



*Submission to the Criminal Law Policy Unit
Department of Justice*

*Draft Model Spent Convictions Bill –
Consultation Paper*

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Acknowledgment

Fitzroy Legal Service was assisted in preparing this submission by consultation with Youthlaw, Loddon Campaspe Community Legal Service, St Kilda Legal Service, the Federation of Community Legal Centres, the Human Rights Law Resource Centre, and Victoria Legal Aid.

About Fitzroy Legal Service

Established in 1972, Fitzroy Legal Service ('FLS') is one of Australia's oldest Community Legal Centres.

FLS operates a free legal advice service five nights per week, facilitated by extensive volunteer support from legal and student communities; a substantial legal practice with present expertise in the areas of criminal law, family law, infringements, and victims of crime applications; law reform, community legal education, and community development activities; and has pro bono contributors from the legal profession to facilitate annual publication of the Law Handbook.

A broad based commitment to improved access to justice underpins all the activities of FLS. The organisation works closely with its community to ensure that its involvement in policy development and law reform is informed by the experiences of its clients. FLS works to achieve systemic responses to the legal issues facing its clients within a human rights and social justice framework.

FLS has been engaged in advocacy on the issue of criminal record discrimination for a number of years. Funding for this advocacy was received from the Reichstein Foundation and Donkey Wheel in the years 2006 - 2007 & 2007 - 2008. Through the life of this project FLS has engaged in community consultation, legal advice, casework, community development, community legal education and law reform activities around the issue of criminal record discrimination.

Introduction & Overview

We commend the attention given to the important issue of regulation around the release of criminal record information through this consultation process, and welcome the opportunity to make submissions in relation to the Draft Model Spent Convictions Bill ('the Bill') to the Department of Justice at this time.

We strongly support in principle the endeavour to develop national uniform legislation allowing for criminal record information to become spent. We have observed through casework discrepancies across jurisdictions leading to inequitable outcomes for some of our clients.

We applaud some aspects of the proposed legislation as representing progressive moves towards an improved system of dealing with criminal record information. Those elements we see as positive developments are specifically identified and commented upon in the body of our submission.

However, it is our firm view that the Bill should not be endorsed without extensive amendment by Victoria, as it is our submission that the circumstances of discrimination and exclusion facing most Victorians will not be improved under its operation.

We further submit that, should extensive amendment be untenable through the Standing Committee of Attorneys-General, Victoria should take a position of leadership and reform in relation to this issue. We believe this consideration is particularly pertinent given the economic downturn and increased unemployment levels being experienced.

The Bill raises a variety of complex issues.

We note at the outset that the Bill does not address differing approaches across jurisdictions to the 'release' of criminal record information, as compared with its capacity to become spent. Comment has been included in this submission pertaining to release of criminal record information.

We note also the contemporaneous reviews of equal opportunity laws occurring in Victoria and relevant amendments to the Equal Opportunity Act proposed therein.

Summary of Proposals in relation to the Bill

FLS supports uniform national legislation that is fair, informed by evidence, human rights based, and delivers an appropriate balance between community safety and rehabilitation. We submit this Bill does not achieve those objectives, and if endorsed, will constitute a move further away from much needed reform.

We reiterate that we are living in increasingly risk averse times wherein any criminal record is likely to result in real and significant disadvantage in obtaining meaningful employment. Whilst protections against irrelevant criminal record discrimination are highly desirable, FLS submits that the best protections against irrelevant discrimination and inclusive approaches involve limiting access to criminal record information.

We express concern that the existing Victorian Policy governing release and the Bill do not appear to be underpinned by clear policy, evidence or human rights considerations. We are concerned that the Department should keep in mind that a criminal record constitutes a long-term punitive consequence of exclusion and alienation, and that the link between a criminal history and work performance will in many cases be tenuous or non-existent.

We submit further that the interests of employers are consistent with those of employees with an offending history, in that access to extensive irrelevant information is likely to cause prejudice and increase pressures not to employ persons with criminal histories. This has certainly been the experience of FLS in relation its casework in this area.

As such, it is our submission that Victoria should take a position of leadership in relation to criminal record law reform. That included in those reforms should be serious consideration of alternative models of dealing with criminal record information and consultation with a broad range of stakeholders.

That should legislation be adopted similar to that proposed by the Bill, amendments are included that limit the scope of information to be released, and in relation to capacity of records to become spent, at the very least maintain the threshold presently in operation in Victoria.

General Recommendations

1. That the principles of proportionality and relevance are central to any legislation reforming laws/ practice regarding criminal record information.
2. That it is recognised that in many cases a criminal record is the most significant aspect of the penalty imposed by court processes (in some cases involving a life long obstacle to most forms of employment, whilst in others involving ten years unemployment or under employment.)
3. That the unreliability of a criminal record as a workplace risk management tool is acknowledged, as is the discriminatory impacts for employees of having any form of criminal record (being grounds for stringent limits on the release and use of criminal record information).
4. That the significant financial costs and other negative impacts on the community of the under-employment and unemployment of persons with a criminal record are incorporated into policy approaches, noting the deleterious impacts not only on offenders post sentence, but also on their families and communities.
5. That where specific regulatory bodies operate pursuant to statute, employers are precluded from applying for standard criminal record checks. That further checks are regarded as facilitating irrelevant criminal record discrimination, and as undermining the authority and legitimacy of authorised decision-making bodies.
6. That the pressures on employers with the burden of responsibility for judgements made about prospective workers in a risk adverse culture is given due recognition. In particular having regard to the complexities for employers around judgments of relevance and the difficulty for employees of proving discrimination.
7. That it is acknowledged that limiting release of criminal record information is the strongest protection against discriminatory outcomes.

Specific Recommendations regarding the Content of the Bill

8. That the details of minor offences, including no conviction records, are not released on standard criminal record checks. That variance amongst local jurisdictions is permitted in this regard.

9. That Victoria considers alternative models by which all sentences are capable of becoming spent, and/or a staggered approach to periods of good behaviour informed by evidence.
10. In the alternative, that Victoria does not depart from the 30-month imprisonment or greater cut off and considers a shorter period of good behaviour after which a conviction becomes spent.
11. That sexual offences are treated the same as other offences, given the operation of regulatory schemes to protect the public where specific risks have been identified.
12. That accessing of criminal record histories by employers is not permitted where regulatory bodies are in place to determine whether persons are able and suitable to engage in particular professions.
13. That accessing of non-authorized criminal record services is prohibited so that offshore traders are unable to avoid protections provided to individuals under Australian law.

Why meaningful reform is needed

Who is affected?

The Department will be aware that having a criminal record can be a significant barrier to obtaining meaningful employment in a wide range of fields.

Around 94,000 people were sentenced in Victorian Courts 2007/2008. Of these, over 80,000 were sentenced in Magistrates Courts, and over 11,000 were children sentenced as juveniles.¹ At a national level, 586,202 criminal matters were finalised in Australian Courts in the period 2005-2006.² Many of those persons will have been charged with minor offences, and will be unlikely to re-offend.

Yet it is our experience that any criminal record is likely to put many job applicants at serious disadvantage when applying for work. Many of those affected have garnered significant training and experience in their chosen field prior to the introduction of criminal record checks or prior to being sentenced for an offence.

Additionally, many seeking employment will be subjected to layers of criminal record checks – for example, a bus driver is likely to be subjected to licensing requirements, followed by a Working With Children Check, followed by a standard criminal record check for a prospective employer.

¹ Sentencing Advisory Council Annual Report 2007-2008 p 36

² ABS, Criminal Courts, Australia, 2005-06, ABS Catalogue No 4513.0 (2007) 3 cited in Naylor et al, *In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record*, Melbourne University Law Review, Volume 32, p 192.

Increasingly criminal record checks are regarded as a standard risk management tool in relation to any form of paid or voluntary work. United Kingdom research indicates around 2/3 of employers in that jurisdiction request information about a person's criminal history regardless of the position they are applying for.³

Community protections already in place

We note that specific regulatory schemes adapted to particular occupational requirements already proliferate in Victoria.

Some of the areas identified by the legislature as involving special responsibilities or giving rise to significant risks such as to justify specific regulation include the following employment or voluntary roles: security guards, teachers, lawyers, police members, corrections employees, estate agents, motor-car traders, second hand dealers and pawn brokers, members of Victorian State Emergency Services, employees of organisations funded by Department of Human Services, persons working with children in a paid or voluntary capacity, taxi drivers, tow truck drivers, bus drivers, tax accountants, operators of meat processing facilities, exporters/ importers of certain chemicals, environmental auditors, migration agents, canteen operators, directors or auditors of companies, persons working in aged care and health services, persons with special responsibilities in relation to fundraising or cooperatives.

We take this opportunity to express that we are not opposed to the operation of specific regulatory bodies with guided decision-making powers. These schemes can be differentiated as being generally premised on the standards of proportionality and relevance, provide clear opportunities for submissions by applicants and appeal mechanisms, and incorporate strategies to protect the privacy of criminal record information from persons other than authorised decision-makers.

Our submissions are rather directed to limiting criminal record information made available to employers through standard criminal record checks or by private traders in criminal record information.

Pressures on employers

It is our submission that limiting criminal record information made available through standard checks also protects the interests of employers.

³ Hilary Metcalf, Tracy Anderson & Heather Rolfe, Department for Work and Pensions, United Kingdom, *Barriers to Employment for Offenders and Ex-Offenders – Part One: Barriers to Employment for Offenders and Ex-Offenders*, Research Report No 155 (2001) 74 cited in Bronwyn Naylor, Moira Paterson & Marilyn Pittard, *In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record*, Melbourne University Law Revue, Volume 32, p 172.

Whilst no evidence base has been provided to show persons with a criminal record per se are more likely to commit offences in the workplace, access to extensive criminal record information places employers under pressure to be seen as appropriately managing (or eliminating) risk in the work place under statute and common law. As criminal record checks become an increasingly standard work place practice, this pressure is likely to increase and runs contrary to existing and proposed protections.

We submit the best protection for employers is to institute legislative schemes limiting information able to be accessed to that which could reasonably be considered to be relevant and necessary to making the relevant employment decisions.

We note protection against discrimination on irrelevant bases has been canvassed as a possible amendment to equal opportunity laws in Victoria. Nevertheless it is our view that the most efficient way to protect employers from potential liability and assist appropriate recruitment practice is for a comprehensive approach to placing reasonable and proportionate limits on information to be accessed about prospective employees.

Community costs

It is our submission that the impacts of present exclusionary policies include unemployment, under-employment, associated harms to health and wellbeing, wasted human resources, and significant costs to the broader community. We cite the following comments provided by peer participators in criminal record reform:

I believe the information revealed in my criminal records check is no longer a true reflection of my character... This police check process, in its current form, is I believe discriminatory as it permanently disallows a person like me to totally reintegrate myself back into society. In doing so it denies me exactly the one thing that everyone deserves: a second chance. Peer participator: FLS

I have not been in trouble with the Police or any other authority ever since my conviction 11 years ago. I have tried very hard to forget about the things that are in my past and to create a new and more productive life for myself and now also my children. I live in a very high unemployment area ... and have even been offered a position in another nursing home, which I had to decline. Unless these laws are changed in Victoria I can most likely throw all the training and education that I acquired out the window. When I began my training I had never even considered that I would have a problem such as this as the offence was so far in my past. If I paid my debt to society 11 years ago then why I am I being discriminated against all these years later. I am not a violent person and never really have been. I just did some stupid things as a young man that these days I would never even consider. Peer participator: FLS

The issues that surround having convictions in the past is that when one tries to establish some sort of balance in life, like working for a living being a good

husband and father. This issue has caused my family great hardship over recent years. It seems if you've had some sort of past society thinks you shouldn't expect to achieve much in life, what with employment and study options being so limited. It seems not much has changed over the past 30 years. Employment opportunities that involve hospitals, community related employment, government sectors, conservation and land - they all require criminal record checks. It really influences the outcome for persons with the desire to achieve and blend in with society. I think the law in Victoria needs to be reviewed. My priors included armed robbery, but I served my time, and that was more than twenty-five years ago. Peer participator: FLS

We submit that, even where serious offences are involved, serious consideration must be given to the important community objective of rehabilitation and reintegration.

We note the extraordinary contribution of peer educators mentors and advocates in Victoria whose lived experiences (including contacts with the criminal justice system) have enhanced their capacity to support their communities. This is particularly evident in historic and ongoing social welfare work supporting drug users, prisoners, victims of domestic violence and sexual assault, sex workers, and homeless communities.

We note the importance of meaningful work as a pathway to community reintegration.

We submit that getting the balance right involves a clear appraisal of the community costs of long-term disenfranchisement, and provision of adequate recognition to the right of individuals to privacy and dignity in the ongoing project of creating their own lives and opportunities.

For reasons set out in response to provisions of the Bill, we believe the key terms of the proposed legislation would fail to achieve these important community goals. Whilst advanced as delivering protections for persons with a criminal record through introducing a spent convictions scheme, the terms of the legislation simply reinforce, and in important respects expand, the existing broad based criminal record information release policy in Victoria. We believe the Bill if adopted functions as an endorsement of unfairly discriminatory dealings with persons with a criminal history.

Matters pertaining to the release of criminal record information

We note the proposed Bill does not address to any significant degree matters relating to release of criminal record information, leading to uncertainty as to how the Bill will interact with existing schemes.

We note the Bill mirrors in some respects the present Victoria Police Criminal Record Information Release Policy operated by Victoria Police ('the Policy') whilst diverging in other respects. For example, the definition of 'conviction' is comparative, whilst the exemptions under the Bill are significantly broader.

As such, the Bill does not address the significant variations likely to be retained across jurisdictions in relation to what criminal record information is released. For example, the release of conviction records as opposed to findings of guilt will be able to remain variable across Australian jurisdictions. Under present legislative schemes, those committing offences in Victoria would be disadvantaged as against those committing offences in New South Wales, Northern Territory, Queensland, Tasmania, and Western Australia.

It is unclear under the proposed Bill whether those offences released under the Policy where a person has been acquitted or found 'not guilty' by reason of mental impairment/insanity in relation to a serious offence will or will not be capable of becoming spent. These sentences would not seem to fall within the scope of 'convictions' as defined by the Act and therefore may not be covered by the Bill.

Alternatively, if the Policy is to be amended to reflect the Bill, it may be that such records will no longer be released.

It is also unclear whether the proposed Bill will affect the release of details regarding pending proceedings or matters under investigations. We are strongly opposed to the release of details of pending proceedings under standard criminal record checks as contrary the presumption of innocence protected under section 25 of the Charter of Human Rights and Responsibilities Act ('the Charter'). The impact of the Policy is particularly unjust when charges are not laid, a person is acquitted, or the matter proceeds by way of Diversion. It is our experience that significant prejudicial impacts may occur prior to any determination of the matter.

Release of Details of 'Minor Offences'

In relation to sentencing and procedures applicable to 'minor offences' variance is likely to be especially significant. For example cautions or diversions may be available in some jurisdictions as opposed to more serious penalties applicable in other jurisdictions for comparative offences.

At a Victorian level, we raise specifically concerns regarding differential court proceedings applicable to minor offences. Many minor offences are dealt with for expedience sake in an ex parte fashion. It is our view that many of these matters would be deemed eligible for Diversion, were such an application made. It would be an unfair outcome if some persons were to suffer the circumstance of a criminal history whilst others did not, simply on the basis of preferred and expedient court procedure.

Case study

Antonio had been drinking with friends in the Central Business District. He did not consider himself to be drunk, but nonetheless was arrested and charged with being drunk in a public place. On leaving police custody Antonio signed a bail form but was told by a police member that he would not need to attend court, as the matter would be dealt with ex parte and he would receive fine. The informant was contacted and advised that the matter would not show up on Antonio's record

as it would be proved and dismissed. The matter proceeded in this fashion and Antonio now has a finding of guilt for being drunk in a public place. Antonio is employed as a human rights advocate, and his work involves a good deal of international travel. He is concerned at the implications of the offence on his character. He believes he was targeted because of his racial background.

Comments

To remedy this situation an application for rehearing would need to be lodged, followed by an application for the matter to proceed by way of diversion. Most summary offences are dealt with in this fashion. In the absence of submissions, generally a conviction and fine attach to the offence. However, in many cases a diversion would be made available if application were made either to the informant or to the court. Even if standard protocol were put in place so these matters can proceed by way of diversion, significant court resources would need to be allocated. Additionally persons whose matters have already been dealt with would be unfairly disadvantaged. It would be preferable that such offences fit into a minor offences category the details of which are not released.

We note section 7(4) of the Bill states further convictions will be disregarded and not cause time to run again where 'the offence is a minor offence'. It would seem appropriate that this is mirrored by an amendment to existing release policies, wherein Victoria would be enabled to determine a broad category of minor offences that would not be released on a criminal record check.

Release of Details of 'No Conviction' Records

In relation to the interpretation provided of 'conviction' in the Preliminary section of the proposed Bill, we note this redefining of the concept of conviction is inconsistent with the law and practice deriving from section 8 of the Sentencing Act.

Whilst the proposed interpretation is consistent with the Victoria Police Criminal Record Information Release Police, this change in approach has been raised with the Department over a number of years as problematic.

The discretion vested in the court as to whether to record a conviction or not specifically includes as prescribed matters for consideration the impact on the individual's 'economic or social well-being or on his or her employment practices'. The history and practice in this regard reflects an implication that the absence of a recorded conviction will afford some protection to the reputation of affected community members.

The consequence of altering the operation of this section at this time is to retrospectively disadvantage persons who received a no conviction record in light of all relevant considerations set out for judicial consideration at the time. The same persons might now be eligible for diversion, were the scheme in operation at that time.

We do not believe this is a fair or equitable position for the Department to now advocate. We further do not believe that administrative expediency is an adequate justification for such an approach.

It may be considered that retaining and returning the section 8 discretion enacted to the judiciary facilitates an appropriate boundary between protection of individual and community interests to be decided by decision makers with a good opportunity to access relevant considerations.

Case study

Jim was found guilty eight years ago with 'Behave in Offensive Manner Public Place' several years ago as a result of being picked up by police for urinating in a public place. When the matter was heard no conviction was recorded and Jim was fined \$150.

Jim is an older man and applied to volunteer at a charity in his local area. When his criminal record check was completed his application was rejected. Jim suspected he was being viewed as a 'flasher' as a consequence of his record though no one had discussed this with him.

Jim has no other criminal priors.

On Jim's behalf we applied for police records relating to his offence so that the true nature of the offending could be made clear from the outset the next time he applied for a position doing charity work.

Later Jim discussed this issue with one of the coordinators at another charity where he had been volunteering for a lengthy period of time. The coordinator there agreed that had she not known Jim and seen the further information, she would indeed have assumed he was a flasher and would not have given him permission to volunteer with their organization.

Comment

Under the proposed amendments, Jim would not receive any better protection than he presently has. Additionally, this record will be disclosed on a permanent basis should he be seeking to act as a carer to prospective employers, as opposed to only to the relevant regulatory body.

Case study

James has recently completed a degree that will allow him to work as a teacher. Nine years ago he was found trespassing after hours at the local park near his home. He was found guilty of trespass but no conviction was recorded.

James was required to give written consent to a criminal record check by the Department of Education. At the time of filling out the relevant forms he was unsure as to whether he had a criminal record that he was obliged to disclose. At

the time of trial he had been told by his lawyer that the 'no conviction' meant his record would not be disclosed in the future. James indicated he had not been found guilty of any criminal offences.

Comment

James later received correspondence indicating his fitness to teach was in question as a result of his misrepresentation. We were able to assist James in making representations as to fitness and he has subsequently been admitted to teach. Under the proposed model, James 'no conviction' record will continue to be released to future employers, as well as to the Department. He would almost certainly have received a Diversion had the offence occurred more recently.

Case Study

Frances was charged nine and a half years ago with possession of marijuana and resisting arrest. She pleaded guilty and received no conviction on the basis of extenuating circumstances. Those same circumstances suggested a possible defence to the charges.

Frances was advised that a plea of guilty with no conviction recorded would be the simplest outcome to seek in the matter, and would not be disclosed on her criminal record. Frances decided to plead guilty in order to avoid the ordeal of defending her matter.

Frances has been studying a social work degree that she has almost completed. It has now come to her attention that her record will be disclosed and that she may struggle to obtain employment. Frances is inconsolable. She is a single mother with three children.

Comment

Changing policies and practice have already had a serious impact on Frances. Under the proposed Bill, Frances prior offences will continue to be released, not only to the relevant regulatory bodies, but to all future employers.

We note the Charter has created an ideological framework for Government supportive of this submission. In particular, section 26 engaging the right not to be tried or punished more than once after conviction or acquittal in accordance with the law, and section 27 stating that a penalty is not to be imposed for a criminal offence that is greater than the penalty that applied to the offence when it was committed. Whilst the Policy may not involve a technical breach of these sections, it would seem their ideological content is certainly compromised.

Matters pertaining to the Bill

Offences capable of becoming spent

In a general sense, we support an approach that allows criminal offences to become spent by reference to sentence as opposed to offence-type. The reasoning behind this is that the trial judge will have before him/ her all relevant factors to determining sentence, whilst a later decision maker in most cases will not.

We note that under the proposed Bill those records incapable of becoming spent have moved from a 30-month imprisonment period to a 12-month imprisonment period. We note the number of prisoners in 2006 was 3905, with an average imprisonment term of 13.8 months.⁴ We note further that this period is specifically drafted to include suspended sentences, and presumably, intensive correction orders or combined treatment and custody orders.

Reflecting the premise that a criminal history should not be a life sentence, we are of the view that all criminal records should be capable of becoming spent under standard criminal record checks.

The rationale behind this position is that in the present employment climate and widespread practice of criminal checks for jobs as variable as parking attendants to employees in supermarkets, a person with a criminal history may be relegated to long term unemployment or under-employment.

We submit that any amendments stripping back the scant protections available to Victorians struggling to reintegrate into society should not be endorsed at this time. At the least, we submit that the 30-month prison sentence threshold should be retained.

We submit alternative models for consideration as follows:

- That the determination of the period of time for which a criminal record is to be released forms part of the initial sentence or on application to the relevant Court or other legislative authority, at which time relevant factors relating to risk and rehabilitation are available to the decision maker.
- That a staggered approach is taken in release policy/ law/ practice by reference to the sentence received.

Sexual offences

We note at the outset that 'sexual offences' are not prescribed in the Bill.

We submit that there is already a regulatory scheme in place to ensure persons who have committed sexual offences do not work with children. We note the Sex Offenders List is also in operation.

⁴ Sentencing Advisory Council Annual Report 2006-2007 page 21

We note also that the breadth of the exemptions outlined in section 14(6) of the Bill already appears to cover the conceivable range of scenarios where sexual offences could be deemed to be relevant to employment.

In light of these considerations, we submit that sexual offences should not be treated in any differential manner to other offences under standard criminal record checks. To treat these offences differently is to tacitly endorse discrimination and exclusion from all forms of employment on a long-term basis of persons with criminal history inclusive of sexual offences.

In the event sexual offences are treated differentially, we would preference those provisions facilitating applications to be made in order for an offence to become spent.

Adverse publicity attaching to employment of persons who have committed sexual offences should not be the determinative factor in deciding on policy in this area. The costs of unemployment or underemployment should also be considered.

Minor offences

We cite comments made above in relation to the release of ‘no conviction records’ and ‘minor offences’.

We further submit our view that the definition of ‘minor offences’ in the Bill is too narrow.

We believe this category should be capable of being amended through legislation or regulations.

We submit for consideration that if the ‘cut-off’ is a sum, the Court is likely to hear extensive submissions on that point, given in cases of minor offences a criminal record is often the most stringent aspect of any sentence imposed.

For this reason, it may be more appropriate that *minor offences* are determined according to their character as opposed to the sentence attaching as determined on a case-by-case basis. Alternatively, the maximum penalty attaching to a minor offence could be increased to reflect a range of offences that should not be disclosed under a standard criminal record check. Such approaches would permit for greater equity across jurisdictions in terms of the way offenders are treated.

We note that in all other respects regarding this Bill, we support an approach that allow criminal history to become spent by reference to sentence as opposed to nature of offence.

Period of good behaviour

We note the time period represented in the Bill is that most common across Australian jurisdictions at present and does not represent a reform.

We submit that the time period selected for good behaviour should be informed by research around recidivism, and/ or that alternative models including a staggered approach linked to sentencing or otherwise be considered (see above).

We note that significant rehabilitation can occur in a period of ten years, and minor offences can be enormously prejudicial. We cite concerns in this context of the details of minor offences and no conviction records being released, and the broad range of offences available under the draft on a permanent basis as a result of sentence or exemptions.

We are supportive of section 7(4)(b) should the present Bill be adopted. It is our experience that persons with priors are more likely to be charged with minor offences than persons without priors as a result of police reliance on the LEAP system in policing activity.

Overseas offences

We endorse the views of Loddon Campaspe Community Legal Centre in this regard.

Exceptions

We are extremely concerned at the breadth of the exceptions contemplated by the Act. In relation to the exceptions contemplated by section 14(6) we note the following:

No limits are imposed on whom the recipients of information regarding spent convictions can be – for example, statutory or regulatory bodies as opposed to employers receiving standard criminal record checks. It is our submission that where a regulatory body has made a decision that a person is fit to work in an area subject to specific regulation, any further disclosure will facilitate discrimination on an irrelevant basis by definition.

It is our further submission that where specific regulatory bodies are in place, standard criminal record checks should be prohibited. For example, where a lawyer has been authorised to practice by the Board of Examiners and Legal Practice Board, it should not be permitted for a future employer to second guess that decision by requiring their own criminal record check disclosing priors, whether inclusive of spent convictions or not.

We note also that section 14(6)(a) contemplates not only judicial or administrative, but any ‘other inquiry’ into guardianship, custody, care, control, supervision of or access to a child. We are concerned at to what is contemplated, or could conceivably be covered by, this provision.

We note in relation to section 14(6)(b) & (c) that no requirement of relevance is imposed, as compared with the Policy presently operating in Victoria which requires that for a standard criminal record check the relevant offence must be one of violence.

Additionally, again the section does not contemplate whom may be provided with such information and in what circumstances.

It is our strong submission that where a Working With Children Check has been conducted, provision of further information regarding spent convictions will by definition operate to facilitate discrimination on an irrelevant basis. The same issue arises where authorisation has been granted for instance authorising a person to work as a teacher.

In relation to section 14(6)(e) we note the breadth of professions subjected to character or fit and proper person tests, some of which were listed in the section on page 3 of this submission. Again, the exception does not specify whether spent convictions are to be released to regulatory bodies only or to prospective employers also, the latter of which appears to be contemplated by the present drafting of the Bill.

We are concerned that the Department should be aware that this section is likely to significantly alter the position of persons engaged in or trained to engage in employment in those areas retrospectively.

Further we submit that the purpose and authority of the relevant regulatory bodies is completely undermined if such an approach is adopted.

We note also that retrospective changes of this nature, even where the material regarding spent convictions is only to be provided to the regulatory body, can have significant detrimental aspects to persons with training or employment in the relevant fields of employment, and should be considered by the Department with great caution.

We are of the view that any reforms should remove layering of checks, and where prescribed checks are in place, no further criminal record checking should occur. We submit that, if spent convictions are to be released, these should be released to the regulatory body only, which would then make a determination of suitability for employment in that field.

Positive aspects to the Bill

We strongly support the inclusion of provisions enhancing protections and introducing punitive consequences where spent criminal record information is unlawfully disclosed (section 12), traded in (section 13), or accessed (section 15).

In relation to trade in criminal record information, we support the submissions of Loddon Campaspe Community Legal Centre.