



Victorian Equal Opportunity  
& Human Rights Commission

# Submission to the Inquiry into a Legislated Spent Convictions Scheme July 2019

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# 1. Executive Summary

The Victorian Equal Opportunity and Human Rights Commission (**Commission**) welcomes the Legal and Social Issues Committee's inquiry into a legislated spent conviction scheme (**Inquiry**). Having a prior criminal record can create impacts that endure long after any punishment is served for an offence and it is timely to address the appropriate use of conviction and criminal records information.

In certain circumstances, information about a person's prior conviction or criminal record is an important and legal requirement<sup>1</sup> to assess suitability for a service or employment. However, the Commission is aware of use of information about a person's criminal record, in circumstances where there is no rational basis for its use. The Commission receives enquiries from across Victoria where people have been denied employment and access to services, long after a person is rehabilitated.

Such actions can cause hardship for people who have otherwise already received punishment or resolved their matters through court processes. In addition, the Commission has heard that processes for disclosure of information are either unclear or inconsistent. The impact of this unfavourable treatment falls heavily on Aboriginal Victorians, who are disproportionately represented in the criminal justice system.

The development of a spent conviction scheme that allows the criminal records of offenders to be amended after a certain period of time will allow people with a criminal record to move on from their prior convictions. This can assist people with a criminal record rehabilitate by providing them with a legally sanctioned means of 'moving on'. The Commission supports the development of such a scheme in Victoria.

A necessary complement to such a scheme is to ensure that people are not treated unfavourably because of an irrelevant conviction. The Commission recommends that discrimination on these grounds be unlawful through legislative amendments to add an attribute to the *Equal Opportunity Act 2010* (Vic). Such a change would provide clarity to the community about the use of criminal records and provide a mechanism for people to seek recourse if they have been unfairly, and unlawfully treated. Providing protection against discrimination in this context is supported by human rights principles and is consistent with approaches across Australia.

The Commission considers that such protection should apply to all irrelevant criminal records, including convictions that are spent under any scheme. The Commission also recommends that guidance is developed alongside any legislative amendments, to provide necessary practical information to employers, service providers and members of the community about the permissible uses of criminal records information.

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<sup>1</sup> For instance, under a Working With Children Check process.

### Recommendation 1.

The *Equal Opportunity Act 2010* (Vic) should be amended to prohibit discrimination on the basis of an irrelevant criminal record.

### Recommendation 2.

Any scheme or legislative amendment should be accompanied by the development of practical Guidelines for community, and specifically for employers, to clarify rights and responsibilities regarding the use of criminal records information.

These reforms are an important mechanism for supporting the dignity and equality of Victorians to be treated fairly and on merit. They will also have significant practical consequences in alleviating ongoing disadvantage.

## 2. About the Commission

### 2.1 Our role and functions

The Commission is an independent statutory body with responsibilities under the following Victorian laws: the *Equal Opportunity Act 2010* (Vic) (**EO Act**); the *Charter of Human Rights and Responsibilities* (**Charter**); and the *Racial and Religious Tolerance Act 2001*.

Our role is to protect and promote human rights and eliminate discrimination, sexual harassment and victimisation, to the greatest extent possible. We do this through a range of functions.

<b>Resolve complaints</b>	We resolve complaints of discrimination, sexual harassment, racial and religious vilification and victimisation by providing a free confidential dispute resolution service.
<b>Research</b>	We undertake research to understand and find solutions to systemic causes of discrimination and human rights breaches.
<b>Educate</b>	We provide information to help people understand and assert their rights, conduct voluntary reviews of programs and practices to help organisations comply with their human rights obligations and provide education and consultancy services to drive leading practice in equality, diversity and human rights, including a collaborative approach to developing equal opportunity action plans.
<b>Advocate</b>	We raise awareness across the community about the importance of equality and human rights, encouraging meaningful debate, leading public discussion and challenging discriminatory views/behaviours.
<b>Monitor</b>	We monitor the operation of the Charter to track Victoria's progress in protecting fundamental rights.
<b>Enforce</b>	We intervene in court proceedings to bring an expert independent perspective to cases raising equal opportunity, discrimination and human rights issues. We also conduct investigations to identify and eliminate systemic discrimination.

## 2.2 Contribution to this Inquiry

The Committee is investigating the need for and potential impact of a spent convictions scheme, including the types of criminal records that should be capable of being spent and the mechanism by which convictions become spent.

In considering the design of such a scheme, the Committee is tasked with having regard to:

- the experience of groups in our community who suffer particular disadvantage due to past convictions, such as young people and Aboriginal and Torres Strait Islander people; and
- the public interest in ensuring that the disclosure of criminal history records in Victoria operates in a fair and transparent manner and balances the interests of offender rehabilitation and reintegration with community safety, including the safety of vulnerable Victorians and the safety and wellbeing of victims.

The Commission recognises that the development of a spent convictions scheme, and consideration of discrimination in that context, raises issues regarding the interaction of criminal, workplace, privacy and discrimination laws. Commission's submission is directed to the following Terms of Reference:<sup>2</sup>

- 2(i); 'the committee should consider the design of such a scheme that would be appropriate for Victoria, including, but not limited to...the interaction between any proposed 'scheme' and other legislation' and
- 3; 'in considering the need for and design of a legislated spent conviction scheme, the committee should have regard to the experience of groups in our community who suffer particular disadvantage due to past convictions, such as young people and Aboriginal and Torres Strait Islander people'

In particular, the Commission's submission makes recommendations regarding the interaction of any scheme with Victoria's EO Act and highlights the need for reform to anti-discrimination law.

The Commission does not make recommendations for the content of a spent convictions scheme but commends to the Committee the submissions of members of the community with experiences of criminal records discrimination, including the submission of Woor-Dungin.<sup>3</sup>

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<sup>2</sup> Parliament of Victoria, Legal and Social Issues Committee, Terms of Reference to Inquiry on a spent conviction scheme for Victoria, 2 May 2019 <<https://www.parliament.vic.gov.au/lpic-lc/article/4215>>.

<sup>3</sup> See Woor-Dungin, Submission No 5 to Legal and Social Issues Committee, Inquiry into legislated spent conviction scheme, 3 June 2019 <[https://www.parliament.vic.gov.au/images/S5 - Woor-Dungin\\_Redacted.pdf](https://www.parliament.vic.gov.au/images/S5 - Woor-Dungin_Redacted.pdf)>

## 3. Criminal records discrimination

### 3.1 The legal framework

Victorians who have a criminal history may face significant barriers to full participation in the community. The use of criminal history information, or more specifically, a 'criminal record', can seriously affect Victorians in a range of circumstances; from release of information to prospective employers, accommodation providers, or admission as a member of club. Other services, such as financial or government services, may use a criminal record to make decisions about eligibility.

In Victoria, there is currently no mechanism for criminal records to become 'spent', meaning that a criminal record may impact on a person's employment prospects, or access to services such as housing. In the absence of a spent convictions scheme in Victoria, once a person is found guilty of a crime, information about that crime stays on a person's criminal record unless that conviction is overturned, quashed, annulled.

In addition, there are limited avenues for Victorians to seek redress if they consider they have been unfairly treated because of their criminal record. In this submission, we set out legal considerations relevant to the Committee's Inquiry, including the protections available at state and federal law, and relevant human rights considerations.

#### 3.1.1 Legal protection from discrimination

Victoria's EO Act protects people from discrimination in areas of public life such as workplaces, schools, clubs, shops or places that provide services. Discrimination is treating, or proposing to treat, someone unfavourably because of a personal characteristic protected by the law.

Having a criminal record or a spent conviction is not a personal characteristic, or attribute, protected by the EO Act. It is not unlawful to treat someone unfavourably because of their criminal record, and the Commission cannot accept complaints about discrimination on the basis of a criminal record.

The inclusion of an attribute of 'irrelevant criminal record' was recommended by a 2008 Review of the EO Act,<sup>4</sup> which looked at the impact of criminal records discrimination, and Victoria's anomalous position compared to the protections offered in other Australian jurisdictions. However this recommendation was ultimately not implemented in the 2010 reforms to EO Act.

The EO Act does provide protection from discrimination on the basis of an expunged homosexual conviction. This attribute was introduced to the EO Act alongside a scheme to allow people convicted of historical homosexual offences to have their convictions expunged (removed from record).<sup>5</sup> From 1 September 2015, it has been unlawful to discriminate against a person who has successfully applied to have their historic homosexual conviction expunged.

Although there is no general protection against criminal records discrimination in Victoria, the Commission receives enquiries about them. Information about these

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<sup>4</sup> Julian Gardner, *An Equality Act for a Fairer Victoria*, Final Report (2008) (**Gardner Review**), recommendation 48.

<sup>5</sup> *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic).

enquiries, including the significant impact that criminal records discrimination may have, is detailed below in Section 3.2 below.

### 3.1.2 Legal protection in other jurisdictions

The Australian Human Rights Commission (**AHRC**) has the power to inquire into any act or practice that may constitute discrimination.<sup>6</sup> Australia has declared criminal record as a ground of discrimination for the purposes of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**).<sup>7</sup>

'Discrimination' in the AHRC Act is defined as a distinction, exclusion or preference that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. In this way, the AHRC may inquire into complaints of rejection of job applications, termination from employment, lack of promotion, harassment in the workplace and lack of training for employment or promotion purposes.

The AHRC reports that in 2017-2018, it received 95 complaints about criminal record discrimination.<sup>8</sup> If the AHRC finds that an act or practice constitutes discrimination, and the complaint is unable to be conciliated, then the Commission may prepare a report, with recommendations, to the federal Attorney-General for tabling in parliament.

The AHRC does not have the power to make respondents to a complaint comply with or implement its recommendations. An example of the AHRC's inquiry reports is discussed below.

#### ***BE v Suncorp Group Ltd [2018] AusHRC 122***<sup>1</sup>

BE had been convicted of a serious offence in 2008, and in 2015 applied to work in an 'on call' customer service role for Suncorp. His job offer was rescinded once Suncorp discovered his criminal record, on the basis his conduct did not align with Suncorp's company values.

The AHRC conducted an inquiry into whether discrimination on the basis of criminal records had occurred.

President Croucher found that Suncorp had discriminated against a person on the basis of his criminal record by excluding him from a position which he was able to perform. Notwithstanding the seriousness of BE's former convictions, President Croucher did not consider that he would be unable to fulfil the employment requirements to be 'trustworthy' and of 'good character', and that his criminal record suggested he was unable to perform duties of the position.

The AHRC has released Guidelines for employers to prevent discrimination on the basis of a criminal record.<sup>9</sup> These Guidelines canvas matters including the relevant

<sup>6</sup> *Australian Human Rights Commission Act 1986* (Cth), section 31(b).

<sup>7</sup> *Australian Human Rights Commission Regulations 1989* (Cth), reg 4(a)(iii).

<sup>8</sup> Australian Human Rights Commission, '2017-2018 Complaint statistics', < <https://www.humanrights.gov.au/our-work/commission-general/publications/annual-report-2017-2018>>.

<sup>9</sup> Australian Human Rights Commission, *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record*, Sydney, February 2012 < [https://www.humanrights.gov.au/sites/default/files/content/human\\_rights/criminalrecord/on\\_the\\_record/download/otr\\_guidelines.pdf](https://www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf)>.

law, how to assess what is an inherent requirement of the job, recruitment processes, and policies and procedures to prevent discrimination.

The ACT,<sup>10</sup> Northern Territory<sup>11</sup> and Tasmania<sup>12</sup> prohibit discrimination on the basis of an 'irrelevant criminal record'. This category includes, but is not limited to spent conviction.

Western Australia has a spent convictions scheme.<sup>13</sup> An important element of this scheme is that the Spent Convictions Act prohibits discrimination on the basis of a 'spent conviction'.

Each of these schemes, across Australia, goes some way to recognising that it is appropriate to place limits on the use of criminal records. The schemes variously prohibit discrimination on the basis of a criminal record or spent conviction, and provide mechanisms for recourse if that conduct occurs. It is appropriate that Victoria also seeks to limit the use of criminal records where it is relevant in the circumstances, and allows Victorians to seek redress for unfair or inappropriate use of this information.

## 3.2 Experiences of unfair treatment in Victoria

The Commission supports the significant research conducted by community organisations to document the impact of a lack of spent convictions scheme, and the impact that discrimination on the basis of criminal record has on members of the Victorian community.<sup>14</sup>

As set out above, there is no protection in the EO Act for discrimination on the basis of a criminal record, and the Commission cannot conciliate complaints on this basis.

The Commission provides a telephone and web enquiry service, providing free information on discrimination, victimisation, sexual harassment, racial or religious vilification, equal opportunity and the Charter. Through this mechanism, the Commission receives enquiries about possible criminal records discrimination.

It estimates that:

- over the last 12 months, it received 49 enquiries about possible criminal records discrimination;<sup>15</sup>
- over the last five years, it received over 200 enquiries about possible criminal records discrimination.<sup>16</sup>

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<sup>10</sup> *Discrimination Act 1991* (ACT). In 2006, section 2 was added to include a definition of 'irrelevant criminal record' to include a record relating to an offence or an alleged offence if (f) "the person has a spent conviction or an extinguished conviction within the meaning of the *Spent Convictions Act 2000*, for the offence".

<sup>11</sup> *Anti-Discrimination Act 1992* (NT), s 19(1)(q).

<sup>12</sup> *Anti-Discrimination Act 1998* (Tas), s 16(q).

<sup>13</sup> *Spent Convictions Act 1998* (WA), Division 3.

<sup>14</sup> See, for instance, Woor Dungin, Submission No 5 to Legal and Social Issues Committee, *Inquiry into legislated spent conviction scheme*, 3 June 2019 <[https://www.parliament.vic.gov.au/images/S5\\_-\\_Woor-Dungin\\_Redacted.pdf](https://www.parliament.vic.gov.au/images/S5_-_Woor-Dungin_Redacted.pdf)>, Fitzroy Legal Service and Job Watch (2005) *Criminal Records in Victoria: Proposals for Reform* <<http://jobwatch.org.au/wp-content/uploads/2018/04/Criminal-records-Final-Copy.pdf>>; 'Off the record' documentary film, (2012) funded by University of Melbourne for Fitzroy Legal Service, <<https://offtherecordcampaign.wordpress.com/>>.

<sup>15</sup> From approximately 1 July 2018 – 30 June 2019.

<sup>16</sup> From approximately 2013 - June 2019.

The Commission currently refers enquiries about criminal records discrimination to the AHRC.

Analysis of these enquiries show that concerns also relate to the disclosure of information, and to the subsequent use of that information, as discussed below.

### 3.2.1 Unfair treatment: employment

Over 75% of the criminal records enquiries received by the Commission in the last five years relate to that person experiencing employment restrictions, most at the time when the person is seeking a new job.

Unfavourable treatment because of a person’s criminal record may include being refused a job, being dismissed from employment, being denied opportunities or being harassed at work because of the criminal record.

The examples below demonstrate the breadth of experience for different Victorians with a criminal record either seeking or during employment.

Criminal records and employment
Alice* has been struggling to find employment due to her criminal history. Wherever she applies, she gets through the interview stage, succeeds and gets to the stage of signing employment contract. When she gets asked for police clearance, she does not get the job.
Luka* was charged with offences 8 years ago. He has changed his life and just finished a Certificate 3 in Aged Care. Luka currently receives a Disability Support Pension. Luka applied for cleaner job – he wants to work and has been told cannot get a job at school as a cleaner, because of the old offences.
Elena’s* daughter has a criminal record for dangerous driving and possessing a weapon. These offences occurred 6 years ago. Since the incident six years ago, her daughter has not had any further trouble with the law. Recently, on two occasions, Elena’s daughter was the successful applicant for a job. However, both job offers were rescinded after the employer conducted a criminal history check.
Mari* has a criminal record. She applied for a job and had all the necessary documents. The company informed Mari that it does not employ anyone with a criminal record.
Harriet* called to inquire about her father. He has been denied a job due to a criminal record, which arose 50 years ago when he was still a teenager.

\* = not their real name.

### 3.2.2 Unfair treatment: other areas

Other enquiries made to the Commission regarding a criminal record relate to a person being refused a service or excluded from education or another area of public life, such as enquiries about banking services being denied, residential tenancies being refused and access to premises being limited.

Each of these examples occurred in areas of public life where discrimination is unlawful.<sup>17</sup>

### Criminal records and accommodation and services

Apoor\* rang an insurance company to insure a motorbike. Apoor was asked about his criminal record and then denied insurance. Apoor did not think his record was relevant to his insurance request.

Tom\* was refused accommodation on the basis of pending criminal charges.

A community security organisation (not affiliated with the police) ran some 'background checks', and found out that Mel\* had a history of domestic violence and pending charges. The organisation told an education institute where Mel is enrolled, and a religious organisation that Mel attends, about her criminal history. The organisation says Mel is not allowed to enter those premises due to her criminal history.

\* = not their real name.

In the examples above, it is difficult to determine if the criminal record is relevant to the decision to deny the person access to a service.

### 3.2.3 Unfair treatment: concerns with process

The Commission also receives enquiries that demonstrate some confusion about the scope of the term 'criminal record', and the process undertaken by Victoria Police and other entities when releasing information.

Furthermore, callers to the Commission are at times confused about the application and consistency of decisions by employers, including decisions about how to assess the relevance of any conviction in the context of employment.

### Criminal records and information processes

Shen\* received his police check. Shen tried to apply for a job but did not get accepted due to his 'criminal record', even though he has not been convicted of an offence.

Sam\* has lost her job for having a Driving Under Influence (DUI) conviction. Sam is aware of another colleague, who also had a DUI, being reinstated into the role. Sam questions the consistency of decisions

\* = not their real name.

### 3.2.4 Impact of discrimination

The enquiries received by the Commission indicate that the experience of criminal record discrimination is felt widely and deeply across Victoria. The enquiries show:

- a variety of different criminal records impacting hundreds of Victorians over several years
- people fearing lost employment opportunities or feeling discriminated against at work because of a criminal record
- criminal records being considered in other areas of public life, particularly where people are seeking a service
- consistent confusion expressed by Victorians regarding what information will be available on a criminal record.

In each instance, the person is unable to seek redress of a decision under Victoria's anti-discrimination laws.

While the Commission considers the number of enquiries it has received in relation to criminal record discrimination is significant, it also is difficult to quantify the total number of people who are impacted by irrelevant criminal record discrimination. Many people may not report unfair treatment to the Commission, for reasons including the absence of legal redress, as well as stigma associated with criminal records.<sup>18</sup>

Consideration of a person's criminal record where it is irrelevant to the applicant's prospective employment "can blight opportunities even after the punishment is spent".<sup>19</sup> If someone can work, and wants to work, they should be allowed to work in jobs for which they are suited.<sup>20</sup> Access to work not only provides an opportunity for a person to provide for their family and financially support themselves, but also to build personal relationships, autonomy and self-worth.

Discrimination on the basis of an old or 'irrelevant' criminal record<sup>21</sup> may prevent people from reintegrating with the community and from engaging in meaningful work, which can have wide-ranging impacts on a person, including reducing employment opportunities, entrenching disadvantage and a person's marginalised status.

In particular, the Commission notes the disproportionate impact criminal record discrimination has on Aboriginal and Torres Strait Islander people, people with a mental health condition and people from low socio-economic backgrounds,<sup>22</sup> who are overrepresented in the criminal justice system.

Regarding the impact of criminal record discrimination, the Commission notes that the Victorian Government's Aboriginal policy reform is underpinned by principles of self-determination,<sup>23</sup> as are broader commitments made under the Victorian Aboriginal Justice Agreement (AJA).<sup>24</sup> Key goals of the AJA include 'fewer aboriginal people in the justice system' by supporting people to 'transition from the justice system and reintegrate into their communities'.<sup>25</sup> To address this, the AJA sets out a number of actions that the Victorian Government has committed to, including working with

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<sup>17</sup> *Equal Opportunity Act 2010* (Vic), Part 4.

<sup>18</sup> Stan Winford, Bronwyn Naylor, Sylvia Rowley, 'Criminal Record Discrimination Project – Position Paper' (Paper presented at the Woor-Dungin Consultation, Melbourne, 4 April 2017). <<http://www.woor-dungin.com.au/criminal-record-discrimination/>>.

<sup>19</sup> Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia*: (Cambridge University Press, 2017), 103.

<sup>20</sup> Emeritus Professor Rosalind Croucher, 'Criminal record discrimination' article published in *the Australian*, 4 July 2018 <<https://www.humanrights.gov.au/about/news/criminal-record-discrimination>>.

<sup>21</sup> Julian Gardner, *An Equality Act for a Fairer Victoria*, Final Report (2008) 99 (**Gardner Review**).

<sup>22</sup> Stan Winford, Bronwyn Naylor, Sylvia Rowley, 'Criminal Record Discrimination Project – Position Paper' (Paper presented at the Woor-Dungin Consultation, Melbourne, 4 April 2017). <<http://www.woor-dungin.com.au/criminal-record-discrimination/>>. The Commission has also reported on this issue; '*Unfinished Business; Koori women and the justice system*', August 2015); Victorian Equal Opportunity and Human Rights Commission, Annual Report 2014/15, 48.

<sup>23</sup> Burra Lotjpa Dunguludja, Victorian Aboriginal Justice Agreement, Phase 4, A partnership between the Victorian Government and Aboriginal Community, August 2018, 50. <[https://www.aboriginaljustice.vic.gov.au/sites/default/files/embridge\\_cache/emshare/original/public/2018/09/9d/784c6e742/Victorian%20Aboriginal%20Justice%20Agreement%20Phase%204.pdf](https://www.aboriginaljustice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2018/09/9d/784c6e742/Victorian%20Aboriginal%20Justice%20Agreement%20Phase%204.pdf)> 11; Department of Premier and Cabinet, Victorian Government, *Victorian Aboriginal Affairs Framework 2018-2023* (October 2018) 22.

<sup>24</sup> Burra Lotjpa Dunguludja, Victorian Aboriginal Justice Agreement, Phase 4, A partnership between the Victorian Government and Aboriginal Community, August 2018, 50.

<sup>25</sup> *Ibid*, 44.

Aboriginal communities to consider employment options for Aboriginal people exiting the criminal justice system.<sup>26</sup>

The introduction of a spent conviction scheme would afford Aboriginal people with substantive and meaningful autonomy to re-establish themselves after leaving the Victorian justice system and would go toward the Victorian Government's stated commitments under the AJA.

## 4. Reform to protect against discrimination

The information presented above indicates the need for a fairer system in Victoria to ensure that people with a criminal record are not unduly penalised. The Commission considers that Victoria ought to provide a legal mechanism that allows a person's prior offending to not be listed as a 'criminal record' through the development of a spent conviction scheme.

The Commission notes the many possible options regarding an appropriate time-frame for which different convictions could become spent, and different approaches taken by other states and territories.<sup>27</sup>

The Commission does not make comment about the specifics of any contemplated scheme (save for the suggested legislative reform to the EO Act detailed below) but encourages the Inquiry to give weight to proposals for a scheme made by people with lived experiences of criminal record discrimination, such as the Victorian Aboriginal-led Criminal Record Discrimination Project led by Woor-Dungin.<sup>28</sup>

Legal protection against discrimination sets a standard that guides community conduct, as well as providing an avenue for recourse to people adversely affected by discrimination. As such, reform to the EO Act will be a necessary part of tackling criminal record discrimination, and would therefore be an important complement to any spent conviction scheme.

Victoria is now the only state in Australia without a regime in place to regulate the existence of old or irrelevant convictions, with many states also making legislative changes to their anti-discrimination laws to ensure that either 'spent' or 'irrelevant' criminal records are expressly covered.<sup>29</sup>

Currently the EO Act does not prohibit discrimination on the basis of a criminal record (either 'irrelevant' or 'spent'). The Commission considers that it is important to provide

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<sup>26</sup> Ibid, 44 - 45.

<sup>27</sup> See for instance, Law Institute of Victoria, Submission Number 8A, Legal and Social Committee, *Inquiry into Legislated Spent Convictions Scheme*, 7 June 2019, 2, 6.  
<[https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Spent\\_Convictions/submissions/S8\\_-\\_Law\\_Institute\\_of\\_Victoria\\_Redacted.pdf](https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Spent_Convictions/submissions/S8_-_Law_Institute_of_Victoria_Redacted.pdf)>

<sup>28</sup> Stan Winford, Bronwyn Naylor, Sylvia Rowley, 'Criminal Record Discrimination Project – Position Paper' (Paper presented at the Woor-Dungin Consultation, Melbourne, 4 April 2017) <<http://www.woor-dungin.com.au/criminal-record-discrimination/>>. Woor-Dungin's thoroughly researched submission was produced over a three-year period following extensive consultation in Victoria with Aboriginal and non-Aboriginal individuals and organisations. The position paper was presented to the Aboriginal Justice Forum in December 2017 and the Commission notes its submission to this Inquiry has been endorsed by several organisations such as the Law Institute of Victoria, Jobwatch and the Human Rights Law Centre.

<sup>29</sup> Western Australia protects the attribute of a 'spent conviction'. (*Spent Convictions Act 1988*, (WA), Division 3.) Tasmania, the ACT and the Northern Territory protect relevant medical record and 'irrelevant criminal record' discrimination. (*The Tasmanian Anti-Discrimination Act 1998*, Division 7; *Discrimination Act 1991* (Act), Section 2; *Anti-Discrimination Act 1992* (NT), s 37) See also Beth Gaze, Belinda Smith, *Equality and Discrimination Law in Australia: Introduction* (Cambridge University Press, 2017), 298-299.

a mechanism in Victorian law to establish that discrimination on the basis of an irrelevant criminal record is unlawful.

Providing protection against discrimination would be an important adjunct to any spent conviction scheme.<sup>30</sup> Absent these changes, people who experience unfavourable treatment even when their conviction is spent would still have insufficient legal recourse to make a complaint or challenge a practice.

The Commission notes the addition of a protected attribute to address criminal records discrimination under the EO Act has community and academic support.<sup>31</sup>

## 4.1 Human rights principles

In Victoria, the Charter provides a framework for parliament to follow to ensure that human rights are taken into account when developing new laws and policies.<sup>32</sup> The Commission encourages the Committee to have regard to human rights in its consideration of a spent convictions scheme.

In addition, the Commission submits that providing protection from discrimination on the basis of an irrelevant criminal record is consistent with human rights, in particular rights to equality and rights to privacy.

### 4.1.1 Equality rights

The right to equality protected in section 8 of the Charter includes, at s 8(3), the right to equal and effective protection against discrimination. The Charter picks up the meaning of discrimination in the EO Act.<sup>33</sup> Currently, criminal records are not included as part of this definition.

Expanding the protection against discrimination to include irrelevant criminal record is consistent with art 26 of the International Covenant on Civil and Political Rights, on which the Charter is modelled. Article 26 of the ICCPR defines discrimination as

any distinction, exclusion, restriction or preference which is based on any ground...which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>34</sup>

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<sup>30</sup> The Commission notes that Victoria (recently) added the attribute of 'expunged homosexual conviction' as protected attribute 6(pa). This legislative change recognised that in addition to removing the criminality of a historical conviction for a homosexual act, additional, specific protections were required.

<sup>31</sup> Recommendation 9, p 39 of Woor Dungin, Submission No 5 to Legal and Social Issues Committee, *Inquiry into legislated spent conviction scheme*, 3 June 2019 <[https://www.parliament.vic.gov.au/images/S5 - Woor-Dungin\\_Redacted.pdf](https://www.parliament.vic.gov.au/images/S5_-_Woor-Dungin_Redacted.pdf)>; Bronwyn Naylor, Moira Paterson and Marilyn Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Employment Checks' (2008) 32 *Melbourne University Law Review* 171, Lynch, P (2005) *Discrimination on the Ground of Criminal Record: The Human Right to Non-Discrimination*, PILCH Homeless Persons' Legal Clinic. .

<sup>32</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290, 1295 (Rob Hulls, Attorney-General)). This often referred to as the 'dialogue model' which envisages an interaction between government institutions. Section 28 of the Charter also requires a statement of compatibility to be prepared.

<sup>33</sup> Notably, the definition of discrimination in s 3 of the Charter draws on the discrimination as defined in the Equal Opportunity Act 2010. This does not presently include discrimination on the basis of an irrelevant criminal record. See discussion in *Lifestyle Communities Ltd (No 3) (anti-discrimination)* [2009], VCAT [132].

<sup>34</sup> UN Human Rights Committee, General Comment 18, 10 November 1989, 7.

## 4.1.2 Right to privacy

Importantly, consideration of a person's criminal record may engage the right to privacy, which is protected in Victoria under section 13 of the Charter.<sup>35</sup> Section 13 provides a person has the right 'not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'.

In Victoria, there has been support for the argument that consideration of a person's *irrelevant* criminal record may constitute an arbitrary interference with that person's right to privacy. In the 2013 case of *ZZ v Secretary, Department of Justice & Department of Transport*,<sup>36</sup> Justice Bell observed that work was an aspect of human dignity with great personal and social importance to individuals. His Honour also noted that employment restrictions, such as those which prevent a person from being able to gain employment because of a criminal record, 'impact sufficiently on the personal relationships of the individual and otherwise upon his or her capacity to experience a private life.'<sup>37</sup>

## 4.2 Reform to the Equal Opportunity Act

Proposals for reform include the following attributes under anti-discrimination law:

- spent conviction; or
- criminal record;<sup>38</sup> or
- irrelevant criminal record.

In the Commission's view, it is preferable for the EO Act to protect against discrimination on the basis of '*irrelevant criminal record*'. As is the case in the ACT and Northern Territory, an 'irrelevant criminal record' should be defined to include convictions that are 'spent'.<sup>39</sup>

Providing protection from discrimination could occur most efficiently by amending the EO Act to add a new protected attribute under section 6.

Importantly, prohibiting discrimination based on an irrelevant criminal record recognises that there may be limited situations where a person's criminal record is relevant to conduct that is covered by the EO Act. However, the use of the term 'irrelevant' means there must be some nexus, or relevance, of any criminal record to the treatment. For instance, it will be necessary to consider how the criminal record is directly relevant to the situation, whether that be employment, provision of services, or accommodation. The Commission considers it preferable to allow the broader definition of 'irrelevant' rather than 'spent' to ensure that criminal record discrimination is not only limited to discrimination based on an 'old' record, but also discrimination on the basis of a record which does not preclude a person from being able to substantively meet the needs of the position. For example, if the EO Act was amended to only include

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<sup>35</sup> *ZZ v Secretary, Department of Justice & Department of Transport* [2013] VSC 267 [(*ZZ v Secretary*)] [86].

<sup>36</sup> *Ibid*, [87].

<sup>37</sup> *Ibid*, [94].

<sup>38</sup> Note that the AHRC Regulations 1989 use the term 'criminal record'. These Regulations are due to sunset in November 2019 and are under review by the Commonwealth Attorney-General's department. The Attorney General's Department has recommended that 'criminal record' be amended to 'irrelevant criminal record': see *Review of the Australian Human Rights Commission Regulations 1989 and the Disability Discrimination Regulations 1996: Consultation Paper* at <https://www.ag.gov.au/Consultations/Pages/Review-of-the-Australian-Human-Rights-Commission-Regulations-1989-and-the-Disability-Discrimination-Regulations-1996.aspx>

<sup>39</sup> in 2006, the ACT's *Discrimination Act 1991* was amended to confirm that an irrelevant criminal record included "the person has a spent conviction or an extinguished conviction, with the meaning of the Spent Convictions Act 2000": see *Discrimination Act 1991* (ACT), Dictionary; *Anti-Discrimination Act 1992* (NT), s 4(1).

a 'spent' criminal record, the circumstance of *BE* in the AHRC determination discussed above, would not be protected from unfavourable treatment. While *BE*'s criminal record was considered by the AHRC to be 'irrelevant' to the role he was applying for, the offending took place only 8 years prior. Such a conviction would be unlikely to be 'spent' under a spent conviction scheme.<sup>40</sup>

In the 2008 Review of the *Equal Opportunity Act 1995*, "of the submissions that commented on the issue, there was overwhelming support for the introduction of irrelevant criminal record as a new attribute in the Act".<sup>41</sup>

The addition of a protected attribute in these terms would ensure a right to make a formal complaint to the Commission and have that dealt with in conciliation, or have their matter heard at the Victorian Civil and Administrative Tribunal. Introducing legislative reform to the EO Act would also reduce the confusion in the community and could ensure that Victoria is consistent with other states and territories which have already introduced spent conviction schemes and provide protection from discrimination on the basis of criminal record.

### Recommendation 1.

The *Equal Opportunity Act 2010* (Vic) should be amended to prohibit discrimination on the basis of an irrelevant criminal record.

The introduction of an attribute of 'irrelevant criminal record' should be supported by guidelines for the community and with specific guidance for employers.<sup>42</sup> The Commission has the power to issue practice guidelines under the EO Act.<sup>43</sup> Such guidelines could address:

- the definition of terms such as 'criminal record'
- inclusion of a 'spent conviction' as an irrelevant criminal record<sup>44</sup>
- processes for determining if a criminal record is relevant in circumstances such as employment, accommodation and the provision of services.

The enquiries received by the Commission above demonstrate that there is confusion in the community about the appropriate release of, and use of, criminal records information. These matters could also be addressed in guidelines, along with the relationship of discrimination to lawful information release processes.

### Recommendation 2.

Any scheme or legislative amendment should be accompanied by the development of practical guidelines for community, and specifically for employers, to clarify rights and responsibilities regarding the use of criminal records information.

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<sup>40</sup> Assuming the scheme determined that a 10-year period was the appropriate time-frame for a conviction to become spent.

<sup>41</sup> Gardner Review (2008), p 103. In 2009 the Scrutiny of Acts and Regulations Committee considered the introduction of an attribute for irrelevant criminal records. At that time, it was considered unnecessary to include an 'inherent requirements test' to the attribute of 'irrelevant criminal record', however, the committee did make recommendations regarding an inherent requirements exception for other parts of the Act: Parliament of Victoria, Scrutiny of Acts and Regulations Committee (2009) *Exceptions and Exemptions to the Equal Opportunity Act 1995 – Final report*.

<sup>42</sup> The Commission notes a similar recommendation was also put forward in the Gardner Review (2008), 99.

<sup>43</sup> *Equal Opportunity Act 2010* (Vic), s 148.

<sup>44</sup> In 2006, section 2 of the *Discrimination Act 1991* (ACT) was added to include a definition of 'irrelevant criminal record' to include a record relating to an offence or an alleged offence if (f) "the person has a spent conviction or an extinguished conviction within the meaning of the *Spent Convictions Act 2000*, for the offence".



Victorian Equal Opportunity  
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