

Submission to the  
*Draft Model Spent Convictions  
Bill: Consultation Paper*  
*Department of Justice (Victoria)*  
*November 2008*

 Ioddon campaspe  
community legal centre

A program of the Advocacy & Rights Centre Ltd

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## 1. Introduction

The Bendigo based Loddon Campaspe Community Legal Centre (LCCLC) is a generalist community legal centre servicing the local government areas of Macedon Ranges, Central Goldfields, Mount Alexander, City of Greater Bendigo, Loddon and Campaspe.

The LCCLC is signatory to a statement of principles formulated at the roundtable forum "*Fairer Access to Criminal Records*" held by JobWatch on the 26<sup>th</sup> June 2008, see Schedule 1.

This is a submission to the *Draft Model Spent Convictions Bill: Consultation Paper* issued in November 2008 by the Department of Justice, Victoria (the **Department**). This paper (the **Consultation Paper**) invites comment on a draft Bill that could form the national model for a spent convictions scheme.

LCCLC congratulates the Department for conducting the consultation and pursuing the issue of spent convictions through the Standing Committee of Attorneys-General (**SCAG**). However, LCCLC strongly urges the Department and the SCAG to see the need for reform in this area as part of a broader reform package, including sentencing and anti-discrimination regimes. LCCLC also urges the Department to pursue a reform agenda in Victoria if it is unable to progress through the SCAG.

The Consultation Paper covers a range of issues relevant to the introduction of a national scheme. Not all issues are addressed in this submission. This submission is limited to the following issues:

1. Meaning of conviction
2. Minor offences
3. Overseas offences
4. Exceptions - when should a spent conviction still be relevant?
5. Consequences of disclosing a Spent Conviction

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## **2. Summary of Recommendations**

This submission makes the following recommendations:

### **Recommendation 1**

That only convictions imposed by a Court pursuant to Sections 7 and 8 of the *Sentencing Act 1991* (Vic) (or the corresponding sections in the various Australian jurisdictions) are capable of being recorded on a criminal record and, therefore, capable of becoming spent.

### **Recommendation 2**

That there be no separate provision relating to minor offences as drafted. However, in the event that all findings of guilt are to constitute convictions as defined under the draft Bill, then a provision relating to minor offences should be included.

### **Recommendation 3**

That (subject to the application of mutual recognition provisions) all overseas offences constitute convictions but are capable of becoming immediately spent, or spent after a certain period of time, upon application to the Court.

### **Recommendation 4**

That where a spent conviction is relevant to a certain occupation, only those spent convictions that fall within pre-determined categories of offences correlating with the respective occupation may be released.

## **Recommendation 5**

Where a licensing or registration authority conducts a police record check as part of the licensing / registration process to work in a certain industry, the police record check performed by the licensing authority must be relied upon by an employer operating in that field.

## **Recommendation 6**

That it be an offence to:

- i. trade in criminal-record information without the consent of the individual identified by such information;
- ii. obtain criminal record information from any businesses trading in criminal record information, without the consent of any individual identified by such information.

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### **3. Meaning of Conviction**

#### **3.1 Summary**

Under the draft Bill conviction is defined as *"a conviction, whether summary or on indictment for an offence and includes a formal finding of guilt by a court, or a finding by a court that a charge has been proved"*.

This definition attempts to remove the long standing confusion as to the nature and effect of a conviction. While removing this confusion is laudable, the effects of doing so include a fundamental philosophical change in the sentencing process in Victoria and the need for corresponding consequential amendments to the *Sentencing Act 1991 Vic* (the **Act**).

While the need to clarify the meaning of a conviction is beyond dispute, justification for the philosophical shift does not exist. In our submission there are three ways of resolving the confusion as to the nature and effect of a conviction while preserving, at least in part, the current sentencing philosophy underpinning the relevant sections of the Act:

1. Only convictions imposed by a Court pursuant to Sections 7 and 8 of the Act are capable of being recorded on a criminal record and, therefore, capable of becoming spent; or
2. That all findings of guilt constitute a conviction as defined under the draft Bill but are capable of becoming immediately spent, or spent after a certain period of time, upon application to a Court; or
3. That findings of guilt in certain minor offence categories will not automatically constitute convictions as defined in the draft Bill. However, they may attract a conviction (akin to the current Sections 7 and 8 of the Act), and therefore appear on a criminal record and be subject to the spent convictions scheme.

#### **Recommendation 1**

That only convictions imposed by a Court pursuant to Sections 7 and 8 of the Act (or the corresponding sections in the various Australian jurisdictions) are capable of being recorded on a criminal record and, therefore, capable of becoming spent.

## 3.2 Discussion

### Discretion to record or not to record a conviction

Under section 7 of the *Sentencing Act 1991* (Vic), a court has the power to exercise discretion regarding whether or not to record a conviction following a finding a guilt. Section 8(1) of the Act sets out the circumstances which must be considered by a Court when exercising this discretion, including:

- a. the nature of the offence; and
- b. the character and past history of the offender; and
- c. the impact of the recording of a conviction on the offender's economic or social well-being or on his or her employment prospects.

Under section 8(2), except as otherwise provided by the Act, a finding of guilt without the recording of a conviction must not be taken to be a conviction for any purpose.

### Release of information under Police Record Check

Unlike most other Australian States, Victoria does not have any legislation prescribing what information the Police must or may release through a criminal history check. As a result, Police refer to their own guidelines when deciding what information should be released. Notwithstanding section 8 of the Act, which is widely understood to mean that there will not be a releasable record of a finding of guilt, Victoria Police policy is to release criminal history information on the basis of findings of guilt rather than conviction, under the *Victoria Police Records Information Release Policy (2005)* (**Police Policy**). A finding of guilt without conviction will therefore be released under a police record check. Under the Police Policy, details of matters currently under investigation or awaiting court hearing may also be released.

Under the Police Policy, the release of information does not depend upon whether a conviction was recorded but may depend on other factors including the type of offence, the offender's age, the type of sentence imposed, the purpose of the request and public safety issues. Significantly, findings of guilt without conviction and findings resulting in a good behaviour bond are considered to be findings of guilt and will be released by Police.

## The legislative intention behind section 8

The *Sentencing Act* was enacted in 1991 and replaced the *Penalties and Sentences Act 1985*. The Act, at its commencement, was considered to be a significant overhaul<sup>i</sup> of a "hopelessly complex"<sup>iii</sup> sentencing regime. A discussion paper and report published in 1988 by the Victorian Sentencing Committee (the **Committee**) provided the fundamental building block for the 1991 reform.

The previous sentencing regime provided Courts with very little guidance on how to impose sanctions or in respect to the aims of sentencing in particular offence categories. Whilst section 8 of the new regime is not prescriptive in guiding Courts as to whether or not it is appropriate to record a conviction, the section goes some way in outlining that factors which must be taken into account. The principles dealing with these matters are additionally set down in the decisions of the Courts are discussed below.

The Sentencing Committee Report noted that the general attitude of Courts to sentencing reflects that "the purposes of punishment cannot be found in any single explanation, for it depends upon the nature and type of the offence and the offender"<sup>iii</sup>. In *The Queen v Phelan, Burge and Collier*<sup>iv</sup>, Starke J commented that "depending on the circumstances and the nature of the crime, sometimes more weight will be given to the reformatory element than to deterrence."

According to the Sentencing Committee Report, one of the fundamental principles underpinning the introduction of the conviction discretion is that of rehabilitation where the needs of the offender are taken into account.<sup>v</sup> The purpose of any sanction imposed for rehabilitation purposes is to transform the attitudes of the offender so that he or she is given the opportunity to become a law-abiding citizen, and the impacts of conviction are considered in the circumstances.

The Sentencing Committee Report discusses at length the exercise of discretion in the criminal justice process.<sup>vi</sup> It was understood that discretion involves a sphere of autonomy in making a judgment or arriving at a decision, however, the Committee accepted that the exercise of discretionary powers created tension between the general rule and dealing with each case on its merits. It is evident from the Committee's report and recommendation that section 8 was intended to give Courts some autonomy over how a criminal conviction will impact on the social and economic well-being of an offender, to weigh up the principles of sentencing

and to ensure that an adequate and appropriate form of sanction is imposed. In the view of the Committee, the basic duty of a Judge exercising discretion is to "realise and advance the object and purposes for which his [or her] powers have been granted"<sup>vii</sup>.

A criminal conviction can seriously impact upon a person's employment prospects, ability to travel overseas and obtain housing, and affect their general social and economic well-being. The discretionary power to record a conviction is underpinned by the idea that the recording of a conviction can have significant adverse social and economic consequences for an offender. The discretion was considered by the Committee and legislature, in light of the principles of sentencing, as an appropriate tool to promote rehabilitation of offenders and to maximise long term economic and social well-being.

In giving Courts the power to exercise discretion, the legislation often guides the exercise of that power.<sup>viii</sup> Such guidance can be seen in section 8 where the relevant factors to be taken into account are set out. The Sentencing Committee Report noted that the aims of such guidance are:

- to eliminate the arbitrariness in the decision making process; and
- to promote fairness.<sup>ix</sup>

It was the Committee's view that the giving of discretionary power under the new sentencing regime required a balance between achieving settled standards and the circumstances in a particular case. The difficulty in achieving this balance was something that the Committee conceded is often difficult to realise; however the task of providing assistance to the judiciary, by defining the parameters and in distributing discretion appropriately, was seen by the Committee as the responsibility of the legislature.<sup>x</sup>

Finally, in making its recommendations in relation to the sentencing regime in Victoria prior to the 1991 reforms, the Sentencing Committee outlined the following, amongst others, as the aims of the proposed reforms to:

- eliminate arbitrariness;
- promote fairness;

- formulate the relevant factors to be taken into account when sentencing and ensure that these are taken into account when sentencing an offender;
- provide a framework within which like cases are treated in a like manner; and
- enable Courts to isolate relevant policy considerations that are to be applied to the circumstances.<sup>xi</sup>

The discretionary power given to Courts under section 8 of the Act clearly embodies the proposed reforms recommended by the Committee. The discretion to record a conviction enables Courts to take into account the relevant factors when sentencing offenders and provides Courts with a level of autonomy that can be exercised to suitably address the needs of the offender. Notwithstanding the intention of section 8, the existence of the *Victoria Police Records Information Release Policy* operates to render section 8 redundant in practice despite careful consideration by Courts of the issues set out in section 8. As long as the Police information release policy is in operation, the discretion given to Courts under section 8 has no prospect of achieving what the legislature intended.

#### Operation of section 8 - discretion not to record conviction

The discretion not to record a conviction has also been utilised by the Courts in circumstances where the recording of a conviction in itself often outweighs the crime or is inappropriate in the interests of preserving an offender's social and economic well-being.

Case law demonstrates the willingness of the judiciary to impose upon offenders various sanctions without convictions. In borderline cases, this discretion is often exercised in favour of providing the offender with the greatest possible rehabilitation without the stigma of a conviction, rather than any purported benefit to the community that a conviction may provide. This was particularly evident in *DPP v Candaza, Koufomanolis, Mavros & Nunez*.<sup>xii</sup>

In *Cadanza*, the respondents pleaded guilty to two counts of armed robbery. The respondents robbed three teenage boys standing outside Pizza Hut in Chadstone. The respondents used force and threatened the victims with a weapon in order to obtain personal items.

The trial Judge accepted that each respondent:

- was aged between 18 and 21;
- had pleaded guilty at the earliest opportunity and had shown deep remorse for his or her conduct;
- was from a hardworking and supportive family, with which they continued to live;
- had made sound progress in tertiary education;
- the offending was out of character; and
- had a strong prospect of becoming a 'model citizen'.

The trial Judge then considered the offence was serious and warranted general and specific deterrence. The Judge considered that while normally crimes of this nature would warrant a custodial sentence, this case was not one of them, and it was more appropriate for the respondents to undertake a considerable amount of community work.

The trial Judge considered that the respondents had a strong prospect of rehabilitation, and that in the circumstances, the long-term detrimental economic and social effect of a conviction would place that prospect at risk. The Judge also remarked that conviction is a form of punishment itself, and that the detrimental effects of conviction justified not adding the additional punishment of conviction in this case. However, the Judge commented that this was a course of action that was undertaken with some reservation.

The trial Judge sentenced each respondent to a community based order for a period of two years and 400 hours of community work, without conviction. The DPP appealed against the sentences on the sole ground that the non-conviction disposition was manifestly inadequate.

On appeal, the Court of Appeal held that the discretion exercised by the trial Judge was not a miscarriage of justice, regardless of any doubts that the trial Judge expressed about the sentence given. The Court of Appeal held that failing to record a conviction was a choice reasonably open to the trial Judge.

As stated in the appeal judgment, an absence of conviction in cases such as these only occur in rare and exceptional circumstances. However, it is easy to understand why the trial Judge faced the difficulty that he did. Weighing armed robbery against a raft of mitigating factors is no simple task. However, this is a

task that Courts are required to undertake by virtue of sections 7 and 8 of the Sentencing Act.<sup>xiii</sup> It is of concern that the weighing up process engaged in by Courts is circumvented by the *Victoria Police Records Information Release Policy*.

The case of *DPP v Christopher Gerald Marks*<sup>xiv</sup> demonstrates that, although an appellate court may have chosen to impose a conviction, rarely will the trial Judge's exercise of discretion not to convict under section 7 of the Sentencing Act be outside the appropriate range of sentencing dispositions available to them.

The respondent had accessed Victoria Police's Law Enforcement Assistance Program (LEAP) for an unauthorised purpose. He was charged with misconduct in public office. The respondent was fined \$4,350 without conviction. The DPP appealed, claiming that the sentence was manifestly inadequate, that the trial Judge failed to give proper weight to sentencing considerations and gave too much weight to factors in mitigation. However, the DPP conceded that if a substantially higher fine had been imposed then it may not have appealed.

The trial Judge concluded that the probabilities were high that a conviction would cause the respondent great difficulty. Further, the respondent pleaded guilty at an early stage, co-operated with the investigators, had shown deep remorse and shame, had lost his career as a police officer and has received a substantial fine.

On appeal, the Judge questioned the trial Judge's finding that the offence was an 'error of judgement' as opposed to 'moral turpitude'. The Judge also said that if he were sentencing at first instance he would have certainly recorded a conviction, however the discretion that the trial Judge showed here was not outside the range of appropriate sentencing dispositions available to him.

As in *Candaza*, the trial Judge ruled in favour of giving the offender every opportunity for rehabilitation without the burden of a conviction. It is difficult to conceive how the release of an offender's criminal history, despite a conviction not being recorded, is a preferable option to a Judge determining the proper course of action based on the evidence before them.

The case of *DPP (Cth) v Li*<sup>xv</sup> is useful to explore the practical operation of section 8. Li pleaded guilty to two counts of defrauding the Commonwealth arising from his involvement in a fraudulent scheme established by his employers to avoid the payment of sales tax.

At trial Li was discharged without conviction. The DPP appealed against the discharge of the respondent, calling the discharge without conviction 'manifestly inadequate'. The appeal was unsuccessful, with the Court of Appeal finding that the order was open for the trial Judge to make given the following reasons:

- the respondent was a migrant who had a limited command of English;
- the respondent was not motivated by greed and did not profit from the scheme;
- the respondent took no part in devising the scheme, pleaded guilty, assisted the authorities in their investigation of the fraud and undertook to further assist in the prosecution of his co-defendants; and
- the respondent had been fined \$35,000.

The court also noted that a subsequent business that the respondent had established and was the sole director of had complied with all of its legal obligations and employed eight people. If convicted the respondent would lose his directorship and his capacity to manage the company.

Again, the case demonstrates the court imposing a sanction based on the holistic circumstances of the case, and it was clear that Li had achieved a degree of rehabilitation through leaving his former employment and establishing his own company. He was now a law-abiding citizen in charge of a profitable business. There was little evidence to suggest that he would re-offend.

#### Inconsistency between section 8 and release of information under the Police Policy

The operation of the Police Policy is clearly inconsistent with the intention and operation of section 8 of the Act, as demonstrated by the way in which the discretion has been exercised by the judiciary and the sentencing principles underlying the legislative intent. The release of findings of guilt without conviction by Police in certain circumstances has the effect of rendering section 8 nugatory.

As a result of the Police Policy, the intention behind the enactment of section 8 has no prospect of being fulfilled without the introduction of a legislative scheme which clearly regulates criminal record management and release. A clear legislative framework for the release of criminal histories and the management of criminal record systems is required in order to restore the full effect of section 8.

## Options for restoring the effect of section 8

### Option 1: Release details of convictions only

The inconsistency that currently exists between the operation of section 8 and the Police Policy can be corrected by the introduction of a clear legislative framework which ensures that only convictions imposed by a court under Sections 7 and 8 are released under a Police Record check.

It is inadequate that the release of information with such serious potential to affect the social rights of individuals and frustrate their ability to participate in the community is currently determined solely by Police Policy in clear contradiction to state legislation. The above case of *DPP v Candaza*<sup>xvi</sup> demonstrates this point. In a case where it would not have been unreasonable for the Judge to impose a conviction, the trial Judge erred on the side of the offenders' long-term rehabilitation through allowing them the maximum possible opportunity to fulfil their potential as 'model citizens' unencumbered by the restrictions that a conviction would place on them. While it is acknowledged that society bears a risk that the absence of a conviction makes it easier for the perpetrators to re-offend, such a risk must be understood in the broader framework of our criminal justice system. It parallels the risk incurred by society through concepts such as parole and bail. Further, a greater risk to society is that offenders are not able to fulfil their potential due to restrictions placed on them by a conviction, and are not able to become a fully-functioning contributor to society.

In many cases the release of information about findings of guilt without conviction under Police Policy contradicts the carefully considered decisions of Courts and the principles behind the Act.

In order to restore the full effect and intention of section 8, it is necessary to introduce legislation or a policy framework which ensures only that findings of guilt where the court has exercised its discretion to not record a conviction are not released.

### Option 2: Details of Conviction Deemed Spent Upon Application at time of Sentencing

This option allows an application to be brought by the offender at the time of sentencing for a conviction to become immediately spent, or spent after a certain period of time. Effectively, a Court would no longer have the discretionary power to

record a conviction, however an offender would bear the onus of having to request the conviction become spent.

If the default position for all findings of guilt is that they are classified as convictions, the result for someone who successfully applied to have a conviction immediately spent would be the same as successfully avoiding a conviction under the first option. Although this approach allows a degree of definitional clarity, the approach could be problematic. The procedural onus for bringing such an application would lie with the person being convicted, rather than allowing the Court discretion. Taking full advantage of this right assumes that the convicted person has been advised of their right to make such an application. In many instances such persons may not have access to advice, in which case they will be reliant upon their own legal knowledge.

### Option 3: No Automatic Conviction for Minor Offences

A final option could be where findings of guilt in certain minor offence categories will not automatically constitute convictions as defined in the draft Bill. However, they may attract a conviction (akin to the current Sections 7 and 8 of the Act), and therefore appear on a criminal record and be subject to the spent convictions scheme.

The challenge of this option will be determining which categories of offences, or sentences imposed, constitute minor offences. The notion of a minor offence category is not novel; it is canvassed in the Consultation Paper and included in the draft Bill. The option may provide a reasonable compromise, allowing Courts to exercise their discretion to impose a conviction following a process akin to the current Sections 7 & 8 of the Act in minor offence categories.

### **3.3 Conclusion**

It is accepted that in attempting to achieve a uniform scheme it may be necessary to arrive at a definition of conviction that provides the greatest clarity, enables the operation of a national scheme and requires as little consequential amendment as possible. For this reason we believe that option two contains a number of attractions. The consistency of option two with Clause 9 of the draft Bill also lends some support to option two. Option three may be less attractive, for similar reasons, but goes some way to preserving the current regime under Sections 7 & 8

of the Act. Notwithstanding these factors, we do not believe that options two or three are the preferable options in all of the circumstances because:

- i. They will have retrospective consequences; cases where there has been a finding of guilt but a Court has decided not to impose a conviction will be deemed (excepting minor offences under option three) to be convictions for the purpose of the scheme.
- ii. They would necessitate consequential amendment to the Act to remove or amend Sections 7 and 8.
- iii. Sections 7 and 8 of the act were enacted to achieve specific purposes and to vest power in the judiciary to carefully weigh sentencing principles on a case by case basis. The case against these purposes and the critical role of the judiciary has not been made. The introduction of a spent convictions regime in Victoria is a sensitive issue. However, it is debateable whether deeming all findings of guilt to be convictions is necessary to ensure broad community acceptance of a scheme, given that at least 42% of the community<sup>xvii</sup> already believe that only convictions recorded by a Court will appear on a criminal record.

## **Recommendation 1**

That only convictions imposed by a Court pursuant to Sections 7 and 8 of the Act (or the corresponding sections in the various Australian jurisdictions) are capable of being recorded on a criminal record and, therefore, capable of becoming spent.

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## **4. Minor offences**

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. For example, a conviction for a minor littering or parking offence would not affect the qualifying period for an earlier conviction.

To some degree this provision (and the similar overseas offence category contained in Clause 7 (4) (a) of the draft Bill) is inconsistent with logic underpinning the

proposed definition of conviction. The effect of the provision is that a minor offence would constitute a conviction but not affect the qualifying period for an earlier conviction. This effect is far more preferable than the current Police Policy, namely to trigger all earlier findings of guilt. However, we are concerned that the provision may perpetuate a degree of confusion regarding the nature and effect of a conviction. We are also concerned that the provision may create a de facto sentencing regime akin to the current Sections 7 and 8 under which submissions may be made (by prosecutors and defendants alike) to impose or not impose a penalty or fine of a certain value because it will trigger the release of an earlier conviction.

We are also concerned that the monetary threshold proposed in the draft Bill may be too low.

Consistent with Recommendation 1 above, we do not believe that minor offences where no conviction is recorded should appear on a police record in the first place.

## **Recommendation 2**

That there be no separate provision relating to minor offences as drafted. However, in the event that all findings of guilt are to constitute convictions as defined under the draft Bill, then a provision relating to minor offences should be included.

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## 5. Overseas offences

The draft Bill proposes that an overseas offence should be treated in the same way as a local offence, that is, if it is eligible to become spent, then it would become spent at the time it would have become spent if the conviction had occurred here.

There will undoubtedly be situations where some overseas offences do not correspond with local laws. The current case of Melbourne man Harry Nicolaides is on point. Mr Nicolaides was recently sentenced to three years jail by Thai Courts for the offences of lese majeste – the crime of maligning the Thai monarchy.<sup>xviii</sup> This law obviously does not correspond with a local law.

According to the draft Bill it would not be possible to spend Mr Nicolaides' conviction under the scheme because he was tried as an adult and was sentenced to more than 12 months' jail.

Because of the difficulty presented by laws that do not correspond with local laws, the simplest approach may be to permit a person to apply to a Court for the offence (regardless of whether it corresponds to a local law or not) to become spent immediately or after a certain period of time. This approach is consistent with Option 2 under *Meaning of Conviction* above, and with Clause 9 of the draft Bill. Mutual Recognition laws operating between countries may qualify this approach.

### **Recommendation 3**

That (subject to the application of mutual recognition provisions) all overseas offences constitute convictions but are capable of becoming immediately spent, or spent after a certain period of time, upon application to the Court.

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## 6. Exceptions - when should a spent conviction still be relevant?

The draft Bill proposes that even if a conviction has become spent, there will still be some situations in which its disclosure is relevant. That is, there will be cases where the individual's interest in putting the offence behind him or her is outweighed by the public interest in community safety. The submission regarding exceptions is limited to special occupations only, namely:

*"those jobs where extra protection of the public is justified and the spent conviction should be disclosed. That includes where the person seeks to become a judge, magistrate, justice of the peace, lawyer, doctor or other health professional, teacher, social worker, child-care worker, aged-care worker or personal carer. It also extends to jobs for which the law applies a character test, for example, licensed occupations such as being a security guard or operating a supported residential facility."*<sup>xxix</sup>

The Consultation Paper explains that no distinction is made in the draft Bill based on the category of offence.

*"It does not matter whether it 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."*<sup>xxx</sup>

Notwithstanding this approach we believe that departing from the normal spent convictions regime (by disclosing all offences, regardless of whether they are spent or not) should not be done lightly and must be justified not only with reference to the special occupation, but categories of offences that are inherently relevant to those occupations. It may well be that for certain occupations it is appropriate that all offences be disclosed, regardless of their age or nature. However, for other occupations we believe that legislatures should prescribe, under regulation, those categories of offences that are relevant to specific occupations.

We believe that this approach reinforces the "inherent requirements" approach as provided under the *Human Rights and Equal Opportunity Commission Act 1996* (Cth) and recommendations 48-50 of the recent report reviewing the operation of Victoria's Equal Opportunity Act, *An Equality Act for a Fairer Victoria Equal Opportunity Review Final Report*<sup>xxxi</sup>. We believe that the approach is grounded in

reality; that the best way to avoid discrimination on the basis of an irrelevant criminal record is to control the level of disclosure, not merely to require that disclosed information be interpreted and considered in accordance with the inherent requirements of the job.

Some occupations may be regulated by licensing or registration authorities which routinely conduct police record checks as part of the licensing / registration process. In such circumstances it seems unduly burdensome that a licensed worker (in the relevant occupation) should be subjected to further police record check processes by potential employers. Instead, these employers should be entitled to rely on the check process undertaken by the licensing or registration authority (as they presently do under the Working With Children check process in Victoria<sup>xxii</sup> .

#### **Recommendation 4**

Where a spent conviction is relevant to a certain occupation, only those spent convictions that fall within pre-determined categories of offences correlating with the respective occupation may be released.

#### **Recommendation 5**

Where a licensing or registration authority conducts a police record check as part of the licensing / registration process to work in a certain industry, the police record check performed by the licensing authority must be relied upon by an employer operating in that field.

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## **7. Consequences of disclosing a Spent Conviction**

### **7.1 Summary**

The draft Bill proposes 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.

This provision is consistent with recommendation 45 of *Uniform Spent Convictions: A Proposed Model – Discussion Paper: August 2004*<sup>xxiii</sup>. However, it is our concern that the provision may have little practical effect due to the manner in which some businesses trading in criminal record information actually operate. Furthermore, the provision may lead to confusion insofar as the *Privacy Act 1988 (Cth)* prohibits trading in criminal record information without the express consent of the relevant person, not merely criminal-record information that discloses a conviction that it knows, or should know is spent.

In *Criminal Records in Victoria: Proposals for Reform*<sup>xxiv</sup>, it was argued that simply prohibiting the trade in criminal-record information that the trader knows, or should know, is spent, was inadequate. This prohibition does not go far enough in controlling the use and abuse of criminal record information by businesses in the trade of providing it, or third parties seeking access to such records without the consent of the individual identified by the record.

### **Recommendation 6**

That it be an offence to:

- i. trade in criminal-record information without the consent of the individual identified by such information.
- ii. obtain criminal record information from any businesses trading in criminal record information, without the consent of any individual identified by such information.

## 7.2 Discussion

### How Private Criminal Databases Operate – CrimeNet Case Study

CrimeNet is a private criminal record database. The CrimeNet website contains the following description of the services that it offers:

*Launched in May 2000, CrimeNet is the world's first site to provide a combined information service on criminal records, stolen property, missing persons, wanted persons, con artists and unsolved crimes.*

*Since that time we have built up a database of thousands of mostly Australian criminal records with emphasis on records relating to fraud, paedophilia, sex-related crimes and crimes of violence. New records are added daily.*

*Thousands of corporations, small businesses, legal firms, banks, airlines, employment agencies and individuals regularly use our services.*

*Why use CrimeNet for checking criminal records?*

*State Police Clearance Certificates can only be issued to the applicant and relate only to offences in that state. CrimeNet covers all jurisdictions, is faster and does not require the permission of the person being checked.<sup>ixxv</sup>*

Currently the fee for searching the CrimeNet Database is \$11 per search.

Discounts apply to multiple searches.

The CrimeNet website also states that:

*CrimeNet does not have access to police or Justice Department records and does not claim to have complete records of all criminal convictions in Australia;*

- *the records that CrimeNet lists on its website must meet CrimeNet's criteria and must be verifiable (e.g. by original newspaper clippings with date and name of newspaper and certified copies of newspaper clippings or court records); and*
- *CrimeNet will publish convictions in relation to any person:*

- *who has been convicted of one or more offences and sentenced to imprisonment to a term of not less than three months;*
- *who has a conviction relating to sex offences, paedophilia, fraud or violence;*
- *who is a person in a position of public trust; or*
- *where the publication of information about that conviction is, in CrimeNet's opinion, in the public interest.*

*When the CrimeNet Database launched in May 2000, the demand for its information on convicted criminals was reportedly overwhelming, with over 150,000 hits within a few hours.<sup>xxvi</sup>*

#### Who operates the CrimeNet Database?

Under the heading "How to Contact Us", the CrimeNet Database lists Crimenet LLC, at 8721 Santa Monica Blvd, Los Angeles, California, 90069-4507, USA.<sup>xxvii</sup> There was an Australian company called CrimeNet Pty Ltd, the registered office of which was listed in the Australian Securities and Investments Commission records as being in Western Australia. This company was the registrant of the domain name [www.crimenet.com.au](http://www.crimenet.com.au) until recently. The company sold its business in 2005 to CrimeNet based in Los Angeles, California, and was formally deregistered in 2007.

#### What does the CrimeNet Database say about privacy?

The CrimeNet Database provides the following explanation of CrimeNet's collection of information provided on the website and correction of that information:

##### *Accuracy of Records*

*We only record details of criminals where the person has pleaded guilty or has been convicted by a judge or jury, of a criminal offence. Details of criminal convictions are public records in most Western democracies and it is a generally accepted principle of privacy rights that this information should always be accessible. We do our best to maintain accurate records. All entries are independently checked and verified. However, if you believe the information relating to any person listed on this site, is inaccurate or incorrect, you may request a correction by contacting our records department.*

*Our policy is to make corrections within one working day of receipt of your request, subject to evidence of the correction required. You can send your request for correction, along with necessary documentary evidence to:*

*Crimenet Records Dept*

*8721 Santa Monica Blvd #1070*

*Los Angeles, California 90069-4507*

*USA*

*We work within the law*

*In democratic countries, criminal court procedures are open to the public. Various Australian Courts have ruled that criminal records are public documents. However, minor convictions are expunged after a certain time under "spent convictions" rules. We have set up systems to remove conviction details in accordance with spent convictions requirements.<sup>xxviii</sup>*

### Application of the Privacy Act

Background:

Since 21 December 2001, all private sector organisations in Australia have been required to comply with the private sector provisions of the *Privacy Act 1988* (Cth) (the **Privacy Act**), unless they fall within one of the exemptions contained in the Privacy Act.

### What does the Privacy Act regulate?

The Privacy Act regulates the manner in which private sector businesses handle personal information, which is information or an opinion, in any form and whether true or not, about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.

Examples of personal information include an individual's name, address, telephone number or photograph. There is a particular sub-category of personal information,

called sensitive information, which is subject to more restrictive privacy obligations. Importantly, sensitive information includes information about an individual's criminal record<sup>xxix</sup>.

### Compliance with the Privacy Act?

Generally, the private sector provisions of the Privacy Act apply to the acts and practices of organisations, including bodies corporate such as CrimeNet.

Some types of organisations are exempt from complying with the NPPs in certain circumstances, but we do not believe that any of these exemptions apply to CrimeNet. Most relevantly, small business operators with an annual turnover in the preceding financial year of \$3 million or less are exempt from the Act, but only if they do not trade in personal information (i.e. collect or provide personal information for a benefit, service or advantage). Even if CrimeNet's annual turnover fell below the \$3 million annual turnover threshold, the exemption would not apply as CrimeNet's activities (outlined above) clearly involve the trade of personal information for a benefit.

### What does the Privacy Act require?

The National Privacy Principles (NPPs) set out minimum standards that private sector organisations must comply with when they handle personal information throughout its life cycle, from collection to use and disclosure, storage, security and accessibility.

Under the following headings, we have summarised the NPPs we believe are most relevant to the issue at hand.

#### NPP 1 – Collection

NPP 1 sets the standard for collection practices of organisations. For example, it provides that only information necessary for what the organisation does should be collected, and that this must be done by lawful and fair means and not in an unreasonably intrusive manner.

At or before the time of collection, organisations must take reasonable steps to ensure that the individuals about whom they are collecting personal information are informed of certain details about that collection. This obligation applies whether the information is collected directly from the individual (NPP 1.3), or from a third

party (NPP 1.5). This is often referred to as the provision of a "privacy collection statement".

Specifically, the collecting organisation must disclose:

- the identity of the collecting organisation and how to contact it;
- the fact that the individual is able to gain access to the information;
- the purposes for which the information is collected;
- the organisations (or types of organisations) to which the collecting organisation usually discloses information of that kind;
- any law that requires the information to be collected; and
- the consequences for the individual (if any) if the information is not provided.

NPP 1 only applies to personal information collected after 21 December 2001.

#### NPP 2 - Use and Disclosure

As a general rule, organisations may only use and disclose personal information for the primary purpose of collection. Use or disclosure for a secondary purpose is permitted only in specified circumstances (for example where the individual has consented or where required or authorised by or under law).

NPP 2 only applies to personal information collected after 21 December 2001.

#### NPP 5 - Openness

Organisations must set out in a document clearly expressed policies on their management of personal information and make that document available to anyone who asks for it. On request by a person, organisations must also take reasonable steps to advise that person generally about the sort of information the organisation holds, for what purposes, and how it collects, holds, uses and discloses that information.

NPP 5 applies regardless of when the information was collected.

## NPP 10 - Collection of sensitive information

NPP 10 provides that sensitive information (which includes information about a person's criminal record<sup>xxx</sup>) can only be collected in certain circumstances, for example where the individual consents or the law requires the collection.

NPP 10 only applies to personal information collected after 21 December 2001.

### Is CrimeNet breaching NPP 10 if it is collecting information about criminal records from public sources?

The CrimeNet website states that "various Australian Courts have ruled that criminal records are public documents". The fact that Courts have ruled this does not however mean that CrimeNet can collect information about an individual's criminal record without complying with the NPPs.

In summary, even if CrimeNet collects information about an individual's criminal record from public sources (such as newspaper articles about a crime or court reports) it must still comply with the collection principles in NPP 1 and NPP 10 if it is collecting that information for inclusion in its own records or with the intention of re-publishing that information in its own generally available publication (e.g. the CrimeNet Database).

This means that, in respect of information about an individual's criminal record, CrimeNet must either obtain the consent of the relevant individual to its collection of that information, or one of the other provisions in NPP 10 must apply.

The Privacy Act provides that an individual's consent may be express or implied. It certainly does not appear that CrimeNet is obtaining the express consent of individuals to the collection of information about their criminal record, so the question becomes whether that consent can be implied by CrimeNet.

Information Sheet 17 produced by the Office of the Privacy Commissioner (the **OPC**) states<sup>xxxi</sup>:

*In carrying on their activities many organisations collect personal information from a range of public sources. These include books, newspapers, magazines, websites, television, radio, telephone directories (hard copy and electronic), share registers, the register of births, deaths and marriages, ASIC company registers, company annual reports, the*

electoral roll, **court records**, National Personal Solvency Index, land titles registers, personal property registers, probate registers and registers of change of name.

...

*An organisation wanting to collect sensitive information from public sources, for example, books, newspapers, or magazines (for example, to develop a profile of an individual for employment or marketing or fundraising purposes) will generally need to consider whether the individual has consented, either expressly or by implication, to the collection.*

*Tip for good privacy practice*

*Where an organisation collects sensitive information from a public source on the basis of implied consent it should be careful that its expectations and understanding about what has been impliedly agreed to are the same as that of the individual. If an organisation has any doubt it would be prudent to seek the individual's express consent.*

*It may be possible to imply consent to the collection of sensitive information in circumstances where a person has consented to their information being published and is likely to understand the kinds of uses that are generally made of that information. Examples of this might be sensitive information collected from Who's Who or company annual reports. Another example might be where a high profile person agrees to be interviewed for a magazine or television show about a health issue affecting them.*

*It may also be possible to imply consent to collection of sensitive information from a newspaper where the person the information is about is a public figure and the information relates to the public life of that figure. However, this will depend on the circumstances and an organisation should not conclude that just because a person is a public figure that he or she is not entitled to privacy.*

Although the matter is not beyond doubt, on the basis of the information set out by the OPC in Information Sheet 17, we do not believe that CrimeNet can reasonably

imply the consent of individuals to the collection of information about their criminal record given:

- the extremely sensitive nature of criminal record information; and
- the potentially adverse implications for an individual if that information is made widely available.

As a result, we believe that there are strong grounds for arguing that any such collection by CrimeNet after 21 December 2001 will be in breach of NPP 10 and so interfere with the privacy of the relevant individual.

#### How are privacy complaints handled?

Individuals can complain to the Privacy Commissioner about an act or practice that may be a breach of an NPP and so an interference with their privacy. However, the Privacy Commissioner generally requires that the individual must first make a written complaint to the relevant organisation and provide that organisation with a reasonable timeframe in which to respond (e.g. 30 days).

If the individual is not satisfied with the way that the organisation has dealt with their complaint, they can then complain to the Privacy Commissioner, who will investigate the matter and attempt to conciliate the complaint. If a conciliated outcome cannot be reached, the Privacy Commissioner may make a determination, for example that the organisation:

- has interfered with privacy and should not repeat or continue conduct;
- should perform any reasonable act to redress loss or damage;
- should pay the applicant an award of compensation for loss or damage (including injury to feelings or humiliation).

The Privacy Commissioner may also determine that it is inappropriate to take further action (in which case the determination can be appealed to the Federal Court or the Federal Magistrates Court).

If the organisation does not comply with a determination by the Privacy Commissioner, the individual or the Privacy Commissioner can apply to the Federal Court or the Federal Magistrates Court to have the determination enforced. Enforcement proceedings are by way of hearing de novo.

Determinations including an award for compensation are reviewable by the Administrative Appeals Tribunal.

### Possibility of broader investigation by the Privacy Commissioner into CrimeNet's activities

#### Own Motion Investigations by the Privacy Commissioner

The Privacy Commissioner can also conduct an "own motion" investigation into CrimeNet's compliance with the NPPs. The Privacy Act gives the Privacy Commissioner power to investigate, on her own initiative, acts or practices where there is no individual complaint or where there may be systemic breaches of privacy principles. These are referred to as "own motion" investigations.

In the majority of cases investigated, the respondent dealt with the issues of concern, either on their own initiative or following the OPC's suggestions. The action taken has included advice to people affected, apologies, retrieval and appropriate disposal of records, a change in practice (for example greater web site security) and a change in procedures.

### Extraterritoriality and the activities of CrimeNet

While CrimeNet may be in breach of the Privacy Act, it may be difficult if not impossible to succeed in a complaint against them. Barriers to mounting a successful complaint include:

- proving that the relevant criminal record is being, or was previously, collected in Australia
- proving that CrimeNet is carrying on a business in Australia
- being able to enforce any decision of the OPC, or Court upon review, against CrimeNet given that their operations appear to be based in the United States of America.

## **7.3 Conclusion**

In *Criminal Records in Victoria: Proposals for Reform*<sup>xxxii</sup>, it was argued that simply prohibiting the trade in criminal-record information that the trader knows, or should know, is spent, was inadequate. Such a prohibition does not go far enough in controlling the use and abuse of criminal record information by businesses in the

trade of providing it, or third parties seeking access to such records without the consent of the individual identified by the record.

Two additional recommendations are made by the report, namely:

- That trading in criminal record information, without the consent of individuals identified by such information, be a criminal offence.
- That obtaining criminal record information from any business trading in criminal record information, without the consent of any individual identified by such information, be a criminal offence.

These recommendations are supported by this submission for the following reasons:

- i. They support a stringently regulated criminal record information industry, and do not merely seek to control the misuse of spent conviction information.
- ii. They are a practical response to the manner in which some businesses trading in criminal record information actually operate. They acknowledge the difficulty in regulating and policing an industry which is internet based and beyond the jurisdictional control of Australian law enforcement authorities.
- iii. They seek to standardise the expectations regarding the legality of trading in criminal record information under both privacy law and criminal law.

## **Recommendation 6**

That it be an offence to:

- iii. trade in criminal-record information without the consent of the individual identified by such information.
- iv. obtain criminal record information from any businesses trading in criminal record information, without the consent of any individual identified by such information.

## STATEMENT OF PRINCIPLES

**Participants at the roundtable forum "*Fairer Access to Criminal Records*" held by JobWatch on the 26<sup>th</sup> June 2008 supported the introduction of laws in Victoria which prohibit discrimination on the ground of (irrelevant) criminal record based on the following principles:**

### **1. Compliance with the Victorian Charter of Human Rights**

As Victorians we need to comply with the principles of the Victorian Charter of Human Rights.

At the heart of the Charter is the belief that everyone is entitled to a "fair go". This includes recognition and equality before the law and embodies the right to enjoy human rights without discrimination:

- (a) Everyone should have the opportunity to be judged on their merits;
- (b) People shouldn't be judged on their past – their past should not impede their future.

### **2. Promoting Social Inclusion**

To be socially included, every Australian, including those with a criminal record, should have an opportunity to fully participate in Australian life including the opportunity to secure a job:

- (a) A criminal record shouldn't mean a life sentence;
- (b) There is a need to allow equal participation in public life for those with a criminal record.

### **3. Getting the Balance Right**

It is important that there is a balance between the rights of the offender, employer and the community. Everybody can benefit if the balance is right:

- (a) The business case for employers includes:
  - (i) Addressing the skills shortage;
  - (ii) Improving productivity;
  - (iii) Preventing waste of human capital;
  - (iv) Minimising risk to employers.
- (b) This is a multifaceted problem requiring a multifaceted response;
- (c) A realistic timeframe is needed for implementation;
- (d) Offender rehabilitation needs to be considered alongside community safety.

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- <sup>i</sup> Victoria, *Parliamentary Debates* Legislative Assembly, 19 March 1991 (Mr Kennan, Attorney-General).
- <sup>ii</sup> Victoria, *Parliamentary Debates* Legislative Assembly, 18 April 1991 (Wade).
- <sup>iii</sup> *R v Cuthbert* (1967) 86 W.N. (PT 1) (NSW) 272.
- <sup>iv</sup> *The Queen v Phelan, Burge and Collier*, 30 July 1976, Vic (Unreported).
- <sup>v</sup> Victoria, Sentencing Committee, *Report on Sentencing*, April 1987, Attorney-General's Department, p 78.
- <sup>vi</sup> *Ibid*, p 135.
- <sup>vii</sup> DJ Galligan, *Discretionary powers*, 8, from Victoria, Sentencing Committee, *Report on Sentencing*, April 1987, Attorney-General's Department, p 140.
- <sup>viii</sup> Victoria, Sentencing Committee, *Report on Sentencing*, April 1987, Attorney-General's Department, chapter 4.3, p 143.
- <sup>ix</sup> *Ibid*, p 143.
- <sup>x</sup> *Ibid*, p 140.
- <sup>xi</sup> Victoria, Sentencing Committee, *Report on Sentencing*, April 1987, Attorney-General's Department, p 146.
- <sup>xii</sup> [2003] VSCA 91 (25 June 2003)
- <sup>xiii</sup> *Sentencing Act 1991* (Vic).
- <sup>xiv</sup> [2005] VSCA 277.
- <sup>xv</sup> [2000] VSCA 76.
- <sup>xvi</sup> *DPP v Candaza, Koufomanolis, Mavros & Nunez* [2003] VSCA 91.
- <sup>xvii</sup> Criminal Records in Victoria - Options for Reform: 1995, Fitzroy Legal Service and Job Watch, pp28-30.
- <sup>xviii</sup> <http://www.theage.com.au/national/melbourne-writer-jailed-for-insulting-thai-royals-20090119-7kty.html> accessed 20 January 2009.
- <sup>xix</sup> Draft Model Spent Convictions Bill – Consultation Paper (November 2008), p5
- <sup>xx</sup> *Ibid*, p3.
- <sup>xxi</sup> *An Equality Act for a Fairer Victoria Equal Opportunity Review Final Report*: June 2008, Department of Justice (Victoria), pp99-104.
- <sup>xxii</sup> <http://www.justice.vic.gov.au/workingwithchildren> accessed 21 January 2009.
- <sup>xxiii</sup> *Uniform Spent Convictions: A Proposed Model – Discussion Paper: August 2004*, Department of Justice (Victoria)
- <sup>xxiv</sup> 1995, Fitzroy Legal Service and Job Watch.
- <sup>xxv</sup> <http://www.crimenet.org/> accessed 19 January 2009.
- <sup>xxvi</sup> *Ibid*
- <sup>xxvii</sup> *Ibid*
- <sup>xxviii</sup> *Ibid*
- <sup>xxix</sup> s.6 *Privacy Act 1998* (Cth)
- <sup>xxx</sup> *Ibid*

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<sup>xxxi</sup> [http://www.privacy.gov.au/publications/is17\\_03.html](http://www.privacy.gov.au/publications/is17_03.html), accessed 20 January 2009.

<sup>xxxii</sup> 1995, Fitzroy Legal Service and Job Watch.