



Community
driven justice.

Submission to the Review of the Spent Convictions Act 2021

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About Fitzroy Legal Service

Established in 1972, Fitzroy Legal Service ('FLS') is Victoria's longest standing community legal centre championing justice for the most marginalised members of our community. With deep commitment to community-driven change, we provide individuals and communities with access to justice when they need it most, and boldly agitate for high-impact policy and legislative reforms.

In this we co-design grassroots solutions and holistic services that reach women at risk of incarceration, injecting drug users, LGBTIQ+ communities and people experiencing homelessness.

Following a fifty-year legacy, we remain fearless and feisty in our stance for justice.

FLS provides place-based and state-wide services with client-facing offices operating out of Fitzroy Town Hall, Reservoir and the Pride Centre in St Kilda. We also provide duty lawyer services at the Neighbourhood Justice Centre in Collingwood and the Heidelberg Magistrates' Court.

FLS is proud to service the diverse Yarra and Darebin Local Government Areas. We work in partnership with local community organisations to deliver legal services through a range of outreaches including alcohol and other drug services, needle and syringe programs and the Medically Supervised Injecting Room, specialist youth, mental health and LGBTIQ+ services.

Background

FLS has been engaged in advocacy supporting reform in the area of criminal record disclosure policies for over two decades. Through our criminal law practice and our Drug Outreach Lawyer program, we have worked extensively with people who experience stigma and criminalisation due to their lived experience of homelessness, institutional trauma and violence, drug use and psychosocial disability. We also run an employment law clinic in which we have worked with clients who face barriers to gaining or maintaining employment due to discriminatory or unlawful practices.

We commend the government for implementing this review of the *Spent Convictions Act 2021* (Vic) ('the Act') and the ongoing commitment to improve this scheme through the consultation process and welcome the opportunity to make submissions in this review.

FLS supports spent convictions legislation that is fair, informed by evidence, human rights based, and delivers an appropriate balance between community safety and rehabilitation. A criminal record continues to be a significant barrier to employment and creates real disadvantage for people with criminal records. Victoria does not have broader protections against irrelevant criminal record discrimination. The Victorian spent convictions scheme is the only protection against discrimination based on criminal record.

FLS recommends the following general principles to assist the review of the *Spent Convictions Act 2021* to achieve its objectives of removing unfair discrimination and barriers to rehabilitation for people who have previously offended, while supporting public safety:

1. That the principles of proportionality and relevance are central to this legislation.
2. That it is recognised that in many cases a criminal record is the most significant aspect of the penalty imposed by court processes (in some cases involving a lifelong obstacle to most forms of employment, whilst in others involving ten years unemployment or under-employment.)
3. That the unreliability of a criminal record as a workplace risk management tool is acknowledged, as are the discriminatory impacts for employees of having any form of criminal record (being grounds for stringent limits on the release and use of criminal record information).
4. That the significant financial costs and other negative impacts on the community of the under-employment and unemployment of persons with a criminal record are incorporated into policy approaches, noting the deleterious impacts not only on offenders post sentence, but also on their families and communities.

5. That where specific regulatory bodies operate pursuant to statute, employers are precluded from applying for standard criminal record checks. That further checks are regarded as facilitating irrelevant criminal record discrimination, and as undermining the authority and legitimacy of authorised decision-making bodies.
6. That the pressures on employers with the burden of responsibility for judgements made about prospective workers in a risk averse culture is given due recognition. In particular having regard to the complexities for employers around judgments of relevance and the difficulty for employees of proving discrimination.
7. That it is acknowledged that limiting release of criminal record information is the strongest protection against discriminatory outcomes.

Finally, prior Criminal record is not always a good indicator of current or future character. FLS believes that people are more than the sum of their actions and should be given opportunities to move forward and participate fully in public life. This is the spirit to which this legislation should focus on.

In respect of the last principle, we wish to acknowledge the leadership of the late Uncle Jack Charles on the issue. He always expressed that just because someone received a sentence, it was not a life sentence. People need hope there is a life beyond the cycle of harm, and that they can take their rightful place one day as leaders in the community:

'I needed to give those young ones in our youth detention centres, and adults in our prisons, [the belief] that there can be a light at the end of the tunnel. If you've got a criminal record you are confounded with that for the rest of your life. It is a life sentence. Well no judge ever sentenced us to life.' – Uncle Jack Charles¹

Responses and Recommendations

We acknowledge the extensive work that has been undertaken to identify the topics and questions posed in this review and will respond directly to the topic questions below.

General Feedback:

FLS would like to raise three significant issues we have identified with the current scheme that are practical barriers to achieving the objectives and efficacy of the scheme.

Recommendation 1: The scheme should implement an automatic notification process to let people know when their convictions are automatically spent.

Currently, for people whose convictions are automatically spent, there is no notification process and people are often unaware that their convictions have been spent. This can lead to 1) inadvertent disclosures to prospective employers that creates bias and discrimination; 2) where there has been an error and the conviction is still recorded despite being eligible for automatic removal, individuals do not always know they are able to seek amendments; and 3) people who are unaware of the automatic process may continue to believe they have convictions recorded and therefore avoid applying for jobs or positions that they would be eligible for once their convictions are spent.

To remedy this situation, we recommend that the scheme implement an automatic notification process to let people know when their convictions are spent. This process should be accompanied by information about how to check their record and avenues if information is incorrect.

¹ Wilson, Tony, Interview with Uncle Jack Charles, 12 October 2022, available at <https://goodonewilson.substack.com/p/uncle-jack-sorry-for-standing-in>. See also Wright, Tony, "Jack Charles did his time, but his record remains a ball and chain" *The Age*, 7 March 2019, available at <https://www.theage.com.au/politics/victoria/jack-charles-did-his-time-but-his-record-remains-a-ball-and-chain-20190307-p512qf.html>.

Recommendation 2: The scheme should develop an electronic record that enables people to access their record and check which convictions are eligible to be spent without seeking a formal criminal record check.

A key issue for the scheme is access and awareness of eligibility. There has been little education and public information following the first year of the scheme and many people who may be eligible to apply for the scheme lack awareness of their eligibility. In particular, people who may no longer be engaged with reintegration/justice services may not ever be notified as they are not interacting with services aware of the scheme. The scheme needs more public education and promotion and it would assist access and awareness to create an electronic record (similar to Medicare health records) that enables people to see their record at no cost, to see which convictions are eligible to be automatically spent or eligible to apply to be spent, or create an easy way for people to check the eligibility of their offences without requiring a paid criminal record check.

Recommendation 3: The scheme also conduct education and encourage individuals, lawyers and decision makers to keep records where they have been found guilty of an offence that constitutes a 'serious conviction', beyond the requisite 7 years. These records will enable people to provide contemporaneous information to future spent conviction applications.

When individuals are eligible to apply for their convictions to be spent, a significant time has passed and in many cases, legal records have been destroyed. This limits the amount of information available to the court to determine the nature and gravity of the offence at the time of sentencing. The court must rely on the sentence and charge alone, which does not always demonstrate relevant considerations taken into account. The scheme should conduct education around the importance of keeping records about the circumstances of the offence where it constitutes a 'serious conviction' and to encourage lawyers to consider retaining or providing this to clients where they may be eligible.

Topic 1: A new definition of 'serious violence offence' should be created for the Spent Convictions Act that reduces the offences excluded from the scheme. In drafting the definition, and therefore which offences are included and excluded, consideration should be given to the public safety risk balanced with the impact on the individual and community.

The current definition of 'serious violence offence' captures many individuals who have spent limited time in prison, and automatically excludes them from the spent convictions scheme. This is a blunt approach for some offences that are not serious public safety risks and can lead to further issues reintegrating into the community. The seriousness and public safety risk of an offence are considered by a sentencing court and are reflected in the final sentence. Significantly, where materials relevant to mitigation and the specific offences are no longer available, the conviction discloses little information about the genuine public safety risk.

We recommend that instead of referring to other legislative definitions, a new definition of 'serious violence offence' should be created. This definition should consider the public safety risk balanced with the impact on the individual and community when deciding which offences to include and exclude. This would better capture a limited range of convictions that is proportionate to the public safety objectives of the Act.

Similarly, and in our view, more significantly, the category of serious offence as including 'sexual offence' by reference to the *Criminal Procedure Act 2009* and *Crimes Act 1958* is very broad and can capture offences which do not pose a public safety risk, and exclusion from the scheme has a disproportionate impact.²

² E.g., 1(b) An offence an element of which involves - (i) any person engaging sexual activity; (ii) any person taking part in a sexual act; or (iii) commercial sexual services;(e) an offence which involves an element of indecency, etc.

For example, a serious sexual offence, by including 'an offence an element of which involves indecency' section 4(1)(e) of the Criminal Procedure Act 2009, casts the net much too widely.

Case Study

FLS has assisted client X who was observed urinating in a public place during a period of homelessness. X was an elderly male and suffered bladder control issues. X was observed and received a charge of indecent exposure, to which a plea of guilty was entered. X attended our service distressed that the charge appeared on his criminal record and had resulted in him being refused a volunteering opportunity with a local op shop. X did not have access to records detailing both allegations and submissions in relation to his offending. Under the current legislation, this offence, if accompanied by a recorded conviction, would constitute a 'serious conviction' incapable of becoming automatically spent. It would seem this is not the category of offender that the legislation is intended to capture to protect the public. If X received penalty of a short term of imprisonment for time served on remand, this offence would not be eligible for the scheme and would prevent them from accessing employment and volunteering permanently.

Other examples that may fall within this category include offences relating to commercial sex services and statutory rape offences occurring between a young person and a minor where there is a term of imprisonment.

The following example demonstrates how the gravity of the offending within an offence category may range significantly from lower end to serious:

A 17-year-old Melbourne man and his girlfriend, also 17, filmed themselves having sex. After he turned 18, they broke up and he emailed two still images from the video to three friends. Police charged him with making and transmitting child pornography.³

If this young person received a term of imprisonment, he would be excluded from the spent convictions scheme.

We note that in our practice, FLS clients are more likely to have time spent in prison on their record for minor offences because they were remanded on the matter because of bail risks (eg. unstable housing or homelessness, multiple minor offences) and pled guilty at the first opportunity. This leads to time served imprisonment sentences for relatively minor offences, which makes them ineligible for the scheme. In general, FLS does not support the exclusion of specific offences or categories of offences to the scheme, given the broad exemptions for specific fields of professional work (section 22 of the Act). FLS holds specific concerns where blanket preclusion to conviction becoming spent is defined by reference to a term of imprisonment.

As outlined above, the factors resulting in a term of imprisonment often have little to do with the gravity of offending and are directly referable to administrative barriers in the criminal justice and social services systems.

FLS recommends that judicial discretion be available for all serious convictions where an applicant makes an application for leniency or can demonstrate exceptional circumstances.

Case Study

L was found guilty of committing a serious offence at the age of 23 and served a sentence of 7 years. L subsequently engaged in community service and trained in a profession that permitted them to support others experiencing similar struggles that had led to their original offending. At 60 years of age, L approached FLS seeking advice as to whether their record may ever be expunged. L had never been found guilty of any further offending and was

³ Nicole Brady, "Sexting' Youths Placed on Sex Offenders Register', The Age (online, 24 July 2011) <<https://www.theage.com.au/national/victoria/sexting-youths-placed-on-sex-offenders-register-201107231hugu.html>>.

broadly recognised as being a community leader who had demonstrated their complete rehabilitation and good character. FLS supports the premise that the commission of a serious offence attracting a lengthy term of imprisonment should not be a life sentence, and there should be an opportunity at some stage to make application to have any criminal record expunged.

Topic 2: FLS recommends reviewing the recommencement provision to limit restarting the conviction period where offences are related and are proportionately balanced with the impact on employment prospects of the individual and impact on the community.

In FLS experience, when people have interactions with the criminal justice system, past interactions and prior convictions can create a prejudicial impact on decisions about charging someone with offences, sentencing and ultimately who has access to their criminal record. People who have prior convictions are more likely to be charged with fresh offences, even if the previous charges were for minor and unrelated matters because there is an alert attached to their name. FLS commonly see this occur for subsequent minor drug offences.

For example, FLS has assisted a client who was charged as an adult on minor driving charges. These charges occurred within the recommencement period for serious charges from when the client was a minor. This reactivation led to loss of employment, mental health deterioration and impacted the client's family's financial security.

Case Study

FLS assisted a client N who had experienced an extremely difficult youth and had been homeless from approximately 12 years of age. N had numerous offences, leading up to the period of his early twenties, in relation to some of which he had served short terms of imprisonment. N had a great deal of trauma associated with his youth and had made extraordinary efforts to build a life of contribution for himself and his community. He was gainfully employed in a service industry and had been able to satisfy the requirements of his new profession because of the time that had lapsed since he had had contact with police. N was arrested on an evening which coincided with a difficult anniversary of a family loss and received a sentence for drunk and disorderly conduct with conviction. N's prior offending was subsequently disclosed in his fresh criminal record check (required for his employment), and he was unable to continue with that work because of the risk he was deemed to pose in the workplace. There had been no concerns with his work performance, and N was regarded as a highly committed and exemplary employee. N was profoundly traumatised by the experience and felt entirely trapped by the childhood circumstances that he had struggled so hard to escape. N did not have priors that suggested any risk of violence and was engaged in a profession of care giving. He was not excluded from his work by virtue of the professional regulatory body, but by virtue of the employer's concern with avoiding risk. N was too impacted at the time in terms of his mental health to engage in proceedings against his employer.

At all times the objectives of the Act should correspond with managing risk to the community and considering harms to the community caused by loss of employment. For employers, they face a difficult challenge when prior convictions are disclosed as they are required to risk manage the workplace. Information about prior convictions can place employers in a position where their actual experience of the worker is displaced by the information they are subsequently legally bound to consider. If a criminal conviction is not relevant to the employment, the employer should not receive that information. There is also extensive research indicating employers do not know how to interpret

criminal record information meaningfully in a risk matrix, and the information they do receive is very simplified (i.e. does not include anything beyond the charge and sentence).⁴

We recommend reviewing the recommencement provision to limit restarting the conviction period where offences are related and are proportionately balanced with the impact on employment prospects of the individual and impact on the community.

Topic 3: If a serious offence is eligible to be immediately spent, this should be treated as any other offence with respect to the separation of powers and the information available to the judicial officer at the time of sentencing.

A serious offence should be immediately spent if it is eligible to be immediately spent. This would respect the fundamental principle of the separation of powers as judicial officers have access to information that provides all the relevant context to the offending. As mentioned above, the categories of serious convictions are very broad. If no conviction is recorded and there is no term of imprisonment, the judicial officer would have weighed the information available to them and the community safety has been considered. It is for prosecutors to make the case that a different outcome is protective of the community, and the sentence may be appealed if the prosecution, as agent for the State, believes the outcome poses risk to the community.

Topic 4: Adjourned undertakings without conviction should be immediately spent regardless of any conditions. An adjourned undertaking should not re-enliven a conviction period.

In FLS's practice experience, the ineligibility of an adjourned undertaking to be immediately spent has significant and real impact on sentencing considerations and individuals. Where an adjourned undertaking is a prospective sentencing option, FLS lawyers have had to submit for higher sentencing penalties (fines) because the adjourned undertaking would have an impact on work or travel prospects.

For example, FLS has assisted a client who had work prospects that required a police check. The lawyer was instructed to submit for a fine instead of an adjourned undertaking, despite the higher penalty, because the fine was immediately spent and would not jeopardise the client's work prospect.

Similarly, FLS assisted a client who was granted diversion with conditions to pay funds into the court fund and to the victim. The client could not afford to pay these funds due to limited Austudy payments and was brought back to court. The Magistrate proposed an adjourned undertaking without conviction, however, because the client was applying for an overseas working visa and would have been barred because of the conviction recorded, FLS submitted for a fine without conviction. This was granted and the client was able to apply for their visa because the conviction was automatically spent.

This discrepancy between sentences creates issues that uplift sentences because of their secondary impact on employment and visas. This is inconsistent with the aims and objectives of the Act and FLS recommends that this be remedied by making adjourned undertakings without conviction automatically spent. Similarly, to be consistent with sentencing hierarchies and judicial independence, adjourned undertakings without conviction should not re-enliven past convictions.

⁴ See for example, Naylor, Bronwyn & Heydon, Georgina & Paterson, Moira & Pittard, Marilyn. (2018). LIVING DOWN THE PAST: Criminal Record Checks and Access to Employment for Ex-offenders: Final Report; Heydon, G., & Naylor, B. (2018). Criminal record checking and employment: The importance of policy and proximity. *Australian and New Zealand Journal of Criminology*, 51(3), 372–394; Naylor, Bronwyn and Naylor, Bronwyn, Living Down the Past: Why a Criminal Record Should Not Be a Barrier to Successful Employment (July 19, 2012). (2012) 18(8) *Employment Law Bulletin* 115-119; Naylor, Bronwyn & Paterson, Moira & Pittard, Marilyn. (2009). In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks. *Melbourne University law review*. 32.

Topic 5 : The definition of ‘conviction’ in the Act must be amended to provide further clarity.

FLS agrees the current definition of ‘conviction’ under the Act is unclear and potentially erroneous. In so far that there is a risk that this could be interpreted as meaning that:

- 1) an offence can only be spent if there is no finding of guilt, or
- 2) an offence without conviction would not be immediately spent because there is a finding of guilt.

This would be contrary to the intention of the legislation and the objective of the scheme.

FLS recommends that the definition of ‘conviction’ in the Act be amended to provide further clarity. We suggest that the foundation of any consideration of the meaning of a ‘conviction’ within the operation of the criminal law in Victorian must rest with section 8 of the Sentencing Act 1991 (Vic), being the legislative text on which practitioners, judicial decision makers, and clients have relied in engaging with the subject of a recorded conviction, and its meaning and consequences in this State.

Topic 7: FLS supports the inclusion of historical findings of guilt under mental health provisions prior to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*

It is consistent with the aims and objectives of the act to include findings of guilt where a person is found unfit to plead or not guilty by way of mental impairment. The policy justification for these offences to be included is maintained regardless of the legislation that covers these findings, therefore we support the inclusion of historical findings of guilt under other mental health provisions.

Topic 8: Legal aid funding and education should be made available to legal practitioners to assist individuals to apply under the scheme. Judicial guidance and accessible resources at court should also be made publicly available to assist individuals to understand the consequences of their sentence.

In FLS’s practice experience, many clients and lawyers are similarly confused by the application process for spent convictions. People who experience barriers to access to justice (young people, Aboriginal and Torres Strait Islander people, people who are disproportionately represented in the justice system), greatly benefit from having their legal rights and processes explained by a lawyer. This is work that community legal centres assist with on a daily basis. However, lawyers do not currently receive training in spent convictions because they are not eligible for legal aid grants and limited information is available to assist individuals and lawyers alike.

Legal aid funding should be available for spent convictions applications and resources should be provided to fund lawyers to assist individuals. This is in addition to issues of awareness about the scheme and eligibility. We also recommend that judicial guidance be made available to legal practitioners to assist them to understand decision making considerations and enable advice for clients.

We further suggest resources are provided by the Court to assist members of the public receiving a sentence to understand the consequences of their sentence, any options available to them, and reinforcing the importance of retention of documents should they have been found guilty of a serious conviction as defined by the Act. As a criminal record is such a significant aspect of the punishment received by a sentenced individual, it would seem incumbent on those engaged in the administration of justice to ensure clear accessible information is provided in relation to it.

Topic 9: FLS supports removing the requirement of personal service as this is onerous and a barrier for self-represented applicants.

Topic 10: FLS strongly supports requiring reasons for unsuccessful applications to enable consistent decision-making and build jurisprudence.

Publication of reasons would assist to build up jurisprudence for decision-makers and applicants and create consistency in decision making. This would enable applicants to better tailor their applications and help decision-makers make consistent and informed decisions.

Topic 11: FLS supports a requirement that the Attorney-General or Chief Commissioner of Police give notice if they intend to make submissions to support the proper function of the court and preparation by the applicant.

FLS does not have recommendations in relation to Topic 12- 22