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Committee Secretary
Legislative Council, Legal and Social Issues Committee
Parliament House, Spring Street
EAST MELBOURNE VIC 3002

Dear Committee Secretary

Submission in response to the Inquiry into a Legislated Spent Convictions Scheme

The Office of the Victorian Information Commissioner (**OVIC**) is pleased to provide a submission addressing the Terms of Reference of the Legislative Council's Legal and Social Issues Committee's (**the Committee**) inquiry into a legislated spent convictions scheme (**the scheme**) in Victoria.

OVIC is the primary regulator for information privacy, information security and freedom of information in Victoria, and administers the *Privacy and Data Protection Act 2014* (Vic) (**PDP Act**) and the *Freedom of Information Act 1982* (Vic). As Information Commissioner, I have a strong interest in matters that affect individuals' privacy.

Given this remit, this submission is focused on the interaction of the scheme with the PDP Act (addressing point 2(j) of the Terms of Reference). Specifically, the purpose of the submission is to draw the Committee's attention to relevant privacy considerations under the PDP Act, to inform the development of the scheme.

Protecting the privacy rights of individuals is consistent with the Victorian public sector's (**VPS**) obligation to act in accordance with the *Charter of Human Rights and Responsibilities Act 2006*, and the requirement to take individuals' human rights into account, including the right to privacy, when making decisions.

The collection, use and disclosure of spent conviction information

The PDP Act prescribes how VPS organisations collect, hold, manage, use, disclose and transfer personal information, through the Information Privacy Principles (**IPPs**).¹ For example, IPP 1 outlines when a VPS organisation may collect personal information and IPP 2 outlines how VPS organisations may use and disclose that information.

¹ s 13 of the *Privacy and Data Protection Act 2014* outlines the types of organisations to which the IPPs apply; the IPPs are contained in Schedule 1 to the *Privacy and Data Protection Act 2014*.

Sensitive information

Under the PDP Act, information or an opinion about an individual's criminal record is defined as sensitive information.² This means information relating to an individual's spent conviction (**spent conviction information**) is likely sensitive information under the PDP Act, which attracts a higher level of protection. For example, IPP 10, outlines the limited circumstances in which a VPS organisation may collect information of this type. OVIC encourages the Committee to note this additional privacy protection for sensitive information when designing the scheme.

Relationship of the PDP Act to other legislation

Given the nature of spent conviction schemes in other Australian jurisdictions, a Victorian scheme will likely outline how organisations can collect, use and disclose spent conviction information which may be different to the obligations under the IPPs. If an IPP is inconsistent with a provision under another piece of legislation, that legislation will prevail over the IPP to the extent of the inconsistency.³ Therefore, some IPPs under the PDP Act may not apply to spent conviction information, depending on the scheme's design.

OVIC recommends that the scheme clearly set out organisations' obligations with respect to the collection, use and disclosure of spent conviction information in so far as possible. For instance, it should be clear when the scheme prohibits the use and disclosure of spent conviction information and, conversely, it should be clear when the scheme authorises or requires collection and disclosure of that information (in line with IPP 10.1(b) and IPP 2.1(f)). For example, IPP 10.1(b) states an organisation must not collect sensitive information about an individual unless the collection is required or authorised under law.

The IPPs will still apply, however, where the scheme is silent regarding the handling of spent conviction information. This means VPS organisations will still need to comply with their obligations under other IPPs, such as IPP 3 which relates to data quality.

Data quality

IPP 3 outlines an organisation must take reasonable steps to make sure the personal information it collects, uses or discloses is accurate, complete and up to date. Victoria Police manages the release of criminal history information in Victoria, however other VPS organisations would also likely hold this information (for example, in relation to an individual's eligibility for employment).⁴ As such, the scheme may wish to consider how VPS organisations can ensure criminal record information they use or disclose is accurate, complete and up to date, in the context of convictions that may be spent.

Consequences of non-compliance with the scheme

Under the PDP Act, individuals have the right to complain to the Information Commissioner in relation to a suspected breach of the IPPs.⁵ This right of complaint would likely still exist if there is a breach of the IPPs in relation to spent conviction information (provided the relevant IPP applies to the information in light of any inconsistent provisions under the proposed scheme and provided that an exemption from complying with the IPPs does not apply).⁶ As such, the Committee may wish to consider how any sanctions provided for under the scheme should interact with the complaint mechanisms under the PDP Act.

² Schedule 1, *Privacy and Data Protection Act 2014*.

³ s 6(1) of the *Privacy and Data Protection Act 2014*.

⁴ This is done through Victoria Police's Information Release Policy: https://content.police.vic.gov.au/sites/default/files/2019-05/Info_Sheet_Info_Release_Policy%20May19_1.pdf?_ga=2.10824500.1662131279.1561698524-1615615977.1554689035.

⁵ s 57 of the *Privacy and Data Protection Act 2014*.

⁶ For example, the *Privacy and Data Protection Act 2014* contains specific exemptions under ss 14, 15 and 15A relating to the *Freedom of Information Act 1982*, law enforcement, and information sharing under the *Family Violence Protection Act 2008*. In these circumstances, certain IPPs may not apply to the relevant information.

Thank you for the opportunity to provide a submission on the Terms of Reference of the Committee's inquiry into a legislated spent convictions scheme in Victoria.

I have no objection to this letter being published by the Committee without further reference to me. I also propose to publish a copy of this letter on the OVIC website but would be happy to adjust the timing of this to allow the Committee to collate and publish submissions proactively.

If you have any questions regarding any of the above, please contact me or my colleague Sarah Crossman, Senior Policy Officer, at sarah.crossman@ovic.vic.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'S. Bluemmel', with a long horizontal flourish extending to the right.

Sven Bluemmel
Information Commissioner

