

8 July 2019

Lilian Topic
The Secretary
Legislative Council, Legal and Social Issues Committee
Parliament House, Spring Street
East Melbourne Vic, 2002

Via email: spentconvictionsinquiry@parliament.vic.gov.au

Dear Ms. Topic,

Re: Inquiry into Spent Convictions Bill 2019.

The Victorian Aboriginal Child Care Agency (VACCA) welcomes the opportunity to provide input into the Inquiry into Spent Convictions by the Legislative Council Legal and Social Issues Committee regarding spent convictions.

The Victorian Aboriginal Child Care Agency (VACCA) is the lead Aboriginal child welfare organisation and the largest providers of Aboriginal family violence services in Victoria. As an Aboriginal Community Controlled Organisation (ACCO), VACCA provides services to vulnerable Aboriginal children, families and communities. VACCA's vision is Aboriginal self-determination- Live, Experience and Be. Our purpose is supporting culturally strong, safe and thriving Aboriginal communities. We believe in the principle of the right of Aboriginal people to self-determination and the rights of the child and we commit to uphold Victorian Aboriginal cultural protocols. Our values are: Best interests of the child, Aboriginal Cultural Observance, Respect, Self-determination, Healing and Empowerment and Excellence.

Our main priority is protecting and promoting children's rights, so we do not make these recommendations lightly. We are aware that any such reform requires a balance between rehabilitation for offenders; including addressing ongoing discrimination around prior criminal convictions in employment and housing and community safety; including the wellbeing of victims, and particularly from VACCA's perspective protecting Aboriginal children and young people.

VACCA has long advocated for a Victorian spent convictions scheme to be legislated, particularly through the work of Woor- Dungin. We wish to formally endorse their submission and the accompanying recommendations for this inquiry. As quoted in their submission, our CEO Adjunct Professor Muriel Bamblett AO, believes

Our priority at VACCA is to ensure that all Aboriginal children are safe and connected to their culture and community. Having a criminal record for minor offences without the ability to consider on merit spent convictions lessens the pool of available carers for our Aboriginal children making a poor situation worse. It also means restricting employment prospects in our sector for a number of Aboriginal people. Having a criminal record should not in itself be a reason for this additional disadvantage being borne by Aboriginal people. There has to be a sensible way through this that doesn't penalise the community further. A Spent Conviction Scheme is one way forward with additional measures to allow for improved screening.

Our submission directly responds to s3 of the Terms of Reference for this Inquiry:

in considering the need for and design of a legislated spent convictions scheme, the Committee should have regard to the experience of groups in our community who suffer particular disadvantage due to past convictions, such as **young people** and **Aboriginal and Torres Strait Islander people**

Victoria is the only state or territory not to have a legislated spent convictions scheme, nor does it protect against discrimination on this basis. We know that the Victorian Aboriginal population is vastly over represented in the criminal justice system (AIHW, 2017). The intergenerational impact of colonisation on the physical, social, spiritual and cultural wellbeing of over 500 Aboriginal clans across Australia is widely recognised (Frankland et al., 2010). Aboriginal people are almost three times as likely to experience high or very high levels of psychological distress (State of Victoria, 2017) and suicide rates are twice as high within the Aboriginal population compared to the broader population (DHHS, 2016). We see our communities suffering because of disconnection from family, community, Country and culture with the intergenerational impacts. We are deeply concerned that the ramifications of not having a legislated spent convictions scheme, nor protection against discrimination on this basis is unfairly affecting the opportunity of those affected in the Victorian Aboriginal community, particularly our children and young people, to reintegrate into society, and to effectively rehabilitate due to discrimination on the basis of their criminal record.

We are also concerned that with the introduction of WWCC for all kinship carers that having a criminal record, without a spent convictions scheme, will negatively impact and deter potential community members from becoming kinship carers. There should be a mechanism for review, or appeal rights included in any spent convictions legislation for this purpose. As raised above, the safety of our children and young people remains our paramount concern, however where someone has a criminal record for committing an unrelated minor criminal offence, we do not want to further impede their ability to care

for their family in a safe and nurturing home. We are aware that someone with a criminal record can become a kinship carer, unless the nature and timing of the criminal offence indicates that there may be a risk to a child's safety. As this must be assessed before a person can be approved as a carer, some Aboriginal people do not feel safe to put themselves forward. VACCA can support Aboriginal people with historical criminal records through this process, however implementing an appropriate spent convictions scheme would further support those potentially affected.

VACCA welcomed the introduction to the *Victims and Other Legislation Amendment Act 2018*, including the Statement of Recognition acknowledging the considerable harm and distress caused by historical recording practices, criminalising children and young people for being in state care, including the disproportionate effect these practices had on Aboriginal children. This was a historic and overdue recognition of past wrongs, we must now ensure that Aboriginal children, young people and adults are not penalised further after they have served their sentence. The Victorian Attorney-General at the time, the Hon. Martin Pakula MP poignantly reflected that

“The Government recognises that these recording practices are likely to have had a disproportionate impact on the Koori community given past policies of taking Aboriginal children away from their families and into state care.”

Mr Pakula’s quote is just as relevant in today’s discussion about the broader spent convictions scheme.

What the evidence-base tells us:

- The pathway from out of home care to youth detention and then adult prison has been well established. Aboriginal and Torres Strait Islander young people were 16 times more likely to be involved in both systems than non-Indigenous young people. (AIHW, 2017)
 - There are many reasons for this and include the impacts of trauma on the developing brain and the criminalisation of children in out of home care.
- The younger someone enters youth detention the more likely they are to stay in or return to prison. Aboriginal children in out of home care are over-represented in this group. (AIHW, 2018)

- Aboriginal children are over-represented in out of home care and youth detention and Aboriginal people are over-represented in adult prisons.¹
- These high rates of incarceration and detention have a strong correlation with a greater risk of ill health, substance misuse, complex health conditions and premature death. (Australian Medical Association, 2012)
- In 2015/2016, compared with the non-Aboriginal population, Aboriginal children were 6–10 times more likely to be proceeded against by police, 15 times more likely to be under community-based supervision and 25 times more likely to be in detention (AIHW, 2017)
- There is evidence that there may be a positive impact on recidivism if access to employment, housing etc can be improved with the implementation of a spent convictions scheme. This would help break a cycle of disempowerment and hopelessness.

Case Study – impact of past convictions

A client who told their story to the Royal Commission into Institutional Responses to Child Sexual Abuse at a Private Session in prison raised the issue with the Commissioner about impacts of past convictions and the influence of them on client’s ability to get bail rather than remanded when accused of a crime.

Many clients who were sexually abused in their childhood, often when in the care of the State, including being in state run institutions (Youth Training Centres) have not found effective healing for their sexual abuse and therefore they have self medicated through misuse of drugs and alcohol to manage the impacts of the abuse. Much of their offending behaviours have been to “provide” for their self medicating needs, that is to get drugs and alcohol.

As a number of our clients have been very institutionalised since being “in care” and sexually abused in those settings, they often have quite a lengthy conviction record and it is important that at some point people are viewed without the influence of their past,

¹ Although the Aboriginal and Torres Strait Islander population comprise of less than 3% of the national population, they make up over 28% of the prison population (ABS (2019) Corrective Services) and over half of all young people in juvenile detention are Aboriginal and Torres Strait Islander. (AIHW (2018). Aboriginal and Torres Strait Islander children comprised about 1 in 3 of the children sentenced to a custodial order who had been the subject of a child protection order or had experienced residential care. (Sentencing Advisory Council (2019) *Crossover Kids: Vulnerable Children in the Youth Justice System.*)

particularly when their past was one of victimisation and their crimes were petty crimes to enable self-medication for healing, albeit unhealthy healing.

Age of Criminal Responsibility:

Our final consideration for this submission is that the age of criminal responsibility should be raised from ten to fourteen years of age, this is in line with the United Nations Committee on the Rights of the Child², and the median age worldwide. Significantly, the Royal Commission into the Protection and Detention of Children in the Northern Territory recommended that the Northern Territory raise the age of criminal responsibility.³ There is growing evidence that children under the age of 14 are not developmentally able to know their actions are wrong, and do not have the capacity to understand the repercussions of their actions.⁴ The impact on their development as well as their health and social and emotional wellbeing is deeply concerning. The Sentencing Council of Victoria (2019) reported that of children first sentenced aged between 10-14 years of age;

- 1 in 2 were the subject of a child protection report
- 1 in 3 experienced out of home care
- 1 in 4 experienced residential care

The vast majority of offences committed by this age group in Victoria are property and deception offences (Sentencing Council of Victoria, 2019). Given the over representation of Aboriginal and Torres Strait Islander children in child protection, we know these statistics, along with the greater likelihood of recidivism for young offenders identifies a deeply concerning risk for our children and young people in out of home care. Victoria Legal Aid (2016) reported that one in three young people they assist with child protection matters who are placed in OOHC return to assistance with criminal charges. Of the young people they assist in OOHC are twice as likely to face criminal charges. The *Care Not Custody Report*⁵ detailed that while there is serious offending being committed by some young people which warrant police response, they were aware of children in residential care having received criminal charges for smashing a cup. This speaks to a criminalisation of children and young people for behavioural issues. Diversionary programs, with

² Committee on the Rights of the Child, General Comment No. 10 Children's rights in juvenile justice, 44th sess, UN Doc CRC/C/ GC/10 (25 April 2007), paras 32–33.

³ Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2B, 420.

⁴ Human Rights Law Centre, "Explainer' for raising the age: <https://www.hrlc.org.au/factsheets/2018/2/8/explainer-raising-the-age>

⁵ Victoria Legal Aid (2016) *Care not Custody Report*.

therapeutic interventions would be more appropriate for such young children (Sentencing Council of Victoria, 2019). We also know, as discussed above, the implications of early contact with the criminal justice system for children and young people.

The introduction of a spent convictions scheme, protections against discrimination on this basis, as well as raising the age of criminal responsibility would have a significant affect in addressing the disproportionate numbers of Aboriginal children and young people involved in the criminal justice system. These reforms would ensure that the state of Victoria is meeting its international human rights obligations, particularly the *United Nations Convention on the Rights of the Child*, the *United Nations Declaration of the Rights of Indigenous Peoples* as well as the rights detailed in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Recommendations:

VACCA recommends the following

- *The Spent Convictions Bill 2019* (Vic) – introduced by the Reason Party earlier this year should be enacted with some amendments.
 - Sentences of up to 30 months imprisonment should be capable of being spent.
 - Regarding exceptions to convictions that can be spent; VACCA strongly believes alongside sexual offence, offences against children should not be eligible to be spent.
 - There needs to be a mechanism of review or appeal rights included so potential foster or kinship carers who have not or cannot have their criminal history spent can still be considered.
- *The Equal Opportunity Act 2010* (Vic) should be amended to include protections against discrimination on the grounds of irrelevant criminal history and spent convictions.
- VACCA formally endorses the eleven recommendations submitted by Woortjara – Dungin (see Appendix One)
- VACCA recommends that the age of criminal responsibility should be raised from ten to fourteen years of age.

VACCA supports the introduction of a legislated spent convictions scheme in Victoria and looks forward to supporting and working with the Committee for this Inquiry to ensure this important and necessary reform progresses.

For any further information please contact Nigel D'Souza, Director, Office of the CEO nigeld@vacca.org or on 03 9287 8800.

Yours sincerely,



Adjunct Professor Muriel Bamblett Hon DLitt SW AO
CEO

References:

Detailed references available on request.

Appendix One: Woor-Dungin Recommendations

Recommendation 1: Victoria should introduce a legislated spent convictions scheme.

Recommendation 2: Sentences of up to 30 months' imprisonment should be capable of being spent. There should also be a special provision that would enable offenders sentenced to more than 30 months' imprisonment to apply to have their conviction capable of being spent after the relevant waiting period. This application could be made at the time of sentencing or at a subsequent time.

Recommendation 3: Sexual offences should not be covered by the spent convictions scheme, except for certain sexual offences committed by the person as a child or young person. The sexual offences capable of being spent would be based on the categories of sexual offences which do not prevent a person from obtaining a Working With Children Check.

Recommendation 4: Findings of guilt without conviction should be immediately spent. If the non-conviction sentence also included conditions, the sentence would be spent once the conditions were completed.

Recommendation 5: The issues raised by the Woor-Dungin consultation should be noted in determining the appropriate waiting period before a conviction becomes spent.

Recommendation 6: For 'minor offences' the waiting period should continue. For 'serious offences' the waiting period should restart from the date of conviction of the later offence. The Model Bill 2008 definition of minor offence should be adopted.

Recommendation 7: Offences should become spent automatically after the relevant waiting period.

Recommendation 8: It should be an offence for a person to disclose a spent conviction contrary to the provisions of the spent conviction scheme. SC - Submission 5 49 of 72 47

Recommendation 9: The Equal Opportunity Act 2010 (Vic) should be amended to prohibit discrimination on the basis of an irrelevant criminal record and spent conviction.

Recommendation 10: People should be protected from discrimination on the basis of an irrelevant criminal record or spent conviction. The protections should cover employment, education and learning, housing, buying things, access to services and public places, being a member of a club or association and government programs.

Recommendation 11: There should be limited exceptions to the proposed anti-discrimination protections. These exceptions would make it lawful to discriminate against someone with a criminal record in the context of employment only if:

- the person's criminal record would make it impossible for them to fulfil the inherent requirements of the work; or
- the employment involved working with vulnerable persons, including children, elderly people, people with physical or intellectual disability or mental illness.

A balanced approach is required to address these issues and exceptions should be carefully drafted. The risk posed by a kinship carer with a criminal record needs to be appropriately weighted, and balanced with the significant risk to a child of growing up without an Aboriginal family.