



WOOR-DUNGIN

A New Partnership between Aboriginal Organisations and Philanthropy

Criminal Record Discrimination Project Discussion Paper

NB. This discussion paper was originally distributed 31 March 2017, with links to tables formulated prior to the CRDP Consultation held 4 April 2017. The tables now reflect CRDP's proposed position statements as developed during the Consultation

Dear Colleagues,

Thank you for agreeing to participate in the consultation on 4 April.

Victoria is the only State in Australia that doesn't have a 'spent convictions' scheme. This means that even after 10 years, a crime can still show up on your criminal record check.

And Victoria's Equal Opportunity Act doesn't prevent employers discriminating against people because of a criminal record, even when the crime has nothing to do with the job or position they are applying for.

This means that some people find it difficult to move on with their lives. We think these laws need to be changed.

Woor-Dungin is working with others to make sure that issues for Aboriginal Victorians are fully understood by the Government and are part of the case for change.

I agreed to take on the role of Convenor of the Criminal Record Discrimination Project because access to suitable employment remains an ongoing issue for many Aboriginal people and the state of the law in Victoria is an additional barrier that prevents people getting jobs.

The Criminal Record Discrimination Project (CDRP) seeks to achieve two key reforms:

- (1) the introduction of a legislated spent convictions scheme in Victoria, and
- (2) an amendment to the *Equal Opportunity Act 2010* (Vic) to prohibit discrimination against people with an irrelevant criminal record.

We have heard from many Aboriginal people that they have faced discrimination in getting a job, getting insurance, being approved as a kinship carer, and serving on community or Government committees because they have a criminal record.

We have developed a set of fact sheets to help community understand their rights and are putting together some stories of people who have faced these problems.

The purpose of the consultation is to discuss the content of what needs to be included in a spent convictions scheme and anti-discrimination legislation.

This discussion paper has been prepared to provide you with background information to inform you about the legislation in other states and territories and also how the current legislation impacts community in Victoria.

NATSILS introduced us to Aboriginal Legal Services in other states and Stan Winford spoke to staff to find out whether there are advantages or disadvantages of the schemes in different jurisdictions, from the experience of Aboriginal communities, which we could highlight in our advocacy.

The discussion paper contains feedback and quotes from interstate Aboriginal Legal Services on some of the pros and cons of the legislation in their jurisdiction and what advice, if any, they have for us in Victoria.

It also contains feedback from services in Victoria about how the current situation negatively impacts on Aboriginal people in Victoria.

Following the consultation, a position paper will be developed outlining the draft content of a spent convictions scheme and a draft amendment to the Equal Opportunity Act.

We will seek endorsement from key stakeholders and once obtained, these will be included as recommendations for reform in a report to be tabled at an Aboriginal Justice Forum, later in the year.

The report will also contain several of the stories we have collected and will outline how the current legislation in Victoria is a barrier to achieving economic reform, self-determination and does nothing to stem rising rates of Aboriginal incarceration.

Thank you



Michael Bell

Convenor, Criminal Record Discrimination Project Advisory Committee

Chief Executive Officer, Winda-Mara Aboriginal Corporation

Woor-Dungin

Ten years ago, Woor-Dungin was established by Aboriginal and non-Aboriginal women to increase the philanthropic investment in Aboriginal community-controlled organisations. Together, we developed a framework for reconciliation based on strong, trusting relationships.

In 2009, we received funding to pilot this framework – the Aboriginal Partnership Program – and together commenced work on realising our mission: to increase resources, build strong partnerships and share knowledge to fulfil the purpose of Aboriginal and Torres Strait Islander organisations.

Our current partners and alumni are:

- Mallee District Aboriginal Services;
- Winda-Mara Aboriginal Corporation;
- Willum Warrain Aboriginal Association;
- Njernda Aboriginal Corporation;
- Healesville Indigenous Community Services Association;
- ILBIJERRI Theatre Company.

Our direct work with our Aboriginal partners informs our advocacy, program and policy development. Maintaining culture, securing resources and employment (recruit, retain and obtain jobs for community) are our partners' identified priorities. In response, we run the following programs:

1. **Income Generation and Resources Group** sessions, to assist in accessing philanthropic funding and pro bono resources, including skilled volunteers;
2. **Maarni Aboriginal Women's Leadership Program**;
3. **Aboriginal Community Worker Support Program**, to support staff and board members;
4. **Respectful Relationships**, a program which advocates for philanthropy and Aboriginal organisations to take the time to develop genuine relationships;
5. **Criminal Record Discrimination Project (CRDP)**.

The CRDP commenced in 2015 in response to the current legislation which negatively and disproportionately impacts on Aboriginal people seeking employment, particularly in rural Victoria. An advisory committee, convened by Michael Bell and comprising 56 stakeholders oversaw the development of a set of fact sheets covering:

- Criminal records in Victoria
- Employment
- Appointment to government advisory committees
- Appointment to community boards of management
- Insurance
- Kinship care
- Recording a non-conviction in the Magistrates' Court
- Enduring Powers of Attorney

Aboriginal people who have experienced discrimination based on their criminal histories are being interviewed and their case studies included in a submission for reform to be presented at an Aboriginal Justice forum.

Criminal Record Discrimination Project - Discussion paper¹

This discussion paper has been prepared to support a consultation process with community in Victoria about the need for a spent convictions scheme, and legislation to protect people from discrimination based on irrelevant criminal records.

Victoria is the only state or territory in Australia without a spent conviction scheme, and one of several states without equal opportunity protection for people with criminal histories.

This discussion paper contains feedback from community and stakeholders about how the lack of legislative protection affects Aboriginal people in Victoria, and their views about the need for change.

This discussion paper includes information about spent conviction schemes and equal opportunity protections in each Australian state and territory. Aboriginal Legal Services told us about the issues we should be aware of in Victoria, based on the experience of Aboriginal people with these laws in their jurisdictions.

This discussion paper also includes proposals for reform that will be considered as part of the consultation process.

The consultation process will seek the views of community on the best approach in Victoria, which will inform the development of a position paper by Woor-Dungin.

Woor-Dungin will seek support and endorsement for the model for reform outlined in the position paper in a report to be tabled at an Aboriginal Justice Forum later this year.

Background

What are spent convictions schemes?

Spent convictions schemes allow people not to disclose old convictions, when they were for minor offences and where a 'waiting period' (often 10 years) has passed.

Most spent convictions schemes don't cover sexual offences, and many laws override them to require disclosure of old convictions in order to protect children or vulnerable people.

How do laws in other states protect people from discrimination because of their criminal history?

Anti-discrimination legislation can state that employers are not permitted to discriminate against someone when offering them a job, where the person has a criminal record for an offence that is 'irrelevant' to the job for which they are being employed.

¹ This discussion paper was prepared by Stan Winford, Associate Director of RMIT University's Centre for Innovative Justice on behalf of Woor-Dungin with the support of Christa Momot and Professor Bronwyn Naylor.

There are exceptions to these laws designed to protect children or vulnerable people.

Do other States and Territories in Australia have spent convictions schemes?

Every State and Territory in Australia, as well as the Commonwealth, has a spent convictions scheme. Victoria is the only jurisdiction in Australia without a spent convictions scheme.

Do other States and Territories have anti-discrimination protections?

The Commonwealth, Tasmania, the Northern Territory, Western Australia, and the Australian Capital Territory all provide a process for people to make a complaint about discrimination on the basis of their criminal records or spent convictions.

The Commonwealth, Tasmania and the Northern Territory have legislated protections against discrimination on the basis of 'irrelevant criminal record'.

Western Australia and the Australian Capital Territory have legislated protections against discrimination on the basis of 'spent convictions'.

What are the differences in the spent convictions schemes in operation across Australia?

Australian spent convictions schemes have many similarities, but there are some differences.

[Table 1: Spent convictions schemes by state](#) summarises the content of each scheme in operation across Australia. It compares the following provisions in each spent conviction scheme:

- Which sentences are capable of being spent
- Which offences are not covered by the scheme
- What happens to findings of guilt where no conviction is recorded ('non-convictions')
- How long the waiting period is before a conviction becomes spent
- What happens if the person re-offends during the waiting period
- The process whereby the conviction becomes spent

A copy of *Table 1* is attached to this discussion paper in electronic form (follow the link above). Copies will be available at the consultation.

What are the differences in the anti-discrimination schemes in operation across Australia?

[Table 3: Protections against discrimination on the basis of 'irrelevant criminal record'](#) and [Table 4: Protections against discrimination on the basis of 'spent conviction'](#) summarises the content of these schemes in relation to various activities including:

- Employment
- Education and training
- Housing
- Buying things, access to services, and access to public places
- Being a member of a club or association
- Government programs

These tables also compare exceptions to these rules where, for example, it will be lawful to discriminate against someone because of their criminal history or spent conviction. These exceptions include where a person's criminal record means that they cannot do the things the job requires them to do, or working with children or vulnerable people.

Copies of *Table 3* and *Table 4* are attached to this discussion paper in electronic form (follow the links above). Copies will be available at the consultation.

What do Aboriginal Legal Services think about the operation of these schemes in their State or Territory?

Aboriginal Legal Services in other jurisdictions consulted overwhelmingly recommended that Victoria adopt spent convictions legislation and anti-discrimination measures.

This type of legislation is very worthwhile. It should play an important role. It will definitely help some people.²

One legal service consulted said 'you have a chance of setting up the best model in Victoria', and felt that even though there were some problems with the schemes, Victoria would have an opportunity to 'make them do the job they are supposed to do' for Aboriginal people.

Jurisdictions that did not have anti-discrimination measures believed that the effect of spent convictions schemes were undermined and unenforceable without them. They suggested that it was important to have greater protection from the unlawful disclosure of criminal records.

All Aboriginal Legal Services consulted felt that the spent convictions schemes in their jurisdictions were not benefitting their clients as much as they should, for a range of reasons.

A common view was that because Aboriginal people are over-policed and over-incarcerated, and tend to receive longer sentences than non-Aboriginal people, fewer Aboriginal people would meet the relatively short sentence-length criteria for convictions to become eligible to be spent, or to avoid re-offending within the relatively lengthy waiting time prescribed by spent convictions schemes. For example, one legal service commented:

I think our scheme is fairly attractive, but it's of little benefit to our clients. Our people don't fit into it. Most have racked up a lot of convictions and get longer sentences than would fit within the scheme. This type of scheme assists people who are putting themselves up for employment and so on, but they're not the kinds of people we generally act for. A lot of our clients are coming from a long way back.³

Many legal services suggested that consideration be given to shortening the offence-free waiting period of 10 years for adult offenders, to recognise that it was rarely achievable for their clients.

All Aboriginal legal services consulted agreed that their schemes were under-utilised because there were very low levels of awareness of them amongst their clients, and in many cases, their own staff. All consulted indicated that they believed that more needed to be done to raise awareness of these

² Glen Dooley, Central Australian Aboriginal Legal Aid Service (NT), 22 March 2017.

³ Glen Dooley, Central Australian Aboriginal Legal Aid Service (NT), 22 March 2017.

schemes and that this might lead to greater utilisation of them by Aboriginal people. Some of the suggestions for increasing knowledge and utilisation of these schemes included a greater focus on education including community legal education programs and promoting the schemes through the media.

Aboriginal legal services consulted felt that there were some shortcomings with their legislation. Many, particularly those without anti-discrimination protections, felt that their legislation was not enforceable. They felt that it needed to be backed up by other protections such as penalties for unauthorised disclosure of a spent conviction, and greater enforcement. Some also felt that the legislation designed to prevent disclosure of criminal records was undermined by various other pieces of legislation that required disclosure. Some felt that their legislation wasn't as clear as it could be, and more guidance needed to be provided about things such as the relevance of a conviction in different contexts so that people could be clearer about disclosure obligations or prohibitions.

When asked whether these measures were important for Aboriginal people, one legal service commented:

They're seriously disadvantaged. ... They're disadvantaged because of their culture of apathy towards some of these things ... they're ashamed and shy ... they wait until the drama is over. They wait until permission has been given ... That works against them. Then there's their literacy levels. The whole mainstream system works against them. And there's still racial profiling, racial discrimination and racism.⁴

Other legal services noted that Aboriginal people felt a great deal of shame about offending and that young people simply wouldn't apply for employment if they were worried about a prior conviction coming up. Another service gave the example of a working with children checking system which requires people to explain even *irrelevant* spent convictions if they want to be kinship carers:

Because they have to speak to the Blue Card, because of the cultural issues, literacy issues and so on, they're just not equipped to. And so they don't. And that's just about an irrelevant spent conviction! It's crazy, just crazy. This happens often. It's leading to the second Stolen Generation.⁵

When asked whether Victoria should establish a spent convictions scheme and protection from discrimination on the grounds of irrelevant criminal record, legal services were overwhelmingly supportive, and felt that the benefits of such schemes could be much broader than first thought. They felt that these schemes were beneficial:

Because spent convictions assist in providing opportunities for employment; due to the Aboriginal population having much greater rates of imprisonment. Having a conviction is a barrier to employment. This means that the effect is that Aboriginal people aren't in employment, and their lower socio-economic outcomes and loss of opportunities leads to a vicious cycle.

⁴ Ginny Rabeling, Aboriginal and Torres Strait Islander Legal Service (QLD), 24 March 2017.

⁵ Ginny Rabeling, Aboriginal and Torres Strait Islander Legal Service (QLD), 24 March 2017.

The direct effect of these schemes is employment [for Aboriginal people] but there are other benefits associated with employment, including well-being, resilience, education and freedom from poverty which can change a whole family, not just an individual and for the next generation it can have a huge spin off.⁶

However, while recommending that Victoria introduce these schemes, some warned that:

It's good legislation for some people, but if it's not really enforceable, it doesn't do what it's meant to do. You need to make sure that it can be enforced.⁷

Finally, many legal services expressed surprise that Victoria didn't have either of these schemes, and noted that 'the human rights issues and the incarceration issues [for Aboriginal people in Victoria] make it really important'.

Context for previous attempts to reform Victorian spent convictions and equal opportunity laws and proposals for reform

Campaigns and policy commitments

In Victoria, there have been a number of campaigns and submissions calling for the introduction of a spent convictions scheme and anti-discrimination protections. These campaigns have not resulted in either reforms being legislated, but it is clear that these campaigns have influenced policy commitments and government consideration of these issues.

In recent years, the Victorian government has come close to legislating a spent convictions scheme and has also considered anti-discrimination reform. In 2009, the Bracks/Brumby Labor Government released an exposure draft spent convictions bill, based on a national uniform model bill that would have established a spent convictions scheme. At the time, Victoria and South Australia were the only two Australian states without such schemes. South Australia went on to enact spent convictions legislation based on the uniform model bill in 2009 but Victoria did not do so.

In 2010, Julian Gardner was commissioned by the Bracks/Brumby Labor Government to produce a report as part of a review of the Equal Opportunity Act. The Gardner report recommended that criminal records become a 'protected attribute' in the Equal Opportunity Act, that is, that it should be unlawful to discriminate against someone because of an irrelevant criminal record. In 2014, the Baillieu/Napthine Liberal Government went some way towards addressing criminal records reform by legislating to expunge historic gay sex offences from people's criminal records following a campaign by LGBTI groups.

Prior to the State election in November 2014, the then Labor opposition (now Andrews Labor Government) made a commitment to refer the matter of a spent convictions scheme to the Victorian Law Reform Commission if elected. This referral has not occurred within this term of government to date. The ALP policy platform prior to the election of the Andrews Labor Government in 2014 made a commitment to 'explore and consider' a spent convictions scheme. This

⁶ Amanda Lambden, Aboriginal Legal Rights Movement (SA), 24 March 2017.

⁷ Ginny Rabeling, Aboriginal and Torres Strait Islander Legal Service (QLD), 24 March 2017.

commitment was repeated in media releases issued by the then Shadow, now Attorney-General, Martin Pakula MP.

Victorian community legal centres and other groups have been advocating for these reforms for some time. In 2004, the Fitzroy Legal Service, in conjunction with JobWatch, prepared a research paper on criminal record discrimination. The paper included information obtained through Freedom of Information legislation that indicated that hundreds of thousands of criminal record checks were being carried out, and that the practice of doing so was largely unregulated. The paper recommended the introduction of a spent convictions scheme and anti-discrimination protections. The research was presented to the Bracks Government. Fitzroy Legal Service also obtained funding to support a campaign designed to advocate the establishment of a spent conviction scheme to Government. As part of this a range of activities took place, including a forum with employer groups, academics and others, as well as a media campaign. In 2012, Fitzroy Legal Service produced the film “Off the record” which included interviews with people who had lived experience of the impact of having a criminal record.

Proposals for reform – spent convictions schemes

In 2015, the Law Institute of Victoria provided a submission to Government recommending a spent convictions scheme and amendment to the Equal Opportunity Act. A copy of the Law Institute of Victoria 2015 submission is attached to this discussion paper.

[Table 2: Spent convictions proposals and policies](#) includes a summary of the Law Institute of Victoria’s proposal for a spent convictions scheme (as well as the Model Bill and the Victoria Police Information Release Policy).

A copy of *Table 2* is attached to this discussion paper in electronic form (follow the link above). Copies will be available at the consultation.

Proposals for reform – anti-discrimination protection

In 2015, the Human Rights Law Centre, together with a range of legal and community organisations, unions and academics that assist people who experience discrimination, including Aboriginal and Torres Strait Islander people, made a submission to the Victorian government suggesting changes to the Equal Opportunity Act 2010. This submission included a call for the Equal Opportunity Act to be reformed so that ‘irrelevant criminal record’ was recognised as a ‘protected attribute’. The submission noted that:

Individuals who are discriminated against based on an irrelevant criminal record currently have little legal recourse. People can experience discrimination during recruitment processes as a result of a criminal record from their early twenties during a very different period in their life. This can have unfair and devastating consequences for them and continues to marginalise and disenfranchise people who are often already experiencing disadvantage

Discrimination on the basis of criminal record is prohibited by the Australian Human Rights Commission Act 1986 (Cth), although there is no mechanism for enforcing this obligation.

It is also unlawful in the Northern Territory and Tasmania.

This amendment is consistent with the Labor Government's pledge that it will examine the merits of a spent and mistaken convictions regime in circumstances of non-violent and low-level convictions where no re-offending has occurred: 2014 ALP Platform, 67.

[Table 3, Table 4 and Table 5](#) show how the Commonwealth, and other States and Territories in Australia have established protections against discrimination for people with criminal records.

Copies of these tables are attached to this discussion paper in electronic form (follow the link above). Copies will be available at the consultation.

Impact on community in Victoria

The impact of the failure to legislate a spent convictions scheme in Victoria, or to provide protection from discrimination on the grounds of irrelevant criminal records, and the need for change are well recognised by community in Victoria.

Past criminal records for minor offences can have devastating and negative long term outcomes, we know racism and discrimination effects employment opportunities for our Mob. Introducing a spent convictions scheme in Victoria can make a real difference for the health and wellbeing of every Aboriginal person living in Victoria.

Jill Gallagher AO, CEO, VACCHO.

I echo the call for a spent conviction scheme to be introduced in Victoria. We know that Aboriginal women are the fastest growing prison population in Victoria and most women in our jails are victims/survivors of family violence. I want to see a time where Aboriginal women are no longer criminalised, driven by family violence into homelessness, prisons, and poverty. A spent conviction scheme could help make sure that when our women do get a criminal record it doesn't plague them for the rest of their lives. It could also help make sure that when our kids are forced into out-of-home care because of family violence they remain in the community with trusted kin – not sent to non-Aboriginal carers, suffering loss of culture and identity, simply because of old, irrelevant criminal records.

Antoinette Braybrook, CEO, Aboriginal Family Violence Prevention and Legal Service Victoria.

A spent conviction scheme is long awaited within the State of Victoria. Time and again we have seen our community members adversely affected by their past convictions in regards to employment, housing and general community interactions. We have had to bear witness to individuals feeling that they can never fully participate in community life because their convictions are what defines them. They have been convicted, they have served their penalty, they must be allowed to move on with their lives and a spent conviction scheme assists in this process.

Wayne Muir, CEO, Victorian Aboriginal Legal Service.

The Koorie Youth Council acknowledges the important work and advocacy of Woor-Dungin. The introduction of a spent convictions scheme will provide Aboriginal & Torres Strait Islander people freedom from the restrictive stigma of criminal records. This provides an opportunity for healing and will help to build stronger Aboriginal & Torres Strait Islander communities within Victoria.

Indi Clarke, Manager, Koorie Youth Council.

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.

Muriel Bamblett, CEO, VACCA.

Our ground-breaking work with Woor-Dungin in the Criminal Record Discrimination Project aims to quantify the impacts of Victoria's current discrimination laws, which state it is not unlawful to discriminate against someone on the basis of their criminal record.

The work under the CRDP is allowing us to develop a sound research base and document case studies. We expect this work to create the foundation for a more constructive approach in future and potentially to make a case for law reform. MDAS is committed to community development and change through building bridges, creating partnerships and developing strong and trusting relationships and the CRDP project is supporting these values and aims.

Rudolph Kirby, CEO, Mallee District Aboriginal Services.

We live in a time where law and order, is for want of a better term, a black and white thing. There is no room for the grey area of "in the middle". If you have a criminal conviction, you are a criminal. If you have a record, you must have done something wrong. There will be those who don't want to listen to this because it is a law and order issue, and that's where it gets tough, but equally there are those who want to do something about it.

Ian Hamm, Woor-Dungin Member and Chair, Connecting Home.

The issue that the Criminal Record Discrimination Project targets is significant. The disparity in employment for Aboriginal peoples is well documented. The over-representation of Indigenous peoples in custody is also well known. I believe this project is an essential step in assisting Aboriginal community members who have had contact with the justice system to re-enter community life and find stable employment.

Woor-Dungin is perfectly placed to deliver the project due to its strong community ties and Aboriginal membership base, and increasing credibility with Victorian Aboriginal communities. Not only does Woor-Dungin have the necessary networks to identify case

studies for the project, it has the trust of its partner organisations to deal sensitively and culturally appropriately with the persons who provide those case studies.

Tim Goodwin, Woor-Dungin Member and Barrister

Questions for consultation

This discussion paper has been prepared to support a consultation process with community in Victoria about the need for a spent convictions scheme, and legislation to protect people from discrimination because of irrelevant criminal records.

To guide the consultation process, these questions will be considered:

- (1) Should Victoria establish a legislated spent convictions scheme? If so, what should be the key features of a Victorian spent convictions scheme?
- (2) Should the *Equal Opportunity Act 2010* (Vic) be amended to prohibit discrimination against people on the basis of an irrelevant criminal record? If so, how should the Act be amended?

The attached tables comparing the proposals for reform will also help guide a more detailed consideration of the elements of any model community supports. This detailed consideration includes questions highlighted by the tables, such as:

- Which sentences should be capable of being spent?
- Which offences should not be covered by the scheme?
- What happens to findings of guilt where no conviction is recorded ('non-convictions')?
- How long should the waiting period be before a conviction becomes spent?
- What should happen if the person re-offends during the waiting period?
- Should the conviction become spent automatically?
- Should there be penalties for disclosing a spent conviction?
- What activities should be protected from discrimination on the basis of irrelevant criminal record or spent convictions?
- Should there be any exceptions to these anti-discrimination protections?

The consultation will also address issues with the operation of existing schemes highlighted by Aboriginal Legal Services across Australia.