

# TRANSCRIPT

## LEGISLATIVE COUNCIL LEGAL AND SOCIAL ISSUES COMMITTEE

### **Inquiry into a legislated spent convictions scheme**

Shepparton—Monday, 15 July 2019

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Dr Tien Kieu—Deputy Chair

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**WITNESS**

Mr Robert Nicholls, Chairperson, Hume Regional Aboriginal Justice Advisory Committee.

**The CHAIR:** I declare the meeting open again. Thank you again so much for coming today. If there is anything that you would like to speak to us around the notion of why you think spent convictions might be helpful or unhelpful, that would be great, and then we can open it up to a more general discussion.

**Mr NICHOLLS:** Since I have been involved with the Aboriginal Justice Forum—and I am also a member of the Aboriginal Justice Caucus members, who sit separately to the Aboriginal Justice Forum—we have discussed this on numerous occasions in regard to spent convictions. One of the things that worries me is—and I can only speak on Shepparton and in terms of the regions that I cover—I feel that it limits a lot of our youth in terms of having convictions, and I know that we look at the seriousness of the crimes but if it is for something like stealing a chocolate or stealing a bicycle or something like that, that could destroy a young person's life in terms of getting future employment and more so because we are trying to encourage people to go into the public service sector, and unfortunately if you have got a record that could prohibit you from gaining full-time or long-term employment.

**The CHAIR:** Yes. Just on that, I have certainly been reading the Woor-Dungin criminal record discrimination project. They said that also criminal convictions can affect other parts of your life, and while for employment we are certainly hearing that police checks are a major barrier, are there other areas that you have seen up here where a criminal conviction has affected other areas, whether it is housing or kinship programs or other?

**Mr NICHOLLS:** Look, I think one that springs to my mind is child protection. Now, if you want to become a carer, whether it be for an extended family member or family members as such, you have to go through a working with children check as well as a national police check, and if there is any form of offending issues that come up there, that could prohibit him or her from becoming a carer. I know of a person in Echuca who raised this at our forums as well as speaking to Victoria Police at the time. He was trying to become a carer for five of his nieces and nephews, and because he could not pass that police check he was not able to. Look, that is just the tip of the iceberg in terms of where families are looking at caring for Aboriginal children, whether that be immediate siblings or whether that be extended family members, so it is a big issue within the Aboriginal community.

**The CHAIR:** Yes. With the notion of spent convictions, I guess the general model that we have seen in all other jurisdictions is a wait period of 10 years for an adult and five years for a young person. Do you think those wait periods are appropriate?

**Mr NICHOLLS:** Look, I think it is a big ask when you look at the life expectancy of Aboriginal people, and I am talking young people as well as older people. It has a major impact on what I call their survival, because most families live from day to day, whereas I suppose the wider community, they are probably more planned in terms of how the household functions and whatever like that. So I think the length of time that Aboriginal people face—and that is males and females—could be shorter, but at the same time I have heard young people when I have represented them at courts say, 'Oh, I'm going to get a conviction out of here. There goes my career'.

I know that in the Hume region here now we are trying to encourage people to join the police force, join corrections as corrections officers and corrections workers, and unfortunately as soon as they know they are going to apply for that and they hear that you have got to have a police check done and a working with children check done, they just say, 'Look, I'm not going to apply for it', because the shutters are already put up, or the challenges for them are already put up, and they are saying, 'Okay, well, I've got a conviction'. Look, it is sad, because I know that when I look at the City of Greater Shepparton, a lot of the work is done by a lot of our members, like the Paul Briggses, the Felicia Deans, myself and others within the community. Rumbalara Aboriginal Cooperative employs in excess of 300 people—doctors, nurses, dentists—and it is not just all Aboriginal people. I think that is where we have got a lot of people who misunderstand Aboriginal organisations. They think it is just specifically employment for Aboriginal people. But there is a mixture of

people that are employed there. It is also what Rumbalara contributes to the economy as well. When you look at that, Rumbalara pay wages, they buy cars, they buy petrol, they buy stationery and all that sort of stuff. So we contribute. But then those people that are employed also contribute to the economy for the simple reason that they go to Woolworths and they go to Safeway and whatever like that. They buy petrol and that sort of stuff. And even our own organisations, when they employ an Aboriginal person, it is a police check or a national working with children—

**The CHAIR:** Are you able to have discretion in employing someone with a record?

**Mr NICHOLLS:** I think—and again I go back to the nature of the crime or the offence—if it is minor, as I said before, if it is a bicycle or something like that, or taking a chocolate or something like that, I think it is at the discretion of that organisation or that person, whether they be Aboriginal organisations or non-Aboriginal organisations.

I believe in the cautionary program, but there is not enough of that going on. I could be given a cautionary notice, and it could be the second time, but the next time, again it gets back to that individual police officer to say, 'Okay, look, I'm going to use my discretion. I'm going to give you another one'. But sometimes they will say, 'You've got two, it's off to the courts now', and hence they end up with a conviction. I think those are some of the things we are trying. When we have run some workshops we have looked at some of the patterns of how we prevent them, whether they be older people or young people, from coming before the justice system. We are saying early intervention. If we can come in early, whether it be the police or whether it be the justice system, and say, 'Okay, Bob, you're starting to wear thin in terms of stuff that you've been doing. If you don't pull your head in, these are the consequences that are going to happen'. I believe that if you have given a person a chance, they will listen and learn from that.

I was at an event on last Friday—Col Walker retired from the courts—and one of the things, and I said it first, is that some of our young ones are lost. There is a loss of identity and there is a loss of culture and all these sorts of things. When I was growing up I had that wrapped around me, whether it be camping or whether it be around the kitchen table, but some of our families are dysfunctional, and unfortunately they do not have that leadership role model to sort of look up to. They look at some people, and because of some of the stuff that is happening on the home front, some of them do not even go home. They prefer to stay with their aunt or extended family members. So again that is a challenge for our young ones. They are wanting to excel and exceed.

**The CHAIR:** But.

**Mr NICHOLLS:** But. Yes.

**Dr KIEU:** Thank you, Robert. You brought up a very important element there about the life expectancy in your community, which is much less than in the mainstream.

**Mr NICHOLLS:** Yes.

**Dr KIEU:** I would like to find out if you could put a number on how many people have been affected by their past conviction compared with the mainstream and other communities, particularly for the young people in your community.

**Mr NICHOLLS:** Yes. I will give you an example. My son is an example, and I will lead into the other. My son is unemployed. He has got mental health issues and whatever, but he felt that he wanted to go and buy some clothes to make himself feel better and whatever. But one of the things that I noticed when we walked into the sports store was that as soon as we walked in—we looked at some of the tracksuit pants and jumpers—we saw the shop attendant come across, and rightly so she asked, 'Can I help you?'. I said, 'No, we're just looking at the moment, but when we need to speak we'll give you a call and then we can take it from there'. But for approximately 7 minutes she followed us everywhere from the tracksuits to the socks to the runners, and I said, 'I don't mean to be nasty, but why are you following us around? We told you we don't need any assistance'.

So to me it was that, not only for myself but also for my son, we were stereotyped as soon as we walked into that shop. And it is not only that, it is also when you walk into supermarkets, it is when you walk into milk bars and whatever, like that. The eyes are on you straightaway. Now, is that because that person is Aboriginal? And I can only speak on Aboriginal people because as I say, I was very annoyed as a parent. And I said to the shop attendant, 'Look, my son was going to spend \$800 here, but your following us around not only made him uncomfortable but it also made me uncomfortable as well'. So we walked out and went to another sports store. So they are the sorts of things that a lot of our people have to put up with. And look, I know there are some people out there that do the wrong thing, but I mean, you do not just sort of what I call tailgate someone until they walk out of the shop.

But getting back to the wider community, I see a lot of young Aboriginal males and females where, no matter whether they are walking on the street or whether they are walking into shops, the eyes are straight on them. And it is not just one set of eyes. It is probably four or five different people watching you. And to me, that is where people who do not have the confidence to speak up then become a little bit aggressive, and then all of a sudden aggressiveness turns into a scuffle with somebody or whatever, like that. So I always say: sometimes it is the colour of your skin and sometimes it may not be the colour of your skin. It might be in terms of how you are dressed or your mannerisms in terms of your body language—how you speak may not be the way that one would expect to be spoken to. And I suppose for young people—whether you are Aboriginal or non-Aboriginal—it is a different, I suppose, language that they use. I get annoyed when I see people with their hats backwards and their pants hanging down around their backsides and that. It really puts me right off, but that is their dress code. I have seen a young girl with a pair of jeans—I mean there was a hole from there down nearly to her ankles. And I am thinking to myself, 'They pay 90 or 100-something dollars for a pair of those'. But that is the way they dress, you know.

The thing that I suppose annoys me is that some of our young people need to be educated as well, for the simple reason that when they do do something wrong that is when—and I made mention of Uncle Col Walker—he would come in, if they were coming through the Koori Court, and say, 'Look, I know your mother. I know your father. I know your brothers and your sisters'. And all that sort of stuff. And just the mere fact, in a calm way, of saying that is a shame job—what we call shame. Because you will see them walk in real smarty and then all of a sudden the elder starts speaking and all of a sudden the head and the eyes go down. That has an impact on them. And, you know, the parting words that probably Uncle Col would say, in a nice soft way, would be, 'Don't come back here again. I hope this is it'.

**Ms LOVELL:** So, Bobby, we have had the Koori Court operating here for what, 20 years now?

**Mr NICHOLLS:** Twenty years, yes.

**Ms LOVELL:** And Uncle Col and the other elders have done a tremendous job, but are you seeing an impact on that being diversionary out of the justice system for our young people so they will not have these convictions that will deter them from getting employment in the future?

**Mr NICHOLLS:** Yes. Look, some 20-odd years ago, when I was working in Geelong, I spoke to a few non-Aboriginal people in the community and they said that Koori Courts were a waste of time—they were not doing what they were supposed to be doing. And I said, 'Well, what is that?'. And they said, 'Well, it is the old saying: do the crime, do the time'. I said, 'Yes, that happens', but one of the things that I had to explain to them—and I have heard some people up here and even in Wodonga, where we are getting another Koori Court up there, say 'Oh, yes, but they just get a slap across the wrist'. I have to say to them that I beg to differ for the simple reason when you go to the Koori Court, the sad part about it I suppose is that you have got to plead guilty. That is the only bad part about it.

Some people will say, 'I would rather face the Magistrates Court', and we have asked them why—'Because it's a shame job if you go into the Koori Court', but when you do go into the Koori Court you have people like Uncle Col Walker and Rochelle Patten, you know, Joe Day, just to name a few, that are sitting there, and they are presiding over in terms of what kind of punishment is going to be suitable for that person. One of the things that I say to the wider community is that they make recommendations to the magistrate who in turn then hands down that decision, so he or she is guided by the elders' recommendations to say that, 'Look, we believe that this person', he or she, 'needs to have a diversion program put in place rather than a conviction'. So to me that

is not a slap on the wrist because at any given time if the elders said, 'Look, we want to give this person another chance', if the magistrate says, 'No, I'm sorry', then they will hand down their decision.

**Dr KIEU:** On his recommendation?

**Mr NICHOLLS:** On his recommendations, yes. So I find that Koori Courts do work, and it is the same as we have got a Children's Court here as well and it is working on the same principles again, and we have got a Koori County Court here now. It is the same principles again, but they are at the higher end of the offending and the handing down of sentences and all that, but still the magistrates and judges rely on those elders making a good recommendation. And, look, magistrates err sometimes in their decisions and sometimes our elders err. I think we all make an error in life at some stage, but that is where we look at it and say, 'Okay, well look', and I have recommended to judges and magistrates and said, 'Look, I'd like to give this young person another chance', because I think there is something in there, something in the heart telling me that because he is coming from a dysfunctional family or home, he is missing what is cultural or what identity that he has got, because one of the things that forces some of our young people to go off the track is the loss of identity, the loss of culture. And people like Uncle Col who are retiring, we do not want them to retire. We want them to continue to be active in our communities, but unfortunately as people get older and older you have got to accept that people want to have a peaceful life.

To a lot of our young people I always put myself out there to say, 'Look, if you want to talk to me', I am quite happy to give them my mobile number to call me. Unfortunately, and Wendy would know this, we have got quite a lot of Aboriginal and Torres Strait Islander people camping out in the bush here on the Shepparton side.

**Ms LOVELL:** That's our next inquiry. We'll be back.

**Mr NICHOLLS:** But again it gets back to sometimes when a young person does apply for public housing, whether it be through the office of housing or Aboriginal housing. Unfortunately if you are a single person, when I was in housing we used to talk about two or three years you would have to wait. With single people today they are talking in terms of decades, and when I say 'decades', they say, 'What's a decade?', and I say, 'Ten years or more'. You know, you are on the waiting list but families come first, and rightly so, but they then get very disappointed in terms of the length of time that they have to wait for housing and whatever. That is just another example in terms of what pushes a young person over the edge to go out and sometimes commit a crime.

**Ms LOVELL:** I think it is important for the committee to understand too that our Aboriginal community is very good at the shaming of young people in the Koori Court and even in public. Last week at the NAIDOC breakfast we had a young dance group, and there was a boy of about 14 or 15. I think it was Graham Briggs introducing them. He gave the boy a very backhanded compliment. He pointed him out to everyone—there were about 200 people there—and talked about the fact of how well he was doing and how engaged with culture he was through the dance but said that he had got involved with that because he was in danger of becoming involved in the justice system and that they had diverted him into the cultural program to keep him out of the justice system. So the poor kid is standing there and everyone knows, 'Oh, I've been a bad kid'.

**Mr NICHOLLS:** And very cold in the morning too.

**Ms LOVELL:** But he was very proud of himself as to how far he had come.

**Mr NICHOLLS:** And I think that just in saying that, that gives one pride as well, because you are not only standing up there as a young Aboriginal person but you are also performing cultural dancing, not only for the community—and we have non-Aboriginal people that are there as well—but to give them self-pride, because they walk away then with their head held up high.

**The CHAIR:** That is right. They have achieved and they have overcome.

**Mr NICHOLLS:** Yes. So when people are asked to do those cultural dances or cultural events, that gives them something. It gives them a meaning; there is a meaning in life. It is not all doom and gloom about, 'Oh, well, poor Bobby's being picked on all the time'. It gives them something to hang on. We have got ASHE as an

example. ASHE is an alternative school where if you cannot fit into, say, McGuire College or St Brendan's or other schools around, ASHE picks up these ones that have sort of, I suppose, lost their way.

**Ms LOVELL:** It is the Academy of Sport, Health and Education.

**Mr NICHOLLS:** So that has been a lifesaver for a lot of our young ones as well. And we have seen, as you would attest, Wendy, that we have had some great leaders come out of there as well.

**Ms LOVELL:** Hear, hear.

**Mr NICHOLLS:** So to me it is not about locking them up and throwing the key away; it is about looking at other alternatives. I look at it in terms of—whether it be the police or the courts—the alternatives and say, 'What can we do better to make this young person's life change and turn around?'. I think that is the importance of it. I was telling someone about Uncle Larry Walsh. I think he is 60-odd now, and I think we have probably all heard about how he, like a lot of others—and I am only talking about Victoria, not Australia—just by being born ended up with a conviction. On his birth certificate it had 'Abandonment'.

Another one that springs to my mind is James Savage Moore, who is in an American—Florida—prison. Now, through no fault of his at the time—I know he committed a horrific crime over in America—he was born in North Fitzroy hospital with the Salvation Army there, and one of the, I suppose, Salvation Army families took him, and her comments back to us were to say that 'This family is going to look after my child until I get well', because back then, having a child at 14 years of age, you had no parenting skills or anything like that. So they said, 'Look, we'll look after you'. And that child then ended up with another family, who in turn went over to America. We have tried desperately to get him back because his health is failing him but also at the same time his mother has passed away, and that is sad in itself. He will probably end up dying there. But we have had some dialogue with a barrister that I spoke with, and he indicated that the governor of the prison at the time said that they will not discuss his release because of the high profile that he holds. Whether he gets out or not is another sad story. There are a lot of other sad stories as well.

**Ms VAGHELA:** Thanks, Robert, for your contribution today. My question is a continuation of what Fiona asked in terms of the waiting period of 10 years, which is in the other jurisdiction. Do you think that after the waiting period the spent conviction should be granted automatically, or should it be subjected to some sort of process where they apply for a spent conviction? And if that is the case, should it vary by what sort of offence was done, whether it was a serious offence or it was just a chocolate bar pinched from a supermarket?

**Mr NICHOLLS:** Look, my personal view would be to say immediately because that way then that person, he or she, can get on with life. I then have to look at it from a justice or a law enforcement perspective—is it going to take changes of legislation with government, because it is not only with police but it is also with government to change that legislation. How easily is that done? I am not quite sure. I know that some of the stuff that we have been dealing with has been taking four and five years before we actually came up with something. So I am not quite sure how long it would be. Is it 12 months, is it two years or what? But if I had the powers here today to change that, I would be saying, 'Okay, with the strike of a pen I want to say that that spent conviction has now been done'.

**Ms VAGHELA:** I am asking about after the waiting period. Should it be automatically?

**The CHAIR:** You are saying no waiting period?

**Mr NICHOLLS:** No waiting period.

**Ms VAGHELA:** No waiting period at all.

**The CHAIR:** Once you have done the time, it is off your record.

**Mr NICHOLLS:** That is it. Yes.

**Ms VAGHELA:** Automatically, then.

**Mr NICHOLLS:** Automatically, yes.

**Ms VAGHELA:** So it does not matter what sort of crime they have committed?

**Mr NICHOLLS:** I know that we come back sometimes to scrutiny. When I say ‘we’, the community comes back and says, ‘Okay, but hang on, that person murdered someone or that person’s robbed a bank or that person’s a paedophile’. There are a wide range of things. You know, ‘How dare you let this person out or erase that particular sentence or offences’. So again, it is the wider community too because it goes both ways in terms of whether you are non-Aboriginal or Aboriginal. They look at it and say, ‘Okay, well, if I was in that position, would I do that? Would I try and erase that?’. But, yes, I would say immediately on it.

**Ms MAXWELL:** Robert, thank you for coming today. Are there any crimes that you believe should not ever be spent?

**Mr NICHOLLS:** ‘Shouldn’t be’—well, I suppose in this area, again, pursuing cars is a major issue. I know it deals with property. Sometimes, again, it is looking at some of the crimes that have been committed, but I think it is also how do we deal with those young—and I keep going back to young people because I think it is young people that seem to be at the forefront. One of the things that my uncle Doug Nicholls used to always say to me is that we have got to educate through not only the culture but also what is right and what is wrong.

The thing with one of the projects that I work with is that it is not only working with that young person, he or she, but it is also working with the whole family and providing them with support too, because if you look at child protection, most of the families now or the children that are under child protection are being cared for by grandmothers. They should be living out their life and enjoying it. They do it because they want to as well, but the thing is that there is no other alternative because they would rather them be with the extended family member—nothing against non-Aboriginal carers as well, but they would rather stay with the extended family members. That is where I see it, ensuring that they stay there for the simple reason that they are going to get the love, they are going to get the cultural upbringing in terms of their cultural life. So it is very challenging and it is going to be very challenging.

This is on our agenda for the 18th and 19th. It is going to be raised again as to where it is going to be taken to. I am not quite sure whether the KJU—the Koori Justice Unit—have put in a submission. I think they were discussing it, and I think the Aboriginal Justice Caucus members were also going to put in a submission as well.

**The CHAIR:** I think many of them are signatories to the Woor-Dungin submission and have sort of said, ‘We agree with them’.

**Mr NICHOLLS:** So it has been on our radar for quite some time, and there is for and against it. You will get some people on the police force who will say, ‘Yes, look, we totally agree with what you’re saying’, but then you have got the hard and fast ones who will say, ‘Look, no. Again, you are just giving them a bit of a slap on the wrist and saying they have committed a crime, but they are walking away from it’.

**Ms MAXWELL:** From your past experience and things that you have alluded to today, I have always been an enormous believer that if we have early intervention and primary prevention, we will potentially decrease our incarceration rates by getting to these families earlier. Would you agree, Robert, that that is something that—

You know, spent convictions almost needs to be the end of the line. We need to be doing that work way down here.

**Mr NICHOLLS:** Yes.

**Ms MAXWELL:** And I do not think the spent convictions is a standalone solution by any means. I think we have got to prevent them from having those convictions in the first place. This is just one piece of the puzzle. But I also believe that perhaps there is potential for—I know that before we said about the courts being filled up, but if we can embrace, implement and utilise early intervention and primary prevention, the courts will not be as full, but the spent convictions going before a magistrate could then potentially offer somebody to go before a court prior to that 10 years and having a mentor or somebody there advocating for them and saying, ‘Look, we believe that yes, okay, the 10 years isn’t up’.

There are often, under charges and things, special conditions or exemptions. That is maybe something else that we could consider, that yes, okay, it may be 10 years for an adult, but there is actually a special clause in there that says that somebody can actually go before magistrate and plead their case to see if their spent conviction can be done earlier, when you have got perhaps offending that was not as serious as something else.

**Mr NICHOLLS:** One of the challenges I think that young people of today have got is having legal representation to advise them of that, because they may be given a cautionary notice but then at the end of the day do they realise the consequences of that caution and getting back to them and saying, 'If you get a conviction, this is what the outcome is going to be'?

So in terms of knowing your rights, I was talking to someone a few weeks ago and it was about youth. Now to me youth is 18 downwards—nought to 18—but then with the project that I am doing with AO and D and mental health it is nought to 25 or past that. It depends on the maturity of the person's brain.

**The CHAIR:** That is right. Not everyone just clicks on their 18th birthday.

**Mr NICHOLLS:** That is right. So again I suppose a part of the question is I would say that if a young person is being taken before the courts—and I know how busy not only Victoria's actual legal service is but also legal aid is caught up in terms of hopping from court to court and whatever like that. Sometimes you might get 5 minutes of your lawyer before you go into the courtroom. That young person has probably seen three people prior to him or her and they are asking the same questions over and again and they are saying, 'Well, hang on. I just told so-and-so my whole life story but I am now having to repeat it again'. So I suppose making sure that the young person knows what their rights are because sometimes when they get in there it is a bit of a hard challenge for them because of the simple reason that they are only looking at one person. They are not looking at the prosecutor or the defence; they are looking at the magistrate. So therefore they are waiting for that magistrate to say, 'Well, I am going to give you six months or 12 months in the YJC and whatever like that'. That is the thing that I find: do they clearly understand what their legal obligations and rights are? Because I know when we look at YJC in Melbourne and Parkville, it is full of them down there with young people.

One of the things that really—and this goes for the adults—is that some people are on remand longer than what their sentence is. When they do come before the courts they have spent probably three, four, five months longer than what the magistrate has given them as a sentence. So again, does the person understand their rights? I think if there is enough energy in terms of early intervention, whether that be community people, people like myself being involved—I know we have got Rumbalara local justice workers. There are only one or two workers coming before the courts with Aboriginal people and all that sort of stuff. But again, I get back to the same question: does that young person know their rights and are they making proper and informed decisions in terms of, 'Yes, I do clearly understand that'.

**The CHAIR:** I think it is very important, particularly with the increases in police checks and understanding the consequences of a guilty plea. Thank you so much.

**Mr NICHOLLS:** Not a problem.

**The CHAIR:** I really appreciate it. I know you sort of were not sure how you might help us, but you have helped us a lot. It has been really insightful.

**Mr NICHOLLS:** I was coming to listen, not to contribute.

**The CHAIR:** No, your contribution has been very insightful and I think it has given us a great picture, particularly here.

**Mr NICHOLLS:** I would like to thank the panel too as well for giving me the opportunity. One always thinks, 'Will I make a difference?'. Well, again, I go back to my old Uncle Doug. He used to always say, 'We all make a difference'. His whole old slogan is—and I say this at numerous events that I attend—'Do not walk beyond me or do not walk in front of me; walk beside us because we are on this journey together to try and get justice for Aboriginal people'.

**The CHAIR:** Thank you—a beautiful way to end this.

**Witness withdrew.**