

TRANSCRIPT

LEGISLATIVE COUNCIL LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into a legislated spent convictions scheme

Melbourne—Monday, 1 July 2019

MEMBERS

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Mr Stuart Grimley

Dr Catherine Cumming

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Mr Edward O'Donohue

Mr Tim Quilty

WITNESSES

Ms Christa Momot, Community Development Manager,

Ms Naomi Murphy, Convenor, Central Gippsland client services officer, Victorian Aboriginal Legal Service,
and

Uncle Wenzel Carter, Ngarrindjeri Elder and Aboriginal Cultural Support Worker, Woor-Dungin;

Mr Stan Winford, Associate Director, Centre for Innovative Justice, RMIT; and

Uncle Larry Walsh, Taungurung Elder.

The CHAIR: Thank you all so much for being here today. For the advice of my members, I met a number of these people last week at the Reintegration Puzzle. Today we are hearing evidence about a legislated spent convictions scheme. Just to let you know that all the evidence taken at this hearing is protected by parliamentary privilege; therefore you are protected against any action for what you say here today, but if you go outside and say the same things we cannot protect you. We really appreciate you coming today and acknowledging that particularly for our Aboriginal people this is a very important issue, and we appreciate the very detailed submission that you have given us. I understand, Ms Murphy, that you will be the timekeeper and controller of this hearing.

Ms MURPHY: Yes, that is correct.

The CHAIR: Take it away.

Ms MURPHY: First I would like to introduce Uncle Larry Walsh. He is going to do an acknowledgement.

Uncle Larry WALSH: Thank you. On behalf of us all—I will include Parliament because I realise you would know which week it is—I would like to acknowledge the Wurundjeri Woiwurrung language people and the Boon Wurrung people, and I would like to pay my respects to their ancestors and their elders, past, present and future. I would also like to, as it is NAIDOC Week, pay my respects to those elders who have passed that actually created the call for Aboriginal citizenship. That is all I have got to say at the moment.

The CHAIR: Thank you, and we really appreciate that.

Ms MURPHY: Thank you for that, Uncle Larry. Next I would like to hand over to Christa Momot.

Ms MOMOT: Thanks, Naomi. I am Christa Momot. I am the community development manager at Woor-Dungin. Woor-Dungin means 'share' in Gunnai language. We are an Aboriginal organisation, and we were established in 2006 to support Aboriginal community-controlled organisations in Victoria to achieve self-determination. I have brought some of our annual reports for you. The issue of employment was our partner's number one priority and the barrier that not having a spent convictions scheme poses is why we formed the criminal record discrimination project. Thank you. I would like to hand over to Stan.

Mr WINFORD: Thanks, Christa. We have submitted a submission, which I will just briefly talk through in the time I have got, but we are obviously happy to take questions on any of the positions that we have adopted. As Christa said, this is really driven by the issues that Aboriginal people have raised both as corporations as employers and as Aboriginal people as prospective job applicants. It is because Aboriginal people are disproportionately impacted by the absence of a spent convictions scheme that this is so important. That impact operates on a number of levels, but two really simple ways in which it operates are in relation to the contact that Aboriginal people have with the criminal justice system based on historic disadvantage and other factors, and also the evidence is that Aboriginal people have less access to the diversionary or caution options that many other non-Aboriginal people have. The figures show that they are less likely to access those provisions, which are another way of avoiding having your history prevent you from engaging in employment.

The project has adopted a number of different responses to address that issue, including fact sheets, so trying to provide education to people about the impact and about their rights in the absence of a scheme. But I must say that in doing so it has become very clear that the law itself is incredibly difficult to interpret, and that is not

surprising, because at the moment it is based on a discretion; it is based on the application of a policy by police, which has ultimately complete discretion. When people have come to us and said, 'Look, I've got this driving offence or this traffic offence, will that show up?', I have to say, 'Look, I don't know', because although traffic offences are an exception, they are not defined. I do not know whether they are culpable driving, I do not know whether they are red-light camera offences; I do not know exactly what they mean by that, and even if I knew, they would still retain a discretion as to what they would release. So, clearly, relying on a policy which is inherently uncertain is an insufficient basis for such critical decisions to be made. Really, Aboriginal people, from the stories that we have heard for our submissions, will tend to avoid going for jobs simply because of the shame and embarrassment of having to talk about what their records were, even not knowing whether those issues would come up. So having certainty is absolutely critical. In order to get that certainty we certainly think that a legislative scheme is critical. Part of the process that we undertook over the three years was to meet with many individuals and organisations and identify how a scheme would best work to address the issues that they faced.

Ms MOMOT: Sorry, Naomi, you were meant to go before.

Ms MURPHY: That is okay, Christa. I too would like to acknowledge the people of the Kulin nation, the Wurundjeri, elders here, past and present, and the traditional custodians of the land we are gathering on today, and also the elders that paved the way for us. Being NAIDOC Week, it is a week of celebrating for our mob across country. Today I am convening in the absence of Michael Bell. Just a bit of background on how we came about with the criminal record discrimination, it was that we formed three years ago, and we formed the criminal record discrimination with hopes of getting a spent convictions legislation scheme and the amendment to the equal opportunity legislation so employers cannot discriminate if the criminal record is irrelevant to the job, which is an example that Stan gave before.

Part of the process was to consult with the Victorian Koori community statewide, and this was done over three years to make sure the content of the legislation is culturally relevant and the community's voices are really heard. We did this through the regional Aboriginal justice committee statewide and then presented it for endorsement at the statewide Aboriginal Justice Forum in December 2017. Then the Koori caucus unanimously decided to sign off on our submission for the law reform, and the Attorney-General has now been briefed. Next we have Wenzel Carter. Wenzel is going to share his story with us.

Uncle Wenzel CARTER: Thank you, Naomi. My name is Wenzel Carter. I am a Ngarrindjeri man and a cultural support worker at Woor-Dungin. I would like to pay my respects to the traditional owners, the Wurundjeri and Boon Wurrung people. I am involved in the Aboriginal ex-offender employment project, and I coordinate cultural activities for our annual Aboriginal on country gathering. Previously I helped establish Willum Warrain Aboriginal gathering place in Hastings, Victoria. As part of this role I ran a men's group and supervised men undertaking their community correction orders. I represented Willum Warrain on the Woor-Dungin criminal record discrimination project, and I am involved in this project because Victoria is the only state that does not have a spent convictions scheme.

This law is one of the main barriers, I believe, to communities functioning to their full potential. This means if you have a criminal record it will keep showing up on any criminal record check. This has affected and is still affecting Indigenous people because it stops us from being a valuable community member and participating in the many jobs required to function as a community. It is a life sentence after the sentence has been served. With this law there is no such thing as a second chance or a fair go. Community members who have offended 20 years ago will still have their convictions show up on a criminal record check. Another sad effect is the steady downward spiral of many Indigenous people. They then believe they are unemployable and reoffend. Because of this, Centrelink is the only source of income available, and this can be also suspended. Our project has developed some fact sheets and we run information sessions to help people with criminal records to understand this situation, but we need to change the law so people have a reason to try again. If we do not do this, people will just give up and lose hope.

This issue is one which I feel strongly about because it has affected my family. In 2017 I lost three of my youngest brothers. The struggle was too hard. They gave up trying to look for employment. One was barely out of prison from the age of 15; if he stayed out of prison for more than three months, that was a miracle. There are seven in our family, and we have never had our Christmas together. My other brother suffered from alcoholism.

They gave up trying to look for employment. I have been in this hole myself. Without hope for the future I would have stayed in this hole. Because of my life experience I was selected by Corrections Victoria to join the Yawal Mugadjina cultural mentoring program where I work with Indigenous men in prison.

Thank you very much.

Ms MURPHY: Thank you, Wenzel. So back to me. I am just going to share with you a bit of my personal story about how a spent conviction and a criminal conviction from my past has affected my life. My name is Naomi Murphy. I am a very proud Wakka Wakka woman, a mother of three beautiful, strong-spirited children—24, 22 and 10—with bloodlines from central Queensland. My mother was born on the banks of the Dawson River at Woorabinda mission—that is in central Queensland. Sadly my mother is stolen generation and my dear nan, Nancy Fuller—her mum—then lead a tragic life of drinking, violence and a revolving door of imprisonment. She was locked up in Boggo Road prison after her children were stolen, where she died of a broken heart. The intergenerational trauma of the stolen generation is real. Three generations on I still feel the effects every day of my life. My first contact with the justice system was many years ago. When I was 11 years old I was stolen off my mother by the same white man who stole my mum and who then tried to assimilate me.

Being separated from your parents and your home, and not having that nurturing most children have and boundaries, I rebelled, and this is when I first had contact with the police and the justice system. This escalated into my teens stealing cars, theft, drinking, substance abuse, fighting around and being expelled from school. And then into my adulthood many of my relationships were very violent, traumatic and fuelled by alcohol and drugs. I too was violent as it was all learnt behaviour, what I had seen as a young girl, and it was all that I knew. It was deeply entrenched in my life. It was fight or flight.

I have been in prison cells from Morwell to Alice Springs to Fitzroy, always under the influence of alcohol and drugs. It was not until my late 30s when I found myself pregnant and going through a very high profile, lengthy court case where I was looking at serious jail time that I made the decision to change my life, not for my kids not for the courts, but for me. This was the beginning of my true healing journey, on which I continue today. I now know that many factors, including intergenerational trauma, violence, family violence and mental health, led to my criminal activities and my criminal record. Unfortunately this is all too common in my community.

I am currently the Aboriginal ex-offender employment worker with Woor-Dungin and on the committee of management, and I also work for the Victorian Aboriginal Legal Service as a client service officer in Central Gippsland, where I live respectfully on Gunnai/Kurnai country. I first became involved with Woor-Dungin three years ago on the criminal record discrimination project, sharing my personal experience at being discriminated against due to my criminal record.

I have been asked to ‘Please explain’ and tell my criminal record offending story over and over again when the police check has come back tainted. This is very traumatic and is a huge trigger for me, as I suffer from post-traumatic stress disorder. I have been offered jobs and then had them taken off me after a couple of weeks when the police check has come back, once again tainted. I had my working with children check taken off me after my last arrest in 2008, which I then fought very hard to get back after a lengthy process. And I have even been discriminated against and deemed too risky to work for an Aboriginal organisation. What chance do mob have if our own Aboriginal organisations start to discriminate against us?

I finally got the second chance I was hoping for when a great a man, a warrior and well-respected Aboriginal elder, Uncle Peter Rotumah, gave me that opportunity and I started working at VALS five years ago and then with Woor-Dungin three years ago. Sometimes it just takes that one person to believe in you. So today I share my story with the hope to not see other mob go through the trauma, barriers and discrimination that I went through, and to create change—real change—for all.

In our Aboriginal community we have 7.8 per cent of the population in the prison system, but we are only 0.9 per cent of the Victorian population. Therefore the chance of criminal record discrimination is higher for our community. I know right now there are approximately 400 women at the Dame Phyllis Frost Centre. Unfortunately 100 of those are Aboriginal women, many of who are our sister girls, our aunties, our elders, our mothers and grandmothers.

We formed the criminal record discrimination project with the hopes of getting a spent conviction legislation scheme and an amendment to the equal opportunity legislation so employers cannot discriminate if the criminal record is irrelevant to the job. Part of the process was to consult with the Victorian Koori community statewide over three years to make sure the content of the legislation is culturally relevant and the community's voice is really heard. We did this through the regional Aboriginal justice committee and then presented for its endorsement at the statewide Aboriginal Justice Forum in December 2017 and had the Koori Caucus's unanimous decision to sign off on our submissions. The Attorney-General has now been briefed.

Woor-Dungin advocates strongly for our mob with true-lived experience into employment and supporting mob to become role models and mentors, such as myself and Wenzel, and to work in policy at the grassroots level where the hard work really is. I now know the true connections between reoffending and connecting with culture and community, because this is my true experience. Once I connected I felt a purpose and a sense of belonging. I started to give back to my community, connect, sit down and yarn with my elders. I have run an Aboriginal women's group and taught and learned Aboriginal dance. I started playing netball, coaching and many other activities. This is also building confidence in our youth, which builds strong spirit to be able to make good life choices. Since 2008 I have not reoffended, and I know this is because of the connections I have made in community.

Woor-Dungin graciously nominated me and I was honoured to win the statewide Fellowship for Indigenous Leadership award in 2018 along with a scholarship, and I have had the opportunity to train in Dadirri, which is cultural trauma-based healing—deep listening—and Wayapa Wuurrk, which is an Aboriginal wellbeing modality. These cultural practices I will soon share with my community through my healing circle, which will be funded through my Fellowship of Indigenous Leadership scholarship. This is in direct response to the local Aboriginal women asking me for support and wanting to start their own healing and get out of the revolving door of the justice system, family violence and the child protection system through proper consultation with the elders and community, and who are going through the same issues I went through—to support them on their healing journey.

I, too, recently was appointed by Corrections Victoria and the Koori Justice Unit, have been accepted as a Yawal Mugadjina mentor and will soon be going into the prisons to mentor and support my mob. I am also looking forward to being part of this and sharing true cultural healing. We as Aboriginal people know the solutions, we know the answers and we know what works, and this is true self-determination. Thank you. Next we have got Uncle Larry.

The CHAIR: Fantastic. Thank you.

Uncle Larry WALSH: Thank you. Imagine you are just a young eight-year-old walking up the street. You have been fostered for maybe 18 months, you are living in a new environment, you are going to a new school—all white—and you are walking up the street to go to the shop. Police stop you and ask you your name. They ask you, 'Have you got a criminal record?'. My reply, 'No'. They went. They were back within 2 minutes of doing a check, and it seemed like I was a liar as well as a criminal, for I had a criminal record from the age of two.

The second time it happened I figured they were already marking me as a person that had a criminal past. Therefore they were going to keep going me, so I did decide, 'Well, if you're going to blame me, I might as well do it'. So by the time I was 14, I was on Coburg's police wall, I was on Fawkner's police wall and I was on the Broadmeadows police station wall. The funny thing was that it all happened when I was 13—or 12½. I went to secondary school, and all the form 6s—year 12s, whatever you want to call them now—were coming up and going, 'We've seen your picture on the police station wall. What did you do?'. I did get in and out of a bit of trouble, but I realised the picture people were painting of me was going to end up true, and I decided to change it. I have worked in things such as helping set up various Aboriginal organisations. My history is that people that worked under me in my younger days won NAIDOC awards. Last year we won the national award for reconciliation in arts, even though the Opera House is better known. Yet three times I have applied, at communities' request, to be on government advisory committees, and I have always been knocked back. I have never been given a reason why, but I know the minute I sign that paper to say, 'Can you do a criminal check', it was what was used.

The worst bit, though—it creates distrust. Some of these people that ran the organisations were people I had known for 30 years. To have people turn around and distrust you because they are on this committee and they are the ones that said, ‘Why can’t you join this, Unc?’, and you go to join and you cannot get on. Whilst they still think I am peaceful and good at teaching, you know the doubt is in their minds for things I have done. The worst thing is the last time I went to court was because someone asked me about it, because it was always the same thing: ‘And, Your Honour, he’s got convictions dating back to 1956’. The thing was I was born in 1953, so it has been used against me time and time again. I have had arguments with police and judges on being too young to have a criminal record, and then one day I ran into Woor-Dungin. The convener, Michael Bell, heard me speak at an Aboriginal meeting and Michael introduced me to Woor-Dungin, and they have been helping me.

The funny thing is that it happens to us more because we are a smaller population, but I guarantee you any child that was taken into care before 1980 has a criminal conviction that has been used at one stage or another against them to limit their chances. Because of legislation to protect children and to protect older people and because of legislation to protect people with intellectual disabilities or other disabilities, the ones that are discriminated against most are Aboriginal families. Some people say, ‘How come you’ve never fostered, Larry? You know, you’ve raised your own kids okay’. I know why: because I have to fill out a form that says I will get a police check, and I will get an automatic no. I know why I am not getting on some of these government committees. I am actually helping Creative Victoria with writing their Aboriginal Indigenous policy at the moment. Mr Foley spoke to me about it. And yet I am still being whispered about by some people: whether I will be on that advisory committee or not because of my past. I have seen people change, young people, from being loutish to actually being respected by their communities because they have learned their lesson. I have even had cousins and nephews go, ‘Unc, we’ve learned. We’re not going to do that again’. Good. So I did not have to tell them off. And they are looked at as good community people.

I am getting a bit too long in the tooth to worry too much about whether I get on a committee or not, but I am concerned that the generations under me are discriminated against that way. I had a young nephew approach me. He was coaching the local Aboriginal football team as a trainer—assistant coaching—and when he did a police check they kicked him off because in his youth too he had trouble. So today whilst we try and support each other as much as possible we feel the discrimination because—shame job: ‘We thought you were such a good person’, and that is where they suffer. As I say, when Neil Carter was talking to me about something I go, ‘Yes, you learn to live with it’. It still affects you in some way or another, but you learn to live with it, and the problem is nobody should learn to live with discrimination. Thank you.

Ms MURPHY: Thank you, Uncle Larry. Today unfortunately Uncle Jack Charles could not be here with us because he has been recently appointed NAIDOC patron. We are really excited for Uncle Jack. But I think that wraps up. Stan, was there something you wanted to finish off with?

Mr WINFORD: No. I mean, that has covered it. I think, as I said, our submission covers all of those issues in terms of primarily how this works against a whole lot of government policies as well, so this idea that Aboriginal community-controlled organisations should be able to employ an Aboriginal workforce to provide culturally appropriate responses and all that sort of stuff. Constantly all those aspirational policies and programs and all that are undermined by this, and it is just really critical that it gets addressed, so it is great that this committee is going to take that task on.

The CHAIR: Thank you, and thank you all for telling your stories. I really appreciate it, and I think that the statistics just speak for themselves—that any spent convictions legislation will affect our Aboriginal brothers and sisters the most. I wanted to just follow up from what you were saying about employment, noting that Corrections Victoria has employed you.

Ms MURPHY: That is right, yes. The commissioner signed off on my police check, and I am going to be let into the prisons as a mentor, so that is a great thing, I think because it is so historical—like 2008. I mean, it is obviously still shown, but then they have seen what I have done since then. And I have had respected persons—you know, references from elders and respected people, so I have worked really hard to get that.

The CHAIR: And that would certainly follow on, because I am guessing that that probably indicates that some of your convictions may not be covered by the existing policy, and even future policies may not cover it,

but given that there is that room for movement in it. Going back to what you were saying, Mr Winford, about Aboriginal organisations being restricted by this, even with spent convictions legislation some of your people would be waiting up to 10 years before their convictions were spent or before they could apply for them to be spent. Do you think that is an appropriate period of time, or would you as Aboriginal organisations want the ability to work around that? I am sure it is probably somewhere in this submission. I apologise.

Mr WINFORD: Yes, it is. I am just looking for the relevant waiting period that we looked at. It is interesting actually in terms of the appropriate waiting period. We know that most Australian states and territories have a waiting period of 10 years for adults before a conviction becomes spent, but we heard from a number of people who said that 10 years is a long time to have employment and opportunities restricted by a continuing criminal record, and also that it seems to be an arbitrary waiting period that is not informed by evidence about recidivism and rehabilitation, which we know often will be shorter than that. You know, if you look at two people, one with an offending background and one without an offending background, the rate or the risk changes a lot sooner than 10 years in many cases.

We also noted that recently overhauled schemes in other jurisdictions have had variable waiting periods, but we did not determine a model. We just thought that it was worth observing that in the UK, for example, there is a graduated scheme and separate provisions. So really there is an indication that over the time different schemes have been introduced there has been, I guess, a greater recognition of the need for proportionality in terms of that waiting period. What we also thought was that if it is a lengthy waiting period then it is quite critical to have protection for people on the basis that if the job that they are applying for and the inherent requirements of that job do not mean that a criminal record should impact on them, then there needs to be protection there.

So, in a sense, you could say, 'Well, either you wait 10 years under the current policy and then you apply, or you apply before 10 years has elapsed'. But if there is an anti-discrimination protection and if it is a job for which your record should have no impact then it should not prevent you from getting into the workforce. So I suppose we would say it is a bit of both—a more proportionate and evidence-based waiting period as well as protection for people before that waiting period has elapsed.

The CHAIR: Could you just—I appreciate it might not be easy to do—think of a specific example where the relevancy of the conviction should not affect, or that the conviction is irrelevant to, the job that you are seeking?

Mr WINFORD: Yes. While there are some examples given in the federal context where the human rights commission can inquire into complaints made by people on the grounds of discrimination, and one of those cases, as I recall, was a case where someone wanted a job as a medical receptionist—a receptionist in a medical office—and they had some relatively substantial history that related to offending while driving, and that was not relevant to their role as a medical receptionist.

The CHAIR: Yes, thank you.

Uncle Wenzel CARTER: On that, it is the minor convictions that some young have got that are still used.

The CHAIR: Right.

Uncle Wenzel CARTER: For me, anyone under 40 is young. So I am putting it in the context that I know some people only got a driving conviction or two. They have not drunk alcohol in the last—

Because they had to go through those courses to get it back, they have not drunk over that period. Again, it can be used. So I think there are certain categories of minor offences that should not be the stumbling block. I will accept if you say, you know, they did a robbery, maybe they will have to wait 10 years, but I also think there are some criminal—well, they are classified as criminal—acts that should not be the reason they are held back. So I think it needs to be examined in both areas. What is good law? Like, if I got convictions for driving without paying the tollway, that is a criminal conviction now. Surely a kid should not suffer from that. I am saying they are young—18, 19, 20—and yet they have done good things, but they are being held back.

The CHAIR: I think it is a very good point and I think it goes back to the point of the UK having that graduated—

Mr WINFORD: I think other people have made the point before about having a one-size-fits-all response to something. You know, literally people can commit one offence in many, many different ways—from an armed robbery with a chopstick in a restaurant to a sawn-off shotgun in a bank—to the circumstances in which people themselves commit offences, and those are things that courts take into account often with a great deal of information and yet we then apply subsequently a very blunt set of principles which do not allow for recognising that difference. I think the British scheme at least acknowledges that there are, relevantly, different waiting periods for different types of situations.

Ms LOVELL: I was just wondering if you have any data or evidence of how the outcomes have improved in the other states where they have spent convictions or how they are improved compared to the outcomes here in Victoria?

Mr WINFORD: Sure. I spoke to Aboriginal and Torres Strait Islander legal services in other jurisdictions where they have spent conviction schemes, and it was interesting. What they said was that although those schemes have made a difference for their clients, there was still a bit of a problem in relation to Aboriginal people and whether they worked for them, and a few of the issues that they raised were that sometimes people were not aware of those schemes so they assumed that they were going to be not able to get jobs because of their history. Another factor that was mentioned was that sometimes there was an application process that people need to go through to get their convictions spent, which was a real barrier for people who often could not get advice or did not know about them.

They also raised the point that I was mentioning before about protecting people from discrimination. They said having one thing without the other can undermine the value of a spent conviction scheme if people can say, ‘Well, that is spent. But if it is still disclosed and there are no teeth preventing people from disclosing it and no protection for people if they do disclose it and it is used against them to restrict them from a job for which that record is relevant, if you do not have that other provision, then it is not particularly effective as a scheme.

But in terms of data around what it has meant for jobs and so on, I have not got specific data, but anecdotally in those jurisdictions it seemed as though people relied more—in mining, for example—on drug and alcohol testing and other more relevant tests to decide whether someone was a risk or not in construction and so on. So they did not actually seem to worry all that much about the history itself, but unfortunately it was really interviews that we did with people about what it was like for them in their organisations.

Ms LOVELL: But it sounds, from what you have said, you are saying that although they have got these schemes in other states, they are not perfect and there are a lot of barriers still to getting good outcomes for the Aboriginal community?

Mr WINFORD: Yes, I think that is fair to say.

Dr KIEU: In the example you just gave about the human rights commission appeal on the basis of discrimination, that is only applicable to certain cases where you know that the past criminal record is affecting the job application. But for most of the cases—a majority of the cases, like the case of Uncle Larry there—there is a suspicion that you are not given a job because of the police check but it is hard to prove that there is such a link.

Mr WINFORD: Yes, that is exactly right. I mean, no employer, knowing that there would be a risk of discrimination, would allow themselves to be quoted as saying, ‘I have refused to give you this job because of your criminal history’. So it can be very hard, but despite that there are still five or 10 cases each year in the commonwealth human rights commission where they report cases where someone has made a complaint, and sometimes the employer will say, ‘Yes, we did choose not to employ this person because of this history’, and sometimes the commission will say, ‘That was discriminatory’, and the employer can just say, ‘Well, okay’. It is not an enforceable finding by the federal commission. All it does is it tells them that in their view it was discriminatory.

Dr KIEU: There is clearly a case of injustice here, with a two-year-old or a three-year-old having a criminal record.

Mr WINFORD: Absolutely, yes.

Dr KIEU: Just to come back to the issue here, in other jurisdictions the type of conviction and also the length of a sentence that may be applicable for a particular conviction to be spent ranges from six months to 30 months. What do you feel about that? Do you think it is too soft, too long? Do you have any recommendation on that?

Mr WINFORD: Well, we actually did not feel that we were in a position through the consultation that we did to arrive at any hard and fast rules, and you are right, there is a broad variety of different sentence lengths which are considered capable of being spent. If I could say one thing based on what we heard from Aboriginal people, it is that increased contact with the system would often mean that Aboriginal people were exposed to longer sentences. So I suppose if we were to say anything, at least—and we say this in our submission—there should be an opportunity, whatever the period is set, whether it is 30 months or whatever, in certain circumstances for people to be able to go back to a court and say, ‘Look, I’ve rehabilitated. I’ve spent a number of years crime free. This is what my community says about me. I would like to get a job, so I would like to have this dealt with’. There should be some discretion remaining. Again it comes back to that thing, there are always cases which do not meet that one-size-fits-all rule. So you do need to provide some form of discretion, where someone, whether it is a court or a tribunal, can make a proper assessment of whether or not this person is a risk and whether the kinds of policy reasons that we have spent convictions schemes for apply to them or not. In my view if someone has a history and they have shown that they have been crime free for a number of years and they have got supports in place that would tend to give us confidence that they are not going to get into trouble again and given the nature of the offence and given their future intentions in terms of work, there should be a capacity for them to ask for that to be dealt with. So that was sort of where we landed with that one.

Dr KIEU: Just further, particularly with the Aboriginal community you just mentioned that there is a tendency—it may not be hard proof—that the people in that community tend to attract longer sentencing as compared to the other communities. To follow on from that, there is an administrative policy by the police not to disclose a spent conviction. Would that be applied to the community as often as the other communities? What do you feel about that?

Mr WINFORD: Look, I have no data on that. I do not know. All that we found from speaking with Aboriginal people was that it was incredibly uncertain and inconsistent. The impact of that was pretty severe, because people would say, ‘I think I’ve got a record. I think it’s going to come up, so I won’t apply for this job because I’ve seen the ad, which says that a criminal record check will be carried out. So I’ll rule myself out of it’. Or another circumstance in which that played out was an Auntie who wanted to foster care her niece and she was concerned that a very old record, which I would think would be irrelevant, would be raised in an interview with the department of child protection. She just said, ‘I’m not putting myself through that. It’s embarrassing. It’s shameful—I just won’t apply’. It seemed to me that it operates a lot in terms of people self-limiting what they are doing, because they cannot know for certain what will happen if they apply for a job. And if they see a check will be conducted, then they will say, ‘Well, I’m not going for that job because I don’t want to go through that shame’.

Uncle Larry WALSH: And as I said before, I have been asked will I foster kids. I have raised my own. I have helped other foster kids that live in our area because they have got non-Aboriginal parents. I will not sign the documents because I know I will get no, because I have criminal convictions. The last time I ever went to court was not in the last 10 years or 15 years—I do not know how long since. But this is the point: we have young people who want to mind their grandparents because their grandparents’ health is failing; the grandparents want them to, but the system says they cannot. We have old people—well, some in my age group—who would take their grandchildren, but they know they cannot because they feel, they know, they have got that conviction, and once before they did and they got knocked back. It is not a case of how you feel.

We have a thing that we call shame—shame job—which is about admitting your wrongdoings, not that you think about them and then try and hide them, just that over your life you have been looked at as a certain type of person by people with respect for you and so you do not even bother thinking about it or talking about it. Then you have to do something, and that is when shame job comes in. Shame job is like losing face, if you like. It is one of the biggest hidden obstacles of our community: if I know, I sign that document, that organisation knows I cannot foster. Someone will say something, but not to me. Face, shame job, is why some people will not mention it, because it is hard to live a life where everyone has respect and admiration for you and then all of a

sudden something you did as a teenager is being held against you. And it is hard for the grandmother or grandfather to accept why their grandchild, who they have helped raise or, you know, have been there to see them through every landmark—and, yes, the boy or, yes, the girl got into a little trouble when they were a kid, but they have been all right since then—is not allowed to look after them. ‘If I don’t have them, I’m going to end up in a hostel or in elderly care’.

Ms MURPHY: Non-Aboriginal care.

Uncle Larry WALSH: A non-Aboriginal place. They want to stay in their communities.

The CHAIR: I suppose the spent convictions legislation will assist to some degree in this area, but it is not going to solve everything by any means, and there will be some convictions that will be difficult to expunge or to expend.

Uncle Larry WALSH: We also know when we have got bad people, and we will not be recommending them.

The CHAIR: I am actually not suggesting that. I am asking: are there other things that we should be contemplating in this area? Because certainly I think things like looking after elderly relatives or looking after young relatives is really important, and I am not sure that any legislation that we introduce is actually going to help that, because when you look particularly at working with children, everything is disclosable in that, regardless of the spent convictions legislation.

You can take this on notice, but are there other things that you would suggest that we consider in ensuring that someone’s past does not affect their ability to continue to help their families, in particular in these circumstances?

Uncle Larry WALSH: If you were saying, say, a sexual conviction, if it is a boy of 16 with a girl of 15, that is still a sexual conviction because the girl is under-age. If it was forced, no way would I agree to ‘You should wipe that’, but when it is a romantic thing I think there should be leeway there. So there are those grey areas that are not defined.

Mr WINFORD: Can I add too that I think education for the community and for employers is really important because if employers made completely fair and reasonable decisions, there is almost an argument to say they should have all the information, because I completely understand an employer where having a criminal history is relevant to the job. For example, someone who has recently been convicted of fraud and is entirely untrustworthy, you know, if I was a shopkeeper I probably would not want them in charge of my cash register. But equally, if that person had committed a theft 12 years ago and the employer said, ‘Well, I just don’t like anyone who has ever committed a theft. I’m never going to employ them for this job that has nothing to do with my cash register’, then I think that is unfair. Both employers and job applicants need more information about what it means to have a criminal history, how relevant is it to the role that you have got and how much of it is a predictor of risk. If they are able to understand that better, then they might make better and fairer decisions. So I think definitely more awareness. And as I was saying before, even if you look at a criminal history report when it comes back and it says something like ‘armed robbery’, or it says something like ‘robbery’, there are a multitude of different ways in which that can occur, some of which are not the kinds of things that might spring to your mind immediately and therefore do not represent the kind of conduct that you might assume that charge in itself represents. Theft is another great example. You can have a teenager that walks into a milk bar and walks out with a Mars bar, or you can have \$400 000 stolen by the secretary of the netball club over many years. They are totally different scenarios.

Ms MURPHY: I guess within the Aboriginal community because of our systemic poverty and racism we have got community that are stealing to survive—bread, milk, baby formula, nappies—and are penalised because of poverty. How do you justify that? It is a reality, so I see it firsthand in my community. How long do you get punished? And have you reoffended? I guess there are many, many layers to it. We are not saying get rid of everything. There are definitely going to be different layers and different levels, but within the Aboriginal community it does affect us because of our contact with the justice system. You are born into poverty, you are born into a low socio-economic part of the community, and it is just a means of survival.

Ms MOMOT: And looking, I think, at the circumstances surrounding why that crime was committed is really important. We learned last week at that conference that 90 per cent of Aboriginal women in prison have a history of family violence. That was a factor in Naomi's case. I think those circumstances are important to take into account.

Ms MURPHY: That is right. When I was speaking to the other sister girls, there was a group of us, and a lot had been charged with drug trafficking. That was stemming from just needing to—

It sounds really bad, but they were just trying to keep themselves in supply to deal with the family violence. So you have got that ripple effect. But if you look at that and it says 'drug trafficker', it is not what it seems and employers would not understand that unless you had to speak about it.

The CHAIR: It is education

Ms MURPHY: Yes.

Uncle Wenzel CARTER: I wanted to add violence against women. We are seeing many women now, getting to the higher rates of Indigenous women. That is because of violence against women. It is being forced to do things sort of like being forced to go drive down to the Bottle-O, you know, or similar things, and being picked up for DUI—you know, violence against women.

Dr KIEU: I would like to hear your view on the exclusion from spent convictions. It has been proposed for the length of sentencing, the type of conviction and also the number of previous convictions. For example, in Canada if it is about four or five previous convictions then that person will not be able to apply to have the conviction spent. So what is the view from your community?

Uncle Larry WALSH: I think there are certain penalties where it should not apply. I think it is also length of time. Whether it be they have had a fine or whether it be that they have had probation or whatever, technically it says once you finish your probation you are supposed to be finished with the crime. But I think it also depends on the type of probation. I had to go for some. The longest I have heard of is five years probation. I would look at adding two years onto a probation, and then it should not be used if they have not been a continual. For me there is a difference between a continual criminal and a criminal of bad choice or bad luck. I know people who have been broke. When I used to live in Melbourne, every Wednesday I used to get people come and want to cook at my place. Why? They were out of food. I did not mind because it meant I did not have to do the cooking when I was young. So if they did not have anywhere, what were they going to do? Go down the local store and steal it? And they get a probation or something for it. It is not just the criminal system itself that needs to work better to help those people, but it is also the—

Call it the welfare system. They need to work a little bit better so that that is not a mark that young mother is going to carry all her life. And extenuating circumstances. If I was not able to be home—I was living in a share house, so if we were not able to be home because we had to go off to something—well, because our neighbours were hungry, someone might see them entering our place and then the police were called in because we were not home. And yet it is, 'Hey, yeah, we know. Someone's been here. Yeah, look they've grabbed a bit of food. Yeah, she's left a note. We know who it is'. You know? That is what I mean about the circumstances. If they were not our neighbours and did not know that people were coming into our house and they saw them walking off to their place with something, someone could think a crime was on. The police would arrest them, and by the time we got there they would be in the system. So there are circumstances that need to be worked within both the legal side and the health and community service side for those single parents where it can be a struggle. By the way, I once, because my wife was sick, raised my children for two years by myself. I almost felt like doing the same thing, but I had mates and friends that could lend me a buck for week. But not everyone has that, especially in the poorer areas. If I tried to borrow a buck in some areas, everybody would look at me wanting the same thing, to borrow a buck, because it is not there.

The other thing is sometimes you do not want to go in and do all that paperwork to get your conviction overturned because of that shame. I cannot read or write too well. That is some type of English I do not understand. So there has got to be a simplification of the process. Do you know what? It would not just apply to Aboriginal people, but I am saying it will mainly apply to Aboriginal people. Because of the low economic

circumstances you want to get out as quick as you can. Because there is no way to support yourself where you live you want to go to where the nearest work is, but then you have got that problem of those convictions that you did not deserve.

The reason they took me was nothing to do with my mother not looking after us. It does not say that. It does not say I was homeless. It just says 'In need of care and protection' while she and all her brothers and sisters go and do fruit picking. That does not necessarily mean that I was not getting fed. That does not necessarily mean that I did not have a bed. But it was such an overall category 'In need of care and protection', that it did not need to be explained. Mum could not read or write, yet Mum knew if she signed the paper I would be gone forever so she refused to sign any paper. But that is what I mean. And it has happened in the past. People have put documents in front of Aboriginal people, got them to sign them and the next thing their kids are gone. They have actually admitted to a crime they had not done, so their kids are taken—and that could be a father or a mother, by accident. Never are the circumstances taken into account.

The CHAIR: No, that is right. I think that lack of information is a really good point. I just have one more question about the fact that this is not black and white. This is very grey, and there are circumstances that are not the same. As you quite rightly say, there should be some process where an application can be made for waiving the scheme or taking a different approach to a certain individual. Do you have any thoughts on what that would look like? Would this be an application to a court where there would be an open court, we have had some people say, where victims would be able to possibly make statements as well, or would you see it as a separate kind of adjudication? Has there been much thought in that area?

Mr WINFORD: No. We did not think too much about the procedural aspects of it. It was more just giving the capacity to make an application to ask a court or a tribunal to exercise a discretion if it were thought appropriate that someone ought to have a different period of time apply to them. I personally have not really thought through the implications of it, but you can think about other contexts where decisions like that are made—for example, in relation to parole, anyone can make a submission, victims or anyone else in the community can make a submission about it. But I think the key thing would be that the person who was applying had the capacity to put a case to whichever court or tribunal had jurisdiction to hear it about whether and how their former offending and the period of time that had elapsed since it had occurred should continue to preclude them from participating in the community.

I think one of the underlying things for these schemes is that we have got a justice system that is supposed to impose a sentence on someone, but I do not think that sentence really ought to be continuing to work as a punishment long after that sentence has been served. There is a reason for these schemes, which is to ensure that people can be rehabilitated and to reduce recidivism, and we have got a big issue with that at the moment, as we know. We have got more people returning to prisons. We have got more prisons being built. I am certain that one of the reasons for that is that people are continuing to be punished well after they have served their sentence, which is not what is intended. It is not what is intended by section 8 of the Sentencing Act, which gives the court discretion not to record a conviction, which is undermined by the police policy. It is not the intention of the system when someone gets a dismissal under section 76 of the Sentencing Act. All of these things are really being undermined by the lack of a legislated scheme, and the results are that for Aboriginal people there is a disproportionate impact and for the whole community there is this enormous cost as we keep excluding people and we keep stigmatising them and excluding them from the very things that I think make us safer as a community—people getting jobs, people being able to reintegrate, get employment, all those things.

The CHAIR: That is right, yes.

Ms MURPHY: Aboriginal people—family—being able to care for Aboriginal kids instead of being put into non-Aboriginal families, which is happening. The stats are going through the roof, so it all has that ripple effect.

Mr WINFORD: So I think that those should be the considerations that any court considers if someone is saying, 'Let's assume that a 10-year exclusion period applied'. And let's say someone after five years. I read about a fellow, a Yolngu man, who became a doctor. What happens if he had a historic criminal record? Shouldn't he be able to go to a court and say, 'Hang on a minute. I'm here. I've got my medical degree. I'd like to be able to practise. I'd like to not be discriminated against on this basis'. Why shouldn't he be able to apply

to a court to make an assessment about whether it is appropriate to continue to exclude him from doing what he could do that would help people?

Ms MOMOT: And, Fiona, if Michael Bell were here I suspect he may answer your question by saying he is an elder at the Koori Court in Portland, Hamilton and Warrnambool, and elders make those decisions where they look at the circumstances of the offending, and that seems to be working really well. So I would say that is a possible answer to your question.

The CHAIR: I think that is very good. I think 10 years ago there were about 3000 police checks, and there are now 700 000 police checks. Is that something that your organisation has seen, that the opportunities to work without a police check have been narrowing over the last few years?

Mr WINFORD: Yes. I mean, I think—

Uncle Larry WALSH: Yes from everyone.

Mr WINFORD: It is an exponential increase, and it indicates that people are using these sorts of checks as a default way of assessing risk. And that is all very well, but if when their records are disclosed they are using a policy rather than a piece of legislation, which is entirely discretionary, then the lack of certainty means that with each and every one of those 700 000 checks there is actually nothing that a person wanting to rely on it could honestly say when they were about to apply for a job or thinking about applying for a job. They could not really say for certain what would come back. So if it is someone for whom it would be shameful, they will not apply. If it is someone who recognises that they have been given a non-conviction disposition that they are concerned about, then, ‘What if I say I don’t have a conviction? How will that be interpreted? And if I say the wrong thing and it comes back showing I have a record, will I then be excluded because I have misled my potential employer?’. It is a terribly inadequate mechanism for conducting what are very, very significant assessments that have huge impacts on people’s lives, including their work and their families and everything else.

Ms MOMOT: One of our case studies is of a man who served his sentence, and it was for a quite serious crime. He got out, he was highly motivated, and he was never asked to do a police check. He actually got a job, and you will see in his case study he has worked for 20-something years.

The CHAIR: I saw that.

Ms MOMOT: Whereas we regularly hear about the people who want to do volunteer work to get a foot in the door, or even do a student placement, but because they have got a criminal check they are not approved for that.

Mr WINFORD: And I think the other example of the impact—sorry.

Uncle Larry WALSH: I was going to say that 20, 30 years ago this was not used much, this police check, and as the population has grown and governments are trying to in some cases make sure the Parliament is not getting crooked people—tried, I said—they legislate to think that sometimes it will help everyone. If I had stayed at the Victorian Aboriginal Legal Service, if I had stayed at the Koorie Heritage Trust or a couple of other places that I helped with back in them days, I would not have needed to go through a check because everyone would have suspected: ‘Oh yeah, he’s been working here for 20 years, he must be all right’. So it is the fact that now because the legislation is there, and it has been there since the late 80s or something like that, it has created that—what do they call it—unintentional—

The CHAIR: Unintentional consequences—unintended.

Uncle Larry WALSH: Yes, and this is where it is affecting people. As I say, it will not affect me because I can go to a public meeting and I can have my say and the government will let me, but I cannot get on any government board even though I help write policy. I am not saying I am the greatest guy in the world, but I know others in my position. Jack would talk about ‘in my position’ from a different angle, but to us we are seeing it more and more affect our younger generations.

Half of it years ago was not a crime. If I got arrested when I was younger for drunken driving I would get a fine and get a warning. Then they introduced the alcohol things—sweet, still not a problem. But now it is a criminal offence. Again, the legislation changes without realising—for a good reason, because too many people were getting drunk and driving and creating accidents—that it is those things where other people unintentionally do things. You know, there are kids on the street corner and the shop window breaks because they are all pushing and shoving each other, and everyone gets charged with wilful damage. When I was young that was a fine, but these days it is more than a fine. Why should kids—maybe one or two of them might go wrong but the majority will not—why should the majority of kids just doing kid things and something happens—

The CHAIR: Kids being kids.

Dr KIEU: I suspect that the rate and the number of police checks will increase with time because of some of the less related requirements for certain types of jobs, maybe because of the ease and affordability of having a police check and maybe because the employers want to protect themselves against being sued for insurance refusal or whatever the case. So I think this spent convictions inquiry is timely.

Ms MURPHY: One of the things that showed up on my criminal record is fare evasion. I remember that day. I was running with my two children—they were like one and two and I was a single parent—to get the train and I forgot to get my ticket and I got fined. The ticket inspector came on the train and I got a fine. That shows up on my criminal check, but that was 20 years ago; it just says ‘Fare evasion’. So there are certain things that I think could drop off, you know, things like that.

If you have committed an offence and it has been converted to a fine and that fine is not paid then it shows again. If you do not address it, if you do not pay the fine for whatever reason—because you do not have the money, you do not have a job and you are trying to raise kids on your own—it will show up again until you have sorted it out. So the one offence that I was charged for showed up three times on my record, and it looked like I had stolen a car three times when it was just the once. But because I was in a situation where I could not afford to pay the fine it showed up again—‘Oh okay, she’s done it again’. I set up a payment plan but I fell through with it. Then I went again and had it converted to community work and then I sorted it out. I went back into my community and I joined the NAIDOC committee and I did some stuff back home in Gippsland, but it showed up three times. It is just the way that it is written. For someone to look at that, they would go, ‘Oh, she’s done that three times’, until you explain to them. So it is that education, as Stan said. That was around the department wanting me to kinship care for a young Aboriginal girl in my community, so they are the sorts of checks that they are doing as well. So that is another—

The CHAIR: I think that is an interesting body of work about what actually goes on a police check and how it is presented. We heard from another person who had been homeless that they ended up with 1400 line items on their police check, despite the fact they had not really committed terribly many crimes, but it is the way it is presented. For an employer to look at that or to look at the fact that you have got ‘car theft’ three times, they will—

Ms MURPHY: I am not going to get a job in a car yard.

The CHAIR: Did you want a job in a car yard?

Ms MURPHY: No.

Ms LOVELL: Or with Uber or taxis.

The CHAIR: Thank you so much.

Ms MURPHY: Anyone? Wenzel, anything else to say?

The CHAIR: Does anyone want to say anything?

Ms MURPHY: Any final—

Uncle Wenzel CARTER: No.

The CHAIR: You are all good?

Ms MURPHY: It has been a big day for us. I think we have been looking forward to this. It has been a long three years. We have got a lot of young ones that sadly are in contact with the justice system, so I often think about once they hit 18, when things are allowed to be shown. I had a young girl who had something up to 70 charges. It is often the police just drumming up, making one charge into 10. It is that overcharging of certain crimes. It is overkill. I see it firsthand, and I have lived it. It is just deeply entrenched in our community. I do not think we should be discriminated against. We understand that we all live by the same law—we all follow the same law—but we are disproportionately because of historical injustices and intergenerational trauma—

Uncle Larry WALSH: Yes.

Ms MURPHY: born into poverty, and it is still happening to this day. Departments are putting us in housing projects where there is no employment and there is—

Uncle Larry WALSH: Very little resources.

Ms MURPHY: drug dealing going on. It is like we do not want to live in those areas. We want to have healthy, strong Aboriginal communities and we want to be able to be given a second chance, and unless—

The CHAIR: Not set up to fail.

Ms MURPHY: you have someone who sees you, like Uncle Peter Rotumah did for me—and that was a blessing—but I was one of the lucky ones, you know, so—

Uncle Larry WALSH: And with some of the things that are happening, our average age is much lower than the rest of Euro Australia in children being mothers and fathers, and that adds a greater stress too. Both unemployed, and then they move into a relationship. And sometimes the only way they can get away with being paid something is actually, 'I'm living up the road, you're living here'. Then someone says, 'No, no, that's illegal', so it leads to problems. We have kids earlier than most, on average—not everyone, but on average—and with a lack of education, a lack of resources and a lack of chances to work. I do mean a lack of resources because in most of the housing commission areas really there is not a great deal for them to do, so that is maybe why they have families early. But it does raise a lot of that question, whereas, as I said, sometimes they end up a couple, but guess what? One of them has got a conviction because they had that kid under-age. It is all those things. It is minute little things that just add up on each other, on each other, on each other—

The CHAIR: That is right.

Uncle Larry WALSH: and they are not being considered. The one I am most proud of is being called by a judge a disgrace to my race. I am proud of that one. What I am getting at is that we sometimes have to create our own opportunities but the system holds us back, and it is sometimes one little thing after another after another, and then it starts to look like a very bad pattern.

The CHAIR: That is right, and I think again that goes back to how do we present criminal history?

Uncle Larry WALSH: That is telling us our time is up.

The CHAIR: It is actually not. We have got Youth Parliament on, so they are—

Uncle Larry WALSH: Good on them.

The CHAIR: They are having a vote. But that is probably—

Uncle Larry WALSH: Thank you.

Ms MOMOT: And I would just like to thank you also for making time to come out on community—

The CHAIR: Looking forward to it.

Ms MOMOT: coming to Gunditjmara country in August. I know that Michael Bell and community are really grateful and looking forward to meeting with you there.

The CHAIR: Thank you, and I am very much looking forward to it indeed. And just personally, it is great to see you all again.

Ms MURPHY: Yes, so soon.

The CHAIR: It has been days. It has been days since I last saw you.

Ms MURPHY: I know, and in August people are going to start talking.

The CHAIR: There will be a transcript of this hearing sent to you. It will probably take a couple of weeks. That will be a draft, and you can look through it and colour it in or send us corrections as you wish. Thank you.

Witnesses withdrew.