SUBMISSION TO THE LEGAL AND SOCIAL ISSUES COMMITTEE INQUIRY INTO A LEGISLATED SPENT CONVICTIONS SCHEME

17 JULY 2019

BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

The Victorian Aboriginal Legal Service (VALS) is an Aboriginal Community Controlled Organisation established in 1972 by committee and incorporated in 1975. VALS is committed to caring for the safety and psychological well-being of clients, their families and communities and respecting the cultural diversity, values and beliefs of our clients. VALS vision is to ensure that Aboriginal Victorians are treated with true justice before the law, our human rights are respected, and we have the choice to live a life of the quality we wish.

We operate in a number of strategic forums which help inform and drive initiatives to support Aboriginal people in their engagement with the justice, and broader legal system, in Victoria. We have strong working relationships with the other five peak ACCOs in Victoria and we regularly support our clients to engage in services delivered by our sister organisations. Our legal practice spans across Victoria and operates in the areas of criminal, family law and civil law. In our civil practice, we provide legal assistance to clients to obtain a Working With Children Check, and we regularly see the challenges faced by Aboriginal people with a criminal record in accessing employment.

Our 24-hour support service is backed up by the strong community-based role our Client Service Officers play, in being the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings. Our community legal education program supports the building of knowledge and capacity within the community so our people can identify and seek help on personal issues before they become legal challenges.

We seek to represent women, men and children who come to us for assistance in their legal matters, and are only hindered in doing this where there is a legal conflict of interest and we cannot act. If this is the case, we provide warm referrals to other suitable legal representatives, which include Victoria Legal Aid, Djirra, community legal centres and private practitioners as appropriate.

ACKNOWLDGEMENTS

VALS takes this opportunity to acknowledge Aboriginal and Torres Strait Islander people and traditional owners throughout Victoria, including elders past and present. We acknowledge the strength and bravery of our clients who have allowed us to share their stories as part of this submission.

We also acknowledge the following staff members who collaborated to prepare this submission:

- Isabel Robinson, Policy and Advocacy Officer
- Rachel Gleeson, Civil Lawyer
- Beau Patterson, Civil Lawyer (DLA secondee)
- Sophia Blosfelds, Civil Lawyer
- Kate Browne, Civil Lawyer

SUMMARY OF RECOMMENDATIONS

Recommendation 1: The definition of conviction should align with Section 7 of the *Sentencing Act 1991 (Vic),* whereby a finding of guilt without recording a conviction is not considered to be a conviction.

Recommendation 2: A finding of guilt without recording a conviction should be automatically and immediately spent. If the "non-conviction" sentence also includes conditions, the sentence should be spent immediately after the conditions are completed.

Recommendation 3: Convictions for which a sentence of less than four years imprisonment is imposed, should become spent automatically. The eligibility limit for the Victorian Spent Convictions Scheme should include terms of imprisonment and be based on the length of the imposed sentence rather than the maximum possible sentence.

Recommendation 4: The Spent Convictions Scheme should not include blanket exclusions for certain categories of offences.

Recommendation 5: Individuals convicted of offences that are not automatically spent, should be able to apply for their conviction to be spent on the basis of special circumstances, where it is in the interests of justice to do so.

Recommendation 6: Convictions should become spent automatically after the relevant waiting period.

Recommendation 7: Waiting periods should commence from the date of conviction, not from the end of the sentence (custodial or otherwise).

Recommendation 8: Applications to have convictions become spent on the basis of special circumstances should be heard by the Victorian Civil and Administrative Tribunal (VCAT).

Recommendation 9: A waiting period of 10 years before a conviction can be spent is arbitrary and onerous. The legislated Spent Convictions Scheme should adopt a graduated model, whereby the waiting period is determined with reference to the length of the sentence imposed and the person's age.

Recommendation 10: The same waiting period should apply for both children and young people, to align with Victoria's dual-track system.

Recommendation 11: For the purposes of the waiting period, the definition of "minor offence" should be much broader and any definition should align with a framework for the scheme that is focused on fairness and rehabilitation.

Recommendation 12: The effect of a spent conviction should be that a person is regarded and treated as though they have not committed, been charged with, prosecuted for, convicted of, nor sentenced for that charge. As such:

- they should not be required to disclose that spent conviction;
- questions of a person's criminal history shall not include that spent conviction; and
- questions of character or fitness shall not permit reference to or consideration of that spent conviction.

Recommendation 13: The legislated Spent Convictions Scheme should designate the following offences:

- unlawful disclosures;
- improperly obtaining information;
- threat to disclose information;
- taking into account a spent conviction for purposes not authorised; and
- requiring a person to disclose a spent conviction as a condition of a contract or agreement.

Recommendation 14: Penalties for offences should apply to public entities, media outlets and individuals, and be sufficiently high to ensure the desired deterrent effect.

Recommendation 15: Cross-jurisdictional convictions should be capable of being spent where they meet the threshold under the Victorian Scheme, or if they already qualify under the Scheme in a relevant jurisdiction.

Recommendation 16: The *Equal Opportunity Act 2010* (Vic) should be amended to prohibit discrimination on the basis of an irrelevant criminal record and spent conviction. The protection under the Act should cover employment, education and learning, housing, buying things, access to services and public places, being a member of a club or association and government programs.

Recommendation 17: There should be limited exceptions to the proposed anti-discrimination protections. These exceptions would make it lawful to discriminate against someone with a criminal record in the context of employment only if:

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

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

Recommendation 18: Further consideration of the presumptions against treatment and the guiding principles of the *Assisted Reproductive Treatment Act 2008* (Vic) is warranted, to ensure discrimination on the basis of an irrelevant criminal record or spent conviction does not occur.

Recommendation 19: Information disclosed to the Working With Children Check unit, whether as a police record check or from any other source, should not include criminal records that are spent under the proposed Spent Convictions Scheme, subject to exceptions:

- in which the person against whom the offence was committed, or was alleged to have been committed, was a child; or
- where the relevant offence is a sexual offence — for example, an offence specified in schedule 1, clause 1 of the *Sentencing Act 1991* (Vic).

DETAILED SUBMISSIONS

VALS sets out our detailed submissions under numbered headings which correspond to each of the Terms of Reference of the Inquiry. Case studies are de-identified and are provided with the consent of our clients, who are eager to see reforms that could lead to significant positive outcomes for their wellbeing, livelihoods, families and communities.

1. THE TYPES OF CRIMINAL RECORDS THAT SHOULD BE CAPABLE OF BECOMING SPENT

As highlighted in the Committee's Terms of Reference, the underlying objective of a Spent Convictions Scheme is to balance the interests of offender rehabilitation and reintegration, with community safety (including the safety of vulnerable Victorians and the safety and wellbeing of victims). VALS acknowledges and supports the critical need to balance these competing interests. We strongly encourage the Committee to ensure that a future legislated Spent Convictions Scheme in genuinely committed to the rehabilitation of offenders, which is by far the best way to ensure community safety.

Aboriginal and Torres Strait Islander peoples are over-represented in the criminal justice system[1] - in part because of high recidivism rates[2] - and are disproportionately impacted by the stigma and discrimination associated with having a criminal record. While Aboriginal communities have shown incredible resilience in resisting the impact of invasion and colonisation, over-representation in the criminal justice system is directly attributable to the ongoing legacies of colonisation,[3] including socio-economic disadvantage, higher rates of child removal and family violence, higher suicide rates, poorer health and mental health and higher unemployment rates.

To address the over-representation of Aboriginal people in the criminal justice system, the Victorian government and the Aboriginal Justice Caucus have committed to ensuring that fewer Aboriginal and Torres Strait Islander people[4] return to the criminal justice system.[5] As noted in *Burra Lotjpa Dunguludja* (meaning 'Senior Leaders Talking Strong'), *"the barriers to gaining employment and housing are two of the greatest risks to successful reintegration. The barriers to employment for exiting prisoners are serious and include their criminal record, lack of skills, lack of recent work*

[1] Corrections Victoria's Monthly Prisoner and Offender Statistics at 31 May 2019 indicate that more than 10% of the total prison population (812 people) identified as Aboriginal. By contrast, Aboriginal people make up less than 1% of the total Victorian population. Corrections Victoria, *Prisoner and offender statistics* (May 2019) ABS 2016 Census QuickStats available online: https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/2?opendocument

[2] In 2018, 75% of Aboriginal and Torres Strait Islander prisoners had been imprisoned under sentence previously, compared to 50% of non-Aboriginal prisoners. See Australian Bureau of Statistics (ABS), *4517.0 - Prisoners in Australia, 2018 (Aboriginal and Torres Strait Islander Prisoner Characteristics).* Recidivism is one of the main causes of over-representation of Aboriginal people in the criminal justice system. See Aboriginal Justice Forum, *Burra Lotjpa Dunguludja*, p. 17.

[3] Victorian Government, Victorian Aboriginal Affairs Framework,

[4] The term Aboriginal is used throughout the document to refer to Aboriginal and/or Torres Strait Islander Peoples.

[5] Aboriginal Justice Forum (AJF), *Burra Lotjpa Dunguludja* (Aboriginal Justice Agreement Phase 4), p. 44-45.

experience and poor education."[6] In VALS' experience, inability to access employment is a key reason why an individual may become trapped in a cycle of reoffending.

We believe that a legislated Spent Conviction Scheme in Victoria presents an opportunity to further the government's commitment to rehabilitation and reducing recidivism rates for Aboriginal peoples. In that regard, we recommend that Victoria take a progressive approach whereby:

- Findings of guilt without recording a conviction are automatically spent;
- Convictions for which a sentence of less than four years imprisonment is imposed is capable of becoming spent after the relevant waiting period (with some exceptions);
- Convictions for which a prison sentence of more than four years is imposed, is capable of becoming spent in special circumstances.

1.1 Findings of guilt without recording a conviction

Under the Draft Bill, convictions resulting in a prison sentence of less than 6 months are automatically spent,[7] and convictions resulting in a prison sentence of 6 months or more can be spent by court order, if it is in the interests of justice to do so.[8] In both cases, convictions for prescribed offences can never be spent and convictions are taken to include all findings of guilt, regardless of whether a conviction is recorded or not.[9]

Under the *Sentencing Act 1991* (Vic) ('**the Sentencing Act**), magistrates and judges can exercise discretion and choose not to record a conviction in appropriate circumstances.[10] Often this is the case for first time offenders, young offenders and/or low-level offences. In doing so, the judge or magistrate must consider: (a) the nature of the offence; (b) the character and past history of the offender; and (c) the impact of recording a conviction on the offender's economic or social wellbeing or on his or her employment prospects. Findings of guilt without conviction are a judicial sentencing tool which allows courts to be lenient and limit the impact of the criminal process in relation to future educational, employment and other opportunities.

VALS is concerned that under both the Victorian Police Information Release Policy[11] as well as the Draft Exposure Bill ('**the Draft Bill**'),[12] "non-convictions" are subject to the same rules as convictions, meaning that they will be released as part of an individual's criminal record unless the relevant waiting period has expired. We believe that this approach substantially reduces the benefits of

[6] Ibid., p. 44.
[7] *Spent Convictions Bill 2019*, Division 1.
[8] Ibid., Division 2.
[9] S. 3, Spent Convictions Bill 2019.
[10] *Sentencing Act 1991* (Vic), s. 8.
[11] Victorian Police, *Information Release Policy*, (revised May 2019).
[12] *Spent Conviction Bill* 2019, s. 3. The Draft Bill defines conviction as: 'a finding by a court that a person is guilty of an offence – (a) whether the offence is indictable or summary; and (b) whether or not a conviction is recorded by the court.'

discharge provisions and undermines the ability of the courts to express leniency in appropriate circumstances.[13]

In VALS experience, our clients are often confused and dismayed that, despite the fact that a judge ordered a non-conviction, a guilty finding later appears on their criminal record. For example, we have had clients who received a non-conviction and did not realise that this would appear on their criminal record until they were concluding tertiary education and trying to find a job. In many cases, the non-conviction has a significant impact on the ability of the individual to obtain employment, including because of challenges in obtaining a Working With Children Check ('**WWCC**').

Case Study: Jessica

Jessica is an Aboriginal woman from Gippsland area of Victoria. Through her childhood Jessica experienced many difficulties including witnessing and being subjected to significant family violence. She moved schools several times and eventually left school aged 16.

When Jessica was 17 she was diagnosed with depression. She began abusing drugs, including smoking marijuana, sniffing glue, and drinking alcohol heavily. With her group of friends, Jessica engaged in some immature behaviour and they got into minor trouble with police. Jessica received a fine with no conviction.

When she was 18, Jessica began a relationship with a young man who suffered from schizophrenia. On one occasion, Jessica's boyfriend got into a fight and injured someone on public transport. Jessica was not directly involved, but nevertheless she was charged. She was not convicted, and was given a good behaviour bond, which she complied with.

Not long after this incident, Jessica's boyfriend took his own life. Jessica was deeply traumatised and began to drink heavily. Shortly after her boyfriend's death, she was taken to hospital due to intoxication, and whilst there became aggressive and injured a hospital staff member. Jessica was charged. She pleaded guilty and received an undertaking by the Court with no conviction, which she complied with and the matter was dismissed.

Several years have now passed since these incidents took place. Jessica has completely moved past this period of her life. She is now the mother to a young family and is studying for an aged care and nursing qualification. Jessica acknowledges that her behaviour was illegal and immature at times. She also recognises that her circumstances, including childhood trauma, mental illness, the use of drugs and alcohol, and personal tragedy, contributed to this behaviour. Jessica does not think that these circumstances excuse her behaviour, but she does believe they help explain how she ended up in such situations during her life.

Jessica came to VALS seeking assistance to obtain a WWCC, a requirement of the practical training in her course. Given her criminal history, Jessica was required to explain the circumstances of her offending and why she should be granted a WWCC. Jessica's offences did not involve children.

[13] Fitzroy Legal Service (FLS) and Job Watch, *Criminal Records in Victoria: Proposals for Reform* (2005), p. 36.

They also occurred when she was a young person. She is now a mature adult who has established a healthy and productive life. She does not, and has never, engaged in conduct that make her a risk to children.

With VALS' assistance, she was able to obtain a WWCC, but the process of re-visiting her previous misconduct in detail was both shameful and upsetting for Jessica. She felt as though she was being re-punished for something that happened years ago that she had well and truly moved on from.

VALS acknowledges Jessica's bravery in going through the process above to obtain a WWCC and move forward with her education and employment. However, we would like to highlight that many community members may not feel so confident, and may decide to give up when it becomes apparent they will be required to provide written details of previous offences that occurred years prior, often in upsetting and traumatic contexts as described above in Jessica's case.

Because of the adverse consequences associated with a criminal record, we strongly encourage the Committee to ensure that non-convictions are automatically and immediately spent, as is the case under the *Criminal Records Act 1991* (NSW).[14]

Recommendation 1:	**The definition of conviction should align with Section 7 of the *Sentencing Act 1991 (Vic),* whereby a finding of guilt without recording a conviction is not considered to be a conviction.**
Recommendation 2:	**A finding of guilt without recording a conviction should be automatically and immediately spent. If the "non-conviction" sentence also includes conditions, the offence should be spent once the conditions are completed.**

1.2 Convictions capable of being spent

Under the Sentencing Act, a sentence can be given in order to punish, deter, denounce certain behaviour, rehabilitate the offender and protect the community. Whilst these are all legitimate reasons for ordering a particular sentence, VALS is of the view that, in most circumstances, once a sentence is complete, individuals should not have to suffer further punishment as a result of a criminal record.

In VALS' view, the threshold for which convictions are capable of being spent should be as broad as possible, to ensure that individuals are given every opportunity for rehabilitation. We believe that a Spent Convictions Scheme provides an incentive for rehabilitation and should be used as such. This is the case in the UK, where the threshold for which convictions are capable of being spent is set at 4 years imprisonment. We strongly encourage the Committee to look into this model further, and take

[14] *Criminal Records Act 1991* (NSW), s. 8(2).

the opportunity to set the benchmark in Australia for a scheme that is truly committed to rehabilitation.

At a very minimum, VALS is of the view that the scheme should follow what is already in place under the Victorian Police Policy (i.e. convictions with a sentence of imprisonment of less than 30 months imprisonment). This is also the approach taken in the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld)[15] and under the *Crimes Act 1914* (Cth).[16]

Additionally, VALS would like to underline that the threshold for whether a conviction is automatically spent, or capable of being spent subject to judicial discretion, must be determined by reference to the actual sentence imposed rather than the maximum possible sentence for the offence. For example, an individual could be convicted of the offence of threat to kill, which carries a maximum sentence of 10 years imprisonment, but where there are significant mitigating circumstances, the Court may only sentence the offender to a good behaviour bond.

Recommendation 3:	**Convictions for which a sentence of less than four years imprisonment is imposed, should become spent automatically. The eligibility limit for the Victorian Spent Convictions Scheme include terms of imprisonment and be based on the length of the imposed sentence rather than the maximum possible sentence.**

1.3 Exclusion of certain categories of offending

VALS does not support the exclusion of certain categories of offending from a spent convictions scheme, including a blanket exclusion in a legislated scheme (for example, for sexual offences). In our view, any such blanket exemption would be arbitrary and has the potential to undermine the rehabilitative intent of the scheme. We suggest that further consideration be given to whether existing laws (i.e. WWCC Act, Sex Offenders Registry) already provide sufficient protection to the community to safeguard against perceived risks. The following case study highlights the disproportionate impact that blanket exclusions for certain types of offences from a spent convictions scheme could lead to.

Case study: James

James had consensual sex on two occasions at the age of 17 with his girlfriend Shania, then aged 15. After James turned 18, they had consensual sex on two further occasions while Shania was still 15 years old. The relationship ended amicably, and they went their separate ways and did not see each other for many years.

James struggled with mental health and alcohol abuse in his early adulthood. In their mid-thirties, Shania and James reunited briefly. One evening James visited Shania whilst intoxicated. They were

[15] *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), s. 3(2).
[16] *Crimes Act 1914* (Cth), S. 85ZM(2)(b).

both drinking and talking, and both became intoxicated. James asked Shania to have sex with him. Shania refused and an altercation occurred, with assaults on both sides. Shania later reported this incident to the Police, and also reported the details of their consensual sexual relationship in their teenage years.

James was charged in relation to the recent incidents, as well as with a historical charge of sexual penetration of a child under the age of 16 years. He pleaded guilty and was convicted of the charges, and sentenced to seven months imprisonment for the sexual penetration of a child under 16 years. As a result of the historical charge, James was placed on the Sex Offenders Registry for a period of 15 years.

Shortly after being placed on the Sex Offenders Registry, James' young daughter was placed into his care by the Family Court. Because of his registration as a Sex Offender, James is unable to participate in the school and extracurricular activities with his daughter and her peers. He has struggled to find work and often chooses not to apply for jobs because of the shame of having to disclose his conviction.

James is in the process of applying to be removed from the Sex Offenders Registry through a narrow provision applying only to people who were aged 18 or 19 at the time of the offence, where the victim was a minor. However, even if James is removed from the Registry, he will still face discrimination in employment because of his criminal history.

Excluding sexual offences from the spent convictions scheme would prevent people like James from moving on with their life, gaining work and contributing to society. It would impact on many young people charged with these types of offences. Studies have found that recidivism for sexual offences are quite low compared to other types of crime and vary according to the offender (however, we note that sexual offences may also be underreported in comparison with other crimes).[17]

Along with the sex offenders' register, we also believe that a separate requirement that sexual offences and offences against children (even where they are spent) should be disclosed when applying for WWCC will provide additional protections to the community.

Legislating a blanket exclusion for certain types of offences is inconsistent with the aim of the Inquiry to ensure that the scheme operates in a 'fair and transparent manner', and VALS does not support such an approach.

Recommendation 4: The Spent Convictions Scheme should not include blanket exclusions for certain categories of offences.

1.4 Special circumstances

[17] See for example, S. Huang (Victoria Legal Aid), *Sexual Recidivism: what is known and what remains to be understood?* (November 2014) p. 2.

Regardless of the scope of a future legislated Spent Convictions Scheme, VALS strongly supports a mechanism whereby a conviction that falls outside the scope of the Scheme may still be eligible to become spent in special circumstances. We believe that the relevant forum to consider such applications is the Victorian Civil and Administrative Tribunal (VCAT), as discussed below.

In VALS' perspective, a blanket exclusion of some offences fundamentally undermines rehabilitation as an objective of the criminal justice system. Even in the case of convictions resulting in imprisonment for a period of more than 4 years, there will be some offenders who deserve a second chance and should not continue to be punished on a basis of a criminal record for the rest of their lives.

VALS notes that such an approach is included in the Draft Bill whereby an individual can apply for a conviction to be spent if the sentence imposed is greater than six months.[18] While we believe that the threshold for whether a conviction is capable of being spent should be higher, we support the discretion to order certain offences spent that is set out in the Draft Bill, including the relevant factors for consideration set out at cl 8(a)-(i) of the Bill.

Recommendation 5:	**Individuals convicted of offences that are not automatically spent, should be able to apply for their conviction to be spent on the basis of special circumstances, where it is in the interests of justice to do so.**

2. THE MECHANISM BY WHICH CONVICTIONS BECOME SPENT

2.1 Convictions to be automatically spent

We endorse the submission by the Criminal Records Discrimination Project that convictions should be spent automatically after the relevant waiting period, for the reasons they have set out.[19] In particular, we note the importance of reducing administrative and bureaucratic hurdles for Aboriginal people, and support the recommendation that a system should be in place to allow people to confirm whether a conviction has been spent.

Many VALS clients report they do not apply for jobs due to the shame of disclosing their criminal record to prospective employers, therefore a cost-free method for convictions becoming spent will alleviate this concern.

Recommendation 6:	**Convictions should become spent automatically after the relevant waiting period.**

[18] *Spent Convictions Bill 2019*, s. 8.
[19] Woor-Dungin, *Criminal Record Discrimination Project: Submission to Aboriginal Justice Forum 49 Swan Hill*, December 2017, p. 38.

2.2 Commencement of waiting periods

VALS' position is that waiting periods for conviction offences should commence from the date of conviction, not from the date that the sentence (custodial or otherwise) is completed.

Due to the complex processes and under-resourcing of the criminal justice system, there are already often lengthy delays between the date of offending and the date of sentencing, even for minor offences. If waiting periods were further extended to commence only at the conclusion of completion of sentences, then offenders could potentially be subject to extraordinarily long waiting periods before convictions become spent, which in effect becomes a form of extra-curial punishment.

VALS also considers it appropriate that this apply to offenders who are sentenced to a term of imprisonment. Prisoners are often in a volatile environment, and their behaviour whilst in prison is still capable of being subject to further criminal charges. Therefore, the commencement of waiting periods at the time of sentencing provides further incentives for offenders to behave as model prisoners, as their crime-free period within a prison environment will assist in reaching the required waiting period to have their convictions spent. This same justification applies to offenders sentenced to Community Corrections Orders which can remain in force for up to five years[20].

In light of the above, VALS' view is that the most appropriate time for commencement of the waiting period for conviction offences is the date of actual conviction.

Recommendation 7:	**Waiting periods should commence from the date of conviction, not from the end of the sentence (custodial or otherwise).**

2.3 Appropriate forum for special circumstances applications

As above at Recommendation 4, VALS supports a process whereby an individual who has been convicted of an offence that does not meet the criteria for being automatically spent (either because of the length of the sentence or the nature of the offence if certain offences are excluded from the Scheme) can apply for an order to have the conviction spent, similar to the process set out in section 8 of the Draft Bill.

In VALS' submission, the Victorian Civil and Administrative Tribunal (VCAT) is the appropriate forum for special circumstances applications to be heard, rather than the Supreme or County Courts as envisaged by the Draft Bill, for the following reasons:

- VCAT is a low-cost forum where parties do not need to be legally represented. Many applicants seeking to have their convictions spent will be doing so because they find it difficult to find

[20] Sentencing Advisory Council, *Community Correction Order*.

employment with a criminal record. It is important that any process to have convictions spent is accessible and affordable.

- VCAT is a less formal forum than the County or Supreme Court. The forms and paperwork in VCAT processes can generally be completed without the assistance of a legal professional. VCAT staff are trained to provide assistance to unrepresented parties.

- VCAT already has jurisdiction to hear appeals of negative assessment notices issued to applicants under the *Working With Children Act 2005* (Vic).[21] The *Working With Children Act* sets out criteria which VCAT must take into account when considering a Working with Children Check application,[22] which is similar to the criteria set out in section 8(2) of the Draft Bill.

- VCAT has more discretion in granting anonymisation orders or proceeding suppression orders than the County and Supreme Courts. Given the purpose of a Spent Convictions Scheme is to limit the disclosure of convictions, it is appropriate that applicants seeking to have their convictions spent are also able to make applications to have their personal identifying information kept confidential. Under the *Open Courts Act 2013* (Vic),[23] VCAT may make a proceeding suppression order for any reason in the 'interests of justice', a discretion which is much broader than the criteria for other courts of the state.

Case study: Georgina

Georgina suffered severe domestic violence from her now ex-partner as a young adult. The relationship ended when her ex-partner was arrested for assaulting her while she was pregnant with their child.

Georgina went on to do well as a single mother, but she was suffering PTSD as a result of the family violence and her mental health eventually worsened. She started abusing illicit drugs as a coping mechanism. During her worst moments, she made the difficult decision to place her daughter in her parents' care. She sought help for her mental health issues but was repeatedly turned away from mental health services due to a lack of beds and resources.

Desperate for help, over a period of two weeks Georgina repeatedly requested she be admitted as an inpatient at a psychiatric unit as she was not coping but was turned away due to a lack of beds. She was then briefly admitted but released the following day. The next day, she assaulted her then-partner during an argument whilst still affected by the prescription drugs she was given in hospital. She was charged and sentenced to a good behaviour bond for intentionally causing harm with no conviction recorded, as the Magistrate recognised that her offending stemmed from mental health and drug issues. This was the catalyst for her to finally receive the help she needed. She voluntarily spent several months in a residential rehabilitation facility, and on her release she enrolled in a course to become and Alcohol and Other Drugs Support Worker.

[21] *Working with Children Act* 2005 (Vic), s. 26.
[22] Ibid., ss. 26A – C.
[23] *Open Courts Act 2013* (Vic), s. 18(1)(f)(i).

In order to complete the practical elements of the course, she required a positive WWCC, however she was refused the check due to her criminal record. As a result, she had to forgo many work and study opportunities due to her criminal record and the fact she could not obtain a WWCC, which put her in a precarious financial position as the sole carer for her daughter.

Georgina appealed the negative WWCC to VCAT, and obtained representation from VALS to prepare for and appear at the hearing on her behalf. VCAT ultimately granted Georgina a positive WWCC after she presented strong evidence of her rehabilitation efforts and otherwise clean record. VCAT ordered that the decision regarding her WWCC appeal should be subject to a proceeding suppression order, meaning that none of Georgina's personal identifying information was published in the publicly available VCAT decision, in order to protect Georgina and her daughter and not harm her future prospects of employment.

As there is no spent convictions scheme in Victoria, the details of Georgina's criminal record may still be revealed to prospective employers, despite the fact that she holds a positive WWCC, and VCAT considered it appropriate to protect her identity in its decision.

Georgina's case study demonstrates the types and complexities of matters that VCAT is already equipped to deal with in respect to matters involving people with criminal histories seeking to work with vulnerable members of the community. Because of VCAT's simple application processes, Georgina was able to lodge her appeal to VCAT herself within the required time limit, and then seek assistance from VALS to prepare her case. Community legal services such as VALS can use their resources more effectively to assist more people when such proceedings are heard in VCAT.

Recommendation 8: Applications to have convictions become spent on the basis of special circumstances should be heard by Victorian Civil and Administrative Tribunal (VCAT).

3. CRIME-FREE PERIODS BEFORE A CONVICTION MAY BECOME SPENT

VALS notes that the Draft Bill provides for waiting periods of between three and ten years, including:

- 10 years for an indictable offence;
- 5 years for summary offences and findings of guilt without recording a conviction when the offender is ordered to pay a fine; and
- 3 years for children, including for findings of guilt where a conviction is not recorded and the child is ordered to pay a fine or give an undertaking, or the court places the child on probation or a youth supervision order.[24]

[24] *Spent Convictions Bill 2019*, Schedule 1.

While this is more progressive than the current approach under the Victorian Police Information Release Policy (which provides for 5 years for children and 10 years for adults), VALS is concerned that the proposed waiting periods are too long and have the potential to significantly undermine the chances of reintegrating back into society, thereby increasing the risk of recidivism.

In relation to adults, VALS is of the view that both 5- and 10-year periods are arbitrary and are not supported by an evidence base linked to the likelihood of reoffending. Research suggests that after being "crime-free" for six to seven years, the risk of future offending is relatively equal to a person with no criminal history.[25] We are also concerned that these periods are too long and do not reflect contemporary approaches to criminal justice and rehabilitation. This is particularly the case for Aboriginal people, given that life expectancy is significantly shorter for both male and female Aboriginal and Torres Strait Islander peoples.[26]

In relation to children and young people, VALS is concerned that the 3-year period proposed in the Draft Bill and the 5-year periods that exist in some jurisdictions in Australia are also too onerous. Data indicates that offending behaviour is most likely to occur between the ages of 16 and 17.[27] Waiting three or five years at this age can have a significant impact on future education and/or employment opportunities, as young people are particularly vulnerable to stigma and discrimination in employment settings and are also at a high risk of reoffending and becoming trapped in a cycle of offending behaviour.

Case study: Anna

Anna (not her real name) is an Aboriginal woman from Regional Victoria. DHHS were involved in her care from an early age, and she was subsequently placed in the care of relatives. At 11 years old, Anna was removed from her family by DHHS and placed in residential care. Prior to this, she had no involvement with police.

Over the following 4-year period, Anna was moved about 36 times, between respite care, foster care and secure welfare. Following her placement in care, she was not only removed from her family, friends, and school, but also deprived access to counselling and medication. As a result, Anna's mental health deteriorated, and she commenced self-harming.

During this time, Anna was charged with numerous offences which occurred in the care setting. Unfortunately, the institutional response was often harsher than the discipline that most children experience in the home, at age when they experiment with their behaviour and learn boundaries. For example, as a teenager our client vented her frustration at a much larger and physically

[25] M. Kurlychek, R. Brame and S. Bushway, 'Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement' (2007) 53(1) *Crime and Delinquency* 64; Megan C Kurlychek, Robert Brame and Shawn D Bushway, 'Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?' (2006) 5(3) *Criminology & Public Policy* 483, as cited in Fitzroy Legal Service, *Submission to the Legal and Social Issues Committee in Support of Spent Convictions Legislation*, July 2019.

[26] For Aboriginal and Torres Strait Islander males born between 2005-2007, life expectancy is 11.4 years lower than that of non-Aboriginal males and 9.6 years lower for Aboriginal females born during this period. See Australian Institute of Health and Welfare, Deaths in Australia (June 2018).

[27] P. Armytage and Prof. J. Ogloff, *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending (Executive Summary)* July 2017, p. 8.

powerful male support worker by yelling "I'm going f***ing kill you." She was subsequently charged with making a threat to kill, a very serious charge which carries a 10-year maximum sentence.

These incidents, which included verbal outbursts, minor property damage, and minor physical altercations involving adult staff, were often required to be reported to police, where staff may have personally preferred to deal with matters internally. In addition, Anna's inexperience meant she would often plead guilty to offences she did not think she had committed, often on the advice of lawyers she did not have strong relationships with.

After 4 years in care, Anna was diagnosed with adjustment disorder and depressed mood, and prescribed anti-depressants. She subsequently exited from out-of-home care and into a Lead Tenancy Program. Since leaving care, Anna has had no further involvement with police. She completed VCAL whilst working two jobs to make ends meet, and was offered a scholarship to complete a Diploma.

Anna intends to pursue a career supporting vulnerable Indigenous youth, however her offending history impacted her ability to obtain a WWCC. Ultimately, with the assistance of VALS, our client was granted her WWCC, allowing her to continue her studies.

Anna's most recent sentence was handed down when she was 16, for a minor physical altercation with an adult staff member at her care home aged 15. Although our client was never convicted for any of her offending, under Victoria Police's current criminal records police, all of her prior findings of guilt will be released until late-2022 when she will be 21 years old.

Even with a WWCC, Anna will likely face further significant hurdles when applying for professional accreditation, and also in seeking employment following her studies given that her criminal history will be disclosed to potential employers for years to come.

We submit that any legislated waiting period should be the minimum period to meet the objectives of the scheme and should be determined based on evidence of recidivism and rehabilitation. We strongly encourage the Committee to consider a graduated model which would allow for more flexibility. For example, the UK model includes waiting periods of two to seven years depending on the length of the prison sentence, and the waiting time for children is half the period for adults.[28]

Recommendation 9:	**A waiting period of 10 years is arbitrary and onerous. The legislated Spent Convictions Scheme should adopt a graduated model, whereby the waiting period is determined with reference to the length of the sentence imposed and the person's age.**

[28] *Rehabilitation of Offenders Act 1974* (United Kingdom), s. 5.

Recommendation 10:	**The same waiting period should apply for both children and young people to align with Victoria's dual-track system.**

4. THE EFFECT OF SUBSEQUENT CONVICTIONS DURING THE CRIME-FREE PERIOD

In the majority of Spent Convictions Schemes, the "crime-free" period restarts if the individual commits another offence. While VALS acknowledges and supports the policy reasons for this aspect of a Spent Convictions Scheme, we strongly encourage the Committee to consider the discriminatory impact for Aboriginal people if the threshold for restarting the waiting period is set too low.

In the Draft Bill, the waiting period will re-start if an individual commits an offence that is not a minor offence.[29] Minor offence is defined as an offence where, on conviction, the offender is discharged without penalty or the only penalty imposed (disregarding the loss of any demerit points) is a fine not exceeding $500 or an undertaking, so long as the payment that the offender undertakes to pay does not exceed $500.[30] In the case of children, minor offence also includes an offence for which the young person is convicted and placed on a probation order or a youth justice supervision order.[31]

While VALS acknowledges that under the Draft Bill the waiting period only restarts if the person is convicted (i.e. an infringement offence or a finding of guilt without recording a conviction will not restart the waiting period), we are concerned that the threshold of a $500 fine is too low and that this will have a discriminatory impact on Aboriginal peoples. For example, a conviction for low-level offences such as public nuisance crimes (drunk in public, drunk and disorderly, begging, obstruction of footpaths obscene language) or survival crimes such as low-level shop lifting would restart the waiting period.

The evidence is clear in demonstrating that Aboriginal people are over-policed as offenders and are disproportionality targeted, charged and convicted of low-level crimes.[32] Accordingly, we support the recommendation of Fitzroy Legal Service that the definition of "minor offence" under the Draft Bill should be much broader and any definition should be consistent with a framework for this scheme that centres on fairness and rehabilitation.

Recommendation 11:	**For the purposes of the waiting period, the definition of "minor offence" should be much broader and any definition should be consistent with a framework for this scheme that centres on fairness and rehabilitation.**

[29] *Spent Convictions Bill 2019*, s. 5.
[30] Spent Convictions Bill 2019, s. 3.
[31] Ibid.
[32] For a recent summary of research on over-policing of Aboriginal peoples, see The Law Council, *The Justice Project: Final Report – Part I (Aboriginal and Torres Strait Islander Peoples*), pp. 65-70.

5. THE CONSEQUENCES OF A CONVICTION BECOMING SPENT

Under the Draft Bill, the effect of a conviction becoming spent is:

- The person is not required to disclose information about the spent conviction to any person
- The conviction is not included in the person's criminal history
- The conviction is not relevant in relation to a person's character or fitness (however expressed).[33]

VALS supports this approach. We note that the Committee may wish to further consider whether exceptions should apply for particular professions, however any such exceptions would need to be consistent with the *Equal Opportunity Act 2010* (Vic) which we believe should be amended to prevent discrimination in employment on the basis of irrelevant criminal records.

Recommendation 12:	**The effect of a spent conviction should be that a person is regarded and treated as though they have not committed, been charged with, prosecuted for, convicted of, nor sentenced for that charge. As such:** ▪ **they are not required to disclose that spent conviction;** ▪ **questions of a person's criminal history shall not include that spent conviction; and** ▪ **questions of character or fitness shall not permit reference or consideration of that spent conviction.**

6. OFFENCES AND PENALTIES FOR NON-COMPLIANCE WITH THE SCHEME

The Draft Bill provides for the following offences: unlawful disclosure (50 penalty points); improperly obtaining information (50 penalty units); threat to disclose information (50 penalty units); taking into account a spent conviction for purposes not authorised under the Act (50 penalty units) and requiring a person to disclose a spent conviction as a condition of a contract or agreement (50 penalty units).[34]

The approach in the Draft Bill is in line with other jurisdictions in Australia which all include offences and penalties for non-compliance, ranging from 40 penalty units (NT) through to maximum of $10,000 fine (SA) or 100 penalty units (QLD).

In order to ensure that the Scheme is effective, it is essential to include offences and penalties for non-compliance. VALS recommends that the penalty provisions should be sufficiently wide to cover media outlets who might otherwise be tempted to maliciously publish news stories containing details of spent convictions. VALS notes that the current penalty of 50 penalty units may not be high

[33] *Spent Convictions Bill 2019*, s. 10.
[34] Ibid., ss. 11 – 13.

enough to deter larger media outlets or corporations from publishing details of spent convictions where they consider the risk is outweighed by the potential for bold headlines and notoriety.

VALS recommends further consideration be given to deterring individuals from publishing information on their social media accounts about the spent convictions other people, given the huge detriment to a person's reputation and employment that can occur when such information can be rapidly re-published and shared on social media.

Recommendation 13:	**The legislated Spent Convictions Scheme should designate the following offences:** ▪ **unlawful disclosures;** ▪ **improperly obtaining information;** ▪ **threat to disclose information;** ▪ **taking into account a spent conviction for purposes not authorised;** ▪ **requiring a person to disclose a spent conviction as a condition of a contract or agreement.**
Recommendation 14:	**Penalties for offences should apply to public entities, media outlets and individuals, and be sufficiently high to ensure the desired deterrent effect.**

7. INTERACTION BETWEEN A VICTORIAN SCHEME AND OTHER JURISDICTIONS

We support the approach in the Draft Bill at section 6 regarding cross-jurisdictional convictions.

Recommendation 15:	**Cross-jurisdictional convictions should be capable of becoming spent where they meet the threshold under the Victorian Scheme, or if they already qualify under the Scheme in the relevant jurisdiction.**

9. THE INTERACTION BETWEEN ANY PROPOSED SCHEME AND OTHER LEGISLATION

9.1 Proposal for reforms to the Equal Opportunity Act 2010 (Vic) to prevent discrimination on the basis of criminal records

VALS strongly endorses the recommendations from the Criminal Records Discrimination Project regarding amendment of the *Equal Opportunity Act 2010* (Vic) ('**the EOA**').[35]

[35] Woor-Dungin, *Criminal Record Discrimination Project: Submission to Aboriginal Justice Forum 49 Swan Hill*, December 2017, Recommendations 9 and 10, p. 39-40.

We note and commend the detailed community consultation carried out by Woor Dungin with Aboriginal communities across Victoria with respect to the effects of discrimination on the basis of criminal records and the proposed reforms. As demonstrated by the case studies detailed in VALS' submission, the Civil Law and Human Rights Division of VALS regularly assists clients who experience discrimination and the impact of criminal records across all aspects of their lives, in particular the impact on kinship care and employment.

Recommendation 16:	**The *Equal Opportunity Act 2010* (Vic) should be amended to prohibit discrimination on the basis of an irrelevant criminal record and spent conviction. The protections under the Act should cover employment, education and learning, housing, buying things, access to services and public places, being a member of a club or association and government programs.**
Recommendation 18:	**There should be limited exceptions to the proposed anti-discrimination protections. These exceptions would make it lawful to discriminate against someone with a criminal record in the context of employment only if:** ▪ **The person's criminal record would make it impossible for them to fulfil the inherent requirements of the work; or** ▪ **The employment involved working with vulnerable persons, including children, elderly people, people with physical or intellectual disabilities or mental illness.** **A balanced approach is required to address these issues and exceptions should be carefully drafted. The risk posed by a kinship carer with a criminal record needs to be appropriately weighted, and balanced with the significant risk to a child of growing up without an Aboriginal family.**

9.2 Proposal for reforms to the *Assisted Reproductive Treatment Act 2008* (Vic)

The *Assisted Reproductive Treatment Act 2008* (Vic) includes a presumption against treatment where a criminal record check shows that a person has had charges proven against them for specified sexual and violent offences.[36] This decision can be reviewed by an application to the Patient Review Panel.[37] When deciding on an application for the review the Patient Review Panel must consider the guiding principles set out in section 5 of the Act, along with whether the treatment procedure would

[36] Assisted Reproductive Treatment Act 2008 (Vic), s. 14.
[37] Ibid., s 15(1)(a).

be for a therapeutic goal and is consistent with the best interests of a child who would be born as a result of the treatment procedure.[38]

We recommend, that similarly to the WWCC scheme, that spent convictions should not disclosed for the purposes of this application, except for the sexual and violent offences which are referred to in section 14(1)(a), which trigger the presumption against treatment.

We also note that consideration should be given to amending section 15 (3) to state that the Patient Review Panel should take into the account the fact that the convictions have been spent. In addition, an amendment could be made to the guiding principles in section 5(e) to state that persons seeking to undergo treatment procedures must not be discriminated against on the basis of their criminal record (as part of the amendments to the *Equal Opportunity Act 2010* (Vic).

Recommendation 17:	**Further consideration of the presumptions against treatment and the guiding principles of the *Assisted Reproductive Treatment Act 2008* (Vic) is warranted, to ensure discrimination on the basis of an irrelevant criminal record or spent conviction does not occur.**

9.3 Proposal for reforms to the Working With Children Check Scheme

The **WWCC** scheme is an important aspect of Victoria's Child Protection framework. The purpose of the scheme is to '[protect] children from sexual or physical harm by ensuring that people who work with, or care for, them are subject to a screening process.'[39] The paramount consideration when deciding whether a person should be granted a WWCC and for any other decision in respect of the scheme is 'the protection of children from sexual and physical harm.'[40]

In VALS' experience, more and more employers and educational institutions are insisting that employees and students obtain WWCCs, including when the relevant employment or study will not involve any direct interaction with children. As some of the case studies above have highlighted, this can create significant issues for people with criminal history, by preventing them from moving forward with their education or employment, due to the shame and difficulty of re-visiting past offending and the traumatic circumstances that often surround this offending.

Notably, when deciding whether to grant a positive WWCC, the WWCC unit within the Department of Justice can consider a person's entire criminal history, including all convictions, findings of guilt and charges (concluded, pending or withdrawn) from all periods in the applicant's life.[41] To this end, the WWCC unit is empowered to obtain a police record check on the applicant and to make enquiries with other agencies and non-governmental bodies.[42]

[38] Ibid., s 15(3).
[39] *Working with Children Act 2005*, s 1(1).
[40] Ibid, s 1A.
[41] See, for example, Ibid., ss 12-14.
[42] Ibid., s 11.

The proposed Spent Conviction Scheme has direct implications for the WWCC scheme. The Spent Convictions Scheme recognises that a person's past conduct should not follow them throughout their lives except in certain circumstances. It also recognises that after the appropriate time period has passed for particular offending in which a person has not offended, the person's criminal history is not an accurate indication of whether they will, or are likely to, engage in further criminal behaviour. To implement these objectives, the Spent Convictions Scheme will restrict the information that appears on a person's criminal history and, consequently, on a person's police record check.

To ensure the objectives of the proposed Spent Convictions Scheme are met, VALS recommends that the WWCC legislation also be amended, to ensure that information provided to the WWCC unit as part of its assessment process does not include spent convictions, other than in relation to certain offences involving children.

If information about irrelevant spent criminal records is released to the WWCC unit, in our view the WWCC unit should be required to disregard such information when deciding whether a person should be granted a WWCC.

If it is decided that further information about a person's irrelevant spent convictions should be released to the WWCC unit, such decision should only be based on evidence that demonstrates that a person with that specific criminal history is more likely to pose a risk of sexual or physical harm to children.

Recommendation 18:	**Information disclosed to the Working With Children Check unit, whether as a police record check or from any other source, should not include criminal records that are spent under the proposed Spent Convictions Scheme, subject to exceptions:** ▪ **in which the person against whom the offence was committed, or was alleged to have been committed, was a child; or** ▪ **where the relevant offence is a sexual offence.**