

Artwork: 'Ulupna Wanala (Home in Spring)' by Renee Gray

## Rethinking Criminal Record Checks

# Review of the *Spent Convictions Act 2021* Submission

27 September 2023

## Acknowledgement

RMIT University acknowledges the people of the Woi wurrung and Boon wurrung language groups of the Eastern Kulin Nation on whose unceded lands we conduct the business of the University. We acknowledge their Elders past and present, as well as the ongoing strength of the world's oldest continuing and living culture. Always was, always will be.

We acknowledge the devastating and ongoing impacts of colonisation on Aboriginal communities, impacts which have a direct and continuing relationship with the vastly disproportionate rate at which Aboriginal people have contact with the criminal justice system, as well as their experiences of racism and discrimination once this contact occurs. We acknowledge the ongoing strength, resilience and leadership of Aboriginal communities in striving to address inequalities and improve justice, health and social outcomes for Aboriginal people.

## Background Information

The Rethinking Criminal Record Checks (RCRC) project was established at RMIT University in partnership with Woor-Dungin, the Victorian Aboriginal Community Controlled Health Organisation Inc. (VACCHO) and Winda-Mara Aboriginal Corporation, and is funded by the Victorian Legal Services Board.

The RCRC project builds on the Criminal Record Discrimination Project (CRDP), a project initiated by Aboriginal organisations associated with Woor-Dungin in 2016. The CRDP had an important advocacy role and was influential in the Victorian Government's commitment in February 2020 to introduce a legislated spent convictions scheme reflected in the *Spent Convictions Act 2021* (Vic).

## Scope of this submission

The CRPD submission to the Aboriginal Justice Forum in 2017, endorsed by the Aboriginal Justice Caucus and over 50 organisations and individuals, reflects the aspirations of the community for a legislated spent convictions scheme, and protection from discrimination on the basis of old and irrelevant criminal history. A copy of that submission is available at <https://cij.org.au/research-projects/criminal-record-discrimination-project-submission/>

We note that the Discussion Paper includes 22 topics for discussion and raises a range of issues with the operation of the Act. Many of these are of great significance to those who have contributed to this work, particularly topics that relate to factors and processes relevant to Aboriginal people, such as section 19(2)(d) of the *Spent Convictions Act 2021*. However, it has not been possible in the time provided to enable



consultation and coordination with partner organisations to establish a position or specific recommendations on each of these topics.

For these reasons, the scope of this submission is limited to identifying the findings of the research conducted by the Rethinking Criminal Record Checks Project relevant to the terms of reference for the review. While these findings summarise and highlight what we heard from those who participated in interviews, they do not represent a position in response to the topics for discussion.

It is hoped that further feedback on the additional topics will be provided in consultation with partner organisations as part of the review process and we would welcome the opportunity to discuss consultation approaches that align with the statutory review process.

## The Rethinking Criminal Record Checks project

The RCRC project is an investigation of the significant impact that criminal record checks are having on Aboriginal communities, organisations and individuals who are seeking employment. The use of criminal records as a risk assessment tool by employers in assessing the suitability of applicants for employment can further exacerbate the disadvantage and discrimination already experienced by Aboriginal people.

The project aims to improve employment opportunities for Aboriginal people and to assist employers in the recruitment of Aboriginal people by gathering information from a range of stakeholders with experience in employing or supporting the employment of Aboriginal people.

We have carried out research interviews with government employers, Aboriginal organisations, Aboriginal employment agencies, Aboriginal ex-offender welfare organisations and interest groups to ascertain their experiences in employing Aboriginal people with a criminal record in order to identify opportunities which may assist in increasing the employment success of Aboriginal people.

## Response to terms of reference

Several interviewees referred specifically to the *Spent Convictions Act 2021*. While the introduction of the legislation is considered to be a significant step forward, directions for improvement and clarification were also raised by those we spoke to.

Observations made by these interviewees are discussed below as relevant to the current review of the *Spent Convictions Act 2021* into:

- whether the Act is meeting its stated objectives
- any challenges in the implementation of the Act
- any unintended outcomes of the Act's operation.

We have structured this submission in relation to the terms of reference for the review. We have also highlighted discussion paper topics where relevant.

- 1. Review the Act and identify options for reforms necessary to ensure the Act is meeting its stated objectives, considering:**
  - a. the accessibility of the spent conviction order application and determination processes for cohorts who are overrepresented in the criminal justice system or who are disproportionately impacted by the justice system, including Aboriginal people.**

There was strong view amongst interviewees that while the *Spent Convictions Act 2021* was a significant step forward, aspects of its implementation were inadequate. The introduction of the legislation was not accompanied by an adequate level of awareness-raising or public information about its existence, including explanations about how it functioned, what was included or excluded from consideration, and how determinations about whether a conviction was 'spent' were made.

It was also observed that there was a failure to ensure that community-specific and culturally appropriate legal education in relation to the application of the *Spent Convictions Act 2021* was disseminated. This included education about the process required to have a conviction spent and to have a spent conviction order granted through the Magistrates' Court of Victoria. It was also noted that if Aboriginal organisations are unaware of the process of seeking an order to have a conviction spent, they are not in a position to assist in the application



process through the Magistrates' Court, a process which could be considered onerous and lacking in clarity and transparency.

The following quotes from interviews illustrate the need to ensure that clear information about the process is disseminated to all overrepresented cohorts, specifically Aboriginal people:

*"We get a reasonable amount of questions about spent convictions, and some of that is for clients who have become aware of this spent conviction regime. I would put it as the regime that's got a degree of community awareness, not a high level of awareness, but it is something we are receiving questions about"* (RCRCINTAE02 – **Aboriginal Employer**).

*"... we have had clients and community express interest in the delivery of community legal education around the spent conviction regime CLE in a way that's successful to community. We've delivered CLE often to ACCHOs, to service providers, but it's been very difficult for us to, through the forms of CLE that community are most comfortable with, which is us turning up to ACCHOs in person, chatting to clients, just delivering that in a structured and semi-structured way. It's definitely something we will be doing, and there's a lot of interest and desire to do it"* (RCRCINTAE06 – **Aboriginal Employer**).

*"so obviously we need some guidelines, given the state scenario has changed, so that would be really helpful"* (RCRCINTEXW04 – **Ex-offender Welfare Organisation**).

Overall, there was concern that job applicants were at risk of self-excluding because they did not know how to navigate the spent convictions and other schemes:

*" 'Must pass working with children check and national police check', there's a certain percentage of the community who'll just go, 'Well I'm not going to put in for it.' Now the thing is, this is where the kind of curiosity around spent convictions comes in, is how many of those are spent convictions and they could've? How many of those [convictions] .... wouldn't even be a blip on the radar? So, we are effectively limiting a pool of applicants because of those requirements on paper without people having a better understanding of what that might mean."* (RCRCINTAE02 – **Aboriginal Employer**)

## **2. In conducting the review, consideration will be given to:**

### **a. whether the scope of the Act remains appropriate, including the definition of 'serious violence offence' and other relevant definitions.**

The arbitrary nature of the statutory 'conviction period' (waiting period) of five years for young people and ten years for adults, before a conviction can be considered spent, was seen to be problematic. Interviewees felt that the waiting period fails to adequately address and respond to the exclusion experienced by groups overrepresented in the criminal justice system, who already suffer economically and experience disadvantage and stigmatisation.

The following quotes from interviews conducted as part of the research indicate that a review is needed in relation to defining the waiting periods under the *Spent Convictions Act 2021*:

*"I'd like that Spent Convictions be five years, to be honest. You know, when you look at, like I said, those young community coming through, you know, there's such a disadvantage for Aboriginal people and Aboriginal job seekers in that employment space and, you know, when we have 35-year-olds wanting to go for a traineeship, you know, they're 10 years behind a lot of other non-Aboriginal people going for traineeships and that whole economic space and, you know, that disadvantage gap is widening in some places. So particularly for young candidates, you know, I'd love to see that kind of five-year mark, or even three-to-five-year mark of, you know, not being a no straight away"* (RCRCINTEMA01 – **Employment Agency**).

*"I would love to see a more flexible spent convictions scheme. I think 10 years is too long. Practically, for a lot of people, that will mean being out of prison, being unemployed for 10 years. That's ridiculous. And I think legislative*



*protections for people would be enormously helpful. But I think the general tone of it is that hard and fast rules will be a problem, and that 10 years is far too long” (RCRCINTEXW02 – Ex-offender Welfare Organisation).*

*“One element is that the legislation itself is onerous, but I suppose when we made that recommendation, we also suggested the scheme adopt a graduated model, where waiting period is determined with reference to the length of the sentence imposed, and the person’s age” (RCRCINTAE06 – Aboriginal Employer).*

#### **b. opportunities to improve the efficiency, accessibility and transparency of application processes under the Act.**

Interviews with Aboriginal organisations, employment agencies and employers raised the issue that the process of having a spent conviction order granted under Division 2 of the legislation lacks clarity, transparency and accessibility. It is clear that there is limited understanding as to how the process functions, how a spent conviction order is to be achieved and what is needed to have an order granted.

This is reflected in the limited number of applications to the Magistrates’ Court requesting such an order to be granted that have been successful, as identified within the discussion paper in topics 9 and 10.

It is also evident that the complexity of the process and numerous steps required means an application is difficult or impossible without legal representation or external support. Given the disadvantages Aboriginal people face, this places the process and successful outcomes out of reach for many members of the community that this scheme was intended to assist, as clearly expressed in the discussion paper topic 9 and 10.

The following quote points out that a review is needed in relation to how information about the process is disseminated and knowledge gained. Simplification is needed both for Aboriginal people seeking employment and for employers.

In relation to when a more serious offence can be spent, it was noted:

*“I suppose for us, part of the solution is thinking about how the Spent Convictions Act may operate and assist those clients. But there’s clearly also an educational piece that ought to accompany the introduction of the Spent Conviction regime, which is that the regime is introduced, and ought to be stressed to employers who are thinking, who may be inclined to discriminate against people on the basis of an irrelevant historic conviction, that this is actually about allowing people to have a second chance. I think I’d be keen to see a really strong educational piece going out to employers from the Victorian government accompanying the introduction of the substantive part of the regime, as I see it, which is that serious offence element able to be waived through an application to the Magistrates Court” (RCRCINTAE06 – Aboriginal Employer).*

#### **e. other issues that arise in relation to the operation of the Act.**

A number of interviewees highlighted the issue that the *Spent Convictions Act 2021* does not affect or restrict the requirements of the *Working with Children Check Act*. The requirement for a Working With Children Check, in most employment settings, can render the *Spent Convictions Act 2021* inoperable or irrelevant. Interviewees said that the *Spent Convictions Act 2021* needs to be incorporated into other checks that are used for employment purposes, if the aims and intentions of the Act are to be achieved, this was clearly identified as a concern in the discussion paper, topics 20-22.

The following quotes emphasise that practical changes are needed in relation to the application of the *Spent Convictions Act 2021* to the reports released through a Working With Children Check, especially for Aboriginal people:

*“Working with Children check...go way beyond 10 years, there’s no intersect between the Spent Convictions and a Working with Children check...standard employer, they’re not even going to be making [enquiries into] those checks. My HR team weren’t making those [enquiries], this is just me from the top driving my*



complaints into the Working with Children guys, but they're just not honouring the whole Spent Convictions process" (RCRCINTAE05 – **Aboriginal Employer**).

*"My biggest concern the fact that we've got Spent Convictions, so we've actually got legislation that has passed in that space, yet it's not applied properly in either the police check, because you see the older offending there and people don't understand the Spent Conviction regime and just go, 'Oh, that's offending you're out,' and then the Working with Children check totally ignores the Spent Conviction regime. The legislation itself, even though it's just come in, needs to be reviewed to make a consistent application across the board, and when you hit a Working with Children check, to actually have for certain offences over 10 years that might trigger the questions on that"* (RCRCINTAE05 – **Aboriginal Employer**).

*"introduce something called a Spent Convictions regime, but if you don't consistently apply it across all of your legislative applications and statutory applications, then it's a useless piece of legislation to put in, because you're only paying lip service to it to shut the advocates for it up. You should be actually delivering real outcomes to people because the National Police check might not say it anymore if the legislation's been applied properly but ping, there it goes on the Working with Children check and the employer goes, 'What the hell's this?'"* (RCRCINTAE05 – **Aboriginal Employer**).

## Conclusion

It is an important finding from this project that while the *Spent Convictions Act 2021* is strongly supported by Aboriginal people, the practical application and functioning of the Act needs to be improved if it is to achieve its aims and make substantial differences in the lives of the people it was enacted to assist.

Priority issues relevant to the present review are (a) need for more clarity, transparency and accessibility in the processes, and (b) the intersection of the *Spent Convictions Act 2021* with the Working With Children Check laws (and other) assessment schemes to ensure the aims of the Act are not undermined.

The RCRC project aims to address some of these issues by drawing on this research to work with community members and employers to develop culturally appropriate and useful resources to reduce barriers to employment for Aboriginal people with criminal history.

However, it is also clear that far more resources are required, including support from government to improve awareness of the Act. As recommended by the Parliamentary Inquiry that preceded the legislation, the Act should be accompanied by appropriate education and legal advice and support so that community members can understand how the Act could benefit them, and practical support to enable them to access procedurally complex spent conviction application processes.

## Submission authors

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## RCRC project team

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## RCRC partner organisations

Woor-Dungin, VACCHO, Winda-Mara, RMIT University (Centre for Innovative Justice, Graduate School of Business and Law, School of Global, Urban and Social Studies).