

TRANSCRIPT

LEGISLATIVE COUNCIL LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into a legislated spent convictions scheme

Melbourne—Wednesday, 29 May 2019

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WITNESS

Mr Varuna Weerasekera, Group Manager, Records Services Division, Public Support Services Department, Victoria Police.

The CHAIR: Thank you so much for making yourself available—I appreciate the short notice as well—for this evening. Just to explain a little bit about this, the committee is hearing evidence today in relation to our inquiry into a legislative spent convictions scheme. All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Legislative Council standing orders. Therefore the information you give today is protected by law. However, any comments repeated outside the hearing may not be protected. Any deliberately false evidence or misleading of the committee may be considered a contempt of Parliament. All evidence is being recorded. You will be provided with a proof version of the transcript in the next few days. Transcripts will ultimately be made public and posted on the committee’s website. We have allowed some time for your submission, but I think the question time is really valuable, so if you could keep your contribution fairly brief, thank you.

Mr WEERASEKERA: Certainly. Thank you, Chair. Let me just very briefly introduce myself—my name is Varuna Weerasekera. I am the group manager of the record services division of Victoria Police. Within our division we have all the responsibility for processing the application for police record checks received by the public. We also process the applications or the release of Victorian police records pertaining to interstate and other police agency applications—so that is the Victorian release of police records, if you like—as part of the national police checking service.

In terms of—just very briefly, if I may—Victoria Police’s position, and we have commented on this position previously, we certainly provide in-principle support for legislation, and we also believe it may increase the level of clarity in terms of the information release. We also note that we happen to be the primary provider of police record checks and that information in Victoria, so any changes to the process will have quite a direct impact on Victoria Police and our ability to transition to the new model. So in terms of any proposed legislation, we have not had the opportunity to form the organisational position at this stage, but we are certainly keen to provide a written submission to the committee for consideration.

So the material I am prepared to sort of share and present is primarily based on our current policy and the process. Because it is ultimately a national service in terms of the national police checking, I have a fair understanding of what the other spent conviction schemes look like. I have a close relationship with interstate police partners who also provide this service to the community, so I will be able to certainly draw on that experience for any questions. I am probably not going to be in a position to provide comment around the Victoria Police formal position around certain aspects of any potential proposed legislation, but I can certainly talk to how the mechanics of some of the other spent convictions work.

It is important to note, and we certainly deal with this on a daily basis, making sure that the Victorian process and the policy has some national application, because ultimately the same applicant may enter the channel of getting a police check through Victoria and New South Wales tomorrow and so forth, so we want to, where possible, provide that consistency in the release. So our current policy—and again, yes, it is not legislation—has its own spent conviction provisions and there are certain things that we cannot release and we will not release as part of the policy and the process. So that is a very short introduction, if I may. Very briefly, I understand that some material has been provided to the panel.

The CHAIR: It has been. Certainly your policy papers.

Mr WEERASEKERA: Chair, would you like me to give a brief overview of some of that material? I am happy to be guided by the committee.

The CHAIR: We do have it in front of us, so I appreciate that. I think from my perspective, and certainly understanding that you work with other jurisdictions and would be very aware of all of the other jurisdictions’ work, in working with those, have any problems arisen that you would like to see us avoid in going down the path of spent convictions? Have there been difficulties in other jurisdictions that you know of?

Mr WEERASEKERA: Certainly. Thank you for the question. In the current national landscape, yes, Victoria is the only jurisdiction without a spent conviction, but Victoria happens to be only one of three jurisdictions, including South Australia and WA, that has mutual recognition within our process. So that is quite important for us to get that national consistency, because applicants may request the police check from any jurisdiction. We are seeing this a lot, especially in the working with children sector, people operating from multiple jurisdictions. So we want to keep that as a standard process for the applicant and then the administrative burden that goes with that. So that is one area for us to perhaps focus on.

There is the other area around the definition of conviction. As the previous presenters highlighted, the court may have a certain view as to what a non-conviction may mean, but we know when we look at the current national schemes the majority of the jurisdictions currently have a minimum threshold for the definition of a conviction. It is a finding of guilt. So if the matter is proven, whether it is with or without a conviction, that is contained within the definition of the scheme, and that is consistent for the majority of the jurisdictions. That creates a confusion for, in this case, the person getting that non-conviction, if you like, and then seeing that on a police check. I perfectly understand that concern. So some sort of public awareness and education is certainly required. I can say it is not unique to Victoria. We see this in other jurisdictions, and nationally. So the individual's understanding of what does the non-conviction mean on the day versus what it may mean when they go through the working with children check or getting their teacher registration, there is a gap in their understanding.

Probably the other focus is: policing agencies currently administer this process nationally, so we are working with eight different jurisdictions—with eight different courts, eight different police agencies—with potentially 16 different systems, and trying to do that nationally using one single source of truth. So that is the sort of complexity that we are talking about. In terms of the application of the spent conviction scheme, we need to be mindful that there is a certain system capacity and capability, whether it is the courts being able to capture the data in a way that can be used and provided to the applicant on a police check. So that is certainly something to be mindful of.

Probably the last point is around how convictions should be processed within the meaning of a spent conviction. Should they be automatically spent at the end of the potential crime-free period or the prescribed period or should that be through an application to the court? Again, from our research, in the majority of the jurisdictions nationally an automatic spent conviction process is what is being applied. So it takes away that administrative burden on the courts and the individuals. But getting the balance is probably what we need to focus on there.

Dr KIEU: Thank you for the information. This information is publicly available and there is not a legislated procedure here for the release of information by VicPol. You also mentioned that VicPol does not have any formal position. So is VicPol intending to give a submission to help us with the formation of the legislation? And, given the time frame for the inquiry, what do you think of the time frame that you may have in mind?

Mr WEERASEKERA: Certainly we are aware of the due dates and the internal consultation process has already commenced. We are certainly keen to provide a written submission. In the submission we will certainly draw on all the previous work and the draft bill and the submissions by other agencies. We will certainly also provide some context around the national convictions scheme that is out there, so hopefully the committee can get the view around what should the Victorian scheme look like in comparison to the national schemes already in operation.

Mr O'DONOHUE: Thanks very much for being here tonight and for your submission and evidence. I am just interested. We do not have a spent convictions scheme in Victoria, but Victoria Police has come up with a policy which, de facto, implements in some circumstances a spent convictions scheme. First of all, how did VicPol come to determine that the 30-month threshold, for example, was the correct threshold and what is the legislative basis of this policy?

Mr WEERASEKERA: Thank you for the question. So in terms of the Victorian policy, it is largely based on the commonwealth's spent convictions scheme.

Mr O'DONOHUE: But that has a legislative basis.

Mr WEERASEKERA: Yes. So many years ago, before my time, that is how the policy was, because we looked to what is the legislative basis for Victoria, and at the time South Australia did not have the legislation but there were at least six different pieces of legislation nationally. Then that is where Victoria looked to the commonwealth's spent convictions scheme and then the policy is largely based on the commonwealth's spent convictions scheme. That is in operation.

Mr O'DONOHUE: I appreciate that, but there is no spent convictions scheme upon which to base a policy in Victoria. We do not have a spent convictions scheme in Victoria; that is why we are having this—

Mr WEERASEKERA: I am not sure if I am answering the question. Perhaps to provide a response, the spirit of the spent convictions scheme is to ensure that not everything recorded against someone's police record is disclosable. So the spent convictions scheme legally gives that clarity on what should be disclosed for certain offences or certain purposes, and Victoria Police release policy does that. So we cannot disclose everything that is contained on the police record, even under our current policy. We look to what are the mechanisms that we should use to withhold or consider some matters as spent and not disclose, and we do that by comparing our policy with the commonwealth's spent convictions. If I may just give you a couple of examples. If I look at the definition of a conviction under the commonwealth's Crimes Act 1914, and that is what our policy is based on, the definition is the same: it is the finding of guilt. And then the conviction capable of being spent is more than a 30-month sentence. It is the same measurement there. The waiting period is five years for a juvenile and 10 years for an adult. All of those matters are consistent with the Victorian policy. Probably the other aspect is when should the commencement period be treated for a spent conviction? It is from the date of the conviction, not from the date of the end of the sentence or the date of the offence. Those are, just for example, key features of the spent convictions schemes, whether it is the Victorian policy or the commonwealth's spent convictions act. They are consistent. I do not know if that answers your question.

Mr O'DONOHUE: Not really, but I am happy to pass to someone else.

Ms VAGHELA: I think it is more or less leaning towards what Mr O'Donohue is saying. Just for my clarity, what I am reading in the material that you have provided is that if an adult had committed a crime, say, 15 years ago and if the police check was done, you are saying it would not appear on the record? If the offence was committed 15 years ago for an adult, it would not appear on the check? Is that what I am understanding?

Mr WEERASEKERA: For a general employment. Again the policy document also has a list of exemptions. So it is similar to a spent conviction, whether it is the draft bill or the commonwealth's spent convictions, it will have a list of exemptions. Perhaps if I may answer by saying largely there are two different streams of police checks, so there are police checks for general employment and that is where you find nationally spent convictions being utilised to understand what should be disclosed and what should not be. But then the other stream of police checks are for law enforcement and the administration of justice or for court purposes. So the spent convictions have generally an exemption for those purposes. In those cases you would expect everything. Provided there is a finding of guilt, in most cases that is published and provided for those purposes. But what we are now talking about is for, if you like, probity purposes or employment purposes. That is where the spent convictions schemes are being utilised. So, in that example, something that was committed 15 years ago—it was a shop steal, it was a fine—our policy definitely will not allow us to disclose that for general employment for someone who may want to work at a retail shop. The policy does not allow us to disclose that. So where the policy gives that authority to disclose, if it is beyond the 10 years, for example, the Working with Children Act requires us to provide all the findings of guilt regardless of how old they are and that act is quite prescriptive in that way. That is for obvious reasons here in terms of assessing the risk and the impact and the harm on children. In that case we have no authority, but the legislation requires us to disclose that.

Ms VAGHELA: So does that mean that we already have spent convictions here? I mean, we are already utilising—

Ms PATTEN: It is a police policy. It is not—

Mr O'DONOHUE: I think the question is: what is the power from which Victoria Police draws its capacity to write the policy? Is it the police act or the regulations or—

Mr WEERASEKERA: No, it is the policy. We do not have an act or regulation currently.

Ms PATTEN: So yes, they have developed their own policy.

Ms LOVELL: We heard from the ladies before that in some cases spent convictions will be released. So in certain applications for certain jobs spent convictions will be released. So I guess as the agency doing it, the decision about releasing it is yours. How do you see the practical application of that for your office?

Mr WEERASEKERA: Sorry. Would you mind repeating the question?

Ms LOVELL: The ladies that presented before from the law institute said that there is a file kept of spent convictions, and in some cases—for some jobs that require a high level of security or responsibility—those would still be released on an application. I am just thinking that because you are the one doing it, obviously those decisions are yours, and I am wondering about the practical application of that within your office as to the decision of whether spent convictions are released.

Mr WEERASEKERA: Certainly, and my comment—this applies to all the eight jurisdictions currently—all the other jurisdictions do the same and the policing systems handle this information in the same way. So in terms of the Public Records Act we have the requirement to hold the record, because what we are finding is that this is the outcome of a reported crime, in this case in Victoria. Someone came to the police and reported a crime and police have gone through the investigation and prosecution, and for case management purposes we need to retain a record of that outcome. It will be retained on the system. So what we then do is we control the release based on the spent conviction requirements. That is a manual process. So someone needs to make an assessment: is this for a working with children purpose? If so, then there is another process that we use to provide the required level of release, and if it is for general employment, information exists but we do not disclose that.

Ms LOVELL: And is there a secondary check or review before an application is sent out that there has not been a mistake so a spent conviction or an old conviction could not be released accidentally?

Mr WEERASEKERA: Definitely. So there are at least three or four different layers when it comes to a disclosure, including senior management oversight and sign-off on the actual outcome. So that goes through quite extensive vetting, checking and sign-off. We make sure there are multiple layers. You know, there is a human error factor, so there is a margin of error, so we want to make sure. Then ultimately, under our policy, unless there are exemptions that the applicant has provided and has given the consent, the actual record of that police check belongs to the applicant. So we give the applicant the opportunity to see it first, and if there is anything that needs to be corrected, the person has the opportunity to correct that. This is a standard process across all the policing jurisdictions—that is, the opportunity for the applicant to let us know if something needs to be corrected. But yes, it has got quite a lot of steps to go through before that release.

Ms LOVELL: Are you able to—maybe not tonight—provide information to the committee as to the information release policy here: how long that has actually been the policy, how long that has been in use?

Mr WEERASEKERA: Yes, I will take that on notice, certainly.

Ms MAXWELL: Just perhaps following on from Ms Lovell's question, we know that when you are applying for a police check, obviously the consent is required from the person who is applying for it and information will only be released on their consent. What happens if it is somebody with a spent conviction? They have applied for a police check but upon that police check it comes to light that they are actually applying for one of the listed positions that require that information to be divulged to that potential employer? Where does the young person sit in regard to that? Are they informed that this information is actually going to be disclosed about your—

Mr WEERASEKERA: Consent. Yes, consent works on two levels. One consent is for the individual to give us the right to access and release the record to the individual, and that is the general consent, and there is an added consent where the individual is also required to give consent for the actual result to be provided to a third party, in this case to a working with children check you need for a prospective employer, if that is the consent. So consent requires the two levels, if you like.

Ms MAXWELL: And the other one was: we know with social media that things can go to the cloud and be there for a long time, so potentially when a young person ends up having a spent conviction, things come out in social media after a period of time or we might have media who actually report, ‘We know that that person has committed an offence and has a spent conviction’. Are there likely to be any legal repercussions from people doing that—so potentially media or people using social media to actually divulge that information? It is probably something that has not really been—

Dr KIEU: Yes, but it is difficult: it is a public record. It is a bit hard for the third person to disclose that, because it is already available publicly. I do not know. It is up to you.

Ms LOVELL: If they are a juvenile, it is probably under a suppression order anyway.

Mr WEERASEKERA: So, I was thinking out loud there, and I was thinking the same. Unless there is a suppression order it is an open court and is an open hearing and an open outcome. So there is that aspect, although it belongs to an individual.

The CHAIR: There will be times when you cannot escape your past these days. Could I just ask a quick question and we will go back to Ms Lovell. With the exceptions within the police’s policy, and obviously the policy has been developed over some period of time, the exceptions and things like the Assisted Reproductive Treatment Act and the commercial passenger vehicles Victoria act, which is a relatively new one—with these exceptions was it found that the police, in developing this policy, felt that those pieces of legislation required full disclosure and that spent convictions would not be appropriate?

Mr WEERASEKERA: So, it is probably the reverse, Chair, to be honest. So the policy existed and then those, in particular, two pieces of legislation came after. So what we had to do there was we had to recognise the law in that case. There are two different acts—because in our case it is a policy, so the legislation overrides the policy. So we had to recognise the expectations in those two cases, the need for spent convictions to be provided for those two regulators.

The CHAIR: So would you see similar exceptions in other jurisdictions?

Mr WEERASEKERA: Certainly, yes. The mechanics is—generally that is how that operates. Whether it is the Working with Children Act or the NDIS—we are right in the middle of going through an IGA to consider how, nationally, the NDIS should be screened—those things will need to somehow be considered as part of the spent conviction act.

Ms LOVELL: Mine was just a follow-up. I asked you for the date of the policy, but just in reading this, the heading is probably a little bit misleading because it says ‘information release policy’ but in the introduction it actually sets out that this is just an information sheet that sets out the general provisions. So I was wondering if in addition to the date of the policy becoming the policy we could also have a copy of the full policy, please—the actual policy, rather than just the information sheet and general provisions.

Mr WEERASEKERA: So this policy—

Ms LOVELL: So this that you have sent us—it just says in this that this information sheet sets out the general provisions of the release policy. So it is not actually the policy, I am presuming. So if we could have an actual copy of what is the actual policy rather than just the guidelines.

Mr WEERASEKERA: I understand. It is possibly a bit contradictory there, but this actually has all the mechanics of what we use in terms of the disclosure.

Ms LOVELL: So you are saying this is the policy?

Mr WEERASEKERA: This is the policy, certainly, yes. And what we do have internally are working documents to inform the staff as to how this policy needs to be more operationalised, if you like. But this is the policy that we provide to any applicant. So, if I may also give you an example, when an applicant completes the police check form this document is directly linked to the consent. So that is the legal instrument to say you are

consenting to Victoria Police, in this case, to access your record and make a disclosure based on these policies. So they are linked and that is how this document works.

Ms VAGHELA: Just a last one: you are basing your decision on 30 months, so if someone is reoffending multiple times and if the offence is equivalent to, say, 24 months it would not appear anywhere?

Mr WEERASEKERA: So in the policy guidelines, largely, we find when you look at all the eight different schemes out there—and I call Victoria a scheme, although it is a policy—30 months is really being currently applied by Victoria, Queensland and the commonwealth spent convictions schemes. So that is the highest threshold in terms of the duration. But when you look at New South Wales, the ACT, the Northern Territory and Tasmania, they are all looking at six months, and the draft bill is also looking at six months. So just to give you an example in terms of how we use that 30 months, if in this case, that example, the sentence is under the 30 months but could be quite a significant sentence, potentially more than six months still, then we would use the discretion under the policy.

In the policy document you will see on page 3 or 4, the second point: if the record includes a serious offence or violence or a sex offence and the record check is for the purpose of employment or voluntary work with children or vulnerable people, there is the exemption under the policy for us to consider the disclosure there. By default we do not disclose that matter that is under 30 months, but that provision gives us the discretion, and again the discretion, in this case, we apply. That goes through a three-member review panel, and then that is how we use the discretion in terms of operationalising it. Our general consideration for disclosure in that case is that we look at harm. Is the person likely to be in a trusted role, looking after the vulnerable, unsupervised? If those answers are yes in most cases and if the sentence is quite significant—we are potentially looking for anything greater than six months—there is the potential that outcome will be disclosed in that case if it is within the definition of that exemption.

Ms VAGHELA: Personally I do not know what would equate to a 30-month sentence. I do not know. Is it just bodily harm to someone? I do not know if that is the case, or 24 months is bodily harm. If that is not appearing on the checks, then the person who is committing or reoffending with the same crime is getting off because it is not appearing on the checks, and that person could be working not in that trusted position but in another stressful environment somewhere where this person could be triggered to again reoffend. So I am not quite sure about that 30 months.

Mr WEERASEKERA: Yes. The 30 months is also assuming the person has not re-offended in the last 10 years if the person is an adult. So in this example it is more likely the person has reoffended multiple times within the last 10 years. Therefore the whole record will be disclosed.

Ms VAGHELA: But what if it is 24 months and the person has reoffended then?

The CHAIR: But if they reoffend within 10 years, then the spent conviction does not apply.

Ms VAGHELA: But isn't 10 years in combination with 30 months? You are looking at 10 years with 30 months?

Mr WEERASEKERA: No.

The CHAIR: No, 10 years without any offences.

Ms VAGHELA: Any offence or any similar offence?

The CHAIR: You have to be crime free for 10 years.

Mr WEERASEKERA: Any offence.

Ms VAGHELA: Okay.

Mr WEERASEKERA: In this case, offence—the definition is there has to be a finding of guilt, and if there is no finding of guilt within the last 10 years, then that is when we could consider the matters under 30 months.

Mr O'DONOHUE: Just a quick follow-up question. Is Victoria Police concerned it may be potentially exposed to complaint or litigation if, because of application of this policy, a request for a check against conviction for someone comes back with no conviction recorded, when in fact there has been a conviction recorded because you have applied the policy when there is no spent convictions scheme in Victoria and that person goes on to commit a subsequent offence perhaps whilst in the course of their employment. Are you concerned that that creates exposure for Victoria Police in the absence of a legislated spent convictions scheme in Victoria?

Mr WEERASEKERA: To answer the first question, our first and foremost objective is to minimise harm and protect the community.

Mr O'DONOHUE: Of course.

Mr WEERASEKERA: With that in mind the policy intends to look for that potential harm, and in the case of the previous example we would be certainly looking at what the potential harm is and, where necessary, we will disclose spent convictions and the policy allows that. So in a way we are already looking for that potential harm and where necessary disclosing spent convictions, but the spent conviction legislation will certainly provide us with the clarity legally to do that and hopefully give clarity to the community as well, but that does not necessarily mean the policy is not focusing on exactly that risk.

Mr O'DONOHUE: I am not saying it is not. I am just saying that without a spent convictions scheme in place in Victoria, is Victoria Police concerned there is potential liability that a one-off case may leave Victoria Police exposed, where the history of previous convictions is not disclosed because of the policy but in the absence of a legislated scheme there could be exposure for Victoria Police if the person goes on to commit subsequent offences—in the course of employment, for example?

Mr WEERASEKERA: It is not uncommon in terms of the changes to the legislation. As to the risk of litigation, I am not a lawyer, so I am not sure what that would look like in this case. But just to draw upon an example in the working with children space, probably since the royal commission into the sexual abuse of children we did not have the need to share non-convictions. In this case we are talking of not guilty outcomes at court. So the legislation basically only allowed the disclosure of guilty outcomes. People were operating in the industry with a working with children card, but then the legislation changed and then we are now disclosing not guilty. So someone who was suitable to operate in the industry may be considered not suitable because of that different threshold of release. So it happens from time to time when the community expectations change. Yes, there will be potential concern from the community—something that was previously spent has now been disclosed under the act.

Mr O'DONOHUE: I will just make a comment. My question is really more not around the working with children check because there is an act upon which the policy implements the legislated requirements. It is where there is not a legislated spent convictions scheme and the policy operates in the absence of that legislated scheme.

The CHAIR: I think it will be interesting to follow up once we have received the police's submission on this. If I could just put one final question, which follows on from this: do you have any data as to the number of applications where your spent conviction policy has been applied? I know that you receive over 100 000 applications each year. Do you have any data to provide on when a spent conviction policy has been applied?

Mr WEERASEKERA: I do not have that handy with me.

The CHAIR: Is that something we could ask you to follow up with?

Mr WEERASEKERA: Yes, certainly I will take that on notice; thank you.

The CHAIR: Yes, any data on how this policy is applied that you may have would be very useful for the committee.

Mr WEERASEKERA: Certainly.

The CHAIR: Thank you very much, Mr Weerasekera. We appreciate you coming at this late hour on such a cold evening. As I said earlier, a proof transcript will be supplied to you in the next few days. Again, on behalf of the whole committee, we thoroughly appreciate the information. You have given us a great insight into the policy. Thank you.

Mr WEERASEKERA: Thank you.

Committee adjourned.