

LEGISLATIVE COUNCIL LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into a legislated spent convictions scheme

Melbourne—Wednesday, 19 June 2019

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**Necessary corrections to be notified to
executive officer of committee**

WITNESSES

Mr Brett Halliwell, and

Mr David Jones.

The CHAIR: Great to see you again. Just to check that you heard the information about what we do with this evidence?

Mr HALLIWELL: Yes, we heard at the beginning.

The CHAIR: Great, so I will not repeat it, and we have got a little bit of time. Take your time. Relax.

Mr JONES: All right, well, I thank you very much for the opportunity to tell my story. In some ways I have been waiting for this day for the best part of 30 years. My name is David, and I am an ordinary citizen of Victoria. I have got a wife, who has joined me here today. I have got two adult kids, two dogs. Paid out the mortgage this year, have a beautiful house on 2½ acres in regional Victoria, two university degrees and a recent TAFE diploma. I am currently working weekdays as a school bus driver. There is a bit of a theme emerging through this.

The CHAIR: Yes.

Mr JONES: I drive school buses, and I drive metropolitan buses on the weekend and work as a pool lifeguard over the summer holidays. I am very proud to have held many Australian and Victorian state masters swimming records, and I still have one that I have held since 2009.

The CHAIR: I am jealous.

Mr JONES: And I have a dirty little secret. I have another Victorian record and that is a criminal record, and that is eternal—perpetual—and it is ever present. So according to the police records I am a criminal, and in some circumstances the police are still sharing this information with my potential employers—and we document that.

The CHAIR: Yes.

Mr JONES: The details of this record may or may not be disclosed under a variety of situations, so when I have applied for a working with children check it has not come out. When I have applied for a drivers accreditation certificate or a national police certificate, it has come out. So 38 years later, when I am applying for a job online or I am sitting face-to-face with an employer and they ask me, 'Have you ever been charged?', 'Do you have a criminal record?', I still do not know what to say. Should I lie? Will they do a police check? If they do a police check, will the charge be reported? If they find out what the charges are, will I still get the job? If I say that I have no charges and the police report shows that I do, what will they think? I am not going to ramble on about the sleepless nights I have had, but believe me I have applied for well over 150 jobs over the years and every time I have wondered what impact my dirty little secret will have on my chances of getting a job.

Mr ONDARCHIE: Just breathe, mate. It's okay. Chair, this is not the story about the bit of wood holding the boat down?

Mr JONES: Yes. Anyway, I will go through it. This is a pathetic story, but I will share it with you. So what awful thing did I actually do?

In late 1979, at the age of 20, I needed some timber to carry a boat on the roof of my car. It was the weekend. I knew that the local wood yard had a paddock full of stacks of old grey and weathered timber—unwanted, perfect for the job. I drove there, jumped the fence, selected two pieces of timber, threw them over the fence and commenced securing them to the roof racks of my car. I was approached by a person who told me that he was a security guard, he had my registration number and that he would be calling the police. I told him that I may as well take the timber and I drove home and I waited for the knock at the door. Two junior policewomen

arrived. They asked me to drive the timber up to the police station. I asked them, 'What if I just drive off?', so they called a divvy van. As the neighbours watched on, I went and got a saw and cut each of the timber pieces into two so that they would fit into the divvy van. I hopped in the back of the divvy van with the timber and went to the police station, where I was charged, fingerprinted and on my way to a lifetime with a criminal record.

So anyway, I went to Ringwood court. As I was studying to become a secondary teacher, I was very concerned about the potential impact of this criminal record on my chances of securing a job as a teacher. I engaged the student law services. I had a barrister assigned, who I met on the day 5 minutes prior to my time in court. He accepted my payment and advised me to plead guilty. The magistrate asked me how did I plead; I said I was guilty, and he gave me a long lecture and advised me that I would be put on a good behaviour bond and that no conviction would be recorded. I left the court satisfied in the understanding that I had learned from the experience, that it was an embarrassing lesson and that I had avoided a criminal record.

Approximately 10 years later we were having a family discussion around what we were terming statutes of limitation on criminal circumstances. I decided that I would ring the Nunawading police station. I told them who I was. I asked them if I had a criminal record. The officer on the phone said, 'Hang on a minute. I'll check for you'. After a nervous wait he returned to the phone and advised me that my record showed an offence, that I had been unlawfully on premises, and theft. From that day forward I have felt let down by the courts, distrustful of the police reporting system and concerned regarding my future employment prospects. Who could request this information? What information would be disclosed, to whom and under what circumstances? I certainly did not know the rules.

In 2015 I took a redundancy after 25 years working in the corporate world. I applied for all the certifications that I might need to take me forward: bus driver, swimming teacher and pool lifeguard. The first of them arrived. My working with children check came back clear—phew! I had the little thing that you carry in your pocket, and I had a national police certificate with the reason for the check being contact with children, and it showed no offences whatsoever. A letter came back from the Taxi Services Commission regarding my application for a driver accreditation certificate along with the check results. The report advised of the findings of the Ringwood Magistrates Court in 1980, with offences of theft and unlawfully being on premises, and that all charges were adjourned on good behaviour of 200. The other guy got it cheap. The letter advises that they would continue processing my application. Sometime later my driver accreditation certificate arrived in the mail.

Bus driver: after a period of time working as a truck driver in a small local firm who did not check my police record, I applied for a position as a bus driver. I already had my working with children check and my driver accreditation. I was offered the position, and I commenced work. A few weeks later the company realised that I had not been given all the pre-employment documents. I had another sleepless night when I saw the question on the pre-employment document: 'Have you ever been charged with an offence in Victoria?'. I knew that the taxi services disclosed my offences. I decided to be honest and reported that I had been charged 38 years ago and submitted the paperwork. A few weeks later I was called into the office by the depot manager to go through my paperwork. I knew that I had given him everything that he needed—the working with children check, the whole works—everything was in order. So I was the only new employee to be called into his office, and I guess the depot manager just wanted to eyeball the new guy with the criminal record so that he knew who he was dealing with when the lunchroom pens started to go missing.

Call centre application: I recently applied for a job in a call centre. I filled out the online questionnaire applying for a job online, deliberated over the section that asked if I had a criminal record, ticked the box to say that I did not and submitted my application. I got through multiple rounds of the interviews. They asked us a number of times if anyone had a police record to go and talk to them, because they would be doing a police check. I sat tight and said nothing that time. Would they disclose my police record for a job interview with a finance organisation? Maybe, maybe not. I did not know the rules.

Conclusion: I am always applying for new jobs. I would like to become a tram driver at the end of the year perhaps. I do not want to, at this stage, make my application and make my way right through the employment process and get to the final step where they perform a police check and only then be told that I was not the best candidate and live forever to wonder whether my criminal record was disclosed to them, that they saw that I

had been charged with theft and unlawfully on premises and wondered what horrible thing I had done 38 years ago and wondered if I was now of good character and that they could trust me to not steal the coffee in the employee staffroom or personal belongings from other employees in the employee change room, or that they gave the job to somebody else who was a lesser candidate in other respects but did not have the complications of a criminal record. So I would like to perhaps hand over to my friend and colleague Mr Brett Halliwell, who has put a lot of work into putting a submission to you guys. He just would like to take you through some of the salient points.

Ms PATTEN: Thanks very much, David. We greatly appreciate you retelling your story.

Mr HALLIWELL: Thank you, David, and well done, because I think that presents really well the very personal side of not having spent convictions. Where I wanted to pick up the story was perhaps a little bit more from the mechanical side, which ultimately I think is where the problem lies. A fundamental of our democracy is the doctrine of separation between Parliament, the executive and the judiciary, and I think clearly this is something where that has not occurred. That is why—that is the cause of why—it has gone wrong. In effect in the vacuum of no parliamentary spent convictions scheme, what we have got is the executive in the police setting a policy. That has flow-on implications, and I will speak about them in more detail in a moment, but a key one is to the judiciary. If the police are effectively saying, ‘We will disclose records’—or findings of guilt, not even convictions—and to my mind that completely undermines the judiciary’s power to actually consider someone before the court and to say, ‘I don’t want to give you a conviction; I want to let you off; I want to give you a second chance’. So the police administrative mechanics are depriving the judiciary of their decision-making.

Related to that, it goes to why do people plead guilty? It is because they want to avoid a criminal record, and it is in the court’s interest—90 per cent of cases are tried before the Magistrates Court, and the vast majority of them plead guilty. Most defendants are saying, ‘I want to plead guilty so that I can obtain a non-conviction or good behaviour bond’ don’t get a criminal record. That deprives the court of the opportunity to actually give them that break, so it is dysfunctional. I think very, very simply, though, when you look at community expectations, if you asked anyone in the community what does a non-conviction mean, they would immediately say, ‘It means I have not been convicted. I have not got a criminal record. If I ask for a criminal record check, it won’t appear’. So fundamentally community expectations have not been met.

The last speaker, Bill, spoke about the difficulty between classifying different kinds of offences. If you are now thinking about this, we thought that it is appropriate to differentiate between levels of crime. Our proposal is to do so between misdemeanours and indictable offences. That is an existing framework that already exists within the law. The sexual offence was a good example. There is a misdemeanour category of that. There is also an indictable category. So our proposal is to differentiate between the two and also, as some other speakers have mentioned, 30-year prison terms we think are appropriate. Off the back of that we are proposing a 10-year for indictable, five years for summary offences and three years for juvenile. So we recognise that differs from the commonwealth scheme, but we think that it forms a good balance. I think the most important thing that I did want to focus on, which a number of other people have spoken to and David mentioned it: almost the randomness of what will get recorded when you do a record check. For the committee, we have provided a copy of David’s records as appendix A.

The CHAIR: Yes, thank you for those.

Mr HALLIWELL: One was a taxi check, which was where the record was disclosed. Appendix B was the National Police Certificate, which showed a clear record. But I think most importantly, and a couple of other speakers have mentioned it: why? When you look at the Victoria Police policy it is quite clear on what should not get recorded with a ‘but’. The list of exemptions, which is shown in appendix 3, is just vast.

The CHAIR: Isn’t it? I know.

Mr HALLIWELL: It covers so many different kinds of things.

Mr JONES: Bus driver, school teachers.

The CHAIR: Yes. IVF.

Mr HALLIWELL: Yes. So our proposal is that it really should not be up to what kind of vocation, what kind of job do I want to do? David mentioned a number of different things that he would like to do. Does it really matter? If your conviction is spent, it is spent, and it should not come down to the kind of employment that I am seeking. We think that the legislation should be framed in a way that it is irrelevant. So the waiting times et cetera do apply, but not necessarily the kind of role that you are going for, and that also applies to different kinds of licences as well, which is the other thing—whether it is firearms licences, federal licences et cetera.

The last thing that I wanted to touch on, which has not really been touched on too much, is: what are the privacy implications of this? We note that: why we are sitting here now probably rather than five years ago is that there are about half a million police checks requested every year in Victoria, and that is primarily due to employment checks. So I think you guys have the opportunity to do awesome work in relation to the spent convictions, but I suggest that on the privacy side there is additional work to be done. I personally have been for job applications where I have been asked questions: have you ever been in trouble with the police, have you ever been charged with a criminal offence, have you ever before a court in relation to a criminal matter? I think that raises exactly the matter that David was speaking to: if you are asked the question, do I need to answer it and do I need to answer it correctly? And if I answer yes, I am effectively disclosing. Why should I declare whether I have been in trouble with the police. Or if I have been charged with a criminal offence, the charges might not have gone through, it might not have been to court or I might have been acquitted. So our proposal on that one was that it should be illegal through the privacy law to even ask the question, and employers should be limited to asking, ‘Do you have a conviction in accordance with the spent convictions law?’. So I think that might be just an opportunity for you to put those two together.

The CHAIR: Thank you, Brett. I think that is really interesting. It is something that, you are right, has not been raised with us to date.

Mr HALLIWELL: So, finally, I think it is fantastic that this committee has come together. I really appreciate you bringing this to the front, Fiona in particular. I guess our ask is: you as a committee have a great opportunity. It is almost the rest of the Parliament that I am worried about. There are different parties. There is the Attorney-General. There are others. We know there is considerable community support for this, but often it is silent because people are embarrassed. Our hope is that this will be carried in a bipartisan way by the entire Parliament because just too many Victorians have been discriminated against.

The CHAIR: Thanks very much, Brett. I think you are right. I think really the stories that we are hearing tonight are just very compelling. We will try our hardest.

Dr KIEU: I have got a quick question. Mr Halliwell, you mentioned that a spent conviction should be spent no matter what job one applies for. What do you think about the person applying to be a magistrate, to be a parliamentarian?

Mr HALLIWELL: Within the section where we speak about indictable offences, we say that there are some indictable offences that should never be spent. We list some of them as being serious physical offences, so serious injury, murder et cetera, terrorism, serious sexual offences. So we think that irrespective of the job that you are going for, including parliamentarian—or in the legal profession is probably a good example—if it is a serious indictable offence it would still be disclosed.

Dr KIEU: It will not be spent anywhere?

Mr HALLIWELL: Yes. But if I am going for those other jobs, surely they deserve a second break, just like anybody else.

The CHAIR: Thank you both, and it is a really comprehensive submission. We really appreciate it. And yes, the randomness and the discretion is extraordinary. But thanks very much.

Witnesses withdrew.