T R A N S C R I P T

LEGISLATIVE COUNCIL LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into a legislated spent convictions scheme

Melbourne—Monday, 1 July 2019

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WITNESSES

Ms Julia Kretzenbacher, Vice-President, and

Mr Martin Radzaj, Chair, Criminal Policy Committee, Liberty Victoria.

The CHAIR: Thank you so much for coming in, and we have really appreciated the information and the work that Liberty Victoria has done on this subject. As you know, we are collecting evidence in relation to the inquiry into spent convictions. You understand that this is being recorded and that this is protected by parliamentary privilege, but of course if you go outside and say the same things, those comments will not be protected by privilege. If you would like to speak to us for 5 to 10 minutes, then allow some time for questions, that would be great.

Mr RADZAJ: Can I first acknowledge that we meet on the traditional lands of the Wurundjeri people of the Kulin nation. I pay my respects to their elders, past, present and emerging, including any that will be present here today. Let us show them our respect by treading lightly and making the most of this meeting. My name is Martin Radzaj. Julia Kretzenbacher and I are here representing Liberty Victoria, which is one of Australia's leading civil liberties organisations. We rely on volunteers to undertake our work. We also mentor students and young professionals as part of our Rights Advocacy Project. Each year we recruit volunteers and provide them with training and supervision while they undertake a project. In 2017 the Rights Advocacy Project compiled a report titled *A Legislated Spent Convictions Scheme for Victoria*: *Recommendations for Reform*. We are pleased to present this report to the committee.

By way of introduction, Julia Kretzenbacher is vice-president of Liberty Victoria. She is a barrister at the Victorian Bar and has previously worked as a lawyer in private practice, as a Court of Appeal associate and at the North Australian Aboriginal Justice Agency. She has also taught at Monash and Deakin universities and is a co-author of the report. I chair the criminal law policy group at Liberty Victoria. I am a lawyer at Victoria Legal Aid and have previously worked in private practice and in the community legal sector.

The issue of spent convictions is an important one for the people that Julia and I work with and for the Victorian community. Recording a conviction is a major act of legal and social condemnation. It is by itself treated as a criminal sentence. Our justice system recognises that the nature of a conviction may stand in the way of a person's rehabilitation. Because of this, magistrates and judges have the option when sentencing not to impose a conviction. They hear the details of a case, they hear about the people involved and then they decide whether in the circumstances a person should or should not be marked by conviction. The current system leaves the disclosures of convictions and non-convictions up to an administrative discretionary policy internal to Victoria Police. In 1992 they did 3500 criminal record checks. Last year they performed 716 000 checks. The people affected face ongoing discrimination. Their ability to access employment, insurance, housing, even volunteer opportunities are all impacted. Though there are limited anti-discrimination protections, the reality is that those affected have the fewest resources emotionally, physically and financially with which to respond.

What we bring you today are options—options that have been investigated, pursued and implemented in every other Australian jurisdiction, some are far back as 30 years ago. We make eight recommendations, which address the matters this committee is tasked with considering. We say that the introduction of a legislative scheme is the mark of a compassionate, just and equal society.

Ms KRETZENBACHER: For Liberty Victoria there are wideranging benefits that this scheme would present. Firstly, in our view there are economic benefits. There is an increased certainty for people thinking about pleading guilty, which would mean faster resolution for their court matters. Contested hearings will not necessarily have to run. Police prosecutors can focus on other matters. Police informants will not have to attend court and can focus on policing, and witnesses and victims are prevented from giving evidence and reliving their experience.

It would also decrease the administrative burden on Victoria Police. As Martin has just said, last year there were 700, 000 Victorian police checks, and each of those checks requires that discretionary judgement of someone in the office. It takes many layers of internal discussion as well, because there will be differing views about whether something is or is not relevant and should be disclosed. So that also goes to senior management

of Victoria Police, and the legislation will clarify that process, make it clearer, and also because it is automatic would take that administrative burden off Victoria Police and offer more transparency.

Secondly, we think that there are benefits for the broader community, which comes from promoting rehabilitation for those who have offended. By increasing the protections against unfair discrimination and by giving people the chance to earn a clean slate, Parliament would be giving a great incentive to those who have offended and who want to reform. It gives them an incentive to reform. A legislated scheme would give people the tools they need to thrive and to reach their full potential in the community and also afford them some certainty as to their future prospects.

Thirdly, we are of the view that there are moral reasons for why it is important. There is a stigma associated with a conviction, and that can stay with someone indefinitely. It disproportionately affects certain members of our community, like young people and Indigenous people, and we say that the introduction of a spent convictions scheme in Victoria, one that has been carefully drafted with appropriate protective measures to reach a balance between rehabilitation and protection of the community, would help prevent unfair discrimination for many Victorians who are vulnerable.

We have been approached by someone who has been affected by the lack of a spent convictions scheme in Victoria, and I have got a bit of a story to read out from him. The name in the story is 'Pete', but that is an anonymised name. He has asked to stay anonymous. When Pete was in his teens he started to associate with people who were a bad influence. He left school halfway through year 10 and drifted around for several years. In this time as an adult he was then charged with drink-driving and trafficking cannabis. For the drink-driving offence he received a conviction and a fine and licence cancellation, and for the trafficking he received a without-conviction fine. This incident was a wake-up call for him. He realised he needed to turn his life around drastically. He started working as a labourer, which is something he was not really enjoying, but kept at it. He then went back and completed his VCE. Once he finished his VCE he went and did a diploma, and his results were so good in his diploma that he was able to earn a one-for-one credit for a bachelor. He really enjoyed studying and decided to stay on that path. Because of his great results in his diploma and the credit that he received, within two years he had completed a bachelor, received really high marks and was able to apply for work.

This is when things for him started to crumble. He was still within the 10-year period where his offences, even the without-conviction offence, were going to show up on a police record check, and many of the jobs that he was applying for, which were graduate positions, required a police record check. He had not reoffended or gotten into any more trouble with police, but he knew that his charge would probably show up, so there were a number of jobs he just did not apply for. He got lucky and found one graduate job that did not require a police check. He applied for that job, got the job and excelled at it. He finished the graduate program.

After several years working for the same company he was asked to join the finance team. This was a huge opportunity for him. He was really excited about it. He agreed and really looked forward to the new challenge. Then he received an email from HR that said that because he would be applying for an Australian financial services licence it required a Victoria Police check. He was two months away from the 10-year period. There was a lot of stress and anxiety for him about what would happen if he applied for a police check. It was a huge opportunity for him, so he decided he would agree to take the position—he was going to roll the dice and see how he went. As I have said, he had not gotten into any trouble since those charges. He had worked, studied, built himself up, paid taxes and fully contributed to the community, and in a sense he got lucky because HR was a bit slow in processing his form, so it was not sent off until two weeks after the 10-year period and the police check did come back not disclosing the convictions that he had.

He was still worried, because he had looked up the policy and he just did not know what would happen because it is completely discretionary. There is no way of even applying for one personally and seeing what it shows up before you submit it to your workplace. But when it was returned it did not disclose his charges. Several months later he was approached for another promotion, and the stress and anxiety happened again because that other promotion also required a new police check. Again he was lucky and he had not reoffended at all within the 10-year period—he said he has not had so much as a parking fine in that time—and his priors did not show up on the police check. Pete feels that after years of turning his life around, working hard and being a valued

and contributing member of the community, he is still haunted by a stupid decision that he made as a young man. Since he has had court, he has not even had a parking fine.

Pete feels that his predicament, and that of many other Victorians, is unfair for a couple of reasons. One of them is that for the cannabis trafficking charge he received a without-conviction disposition. There is obviously a choice that the sentencing judge or magistrate has to give someone the opportunity to rehabilitate, and the matters that are taken into account under section 8 of the Sentencing Act include a number of things, including the seriousness of the offence, giving someone an opportunity and what impact a conviction would have on their record. And the magistrate said, when Pete pleaded guilty, that he wanted to minimise the impact that a conviction would have on him, but because Victoria Police releases findings of guilt, which includes without-convictions, that would have shown up on a police check within a 10-year period. Pete feels that this is unfair because it really means there is no material difference between a without-conviction disposition and one with a conviction.

Pete also feels that the Victoria Police policy is unclear and uncertain. Although there is a policy that convictions and findings of guilt that are more than 10 years old for minor offences are not disclosed, this is still up to the discretion of police, and someone applying for a police check has no idea whether they will be one of the people where the discretion is exercised in a different way. Pete feels that he lives in a constant state of fear. Is he going to be requested to go overseas for work and potentially lose his job? Is a career opportunity he cannot refuse going to arise and he will miss out because of the police deciding to release his record? Is he going to travel overseas and be deported because his record is not clean? Pete feels that a spent convictions scheme would give him certainty and clarity for these questions. Pete says that there needs to be some balance between police records generally being in the interest of the general population and protective as well as not being inappropriately applied and not being prohibitive to genuine rehabilitation and the efforts of individuals who are really trying to turn their life around.

The CHAIR: Thank you, both. I think Pete's story has been repeated to us through submissions and through evidence that we have heard, but it does really introduce that interesting distinction between a conviction and a non-conviction—

Ms KRETZENBACHER: Yes.

The CHAIR: even with the guilt. I am just wondering if you would see that we should treat non-convictions differently in a proposed spent convictions scheme, just initially.

Ms KRETZENBACHER: It is our recommendation that they should be treated differently. Section 8 of the Sentencing Act sets out a number of things that a court must take into account before deciding whether or not to record a conviction; the seriousness of the offence is one of them and the impact that a conviction would have. Often in practice, and I am speaking about my personal experience here, when those submissions are made it is usually for those first-time offenders who have just made a really silly decision and it is usually for offences that we would consider my minor offences. When you are in a situation where that is disclosed in any event in a police check, it really means there is no material difference, even though our legislature has ensured that there is a difference between that in the Sentencing Act. So in our submission Liberty's position is that there should be a difference and that when you receive a without-conviction disposition—and I will just find this; so it is on page 17 of the RAP report—we say that it should be immediately spent. So findings of guilt with no conviction, and sometimes you have an offence proven with no conviction; bonds, adjournments and undertakings which are completed; and discharged offences should be spent immediately.

The CHAIR: Yes. Great. Does that occur in other jurisdictions? It is not entirely clear from some of the information we have got.

Ms KRETZENBACHER: Yes. At the back of our report we have done a summary of all the different jurisdictions. So it is from page 23 onwards. There is a table that sets out what the scheme looks like in the different jurisdictions.

The CHAIR: We do not actually have your table in front of us.

Ms KRETZENBACHER: Oh, sorry.

The CHAIR: So we have got our own comparison.

Ms KRETZENBACHER: I will just try to find it; I did see it earlier. Sorry, it is on page 24, the length of the waiting period. New South Wales has 'a finding of guilt or that offence proven without conviction is spent immediately' and the same with a Children's Court dismissal of a charge or a cautioning—is spent—

The CHAIR: Are immediate? Gotcha.

Ms KRETZENBACHER: Yes. So New South Wales, ACT and the NT have systems where your conviction is immediately spent.

Dr KIEU: Thank you for coming. I have a few questions for you—one to do with the police administrative scheme and the other one to do with your submission. To start with the police, it is a discretionary administrative scheme. Are you aware or have you been told of any case where a person has appealed as to the case why his or her record is not wiped as in some other similar case, and would that open for some other appeals of the legal process with the police?

Ms KRETZENBACHER: I have to say I am not an expert in the administrative scheme because there is only a policy document that is online and publicly available, so I am not quite sure exactly how it always operates in practice. But my understanding is that there is no option of appealing or having reviewed the discretionary decision, because it is just an internal Victoria Police policy. And my understanding as well is that you just send off your application, and then the record is sent immediately to your employer, so you do not necessarily have that opportunity to see what is on there before there it is submitted. But I say that with the caveat that I am not that familiar with that policy.

Dr KIEU: Back to your submission, there are two points in your submission I would like to have some clarifications on. Firstly, you mentioned that a minor conviction should not disrupt the waiting period. What is the reason behind that? If a person—

Ms LOVELL: Reoffends.

Dr KIEU: reoffends in that waiting period, why should that not be taken into account?

Ms KRETZENBACHER: I will just find it. It is something that is also in the draft bill. In the draft bill it is defined as a minor offence rather than a minor conviction. The idea is that if there is an offence for which, for example, there is a fine of less than $500, you have got someone, for example, say, Pete, who has his without conviction cannabis trafficking charge and nine years later he has another minor, low-range drink-driving offence and receives a $200 fine, if that would be taken into account, his 10-year period would start again, so he would have almost 20 years of no serious reoffending and be in that situation of uncertainty of how his record would affect him. So it is only for minor offences.

There are not very many offences where you receive less than a $500 fine. An example as well would be when you receive a number of infringements and you are unable to pay them, you can go to court and ask for special circumstances to be taken into account. It might be someone who has a mental illness or someone who is affected by family violence or someone who is homeless and their offending is related to that. They can go to the special circumstances list and receive, for example, a good behaviour bond instead of the $30 000 worth of fines. All of their offences were infringement offences that normally would not show up on your record, but if you go onto the special circumstances list, you then do get a record for it. So you might get a conviction good behaviour bond or 'conviction adjourned undertaking', as it is called now, and that would then also not be taken into account necessarily as reoffending that would restart the period. So our view is that for minor things it would be counterproductive to restart the period of a clean record, so to speak, for that conviction to be wiped.

Mr RADZAJ: Can I just say ultimately it is an issue of fairness, and in our submission it would be unfair if there were trivial matters that reset the clock. The whole purpose of the spent convictions legislated scheme—one of which—is to promote rehabilitation, and as Julia was saying, if there is a trivial offence that occurs in that waiting period, our submission is that it would be unfair to have that reset the clock.

Dr KIEU: I am just thinking about—it is not a fair comparison; it is not applicable—the case of being bailed. There are certain conditions where the person would be having another offence during the bail period. If something even minor happened during that period, that condition of bail will be revoked. So I am just wondering, what is your opinion on that?

Ms KRETZENBACHER: So not every offence committed on bail is one where your bail will be revoked, so there is a specific offence of committing an indictable offence whilst on bail, but there is no equivalent for summary offences. If you have someone brought before the court for reoffending and the reoffending is a summary offence, for example, when the court considers whether to revoke the bail they think about: well, would this person receive jail for that minor offence? Usually the answer is no. And if that is the answer, they would not necessarily revoke bail. So there is a similarity between it, but there is also a difference, because even in a bail situation minor offences are viewed differently. So it is all really a matter of fairness and discretion and looking at all of the circumstances.

Ms LOVELL: So we are talking about it now being discretionary and we need legislation so that it is not discretionary, but wouldn't introducing minor offences not being counted reintroduce the whole discretionary thing into the scheme?

Ms KRETZENBACHER: Well, 'minor offence' is defined. In the draft bill, for example, it is defined specifically as an offence where there is no penalty—where someone is discharged with no penalty—an offence where on conviction the only penalty imposed is a fine that is less than $500 or an adjourned undertaking or an order under the Children, Youth and Families Act. So there is a specific definition of 'minor offence', which would create that certainly. So a carefully drafted spent convictions scheme would ensure that it is not all discretionary. The discretion is more in terms of bail if there is an offence committed on bail, but the idea behind the convictions scheme is to have that certainly. So it could be drafted carefully to make clear what a minor offence would entail.

Ms LOVELL: And sorry, we do not have your submission here with us, so what is the time period that you are recommending before they would become spent?

Ms KRETZENBACHER: For an indictable offence—and our submission adopts really what Victoria Police does, so it is a punishment of 30 months imprisonment or less—we say it is 10 years, and we should not forget that some offences that we might consider minor are still indictable offences. So drug possession, cannabis possession, where the maximum penalty is 5 penalty units, the legislation makes that an indictable offence. So even though you can only receive a fine, you would still have to wait 10 years until that is spent. We say five years for summary or other offences and three years for juveniles, because of course they are in a different basket in any event because of how important rehabilitation is. And we say immediately for matters where there is no conviction recorded.

The CHAIR: Good.

Dr KIEU: This is outside your submission, but I would like to seek your opinion. The previous witness—you may have heard about the case—on the one hand had a very serious offence which had some lifelong impacts on the victims, but on the other hand there may or may not be a consideration for certain cases to be especially considered, because that would contribute to the rehabilitation and also the reoffending reduction and so on. So what is your opinion on a very serious case? Would that in your opinion be able to put up as a special consideration case or not, or otherwise? What do you think?

Ms KRETZENBACHER: As was given in evidence earlier this morning, there are some schemes around Australia—so, WA—where if you have a more serious offence you can apply to a court to ask for that to be spent, and that is also that is something that is present in the draft bill. I think we would be in favour of that scheme, and one benefit of having to apply to a court is that there are a number of things that can be taken into account. Again, it could be carefully drafted so that, for example, victims could make a submission to the judge about what they think. We have victim impact statements when people plead guilty, so there could be that opportunity created for victims to make a submission as well to a judge as to their views, which could be part of the matters to be taken into account. It would be an open—usually it is an open—hearing, I would imagine. So again you have got that transparency there because you have got submissions being made to an independent,

objective member of the judiciary who, in all of their decision-making, has a number of things to take into account. And they would be looking usually at expert evidence. It might be psychiatric or psychological reports about the likelihood of someone reoffending. It could be the victim's views and also looking at, practically, what has this person done? And I imagine it would be quite a high threshold. It would be someone who has really rehabilitated themselves in a positive way—they have changed their life and have contributed to community.

So I think that there is a benefit in that, because you still have people who have those very serious offences, and they have made a really terrible decision and that has affected themselves and a lot of other people, but then 42 years later—as the person gave evidence earlier—they have not reoffended and they have really tried to change things for the better for people who were like them as well. So I think that we should encourage that and we should appreciate that that is really important rehabilitation. It saves our community money. It saves our community more pain, because they have not reoffended, and I think that there should be a benefit to that. And it would be an incentive for people as well, I think, that just because they have made that one silly error it is not all over for them. They have still got that chance to turn their lives around in a way that will have an impact on them as well.

Ms LOVELL: I was just going to ask about the three years for juveniles. I can understand the reason why we would have a shorter period for juveniles and the rehabilitation, but do you think that that period should be the same no matter how serious the crime? If it is an extremely violent, serious crime, should it still be three years, or should it be longer?

Ms KRETZENBACHER: Our view is that it should be three years irrespective of what the offence is, but again, similarly to that there is a difference between indictable and summary offences for adults, you could build that in for juveniles. But our view is that you get very young people—14. Our age of criminal responsibility is 10. Between 10 and 14 of course the presumption of doli incapax has to be overcome, but you might have someone who is 12 years old who has committed a really serious offence but nothing since that at all, and we want to ensure that three years later—they are 15, they are about to really enter the job market, they are going to be thinking about what they want to do—they stay on the track that they are on. So in our view three years is important for juveniles.

Ms LOVELL: So it is only 10 to 14, juveniles? After that it becomes 'youth'?

Ms KRETZENBACHER: The age of criminal responsibility is 10 years. Well, 10 to 13 really is the presumption of doli incapax that has to be overcome by the prosecution—that if the child does not know that what they are doing is wrong, they might not necessarily be held criminally responsible for it. But you do have very young kids who get caught up in the wrong crowd and often—both Martin and I have probably had this experience in our practice—you get kids who are quite young and have intellectual disabilities, and they are taken advantage of by the older kids, and they are the ones, because they are more vulnerable, that get sent off to do the worse things. The older ones try to stay out of it and have someone else take the brunt for it. So you have got someone like that, and to be able to as a society protect them and prevent them from reoffending I think it is really important to have that three-year period.

Ms LOVELL: So youth offenders would be treated the same as the 10 and the five years, the adults.

Ms KRETZENBACHER: Any child, yes. So any child under the age of 18 would be the three-year period.

Ms LOVELL: Under the age of 18 it would be three?

Ms KRETZENBACHER: Eighteen. Sorry. Yes, I was just giving as an example why the three years is important even if it is a very serious offence, but it would be any child under the age of 18.

The CHAIR: You mentioned in your statement that this would streamline some of the court systems and that people would be more inclined to plead guilty in a case. Have we seen that in the other jurisdictions?

Ms KRETZENBACHER: I think it would be difficult for us to answer that, but practically, I know when I have some clients, the idea that they will have something on their record that is not going to be wiped in some certainty is a big factor in their decision-making about what they will do with the charges. So personally, in my

experience, I have definitely had matters like that, but I could not say in terms of other jurisdictions whether that has had an impact. But of course the administrative burden in terms of Victoria Police, I think the inference would be quite strong that there is less decision-making there, so there would be a benefit in terms of cost to the community there.

Mr RADZAJ: I think it would be also a very difficult thing with the data gathering to determine what exact factors somebody used in deciding whether or not to plead guilty, but I will echo what Julia said. In my experience, it is definitely something that people consider when they are deciding.

The CHAIR: Yes. Would you have any idea of how many people a Victorian spent convictions scheme would affect?

Ms KRETZENBACHER: Well, 716 000 Victorian police checks.

The CHAIR: I was just about to ask you about that too.

Ms KRETZENBACHER: But I think that the studies have shown that—

The CHAIR: Actually probably only 5 per cent; out of those 700 000 I think we saw only 5 per cent of them actually have come forward with convictions.

Ms KRETZENBACHER: I think in terms of what studies have shown with young people it is that the vast majority of young people actually do not reoffend. So they do have that period of getting in trouble and making really silly and dangerous decisions, but then they are able to rehabilitate. Now, that is actually the majority of younger people. I mean, if you think about university, we have all known people that we have been to university with that probably got lucky that they just did not get caught. If we think about the people that we know, if they had gotten caught, their lives would turn out very differently, so I think it is more than we know.

One of the things I think that is quite significant is that because Victoria is the only place where we do not have a scheme, we have this strange situation where we have got people living at the border of New South Wales and Victoria and at the border of South Australia and Victoria, where if they commit an offence in New South Wales, they are okay under a scheme—there is a scheme. Even without conviction, it is spent immediately, but if you commit that same offence in Victoria, that is on your record. So you have a situation where, if you have got people competing for jobs in border towns, for example, those who have ended up committing their offences in New South Wales benefit because of a spent convictions scheme, and Victorians are treated differently because there is a lack of scheme. So I think that there are more people than we know that are affected.

The CHAIR: Yes, it is a good comment. I am really struck by the numbers of 700 000 police checks every year.

Dr KIEU: Maybe because now they require more for the sake of employment.

The CHAIR: Which does lead me to: do you have any thoughts about whether there should be some restrictions on police checks in general?

Ms KRETZENBACHER: Well, I think our answer is probably yes, particularly in terms of the 'without conviction' dispositions not being released. The courts, when they give that kind of disposition, have carefully considered it and have heard submissions from either a prosecutor from the DPP or a police prosecutor and defence counsel. They have made that decision with all of the relevant information, but that decision in the end does not mean very much, because we have this policy where it is still released. So I think there are some ways that the policy could be restricted. I guess that is the difficulty with not having a scheme. Victoria Police is in a difficult position themselves, because they are trying to do the right thing and find the right balance, and that is a lot of pressure on them too, and they do not want to be the ones making the ultimate decision.

Ms LOVELL: But most of those checks would be because we have legislated that if you are working with children you have to have a police check or to be a teacher you have to have a police check.

The CHAIR: Yes, to get IVF you have to have a police check.

Mr RADZAJ: I think it would be a very delicate balance to strike when and where a police check can take place. One of the recommendations we make is that in the Equal Opportunity Act irrelevant convictions not be taken into account. That would be another protective element.

The CHAIR: Absolutely. That is certainly in place in some jurisdictions—South Australia and the Northern Territory?

Mr RADZAJ: Tasmania.

Ms KRETZENBACHER: Tasmania. The recommendation in our report is based on the definition in Tasmania, but I think WA also. I will just double-check. Yes, WA and Tasmania.

The CHAIR: Have you got any information about whether that protection has been exercised in those jurisdictions?

Ms KRETZENBACHER: We might have to take that on notice. Yes, we will have a look.

The CHAIR: It would be of interest to see in what circumstances it has been exercised. And obviously I am well aware that just having it there as an attribute has that preventative effect.

Ms KRETZENBACHER: We do have an analogous situation with working with children checks, where we have a number of decisions from VCAT and also the Supreme Court when people have applied for working with children checks and they have had a prior conviction, and it is whether that is a conviction that should preclude them from getting one. So we do have those in that context. There is one case which we have discussed in our submissions, I think it is *ZZ v. Secretary Department of Justice*, where the relevance of a conviction as to whether they are someone who should hold a working with children check was taken into account—also in the context of the charter—and then a decision was made in that context. So we have Victorian examples of that kind, but we will have a look to see if there is anything in WA and Tasmania.

The CHAIR: Certainly it appears in working with children checks that it is a discretionary process. So there is someone taking all things into consideration.

Ms KRETZENBACHER: Yes. I think automatically you are refused a working with children check if you have a particular conviction on your record and then you can appeal that to VCAT. That is where you then have a situation of expert evidence called from psychologists and psychiatrists and references and the person talking about what they have been doing since they had that conviction.

The CHAIR: We had a circumstance where a person had a conviction and a 'no conviction recorded' for an offence that is no longer an offence. It was a carnal knowledge offence. Would Liberty Victoria be of the opinion that if it is no longer against the law then that offence would or should be immediately spent?

Ms KRETZENBACHER: I think it depends on the offence, is one answer, because you have some offences that might not literally be an offence anymore but there is an equivalent that is similar.

The CHAIR: We have changed the name or something.

Ms KRETZENBACHER: Yes, so if there is an equivalent offence I think we would want to be careful about it. Again, it also depends on the context. A great example, and there have already been changes, is people who had convictions for being in same-sex relationships. In that situation that is no longer an offence—and it is very good that it is no longer an offence—and that should not be a conviction. It is the same where we have had situations where Aboriginal people have a conviction for being a child that has been neglected. Again, that should no longer show up and changes have been made there. So it depends on the offence. If we have an equivalent to it I think—

Ms LOVELL: Can you give us an example of where there would be an equivalent?

Ms KRETZENBACHER: I am just thinking of carnal knowledge, for example, now the offence is—I have just gone blank, sorry—basically having sex with a child under the age of 16, because 16 is the age of consent, so if you have a child between 14 and 16 that is still an offence. So carnal knowledge might be equivalent to that, so it would be those kind of matters.

The CHAIR: If there is less than a two-year gap then it changes the offence as well.

Ms KRETZENBACHER: Yes, exactly. Also I think the age of consent changed when I was in high school. There used to be a different age of consent if you were same-sex or heterosexual. So if you have that offence because it was a situation that would not have been an offence if you were heterosexual but it was an offence because you were attracted to the same sex, then I think that should be the kind of conviction that should be spent immediately.

Ms LOVELL: So it might be a matter of looking at each individual one when it comes to something like. With that specific case that would no longer be an offence, should that be spent then?

Ms KRETZENBACHER: Yes, I think so.

The CHAIR: There seems to be this general assumption that all sex offences should not be spent and that we should draw that line there. I think violent offences we say should not be spent even if the conviction was under 30 months, but I suspect it might not be as clear.

Mr RADZAJ: Our recommendation is that in those situations there should be the option of applying to court. We understand why Parliament has that intention, but certain offences—for example, kids sexting each other—could be classed as a sex offence, and in those particular cases the option would be there to apply to the court and have that conviction spent.

The CHAIR: Yes. So on those lower level sex offences you think it should be left to an application to the court? We should not be differentiating in that in sex offences?

Mr RADZAJ: Yes.

Ms KRETZENBACHER: I think that there even is an exception now that was introduced for if you are a child yourself and you are in that situation of a consensual sexting relationship with another child both of you are technically producing child exploitation material, but it is obviously a very different situation from someone who is producing that material overseas or online. I think even now there is already a difference with those situations. I think we want to be careful that we leave a little bit of discretionary room in there where possible, because there is always going to be that situation where you hear about it but you do not think it should fall into the category that you normally consider to be the really serious situation.

The CHAIR: It is quite a separate question, but looking at the waiting periods and looking at the 10 years and the three years, your recommendation is that that waiting period starts at the point of conviction rather than at the point of release. I note that probably it is evenly split in the current jurisdictions—half do it at the point of conviction and the other half do it at the point of release. What would be your argument for doing it at the point of conviction?

Ms KRETZENBACHER: There are a couple of arguments. One would be it gives a little bit of certainty. It makes it clearer what the date of conviction is as opposed to the date of release, because people might have different dates of release, depending on whether they get parole or not. So they might not get parole, which puts their date of release further up, but someone who has committed the exact same offence does get parole earlier so the time would start earlier for them, so to speak. The other reason is that although someone might be spending time in custody they can still commit offences whilst in custody. It could be an offence that is a specific offence against the Corrections Act or it could be an assault, which we know does happen in prison. So it is an incentive to be a model prisoner as well. That is why, in our view, it should start from the date of conviction because somebody could still commit offences while they are in custody and that is that incentive, and also to create that certainty about: we know what date the conviction is definitely; there is a bit more uncertainty about when someone may or may not be released.

Dr KIEU: I have raised this question before to other witnesses. I would like to seek your view on this. On convictions that are being capable of being spent, and this is mostly related to the employment applications and so on, what is your view about certain employment like the legal profession or public office?

Ms KRETZENBACHER: I think with certain jobs it is probably still necessary to disclose your conviction, but it might just be that it is disclosed and then kept within that forum—not necessarily widely publicised. So I think that there are certain jobs where it would still have to be disclosed—for example, the legal profession, and positions of trust as well. And again there will be certain offences that might not be spent in any event. But it is our view, I think, that there are certain positions where it would still have to be disclosed, but perhaps it will be kept in that forum and not publicised more widely. There is also an exception in the draft bill that if someone does reoffend, say outside of the 10-year period, so on paper their conviction is spent—if they do reoffend 10 years later—that can still be taken into account in sentencing. So it is an exception in the draft bill. And also, for example, if that witness gives evidence in cross-examination—if there is someone who might have dishonesty offences, and that is usually something that will be raised in cross-examination—it can still be taken into account, but there is an obligation on the court to minimise the publication of that, so I think that that is trying to strike that balance as well.

The CHAIR: Thank you very much. That was really informative, and it certainly was great to have you speaking to your submission and further; thank you for that. We will send you a draft transcript of this hearing, probably in a few weeks, for proofreading.

Ms KRETZENBACHER: Thanks very much.

The CHAIR: Thank you so much.

Mr RADZAJ: Thanks for the opportunity.

Dr KIEU: Thank you.

Witnesses withdrew.