Standing Committee on Law and Justice

Spent convictions for juvenile offenders

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Terms of reference

That the Standing Committee on Law and Justice inquire into and report on:

1. Whether sex offenders' convictions should be capable of being spent under the *Criminal Records Act 1991*, or should they only become spent in limited circumstances, for example where:
    a. the offence was committed as a juvenile,
    b. there was a finding of fact that the sex was consensual,
    c. the offences were minor sex offences, or
    d. no conviction was recorded.[1]

These terms of reference were referred to the Committee by the Hon John Hatzistergos MLC, Attorney General on 10 November 2009.

[1] LC *Minutes* No 127, 12 November 2009, Item 7, p 1516.

Committee membership

The Hon Christine Robertson MLC	Australian Labor Party	*Chair*
The Hon David Clarke MLC	Liberal Party	*Deputy Chair*
The Hon John Ajaka MLC	Liberal Party	
The Hon Greg Donnelly MLC	Australian Labor Party	
Ms Sylvia Hale MLC	The Greens	
The Hon Lynda Voltz MLC	Australian Labor Party	

Secretariat

Ms Rachel Callinan, Director
Ms Madeleine Foley, Principal Council Officer
Ms Christine Nguyen, Assistant Council Officer

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Chair's foreword

This Inquiry has examined whether convictions for juvenile sexual offences should continue to be excluded from the spent convictions scheme. In examining this issue we have sought to recognise competing interests. Foremost is the need to protect the community from sexual offenders. Balanced against this priority is the community interest in rehabilitating past offenders to reduce re-offending.

One means to reduce recidivism is to allow juvenile offenders to put their offending behind them by removing the requirement to disclose convictions for sexual offences, for example when applying for employment and educational opportunities, after an appropriate period of good behaviour. This is a strong protective factor against re-offending and encourages pro-social lifestyles, which in turn contributes to a safer society.

We recognise that the question of whether to spend convictions for juvenile sexual offences must be approached with caution. It is important to note, however, that the spent convictions scheme is not concerned with punishment; its primary purpose is to contribute to the ability of past offenders to get on with their lives. It is for the courts to determine the appropriate consequences of an offence at the time of sentencing and the courts view sexual offending very seriously indeed.

After considering the thoughtful contributions of Inquiry participants we concluded that, on balance, the evidence does not warrant continuing to treat juvenile sexual offences differently from other juvenile offences for the purposes of the spent convictions scheme. Consequently we recommend that juvenile sexual offences be included in the spent convictions scheme provided that, as with other offences, they meet certain eligibility criteria. We also recommend an appropriate mechanism for spending these convictions.

We believe that our recommendations will achieve an appropriate balance between protecting the community from the risk of re-offending by juvenile sexual offenders, and the community interest in rehabilitating past offenders.

I thank my Committee colleagues for their contributions to this Inquiry. I also thank the Committee secretariat for their professional support.

Finally, on behalf of the Committee, I express our gratitude to Inquiry participants. It is due to your knowledge and insights that we have come to terms with this complex subject and have been able to produce this report.

Hon Christine Robertson MLC
Committee Chair

Summary of recommendations

Recommendation 1 **35**

That the Attorney General further examine whether adult sexual offences should be included in the NSW legislation to implement the Model Spent Convictions Bill.

Recommendation 2 **54**

That the Attorney General ensure that the NSW legislation to implement the Model Spent Convictions Bill includes convictions for juvenile sexual offences.

Recommendation 3 **68**

That the Attorney General ensure that the NSW legislation to implement the Model Spent Convictions Bill provides that where a court finds a person guilty of an offence without proceeding to a conviction under section 10 of the *Crimes (Sentencing Procedure) Act 1999*, including for a sexual offence, the finding is spent immediately after it is made.

Recommendation 4 **77**

That the Attorney General ensure that the NSW legislation to implement the Model Spent Convictions Bill provides that convictions for juvenile sexual offences, as with convictions for other juvenile offences, are capable of being spent where the sentence imposed was less than 24 months imprisonment.

Recommendation 5 **81**

That the Attorney General ensure that the NSW legislation to implement the Model Spent Convictions Bill provides that convictions for juvenile offences, including convictions for juvenile sexual offences, are capable of being spent after a good behaviour period of three years has elapsed.

Recommendation 6 **99**

That the Attorney General ensure that the NSW legislation to implement the Model Spent Convictions Bill provides that convictions for juvenile sexual offences, as with convictions for other juvenile offences, are spent by lapse of time. Further, that a safeguard be introduced to allow the Attorney General or the Commissioner of Police to make an application to intervene towards the end of the good behaviour period, if there are concerns about potential re-offending. The courts would then consider the application and determine whether to issue a spent conviction order.

Recommendation 7 **105**

That the Minister for Youth advise the statutory review of the *Commission for Children and Young People Act 1998* to give consideration to historical cases that resulted in offenders being prohibited from working with children. The review should consider whether or not offenders who have subsequently completed lengthy periods of good behaviour should have their prohibited status lifted.

Recommendation 8 **106**

That the Minister for Youth ensure that the statutory review of the *Commission for Children and Young People Act 1998* gives consideration to the recommendations and conclusions of this report.

Chapter 1 Introduction

This Chapter provides an overview of the Inquiry process including the background to the Inquiry, and the methods the Committee used to facilitate participation by members of the public, government agencies and relevant organisations. The Chapter concludes with a brief outline of the report structure.

Terms of reference for the Inquiry

1.1 The terms of reference for this Inquiry were referred to the Committee by the Attorney General, the Hon John Hatzistergos MLC on 10 November 2009. The terms of reference are reproduced on page iv.

Background to the Inquiry

1.2 The Inquiry was established to consider whether convictions for less serious sexual offences should continue to be excluded from the spent convictions scheme. In examining this issue the Committee has sought to balance competing interests. Foremost is the need to protect the community from sexual offenders. This imperative must be weighed against the benefits of enabling persons who have committed less serious sexual offences, sometimes when they were very young, to put their past behind them and become law-abiding members of society.

1.3 In relation to the Inquiry, the Attorney General advised the House that:

> The issues raised in regard to spent convictions are likely to generate widespread community discussion, with strong arguments lying on both sides of the debate. The inquiry process of the Standing Committee on Law and Justice will allow the views of stakeholders, experts and community members to be aired in an open and public forum and will generate informed analysis on the many complexities of this topic.[2]

1.4 The Committee's recommendations will inform the NSW Government's approach to the Model Spent Convictions Bill (the Model Bill) developed by the Standing Committee of Attorneys General (SCAG), which requires each jurisdiction to make a decision on whether convictions for sexual offences should be capable of becoming spent. According to Ms Gabrielle Carney, Assistant Director, Legislation, Policy and Criminal Law Review Division, Department of Justice and Attorney General:

> Once the Attorney has had the benefit of the recommendations of the Standing Committee, he intends to develop a proposal to submit to Cabinet for consideration. The Government has not yet made any commitment to adopt the SCAG Model Bill, as such any recommendations from the Committee will assist the Government in making this decision; particularly so in relation to the question of convictions for sex offences.[3]

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2 *LC Debates* (12/11/10) 19467.

3 Ms Gabrielle Carney, Assistant Director, Legislation, Policy and Criminal Law Review Division, Department of Justice and Attorney General, Evidence, 29 March 2010, p 2.

Conduct of the Inquiry

Submissions

1.5 The Committee advertised a call for submissions in the *Sydney Morning Herald* and *Daily Telegraph* in November 2009 and *The Law Society of NSW Journal* in December 2009. A media release announcing the Inquiry was sent to all media outlets in NSW. The Committee also wrote to a large number of stakeholder organisations and individuals inviting them to participate in the Inquiry.

1.6 The Committee published a Discussion Paper in November 2009. The Discussion Paper assisted individuals and organisations wishing to make a submission to understand the background to the Inquiry, the current law in NSW, the issues raised by the terms of reference and the options for resolving them.

1.7 The closing date for submissions was 29 January 2010 and a number of Inquiry participants received extensions to make submissions after this date. The Committee received a total of 22 submissions.

1.8 A list of submissions is contained in Appendix 1. The submissions are available on the Committee's website: www.parliament.nsw.gov.au/lawandjustice.

Public hearings

1.9 The Committee held two public hearings at Parliament House on 29 March and 1 April 2010. The Committee heard from a range of stakeholders including representatives of the NSW Children's Court, the NSW Commission for Children and Young People, the Law Society of NSW, the NSW Bar Association and the Youth Justice Coalition, as well as four government agencies. The Committee also took evidence from individuals affected by the exclusion of juvenile sexual offences from the spent convictions scheme.

1.10 The Committee thanks all the individuals and organisations who made a submission to the Inquiry or appeared as witnesses.

1.11 A list of witnesses who appeared at the public hearings is reproduced in Appendix 2. A list of the documents tabled at the public hearings is in Appendix 3. The transcripts of the hearings are available on the Committee's website.

Report structure

1.12 Chapter 2 outlines the spent convictions schemes in place in NSW and in various Australian and overseas jurisdictions, and describes the efforts by SCAG to achieve national consistency in Australian spent convictions schemes. The Chapter also provides information on the child protection mechanisms in place in NSW, notes the resulting requirement to disclose past convictions when applying for child-related employment and describes how these requirements interact with the spent convictions scheme.

1.13 Chapter 3 considers whether convictions for sexual offences should be capable of becoming spent in any circumstances, taking into account community attitudes towards sexual offences and the best way to protect the community, as well as the impact on offenders of the requirement to disclose past convictions. The Chapter also explains why this report makes recommendations only in relation to juvenile sexual offences.

1.14 Chapters 4 and 5 address whether convictions for sexual offences should become spent in the circumstances raised in the terms of reference, namely where the offence was committed as a juvenile, the sexual activity was consensual, the offence was a minor sexual offence, or where no conviction was recorded.

1.15 Chapters 6 and 7 examine the appropriate eligibility criteria and mechanism for spending convictions for sexual offences, including those provided in the current spent convictions scheme in NSW and in the Model Bill.

1.16 Chapter 8 briefly addresses two additional issues raised during evidence that have implications for the operation of the spent convictions scheme. The first issue is the need for further work on the interplay between the spent convictions scheme and child protection mechanisms. The second issue was raised by Privacy NSW and regards the process for removing spent convictions from an individual's criminal record.

1.17 The final chapter, Chapter 9, draws together the recommendations made in previous chapters and sets out the Committee's preferred model for the spending of convictions for juvenile sexual offences.

Chapter 2 Operation of spent convictions schemes

The spent convictions scheme has been in place in NSW since 1991. A spent conviction is a conviction that is no longer required to be disclosed by the offender in certain circumstances, such as when applying for educational or employment opportunities There are spent convictions schemes in most other States and Territories, which in some cases have provisions quite different from the NSW scheme. To address the variation between spent convictions schemes, the Standing Committee of Attorneys-General (SCAG) has prepared a Model Spent Convictions Bill (the Model Bill), which if adopted will achieve national consistency in the spending of past convictions. In the years following the introduction of the spent convictions scheme, NSW has introduced child protection mechanisms that require the declaration of past convictions for sexual offences, opening up an important area of interplay between the legislation on spent convictions and child protection.

Spent convictions scheme in NSW

2.1 Spent convictions schemes offer persons convicted of less serious offences, who have since completed lengthy periods of good behaviour, the opportunity to start afresh as law-abiding and productive members of society. Spent convictions schemes do this by removing the requirement for offenders to disclose less serious offences, for example when applying for employment, and allow past offenders to put their pasts behind them. The rehabilitation of past offenders benefits individuals with a criminal record, but also benefits community safety by reducing the risk of future re-offending, as discussed in Chapter 3. The rehabilitation of offenders is balanced against the imperative to protect the community, by taking into consideration the likelihood of the offender re-offending.

Introduction of spent convictions scheme

2.2 The current spent convictions scheme was introduced in NSW in 1991. In his second reading speech the then Attorney General, the Hon John Dowd MP, noted that one of the 'basic objectives of the criminal justice system is to encourage the rehabilitation of offenders in order that they may become responsible and productive members of society'.[4]

2.3 Mr Dowd explained the need for a spent convictions scheme as follows:

> Many offenders' only contact with the criminal courts involves relatively minor offences, often committed when they were young. Despite subsequent lengthy periods of crime-free behaviour, a substantial proportion of these people are unable to live down past indiscretions because they are required to reveal their convictions to employers, insurers, licensing bodies, and the like, thereby often becoming subject to mistrust and suspicion.[5]

4 *LA Debates* (27/02/1991) 392.

5 *LA Debates* (27/02/1991) 392.

2.4 Mr Dowd indicated that once an offender had served their sentence, they should have the opportunity to move on with their lives: 'Punishment for minor offences should not be indefinite'.[6]

2.5 Currently sexual offences are excluded from the spent convictions scheme: a conviction for a sexual offence can never become spent, no matter the circumstances of the offence, or the length of the subsequent period of good behaviour.

2.6 In explaining the exclusion of sexual offences from the spent convictions scheme, Mr Dowd observed that most sexual offences would not meet the scheme's criteria, as they would involve sentences of imprisonment over the benchmark sentence of six months. However, he added that: 'Nevertheless, there will be some cases where this is not so, and in my view prevailing community standards preclude the disavowal of such convictions'.[7]

2.7 In addition to the exclusion of sexual offences, convictions for offences against bodies corporate and offences prescribed by regulations are not eligible to become spent.[8]

Provisions of *Criminal Records Act 1991*

2.8 Convictions are eligible to become spent if they meet the requirements of the *Criminal Records Act 1991*. Under the Act, a conviction can become spent if the offender:

- receives a prison sentence of 6 months or less
- completes a good behaviour (or crime-free) period of three years for a juvenile, and ten years for an adult.[9]

2.9 The good behaviour period commences from the date of conviction.[10]

2.10 A crime-free period ceases if a juvenile is subject to a control order or is convicted of an offence punishable by imprisonment. In the case of an adult a conviction for an offence punishable by imprisonment terminates the good behaviour period.[11] If an offender commits a subsequent offence within the good behaviour period, the original offence cannot become spent until the completion of the good behaviour period for the second offence.

2.11 A prison sentence is not defined to include a control order imposed by the NSW Children's Court,[12] and therefore all convictions imposed by the Children's Court, other than those for

6 *LA Debates* (27/02/1991) 392.

7 *LA Debates* (27/02/1991) 394.

8 Submission 21, NSW Government, p 3.

9 *Criminal Records Act 1991*, Part 2.

10 *Criminal Records Act 1991*, s9(1).

11 *Criminal Records Act 1991*, s10(1) and s9(1).

12 *Criminal Records Act 1991*, s7(4).

sexual offences, are eligible to become spent.[13] The NSW Children's Court may impose control orders up to 24 months.[14]

2.12 Once a conviction is spent it cannot be revived. Importantly, the spent convictions scheme does not 'provide for the destruction of criminal records'.[15] Spent convictions are still required to be disclosed in limited circumstances, such as when being sentenced by a court for a subsequent offence, when applying for a legal practitioner certificate, when applying for a security industry licence, when applying for registration as a nurse, when applying for employment as a police officer or a teacher or when undergoing a Working With Children Check.[16]

2.13 In his second reading speech the then Attorney General recognised that:

> … the length of the rehabilitation period is one of the most important aspects of the scheme. It must be sufficiently long so that at its conclusion, society can be confident there is little likelihood of further offences being committed. From the point of view of the past offender, the benefits of the scheme should be available within a reasonable period of time …[17]

2.14 The decision to have a crime-free period of ten years for an adult was based on findings of recidivism studies conducted in the United Kingdom and in NSW in the 1970s.[18] The shorter period of three years for a juvenile was determined based on research which showed that young people have the capacity to quickly move through and then abandon periods of criminality as they mature.

2.15 Certain findings and orders of the courts are treated as convictions for the purposes of the *Criminal Records Act*.[19] These include findings under section 10 of the *Crimes (Sentencing Procedure) Act 1999*, such as where a court finds a person guilty of an offence but does not proceed to a conviction, or orders that the charges be dismissed. However, orders under section 10 are spent immediately (as discussed in Chapter 5).

2.16 All orders imposed by the NSW Children's Court (other than an order to dismiss a charge) are deemed to be convictions for purposes of the *Criminal Records Act*.[20] Juvenile offenders who are dealt with at law (that is, not in the Children's Court) due to the seriousness of their offences are treated as adults for the purposes of the *Criminal Records Act*, and are required to complete a ten-year good behaviour period.[21]

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13 Correspondence from Ms Kathrina Lo, Department of Justice and Attorney General, to Chair, cover letter to answers to questions on notice, 14 May 2010.

14 *Children (Criminal Proceedings) Act 1987,* s33(1)(g).

15 *LA Debates* (27/02/1991) 393.

16 Submission 21, pp 3-4.

17 *LA Debates* (27/02/1991) 393.

18 Submission 21, p 2.

19 Submission 21, p 2.

20 Submission 21, p 3.

21 Submission 21, p 2.

2.17 The *Criminal Records Act* makes it an offence for persons who have access to criminal records to disclose information about spent convictions without authorisation.[22]

Spent convictions schemes in other jurisdictions

2.18 This section places the NSW spent convictions scheme in context by providing an overview of the spent convictions schemes in the other Australian jurisdictions, with a focus on Queensland and Western Australia, as well as the spent convictions schemes in the United Kingdom, Canada and New Zealand.

Australian States and Territories

2.19 All Australian jurisdictions, with the exception of Victoria, have spent conviction schemes.[23]

2.20 The ACT, Northern Territory and Tasmania have spent convictions schemes that are very similar to the NSW scheme.[24] All of these schemes exclude sexual offences. One point of difference in both the ACT and Northern Territory schemes provide that where there is a finding of guilt without proceeding to a conviction, the offender is required to complete the relevant good behaviour period before the offence can become spent (rather than the offence being spent immediately as is the case in NSW). The Northern Territory scheme also provides for spent convictions to be revived where an offender is subsequently convicted of an offence punishable by imprisonment. In Tasmania, the good behaviour period for juvenile offenders is five years, in contrast to the period of three years under the NSW scheme.[25]

2.21 The Commonwealth scheme provides for convictions to become spent if they result in a prison sentence of 30 months or less.[26] There is a good behaviour period of five years for juvenile offenders and ten years for adults. Sexual offences are included in the scheme and convictions for sexual offences become spent by lapse of time, as with convictions for other offences.

2.22 In December 2009 the South Australia Parliament passed legislation for a spent convictions scheme.[27] The scheme is based on the provisions of the Model Bill and provides for a benchmark prison sentence of 12 months or less for adult offenders and 24 months or less for juvenile offences.[28] As proposed in the Model Bill, the good behaviour period is ten years for adult offenders and five years for juvenile offenders.[29] Sexual offences are excluded from the spent convictions scheme.[30]

22 Submission 21, p 2.

23 Submission 21, p 5. See *Spent Convictions Act 2000* (ACT), *Criminal Records (Spent Convictions) Act 1994* (NT), *Annulled Convictions Act 2003* (Tas).

24 Submission 21, pp 5-6.

25 Submission 21, p 6.

26 Submission 21, pp 5-6. See *Crimes Legislation Amendment Act 1989* (Cth).

27 *Spent Convictions Act 2009* (SA).

28 *Spent Convictions Act 2009* (SA), s 3(1).

29 *Spent Convictions Act 2009* (SA), s 7(1).

Queensland

2.23 The distinctive feature of the Queensland spent convictions scheme is that convictions for sexual offences are included in the same manner as other offences, and are eligible to become spent automatically, after the relevant good behaviour period has elapsed. As with the Commonwealth scheme, the Queensland spent convictions scheme has a benchmark prison sentence of 30 months or less.[31] The good behaviour period for adult indictable offences is ten years and for other offences the good behaviour period is five years. Convictions for juvenile sexual offences are therefore eligible to be spent automatically after a good behaviour period of five years has elapsed. With some exceptions, a subsequent conviction revives a previous conviction and the good behaviour period recommences.[32]

2.24 Mr Phil Clarke, A/Director General of the Queensland Department of Justice and Attorney General, advised that 52 juveniles were convicted of sexual offences in 2008-2009.[33] Of these, 79 per cent received a non-custodial sentence and 21 per cent received a custodial sentence of less than 30 months, and therefore all these convictions were eligible to become spent.

Western Australia

2.25 While the schemes in the other Australian States and Territories provide for convictions to become spent automatically, after the good behaviour period has elapsed, the spent convictions scheme in Western Australia takes a different approach for adult offenders and provides for convictions to become spent by application to the courts.[34] Convictions for both adult and juvenile sexual offences are included in the scheme and can become spent in the same manner as other convictions.

2.26 Adult offenders convicted of serious offences (that result in a prison sentence of 12 months or more or for an indeterminate period, or a fine of $15,000) can apply to the District Court for a spent conviction order.[35] Adult offenders convicted of lesser offences (that result in a prison sentence of 12 months or less) can apply to the Commissioner of Police for a spent conviction order. A good behaviour period of ten years must have elapsed before an adult offender can apply to the courts. Factors to be considered by the courts in determining whether a conviction should be spent include whether the person is likely to re-offend and whether the person was previously of good character.

2.27 In relation to juvenile offenders, all convictions except for those for murder, attempted murder or manslaughter automatically become spent after a two-year good behaviour period.[36]

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30 *Spent Convictions Act 2009* (SA), s 5(2)(b).

31 Submission 21, p 6. See *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).

32 Correspondence from Mr Phil Clarke, Acting Director-General, Queensland Department of Justice and Attorney-General, to Chair, 11 March 2010.

33 Correspondence from Mr Clarke to Chair, 11 March 2010.

34 Submission 21, pp 6-7. See *Spent Convictions Act 1988* (WA).

35 Correspondence from Hon Christian Porter MLA, Western Australia Attorney General, to Chair, 13 April 2010.

36 Correspondence from Mr Porter to Chair, 13 April 2010.

Convictions for juvenile sexual offences are therefore eligible to be spent automatically after a good behaviour period of two years has elapsed. In correspondence to the Committee, the Hon Christian Porter MLA, Western Australia Attorney General, stated that the legislation '… make[s] it clear that the justice system does make a distinction between juvenile offenders and adult offenders'.[37]

2.28 Attorney General Porter advised that no research has been conducted on that State's experience of the spent convictions scheme in relation to sexual offences.[38] However, in relation to adult offenders, the NSW Department of Justice and Attorney General advised that there were 18 applications for spent conviction orders in 2008, three of which involved convictions for sexual assault and all three of which were successful.[39] There were 13 applications for spent conviction orders in 2009, none of which related to convictions for sexual assault.

United Kingdom

2.29 The United Kingdom introduced its spent convictions scheme in 1974.[40] Convictions become spent automatically by lapse of time, after the relevant good behaviour period has elapsed. Convictions resulting in prison sentences of over 30 months, as well as convictions resulting in youth detention for over 30 months, are excluded from the scheme.[41]

2.30 The good behaviour period differs depending on the class of offence and the length of sentence, and ranges from six months to ten years. For example:

- Convictions resulting in prison sentences of 30 months or less but over six months – ten years for adult offenders and five years for juvenile offenders
- Convictions resulting in prison sentences of six months or less – seven years for adult offenders and three-and-a-half years for juvenile offenders
- Young offender detention of 30 months or less but over six months – five years
- Young offender detention of six months or less – three years
- Absolute discharge – six months.[42]

2.31 In July 2002 the United Kingdom Home Office completed a comprehensive review of the spent convictions scheme and published the *Breaking the Circle* report.[43] The review made a number of significant recommendations, including that 'the cut-off point of a 30 month custodial sentence should be removed so that the scheme applies to all ex-offenders who have

37 Correspondence from Mr Porter to Chair, 13 April 2010.

38 Correspondence from Mr Porter, to Chair, 13 April 2010.

39 Submission 21, p 7.

40 See *Rehabilitation of Offenders Act 1974* (UK).

41 Submission 21, pp 8-9.

42 Submission 21, p 8. *Rehabilitation of Offenders Act 1974* (UK) s 5(2).

43 United Kingdom Home Office, *Breaking the Circle: A report on the review of the Rehabilitation of Offenders Act*, July 2002.

served their sentence. These arrangements should be implemented retrospectively to bring this group within the protection of the scheme without delay'.[44] The report also recommended reduced good behaviour periods. The United Kingdom Government accepted a number of the report's recommendation in its April 2003 response to the review.

2.32 The Rehabilitation of Offenders (Amendment) Bill was introduced to the House of Lords in November 2009. In his second reading speech Lord Dholakia noted that in relation to the current spent convictions scheme, '… the rehabilitation periods laid down in it are lengthy, and many genuinely reformed ex-offenders can never benefit from it'.[45] For all sentences other than life sentences, the Bill proposed to reduce the good behaviour periods to four years for custodial sentences of four years or more, two years for custodial sentences of less than four years, and one year for non-custodial sentences.[46] The proposed good behaviour periods would commence after the sentence and any post-release supervision was completed. The third reading was completed on 16 March 2010 but the Parliament prorogued shortly after and the Bill made no further progress.

Canada

2.33 In 1985 Canada introduced its own version of a spent convictions scheme.[47] Under the scheme offenders can apply to the Solicitor-General for a pardon and the scheme provides for these applications to be considered by the National Parole Board.[48] For summary offences, an offender must have completed a good behaviour period of three years before applying for a pardon, and for indictable offences, a period of five years.[49] The good behaviour period commences from the expiration of the sentence, including any probation period, and the offender must also have paid any fine imposed for the offence.

2.34 The National Parole Board is required to make inquiries and be satisfied that the applicant has been of good conduct since the offence.[50] If an offender is pardoned they are still required to disclose past convictions, but the scheme states that the conviction is not to be taken into account and that the pardon is to be taken as evidence that the offender has been rehabilitated.

2.35 The submission from the NSW Government noted that '… only a small proportion of eligible people take advantage of the Canadian system. Schemes of this type are costly and complex to administer'.[51]

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44 United Kingdom Home Office, *Breaking the Circle: A report on the review of the Rehabilitation of Offenders Act*, July 2002, p 37.

45 *United Kingdom House of Lords Debates* (11/12/2009) column 1294.

46 *United Kingdom House of Lords Debates* (11/12/2009) column 1295.

47 *Criminal Records Act 1985* (Canada).

48 Submission 21, p 10.

49 *Criminal Records Act 1985* (Canada), s 4.

50 *Criminal Records Act 1985* (Canada), s 4(2).

51 Submission 21, p 10.

New Zealand

2.36 New Zealand introduced a spent convictions or 'clean slate' scheme in 2004.[52] The scheme excludes offenders who have ever been convicted of an offence resulting in a custodial sentence, or who have ever been convicted of a specified sexual offence.[53] Eligible convictions become spent automatically after a good behaviour period of seven years has elapsed. The scheme does not differentiate between adult and juvenile offenders.

2.37 A conviction cannot become spent if the court orders that the offender be detained in hospital or indefinitely disqualified from driving for repeat offending.[54] Convictions also cannot become spent unless all fines, reparations or costs ordered by the court are paid in full.

2.38 Under the scheme, offenders convicted of specified sexual offences but who did not receive a custodial sentence may apply to the courts for an order that the conviction be concealed.[55] In this way the provisions of the 'clean slate' scheme would apply to the offender's criminal record.

SCAG project on spent convictions schemes

2.39 As described in the preceding section, the Australian States and Territories take different approaches to spent convictions. There are sometimes significant differences between the eligibility criteria for offences to become spent, including the type of offences, the benchmark sentences and the length of the good behaviour periods, as well as differences in the mechanisms for spending offences. Consequently SCAG agreed to work towards harmonising spent convictions legislation in Australia, and produced a Model Bill for consideration by each jurisdiction. The Model Bill leaves the issue of spending convictions for sexual offences to each jurisdiction to determine. The Model Bill is reproduced in Appendix 4.

2.40 The Committee has therefore been asked by the Attorney General to consider whether sexual offences should be capable of becoming spent, and in doing so will consider the provisions of the Model Bill as they apply to sexual offences. The Committee notes that its consideration of these provisions may in some instances have broader implications for the Model Bill as a whole. For example, the Committee's consideration of the relevant good behaviour periods, benchmark sentences, and application of the spent convictions scheme where no conviction is recorded, may be equally relevant to non-sexual offences. However, the Committee wishes to emphasise that it has not invited submissions on the provisions of the Model Bill as they apply to non-sexual offences, and its recommendations will focus on the spending of convictions for sexual offences.

52 *Criminal Records (Clean Slate) Act 2004* (NZ).

53 Submission 21, p 11.

54 *Criminal Records (Clean Slate) Act 2004* (NZ), s 7.

55 Submission 21, p 11.

Background to SCAG project

2.41 The Attorney General, the Hon John Hatzistergos MLC, gave this rationale for the SCAG model to harmonise spent convictions schemes in Australia:

> The Standing Committee of Attorneys-General examined the spent convictions regimes to reduce the confusion created by different national requirements in different jurisdictions … The national approach to spent convictions will assist with problems associated with the sharing of criminal history information.[56]

2.42 SCAG initially developed a draft Model Bill and each jurisdiction conducted its own consultation on the Model Bill following the release of a discussion paper in November 2008.[57] The consultation period closed in January 2009 and SCAG noted that 'a large number of submissions were made by a broad cross-section of the community including legal organisations and services, child protection advocates, indigenous groups, academics and the police'.[58] After considering the results of the consultation, SCAG finalised the Model Bill in November 2009.

2.43 In developing the Model Bill, SCAG decided not to take a uniform position on the spending of convictions for sexual offences. In this regard the Attorney General noted that the Model Bill '… does not cover sex offences because of policy differences between jurisdictions on whether, and to what extent, sex offences should be spent'.[59]

2.44 Instead, the Model Bill provides scope for each jurisdiction to reach its own decision on how sexual offences should be dealt with. If a jurisdiction decides that sexual offences should be included in its spent convictions scheme, the Model Bill provides a mechanism for doing so, namely that the same eligibility criteria would apply as for all other offences, but that convictions would become spent by application to the courts rather than lapse of time.

2.45 To resolve the issue of how sexual offences should be dealt with in the Model Bill the Attorney General has asked the Committee to examine whether convictions for sexual offences should be eligible to become spent. If the Committee decides that convictions for sexual offences should be capable of becoming spent, the Committee must consider the circumstances in which a sexual offence can become spent and the mechanism for spending the conviction.

2.46 During the Inquiry the Committee, with the assistance of stakeholders, examined the issue of spending convictions for sexual offences in relation to both the current spent convictions scheme and the spent convictions scheme proposed in the Model Bill. The recommendations in this report are framed in terms of assisting the Attorney General to decide how sexual offences should be dealt with in the Model Bill. As the purpose of the Model Bill is to achieve

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56 *LC Debates* (12/11/2009) 19466.

57 Standing Committee of Attorneys General, *Communique November 2008,* accessed 16 April 2010, <www.scag.gov.au>.

58 Standing Committee of Attorneys General, *Communique April 2009,* accessed 16 April 2010 <www.scag.gov.au>.

59 *LC Debates* (12/11/2009) 19466.

uniformity between jurisdictions, the Committee has taken the position that it will only depart from the provisions of the Model Bill if there are sound policy reasons for doing so.

Provisions of Model Bill[60]

2.47 The Model Bill sets out different eligibility criteria for spent convictions than currently exist in NSW. Under the *Criminal Records Act 1991*, eligible offences include those where the prison sentence is less than six months, with a good behaviour period of ten years for an adult and three years for a juvenile. Under the Model Bill, eligible offences include those where a sentence of imprisonment is not imposed, or where the prison sentence is less than 12 months for an adult and 24 months for a juvenile.[61] The good behaviour period is ten years for an adult and five years for a juvenile.[62] The good behaviour period commences on the date of conviction, the same as at present.[63]

2.48 In relation to whether sexual offences should be included in the spent convictions scheme, the Model Bill makes provision for each jurisdiction to choose one of two options. First, that sexual offences should never become spent. In NSW this would maintain the status quo. Second, that specified sexual offences should be capable of being spent based on the same eligibility criteria as for all other offences. In relation to the second option, the Model Bill builds in an additional protective feature for sexual offences, which is that the mechanism for eligible offences to become spent is by court application rather than lapse of time.[64]

2.49 The Model Bill treats as a conviction a formal finding of guilt by the courts or a finding that an offence has been proved, even where no conviction is recorded.[65] Where no conviction is recorded, the offender is required to meet the necessary criteria for the offence to become spent, including the completion of the good behaviour period. At present in NSW, a conviction is spent immediately if there is a finding that the offence has been proved but no conviction is recorded.[66]

2.50 As with the current spent convictions scheme, under the Model Bill spent convictions are only required to be disclosed in limited circumstances, such as when applying for employment in child-related occupations, or for example for a position as a judge, magistrate or police officer. Spent convictions are also disclosed for the purposes of sentencing by the courts.

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60 Tabled document, Department of Justice and Attorney General, *Comparative table: Spent convictions scheme,* 29 March 2010.

61 Model Spent Convictions Bill 2009, cl 3(1).

62 Model Spent Convictions Bill 2009, cl 7(1).

63 Model Spent Convictions Bill 2009, cl 7(1).

64 Model Spent Convictions Bill 2009, cl 9.

65 Model Spent Convictions Bill, cl (5).

66 *Criminal Records Act 1991*, section 8(2).

2.51 There are a number of other significant provisions in the Model Bill that, in the main, attempt to address areas which are not covered in the current spent convictions scheme. The provisions include that, if an offender:

- commits a subsequent offence during the good behaviour period for a first offence, the first offence is not to become spent until the completion of the good behaviour period for the second offence.[67]
- commits a minor offence during the good behaviour period, and is discharged without penalty or fined less than $500, the conviction is disregarded for the purposes of the good behaviour period.[68]
- is convicted of a number of offences, and the court imposes one penalty for some or all of the offences, the penalty is to be taken to apply to each offence for the purpose of determining whether an offence is eligible to become spent.[69]
- is listed on the Child Protection Register, and the offence is one for which the spent conviction scheme applies, the good behaviour period is extended so that it will expire when the offender is no longer listed on the Register, that is, the conviction will only be spent after the offender is no longer listed on the Register. [70]

Court application process in Model Bill

2.52 The Model Bill provides that should sexual offences be included in the spent convictions scheme, rather than a sexual offence becoming spent by lapse of time, an offender can apply to the courts for a spent conviction order after completing the good behaviour period. If the court rejects an application for a spent conviction order, the offender cannot re-apply for two years.[71]

2.53 In deciding whether to make a spent conviction order the court is to consider:

- the nature, circumstances and seriousness of the offence
- the length and kind of sentence imposed
- the length of time since the conviction
- the circumstances of the offender at the time of the offence and the time of application, including whether the offender appears to have rehabilitated and be of good character
- whether the conviction prevents the offender from engaging in a particular profession, trade or business

67 Model Spent Convictions Bill 2009, cl 10(2).

68 Model Spent Convictions Bill 2009, cl 7(4).

69 Model Spent Convictions Bill 2009, cl 3(2).

70 Model Spent Convictions Bill 2009, cl 7(3)(a).

71 Model Spent Convictions Bill 2009, cl 9(2).

- whether there is any public interest to be served in not making the order.[72]

2.54 The Attorney General and the Commissioner of Police are to be notified of an application for a spent conviction order, to give them the opportunity to intervene and be represented at the hearing for the application.[73]

2.55 Applications are to be heard in private unless the applicant consents to the hearing being held in public, or the court decides that the hearing should be held in public.[74]

Child protection mechanisms in NSW

2.56 In the years since the introduction of the NSW spent convictions scheme, additional legislative measures have been introduced to prevent persons who pose a risk to children and young people from working in child-related employment. In many cases this legislation requires the disclosure of spent convictions, and therefore intersects with the spent convictions scheme. Coupled with the increasing use of criminal record checks for other occupations, the introduction of screening processes for child-related employment creates additional requirements to be met by past offenders attempting to enter the workforce.

Prohibited persons

2.57 The *Commission for Children and Young People Act 1998* provides that a person convicted of a sexual offence punishable by a maximum prison sentence of 12 months or more is declared to be a 'prohibited person' and is thereafter prevented from working in child-related employment.[75] In other words, whether an offender is declared to be a prohibited person is dependent on the maximum penalty for an offence, rather the sentence imposed by the courts. Most sexual offences have a maximum penalty of over 12 months, except for offences such as the offence of obscene exposure under the *Summary Offences Act 1988*.[76]

2.58 Child-related employment is defined to mean '… employment in specified work settings (eg schools, childcare centres) where direct unsupervised contact with children is an essential requirement of the role'.[77]

2.59 The Acting Commissioner for Children and Young People, Ms Jan McClelland, noted that 'the definition of child-related employment is quite broad and can cover a wide range of situations – working in schools, foster care, preschools, or it can even involve driving a school

72 Model Spent Convictions Bill 2009, cl 9(5).

73 Model Spent Convictions Bill 2009, Schedule 1(2).

74 Model Spent Convictions Bill 2009, Schedule 1(3).

75 Submission 21, p 5.

76 Ms Jan McClelland, Acting Commissioner, Commission for Children and Young People, Evidence, 29 March 2010, p 16.

77 Answers to questions taken on notice, Commission for Children and Young People, 23 April 2010, p 4.

bus …'.[78] Child-related employment includes paid work, voluntary work, student placements and self-employed people.[79]

2.60 For the purposes of the *Commission for Children and Young People Act*, convictions include matters where the court found a person guilty of an offence but did not proceed to a conviction.[80] Convictions do not, however, include matters where the court has ordered that a charge be dismissed.

2.61 Even if a conviction for a non-sexual offence were to become spent (such as kidnapping), it would still be considered to be a relevant criminal record for the purpose of the *Commission for Children and Young People Act*, and the person would remain prohibited from working with children and young people.[81]

2.62 The legislation applies retrospectively,[82] meaning that all persons convicted of a child sexual offence are prohibited from working in child-related employment.

2.63 Sexual offenders can apply for a review of their status as prohibited persons in limited circumstances.[83] For example, sexual offenders are automatically able to apply for a review if they are convicted of indecency offences. Sexual offenders may also be able to apply for a review if they are convicted of certain offences involving sexual intercourse with a child, provided that the child was less than three years younger than the offender, and the offence did not involve circumstances of aggravation. However, sexual offenders can never seek a review of their prohibited status if they are convicted of producing child pornography, or of murdering a child.

2.64 In 2008-2009 there were 54 persons who applied for a review of their status as a prohibited person, of which 21 were successful.[84] Applications can be made to the Commission for Children and Young People or the Administrative Decisions Tribunal, or to the Industrial Relations Commission in cases where the person is already in child-related employment and is liable to be dismissed or has been dismissed because they are a prohibited person.[85]

78 Ms McClelland, Evidence, 29 March 2010, p 15.

79 Commission for Children and Young People, *Information sheet: How to apply for a review of prohibited status*, accessed 15 April 2010, <kids.nsw.gov.au/uploads/documents/information-status-review.pdf>.

80 Tabled document, Commission for Children and Young People, *Working With Children Check Guidelines 19 February 2010*, 29 March 2010, p 28.

81 Submission 8, NSW Commission for Children and Young People, p 4.

82 *Commission for Children and Young People Act 1998*, s 33(B)(2).

83 Submission 21, p 5.

84 Answers to questions taken on notice, Commission for Children and Young People, 23 April 2010, p 2.

85 Commission for Children and Young People, accessed 15 April 2010, <kids.nsw.gov.au/kids/working/prohibitedemployment/reviewstatus.cfm>

2.65 The Commission advised that successful applications are '… largely for old and minor convictions (eg carnal knowledge in the 1970s)'.[86] When an application is successful, and the applicant is determined not to be a prohibited person, that person is no longer required to declare any prohibiting convictions when applying for child-related employment.[87]

Child Protection Register

2.66 The *Child Protection (Offenders Registration) Act 2000* established reporting requirements for adult and juvenile offenders who commit serious offences against children, including child sexual offences.[88] Registrable offences include any offence involving sexual intercourse with a child, the murder of a child, acts of indecency against a child, grooming offences, kidnapping offences and child pornography offences.[89] The Act does not apply to offenders who commit sexual offences against adults, and does not apply retrospectively to offences committed before October 2001.[90]

2.67 Adult offenders who commit a registrable offence are not listed on the Register in certain circumstances, such as where the court finds the person guilty of a relevant offence but does not proceed to a conviction, and orders that the charge be dismissed, imposes a good behaviour bond, or orders the offender to participate in an intervention program.[91]

2.68 In the case of juvenile offenders, a juvenile is not a registrable person where the NSW Children's Court has directed that charges for a relevant offence be dismissed, or if a juvenile committed a single offence involving an act of indecency or certain voyeurism offences.[92]

2.69 Persons listed on the Register are required to report annually to the Commissioner of Police and provide their address, phone number, car registration, email address and employment details.[93] Adult offenders are subject to these reporting requirements for either 8 or 15 years, depending on the seriousness of the offence. Juvenile offenders are subject to reporting periods of 4 or 7.5 years (that is, half those of adult offenders). Persons listed on the Register who subsequently commit a further registrable offence are subject to lifetime reporting requirements.

2.70 During 2008-2009, approximately 29 juveniles were listed on the Child Protection Register.[94]

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86 Answers to questions taken on notice, Commission for Children and Young People, 23 April 2010, p 2.

87 Answers to questions taken on notice, Commission for Children and Young People, 23 April 2010, p 5.

88 Submission 21, p 4.

89 Submission 21, p 4.

90 *Child Protection (Offenders Registration) Act 2000*, s 3A(2)(d).

91 Submission 21, p 4.

92 Submission 21, p 5.

93 Submission 21, p 4.

94 Submission 21, p 4.

2.71 There is no discretion or review mechanism to exempt registrable people from their reporting obligations, other than for persons with lifetime reporting requirements, who after being listed on the Register for 15 years have a right of review to the Administrative Decisions Tribunal.[95]

Working With Children Check

2.72 The purpose of the Working With Children Check is to protect children from the risk of abuse in the workplace. Employers who provide child-related employment are required to ensure that employees complete a Working With Children Check. The Check is designed to identify potential employees who pose a risk to children, including prohibited persons.

2.73 The Working With Children Check considers a wide range of records including relevant criminal records, apprehended violence orders and any disciplinary proceedings for conduct involving children in an employment capacity.[96] For the purposes of the Working With Children Check, relevant criminal records are defined to include:

- charges or convictions for any sexual offence
- charges or convictions for any assault, ill treatment, neglect of, or physical harm to, a child
- any registrable offence, that was punishable by a maximum prison sentence of 12 months or more
- charges that have not been finalised by a court
- charges that are proven but have not led to a conviction, or have been dismissed, withdrawn or discharged by a court.[97]

2.74 Relevant criminal records include all spent convictions, as well as offences committed when a juvenile.[98]

2.75 If the Working With Children Check identifies that a potential employee has a relevant criminal record, an approved screening agency will assess the risk posed by that record.[99] The risk assessment considers the circumstances of the offence, the type of employment sought and the employer's plan for managing the risk to children. When the screening agency has determined the level of risk the employer is advised of the outcome of the risk assessment. The employer then decides whether to proceed with employing the person. The legislation does not provide a process to review the outcome of the risk assessments provided to employers by screening agencies.

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95 *Child Protection (Offenders Registration) Act 2000*, Division 7, s16.

96 Tabled document, *Working With Children Check Guidelines 19 February 2010*, p 9.

97 Tabled document, *Working With Children Check Guidelines 19 February 2010*, p 9.

98 Tabled document, *Working With Children Check Guidelines 19 February 2010*, p 9.

99 Tabled document, *Working With Children Check Guidelines 19 February 2010*, p 10.

Legislative Review of *Commission for Children and Young People Act*

2.76 In March 2010 the Minister for Youth, the Hon Peter Primrose MLC, announced a statutory review of the *Commission for Children and Young People Act 1998*.[100] The review involves extensive public consultation. The deadline for written submissions was 31 May 2010.[101]

2.77 The review, which was due to commence in December 2010, was brought forward following the publication of the Auditor-General's report on the effectiveness of the Working With Children Check in February 2010.[102] The Auditor-General's report identified ways in which the Check could more reliably identify people who pose a risk to children.

2.78 Ms McClelland observed that through the review the Commission would seek to make its legislation '… clearer as to what categories or what types of offences are included in the prohibited employment situation.'[103]

2.79 The Commission indicated that it was aware of the 'substantial' impact on young offenders of being declared to be a prohibited person. The Commission advised that it '… proposes to consider these prohibiting convictions further in the forthcoming review of the *Commission for Children and Young People Act 1998*'.[104]

100 Hon Peter Primrose MLC, Minister for Youth, 'Cabinet approval for early legislative review of Commission for Children and Young People', *Media release*, 9 March 2010.

101 Hon Peter Primrose MLC, Minister for Youth, 'Head of legislative review announced', *Media release*, 15 April 2010.

102 Audit Office of NSW, 'Gaps found in safeguard to protect children', *Media release*, 24 February 2010.

103 Ms McClelland, Evidence, 1 April 2010, p 21.

104 Submission 8, p 5.

Chapter 3 Should sexual offences be included in the spent convictions scheme?

There are arguments for and against including convictions for sexual offences in the spent convictions scheme. Sexual offences are viewed with great seriousness by the community. Community protection must be a priority in considering whether to spend convictions for sexual offences. However, this imperative must be balanced against supporting the rehabilitation of past offenders, which in turn contributes to a safer society. The requirement to disclose past convictions creates a barrier to obtaining employment, which is a key protective factor against re-offending; putting past offenders into jobs therefore benefits community safety.

This Chapter considers the arguments put forward by Inquiry participants regarding whether sexual offences should be included in the spent convictions scheme. In light of these arguments this Chapter will consider whether there are any reasons that could justify making sexual offences capable of becoming spent. This Chapter will also explain the position taken in this report in relation to adult sexual offences, and the Committee's decision to make recommendations only in relation to juvenile sexual offences.

Definition of sexual offences

3.1 There are 32 offences that are currently prescribed as sexual offences and excluded from the spent convictions scheme.[105] These offences are listed in Appendix 5. Of these 30 are in the *Crimes Act 1900* and include sexual assault, indecent assault, acts of indecency, attempting or engaging in sexual intercourse with a person under 16 years of age, incest, bestiality, procuring for prostitution, and the production, dissemination or possession of child pornography. The remaining two offences, including obscene exposure, are listed in the *Summary Offences Act 1988*.

3.2 In October 2008 the Attorney General, the Hon John Hatzistergos MLC, announced the establishment of a Sexual Offences Working Party to examine the 'offences of persistent sexual abuse of a child, introducing a definition of an act of indecency, increasing the maximum penalties for child prostitution offences and achieving greater uniformity between NSW sexual offences and Commonwealth offences for sexual offences committed overseas'.[106] This review has the potential to result in changes to sexual offences legislation, and thus impact on the spent convictions scheme if sexual offences are included in the scheme.

105 Submission 21, NSW Government, Attachment B. For a detailed description of each sexual offence see answers to questions taken on notice, Department of Justice and Attorney General, 27 April 2010.

106 Hon John Hatzistergos MLC, Attorney General, 'Major Government crackdown on sex offences', *Media release*, 25 October 2008.

Seriousness of sexual offences

3.3 Sexual offences are considered by the community to be of the utmost seriousness. A number of Inquiry participants gave evidence concerning the seriousness of sexual offences, and the trauma suffered by victims of sexual assault. These participants argued that this justifies the continued exclusion of all sexual offences from the spent convictions scheme. These views are examined in this section. Other evidence presented to the Inquiry indicated a need to balance these concerns with the goal of rehabilitating offenders, as discussed elsewhere in this Chapter.

Impact of sexual offending

3.4 In relation to community perceptions of sexual offences, Detective Superintendent John Kerlatec, Commander, Sex Crimes Squad, NSW Police Force, observed that '… sexual offending is perhaps the most abhorrent crime in the community. It touches more than people's lives physically. It traumatises them for the rest of their lives'.[107]

3.5 Further, according to Detective Superintendent Kerlatec, 'it is such an abhorrent crime that it dictates that it should be separated and looked at differently from the other crimes'.[108]

3.6 The destructive impact of sexual abuse was described in her submission by Mrs Patricia Wagstaff, herself a victim of childhood sexual abuse: 'Sexual offences against a child even by a juvenile can leave the child with enormous problems. Not only has the body of the child been invaded but their trust has been violated, their security of being safe destroyed and their innocence polluted forever'.[109]

3.7 Detective Superintendent Kerlatec also drew attention to the impact on victims of sexual offences: 'It is an extreme struggle for victims to have to deal with this for years and years. I notice some criticism of victims coming forward after 20 or 30 years. I think it demonstrates the burden and pain that they have carried for so long'.[110]

3.8 In contemplating whether sexual offences should be capable of becoming spent, Mrs Wagstaff expressed concern at the NSW Government's apparent interest in the welfare of sexual offenders over that of victims: 'The victim has to live with the mental consequences that can haunt them for the rest of their lives, yet the Government does not want the offenders to live with the burden of a prison sentence in their resumes'.[111] Mrs Wagstaff explained that 'there is no "spent results of sexual abuse" time for me'.[112]

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107 Detective Superintendent John Kerlatec, Commander, Sex Crimes Squad, NSW Police Force, Evidence, 1 April 2010, p 11.

108 Mr Kerlatec, Evidence, 1 April 2010, p 18.

109 Submission 5, Mrs Patricia Wagstaff, p 2.

110 Mr Kerlatec, Evidence, 1 April 2010, p 19.

111 Submission 5, p 8.

112 Submission 5, p 9.

3.9 The Salvation Army emphasised that any proposal to include sexual offences in the spent convictions scheme must not be at the expense of supporting victims of sexual abuse:

> Victims and survivors of sexual abuse need to be believed, need to have the seriousness of the crime committed against them recognised and responded to appropriately, to have the impact of the rime on them acknowledged and not minimised, and to hear the message that that abuse was not their fault. Any amendment to the current prohibition on spent convictions should not compromise this.[113]

3.10 Inquiry participants stressed that community safety should be of paramount importance in any consideration of whether to include sexual offences to the spent convictions scheme. In regard to the spending of past sexual offences, The Salvation Army said that 'the importance of the safety, care and protection of vulnerable people must not be diminished'.[114]

Role of legal system in upholding the seriousness of sexual offences

3.11 Because the legal system plays a role in affirming and upholding societal norms, one of the issues considered by the Committee was whether including sexual offences in the spent convictions scheme would undermine the message that sexual offences are unacceptable. The Committee also considered whether including sexual offences in the spent convictions scheme would amount to a lessening of sentences, or in other words, whether the burden of having to disclose a conviction for a sexual offence was an important part of an offender's sentence.

3.12 When questioned on whether the law plays an educative role in affirming societal norms, NSW Children's Magistrate Hilary Hannam, said:

> … obviously it is an extremely important part of going through the criminal justice process and, in particular, in relation to sentencing that there is this concept of reinforcing society's norms and what is right. There is no doubt about that.[115]

3.13 Magistrate Hannam also observed that the courts play this role in relation to all offences and not just sexual offences. [116]

3.14 According to the Office of the Director of Public Prosecutions, 'it is important that the criminal records scheme maintains a hard line towards sexual offending to reinforce the message that this is unacceptable behaviour'.[117]

3.15 Detective Superintendent Kerlatec also recognised the potential for the law to play an educative role, and noted that in making changes to the spent convictions scheme: 'I think

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113 Submission 14, The Salvation Army, p 1, emphasis as per original.

114 Submission 14, p 1.

115 Ms Hilary Hannam, Magistrate, NSW Children's Court, Evidence, 1 April 2010, p 8.

116 Ms Hannam, Evidence, 1 April 2010, p 8.

117 Submission 4, Office of the Director of Public Prosecutions, p 2.

that in that context the suggestion to water down the element of responsibility for actions into the future needs to be regarded'.[118]

3.16 However, Ms Suellen Lembke, Director of Programs, Juvenile Justice, Department of Human Services, stressed that it was important to differentiate between changes to the spent convictions scheme, and the sentences imposed on sexual offenders:

> … young people are actually sentenced for an offence and that [including sexual offences in the spent convictions scheme] does not change under this; that it has not made any different sentencing, so in terms of a deterrent or message to the community, these offences will continue to be seen as serious offences with an appropriate outcome, and that is a key thing to remember…
>
> I do not think it necessarily will send a negative message to the community because we are not changing the front end of sentencing.[119]

3.17 When questioned on whether including sexual offences in the spent convictions scheme would in effect be a lessening of the sentence, Magistrate Hannam responded:

> No, because the sentence is an entirely different exercise and it should be seen as a different exercise … I think there should be a notion – there are in other areas of the law – where you have received your punishment and you have done what was required to be done, that you can put an end to that in terms of the consequences for your life, but that is not happening for this group. I do not think it would be lessening the sentence; I think it would be assisting young people in their rehabilitation.[120]

3.18 Chief Superintendent Antony Trichter, Commander of Police Prosecutions, NSW Police Force, agreed that sentencing should be distinguished from the spent convictions scheme:

> For my part I would say that the spent conviction regime, although it may be perceived for all intents and purposes as a penalty, I do not think it ought to be considered as part of the punitive process. I think it needs to be regarded as a separate process. I think it is more about risk.[121]

Committee comment

3.19 Some Inquiry participants gave evidence that sexual offences can have a long-lasting and destructive impact on the lives of those affected. The Committee notes the strong views of these Inquiry participants regarding the seriousness of sexual offending and, as a consequence, has taken care to ensure that community safety is given paramount importance in any proposal to include sexual offences in the spent convictions scheme. Several Inquiry participants raised concerns that including sexual offences in the spent convictions scheme would amount to a softening of the way in which the justice system deals with sexual offences.

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118 Chief Superintendent Anthony Trichter, Commander, Police Prosecutions, NSW Police Force, Evidence, 1 April 2010, p 20.

119 Ms Suellen Lembke, Director, Programs, Juvenile Justice, Department of Human Services, Evidence, 1 April 2010, p 28.

120 Ms Hannam, Evidence, 1 April 2010, p 9.

121 Mr Trichter, Evidence, 1 April 2010, p 13.

Others spoke of the risk posed by not requiring sex offences to be disclosed, as this could increase the likelihood of re-offending. These participants supported the continued exclusion of all sexual offences from the spent convictions scheme

3.20 The Committee notes, however, the evidence on the importance of differentiating between the sentencing process and the spent convictions scheme. Ms Hannam and Ms Lembke argued persuasively that sentencing is the appropriate tool for determining the requisite consequences for an offence, rather than through the spent convictions scheme. The spent convictions scheme is not concerned with punishment but is about managing the risks posed by past offenders; it needs to provide offenders with an opportunity to rehabilitate themselves and put their offending behind them, while also protecting the community against re-offending. The Committee considers that sentencing will continue to play an important educative role in reinforcing society's norms, and maintaining a hard line towards sexual offending, regardless of any changes to the spent convictions scheme.

Requirement to disclose past convictions

3.21 Offenders are required to disclose past convictions in a range of situations, including when applying for certain jobs or voluntary positions at schools or nursing homes. The disclosure of a criminal record carries a stigma, regardless of whether the offender has since made a fresh start and become a law-abiding citizen, and limits the employment opportunities open to past offenders. This is particularly so for persons convicted of a sexual offence. A substantial number of people have a criminal record and are affected by the requirement to disclose past convictions.

Situations that require disclosure of a criminal record

3.22 There is a range of situations in which people can be requested or obliged to disclose a criminal record. For example, the NSW Children's Court said that a criminal record check can be required for the purposes of:

- paid employment, especially child-related employment
- voluntary employment, such as in nursing homes or schools
- visa applications
- adoption
- security licensing
- firearms licensing
- insurance applications
- credit applications.[122]

3.23 The NSW Children's Court also noted that '… various tertiary courses demand criminal record certificates before an application will even be considered'.[123]

122 Submission 16, NSW Children's Court, p 7.

3.24 It is becoming increasingly common for job applicants to be subject to a criminal record check. Research by Dr Bronywn Naylor of the Law Faculty at Monash University found that 'criminal records checks are becoming a way of life in Australia. Victoria Police had 3459 requests for a criminal record check for employment purposes in 1992-93. This had increased to 221 236 in 2003-04'.[124]

3.25 The Youth Justice Coalition advised that 'the Australian Federal Police processed more than 600,000 requests for criminal record checks in 2006-07, a 700 percent increase from 1997'.[125]

3.26 Employers cannot conduct a criminal record check without the consent of job applicants. However, the Youth Justice Coalition observed that 'while such a process is technically voluntary it is not a requirement a job applicant can realistically refuse'.[126]

3.27 The Australian Federation of Employers and Industries argued that employers conduct criminal record checks because they need to '… be able to undertake a full and informed risk assessment of persons at the employer's workplace. AFEI members seek personal information about: outstanding charges; criminal convictions and findings of guilt recorded against persons'.[127]

3.28 According to the Federation, an employer needs to be informed of a potential employee's criminal record, particularly in relation to sexual offences, because the employer has legal obligations to protect its employees from the risk posed by past offenders.[128] The Federation noted that:

> An employer is: vicariously liable for the actions of its servants, has occupational health and safety obligations to a broad range of different classes of persons to ensure a safe workplace exists and eliminate at the source risks to health and safety and has obligations to prevent the sexual harassment of its employees.[129]

3.29 The Federation advised that these obligations extend to a wide range of situations where clients are vulnerable to sexual offenders, including 'social and community services, disability services, supported employment services, health care services, fitness instruction and education'.[130]

3.30 There are safeguards in place to prevent discrimination in employment on the basis of a criminal record, including anti-discrimination legislation in some jurisdictions. For example, the Federal Government's *Australian Human Rights Commission Act 1986* prohibits discrimination on the basis of a person's criminal record, unless '… the person's criminal

123 Submission 16, p 8.

124 Naylor B, 'Do not pass go: The impact of criminal record checks on employment in Australia', *Alternative Law Journal*, Vol. 30, No. 4, August 2005, p 174.

125 Submission 13, Youth Justice Coalition, p 6.

126 Submission 13, p 6.

127 Submission 19, Australian Federation of Employers and Industries, p 8.

128 Submission 19, p 8.

129 Submission 19, p 7.

130 Submission 19, p 7.

record means that he or she is unable to perform the inherent requirements of the particular job'.[131] The Commission's Guide to employers states that an employer should not refuse to employ a past offender if the past offender's criminal record does not impact on the inherent requirements of the job, and the person is the best candidate for the job in every other way.[132]

3.31 NSW does not have legislation that prohibits discrimination on the basis of a criminal record.[133] Only the ACT, Tasmania, the Northern Territory and Western Australia have laws which prohibit discrimination on the grounds of a criminal record or spent conviction.[134]

3.32 In 2008-2009, the Australian Human Rights Commission received 390 complaints about discrimination on the basis of a criminal record (of a total of 28,373 complaints).[135]

Reduced employment opportunities and impact on re-offending

3.33 Dr Naylor observed that at the same time as the use of criminal record checks and child-related employment screening processes is increasing, '… governments across the world are recognising the importance of re-engaging former offenders in employment and accommodation to reduce the risk of re-offending'.[136]

3.34 According to the 2002 *Breaking the Circle* report by the United Kingdom Home Office, employment can reduce offending by between a half and a third, but a criminal record can 'seriously diminish' employment opportunities.[137] The report noted that 'the best way to make our communities safe is to reduce re-offending' and that the most successful way of doing this is by 'opening up employment to people who want to put their offending behind them …'.[138]

3.35 Dr Naylor noted that the increasing use of criminal record checks resulted in offenders being denied employment even where their conviction did not impact on their ability to perform the inherent requirements of the job. According to Dr Naylor: 'There is an air of moral panic about the evident spiralling demand for police checks in the recruitment process, reflecting

131 *Australian Human Rights Commission Act 1986* (Cth), s 3.

132 Human Rights and Equal Opportunity Commission, *On the record: Guidelines for the prevention of discrimination in employment on the basis of a criminal record*, November 2005 (minor revision September 2007), p 5.

133 Human Rights and Equal Opportunity Commission, *On the record: Guidelines for the prevention of discrimination in employment on the basis of a criminal record*, November 2005 (minor revision September 2007), p 14.

134 Tabled Document, NSW Bar Association, *Model Spent Convictions Bill 2008*: *Standing Committee of Attorneys General,* January 2009, p 18.

135 Australian Human Rights Commission, *Annual Report 2008-09*, p 65.

136 Submission 22, Dr Bronwyn Naylor, p 1.

137 United Kingdom Home Office, *Breaking the Circle: A report on the review of the Rehabilitation of Offenders Act*, July 2002, p ii.

138 United Kingdom Home Office, *Breaking the Circle: A report on the review of the Rehabilitation of Offenders Act*, July 2002, pp 1-2.

fear and prejudice, popular punitiveness, and also perhaps fear of litigation on the part of employers'.[139]

3.36 The NSW Children's Court pointed to research which has '… found that past offenders are less likely to obtain employment than people with chronic illnesses, disabilities or communication difficulties'.[140]

3.37 The Public Interest Advocacy Centre (PIAC) observed that in their experience '… a large number of individuals are prevented from obtaining employment and achieving social inclusion on the basis of their criminal record …'.[141] PIAC's 2008 report on interviews with over 200 people who had experienced homelessness stated that:

> When asked how their homelessness could have been prevented, many of those interviewed confirmed experiences of discrimination when attempting to gain employment. One person said 'having a criminal record stops people getting employment, creates social judgement and leaves people with no options'.[142]

3.38 Ms Natalie Mamone, Chief Psychologist for Juvenile Justice, Department of Human Services, explained how employment assists in reducing recidivism:

> Stable employment assists in helping offenders to see themselves as part of society rather than being separate or isolated from it. People who identify with a particular group tend to comply with the rules of that group. Our aim with young offenders is that they comply with a pro-social society.
>
> Employment provides people with the financial means to meet their needs in legitimate ways, thereby reducing the temptation of crime. Employment also increases the number of pro-social associates that a person has. That is a particularly strong protective factor with juvenile offenders.[143]

3.39 Ms Mamone indicated that longitudinal studies have found that 'the more that people invest in being part of the community the less likely they are to offend'.[144]

3.40 In addition, the requirement to disclose past convictions can have a disproportionate impact on certain segments of society. For example, Dr Naylor noted that the requirement to disclose a criminal record is problematic '… particularly for Indigenous communities, where criminal convictions pose further limitations on community development'.[145]

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139 Naylor B, 'Do not pass go: The impact of criminal record checks on employment in Australia', *Alternative Law Journal*, Vol. 30, No. 4, August 2005, p 174.

140 Submission 16, p 8.

141 Submission 11, Public Interest Advocacy Centre, p 1.

142 Submission 11, p 2.

143 Ms Natalie Mamone, Chief Psychologist, Juvenile Justice, Department of Human Services, Evidence, 1 April 2010, p 22.

144 Ms Mamone, Evidence, 1 April 2010, p 22.

145 Submission 22, p 1.

3.41 The Youth Justice Coalition observed that the impact of having to disclose past convictions can be particularly significant in rural, remote and regional areas where there are less employment opportunities, and because the '…smaller populations and tight-knit social networks…' can intensify the stigma experienced by the young offender.[146]

Impact on juvenile offenders

3.42 The requirement to disclose convictions for past offences, often committed when they were very young, can have a substantial impact on young people. The Commission for Children and Young People emphasised the importance of employment in rehabilitating juvenile offenders, who are often at a significant disadvantage to begin with:

> Stable and ongoing employment is crucial to the rehabilitation process and to assist an offender's reintegration back into the community. However, there is no doubt that people with criminal records are disadvantaged in employment decisions. This further compounds the disadvantage that many young offenders already face due to their disengagement from education and employment.[147]

3.43 The NSW Government noted that 'juveniles in particular, face significant disadvantage from the disclosure of past criminal conduct, especially when first entering the workplace'.[148]

3.44 The Youth Justice Coalition indicated that not being able to obtain employment places young people '… at risk of social disadvantage, homelessness and of developing mental or physical health problems'.[149] The Youth Justice Coalition argued that the current exclusion of sexual offences from the spent convictions scheme represents a 'double punishment' for juvenile offenders as it results in diminished employment opportunities and '… further marginalizes and stigmatises young people who commit sex offences'.[150]

3.45 Professor Dianna Kenny and Dr Christopher Lennings cited a number of examples where the disclosure of convictions for less serious sexual offences had a significant impact on juvenile offenders, who had been:

- expelled from schools on character grounds when prior history has been disclosed
- prevented from completing social work and nursing degrees because they were denied a clearance to work with children and could not complete the practicum requirements of the degrees
- ruled ineligible by DOCS to become carers of young children in their extended families who had suffered family breakdown or tragedy.[151]

146 Submission 13, p 14.

147 Submission 8, NSW Commission for Children and Young People, p 2.

148 Submission 21, p 14.

149 Submission 13, p 8.

150 Submission 13, p 12.

151 Submission 18, Professor Dianna Kenny and Dr Christopher Lennings, pp 2-3.

3.46 Professor Kenny and Dr Lennings observed that the disclosure of juvenile sexual convictions '… may hinder psychological adjustment and the assumption of adult responsibilities'.[152]

3.47 The following case studies drawn from submissions to this Inquiry illustrate how the requirement to disclose convictions for sexual offences continues to impact on offenders who were convicted of minor offences many years ago when they were very young.

Mrs Lyn and Mr Neville Cox*

Lyn and Neville began dating as teenagers in the 1960s. Lyn became pregnant when she was 15 and Neville was 16. Her baby was given up to adoption and Lyn's parents had Neville formally charged with carnal knowledge. The couple continued seeing each other and later married. Lyn and Neville have been married for 40 years and have since had two more children. They are well known and respected in their home town of Wagga Wagga.

In 2007 Neville was offered a contract to do maintenance work in schools. After applying for the position, he was refused on the basis of his criminal conviction, which identifies him as a sex offender. Neville has never been charged with any other criminal offence. Until 2007, he was not aware that he is prohibited from working with children due to his past conviction for a sexual offence against a child. When they found out that Neville was a prohibited person, Lyn said that 'all of a sudden we just felt so terrible that this had happened to us.' Neville now faces restrictions on his business as many jobs require applicants to complete a Working With Children Check. According to Lyn, 'our problem is that when he submits an application for employment his name comes up red-flagged and it looks like he is a paedophile which of course he is not.'

* Submission 1; Mrs Lyn Cox and Mr Neville Cox, Evidence, 1 April 2010

Mr Smith*

In 1953, at the age of 13, Mr Smith and another boy were convicted of indecent assault and Mr Smith was sentenced to an 18-month good behaviour bond. As he recalls, it was the older boy's inappropriate behaviour that resulted in the police charge. At the time there 'was no evidence being presented, no witnesses, no statement of complaint read out in court, apart from the confessions presented by the Police.' Neither he nor his parents were given any legal assistance.

Since then, Mr Smith has been crime free for 57 years. He is an upstanding community member who has lived in the same area for over 48 years. He has been married for 50 years and has three professional children. At 70 years of age he would like to assist at his grandchildren's schools but this would require that he declare his conviction for a sexual offence to the school staff. Mr Smith believes 'this to be confronting and unfair as well as an abuse to his rights to privacy.' Mr Smith asks, 'is this the wish of this Government to continue to stigmatise a decent and law-abiding senior citizen?'.

* Submission 20. Please note that Mr Smith's real name has been kept confidential, at his request.

152 Submission 18, p 2.

Number of people affected by requirement to disclose past convictions

3.48 A substantial number of people in NSW are affected by the requirement to disclose past convictions. Although there are no statistics on the proportion of the NSW population with a criminal record, the number is likely to be substantial: in the fifteen years to June 2009 there were 802,913 distinct individuals (or over 10 per cent of the NSW population[153]) convicted of an offence in NSW.[154] Of these there were 9,266 individuals (or 1 per cent of the NSW population) convicted of a sexual offence.

3.49 According to figures from the 2002 *Breaking the Circle* report by the United Kingdom's Home Office, over one quarter of the working age population in the United Kingdom have a previous conviction.[155]

3.50 In relation to the prevalence of youth offending, a study of all people born in NSW in 1984 found that almost 1 in 10 had a conviction by the age of 21. [156] By the age of 21, members of the cohort had made 178 appearances for sexual assault and related offences (or 0.6 per cent of all offences for which members of the cohort appeared in court). [157] Further, the study found that 94 individuals had been charged on at least once occasion for aggravated sexual assault, and of these, 62 individuals had been convicted at least once.[158]

3.51 Juvenile Justice advised that in 2008-2009 there were 93 young people convicted of sexual offences, resulting in 73 community supervision orders and 20 custodial sentences.[159]

3.52 Dr Ian Nisbit observed that sexual offending accounts for approximately 1 per cent of all appearances in the NSW Children's Court.[160]

Committee comment

3.53 The requirement to disclose past convictions can be a barrier to the rehabilitation and social inclusion of offenders. A substantial number of NSW residents have a criminal record and are

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153 Calculated based on a NSW population of 6.98 million at the end of June 2008, accessed 9 April 2010, <www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/1338.1Main%20Features4June%202009?opendocument&tabname=Summary&prodno=1338.1&issue=June%202009&num=&view=>

154 Ms Gabrielle Carney, Assistant Director, Legislation, Policy and Criminal Law Review Division, Department of Justice and Attorney General, Evidence, 29 March 2010, p 3. This number includes juvenile offenders convicted in the NSW Children's Court.

155 United Kingdom Home Office, *Breaking the Circle: A report on the review of the Rehabilitation of Offenders Act*, July 2002, p ii.

156 Tabled document, Department of Justice and Attorney General, *Generation Y and Crime: A longitudinal study of contact with NSW criminal courts before the age of 21*, August 2006, p 7.

157 Tabled document, *Generation Y and Crime*, p 7.

158 Tabled document, *Generation Y and Crime,* p 7.

159 Ms Megan Wilson, Executive Director, Office of the Chief Executive, Juvenile Justice, Department of Human Services, Evidence, 1 April 2010, p 24.

160 Submission 6, Dr Ian Nisbet, p 1.

affected by the requirement to disclose past convictions. Inquiry participants observed that past offenders experience difficulty in finding employment, which is a key protective factor in preventing re-offending. The Committee notes that, unlike several other Australian jurisdictions, NSW does not have legislation that prohibits discrimination on the basis of a criminal record.

3.54 The Committee is mindful of the seriousness with which the community views sexual offences, and notes the evidence from Detective Superintendent Kerlatec concerning the abhorrent nature of sexual offending. The Committee reaffirms the need to protect society from the dangers of re-offending.

3.55 The Committee has given much thought to where the balance should lie, in terms of providing past sexual offenders with a clean slate and a chance at rehabilitation, and managing the risks to the community of future offending. The Committee has determined that sexual offenders should be supported in their rehabilitation to assist them in moving on with their lives, without in any way diminishing their understanding of the seriousness of their offence. The Committee notes that this in turn has the effect of reducing the risk to the community of recidivism.

3.56 The Committee has therefore formed the view that there is scope to include convictions for less serious juvenile sexual offences in the spent convictions scheme. In the following Chapters the Committee will examine the options for including juvenile sexual offences in the spent convictions scheme, where offenders pose a low risk to the community. The Committee understands that the question of the definition of what is a 'less serious sexual offence' deserves careful consideration. The matter is examined in more detail in Chapter 5.

Adult sexual offenders

3.57 Although the terms of reference left open the possibility for the Committee to examine adult sexual offences, this report focuses on sexual offences committed by juveniles. Lifting the blanket prohibition on the spending of sexual convictions would be a significant step that must be approached with caution. The Committee chose to concentrate on juvenile sexual offences in this Inquiry and report, given the evidence that there are a number of factors that may justify the spending of convictions for juvenile sexual offences. Nevertheless due to the scope of the terms of reference the Committee received some evidence on adult sexual offences, which will be addressed briefly in this section. The evidence concerning juvenile sexual offending will be explored in the remainder of this report.

Recidivism for adult sexual offenders

3.58 Recidivism rates are an important consideration in determining whether convictions for sexual offences should be capable of becoming spent. The Committee received some evidence on recidivism rates for adult sexual offenders, but this evidence was not as extensive as the evidence received in relation to juvenile sexual offenders.

3.59 For example, Dr Naylor pointed to research which found that 'released sex offenders are less likely to reoffend at all than the general group of released offenders'.[161] Indeed, of all offence types, Dr Naylor said that sexual offenders were the least likely to re-offend.[162] Dr Naylor argued that, as with juvenile sexual offenders, there is no justification for excluding adult sexual offenders from the spent convictions scheme based on their rates of recidivism.

3.60 Further, Dr Naylor advised that 'released sex offenders also appear to be less likely to reoffend sexually than they are to reoffend generally'.[163] Dr Naylor indicated that a 2004 meta-analysis of 95 studies found the recidivism rate for sexual offences to be 13.7per cent (compared to an overall recidivism rate among sexual offenders for all offence types of 36.9 per cent).[164]

3.61 Taking into account these findings, Dr Naylor concluded that:

> There is no empirical basis for dealing with sex offenders differently. They generally have similar criminal patterns to other offenders, and tend to commit both sexual and other crimes rather than to 'specialise' in particular forms of offending.[165]

3.62 The NSW Government also referred to research on recidivism rates, for both adult and juvenile sexual offenders:

> Research based on both official reports of offending and self-reports of offenders shows that sex offenders typically have lower rates of recidivism than do other kinds of offender and that these rates vary for different sub-groups of sex offender.[166]

3.63 In addition, the NSW Government stated that 'it could be argued that, absent clear evidence that the causes of reoffending for sex offenders are different to those for other offenders, the purposes of the Criminal Records Act should apply equally to sex offenders as to other offenders'.[167]

Should convictions for adult sexual offences be capable of becoming spent?

3.64 Of those Inquiry participants who supported including sexual offences in the spent convictions scheme, only a small number explicitly addressed the issue of whether adult sexual offences should be capable of being spent, and according to what benchmark sentence.

161 Submission 22, p 4.

162 Submission 22, p 2.

163 Submission 22, p 4.

164 Submission 22, p 4.

165 Submission 22, p 4.

166 Submission 21, p 13.

167 Submission 21, p 14.

3.65 The Law Society of NSW[168] and the NSW Bar Association[169] supported the spending of convictions for sexual offences for adult and juvenile offenders alike, as did the Chief Magistrate of the Local Court Graeme Henson,[170] Dr Naylor[171] and the Public Interest Advocacy Centre.[172]

3.66 The Office of the Director of Public Prosecutions argued that while the majority of convictions for sexual offences should continue to be excluded from the spent convictions scheme, both adult and juvenile sexual offences should be capable of becoming spent in certain circumstances.[173]

3.67 Chief Superintendent Kerlatec expressed the view that he would not support any changes to the spent convictions scheme.[174]

3.68 In relation to the benchmark sentence under which convictions for sexual offences would be capable of becoming spent, Chief Magistrate Henson[175] and Dr Naylor[176] referred to the current restriction to sentences of under six months, without commenting on the proposal in the Model Spent Convictions Bill (the Model Bill) to extend eligibility to sentences under 12 months.

3.69 Only the Law Society of NSW and the NSW Bar Association commented on the Model Bill criteria in relation to adult sexual offences. They both supported the proposal to include sentences for adult sexual offences of under 12 months in the spent convictions scheme.[177]

Committee comment

3.70 The Committee received some evidence that indicates that adult sexual offenders have relatively low rates of recidivism. However the evidence received was limited on this point, given the focus of the Inquiry on juvenile sexual offenders. Consequently, while some Inquiry participants addressed whether adult sexual offences should be included in the spent convictions scheme, and the appropriate benchmark sentence for doing so, most stakeholders did not address this issue.

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168 Answers to questions taken on notice, The Law Society of NSW, 25 May 2010, p 2.

169 Answers to questions taken on notice, NSW Bar Association, 19 May 2010, p 1. In this correspondence the NSW Bar Association noted that they supported the position of the Law Society of NSW.

170 Submission 12, Chief Magistrate of the NSW Local Court Graeme Henson, p 1.

171 Submission 22, p 6.

172 Submission 11, p 4.

173 Submission 4, p 1.

174 Chief Superintendent Kerlatec, Evidence, 1 April 2010, p 12

175 Submission 12, p 1.

176 Submission 22, p 5.

177 Answers to questions taken on notice, The Law Society NSW, 25 May 2010, p 2; Answers to questions on notice, NSW Bar Association, 19 May 2010, p 1. In this correspondence the NSW Bar Association noted that they supported the position of the Law Society of NSW.

3.71 The Committee is of the view that the Attorney General should further examine whether adult sexual offences should be included in the NSW legislation to implement the Model Bill.

Recommendation 1

That the Attorney General further examine whether adult sexual offences should be included in the NSW legislation to implement the Model Spent Convictions Bill.

Chapter 4 Spending convictions for juvenile sexual offences

The terms of reference for this Inquiry ask the Committee to examine whether convictions for sexual offences should be spent in four limited sets of circumstances. This Chapter will consider the first of these circumstances in regard to juvenile sexual offences. The Chapter begins by placing juvenile sexual offending in context by considering the profile of juvenile sexual offenders. Next the nature of juvenile sexual offending is discussed. Many Inquiry participants described various distinctive factors applying to adolescent offenders that, in their opinion, justified including juvenile sexual offences in the spent convictions scheme. Central to the argument that juvenile sexual offences should be capable of becoming spent are the recidivism rates for juvenile sexual offenders and their prospects for rehabilitation. The principles underlying the juvenile justice system are then considered, including how they could apply to the spent convictions scheme. The Chapter concludes by addressing the question of whether juvenile sexual offences should be included in the spent convictions scheme, again considering the views of Inquiry participants, and drawing together the views expressed throughout this Chapter.

Profile of juvenile offenders

4.1 Inquiry participants provided evidence on the characteristics of juvenile offenders, and the often disadvantaged and dysfunctional backgrounds of juvenile sexual offenders. This enabled the Committee to better understand the context of juvenile sexual offending.

Characteristics of juvenile offenders

4.2 Research studies have sought to identify the type of young people who become involved in juvenile offending. One such study of all people born in NSW in 1984 examined this cohort's contact with the criminal justice system before the age of 21. The study found that of those young people who had contact with criminal courts before the age of 21:

- 30 per cent first appeared as a juvenile (or 3 per cent of the total cohort)[178]
- 30 per cent first appeared for driving-related offences[179]
- the most common age of first appearance was 18 for males and 19 for females[180]
- males were four times more likely than females to appear in court.[181]

4.3 The 2009 Young People in Custody Health Survey found that juvenile offenders have lower cognitive functioning, with juvenile offenders having an average IQ of 81 compared to an average IQ of 100 among the general population.[182]

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178 Tabled document, Department of Justice and Attorney General, *Generation Y and Crime: A longitudinal study of contact with NSW criminal courts before the age of 21*, August 2006, p 7.

179 Tabled document, *Generation Y and Crime,* p 1.

180 Tabled document, *Generation Y and Crime*, p 4.

181 Tabled document, *Generation Y and Crime,* pp 7-8.

4.4 In relation to juvenile sexual offending in particular, Juvenile Justice provided the following profile of the sexual offenders involved in their programs:

- average age of 16
- 20 per cent had previously been convicted of a sexual offence and 20 per cent had a previous conviction for a non-sexual offence
- 44 per cent lived in single parent families and 29 per cent lived with both biological parents
- 31 per cent had previously been brought to the attention of Community Services for child protection concerns
- 56 per cent were enrolled at school, 10 per cent had been suspended and 24 per cent had left school,[183] with generally very poor levels of educational attainment.[184]

4.5 The great majority of juvenile sexual offenders are male. Indeed, according to a research study by Ms Sue Righthand and Ms Carlann Welch, 'studies and literature reviews have estimated the incidence of juvenile sex offending by girls to be between 2 and 11 per cent'.[185]

4.6 Inquiry participants indicated that the profile of juvenile sexual offenders is not distinct from the profile of juvenile offenders in general. According to the Commission for Children and Young People: 'Findings from the few studies that compare juveniles who committed sex offences with those who committed other types of offences frequently have not revealed significant differences between offenders'.[186]

4.7 Ms Natalie Mamone, Chief Psychologist, Juvenile Justice, Department of Human Services, observed that juvenile sexual offenders '… do not seem to have particular characteristics that identify them as a separate group'.[187]

4.8 In addition, NSW Children's Magistrate Hilary Hannam advised that based on her experience, 'the reasons that disadvantaged young people get involved in the criminal justice system generally equally apply to sexual offending'.[188]

4.9 Inquiry participants also gave evidence that specifically addressed the backgrounds of juvenile sexual offenders. The Committee heard that juvenile sexual offenders tend to grow up in

182 Ms Natalie Mamone, Chief Psychologist, Juvenile Justice, Department of Human Services, Evidence, 1 April 2010, p 26.

183 Ms Suellen Lembke, Director, Programs, Juvenile Justice, Department of Human Services, Evidence, 1 April 2010, p 23.

184 Ms Megan Wilson, Executive Director, Office of the Chief Executive, Juvenile Justice, Department of Human Services, Evidence, 1 April 2010, pp 23-34.

185 Righthand S and Welch C, 'Characteristics of youth who sexually offend', *Journal of Child Sexual Abuse*, Vol. 13, Issue 3 & 4, April 2005, p 25.

186 Submission 8, NSW Commission for Children and Young People, p 2.

187 Ms Mamone, Evidence, 1 April 2010, p 25.

188 Ms Hilary Hannam, Magistrate, NSW Children's Court, Evidence, 1 April 2010, p 2.

disadvantaged and dysfunctional environments. According to Mr Dale Tolliday, Program Director, New Street Adolescent Service and Pre-Trial Diversion of Offenders Program:

> Overwhelmingly, the young people we see come from circumstances of significant disadvantage. They have been exposed to trauma, violence and emotional abuse. In fact, it is rare for us to see a young person who has not had exposure to some kind of traumatic event … they have been subject to all kinds of harm that brings them to the position of harming others.[189]

4.10 Mr Warwick Hunt appeared as a representative of the NSW Bar Association. Mr Hunt is a former Children's Magistrate and is also a barrister with a practice in child protection matters. Mr Hunt observed that in his experience:

> … more than occasionally, and I do not have firm evidence of this but there is strong anecdotal support, one of the ways in which children who have been sexually offended against deal with that experience is by acting out sexually themselves …
>
> I think it needs to be said that some of those children may not have been sexually offended against themselves but have grown up in very sexually dysfunctional family environments.[190]

4.11 The Youth Justice Coalition pointed to '… the large body of research indicating that a young person who commits a sex offence is likely to have been the victim of previous sexual abuse.' One such study conducted in 2001 '… reported that at least 55 per cent of young people convicted of a sex offence had experienced at least one episode of sexual abuse as a child'.[191]

Committee comment

4.12 The Committee notes the evidence that juvenile sexual offenders are not a distinct group of offenders, but have much in common with other juvenile offenders convicted of non-sexual offences. Witnesses gave evidence that as with other juvenile offenders, juvenile sexual offenders often come from backgrounds of significant disadvantage. In addition, Inquiry participants observed that juvenile sexual offenders may have experienced sexual abuse or observed sexual dysfunction.

Nature of juvenile sexual offending

4.13 Several Inquiry participants suggested that some of the factors contributing to juvenile sexual offending, as with non-sexual offending, may be intrinsic to adolescence, such as immaturity, impulsivity and peer pressure, in conjunction with incomplete brain development. It was argued that these factors distinguish juvenile sexual offending from sexual offending by adults.

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189 Mr Dale Tolliday, Program Director, New Street Adolescent Service and NSW Pre-Trial Diversion of Offenders Program, 29 March 2010, p 28.

190 Mr Warwick Hunt, Bar Councillor, Member of Criminal Law Committee, NSW Bar Association, Evidence, 1 April 2010, pp 43-44.

191 Submission 13, Youth Justice Coalition, p 12.

Factors contributing to juvenile sexual offending

4.14 Inquiry participants advised that there are many factors contributing to juvenile sexual offending. Juvenile Justice gave evidence that:

> The reasons for sexual offending are multi-factorial and complex. These include impulsivity, immaturity and peer pressure – factors which are also related to non-sexual offending. Some young people are opportunistic or may be groomed by adult sexual offenders to commit sexual offences.[192]

4.15 The Commission for Children and Young People noted that '…for many young people sexual offending may be one part of an overall pattern of risk taking behaviour', involving other non-sexual offences and antisocial behaviour.[193] Further, the Commission advised that:

> Research shows that much sexual offending among young people is impulsive in nature and committed as a result of their immaturity, and often peer pressure. Increased novelty seeking, increased risk-taking and a shift towards more peer-based interactions are all behaviour changes that occur during adolescence.[194]

4.16 According to Mr Tolliday: 'Young people's capacity to make judgments is not the same as an adult. When substances such as alcohol are involved that impairs judgment further'.[195]

4.17 Juvenile Justice noted that the 2006 review of the Sex Offender Program found that 'most sexual offences (approximately 71 per cent of young people) appear to be impulsive or influenced by the presence of peers or the disinhibiting influences of drugs'.[196]

4.18 The majority of magistrates in the NSW Children's Court, with the exception of one dissentient senior magistrate, believed that 'most sexual offences that are prosecuted in the Children's Court amount to adolescent or pre-pubescent sexual experimentation'. [197] The Children's Court also advised that 'equally, some juveniles convicted of sexual offences in the Children's Court suffer from intellectual or mental disabilities and do not understand the consequences of their actions'.[198] Magistrate Hannam elaborated in evidence:

> The idea that children are just like little adults committing the same sort of offences just is not correct. In many aspects of our criminal law the same sort of assumptions that are correct for adults are not correct when applied to children. There is a very good reason why sex offences are in a different category for adults. For children they [sexual offences] should not be treated as in a different category for that very reason: children can get caught up in situations.[199]

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192 Correspondence from Ms Megan Wilson, Executive Director, Office of the Chief Executive, Juvenile Justice, Department of Human Services, to Principal Council Officer, 4 May 2010.

193 Submission 8, p 2.

194 Submission 8, p 3.

195 Mr Tolliday, Evidence, 29 March 2010, p 27.

196 Correspondence from Ms Wilson, to Principal Council Officer, 4 May 2010.

197 Submission 16, NSW Children's Court, p 4.

198 Submission 16, p 4.

199 Ms Hannam, Evidence, 1 April 2010, p 8.

4.19 The Youth Justice Coalition argued that because juvenile sexual offending is related to immaturity, offenders are likely to out-grow sexual offending as they mature:

> Research on the psychological immaturity of children clearly shows a relationship between age and deviance and suggests that young people who have engaged in offending at a young age may not continue to do so. Reversion from deviant to mainstream identities is the norm with progressing age. This reinforces the need to provide young people with further opportunities to assume productive roles in society without continually being reminded that they are "bad people."[200]

4.20 Further, the NSW Government noted that '… there is increasing evidence that adolescent and adult sex offenders are distinct populations'[201] and that 'research indicates that important offending characteristics of juvenile sex offenders differ from those of adult offenders. This includes both their capacity to rehabilitate and the nature of their offending behaviour'.[202]

4.21 According to the Commission for Children and Young People, 'to label these young offenders as "juvenile sex offenders" at a time when they are developing their identity may have negative effects. There is no evidence that suggests "once a sex offender always a sex offender"'.[203]

4.22 However, the Office of the Director of Public Prosecutions viewed juvenile sexual offending very seriously and took the view that few trivial juvenile sexual offences are prosecuted:

> In our experience there is a low incidence of the prosecution of what might be considered trivial sexual offending in the Children's Court. In the main the conduct involves the exploitation of a younger, more vulnerable child and is therefore indicative of abuse of power and trust.[204]

Juvenile brain development

4.23 The Commission for Children and Young People advised that brain development continues until a young person is in their mid 20s, and suggested that this may be a factor in juvenile offending:

> We now know that different areas of the brain reach their peak developmental stage at different ages. For example, the development of the frontal lobe, which is responsible for reasoning, continues until the mid 20s and then peaks … As a result, there are some emotional responses that young people are simply unable to control properly, without being taught over time, and some types of reasoning that young people are incapable of doing on their own.[205]

200 Submission 13, p 10

201 Submission 21, NSW Government, p 14.

202 Submission 21, p 14

203 Submission 8, p 4.

204 Submission 4, Office of the Director of Public Prosecutions, p 3.

205 Submission 8, p 3.

4.24 Further, Dr Claire Gaskin, Clinical Director, Adolescent Mental Health, Justice Health, advised that that it is the brain's frontal lobe that is responsible for judgement and impulse control:

> Brain modelling that has taken place shows very clearly that brain development particularly in the frontal lobes, which is responsible for judgement, impulse control, the sorts of problems you see within attention deficit type disorders and control disorders, definitely proceeds onwards to around the age of about 24 or 25 in most people and some outside that range …[206]

4.25 Given ongoing adolescent brain development, Dr Gaskin observed that juvenile offenders may have better prospects for rehabilitation if given the right 'psychological help and support', because juvenile offenders have the '… ability to improve with that and to make significant progress compared to maybe an adult offender who might make less progress given that lack of brain development going on'.[207]

4.26 In relation to juvenile brain development, the NSW Government said:

> … much juvenile sexual offending is committed out of impulse, immaturity and as a result of peer pressure (consistent with the prevailing research suggesting that the adolescent brain does not mature until a person has reached their early to mid 20s) …[208]

Committee comment

4.27 A number of Inquiry participants shared the view that many juvenile sexual offences are committed on impulse, as one part of a pattern of risk-taking behaviour. Others suggested that juvenile sexual offences can be attributed in part to immaturity or sexual experimentation. In explaining the factors contributing to juvenile sexual offending, witnesses gave persuasive evidence that brain development is not complete until young people are in their mid 20s, and that this affects the frontal lobe responsible for reasoning and impulse control. Some Inquiry participants argued that these factors distinguish juvenile sexual offenders from adult sexual offenders.

Risk of re-offending by juvenile sexual offenders

4.28 Inquiry participants, including the NSW Children's Court, the Youth Justice Coalition and the NSW Government, pointed to a credible body of research that has examined the important question of recidivism among juvenile sexual offenders. In particular, this research has sought to determine the risk of juvenile sexual offenders progressing to become child sexual offenders as adults. It was argued that because there are low rates of juvenile sexual recidivism, juvenile sexual offenders pose no greater risk to the community than other juvenile offenders. However, some Inquiry participants, including a senior magistrate of the

206 Dr Claire Gaskin, Clinical Director, Adolescent Health, Justice Health, Department of Health, Evidence, April 2010, p 66.

207 Dr Gaskin, Evidence, 1 April 2010, p 66.

208 Submission 21, p 14.

NSW Children's Court, questioned the reliability of statistics on sexual re-offending by juveniles.

Recidivism rates for juvenile sexual offenders

4.29 Research on juvenile sexual recidivism is important for determining the risk of re-offending posed by juveniles who commit sexual offences. As noted by Bravehearts, an advocacy and support group for survivors of child sexual assault:

> The question around allowing juvenile sex offenders to have his or her conviction spent is complex. At the heart of the question should be consideration of the research around the progression of juvenile sexual offending to adult sexual offending.[209]

4.30 Studies have tended to find relatively low rates of sexual re-offending among juveniles. The Commission for Children and Young People advised that recidivism rates for juvenile sexual offenders are often said to vary between 0 and 20 per cent, and rarely exceed 10 per cent.[210]

4.31 The NSW Children's Court observed that '… the experience of Children's Magistrates supports the research findings which indicate that sexual recidivism among juveniles is quite low'.[211]

4.32 Data sourced from the NSW Bureau of Crime Statistics and Research, and provided by the Department of Justice and Attorney General, examined whether 50 juvenile offenders with convictions falling within seven selected sexual offence categories were re-convicted for sexual offences within the next two to eight years.[212] Of the 50 juvenile offenders convicted of one of the selected offences in 2000, two offenders re-offended within the next eight years: one within four years and the other within eight years.

4.33 The Youth Justice Coalition pointed to a 2003 study which indicated that 9.5 per cent of male juvenile sexual offenders in Western Australia went on to commit a further sexual offence.[213] The study found that while 67.9 per cent of offenders re-offended, they tended to commit non-sexual offences, such as property offences.[214]

4.34 The NSW Government indicated that 'rates of transition from adolescent to adult sex offenders are much lower than originally thought' and that 'the majority of young people who have committed sexual offences do not come to the attention of police for further sexual offences within the first 10 years of their adult lives'.[215]

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209 Submission 15, Bravehearts, p 1.

210 Submission 8, p 3.

211 Answers to questions taken on notice, Ms Hilary Hannam, Magistrate, NSW Children's Court, 27 April 2010, p 2.

212 Answers to questions taken on notice, Department of Justice and Attorney General, 27 April 2010, p 2.

213 Submission 13, p 11.

214 Submission 13, p 11.

215 Submission 21, p 14.

4.35 In commenting on the rates of transition from juvenile to adult sexual offending, Dr Ian Nisbit referred to research which shows that:

> … juvenile sexual offending does not tend to persist into adulthood. In the most recently published study of adult sexual recidivism of juvenile sex offenders from NSW, only 9% of participants who committed a sexual offence as a juvenile came to the attention of police for a sexual offence as an adult.[216]

4.36 Dr Nisbit observed that juvenile sexual offenders are often versatile offenders. That is, they are likely to commit a range of sexual and non-sexual offences, rather than being specialist offenders who only commit sexual offences.[217] He noted that as adults, juvenile sexual offenders are six times more likely to commit a non-sexual than a sexual offence.

4.37 The NSW Government indicated that both adult and juvenile sexual offenders tend to have lower rates of recidivism than other types of offenders.[218]

4.38 According to the Chief Magistrate of the Local Court Graeme Henson, first-time juvenile offenders convicted of sexual offences are '… 31% less likely to re-offend than other juvenile first-time offenders'.[219]

4.39 In relation to recidivism among juvenile offenders convicted of sexual and non-sexual offences, the NSW Government stated that the 'evidence indicates that juveniles who have been convicted of sex offences are no more likely to reoffend than juveniles who have committed other non-sexual offences'.[220]

4.40 The NSW Children's Court concluded that based on the research on juvenile sexual recidivism, '… the majority of juvenile sex offenders who commit crimes against younger children are not early onset paedophiles despite the fact that they have acted on sexual urges or fantasise about sexual contact with children'.[221]

4.41 Evidence suggested that treatment and intervention programs can play a role in reducing recidivism among juvenile sexual offenders. Mr Tolliday drew attention to an evaluation of the New Street program, which found that juvenile sexual offenders who complete the program have a 'very low' rate of recidivism of 2.9 per cent, compared to approximately 14 per cent for juvenile sexual offenders who were unable to be accepted into the program.[222] The evaluation concluded that '… effective treatment greatly reduces recidivism. It also reduces non-sexual recidivism'.[223]

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216 Submission 6, Dr Ian Nisbet, p 2.

217 Submission 6, p 2.

218 Submission 21, p 13.

219 Submission 12, Chief Magistrate of the NSW Local Court, p 5.

220 Submission 21, p 13.

221 Submission 16, NSW Children's Court, p 7.

222 Mr Tolliday, Evidence, 29 March 2010, p 25.

223 Mr Tolliday, Evidence, 29 March 2010, p 25.

4.42 The NSW Government also noted research which '… has found that juvenile sex offenders who received community based sentences involving intensive supervision and treatment as opposed to custodial sentences are less likely to engage in adult sex offending'.[224]

4.43 However, while juvenile sexual offenders in general may not pose a greater risk of re-offending than other juvenile offenders, Inquiry participants noted that certain juvenile sexual offenders are more likely to re-offend sexually than others. Professor Dianna Kenny and Dr Christopher Lennings cautioned that efforts needed to be made to identify this sub-group of juvenile offenders:

> There is a small group of highly deviant young people who must be identified and carefully considered as a sub group. Age is a factor, as is the frequency of the offence and the type of the offence. For example, recidivistic young sex offenders are likely to engage in sex offences of a pedophilic type, so great caution is warranted in these cases.[225]

4.44 Dr Bronwyn Naylor, of the Law Faculty at Monash University, who supported the spending of most convictions for sexual offences, noted that special provisions may be needed for certain juvenile sexual offenders: 'One exception which should be investigated is the reported higher recidivism rates for some juvenile sex offenders. In such a case the 3 years crime-free period may warrant some extension…'.[226]

4.45 Juvenile Justice advised that the 2006 Review of the Sex Offender Program found that:

> Approximately 29% of young sexual offenders had been sexually acting out prior to being charged with the index sexual offence and the average length of time for acting out was almost a year. For these young people their offences appear to be a part of a long-standing pattern of inappropriate sexual behaviour.[227]

4.46 Juvenile Justice also drew attention to certain features of an offender's background that exacerbate the risk of juvenile recidivism, both sexual and non-sexual, including a history of physical abuse or exposure to family violence; inconsistency and instability in an offender's caregivers; and instability in an offender's school and living situation.[228] The other exacerbating factor is impulsive and antisocial behaviour.

4.47 Further, Juvenile Justice advised of a number of traits that characterise juvenile sexual offenders who are more likely to re-offend sexually:

> A particularly high re-offence risk category would be those individuals showing a combination of an unusually high degree of sexual preoccupation (sexualised behaviours and aggression, etc.) together with a significant disturbance of conduct or antisocial behaviour. Such an individual would be more likely to reoffend sexually, show predatory behaviour and be more likely to reoffend as an adult.[229]

224 Submission 21, p 13.

225 Submission 18, Professor Dianna Kenny and Dr Christopher Lennings, p 5.

226 Submission 22, Dr Bronwyn Naylor, p 5.

227 Correspondence from Ms Wilson, to Principal Council Officer, 4 May 2010.

228 Correspondence from Ms Wilson, to Principal Council Officer, 4 May 2010.

229 Correspondence from Ms Wilson, to Principal Council Officer, 4 May 2010.

Reliability of statistics on juvenile sexual recidivism

4.48 Some Inquiry participants questioned the reliability of statistics on juvenile sexual recidivism, and suggested that under-reporting of sexual offences may result in misleading statistics on recidivism rates. In commenting on rates of juvenile sexual recidivism, Bravehearts said:

> Research however is mixed. While studies have suggested that patterns of sexual offending often begin in adolescence and many offenders show a progression to more serious offending in adulthood, others have suggested that the risk of juvenile offending progressing into adult offending may be exaggerated due to the retrospective nature of these studies.[230]

4.49 While the majority of magistrates in the NSW Children's Court believed that there are low rates of juvenile sexual recidivism, one magistrate questioned the accuracy of research findings on recidivism rates for juvenile sexual offenders:

> Other members of the Court place little reliance on official conviction and re-conviction rates, arguing that sexual offending is highly unreported and under-prosecuted. Further they argue that there is a clear link between juvenile and adult sexual offending, as a result of which there is no rational basis for distinguishing between adult and juvenile sex offenders.[231]

4.50 Detective Superintendent John Kerlatec, Commander of the Sex Crimes Squad, NSW Police Force, explained some of the barriers to reporting sexual offences, which can in turn impact on the reliability of statistics on sexual recidivism:

> … there is an issue, in particular, in the Aboriginal community. I am aware that children are afraid to come forward … they are afraid of putting up their hands and nominating their accuser, who might be a member of their family … They then try to come to terms with what will happen. That person is either taken away or he or she is taken out of the community and place in something totally foreign.
>
> … I am also aware that some people fear talking to authorities and reporting a matter. It might be fear that has been instilled by the perpetrator who said, "If you go to the police this will happen. This is what we will do to your parents. This is what will take place."[232]

Community perceptions of the risk posed by juvenile sexual offenders

4.51 There is a widespread perception in some sections of the community that juvenile sexual offenders pose a high risk of re-offending, even though this perception is not supported by the bulk of the research on rates of juvenile sexual recidivism. The NSW Children's Court noted that 'sex offenders are often perceived as having very high rates of recidivism and

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230 Submission 15, p 2.

231 Submission 16, p 1.

232 Detective Superintendent John Kerlatec, Commander, Sex Crimes Squad, NSW Police Force, Evidence, 1 April 2010, p 14.

therefore posing a significant threat to society' although these perceptions are not supported by research on juvenile sexual recidivism.[233]

4.52 The NSW Children's Court argued that based on the statistics concerning juvenile offenders dealt with by the Children's Court, '… juvenile offending is far less common than is perceived by the public'. Further, 'the statistics also indicate that the most common sexual offences are of the less serious kind …'.[234] The Court concluded that there was '… no basis upon which these offenders should be singled out as posing a greater danger to society …'.[235]

4.53 Mr Hunt of the NSW Bar Association observed that community thinking about sexual offences tends to be based on the assumption that all sexual offences are of the most serious kind:

> … whilst we properly concern ourselves with community attitudes, informed community attitudes are different from uninformed community attitudes. I suspect that we all tend to think of the worst kind of sexual invasion, and of course we want to protect people against that and every other kind, but our mind generally tends to go to the more heinous behaviour.[236]

4.54 In spite of the evidence which suggests that juvenile sexual offenders have much in common with the generality of juvenile offenders, as noted by Dr Nisbit, '… public policy responses to juvenile sexual offending rest on the assumption that juvenile sexual offending is a specialised form of offending with unique antecedents … and specific legislative responses to protect the community from ongoing risk'.[237]

4.55 Dr Nisbit concluded that in excluding juvenile sexual offenders from the spent convictions scheme, '… it would appear that previous framers of public policy in this area have overestimated the risk posed to the community by juvenile sex offenders'.[238]

4.56 As noted earlier, the Attorney General who introduced the spent convictions scheme, the Hon John Dowd MP, explained that sexual offences were excluded from the spent convictions on the basis of 'prevailing community standards'.[239]

4.57 Dr Naylor pointed to research which found that 'community perceptions about crime and risk are notoriously poorly informed'.[240] Dr Naylor argued that, in relation to the exclusion of sexual offences from the spent convictions scheme, 'the only basis for this approach appears to be a political one, underpinned by a belief that sexual offenders are particularly likely to

233 Submission 16, p 6.

234 Submission 16, p 5.

235 Submission 16, p 7.

236 Mr Hunt, Evidence, 1 April 2010, p 44.

237 Submission 6, p 2.

238 Submission 6, p 3.

239 *LA Debates* (7/2/1991) 394.

240 Submission 22, p 2.

reoffend either sexually or generally'.[241] It was Dr Naylor's view that 'any scheme should be based on sound evidence and not on ill-informed perceptions of risk'.[242]

4.58 Professor Kenny and Dr Lennings cautioned that in considering whether juvenile sexual offences should be capable of becoming spent, 'care must be taken not to bow to uninformed community or political pressure …'.[243]

Committee comment

4.59 The Committee notes that although some Inquiry participants raised concerns about the reliability of statistics on juvenile sexual recidivism, a number of credible research studies have demonstrated that juvenile sexual offenders have relatively low rates of recidivism for sexual offences. These Inquiry participants advised that the research has found that if juvenile sexual offenders do re-offend, they are likely to be convicted of non-sexual offences. This is important when considering the risk of juvenile sexual offenders becoming child sexual offenders as adults. In addition, the Committee recognises the evidence that treatment and intervention programs are effective in reducing re-offending for sexual offences.

4.60 Some Inquiry participants gave evidence that a sub-group of juvenile sexual offenders is more likely to re-offend than juvenile sexual offenders in general. However, this evidence needs to be balanced against the possibility that if a juvenile sexual offender exhibited characteristics indicative of a high risk of re-offending, this would be taken into account at sentencing, and the sentence imposed is likely to make the conviction ineligible to be included in the spent convictions scheme. In addition, persistent sexual offenders are likely to re-offend within the good behaviour period set by the spent convictions scheme, and the conviction would therefore be ineligible to become spent. The issues relating to the eligibility criteria of the benchmark sentence and good behaviour period are discussed in Chapter 6.

4.61 The Committee is aware that perceptions within some sections of the community of the risk posed by juvenile sexual offenders are at odds with the research findings that juvenile sexual offenders in general are unlikely to pose a higher risk than juvenile offenders convicted of non-sexual offences. The Committee believes that perceptions of a higher risk posed by juvenile sexual offenders are not supported by the research findings on juvenile sexual recidivism.

Principles of juvenile justice system

4.62 The criminal justice system distinguishes between adult and juvenile offenders, with the courts placing an emphasis on rehabilitation in sentencing young offenders. Several Inquiry participants suggested that the principles guiding the juvenile justice system could be instructive in considering whether to include juvenile sexual offences in the spent convictions scheme.

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241 Submission 22, p 2.

242 Submission 22, p 2.

243 Submission 18, p 4.

Imperative to treat juvenile offenders differently to adult offenders

4.63 The Youth Justice Coalition explained how the criminal justice system approaches juvenile offending:

> It is a well-recognised concept internationally and in Australia that young people, because of their age and lack of emotional and developmental maturity, are entitled to special protections in dealing with the criminal justice system …
>
> This has accordingly led to a different approach to dealing with young offenders, involving the examination of the structural causes of juvenile crime with an emphasis on the fundamental principles of rehabilitation and reintegration.[244]

4.64 In her evidence to the Committee, Magistrate Hannam explained that in sentencing juvenile offenders magistrates are required to place a greater emphasis on rehabilitation.[245] She referred to the *Children's (Criminal Procedure) Act 1987* under which magistrates are obliged to consider a number of principles when dealing with juvenile offenders, including that:

- children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance
- it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption
- it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties.[246]

4.65 In relation to the principles underlying the juvenile justice system, the NSW Government stated that:

> A major purpose of penalties in the criminal justice system is to encourage and facilitate the rehabilitation of offenders, especially juveniles. For example, this is reflected through the imposition of community service orders and referral of juveniles to youth justice conferences as alternatives to imprisonment.[247]

4.66 The greater emphasis on rehabilitation is also reflected in appeal court decisions. According to Dr Nisbit, 'there appears to be a consensus among the various appeal courts in Australia that special emphasis needs to be given to the principle of rehabilitation when sentencing juveniles, including those who have committed sexual offences'.[248] Dr Nisbit referred to a Court of Criminal Appeal matter heard by Chief Justice Gleeson, when he accepted a submission that:

> In sentencing young people … the consideration of general deterrence is not as important as it would be in the case of sentencing an adult and considerations of rehabilitation should always be regarded as very important indeed.[249]

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244 Submission 13, p 9.

245 Ms Hannam, Evidence, 1 April 2010, p 5.

246 *Children (Criminal Proceedings) Act 1987*, s 6(b),(c) and (f).

247 Submission 21, p 15.

248 Submission 6, p 4.

249 Submission 6, p 4.

4.67 The NSW Government also observed that '… there also appears to be a consensus among the various appeal courts in Australia that special emphasis needs to be given to the principle of rehabilitation when sentencing juveniles, including those who have committed sexual offences'.[250]

4.68 However, at present the spent convictions scheme does not approach juvenile sexual offending differently to adult sexual offending. All sexual offences are excluded from the scheme, regardless of whether they were committed by an adult or a juvenile. The Youth Justice Coalition argued that '… the current spent convictions regime as applied to juvenile sex offenders punishes young people to a similar or greater extent than equivalent adult offenders'.[251]

4.69 According to the Commission for Children and Young People, 'just as our criminal justice system recognises the different needs of young offenders because of their developmental stage, so should the spent convictions scheme'.[252]

Committee comment

4.70 Inquiry participants drew attention to the principles underlying the juvenile justice system. In particular, there is an imperative to treat juvenile offenders differently to adult offenders because of their immaturity and capacity for ongoing development. Consequently the juvenile justice system aims to support the rehabilitation of young offenders. The Committee took this evidence into consideration when deciding whether to include juvenile sexual offences in the spent convictions scheme.

Should convictions for juvenile sexual offences be capable of becoming spent?

4.71 This Chapter has considered a range of arguments put forward by Inquiry participants on whether juvenile sexual offences should be included in the spent convictions scheme. This final section draws together these views.

4.72 While many Inquiry participants supported including juvenile sexual offences in the spent convictions scheme, it is important to recognise that they hold differing views on the circumstances in which these offences should become spent, including benchmark sentences and good behaviour periods, as well as the appropriate mechanism for spending convictions. The views of Inquiry participants on eligibility criteria and mechanisms for spending convictions will be discussed in Chapters 6 and 7.

4.73 A substantial number of Inquiry participants supported including juvenile sexual offences in the spent convictions scheme. In this regard, the majority of magistrates on the NSW Children's Court supported spending convictions for juvenile sexual offences. However, the Children's Court noted that of the 17 magistrates consulted in the preparation

250 Submission 21, p 15.

251 Submission 13, p 12.

252 Submission 8, p 3.

of their submission,[253] one senior magistrate dissented from this view.[254] According to the NSW Children's Court:

> Some members of the Children's Court do not support the assumption that all sexual offences, regardless of their nature, circumstances in which they occur, or the age of the offender, necessarily amount to serious offences. In the experience of some Children's Magistrates this assumption is rarely supported.
>
> Instead, in their experience, very few juvenile offenders dealt with by the Children's Court display characteristics or commit their offences in a manner which is serious, and which may give rise to concerns about their future offending.[255]

4.74 Magistrate Hannam explained that while juvenile sexual offenders should be properly accountable for their actions, the spent convictions scheme should not place sexual offences in a separate category from other offences:

> It is not to say that they [sexual offences] are trivial. We have never submitted that. They are serious but so is break and enter, robbery, or using weapons et cetera. We just say that where it is really serious, yes, let the appropriate consequences flow, but where it is not as serious, it seems to be unfair, unreasonable and superfluous [to exclude juvenile sexual offences from the spent convictions scheme] …[256]

4.75 Further, Magistrate Hannam noted that:

> … the consequences of not being able to have convictions spent can be quite drastic for young offenders given that the conviction can then stay with them for the rest of their life … these are, on the whole, young people who are already disadvantaged … It seems to be unjust.[257]

4.76 As discussed earlier in this Chapter, the Commission for Children and Young People also supported juvenile sexual offences being included in the spent convictions scheme,[258] as did the Law Society of NSW,[259] NSW Bar Association[260] and Dr Naylor.[261]

4.77 Dr Nisbit supported including convictions for juvenile sexual offences in the spent convictions scheme, and argued that this '… can improve prospects for rehabilitation without significantly lowering levels of community safety'.[262]

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253 Answers to questions taken on notice, NSW Children's Court, 27 April 2010, p 1.

254 Ms Hannam, Evidence, 1 April 2010, p 3.

255 Submission 16, pp 3-4.

256 Ms Hannam, Evidence, 1 April 2010, p 8.

257 Ms Hannam, Evidence, 1 April 2010, p 2.

258 Ms Jan McClelland, Acting Commissioner, NSW Commission for Children and Young People, Evidence, 29 March 2010, p 15.

259 Submission 10, The Law Society of NSW, p 1.

260 Answers to questions taken on notice, NSW Bar Association, 19 May 2010, p 2.

261 Submission 22, p 6.

262 Submission 6, p 8.

4.78 The Youth Justice Coalition advised that 'not allowing sex offences to become spent is a policy directed at the individual criminality of the young person. It emphasises the risk that they allegedly pose to the community and does not address the systemic reasons for their offending'.[263] According to the Youth Justice Coalition, spending convictions for sexual offences committed as a juvenile would '… be an important step in recognising the importance of juvenile justice principles…' and would promote the rehabilitation of past offenders, because 'on entering the workforce at the age of 22 or 23, a young person who had committed a minor sex offence while under 18 would no longer have to admit the conviction to a potential employer'.[264]

4.79 Mr Tolliday observed that many of the sanctions imposed on juveniles who commit sexual offences, such as the blanket prohibition on spending sexual offences, were imposed '… with little contemplation of whether they were developmentally appropriate. Further, there was no empirical evidence to support them but paradoxically to undo or revise those sanctions apparently requires evidence that they are not needed'.[265]

4.80 Other Inquiry participants supported the inclusion of juvenile sexual offences in the spent convictions scheme, but only if the conviction was for a 'minor' offence. For example, The Salvation Army supported spending convictions for minor juvenile sexual offences where appropriate, to allow the consequences to be proportionate to the offence:

> … some consequences of the crime must remain, especially when this is necessary for the wellbeing of the victim and the protection of the vulnerable … the consequences for juvenile sex offences need to be no more than is necessary to achieve this and should not place unnecessary burdens on the ex-offender who is attempting to live a life free of crime.[266]

4.81 Professor Kenny and Dr Lennings also supported the spending of minor sexual offences committed by juveniles, but cautioned that before determining which offences should be eligible to become spent there should be a closer examination of benchmark sentences and types of offence.[267]

4.82 In addition, Chief Magistrate Henson of the NSW Local Court supported spending of convictions for minor juvenile sexual offences where the sentence imposed was six months or less.[268]

4.83 Bravehearts supported the spending of convictions for some juvenile sexual offences, limited to those offences that attracted a standard minimum sentence of less than six months.[269]

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263 Submission 13, pp 13-14.

264 Submission 13, p 20.

265 Answers to questions taken on notice, Mr Dale Tolliday, New Street Adolescent Service, 30 April 2010, p 2.

266 Submission 14, The Salvation Army, p 2.

267 Submission 18, pp 4-6.

268 Submission 12, p 1.

269 Submission 15, p 2.

4.84 The Office of the Director of Public Prosecutions supported spending convictions for sexual offences in limited circumstances.[270] This would involve identifying certain categories of sexual offences that could become spent, provided that the other eligibility criteria were met.

4.85 The Department of Education and Training supported the spending of convictions for sexual offences only in minor circumstances, arguing that '… there is already sufficient procedural fairness for people (including juveniles) with sex offences on their police record when they undergo the *Working with Children Check*'.[271] Further, the Department stated that it needed access to an individual's criminal history to assess whether they posed a risk in the school environment:

> It is essential that any changes to the current spent convictions scheme do not place the Department of Education and Training in the situation where it is without access to relevant risk related information regarding students who may present a high level of potential risk in the school environment.[272]

4.86 The Ombudsman was also concerned about a possible reduction in the information available about persons applying for child-related employment: 'I am concerned that any scheme involving spent convictions for juvenile offenders should sufficiently provide for the requirements of the child-related employment screening program with regard to accessing the totality of any criminal record'.[273]

4.87 Some Inquiry participants opposed the inclusion of juvenile sexual offences in the spent convictions scheme in any circumstances. When questioned on whether there should be any changes to the spent convictions scheme, Detective Superintendent Kerlatec responded: '… at this point I would say I would not be supporting any'.[274]

4.88 The continued exclusion of all sexual offences, including juvenile sexual offences, was also supported by Mrs Patricia Wagstaff, a victim of sexual abuse,[275] and the Australian Federation of Employers and Industries.[276]

Committee comment

4.89 The Committee acknowledges that several factors distinct to adolescence contribute to juvenile sexual offending, including impulsivity, immaturity and peer pressure, coupled with incomplete brain development. In addition, the Committee recognises that the majority of juvenile offenders have a greater capacity for rehabilitation than adults, due to their ongoing development. In considering whether to include juvenile sexual offences in the spent

270 Submission 4, p 1.

271 Submission 9, NSW Department of Education and Training, p 1.

272 Submission 9, p 2.

273 Submission 17, NSW Ombudsman, p 1.

274 Mr Kerlatec, Evidence, 1 April 2010, p 12.

275 Submission 5, p 4.

276 Submission 19, Australian Federation of Employers and Industries, p 6.

convictions scheme, the Committee has taken note of the imperative in the juvenile justice system to support the rehabilitation of young offenders.

4.90 In particular, the Committee has placed great weight on the evidence that juvenile sexual offenders have relatively low rates of recidivism, and if they do re-offend, are more likely to commit non-sexual offences. The evidence does not demonstrate a necessary progression from juvenile sexual offending to child sexual offending in adulthood.

4.91 The Committee is of the view that including juvenile sexual offences in the spent convictions scheme is desirable. This would end the distinction between minor juvenile sexual offences and other minor juvenile offences, reflecting the evidence that juvenile sexual offenders are not a distinct group but have a profile similar to that of other juvenile offenders.

4.92 Given the weight of evidence in this Chapter, and taking into account the considered views of Inquiry participants, the Committee has reached the conclusion that convictions for juvenile sexual offences should be included in the spent convictions scheme. This would mean that juvenile sexual offences that meet the same eligibility criteria as other juvenile offences would be capable of becoming spent. The eligibility criteria and mechanism for spending convictions will be considered in Chapters 6 and 7. The Committee therefore recommends that convictions for juvenile sexual offences be included in the NSW legislation to implement the Model Bill.

Recommendation 2

That the Attorney General ensure that the NSW legislation to implement the Model Spent Convictions Bill includes convictions for juvenile sexual offences.

Chapter 5 Spending convictions for sexual offences in limited circumstances

This Chapter examines whether convictions for sexual offences should be capable of becoming spent in the remaining three circumstances raised in the terms of reference. That is, where the offence involved consensual sexual intercourse with a person under the age of consent, where the offence was minor, or where there was a finding of guilt without proceeding to a conviction. It is important to note that while a number of Inquiry participants support convictions for sexual offences being included in the spent convictions scheme in these three circumstances, some stated that their preferred position is for all juvenile sexual offences to be capable of becoming spent.

The first circumstance considered in this Chapter is consensual sexual intercourse between juveniles, focusing on consent as a consideration in determining whether to spend such offences. This is followed by a discussion of whether convictions should be spent where the offence was a minor sexual offence, including the difficulties in defining a sexual offence as 'minor'. The final section concerns whether offences should be included in the spent convictions scheme where there was a finding of guilt without proceeding to conviction. This section canvasses the evidence that a conviction for a sexual offence would not be recorded unless the circumstances were exceptional.

Consensual underage sexual intercourse or 'young love' offences

5.1 The age of consent in NSW is 16 years.[277] It is an offence to engage in sexual intercourse with a person under 16, regardless of whether the person is a willing participant. Underage sexual intercourse is an offence even if both persons are under 16. The Attorney General, the Hon John Hatzistergos MLC advised that offences involving consensual sexual intercourse between juveniles are sometimes known as 'young love' offences.[278] Offences relating to sexual intercourse with a person aged under 16 are listed in Appendix 4.

5.2 While some Inquiry participants were supportive of spending convictions for consensual underage sexual intercourse, they raised a number of difficulties in taking consent into consideration in determining whether to spend such convictions. This section also considers the options for addressing the issue of convictions for these 'young love' offences.

Consent as a consideration in spending sexual offences

5.3 It is an offence to engage in sexual intercourse with a person under 16, regardless of whether it is consensual. The NSW Government commented that 'it would be difficult in those circumstances to make consent a consideration of whether an offence could be spent'.[279]

277 Submission 21, NSW Government, p 15.

278 *LC Debates* (12/11/2009) 19466.

279 Submission 21, p 15.

5.4 According to Dr Ian Nisbit, there are '… a number of controversies surrounding the legal concept of consent with regard to sexual behaviour'.[280] He advised that:

> If the person was below the age of 16 they are legally incapable of providing consent … Any definition of "consensual" sexual intercourse between juveniles, or between an adult and a juvenile, would need to be considered very carefully indeed.[281]

5.5 In evidence, Ms Gabrielle Carney, Assistant Director, Legislation, Policy and Criminal Law Review Division, Department of Justice and Attorney General said that the courts may take the issue of consent into account when determining a person's guilt or in sentencing, but this is not always the case.[282] Ms Carney explained that if consent was to be the basis for determining whether an offence could become spent, the courts would be required to make a finding as to consent:

> This could require further evidence from the victim and/or the offender. Alternatively, it could mean that this particular issue had to be litigated or relitigated on an application for the conviction to become spent, and this may have an adverse impact on the victim and the offender if evidence was required to be given again in relation to the matter.[283]

5.6 Mr Warwick Hunt of the NSW Bar Association observed that while some juveniles are prosecuted for underage sexual intercourse others are not. He said that 'the random application of the law to a situation – where you have some people who are criminals … and those who do exactly the same thing within the same peer group and are not – creates a difficulty in our society …'.[284]

5.7 Ms Jane Sanders, Solicitor, Youth Justice Coalition, also noted the inequity in prosecuting some but not all young people involved in underage sexual intercourse: 'Although in many cases young people in those sorts of relationships do not come to the attention of the police and are not prosecuted, there are a significant number who are prosecuted'.[285]

5.8 The Office of the Director of Public Prosecutions advised that they had reviewed the number of 'young love' cases in recent years, and found a very small number of such cases:

> Recently the ODPP had cause to investigate how many "truly" consensual sexual intercourse cases are prosecuted where the victim was between 14 and 16 and the offender a juvenile. We were able to identify 8 matters in the last 5 and a half years where there was a consensual relationship between a 14-16 year old female and the males in each case were 16-17 years of age … The results of these matters were in the

280 Submission 6, Dr Ian Nisbet, p 7.

281 Submission 6, p 7.

282 Ms Gabrielle Carney, Assistant Director, Legislation, Policy and Criminal Law Review Division, Department of Justice and Attorney General, Evidence, 29 March 2010, p 13.

283 Ms Carney, Evidence, 29 March 2010, p 13.

284 Mr Warwick Hunt, Bar Councillor, Member of Criminal Law Committee, NSW Bar Association, Evidence, 1 April 2010, p 45.

285 Ms Jane Sanders, Solicitor, Youth Justice Coalition, Evidence, 1 April 2010, p 54.

> main withdrawal or dismissal or if a plea was entered a bond without conviction was imposed.[286]

5.9 In four of the eight matters identified by the Office of the Director of Public Prosecutions, the matter was referred to the police by a parent or guardian.[287] This supports some evidence that suggests that whether an offender is prosecuted can be due to parental pressure. For example, Ms Sanders said that 'normally these sorts of behaviours might go undetected and unprosecuted, but in cases where they are prosecuted it may be because dad does not like the boyfriend and calls the police. I think parents have a role in prosecuting sometimes'.[288]

Should convictions for underage sexual intercourse be capable of becoming spent?

5.10 A number of Inquiry participants supported including convictions for consensual underage sexual intercourse in the spent convictions scheme. For example, the Commission for Children and Young People noted that where a young person had been convicted of consensual underage sexual intercourse, the offender would not pose a risk to the community, and that these offences should therefore be capable of becoming spent.[289] The Salvation Army also supported convictions for consensual underage sexual intercourse being capable of becoming spent,[290] as did the State Parole Authority.[291]

5.11 In addition, Professor Dianna Kenny and Dr Christopher Lennings supported the spending of convictions for sexual intercourse with a juvenile:

> We are unequivocally supportive of spending consensual sexual acts, with the proviso that consideration is given to age disparity between the parties, as a crude way of determining the truly consensual nature of the act. An age difference of five or more years could reasonably be construed to indicate that a power imbalance was operating or grooming was being undertaken.[292]

5.12 The Youth Justice Coalition advised that although it would support including convictions for consensual sexual activity between juveniles in the spent convictions scheme, 'this does not sufficiently address the concerns with the current scheme …'[293] because there are other offences that also should be included in the scheme. For instance, the Coalition gave as an example a 'conviction for child pornography, where a young person has taken photographs of a sexual partner under the age of sixteen and then emailed that photo to a school friend'.[294]

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286 Submission 4, Office of the Director of Public Prosecutions, p 3.

287 Submission 4, p 3.

288 Ms Sanders, Evidence, 1 April 2010, p 55.

289 Submission 8, NSW Commission for Children and Young People, p 5.

290 Submission 14, The Salvation Army, p 3.

291 Submission 3, NSW State Parole Authority, p 1.

292 Submission 18, Professor Dianna Kenny and Dr Christopher Lennings, p 5.

293 Submission 13, Youth Justice Coalition, p 21.

294 Submission 12, Chief Magistrate of the NSW Local Court, pp 21-22.

5.13 The NSW Government explained that in other jurisdictions, the issue of 'young love' offences has been addressed by introducing a defence if the participants in the sexual intercourse are of a similar age:

> Some Australian jurisdictions, such as Victoria, include a defence to certain sexual offences in cases where the defendant is no more than a specified number of years older than the alleged victim and the sexual activity is "consensual." NSW has no such defence.[295]

5.14 In regard to the situation in Victoria, the Youth Justice Coalition observed that the law provides that 'consent is a defence to sexual penetration of a child under the age of 16, if the accused was less than 2 years older than the child'.[296] Further, the Youth Justice Coalition observed that all other States and Territories, except NSW and the Northern Territory, have similar provisions. The Youth Justice Coalition recommended that consent be introduced as a defence to a charge of sexual intercourse with a juvenile under 16 years of age, provided that the accused is not more than two years older than the juvenile.[297]

5.15 Alternatively, the NSW Government noted that if less serious juvenile sexual offences were to be included in the spent convictions scheme, this may address the issue of 'young love' offences.[298]

Committee comment

5.16 The Committee recognises the substantial long-term consequences for juveniles convicted of consensual sexual intercourse with a person under 16. The offender's criminal record will never become spent, creating potential barriers to employment and further education. The offender will live with the stigma of a conviction for a sexual offence, although this stigma may not be warranted by the circumstances of the offence.

5.17 One options for addressing this issue is that convictions for underage consensual sexual intercourse specifically be included in the spent convictions scheme. The Committee does not support this option as it would require the courts to make a finding as to consent. There are also difficulties in defining consent given that it is not legally possible for a person under 16 years to consent to sexual intercourse.

5.18 An alternative solution is found in Recommendation 2 of this report, where the Committee recommended that convictions for juvenile sexual offences be included in the spent convictions scheme provided that they meet the same eligibility criteria as other juvenile offences. This would enable convictions for sexual intercourse between a juvenile and a person under 16 years to become spent, if they meet the necessary criteria. The Committee agrees with the view expressed by the NSW Government that this would address the issue of 'young love' offences.

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295 Submission 21, p 15.

296 Submission 13, p 15.

297 Submission 13, p 19.

298 Submission 21, p 15.

Minor sexual offences

5.19 The terms of reference also require the Committee to examine whether convictions for minor sexual offences should be capable of becoming spent. The Attorney General noted that minor sexual offences could, for example, include '… acts of indecency involving conduct that is a breach of ordinary standards of propriety, or the summary offences of obscene exposure involving exposure of a person in a public place'.[299]

5.20 Inquiry participants discussed the ways in which a 'minor' sexual offence could be defined, including by reference to the offence category and the penalty applicable to that offence. However, other Inquiry participants argued that the sentence imposed is the most reliable indicator of the seriousness of an offence. The section will conclude by considering the evidence on the offence of obscene exposure, as raised by the Attorney General, and whether it should be classed as a minor offence.

Maximum penalty as an indicator of a 'minor' offence

5.21 If the spent convictions scheme was to attempt to define minor sexual offences by reference to the maximum penalty applicable for each offence, the Department of Justice and Attorney General advised that the following sexual offences could possibly be classified as minor offences:

- obscene exposure – maximum penalty of six months imprisonment and/or a fine of $1,100
- act of indecency – maximum penalty of two years if the victim is under 16 years of age, or 18 months if the victim is over 18 years.[300]

5.22 Chief Magistrate of the Local Court Graeme Henson suggested that minor sexual offences could be restricted to those where the courts imposed a sentence of imprisonment of less than 6 months, where the maximum penalty for that offence was 12 months imprisonment or less.[301]

5.23 However, the Department of Justice and Attorney General noted the difficulty of determining the seriousness of an offence based on the maximum penalty applicable to that offence category, by giving the following example:

> For instance, an indecent assault can be committed by touching a person on their buttocks over clothes. In these circumstances, a more accurate way of determining whether serious criminality was involved is by looking at the sentence that the offender received for this offence, rather than the five-year penalty that the offence attracts.[302]

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299 *LC Debates* (12/11/2009) 19467.

300 Answers to questions taken on notice, Department of Justice and Attorney General, 27 April 2010, p 1.

301 Submission 12, p 5.

302 Answers to questions taken on notice, Department of Justice and Attorney General, 27 April 2010, p 1.

5.24 NSW Children's Magistrate Hilary Hannam was of the view that the sentence imposed rather than the category of offence was the most reliable indicator of the seriousness of the offence:

> For example, aggravated indecent assault means that it is a person under 16. Aggravated indecent assault could actually be not as serious as an indecent assault – an indecent assault involving someone who is just over 16, for example. But the fact that it falls within that definition of aggravated indecent assault makes it sound more serious.[303]

5.25 When asked to comment on whether the maximum penalty for an offence gave an indication as to the severity of the offence, Magistrate Hannam said that '… even with the maximum penalty, bearing in mind that that is your worst case example, there can be very minor examples …'.[304]

Sentence imposed as an indicator of a 'minor' offence

5.26 Several Inquiry participants suggested that rather than taking the maximum penalty or type of offence as the indicator of a 'minor' offence, the sentence imposed should be used as the most reliable indicator of the severity of an offence.

5.27 The NSW Government noted that it may be 'problematic' to delineate between 'minor' and 'serious' sexual offences: 'Sexual offences by their very nature are serious. A more accurate way to measure the seriousness of the actual offence that the person has committed is by the sentence that is ultimately given…'.[305]

5.28 Ms Debra Maher of the Law Society of NSW supported the sentence imposed being used as the indicator of the severity of an offence: 'There is no ideal measure, but certainly we are of the view that the maximum penalty allowable under the law is not a good measure. Any one charge can incorporate such an enormous variety of behaviour that you really cannot use it as an indicator'.[306]

5.29 Chief Magistrate Henson indicated that '… the sexual offender's sentence has been determined by a judicial officer after due deliberation as the most appropriate penalty having regard to established legislative guidelines and sentencing procedures'.[307]

5.30 In evidence, Ms Carney said: '… I think the test has been, and currently is, to look at the length of the sentence imposed on the person to determine what the court considered, having viewed all the circumstances, the level of seriousness of the offence to be'.[308]

5.31 Ms Sanders supported the use of the sentence imposed as the main indicator of the severity of an offence. She however noted that:

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303 Ms Hilary Hannam, Magistrate, NSW Children's Court, Evidence, 1 April 2010, p 5.

304 Ms Hannam, Evidence, 1 April 2010, p 5.

305 Submission 12, p 15.

306 Ms Debra Maher, Solicitor, The Law Society of NSW, Evidence, 1 April 2010, p 42.

307 Submission 12, p 5.

308 Ms Carney, Evidence, 29 March 2010, p 4.

> … obviously there is great variety between magistrates and judges as to the sentences they impose. Obviously there will be circumstances personal to the offender that may make a sentence less severe than it would otherwise be. The offender may have an intellectual disability, for example.[309]

5.32 Chief Superintendent Anthony Trichter, Commander of Police Prosecutions, NSW Police Force, observed that there are weaknesses in relying on the sentence as the sole indicator of seriousness, given that:

> … there is a great deal of variation in the penalties imposed by courts, particularly on the basis of subjective factors… Subjective factors in particular which are required to be taken into consideration by the court … can vary enormously depending on the individual, their life circumstances and a whole range of matters that the court took into consideration in imposing that penalty. The penalty is not purely a reflection of the seriousness of the facts of the offence but those subjective factors play a very critical role as well.[310]

5.33 Dr Nisbit also said that length of detention is 'not necessarily a reliable indicator' of the seriousness of a juvenile sexual offence.[311] Dr Nisbit noted that for first-time offenders the courts are inclined to impose non-custodial sentences, sometimes even when the matter is a serious indictable offence, while for offenders with a lengthy history of non-sexual offences the courts may impose a sentence of detention for a first-time sexual offence.

5.34 In addition, Professor Kenny and Dr Lennings advised that 'sentencing … does not always reflect the seriousness of the sexual offence, and cannot be used as the arbiter of seriousness without the consideration of other contextual factors'.[312]

Offence of obscene exposure

5.35 During evidence the Committee considered the issue of whether a person could be charged with obscene exposure if they were found to be urinating in public, and therefore be found guilty of a sexual offence. It was suggested that this type of offence could appropriately be defined as a 'minor' sexual offence. Chief Superintendent Trichter clarified this matter by explaining that:

> Rarely, if ever, is an individual who urinates in public charged with wilful and obscene exposure. Those people are charged with offensive conduct. Wilful and obscene exposure generally always is a sexual offence when there is an intention on the part of the perpetrator wilfully to draw attention to his genitalia …
>
> In most cases there is a degree of sexual exhilaration from the fact of so exposing himself.[313]

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309 Ms Sanders, Evidence, 1 April 2010, p 59.

310 Chief Superintendent Anthony Trichter, Commander, Police Prosecutions, NSW Police Force, Evidence, 1 2010, p 12.

311 Submission 6, p 6.

312 Submission 18, p 6.

313 Mr Trichter, Evidence, 1 April 2010, p 15.

5.36 Further, Chief Superintendent Trichter observed that obscene exposure should not be considered to be a trivial offence because it tends to indicate serious sexual deviance:

> I have to add that in my experience in prosecution of wilful and obscene exposure offences a flashing offence is generally symptomatic of a form of sexual depravity as opposed to a minor inconsequential offence. We need to make sure we do not fall into the trap of trivialising an offence of wilful and obscene exposure. I think it is generally indicative of something far more serious.[314]

5.37 When questioned on whether she would support re-classifying some minor sexual offences as offensive behaviour offences, Magistrate Hannam responded: 'I think it would be much less complex instead of redefining a whole lot of our offences to say that there is nothing different about sex offences and other offences. I think that would be very complex'.[315]

Should convictions for minor sexual offences be capable of becoming spent?

5.38 Inquiry participants held differing views on whether convictions for certain defined minor sexual offences should be included in the spent convictions scheme. According to Chief Superintendent Trichter:

> I think it is right to say that on the face of the offence category it would be impossible I think, or at least inappropriate, for the spent conviction scheme to apply on the basis of the category of the offence as opposed to seriousness of the offence itself within the category.[316]

5.39 Chief Superintendent Trichter concluded that 'it is my view definitively that there is no sexual offence when it is not possible for the facts to be significantly serious. I cannot identify a single sexual offence where that would be the case'.[317]

5.40 The Youth Justice Coalition did not support efforts to define 'minor' sexual offences, observing that:

> An assessment of whether an offence is considered a "minor sexual offence" should be made on a case-by-case basis. All the circumstances of a particular matter should be taken into account, rather than fitting the offence into a pre-defined category.[318]

5.41 While giving in-principle support for the spending of convictions for minor sexual offences, Professor Kenny and Dr Lennings stated that 'the challenge is to define the limits of a 'minor sexual offence".[319] They advised that:

> Challenges for such a classificatory system are significant. For example, some would argue that downloading child pornography may be a minor offence, but when

314 Mr Trichter, Evidence, 1 April 2010, p 18.

315 Ms Hannam, Evidence, 1 April 2010, p 7.

316 Mr Trichter, Evidence, 1 April 2010, p 12.

317 Mr Trichter, Evidence, 1 April 2010, p 15.

318 Submission 13, p 22.

319 Submission 18, p 5.

> assessed against criteria such as risk and harm, using such material supports the abuse of children, usually those from developing countries or who are otherwise disadvantaged and powerless … Other offences, however, may more readily meet the requirement for a definition of 'minor sex offence.' Cases include urinating in a public place, grabbing a woman by the breast as part of a dare at a party, exposing oneself as part of a dare.[320]

5.42 The Salvation Army supported juvenile sexual offences being capable of becoming spent where the offences were minor sexual offences, but did not elaborate on which offences should fall within this category.[321]

Committee comment

5.43 The Committee was persuaded by the evidence that within each offence category there is a great variety in the circumstances of each offence, and that the category of offence alone, or indeed the maximum penalty applicable to that offence, is not a reliable indicator of the severity of the offence. However, some Inquiry participants also raised doubts about the reliability of the sentence imposed as an indicator of offence severity, because the sentence imposed takes into account a range of subjective factors and not just the severity of the offence itself. Notwithstanding this evidence the Committee believes that, on balance, the sentence imposed by the courts is the most reliable indicator of the seriousness of an offence, because it reflects the circumstances of each individual offence on a case-by-case basis.

5.44 The Committee supports the spending of convictions for minor juvenile sexual offences, but believes that this should be based on the sentence imposed rather than defined offence categories. The Committee notes that the spending of convictions for minor juvenile sexual offences would be achieved by Recommendation 2, where the Committee recommended that juvenile sexual offences be included in the spent convictions scheme provided that they meet the same eligibility criteria required of other juvenile offences.

5.45 In relation to the offence of obscene exposure, the Committee is mindful of the evidence from the NSW Police Force that offences classed as 'obscene exposure' generally involve sexual intent and tend to be symptomatic of more serious sexual depravity. Based on this evidence, the Committee does not support singling out this particular offence as a 'minor' sexual offence, for the purposes of including it specifically in the spent convictions scheme.

Finding of guilt without proceeding to a conviction

5.46 Under section 10 of the *Crimes (Sentencing Procedure) Act 1999* a court may find a person guilty of an offence without proceeding to a conviction.[322] The *Criminal Records Act 1991* provides that such a finding is spent immediately after it is made.[323] However, in relation to sexual

320 Submission 18, p 6.

321 Submission 14, p 3.

322 Under section 10 the charge may be dismissed, or the court may impose a good behaviour bond or order that the offender participate in an intervention program.

323 *Criminal Records Act 1991*, section 8(2).

offences, despite a court deciding that the circumstances of the offence do not warrant a conviction being recorded, an order under section 10 is taken to be a conviction for the purposes of the *Criminal Records Act* and the finding can never be spent.

5.47 A number of Inquiry participants believed that for sexual offences where no conviction is recorded, the conviction should become spent immediately, as is the case for all other offences. In support of this position, they argued that a non-conviction order for a sexual offence would only be made in exceptional circumstances.

Section 10 orders as a consideration in spending sexual offences

5.48 Professor Kenny and Dr Lennings advised that 'the Section 10 rule is usually only applied when there are circumstances reducing the culpability of the offender, or where there are good grounds for thinking the offence is atypical and unlikely to be repeated'.[324]

5.49 In relation to sexual offences, the NSW Government noted that 'an order under section 10 in relation to a sexual offence would only ever be appropriate in exceptional circumstances'.[325] This point is illustrated by statistics provided by the Department of Justice and Attorney General on the number of non-conviction orders made by the courts under section 10 of the *Crimes (Sentencing Procedure) Act 1999* in relation to sexual offences. For juvenile sexual offenders dealt with in the NSW Children's Court, there were 15 non-conviction orders of a total of 221 cases involving sexual offences in 2005-2009[326] (or 7 per cent of all sexual offence cases).[327] Of these cases, 13 involved the offence of obscene exposure, and resulted in one non-conviction order in this period (or 8 per cent of obscene exposure cases).[328] For juvenile sexual offenders dealt with at law in the District or Supreme Courts, there were 7 non-conviction orders of a total of 254 cases involving sexual offences in 2002-2008 (or 3 per cent of all sexual offence cases).[329]

5.50 For adult sexual offenders dealt with in the Local Court, there were 123 non-conviction orders of a total of 1,779 cases involving sexual offences in 2005-2009 (or 7 per cent of all sexual offence cases).[330] Of these cases, 562 cases involved the offence of obscene exposure, and resulted in 75 non-conviction orders in this period (or 13 per cent of obscene exposure

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324 Submission 18, p 6.

325 Submission 21, p 16.

326 These figures cover the period July 2005-June 2009.

327 Submission 21, Attachment D, pp9-10: 22.

328 Submission 21, Attachment D, p 22.

329 Submission 21, Attachment D, pp 11-22. While the majority of figures covered the period 2002-2008, the figures for some offences covered shorter periods. The 254 cases dealt with in the District or Supreme Courts does not include 25 cases involving sexual offences not dealt with at law by the Higher Courts, but according to the provisions of the *Children (Criminal Proceedings) Act 1987*. No information was provided on the sentence imposed in these cases and whether any of these cases resulted in non-conviction orders.

330 Submission 21, Attachment D, pp1-2: 8. While the majority of figures covered the period 2005-2009, the figures for some offences covered shorter periods.

cases).[331] For adult sexual offenders dealt with in the District or Supreme Courts, there were 9 non-conviction orders of a total of 1,550 cases involving sexual offences in 2002-2008 (or 0.6 per cent of all sexual offence cases).[332]

5.51 In the Model Spent Convictions Bill (the Model Bill), a formal finding of guilt by a court, or a finding that an offence has been proved, is treated as a conviction and included in the spent convictions scheme.[333] This means that where a conviction is not recorded, the conviction will only be eligible to become spent following the completion of the good behaviour period. This provision will apply to all offences, as well as sexual offences if they are included in the spent convictions scheme.

Should sexual offences be spent where no conviction was recorded?

5.52 Inquiry participants who addressed the issue of orders under section 10 supported such convictions being spent immediately, in the same way as for all other offences.

5.53 Dr Nisbit claimed that juvenile sexual offences where no conviction is recorded should be included in the spent convictions scheme, as the courts considered all the circumstances of the particular case and decided that the offence did not warrant a conviction being recorded:

> The advantage of making the recording of a conviction the threshold for exclusion from the spent conviction scheme is that the judge or magistrate is able to weigh a number of factors that are relevant to each particular case.[334]

5.54 The Commission for Children and Young People recommended that '… where a court finds a person guilty of a sexual offence, but does not proceed to a conviction, these findings should also be capable of being spent …'.[335] The Salvation Army also supported juvenile sexual offences being capable of becoming spent where no conviction was recorded,[336] as did the Youth Justice Coalition.[337] The State Parole Authority supported convictions for adult and juvenile sexual offences being spent where no conviction was recorded.[338]

5.55 Professor Kenny and Dr Lennings observed that 'such a scenario would be an ideal starting point to test the efficacy of a spent conviction policy for sex offences'.[339]

5.56 The Youth Justice Coalition also supported the spending of juvenile sexual convictions where no conviction was recorded. The Youth Justice Coalition also argued, however, that:

331 Submission 21, Attachment D, p 8.

332 Submission 21, Attachment D, pp 3-7. While the majority of figures covered the period 2002-2008, the figures for some offences covered shorter periods.

333 Model Spent Convictions Bill 2009, cl (5).

334 Submission 6, p 7.

335 Submission 8, p 5.

336 Submission 14, p 3.

337 Ms Sanders, Evidence, 1 April 2010, p 58.

338 Submission 3, p 1.

339 Submission 18, p 6.

> Limiting sex offences to those for which no conviction has been recorded is too narrow an approach … while sex offences for which no conviction has been recorded could certainly be considered minor, it is also possible that minor offences may be committed for which a bond or a term of imprisonment is imposed.[340]

5.57 The Model Bill proposes that where no conviction is recorded, offenders should be required to complete the good behaviour period before the conviction is spent. The Youth Justice Coalition said that it would 'strongly oppose' this approach, because:

> Exposing the offender to the significant stigma, discrimination and other detrimental impacts of having to disclose a criminal record, even though the court did not consider the crime serious enough to impose a penalty, is inappropriate.[341]

5.58 The Youth Justice Coalition recommended that 'the Model Bill be changed to provide that all findings of guilt that do not proceed to a conviction are immediately spent'.[342]

5.59 The NSW Bar Association agreed that '… in cases where an offence was proved but no conviction recorded, the conviction should become spent immediately'.[343] The NSW Bar Association pointed to the comments in a submission from the Law Council of Australia providing feedback on the Model Bill, which stated that:

> The Law Council is concerned that the approach taken in the Model Bill may result in dispositions of a court where it specifically wished to avoid recording a conviction being treated as a conviction and subject to lawful disclosure until they have become spent within the terms of the Model Bill.
>
> This has the potential to undermine the rehabilitative motives for not recording a conviction in respect of an offence …[344]

Committee comment

5.60 In Chapter 3 the Committee stated that the focus of this report is on the question of whether juvenile sexual offences should be capable of being spent. However, in relation to sexual offences where no conviction is recorded, the Committee makes the following recommendation in relation to both adult and juvenile offenders, as this is the one instance considered in this report where the issues raised apply equally to both adult and juvenile offenders.

5.61 The evidence indicates that a court would only make a finding of guilt without proceeding to a conviction under section 10 of the *Crimes (Sentencing Procedure) Act* in exceptional cases, where the individual circumstances of the offence were such that they clearly did not warrant a conviction being recorded. This is particularly true of convictions for sexual offences.

340 Submission 12, p 22.

341 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 9.

342 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 9.

343 Tabled Document, NSW Bar Association, *Model Spent Convictions Bill 2008*: *Standing Committee of Attorneys General,* January 2009, p 6

344 Tabled Document, *Model Spent Convictions Bill 2008*: *Standing Committee of Attorneys General,* p 6.

The Committee believes that if, after reviewing the individual circumstances of a matter, the court is satisfied that no conviction should be recorded, a conviction for a sexual offence should be capable of being spent immediately as is currently the case with non-sexual offences.

5.62 Further, the Committee is concerned that under the Model Bill, all findings of guilt without proceeding to a conviction under section 10 of the *Crimes (Sentencing Procedure) Act* would no longer be spent immediately, as is the case at present. Offenders would therefore be required to complete a good behaviour period before the conviction could become spent.

5.63 The Committee notes that the terms of reference for this Inquiry only relate to sexual offences, and not the provisions of the spent convictions scheme in relation to other offences. However, the Committee believes that the arguments in support of immediately spending convictions for sexual offences under section 10 of the *Crimes (Sentencing Procedure) Act* apply equally to non-sexual offences. The Committee therefore recommends that the NSW legislation to implement the Model Bill provide for all offences where no conviction is recorded to become spent immediately, including for sexual offences. Offenders would thereby be exempt from the requirement to complete a good behaviour period.

Recommendation 3

That the Attorney General ensure that the NSW legislation to implement the Model Spent Convictions Bill provides that where a court finds a person guilty of an offence without proceeding to a conviction under section 10 of the *Crimes (Sentencing Procedure) Act 1999*, including for a sexual offence, the finding is spent immediately after it is made.

Chapter 6 Eligibility criteria for spending convictions for juvenile sexual offences

As discussed in Chapter 2, spent convictions schemes generally have two main eligibility criteria that must be met in order for a conviction to become spent. First, convictions must fall under a benchmark sentence, and second, a good behaviour or crime-free period must have elapsed. This Chapter will first consider the appropriate benchmark sentence for including juvenile sexual convictions in the spent convictions scheme, followed by a discussion of the appropriate good behaviour period.

Inquiry participants gave evidence on spending convictions for juvenile sexual offences in relation to both the eligibility criteria in the current spent convictions scheme and in the Model Spent Convictions Bill (the Model Bill). At present, juvenile offences other than sexual offences can become spent if they fall under a benchmark prison sentence of six months or less and a good behaviour period of three years has elapsed. In the Model Bill the benchmark prison sentence for juvenile offenders is 24 months or less and the good behaviour period is five years. When compared with the current spent convictions scheme, the Model Bill proposes a higher benchmark sentence for juvenile offenders and a longer good behaviour period.

Benchmark sentence

6.1 As noted in Chapter 2, at present, the benchmark sentence under which convictions (other than convictions for sexual offences) can become spent in NSW is six months. The Model Bill proposes that for convictions for juvenile offences the benchmark sentence would increase from six to 24 months. If a jurisdiction decides to include sexual offences in the spent convictions scheme, the Model Bill proposes that the same eligibility criteria apply to sexual offences as to all other offences.

6.2 Inquiry participants commented on both the current benchmark sentence and the benchmark sentence proposed in the Model Bill. A number of Inquiry participants supported increasing the benchmark sentence from the current six months, even though it would encompass a broad range of juvenile sexual offences. These Inquiry participants tended to argue that the most serious sexual offences would never be eligible to become spent even with a benchmark sentence of 24 months.

Juvenile sexual offences covered by proposed benchmark sentence

6.3 A benchmark prison sentence of 24 months for juvenile offenders would allow for a broader range of sexual offences to become spent than if the current benchmark sentence of six months imprisonment was retained. In this regard, Ms Debra Maher of the Law Society of NSW noted that 'twenty-four months for children, because of the different issues that are taken into account in sentencing children, would encompass a broader range of offending than that twelve months would for adults. So you would be incorporating, if I could say, some more serious offending'.[345] However, she added that this should be considered in the context of the nature of juvenile offending.

345 Ms Debra Maher, Solicitor, The Law Society of NSW, Evidence, 1 April 2010, p 42.

6.4 Mr Warwick Hunt of the NSW Bar Association explained that the benchmark sentence of 24 months would capture most juvenile sexual offences:

> The reality is that 24 months would capture most offences that are dealt with in the Children's Court to finality and offences that go from the Children's Court to the District Court that are of sufficient seriousness that they ought to go to the District Court or are sent there by the magistrate but against that that are not so serious that they attract a sentence more than two years. I reiterate what I said earlier, that the kind of offences that we would think of as heinous or serious sexual offences will always attract more than that in my experience if they are really serious offences.[346]

6.5 Ms Maher gave evidence that the 24-month benchmark sentences would incorporate less serious sexual offences, given the seriousness with which the courts view sexual offending:

> … the nature of the sentencing process in sexual offences means that the sentences are generally a lot longer, as they should be, so in a way you will be capturing the bottom end of sexual offences whereas in a lot of other categories you would be incorporating a much greater mix.[347]

6.6 Commenting on the penalties applicable to sexual offences, Ms Maher advised that:

> There is not an offence that is classed as a sexual offence that carries a six-month penalty except for the indecent exposure one. In the category of sexual offences, there are some minor indecent assault offences that might carry two, three, four, five and seven years. They are at the absolute bottom end but, generally speaking, all of the offences that are listed under the definition of sexual offences carry 10, 14, 16, 19, 20, 25 and life, so the vast majority of what is defined as sexual offences carry those very high-end penalties, much higher than for other things that you are looking at like break and enter, or assault.[348]

6.7 A submission from the Law Council of Australian on the Model Bill, and provided by the NSW Bar Association, pointed to '… the general trend across all Australian jurisdictions towards increasing rather than decreasing penalties for criminal offences'.[349] The Law Council believed that this trend should be taken into consideration in setting benchmark sentences for the spent convictions scheme.

6.8 Mr Hunt, himself a former Children's Magistrate, gave evidence that the trend to harsher sentences could justify increasing the benchmark sentences in the spent convictions scheme:

> I think whilst there might not be empirical research right on this point, it is inescapable that periods of sentencing have gone up over recent history and over a couple of decades …

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346 Mr Warwick Hunt, Bar Councillor, Member of Criminal Law Committee, NSW Bar Association, Evidence, 1 April 2010, p 47.

347 Ms Maher, Evidence, 1 April 2010, p 48.

348 Ms Maher, Evidence, 1 April 2010, p 48.

349 Tabled document, NSW Bar Association, *Model Spent Convictions Bill 2008*: *Standing Committee of Attorneys General,* January 2009, p 5.

> … the current sentencing regime is far more severe in terms of the length of penalty than would have been the case say 20 or 30 years ago, so I think that is a justification for putting that period up.[350]

Penalties imposed on juvenile sexual offenders

6.9 Some Inquiry participants provided evidence on the number of juvenile offenders convicted of sexual offences in recent years, and the penalties imposed on these offenders.

6.10 In particular, the Committee notes statistics from the Judicial Information Research Service of the Judicial Commission of NSW, which were provided by the Department of Justice and Attorney General.[351] These statistics cover different time periods, and in some cases do not indicate the type or length of sentence imposed. However, what the statistics show is that in 2005-2009,[352] there were 235 juvenile sexual offenders dealt with in the NSW Children's Court who would have been eligible to have their convictions spent, under the benchmark sentence of 24 months. In 2002-2008, there were 63 juvenile sexual offenders dealt with in the District or Supreme Courts who would have been eligible to have their conviction spent, under a 24-month benchmark sentence.

6.11 The figures from the Judicial Information Research Service indicate that in the period 2005-2009, there were 235 juvenile offenders found guilty of sexual offences in the NSW Children's Court.[353] While no information was provided on the type or length of penalty imposed,[354] these offences must necessarily have received penalties of 24 months or less, because the Children's Court can only impose control orders up to 24 months.

6.12 In addition, in the period 2002-2008, there were a further 25 juvenile offenders dealt with according to the penalties imposed in the NSW Children's Court, but whose cases were dealt with in the District or Supreme Courts.[355] Again, while no information was provided on the type or length of penalty imposed, these offences must necessarily have received penalties of 24 months or less.

6.13 In the period 2002-2008, there were 38 juvenile sexual offenders dealt with at law by the District or Supreme Courts and convicted of a sexual offence that resulted in a prison sentence of 24 months or less.[356] 17 offenders received a sentence of six months or less,

350 Mr Hunt, Evidence, 1 April 2010, p 47

351 Tabled document, Department of Justice and Attorney General, *JIRS Statistics: Sexual offenders who received sentences of 6, 12 or 24 months imprisonment or less*, 29 March 2010.

352 These figures cover the period June 2005-July 2009.

353 Tabled document, *JIRS Statistics: Sexual offenders who received sentences of 6, 12 or 24 months imprisonment or less,* p 15.

354 Correspondence from Ms Kathrina Lo, Department of Justice and Attorney General, to Chair, cover letter to answers to questions on notice, 14 May 2010.

355 Tabled document, *JIRS Statistics: Sexual offenders who received sentences of 6, 12 or 24 months imprisonment or less*, p 14.

356 Tabled document, *JIRS Statistics: Sexual offenders who received sentences of 6, 12 or 24 months imprisonment or less*, pp 12-13. The sentence imposed included among others non-conviction orders under section 10, periodic detention, home detention, fines and full-time imprisonment.

two offenders received a sentence of 12 months or less, and 17 offenders received a sentence of 24 months or less. Additional juvenile offenders were convicted of sexual offences in the District or Supreme Courts in this period, but the sentences imposed were over 24 months.[357] No statistics were provided on the number of juvenile sexual offenders who received sentences of over 24 months.

6.14 The Law Society of NSW advised that in relation to adult and juvenile offenders who received custodial sentences for sexual assault, aggravated sexual assault and aggravated indecent assault in the period 2003-2008, the lowest sentence imposed was 12 months.[358] According to the Law Society this demonstrates that:

> … sentences of imprisonment for six months and under do not occur for sex offences, and even sentences of 12 months are extremely rare. The vast majority of sentences of imprisonment for sex offences are over 2 years, and serious sex offences are much higher than that. To limit the ability of juvenile offences to become spent to those where a sentence of imprisonment of less than 2 years was imposed would have the effect of screening out all but the very lower end of seriousness of sex offences.[359]

6.15 Most juvenile offenders convicted of a sexual offence in the NSW Children's Court do not receive a custodial sentence. The NSW Children's Court advised that in 2005-2009 '… a very small proportion of juvenile sex offenders received custodial sentences and the ones who did, received short sentences, with the longest being 13 months'.[360]

6.16 In relation to sexual offences dealt with in the Local Court, Chief Magistrate Henson said that '… many are assessed by magistrates as properly requiring a sentence other than imprisonment' although '… a substantial minority of all sexual offences dealt with in the Local Court result in sentences of imprisonment being imposed … '.[361]

6.17 The NSW Police Force advised that in the period 2004-2008, there were 106 juveniles found guilty in NSW courts of a sexual offence against a victim aged under 16.[362] Of these, 22 received a custodial sentence with four receiving a custodial sentence of two years or more.[363]

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357 Tabled document, *JIRS Statistics: Sexual offenders who received sentences of 6, 12 or 24 months imprisonment or less*, pp 12-13. The sentence imposed included among others non-conviction orders under section 10, periodic detention, home detention, fines and full-time imprisonment.

358 Answers to questions taken on notice, The Law Society of NSW, 25 May 2010, p 2.

359 Answers to questions taken on notice, The Law Society of NSW, 25 May 2010, p 3.

360 Submission 16, NSW Children's Court, p 5.

361 Submission 12, Chief Magistrate of the NSW Local Court, p 3.

362 Answers to questions taken on notice, NSW Police Force, 28 April 2010, p 1.

363 Answers to questions taken on notice, NSW Police Force, 28 April 2010, p 2. The NSW Police Force noted that this data was subject to some limitations, as described in their response to questions on notice.

Proposed benchmark sentence

6.18 Inquiry participants expressed a range of views as to the appropriate benchmark sentence. While some Inquiry participants commented directly on the benchmark sentence of 24 months proposed in the Model Bill, others did not. A number of those Inquiry participants who commented on the provisions of the Model Bill supported the introduction of a 24-month benchmark sentence for juvenile sexual offences.

6.19 In regard to the 24-month benchmark sentence, Ms Maher argued that this would make '… special allowances for everything we know about adolescent development and it makes perfect sense for the level for juveniles to be different than from adults…' because it is '… very well established in both legislation and case law that children should be treated differently…'.[364]

6.20 The NSW Bar Association endorsed the comments of the Law Society and commented that 'the 24 month sentence criterion is appropriate for juvenile offenders in relation to offences generally', including for juvenile sexual offences. [365]

6.21 According to the Youth Justice Coalition, the 24-month benchmark for juvenile offenders '…is fully supported by the YJC. Such an expansion is consistent with the principles of juvenile justice and emphasises the importance of giving a young person every opportunity to rehabilitate'.[366]

6.22 Juvenile Justice indicated that a benchmark sentence of 24 months was its 'preferred option' because 'such a criterion would encourage reintegration for a greater number of young offenders than the alternative of restricting the criterion to where the sentence is less than 6 months'.[367]

6.23 The NSW Children's Court also supported including convictions for sexual offences of over six months in the spent convictions scheme. The preferred option of the NSW Children's Court was to allow all juvenile sexual offences dealt with in the Children's Court to become spent, regardless of the penalty imposed, as is the case at present for all convictions other than convictions for sexual offences. NSW Children's Magistrate Hilary Hannam advised that the Children's Court:

> … it is not of the view that a particular sentence length cut off should dictate when a juvenile sexual offence conviction should become spent. Instead, the Court is of the view that all convictions for juvenile sexual offences which are dealt with by the Children's Court to finality should be capable of becoming spent regardless of the ultimate sentence imposed.[368]

6.24 The NSW Children's Court advised that very few juvenile sexual offenders receive custodial sentences and those who do are often subject to brief periods of custody. Therefore the Court

364 Ms Maher, Evidence, 1 April 2010, p 42.

365 Answers to questions taken on notice, NSW Bar Association, 19 May 2010, p 2.

366 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 12.

367 Answers to questions taken on notice, Juvenile Justice, 4 May 2010, p 3.

368 Answers to questions taken on notice, NSW Children's Court, 27 April 2010, p 2.

was of the opinion that '… it may be difficult, if not futile, to decide on a benchmark sentence'.[369]

6.25 Other Inquiry participants, however, supported a six-month benchmark sentence. The submission from the Chief Magistrate of the Local Court Graeme Henson supported the spending of convictions for minor sexual offences, where a court imposed a sentence of imprisonment of less than six months.[370] Chief Magistrate Henson did not comment on the eligibility criteria proposed in the Model Bill.

6.26 The Commission for Children and Young People supported making juvenile sexual offences capable of being spent provided that the sentence imposed was less than six months and the offender completed a three-year good behaviour period. The Commission did not express a view on a 24-month benchmark sentence, but noted that it '… would clearly include a range of more serious offences…' than a six-month benchmark sentence.[371]

6.27 Bravehearts supported the spending of convictions for juvenile sexual offences limited to those offences attracting a standard minimum sentence of six months or less, provided that the qualifying period was increased from three to five years 'to reflect the seriousness of child sexual offences'.[372]

6.28 In relation to the current benchmark sentence of six months, some Inquiry participants questioned whether this was appropriate, given that the courts are encouraged not to impose prison sentences of six months or less.

6.29 In this regard, Ms Maher argued that the current six month benchmark should be changed because:

> … nobody gets a lock-up sentence, be it a control order as a juvenile or imprisonment as an adult, of six months because there is a section in the *Crimes (Sentencing Procedure) Act* that says you cannot give someone a sentence of six months and under and set a non-parole period … That came about because they did not want prisoners serving short sentences… By definition you cannot get a sentence of six months or less. That is why I think it makes no sense.[373]

6.30 Similarly, Chief Magistrate Henson noted that in the *Crimes (Sentencing Procedure) Act 1999*, 'section 5(2) goes on to provide that that if the sentence of imprisonment is for a period of 6 months or less, the Court is to give reasons for the decision that no sentence other than imprisonment was appropriate'.[374]

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369 Answers to questions taken on notice, NSW Children's Court, 27 April 2010, p 2.

370 Submission 12, p 1.

371 Answers to questions taken on notice, NSW Commission for Children and Young People, 23 April 2010, p 12.

372 Submission 15, Bravehearts, p 2.

373 Ms Maher, Evidence, 1 April 2010, p 47.

374 Submission 12, p 3.

6.31 Professor Dianna Kenny and Dr Christopher Lennings argued that more research is needed before deciding on whether the present benchmark sentence of six months would be appropriate for juvenile sexual offenders:

> … for juveniles, for whom the sentencing act is different to adult acts, it needs to be ascertained whether the 6 month rule is a good one to use … There needs to be some research into sentencing trends for young people with sex offences before an appropriate benchmark for spent convictions for young offenders can be identified.[375]

6.32 However, Juvenile Justice did not agree with this suggestion, and gave evidence that '… the current research is adequate to support the position…' that convictions for juvenile sexual offences be spent where the sentence imposed was under 24 months, and the offender had completed a three-year good behaviour period.[376]

6.33 If convictions for sexual offences were to be capable of becoming spent, Professor Kenny and Dr Lennings suggested that this could create '… a danger that police might start charging young people with more serious offences in order to ensure a custodial sentence or a more lengthy sentence…'[377] and therefore ensure that sexual offences fell outside the benchmark sentences.

6.34 When questioned on this claim, Chief Superintendent Anthony Trichter, Commander of Police Prosecutions, NSW Police Force, said '… I vehemently disagree with that suggestion … Police will generally charge with the appropriate offence that is available on the facts and generally with the most serious offence, not only in relation to sexual offences but effectively any offence'.[378]

Committee comment

6.35 The Model Bill proposes to introduce a longer benchmark sentence for juvenile offenders as compared to adult offenders. The Committee believes that this move is in line with the principle underlying the juvenile justice system that young people should be treated in a different manner than adults, and a greater emphasis should be placed on the rehabilitation of young offenders.

6.36 While a broad range of juvenile sexual offences would be capable of becoming spent under a benchmark sentence of 24 months, the Committee believes this to be justified by the nature of juvenile sexual offending, and the capacity for juvenile offenders to be rehabilitated (as discussed in Chapter 4). Some Committee members believed that more research was needed before moving above a benchmark sentence of six months.

6.37 The Committee acknowledges the evidence that although almost all juvenile sexual offences would be captured under the new benchmark sentence of 24 months, the most serious sexual

375 Submission 18, Professor Dianna Kenny and Dr Christopher Lennings, p 4.

376 Answers to questions taken on notice, Juvenile Justice, 4 May 2010, p 3.

377 Submission 18, p 6.

378 Chief Superintendent Anthony Trichter, Commander, Police Prosecutions, NSW Police Force, Evidence, 1 April 2010, p 18.

offences would not be captured under this criterion. As noted in Chapter 2, the NSW Children's Court can impose control orders of up to 24 months, and therefore if a 24-month benchmark sentence was adopted, all convictions for juvenile sexual offences dealt with in the NSW Children's Court would be capable of becoming spent, provided that the good behaviour period was met. It is important to note, however, that the most serious juvenile sexual offences are likely to be dealt with by the District or Supreme Courts, and penalties higher than 24 months could be imposed and these convictions would be ineligible to become spent. Some Committee members are concerned about the possibility of serious juvenile sexual offences falling beneath a new benchmark sentence of 24 months.

6.38 Taking all the above factors into consideration, the Committee recommends that the NSW legislation to implement the Model Bill provide for convictions for juvenile sexual offences to be eligible to become spent if they fall under the benchmark sentence of 24 months. The Committee notes that the benchmark sentence of 24 months proposed in the Model Bill would apply to all offences, not just sexual offences, and that the effect of this recommendation is therefore to ensure that the provisions of the Model Bill extend to all juvenile offences including sexual offences. Some Committee members believed that more research was needed before moving above a benchmark sentence of six months.

Recommendation 4

That the Attorney General ensure that the NSW legislation to implement the Model Spent Convictions Bill provides that convictions for juvenile sexual offences, as with convictions for other juvenile offences, are capable of being spent where the sentence imposed was less than 24 months imprisonment.

Good behaviour period

6.39 At present, convictions for juvenile offences (other than sexual offences) can be spent after a good behaviour or crime-free period of three years has elapsed. Under the Model Bill, it is proposed that the good behaviour period required for eligible juvenile offences would increase from three to five years. The five-year good behaviour period would apply for sexual and non-sexual juvenile offences.

6.40 Several Inquiry participants opposed extending the good behaviour period for juvenile offenders from three to five years, arguing that it would hamper the rehabilitation of juvenile offenders. These Inquiry participants gave evidence that because persistent juvenile sexual offenders were likely to re-offend within the current three-year good behaviour period, an extension to five years was unwarranted.

Proposed good behaviour period

6.41 A number of Inquiry participants objected to extending the good behaviour period for juvenile offenders from three to five years. For example, the Youth Justice Coalition observed that 'increasing the qualification period to five years will mean that most young people will have to continue to disclose offences at critical points in their development' such as when

applying for their first job, or applying for acceptance into university or further education.[379] The Youth Justice Coalition advised that:

> There is no evidence to show that a young person is more likely to have successfully rehabilitated after five years as opposed to three years. In fact, it is the view of the YJC that the longer a young person is exposed to the disadvantages of having to declare a criminal record, the higher the chance that they will re-offend.[380]

6.42 Mr Hunt also stressed the benefits of a shorter good behaviour period for a juvenile offender's employment prospects:

> … the advantage of the three years is that, all things considered, it should be over at a time to allow a young person, especially a young man, to engage in employment. If it happens when the person is 15 or 16 you are looking at someone 18 or 19 who, if they are going to stay crime-free, need to develop a work ethic, get a job, earn money, not get money through illegal means so extending it to five years could put it past the time that would allow them to do that. It is a big difference between "Okay 18, I can start to apply for jobs and they are not going to look for my criminal record" … That is why I think the shorter period is better.[381]

6.43 According to Juvenile Justice, 'an extra two years before a conviction can be spent would delay the ability of a young person to fully reintegrate into the community and adopt an offending free lifestyle'.[382]

6.44 The Law Society of NSW also supported a three-year good behaviour period for juvenile offenders, because it '… is a proper acknowledgement of the very different situation of juveniles (lack of maturity and development especially) and the greater focus the law gives to rehabilitation when dealing with juveniles'.[383]

6.45 The submission from the NSW Children's Court noted that all but one Children's Magistrate supported retaining the existing good behaviour period of three years for juvenile sexual offenders.[384] The dissentient magistrate, however, held the opinion that the good behaviour period should be extended to ten years.

6.46 The Commission for Children and Young People supported the present three-year good behaviour period for juvenile sexual offenders, but did not express a view on whether they would support retaining this period if the benchmark sentence was increased to 24 months.[385]

6.47 Dr Bronwyn Naylor of the Law Faculty at Monash University cautioned, however, that some sub-groups of juvenile sexual offenders may have higher recidivism rates than juvenile sexual

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379 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 12.

380 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 12.

381 Ms Maher, Evidence, 1 April 2010, p 51.

382 Answers to questions taken on notice, Juvenile Justice, 4 May 2010, p 2.

383 Answers to questions taken on notice, The Law Society of NSW, 25 May 2010, p 2.

384 Submission 16, p 8.

385 Answers to questions taken on notice, NSW Commission for Children and Young People, 23 April 2010, p 12.

offenders in general. For these sub-groups, Dr Naylor said that '… the 3 year crime-free period may warrant some extension, eg to 5 years, the period shown to be generally indicative of any risk of reoffending…'.[386]

6.48 Some Inquiry participants raised concerns that the proposal in the Model Bill to extend the good behaviour period for juvenile offenders was not based on sound evidence. For example, Ms Maher commented on the process used to reach the five year good behaviour period proposed in the Model Bill:

> We cannot see what basis there is for increasing that from three years to five years; there does not appear to have been any research on it. Maybe it has just been because they looked at all the States and came up with what was the most common number.[387]

6.49 Similarly, the Law Council of Australia in January 2009 provided comments to SCAG on the Draft Model Bill, including that: 'the Law Council would be concerned if the longer qualifying period was adopted solely on the basis that it conforms with the period adopted in the majority of jurisdictions, without an assessment of whether this continues to be best practice'.[388]

Risk of re-offending within proposed good behaviour period

6.50 Inquiry participants who commented on the issue of re-offending claimed that because persistent offenders were likely to re-offend within three years, it is unnecessary to extend the good behaviour period to five years. Ms Suellen Lembke, Director Programs, Juvenile Justice, Department of Human Services, advised that:

> The research is indicating that if young people are going to reoffend, they are going to reoffend, 70 per cent, after three years, so if it is going to happen, I think it will happen by that period … If they are crime-free after three years, the literature would be suggesting that they are going to remain crime-free beyond that period.[389]

6.51 Mr Hunt noted that a three-year good behaviour period was supported not only by research, but also by his previous experience including as a Children's Magistrate:

> On my reading of the research and on my anecdotal experience the very odd teenage person who has sexual proclivities that are going to make them an adult and a serial offender, those proclivities will have them back before the court within either [three or five-year] waiting period.[390]

6.52 The United Kingdom's 2002 *Breaking the Circle* report reached a similar conclusion, finding that persistent offenders would not reach the end of the good behaviour period without re-offending: 'Persistent offenders typically re-offend within a few months of being sentenced

386 Submission 22, Dr Bronwyn Naylor, p 5.

387 Ms Maher, Evidence, 1 April 2010, p 43.

388 Tabled document, *Model Spent Convictions Bill 2008*: *Standing Committee of Attorneys General,* p 9.

389 Ms Suellen Lembke, Director, Programs, Juvenile Justice, Department of Human Services, Evidence, 1 April 2010, p 31.

390 Mr Hunt, Evidence, 1 April 2010, pp 50-51.

and, as long as they pursue this pattern of offending, will never reach the end of the disclosure period without a further conviction'.[391]

6.53 Mr Hunt advised that persistent juvenile offenders, including sexual offenders, will re-offend within a three-year period and therefore there is no need to extend the good behaviour period to five years:

> A misconception might be that a vast number of children who are really difficult offenders will escape with the spending of their conviction. A really troubled 13-year-old, whether it is a sexual or non-sexual offence, who is having difficulty of a developmental kind and a behavioural kind, if I might say, the bad eggs will never make the three or the five years…[392]

6.54 In addition, the NSW Government observed that the rehabilitation period was the same for sexual and non-sexual offences: '… little to no evidence exists to suggest that the rehabilitation period for minor sexual offences in particular is longer than for other minor offences'.[393]

6.55 One Inquiry participant suggested that the spent convictions scheme introduce staggered good behaviour period related to the length of the sentence imposed. Staggered good behaviour periods could make convictions for more serious offences that fall outside benchmark sentences eligible to become spent, provided that the offender completed a lengthy good behaviour period. In relation to staggered good behaviour periods, Dr Naylor advised that:

> It would be logical for the scheme to establish different crime-free periods for different offences based on the statistical evidence already gathered. Many European countries, and some states in the US, employ staggered 'good behaviour' periods beginning at less than 10 years, linked to the length of sentence.[394]

6.56 Unlike spent convictions schemes in Australia, some overseas schemes have introduced staggered good behaviour periods. As noted in Chapter 2, staggered good behaviour periods are a feature of the spent convictions scheme in the United Kingdom.

Committee comment

6.57 The Committee is opposed to extending the good behaviour period for juvenile offenders from three to five years as proposed in the Model Bill. Inquiry participants gave evidence that an extended good behaviour period could hamper the rehabilitation of juvenile offenders, by requiring them to disclose offences at critical transition points in their lives including entry into employment and further education. The Committee is concerned that such barriers could have the potential to make juvenile offenders more likely to re-offend, and could therefore pose a risk to community safety.

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391 United Kingdom Home Office, *Breaking the Circle: A report on the review of the Rehabilitation of Offenders Act*, July 2002, p 12.

392 Mr Hunt, Evidence, 1 April 2010, pp 50-51.

393 Submission 21, p 13.

394 Submission 22, p 3.

6.58 In taking this position the Committee points to the evidence that it is unlikely that a persistent juvenile offender will complete the three-year good behaviour period without re-offending, and consequently an extension to five years is unnecessary.

6.59 In addition, the Committee is of the view that the arguments that support a three-year good behaviour period for juvenile sexual offenders apply to juvenile offenders generally. While there is merit in achieving national consistency among spent convictions schemes, as is the aim of the Model Bill, the Committee believes that due to the strength of the arguments in relation to a three-year good behaviour period for juvenile offenders, in this instance there is justification for diverting from the position taken in the Model Bill (that is, a five-year good behaviour period for juvenile offenders). The Committee therefore recommends that the NSW legislation to implement the Model Bill provide that convictions for juvenile offences, including sexual offences, are capable of being spent after a good behaviour period of three years has elapsed.

6.60 Some Committee members believed that, consistent with the Model Bill, there should be capacity for the courts to set up to five-year good behaviour periods for juvenile offenders with respect to serious offences.

Recommendation 5

That the Attorney General ensure that the NSW legislation to implement the Model Spent Convictions Bill provides that convictions for juvenile offences, including convictions for juvenile sexual offences, are capable of being spent after a good behaviour period of three years has elapsed.

Chapter 7 Mechanisms for spending convictions for juvenile sexual offences

The mechanism for spending convictions for juvenile sexual offences could be by lapse of time, in the same manner as other convictions. Alternatively, a new mechanism could be introduced to differentiate between convictions for sexual and non-sexual juvenile offences, and to provide the community with an extra layer of protection in relation to the spending of juvenile sexual convictions. The Model Spent Convictions Bill (the Model Bill) favours the latter option, whereby offenders could apply to the courts for a spent conviction order. In addition to the court application process, several other possible mechanisms were suggested during the course of the Inquiry, and these will be considered later in this Chapter.

Court application process for spending convictions

7.1 As discussed in Chapter 2, the current spent convictions scheme provides for all eligible offences, except sexual offences, to become spent automatically after the relevant good behaviour period has elapsed. This 'lapse of time' mechanism is maintained in the Model Bill for non-sexual offences. However, in relation to convictions for sexual offences, the Model Bill provides that if a jurisdiction decides that convictions for sexual offences should be capable of being spent, the mechanism for doing so would be by application to the courts after an offender has completed the relevant good behaviour period. The Model Bill sets out a number of factors for the courts to consider in determining an application for a spent conviction order. The Model Bill also requires the Attorney General and Commissioner for Police to be notified of an application for a spent conviction order so they can intervene, if necessary.

Case-by-case consideration in court application process

7.2 Several Inquiry participants supported the court application model because it would allow for the individual circumstances of each case to be re-considered, and would thereby provide extra protection for society. The NSW Government advised that the key advantage of a court application model is that it '…provides an extra layer of protection to the community' because it would allow each conviction to be considered on a case-by-case basis.[395]

7.3 The NSW Department of Corrective Services believed that convictions for sexual offences should be spent following court order, because 'only a court can give proper and expert consideration to both the objective seriousness of the offence and the level of risk of re-offending'.[396]

395 Submission 21, NSW Government, p 16.

396 Submission 2, Department of Corrective Services, p 1.

7.4 In the case of less serious sexual offences the Office of the Director of Public Prosecutions supported a court application process after the crime-free period had elapsed.[397] The Office of the Director of Public Prosecutions indicated that:

> Factual circumstances are varied and the charge alone will not accurately convey the conduct; for instance, a single charge of indecent assault may represent a course of conduct involving repeated assaults over a period or one isolated act … we would suggest that simple reference to penalty and type of charge may not convey the whole picture and we accordingly favour a system where the case would be looked at in detail before determining that the conviction should become spent.[398]

7.5 The Salvation Army also supported the court application model. They noted that this process:

> … would require the ex-offender to present evidence that a change has been effected and the risk of re-offending has significantly diminished – ie would provide an opportunity for the court to conduct a risk assessment. This would give a greater level of protection against possible future offences.[399]

7.6 In addition, Bravehearts supported the court application model for juvenile sexual offenders, where the offence attracted a standard minimum sentence of less than six months and after completion of a five-year good behaviour period, provided that the Attorney General was notified of the application and could intervene. According to Bravehearts:

> Such an application would require that the court weigh up factors such as any finding of fact around consent, offence seriousness (offences attracting a standard minimum sentence of more than 6 months would not be eligible), and whether the individual has participated in appropriate treatment programs.[400]

7.7 Chief Superintendent Anthony Trichter, Commander of Police Prosecutions, NSW Police Force, did not express a view on including juvenile sexual offences in the spent convictions scheme. However he said that if juvenile sexual convictions were to become capable of becoming spent, each case should be re-examined on its merits rather than being spent by lapse of time. According to Chief Superintendent Trichter: 'I can only suggest that an examination of the actual evidence available is the best indicator'.[401]

Differentiation between minor sexual offences and other minor offences

7.8 Some Inquiry participants who opposed the court application model objected to a distinction being made between minor sexual and other minor offences. In this regard, Chief Magistrate of the NSW Local Court Graeme Henson advised that 'in my view there is therefore little benefit in maintaining a distinction between minor sexual offences and other minor offences…' by having a different mechanism for the spending of convictions for minor sexual

397 Submission 4, Office of the Director of Public Prosecutions, p 1.

398 Submission 4, pp 1-2.

399 Submission 14, The Salvation Army, p 3.

400 Submission 15, Bravehearts, p 2.

401 Chief Superintendent Anthony Trichter, Commander, Police Prosecutions, NSW Police Force, Evidence, 1 April 2010, p 13.

offences.[402] Chief Magistrate Henson suggested that this would reinforce the perception that offenders convicted of minor sexual offences who have not re-offended '… still deserve to be treated differently from other rehabilitated minor offenders'.[403]

7.9 Overall, the NSW Children's Court also took the position that in the main juvenile sexual offences should be treated in the same manner as other juvenile offences, and thereby become spent by lapse of time.[404]

7.10 The submission from the NSW Government advised that 'before any power is given to the Courts to make orders for a conviction to become spent, further consultation would need to be conducted with them'.[405]

7.11 Dr Bronwyn Naylor of the Law Faculty of Monash University supported the spending of sexual offences in the same manner as other offences. Dr Naylor argued that the evidence did not justify the establishment of a separate mechanism to deal with sexual offenders. In regard to a court application model, she said that 'it is likely to add delay, and to risk damaging publicity, which itself would be likely to undermine rehabilitation, particularly where the ex-offender has been crime-free for 10 years'.[406]

7.12 The Youth Justice Coalition also supported convictions for sexual offences becoming spent by lapse of time in the same manner as other offences. However the Youth Justice Coalition noted that a court application model would be preferable to the current blanket exclusion of sexual offences from the spent convictions scheme.[407]

Costs of court application process

7.13 Other Inquiry participants held the view that a court application process would be an additional impost on the court system. According to NSW Children's Magistrate Hilary Hannam: '…every single matter would be subject to an application and then they would be hearing submissions back and forth. There could be a large number of applications, which is another case in itself…'.[408] Further, Magistrate Hannam argued that 'we just think that there would be a whole lot of unnecessary mini-hearings … if the Model Bill were adopted'.[409]

7.14 The NSW Police Force indicated that while the court application model may have merit, it would have significant workload and resource implications:

402 Submission 12, Chief Magistrate of the NSW Local Court, p 5.

403 Submission 12, p 5.

404 Submission 16, NSW Children's Court, p 1:6.

405 Submission 21, p 17.

406 Submission 22, Dr Bronwyn Naylor, p 6.

407 Submission 13, Youth Justice Coalition, p 25.

408 Ms Hilary Hannam, Magistrate, NSW Children's Court, Evidence, 1 April 2010, p 4.

409 Ms Hannam, Evidence, 1 April 2010, p 5.

> …substantial increase in the workload for the courts, which are already significantly overloaded. There would be consequential adverse resource implications, in both cost and human resources, for police and, in particular, police prosecutors, the latter invariably inheriting responsibility for appearing in such proceedings.[410]

7.15 The NSW Government also acknowledged that requiring convictions to become spent by court application could be '… a costly and time-consuming process'.[411]

7.16 The NSW Police Force suggested that rather than requiring a hearing for each application for a spent conviction order, '… the court could review the court file for the original offence and deal with the application on that basis'.[412]

Factors considered in court application process

7.17 Chief Magistrate Henson reviewed the factors that Western Australian courts are required to consider in determining an application for a spent conviction order. These factors are the same as those proposed in the Model Bill. Chief Magistrate Henson noted that a number of these factors would already have been considered at sentencing, including consideration of the applicant's circumstances at the time of the offence, the nature and seriousness of the offence and the circumstances surrounding the commission of the offence.[413]

7.18 Chief Magistrate Henson considered that 'the other factors set out for consideration in the Western Australian application process similarly add little to the current scheme'.[414] In addition, he advised that '… it is difficult to imagine what circumstances would nonetheless justify a refusal of the application in the name of the public interest…'.[415]

7.19 The Youth Justice Coalition also examined the factors that the Model Bill would require the courts to consider in determining an application for a spent conviction order. The Youth Justice Coalition argued that 'it is the Judge or Magistrate who imposes the sentence who is best placed to take such factors into account'[416] rather than requiring a subsequent re-assessment by another court. The Youth Justice Coalition also stated that by introducing a court application process for spending sexual offences, this would improperly continue the distinction between sexual and other offences.[417]

7.20 In relation to the factors to be considered in a court application process, the NSW Government cautioned that '… it is integral that protection of the community and not further punishment of the offender be the paramount consideration …'.[418]

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410 Answers to questions taken on notice, NSW Police Force, 28 April 2010, p 3.

411 Submission 21, p 16.

412 Answers to questions taken on notice, NSW Police, 28 April 2010, p 4.

413 Submission 12, p 5.

414 Submission 12, p 6.

415 Submission 12, p 6.

416 Submission 13, p 24.

417 Submission 13, p 35.

418 Submission 21, p 17.

Accessibility of the court application process

7.21 Some Inquiry participants suggested that potential applicants may be deterred from applying to the courts for a spent conviction order by the possibility of negative publicity surrounding their applications. According to Chief Magistrate Henson:

> … an application process may also be counter-productive. It is well within contemplation that applications by offenders convicted of minor sexual offences for their convictions to become spent might be the subject of media attention and have old offences 'rehashed' before a wider public audience.[419]

7.22 In addition, the Youth Justice Coalition advised that young offenders may not have the necessary financial resources to access the court application process, or indeed be aware of its existence. The Youth Justice Coalition noted that young offenders are:

> … more likely to be disadvantaged and as a consequence less able to access the court system. A person may not have sufficient financial resources to obtain legal representation or may not even know of the existence of the law allowing them to apply. In addition, the person may be exposed to publicity surrounding their application to the court and this would impose an additional punishment.[420]

7.23 Professor Dianna Kenny and Dr Christopher Lennings advised that the court application model '… would disadvantage adolescent offenders who are unlikely to have the funds, and who lack legal sophistication to avail themselves of such applications, thereby increasing stress and worry at a critical period of a young person's life'.[421]

7.24 Juvenile Justice opposed a court application because it would 'seriously disadvantage' young offenders, because the characteristics of young offenders are likely to limit their ability to access a court application process:

> A disproportionate number of young offenders … have low literacy levels, unstable accommodation, intellectual disabilities and/or mental health issues. Such circumstances, combined with limited maturity means that many young offenders would be unlikely or unable to make informed decisions and exercise their full legal rights through applications to the courts …[422]

7.25 The Law Society of NSW stated that they '… would not support a system based entirely on application to a court or tribunal'[423] because of the difficulties experienced by young offenders in accessing the court application process. According to the Law Society's representative Ms Debra Maher:

> Having had the experience at court, many people do not want to go back. They are not aware. For instance, if you look at the client group that Legal Aid might use, you are talking about severe disadvantage, literacy problems and general social exclusion.

419 Submission 12, p 6.

420 Submission 13, p 24.

421 Submission 18, Professor Dianna Kenny and Dr Christopher Lennings, p 6.

422 Answers to questions taken on notice, Juvenile Justice, 6 May 2010, p 4.

423 Answers to questions taken on notice, The Law Society of NSW, 25 May 2010, p 4.

> The access of people to that kind of scheme would be limited by their disadvantage… That is why our position in the first instance is that things should become automatically spent and should not require any application process.[424]

7.26 Similarly, the NSW Bar Association observed that the court application mechanism '… is administratively cumbersome and keeps young people engaged with legal processes that are foreign to them and would in practice provide a further obstacle to youth employment and rehabilitation'.[425]

7.27 The Youth Justice Coalition observed that a court application process would require a young person to demonstrate that they had been rehabilitated, and to do this they may need to obtain various reports and expert opinions: 'Obtaining such reports requires financial resources that the young person is unlikely to have, but a failure to obtain them could have a significantly detrimental impact on the young person's application'.[426]

7.28 In addition, the Youth Justice Coalition noted that under the Model Bill an application for a spent conviction order could only be made in the jurisdiction in which the sentence was imposed. The Youth Justice Coalition said that if a juvenile offender moved before the expiry of the good behaviour period, the '… young person would then have to bear the significant expense and inconvenience of travelling and staying in the original jurisdiction while the application was heard'.[427]

7.29 According to the Commission for Children and Young People: 'Making an order to the courts is a daunting process for many people, particularly young people, which requires access to information and resources that many young people would not have'.[428]

7.30 The Commission advised that at present young people who are prohibited from working with children as a result of a conviction for a sexual offence are reluctant to apply for a review of their prohibited status, because they '… may be so traumatised by previous court experiences that they resist any process that requires them to attend a court'.[429] According to Ms Jan McClelland, Acting Commissioner for Children and Young People:

> In our case they often avoid applying for an order to remove the prohibited status from them, even in situations where if they had applied it is more than likely it would have been granted. Because it is just another connection, I suppose, with the situation that landed them where they are the moment. It is still our preferred approach to make it as easy, seamless and less traumatic for children as we can.[430]

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424 Ms Debra Maher, Evidence, 1 April 2010, p 45.

425 Answers to questions taken on notice, NSW Bar Association, 19 May 2010, p 2.

426 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 15.

427 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 16.

428 Submission 8, p 5.

429 Answers to questions taken on notice, NSW Commission for Children and Young People, 23 April 2010, p 10.

430 Ms Jan McClelland, Acting Commissioner, NSW Commission for Children and Young People, Evidence, 29 March 2010, p 20.

7.31 As noted in Chapter 2, in Western Australia sexual offences are not treated differently from other offences and become spent in the same way. Namely, convictions for serious offences committed by adult offenders are spent by order of a District Court judge, or for lesser offences by order of the Commissioner of Police. For juvenile offenders, convictions become spent automatically by lapse of time. The Department of Justice and Attorney General provided figures on the number of applications made to the Western Australia District Court for a spent conviction order. In 2008, there were 18 applications for spent conviction orders made to the District Court, three of which involved convictions for sexual assault and all of which were successful.[431] In 2009, there were 13 applications, none of which involved convictions for sexual assault.

Assistance to access court application process

7.32 The Salvation Army noted that the court application process could further disadvantage young offenders who may already suffer social or economic disadvantage, and therefore recommended that:

> … legal aid be available to eligible applicants for the provision of the necessary reports (e.g. solicitors report, psychological assessment etc.) and that information about the provision be provided to juvenile offenders at time of conviction.[432]

7.33 In response to this suggestion the Department of Justice and Attorney General consulted Legal Aid NSW. Legal Aid NSW noted that 'the provision of legal aid to applicants in spent convictions matters would require a dedication of resources from a limited pool of legal aid funds'.[433] Legal aid is provided to all children involved in criminal cases appearing before the NSW Children's Court, but not to all adults appearing in criminal cases. A number of juvenile sexual offenders would be adults before they had completed the good behaviour period and were eligible to apply for a spent conviction order. Legal Aid NSW advised that:

> Despite the fact that the making of an application could have a significant effect on the opportunities available to a young person, in the context of limited resources, providing legal aid in these matters might be seen as a lower priority than provision of assistance to a person facing a custodial sentence.[434]

7.34 The Commission for Children and Young People indicated that they '… would obviously support legal aid being made available…' but that 'Legal Aid resources are limited and may not be sufficient to address all the needs of young people in these situations'.[435]

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431 Answers to questions taken on notice, Department of Justice and Attorney General, 27 April 2010, p 9.

432 Submission 14, The Salvation Army, p 3.

433 Answers to questions taken on notice, Department of Justice and Attorney General, 27 April 2010, p 2.

434 Answers to questions taken on notice, Department of Justice and Attorney General, 27 April 2010, p 2.

435 Answers to questions taken on notice, NSW Commission for Children and Young People, 23 April 2010, p 11.

7.35 Similarly, the Youth Justice Coalition stated that while they did not support the court application model, they would strongly support the provision of legal aid if the model was adopted. However the Youth Justice Coalition stated that '… the provision of legal aid to applicants does not sufficiently address our concerns about access to the court system'.[436]

7.36 In relation to providing information about the court application process at the time of sentencing, the Department of Justice and Attorney General observed that it is '… questionable whether provision of information at this stage would have a significant impact, given that it is often a traumatic point for a young person, and the opportunity to act upon the information might not arise until a much later date'.[437]

7.37 The Youth Justice Coalition also questioned whether providing information at the time of sentencing would increase awareness of the court application process. The Youth Justice Coalition said that 'it is unlikely that after three, five, or seven years, they will have retained the information about their rights in relation to spent convictions'.[438]

Intervention by Crown in court application process

7.38 As noted previously, the Model Bill provides that the Attorney General or the Commissioner for Police may intervene in an application for a spent conviction order. The Youth Justice Coalition indicated that they 'strongly oppose' the provision in the Model Bill giving the Attorney General or the Police Commissioner the opportunity to intervene in an application for a spent conviction order. According to the Youth Justice Coalition:

> It is not clear what reasons could justify the inclusion of such a provision. In the absence of those reasons it is hard not to draw the conclusion that such a provision is intended to allow political considerations to intervene in the court process. An example of this might be where a young person has committed an offence that has attracted a high level of media attention and public condemnation.[439]

7.39 The Youth Justice Coalition asserted that whether an offender has committed an offence that has attracted public attention '… is not relevant to either their rehabilitation or to the risk that they may continue to pose to the community'.[440]

7.40 In response to a question on the circumstances in which the Attorney General may possibly intervene in an application for a spent conviction order, the Department of Justice and Attorney General advised that:

> The Attorney General would most likely only intervene where there is some argument about statutory construction or other questions of law, or some other matter of significant public interest.

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436 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 14.

437 Answers to questions taken on notice, Department of Justice and Attorney General, 27 April 2010, p 2.

438 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 15.

439 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 17.

440 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 17.

> Any substantive reasons for intervening, such as disputed facts, would be left to the Commissioner for Police to intervene as they would be more closely aligned with the original criminal prosecution.[441]

7.41 The NSW Police Force expressed concern that they may be expected to intervene in every case, given the sensitive nature of sexual offences. They questioned:

> Who will make the judgement call whether to intervene? Who, in the NSWPF, will possess the necessary expertise to advise on such cases? What could the NSWPF provide that could add value to the process? Should the NSWPF be engaged in the process at all?[442]

7.42 Further, the NSW Police Force noted that standard operating procedures would need to be developed to determine when to intervene, '… perhaps incorporating some kind of standard risk assessment ie, likelihood of adverse consequences in the event the conviction is spent'.[443]

7.43 The Commission for Children and Young People, although not in favour of the court application model, supported the Attorney General and the Police Commissioner having the capacity to intervene in applications for spent conviction orders, if the court application model was to be introduced.[444]

Consideration of participation in treatment programs

7.44 Mr Dale Tolliday, Program Director, New Street Adolescent Service and Pre-Trial Diversion of Offenders Program, urged that consideration of an offender's participation in rehabilitation programs be built into a court application model. Mr Tolliday advised that '… while recidivism by juveniles who commit sexual offences is generally low, that rate of recidivism is dramatically reduced by those young people and their families participating in holistic family-focused counselling'.[445]

7.45 Mr Tolliday suggested that if participation in treatment programs was taken into consideration in determining an application for a spent conviction order, it could provide sexual offenders with an incentive to participate in treatment programs through to completion:

> I think that would be a positive thing, even though the Children's Court may not agree with it, in that if an incentive could be placed there for young people to participate in a treatment process of some kind that was monitored and accountable and came to a completion, we would expect from all of the research that their rate of recidivism

441 Answers to questions taken on notice, Department of Justice and Attorney General, 27 April 2010, p 2.

442 Answers to questions taken on notice, NSW Police Force, 28 April 2010, p 4.

443 Answers to questions taken on notice, NSW Police Force, 28 April 2010, p 4.

444 Answers to questions taken on notice, NSW Commission for Children and Young People, 23 April 2010, p 16.

445 Answers to questions taken on notice, Mr Dale Tolliday, New Street Adolescent Service, 30 April 2010, p 2.

> would decline markedly, and that may then be a reasonable trigger for a spent conviction. They would have an additional incentive built into that.[446]

7.46 Ms Debra Maher of the Law Society of NSW also supported participation in treatment programs being considered in the court application process, but noted that she supported the current wording of the Model Bill: 'It is phrased broadly, which is good, because it is not just looking at "Have you done the sex offender program?" but "What have you done with your life?"'[447]

7.47 The Office of the Director of Public Prosecutions acknowledged that participation in treatment programs can be an indicator of whether an offender has been rehabilitated, and should therefore be eligible to have their conviction spent:

> … we acknowledge that the steps the offender takes to address the conduct (such as whether a plea of guilty is entered and whether there is participation in rehabilitation programs) are highly relevant in terms of whether the offender has acknowledged the wrong doing, is likely to reoffend and whether the stigma of the conviction should remain.[448]

7.48 The Commission for Children and Young People considered that an offender's participation in treatment programs would be a relevant consideration.[449]

Consideration of victim's impact statement

7.49 It was suggested that if convictions for sexual offences were to be spent by court application, the courts should be required to consider a victim's impact statement. According to the submission from Mrs Patricia Wagstaff, a sexual abuse victim: 'Not only should the court have all relevant information concerning the conviction, they should also have … the victim's statement concerning the impact the offence has had on their life since the court case and conviction'.[450]

7.50 While not expressing a view on whether a victim's impact statement should be considered, the Department of Justice and Attorney General noted that 'it has the potential to shift the focus of the application away from the key question – which is whether the offender will reoffend – to the circumstances and facts of the original offence'.[451]

7.51 The Youth Justice Coalition indicated that while a victim's impact statement played an important role at sentencing, it would not be a relevant consideration in an application for a spent conviction order: 'The only relevant considerations are those that relate to the extent

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446 Mr Tolliday, Evidence, 29 March 2010, p 31.

447 Ms Maher, Evidence, 1 April 2010, p 49.

448 Submission 4, p 2.

449 Answers to questions taken on notice, NSW Commission for Children and Young People, 23 April 2010, p 14.

450 Submission 5, p 8.

451 Answers to questions taken on notice, Department of Justice and Attorney General, 27 April 2010, p 3.

that the offender has rehabilitated and whether or not they pose a continuing risk to the community'.[452]

7.52 The NSW Government provided the following comments on victim participation in the court application process:

> On the one hand, victim participation in this process has the ability to give the victim a voice in a matter that is very personal to them; however, given the length of time that would have to accrue before such an application was made, notifying the victim of such an application has the potential to reopen the crime for the victim and potentially provide an opportunity to revisit the facts of the case.[453]

7.53 Further, the Department of Justice and Attorney General advised that 'in some cases, victims may have moved on with their lives and may not want to revisit the matter'.[454] The Department also noted that some offences that would be capable of being spent, such as obscene exposure, may not have an identifiable victim.

7.54 The Commission for Children and Young People considered that a victim's impact statement would be a relevant consideration in determining whether to make a spent conviction order.[455]

Onus on applicant to demonstrate rehabilitation

7.55 The Youth Justice Coalition argued that the applicant should not be required to demonstrate why a spent conviction order should be granted, but rather, that the courts should be required to show why the order should *not* be granted. The Youth Justice Coalition said in relation to the court application process in the Model Bill:

> Such an approach places a clear burden on the applicant to convince the court that they have been successfully rehabilitated and that they no longer pose a threat to the community. In the view of the YJC, placing this burden on the applicant is too onerous and does little to provide additional protection to the community.[456]

7.56 The Youth Justice Coalition drew particular attention to the problems of this approach when applied to consensual sexual intercourse between juveniles, as 'in making such an application it will be very difficult for the young person to show evidence of rehabilitation. Sex offender programs are not appropriate in those circumstances'.[457]

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452 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 18.

453 Submission 21, p 18.

454 Answers to questions taken on notice, Department of Justice and Attorney General, 27 April 2010, p 3.

455 Answers to questions taken on notice, NSW Commission for Children and Young People, 23 April 2010, p 14.

456 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 7.

457 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 8.

7.57 Therefore, the Youth Justice Coalition recommended that 'a clause could be added to the Model Bill that would create such a presumption, but could further provide that the presumption be displaced in certain circumstances'.[458]

Committee comment

7.58 The Committee acknowledges that a court application process has the potential to provide an extra layer of protection for society, and could allow the courts to assess whether an individual offender had been rehabilitated or continues to pose a risk of re-offending.

7.59 However, the Committee does not support all convictions for juvenile sexual offences being spent by court application. Strong views were presented that there are barriers to young offenders accessing the court application process. These barriers include young offenders' previous negative experiences with the court system, a lack of financial resources, and disadvantaged backgrounds including low literacy levels. Indeed, Inquiry participants noted that it would be difficult to make past offenders aware of the existence of the court application process.

7.60 The Committee takes the view that the court application process would be costly and time-consuming, and would create an unreasonable impost on court and police resources. The Committee places particular weight on the evidence from the NSW Children's Court and the Chief Magistrate of the Local Court in this regard. Both of these key stakeholders argued persuasively that in the main there is no justification for distinguishing between juvenile sexual offences and other minor juvenile offences, and that most juvenile sexual offences should become spent by lapse of time in the same manner as other offences. Chief Magistrate Henson also advised that the factors to be taken into consideration by the courts when determining an application for a spent conviction order are in the main the same factors that are taken into account on sentencing. In addition, the Committee notes the concerns expressed by the NSW Police Force concerning their potential involvement in the process, including whether the NSW Police have the requisite expertise to advise on whether to intervene in an application.

7.61 Given the objections to the court application process, the Committee considers that requiring all convictions for sexual offences to be spent by application to the courts would not represent an appropriate balance between protecting society from sexual offenders, while giving offenders the opportunity to move forward and become law-abiding citizens. The Committee is concerned that a court application process for all convictions for sexual offences could be a barrier to rehabilitation, and thus have the potential to expose society to the dangers of future re-offending.

7.62 If the court application model were to be adopted for all convictions for sexual offences, the Committee would not support consideration of a victim's impact statement. The Committee was persuaded by the evidence that consideration of a victim's impact statement is only appropriate at sentencing, not in assessing an offender's risk of re-offending. In addition, the Committee would support the courts giving consideration to an offender's participation in treatment programs, but considers that this is already sufficiently captured in the provisions of the Model Bill.

458 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 8.

Other possible mechanisms for spending convictions

7.63 The previous section discussed the court application model for spending convictions as set out in the Model Bill, and concluded that the Committee does not support requiring all convictions for sexual offences becoming spent by application to the courts. This section discusses the advantages and disadvantages of a number of alternative mechanisms for spending convictions for sexual offences.

Spent by lapse of time

7.64 A number of Inquiry participants supported the spending of convictions for juvenile sexual offences in the same manner as other offences, namely by lapse of time after the completion of the good behaviour period. These Inquiry participants tended to argue that minor sexual offences were no different from other minor offences, and should not be treated differently. In addition, it was argued that child protection mechanisms are sufficient to protect society against sexual offenders.

7.65 As noted in Chapter 2, the Queensland spent convictions scheme permits convictions for sexual offences to be automatically spent in the same manner as all other offences, provided that the sentence imposed was less than 30 months, and a crime-free period of five years for juvenile offenders had elapsed.

7.66 Dr Nisbit pointed out that regardless of whether a conviction for a juvenile sexual offence became spent, many juvenile sexual offenders would be listed on the Child Protection Register, and would also be deemed to be a prohibited person for the purposes of applying for child-related employment.[459] Dr Nisbit concluded that '… any lingering concerns should be allayed' by the way in which the child protection mechanisms provided an extra layer of protection in addition to the safeguards in the spent convictions scheme.[460]

7.67 Similarly, the Commission for Children and Young People argued that:

> In NSW there are a range of other strategies through which the safety of the community is protected from young people who may re-offend sexually, which are more appropriate than the prohibitions under the current spent convictions scheme. These strategies include the NSW Police Child Protection Offender Register and the Working With Children Check.[461]

7.68 According to the NSW Children's Court, the child protection mechanisms:

> … offer significant protection to children who are considered as most at risk from juvenile sex offenders. If one of the reasons why juvenile sex offenders are precluded from the spent convictions scheme, is to protect the vulnerable members of our society, then some members of the Court are of the view that this goal is already achieved through the *Commission for Children and Young People Act 1998* and that

459 Submission 6, pp 5-6.

460 Submission 6, p 5.

461 Submission 6, p 4.

> additional restrictions through the spent convictions scheme are neither necessary or warranted.[462]

7.69 Chapter 8 discusses child protection mechanisms in detail.

7.70 The NSW Government advised that the arguments in favour of this option, that is, allowing convictions for sexual offences to become spent by lapse of time, include that the completion of the good behaviour period is the most significant indicator that an offender will not re-offend, and also that the sentence imposed is the most reliable indicator of the seriousness of an offence.[463]

7.71 The NSW Government indicated that spending sexual convictions by lapse of time would save court time and money, would not re-open past offences to public scrutiny, and would provide offenders with certainty as to when their conviction would be spent, giving an incentive not to re-offend.[464] However, the NSW Government noted that this model would not provide an additional layer of protection for society, or allow individual convictions to be considered on a case-by-case basis.[465]

Spent by lapse of time unless the Crown intervenes

7.72 Some Inquiry participants suggested that convictions should be spent by lapse of time unless there is an application to intervene by the Attorney General or the Police Commissioner, either at or after sentencing, in which case the courts would determine whether a conviction should become spent.

7.73 In the event that the spent convictions scheme is amended to include convictions for sexual offences, the NSW Children's Court favoured juvenile sexual offences becoming spent in the same manner as other offences, '… unless the Crown makes an application for the conviction not to be spent. In these circumstances a Children's Magistrate should be empowered to hear and determine the application'.[466] If there was an appeal against the decision of the Children's Magistrate, the appeal would lie with the District Court.[467]

7.74 The application to intervene could occur towards the end of the good behaviour period, to allow the Crown to evaluate whether the offender has been rehabilitated or whether they still pose a risk to society. When questioned on the timing of the intervention, Magistrate Hannam said: 'It should have the capacity to make that application almost up to the crime-free period. They should be entitled to take as much advantage giving the young person the chance to prove themselves either way'.[468]

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462 Submission 6, p 3.

463 Submission 21, p 17.

464 Submission 21, p 17.

465 Submission 21, p 17.

466 Submission 16, p 1.

467 Submission 16, p 8.

468 Ms Hannam, Evidence, 1 April 2010, p 6.

7.75 Alternatively, the Crown could make an intervention application at sentencing, which would require the sentencing judge to decide whether to order that a conviction not be spent by lapse of time but be determined by the courts after the expiry of the good behaviour period. The NSW Police Force gave evidence that it would be very difficult for a police prosecutor to make an application at sentencing. Chief Superintendent Trichter advised that:

> From a practical point of view I think that would be difficult… At the end of a case – and a sexual case is often a very difficult case; it is a case where the prosecutor's energy and focus is upon the witnesses in such matters as victim care but primarily because of the nature of our work, the evidence – to then be in a position where the prosecutor must turn his or her mind to ancillary applications such as the one that is being proposed now would create some difficulties.[469]

7.76 In addition to minimising court costs and time, as compared to applying the court application model to all convictions for juvenile sexual offences, the NSW Government observed that this option:

> … gives a second layer of protection to the community, by allowing the Court to look at individual cases in more depth where there is some concern that the person has not been adequately rehabilitated, or there are other unique factors surrounding the case …[470]

7.77 To implement this option the NSW Government advised that government agencies would need to develop tracking systems to identify when convictions for sexual offences were due to be spent.[471] According to the NSW Police Force, the difficulties involved in developing a tracking process would include technological and cost implications, which would be associated with developing an electronic system for the Department of Justice and Attorney General to advise the Police Force of convictions that were due to be spent.[472]

7.78 This option would also involve some uncertainty for offenders as to when, or if, their conviction would be spent. Guidelines would also need to be developed for the courts to consider in determining whether to make a spent conviction order.

7.79 The NSW Government noted that government agencies and the courts would need to be consulted before deciding whether to consider this option.[473]

Application to Administrative Decisions Tribunal

7.80 The NSW Government put forward the possibility that applications for spent conviction orders could be made to the Administrative Appeals Tribunal, rather than the courts. The NSW Government advised that this option would provide an extra layer of protection for

469 Mr Trichter, Evidence, 1 April 2010, pp13-14.

470 Submission 21, p 18.

471 Submission 21, p 18.

472 Answers to questions taken on notice, NSW Police Force, 28 April 2010, p 4.

473 Submission 21, p 18.

society, as with the court application model, but could also be of 'lower cost and greater efficiency'.[474]

7.81 As described in Chapter 2, the Canadian scheme provides for applications to be considered by the National Parole Board (rather than the courts), and it is the Parole Board that decides whether to grant a pardon.

7.82 The NSW Government noted that this option would need to be given careful consideration, because of the Administrative Decisions Tribunal's lack of expertise in this area. Indeed, the NSW Government cautioned that 'given the seriousness of a conviction for a sex offence and the seriousness of the decision of spending that conviction, the decision may be better left to the Courts, which are familiar with criminal legislation and sex offender provisions'.[475]

7.83 The NSW Government observed that the Administrative Decisions Tribunal would need to be consulted before making any decision on whether to proceed with this model.

7.84 The Committee notes that no other stakeholders raised this option.

Application to an expert panel

7.85 The Committee considered whether an expert panel could be established to consider an application for a spent conviction order, rather than applications being considered by the courts. The panel could include persons with a range of expertise such as a judge, police officer, representative of the Director of Public Prosecutions, or a psychologist.

7.86 When questioned on the efficacy of a panel mechanism, Mr Tolliday responded: 'I think a panel would be good. Personally I think a legal practitioner should be on the panel and possibly a judge should head it, but other expertise is available'.[476]

7.87 However, Magistrate Hannam noted that her preference was for any assessment of applications for spent conviction orders to be kept within the courts. She noted that with a panel mechanism:

> … then you would have to set up a bureaucracy, you have to have a panel, an Act for the panel and suitable persons … We do not have those kinds of panels for anything else. I suppose we are saying we do not think that we ought to justify putting sex offences in such a separate category.[477]

474 Submission 21, p 17.

475 Submission 21, p 17.

476 Mr Tolliday, Evidence, 29 March 2010, p 32.

477 Ms Hannam, Evidence, 1 April 2010, p 6.

7.88 Ms Maher of the Law Society of NSW observed that a panel mechanism had the potential to become politicised:

> One of the difficulties with the option of the panel is again the possibility of politicising that process, and I again mean that in the broadest sense …
>
> One of the strengths of the judicial system is the separateness and impartiality of that system. It is not a system that has to listen to the Daily Telegraph or, in a direct way, has to listen to the espousing of various politicians at various times, with apologies. Of course, it listens to legislation and that sort of direction through the Parliament. But the strength of that impartiality is crucial to the fair operating of the system so any panel would have to be equally as impartial.[478]

Committee comment

7.89 As noted previously, the Committee does not believe that all convictions for sexual offences should be required to be spent by court application, as per the process set out in the Model Bill. The Committee also opposes the Administrative Decisions Tribunal hearing applications for spent conviction orders, in part because the Tribunal does not have the expertise needed to deal with sexual offences, and also because stakeholders did not express support for this mechanism. In addition, the Committee does not support establishing a panel of experts to hear applications, because this would create a new bureaucracy without the impartiality of the judicial process.

7.90 The Committee's preferred option is for eligible convictions for juvenile sexual offences to become spent by lapse of time, in the same manner as other convictions. This would reflect the evidence that it is not necessary to differentiate between minor juvenile sexual offences and other minor juvenile offences.

7.91 However, the Committee shares the concerns raised by a number of stakeholders that the seriousness of sexual offences warrants an additional safeguard being introduced to ensure that convictions are not spent where there are concerns about future re-offending. The Committee therefore favours the inclusion of an option for the Attorney General or the Police Commissioner to have the opportunity to intervene before the expiry of the good behaviour period, if any eligible convictions do raise concerns, and the matter would be referred to the courts to determine whether the conviction should become spent.

7.92 This approach would ensure that in the main, eligible juvenile sexual offences would be treated in the same manner as other offences, and would allow most persons convicted of less serious sexual offences to move forward with their lives when they had completed the good behaviour period. On the other hand, this approach would provide an additional protection for the community by ensuring a greater level of scrutiny for those cases that raise concerns about re-offending.

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478 Ms Maher, Evidence, 1 April 2010, p 49.

7.93 In terms of the timing of the intervention process, the Committee supports a decision about whether to intervene being made towards the end of the good behaviour period. This would provide the offender with the opportunity to demonstrate that they had been rehabilitated and no longer pose a risk to society. The Committee does not support an application for intervention being made to the courts at the time of sentencing, because the sentencing process must be kept distinct from the spent convictions scheme.

Recommendation 6

That the Attorney General ensure that the NSW legislation to implement the Model Spent Convictions Bill provides that convictions for juvenile sexual offences, as with convictions for other juvenile offences, are spent by lapse of time. Further, that a safeguard be introduced to allow the Attorney General or the Commissioner of Police to make an application to intervene towards the end of the good behaviour period, if there are concerns about potential re-offending. The courts would then consider the application and determine whether to issue a spent conviction order.

7.94 The Committee recognises the costs associated with establishing a court application process that will be used only sparingly. These costs include tracking applications, developing guidelines for intervention by the Attorney General or the Police Commissioner, and guidelines for the courts to follow in determining an application. However, requiring court assessment for only a minority of applications would be significantly less costly and time-consuming than requiring a court application process for all spent conviction orders.

7.95 In addition, the NSW Police Force raised concerns about having the requisite knowledge to provide advice on whether to intervene and request that the courts determine whether a conviction should be spent. It was also suggested that a court application process could become politicised, rather than focusing on the offender's rehabilitation and their potential risk of re-offending. The Committee considers that both these matters could be addressed by the development of clear guidelines, in the first instance on the circumstances in which the Crown should intervene, and in the second instance, on the matters to be considered by the courts in determining whether to make a spent conviction order.

7.96 The Committee also notes the benefits of this model as compared to a process where past offenders would be required to make an application to the courts, given the evidence that juvenile offenders are unlikely to apply to the courts themselves.

7.97 Some Committee members believe that all convictions for sexual offences should be required to be spent by court application.

Chapter 8 Issues that impact on the operation of the spent convictions scheme

This Chapter addresses two additional issues raised during evidence. These issues do not affect the Committee's recommendations regarding the inclusion of juvenile sexual offences in the spent convictions scheme, but they have important implications for the scheme's operation. First is the need to examine the interplay between child protection mechanisms and the provisions of the spent convictions scheme. This is pertinent in light of the Committee's recommendation that convictions for juvenile sexual offences be included in the spent convictions scheme. The current statutory review of the *Commission for Children and Young People Act 1998* is an ideal occasion to consider this matter. Second is a concern raised by Privacy NSW, regarding the process for removing spent convictions from an individual's criminal record.

Interplay with child protection mechanisms

8.1 The terms of reference for this Inquiry do not encompass the examination of child protection mechanisms. However this issue impacts on the operation of the spent convictions scheme, because even if juvenile sexual offences are capable of becoming spent, as recommended by the Committee, past offenders will still be required to disclose these convictions when applying for child-related employment.

8.2 This requirement will continue indefinitely, regardless of whether the conviction becomes spent, and the length of time since the offence. Therefore the benefits of including juvenile sexual offences in the spent convictions scheme may be diminished, unless consideration is given to the design of child protection mechanisms in consequence of the issues raised in this report.

Child protection legislation

8.3 The spent convictions scheme has been in place since 1991, before the introduction of child protection mechanisms requiring the disclosure of convictions for sexual offences against children.

8.4 As noted in Chapter 2, child protection legislation provides that juvenile offenders convicted of sexual offences against children punishable by imprisonment of 12 months or more are prohibited from working with children. Most sexual offences have a maximum penalty of 12 months or more, except obscene exposure. Convictions are defined to include matters where no conviction was recorded.

8.5 Juveniles convicted of serious offences against children, including child sexual offences, are placed on the Child Protection Register and are required to comply with annual reporting requirements. The reporting requirements continue for time periods ranging from four to seven and a half years.

8.6 Applicants for child-related employment are required to complete a Working With Children Check, which is designed to identify any person who may pose a risk to children. The Check

considers relevant criminal records including charges and convictions for child sexual offences, matters where no conviction was recorded, or matters that were dismissed by the courts. There are no time limits on convictions that are considered by the Check. Therefore even convictions for offences committed decades ago as a juvenile are revealed.

8.7 Offenders can apply for a review of their prohibited status in limited circumstances, but as noted in Chapter 7, juvenile offenders are often reluctant to do so. There is no process to be exempted from being listed on the Child Protection Register, other than for persons with lifetime reporting requirements who have been listed on the Register for 15 years.

Retrospective application of child protection legislation

8.8 As noted in Chapter 2, the *Commission for Children and Young People Act 1998* applies retrospectively. Consequently all persons convicted of a sexual offence in the past, no matter how old the conviction, are prohibited from working in child-related employment.

8.9 The case studies in Chapter 3 illustrate how the historical application of this legislation has created difficulties for persons convicted of sexual offences many years ago. In the cases of Mr Neville Cox and Mr Smith,[479] both men went on to have long-standing marriages and raise families, and are now respected members of their local communities. In the case of Mr Cox, he married Mrs Lyn Cox soon after he was charged with carnal knowledge as a result of Mrs Cox falling pregnant, and they have been married ever since.

8.10 When questioned on cases such as that of Mr and Mrs Cox, the Acting Commissioner for Children and Young People, Ms Jan McClelland, described her concerns in relation to historical cases involving consensual sexual activity:

> The situation that comes up quite regularly in these checks is the case that I mentioned earlier of carnal knowledge as a young person and subsequently the person has been married – they are automatically prohibited unless they apply for an order. Of more concern, is if the age gap between the two individuals was more than three years then there is no right of appeal – to use colloquial language – for that person at all. The offence might have occurred many years ago and the person has had a clean record since but there is nothing we can do.[480]

8.11 Further, in relation to persons who are not eligible to apply for a review of the prohibition on working with children, Ms McClelland explained that 'we have sought advice from the Crown Solicitor's office as to what action is open to us in those circumstances and the advice is nothing'.[481] In relation to the current statutory review of child protection legislation, Ms McClelland noted that: 'So there are clearly situations such as that that need to be remedied, and there are others as well that we would be looking to overcome'.[482]

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479 Please note that Mr Smith's real name has been kept confidential, at his request.

480 Ms Jan McClelland, Acting Commissioner, NSW Commission for Children and Young People, Evidence, 29 March 2010, p 21.

481 Ms McClelland, Evidence, 29 March 2010, p 21.

482 Ms McClelland, Evidence, 29 March 2010, p 21.

8.12 Mr Warwick Hunt of the NSW Bar Association also commented on the evidence from Mr and Mrs Cox, and suggested that it would be beneficial for the Commission for Children and Young People to review such historical cases:

> … it would be a helpful thing for this Committee to make some comment about a proper review of historical cases. I know that a statutory review is coming up in relation to the Commission … some recommendation of this Committee for a review that incorporates some re-examination perhaps of other historical cases … would be a helpful measure. Anecdotally, I suggest probably lots of people are in that position …[483]

Juvenile offenders and the Child Protection Register

8.13 Inquiry participants pointed to problems that arise when the Child Protection Register is applied to juvenile sexual offenders. The Law Society of NSW commented on this matter with reference to Mr Cox's case:

> The problems faced by Mr Cox occur regularly, and now also attract the provisions of the Child Protection Register – set up ostensibly to identify and track paedophiles. This Register unfairly and inaccurately identifies child offenders as 'paedophiles' even where they are the same or similar age as the victim, because it is based solely on the age of the victim and disregards the age of the offender. The Register was not in effect at the time of Mr Cox's offence, but any one in a similar situation to him now would attract the provisions of the Register …[484]

8.14 The Youth Justice Coalition advised that 'almost all' juvenile sexual offenders are listed on the Child Protection Register, because 'other children are the most likely victims of a sex offence committed by a young person'.[485]

8.15 The NSW Sentencing Council recently reported on the application of the Child Protection Register to juvenile sexual offenders. The Sentencing Council's May 2009 report *Child Protection Register Penalties relating to sexual assault offences in NSW* recommended: 'That in the case of first time offenders who are aged under 18 years, the Court have a discretion, at the time of imposing sentence, to excuse the requirement for registration' under the *Child Protection (Offenders Registration) Act 2000*.[486]

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483 Mr Warwick Hunt, Bar Councillor, Member of Criminal Law Committee, NSW Bar Association, Evidence, 1 April 2010, pp 44-45.

484 Answers to questions taken on notice, The Law Society of NSW, 25 May 2010, p 1.

485 Answers to questions taken on notice, Youth Justice Coalition, 28 April 2010, p 10.

486 NSW Sentencing Council, *Child Protection Register Penalties relating to sexual assault offences in NSW*, Volume 3, May 2009, p xxix.

8.16 The report recommended that the requirement for registration should only be excused in less serious cases where the offender posed a low risk of re-offending.[487] The Sentencing Council explained that the courts needed to have the discretion to order that juvenile sexual offenders not be listed on the Register because:

> Otherwise the long term consequences for offenders in this category, who are still in a developmental stage, and whose understanding of sexual mores may be limited, can be disproportionate both for the objective seriousness of the offence and the level of risk of reoffending. This can have a real significance for example, for consensual sexual activities between juveniles, where there is an absence of indiscriminate predatory behaviour.[488]

Effectiveness of registration programs for sexual offenders

8.17 Inquiry participants also drew the Committee's attention to recent research findings that question the efficacy of registration programs for sexual offenders. When questioned on the Child Protection Register, Juvenile Justice advised that:

> Sexual offender registration (and community notification laws) assumes that the likelihood of these offenders repeating their crimes is enduring and unchanging, leaving the community vulnerable to ongoing risk. Research shows that most juvenile sexual offenders are not convicted of further sexual offences (at least) within the first ten years as an adult …
>
> Research by Letourneau et al (2010) found that the registration of juvenile sexual offenders failed to deter sexual offending…
>
> The juvenile justice system aims to balance community safety with the potential for juvenile offenders to be rehabilitated. There is little evidence to support the registration of juvenile sexual offenders as an effective option for achieving either aim. Registration significantly beyond the length of a legal order may in fact delay young people's re-integration into the community by increasing the stigma attached to the original offence thereby making it more difficult to obtain suitable employment and access to educational and recreational opportunities.[489]

8.18 Mr Dale Tolliday, Program Director, New Street Adolescent Service and Pre-Trial Diversion of Offenders Program, drew the Committee's attention to a recent US study of the effectiveness of registration of juvenile sexual offenders, which found that the policy 'generally failed' to reduce juvenile recidivism.[490]

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487 NSW Sentencing Council, *Child Protection Register Penalties relating to sexual assault offences in NSW*, Volume 3, May 2009, pp 202-203.

488 NSW Sentencing Council, *Child Protection Register Penalties relating to sexual assault offences in NSW*, Volume 3, May 2009, p 203.

489 Answers to questions taken on notice, Juvenile Justice, 4 May 2010, p 2.

490 Answers to questions taken on notice, Mr Dale Tolliday, New Street Adolescent Service, 30 April 2010; Letourneau E and Armstrong K, 'Recidivism Rates for Registered and Non-Registered Juvenile Sexual Offenders', *Sexual Abuse: A Journal of Research and Treatment,* Vol. 20, No. 4, December 2008, pp 393-408.

Committee comment

8.19 The spending of juvenile sexual offences is a complex issue with many different facets. The evidence to this Inquiry has identified a number of interlocking issues affecting both the spent convictions scheme and child protection mechanisms.

8.20 For instance, the case studies in Chapter 3 illustrate the ongoing difficulties faced by persons who are prohibited from working with children. The evidence from Mr Neville Cox and Mr Smith suggests that in the 1950s and 1960s the criminal justice system operated according to different standards. For example, in both cases neither juvenile had legal representation. In addition, in the case of Mr Cox, the decision of his wife's parents to pursue prosecution may have been influenced by the prevailing moral attitudes towards pre-marital sex and teenage pregnancy. Regardless of these considerations, as a result of the retrospective application of the *Commission for Children and Young People Act 1998*, both men are prohibited from working with children indefinitely, and there are limited avenues to apply for a review of prohibited status.

8.21 As noted earlier, Mr Hunt suggested that it would be beneficial for the Commission for Children and Young People to conduct a review of historical cases, where offenders have subsequently demonstrated that they are rehabilitated by completing lengthy periods of good behaviour, to determine if the circumstances of the offence warrant the offender continuing to be deemed to be a prohibited person.

8.22 The Committee supports this suggestion, and in doing so, draws attention to the compelling and persuasive evidence from Mr and Mrs Cox.

Recommendation 7

That the Minister for Youth advise the statutory review of the *Commission for Children and Young People Act 1998* to give consideration to historical cases that resulted in offenders being prohibited from working with children. The review should consider whether or not offenders who have subsequently completed lengthy periods of good behaviour should have their prohibited status lifted.

8.23 Inquiry participants also raised concerns about the Child Protection Register. Inquiry participants indicated that juvenile sexual offenders are listed on the Register because they tend to offend against other children, and not because their offences are in the most serious category. This argument also applies to juveniles who are deemed to be prohibited persons and restricted from working with children.

8.24 The Committee notes the Sentencing Council recommendation that the courts be given discretion to order that juvenile sexual offenders *not* be listed on the Child Protection Register. This recommendation reflects a view that in some cases of juvenile sexual offending, the circumstances of the individual matter might not warrant registration. The Committee considers that this finding could be extended to persons who are prohibited from working with children, and consideration should be given to whether prohibition might also *not* be warranted in every case.

8.25 The Committee notes that a sexual offender is deemed to be a prohibited person if they are convicted of an offence with a maximum penalty of 12 months or more. No consideration is given to the actual sentence imposed. As noted in Chapter 6, the Committee does not believe that the maximum penalty is a reliable indicator of the severity of the offence, given the variety of conduct that can fall within a single offence category. The Committee believes that the sentence imposed is the most reliable indicator of the severity of an offence.

8.26 In addition, the Committee is concerned at the limited circumstances in which juvenile offenders can apply for a review of the findings resulting from the operation of child protection legislation. For example, there is very limited potential for juvenile offenders to apply for a review of their status as a prohibited person. Where young offenders do have a right of review, they are required to make an application. The problems faced by juvenile offenders in accessing court application processes also apply, to some extent, to the review processes in place for child protection mechanisms.

8.27 The Committee supports consideration of greater review rights for juvenile sexual offenders. However given the reluctance of many young people to access review processes this is not enough. The Committee supports consideration of whether listing on the Child Protection Register is warranted in every case for juvenile sexual offenders, and also whether juvenile sexual offenders should in every case be prohibited from working with children as a result of a conviction for a juvenile sexual offence. Consideration should also be given to whether the maximum penalty rather than the sentence imposed should be used to determine whether a juvenile sexual offender is deemed to be a prohibited person.

8.28 The Committee believes that it is important for the spent convictions scheme and child protection mechanisms to be moving in step. This is particularly so given the Committee's recommendation that juvenile sexual offences be included in the spent convictions scheme. Much of the benefit of this recommendation could be dissipated without corresponding changes to child protection mechanisms. The Committee therefore recommends that the statutory review of the *Commission for Children and Young People Act 1998* take into consideration the recommendations and conclusions of this report, and in particular the comments made in this section regarding child protection mechanisms.

Recommendation 8

That the Minister for Youth ensure that the statutory review of the *Commission for Children and Young People Act 1998* gives consideration to the recommendations and conclusions of this report.

Removal of spent convictions from criminal records

8.29 The submission from Privacy NSW drew the Committee's attention to a problem in the operation of the spent convictions scheme.[491] The Committee heard that this issue results in the largest single number of inquiries to Privacy NSW. According to Privacy NSW:

491 Submission 7, Privacy NSW, p 2.

> The issue, which I would describe as administrative, concerns the actual removal of spent convictions from the official copy of a person's criminal record history provided by NSW Police to, for example, a prospective employer. Unfortunately, too often spent convictions are not in fact removed from the official copy of a criminal record. Privacy New South Wales's numerous attempts to have this issue addressed over the last six years (since the problem arose), have not met with success.[492]

8.30 The submission points out that unless the spent convictions scheme operates effectively in practice, '… then it would appear to be of minimal value'.[493]

8.31 When asked to respond to these comments, the NSW Police Force said that the Criminal Records Unit '… is not aware of any specific examples where this situation has occurred'.[494]

8.32 The NSW Police Force advised that 'spent convictions will only be released by NSW Police if required for a category of employment or purpose exempt from the *Criminal Records Act 1991*', or to an interstate police jurisdiction as permitted under Section 13 of the Act.[495]

8.33 The NSW Police Force concluded that they would '… welcome details of specific examples so the assertions of the Privacy Commissioner could be further explored'.[496]

Committee comment

8.34 The Committee is concerned at the suggestion that problems in the administration of the spent convictions scheme may be undermining its effectiveness. The Committee welcomes the offer from the NSW Police Force to look into alleged deficiencies concerning the removal of spent convictions from an individual's criminal record. The Committee recommends that the Minister for Police examine this issue to determine the extent of the problem, and if necessary, work with Privacy NSW to address this issue.

Recommendation 9

That the Minister for Police examine the issues concerning the removal of spent convictions from an individual's criminal record to determine the extent of the problem, and if necessary, work with Privacy NSW to address any deficiencies with this process.

492 Submission 7, p 2.

493 Submission 7, p 3.

494 Answers to questions taken on notice, NSW Police Force, 28 April 2010, p 2.

495 Answers to questions taken on notice, NSW Police Force, 28 April 2010, p 3.

496 Answers to questions taken on notice, NSW Police Force, 28 April 2010, p 3.

Chapter 9 Conclusion

This report has examined the complex issue of whether convictions for juvenile sexual offences should continue to be excluded from the spent convictions scheme, or whether there are circumstances in which juvenile sexual offences should be capable of becoming spent. This concluding Chapter describes the Committee's preferred model for including juvenile sexual offences in the spent convictions scheme, drawing together the recommendations made in previous chapters.

Incorporating juvenile sexual offences in the spent convictions scheme

9.1 Lifting the blanket prohibition on the spending of convictions for sexual offences is a controversial question that must be approached with caution. In examining this issue the Committee has sought to balance competing interests. Foremost is the need to protect the community from sexual offenders. Balanced against this is the community interest in rehabilitating past offenders, to reduce re-offending into the future.

9.2 In considering whether to include juvenile sexual offences in the spent convictions scheme, it is important to remember that the scheme is not concerned with punishment. Sentencing will continue to maintain a hard line towards sexual offending, regardless of any changes to the spent convictions scheme.

9.3 One means to reduce re-offending is by allowing young offenders who have been rehabilitated to put their offending behind them by removing the requirement to disclose convictions for juvenile sexual offences, for example when applying for employment and educational opportunities. These are strong protective factors against re-offending and encourage pro-social lifestyles.

9.4 In addition, the research does not demonstrate a necessary progression from juvenile sexual offending to child sexual offending in adulthood, and shows that juvenile offenders do not tend to be re-convicted for sexual offences. This should be reflected in the spent convictions scheme, by acknowledging that the prospects for the rehabilitation of young offenders compare favourably with the risk of re-offending.

9.5 The spent convictions scheme is designed to only permit convictions for less serious offences to become spent, provided that an offender has completed the requisite good behaviour period. The evidence presented to the Inquiry has enabled the Committee to conclude that, on balance, there is no benefit in continuing to treat juvenile sexual offences differently from other juvenile offences for the purposes of the spent convictions scheme. This report therefore recommends that juvenile sexual offences be included in the spent convictions scheme through the NSW legislation to implement the Model Spent Convictions Bill (the Model Bill). The model put forward by the Committee outlines the eligibility criteria that would need to be satisfied and the appropriate mechanism by which convictions could become spent.

Proposed model

9.6 The Committee recommends that juvenile sexual offences be included in the spent convictions scheme where the sentence imposed is less than 24 months, and the offender completes a good behaviour period of three years. The Committee does not support limiting the scheme to include only those offences where the sexual activity was consensual, the offence was a minor sexual offence, or where no conviction was recorded. However, by supporting the inclusion of all juvenile sexual offences that fall under the benchmark sentence, the Committee has opened the way for such offences to become spent.

9.7 There are a number of distinctive factors contributing to juvenile sexual offences, which the Committee considers to be important reasons to justify their inclusion in the spent convictions scheme. These factors include immaturity, impulsiveness and peer pressure, as well as ongoing brain development that continues until young people are in their mid-20s. In addition, research on juvenile sexual offending has shown low rates of recidivism compared to other offence types.

9.8 The model recommended by the Committee would provide juvenile offenders with the opportunity to put their past behind them while they are still young, and have the capacity to change and be rehabilitated. The spending of convictions for juvenile sexual offences would allow juveniles to engage in pro-social lifestyles, by removing the barriers to accessing employment and educational opportunities.

9.9 In recommending the 24-month benchmark sentence proposed in the Model Bill, the Committee was persuaded by the evidence that the courts view sexual offending very seriously, and only less serious offences would be captured. In recommending a three-year good behaviour period the Committee in this instance departed from the provisions of the Model Bill. The Committee considered this length of time to be sufficient to demonstrate that a juvenile offender has been rehabilitated, but to still provide young offenders with an incentive not to re-offend. The Committee was mindful of the evidence that even if a persistent offender received a sentence of less than 24 months, the offender may possibly re-offend within the three-year period, and the original offence would therefore not become spent.

9.10 The Committee considers that this model would benefit community safety by preventing juvenile offenders from becoming persistent offenders, and juvenile offenders would be provided with an incentive to become productive and law-abiding members of society.

9.11 The Committee's preferred option is for convictions for juvenile sexual offences to be spent by lapse of time in the same manner as other convictions. However, the Committee also recognises the seriousness of community perceptions of sexual offences. The Committee therefore believes that there should be an additional option in regard to spending convictions for juvenile sexual offences, to ensure that if a particular offender does raise concerns about re-offending, the Attorney General or the Police Commissioner could make an application to intervene before the offence becomes spent. The conviction would then be referred to the courts to determine whether it should be spent. Rather than requiring all offenders to apply to the courts for a spent conviction order, as proposed in the Model Bill, the Committee's model places the onus on the Crown to identify any cases of concern.

9.12 Some Committee members are concerned about the possibility of serious juvenile sexual offences falling beneath a new benchmark sentence of 24 months, and believed that more research was needed before moving above a benchmark sentence of six months. These Committee members believed that, consistent with the Model Bill, there should be the capacity for courts to set up to five-year good behaviour periods for juvenile offenders with respect to serious offences. Further, these Committee members believed that all convictions for sexual offences should be required to be spent by court application.

Related issues

9.13 In addition to this model for the spending of juvenile sexual offences, there is one area in which the Committee recommends changes that would apply to both adult and juvenile offenders. This area is where the courts find a person guilty of an offence, but decide that the exceptional circumstances of the offence do not warrant a conviction being recorded. The Committee recommends that the NSW legislation to implement the Model Bill provide for offences where no conviction is recorded to become spent immediately, as is the case in the present spent convictions scheme. The Committee recommends that this apply to sexual offences as well as other offences.

9.14 This report also comments on the operation of child protection mechanisms, and draws attention to the importance of the spent convictions scheme and child protection mechanisms moving in step. This is particularly so given the Committee's recommendation that convictions for juvenile sexual offences be included in the spent convictions scheme. Without corresponding changes to child protection legislation, the Committee believes that much of the benefit from including convictions for juvenile sexual offences in the spent convictions scheme could be lost. The statutory review of the *Commission for Children and Young People Act* is an opportune occasion to review the interplay between child protection mechanisms and the spent convictions scheme. One area that should be addressed in the review is whether there could be more scope for offenders with historical convictions to have their prohibited status lifted.

9.15 The Committee was also alerted to alleged deficiencies in the process for removing spent convictions from an individual's criminal record, and recommends that the Police Minister address any such deficiencies.

Appendix 1 Submissions

No	Author
1	Mrs Lyn Cox
2	Department of Corrective Services
3	NSW State Parole Authority
4	Office of the Director of Public Prosecutions
5	Mrs Patricia Wagstaff
6	Dr Ian Nisbet
7	Privacy NSW
8	NSW Commission for Children and Young People
9	NSW Department of Education and Training
10	The Law Society of NSW
11	Public Interest Advocacy Centre
12	Chief Magistrate of the NSW Local Court
13	Youth Justice Coalition
14	The Salvation Army
15	Bravehearts
16	NSW Children's Court
17	NSW Ombudsman
18	Professor Dianna Kenny & Dr Christopher Lennings
19	Australian Federation of Employers and Industries
20	Name suppressed (partially confidential)
21	NSW Government
22	Dr Bronwyn Naylor

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
Monday 29 March 2010 **Room 814-815** **Parliament House, Sydney**	Ms Gabrielle Carney	Assistant Director, Legislation, Policy and Criminal Law Review Division, Department of Justice and Attorney General
	Ms Lauren Judge	Principal Policy Officer, Legislation, Policy and Criminal Law Review Division, Department of Justice and Attorney General
	Ms Kiersten Perini	Policy Officer, Legislation, Policy and Criminal Law Review Division, Department of Justice and Attorney General
	Ms Jan McClelland	Acting Commissioner, NSW Commission for Children and Young People
	Ms Virginia Neighbour	Director, Working with Children Check, NSW Commission for Children and Young People
	Mr Dale Tolliday	Program Director, NSW Pre-Trial Diversion of Offenders Program and New Street Adolescent Services
Thursday 1 April 2010 **Jubilee Room** **Parliament House, Sydney**	Ms Hilary Hannam	Magistrate, NSW Children's Court
	Detective Superintendent John Kerlatec	Commander, Sex Crimes Squad, NSW Police Force
	Chief Superintendent Anthony Trichter	Commander, Police Prosecutions, NSW Police Force
	Ms Megan Wilson	Executive Director, Office of the Chief Executive, Juvenile Justice, Department of Human Services
	Ms Natalie Mamone	Chief Psychologist, Juvenile Justice, Department of Human Services
	Ms Suellen Lembke	Director, Programs, Juvenile Justice, Department of Human Services
	Mrs Lyn Cox	Individual
	Mr Neville Cox	Individual
	Ms Debra Maher	Solicitor, Law Society of NSW
	Mr Warwick Hunt	Bar Councillor, Member of Criminal Law Committee, NSW Bar Association
	Ms Jane Sanders	Solicitor, Youth Justice Coalition
	Ms Julie Babineau	Chief Executive, Justice Health, Department of Health
	Dr Claire Gaskin	Clinical Director, Adolescent Health, Justice Health, Department of Health

Appendix 3 Tabled documents

Monday 29 March 2010

Public Hearing, Parliament House, Sydney

1 *Generation Y and Crime: A longitudinal study of contact with NSW criminal courts before the age of 21*, Crime and Justice Bulletin, Number 96, Bureau of Crime Statistics and Research, August 2006, tendered by Ms Gabrielle Carney, Department of Justice and Attorney General.

2 *Contact with the New South Wales court and prison systems: The influence of age, Indigenous status and gender*, Crime and Justice Bulletin, Number 78, Bureau of Crime Statistics and Research, August 2003, tendered by Ms Gabrielle Carney, Department of Justice and Attorney General.

3 *JIRS Statistics: Sexual offenders who received sentences of 6, 12 or 24 months imprisonment or less*, tendered by Ms Gabrielle Carney, Department of Justice and Attorney General.

4 *Comparative table: Spent convictions scheme*, tendered by Ms Gabrielle Carney, Department of Justice and Attorney General.

5 *Working With Children Check: Guidelines*, tendered by Ms Jan McClelland, NSW Commission for Children and Young People.

6 *Secondary Students and Sexual Health 2008*, Powerpoint presentation, Australian Research Centre in Sex, Health and Society, LaTrobe University, tendered by Hon Greg Donnelly MLC.

7 *Model Spent Convictions Bill 2008*: *Standing Committee of Attorneys General,* Law Council of Australia, January 2009, tendered by Mr Warwick Hunt, NSW Bar Association.

8 Submission to Senate Legal and Constitutional Affairs Legislation Committee in relation to the Crimes Amendment (Working with Children – Criminal History) Bill 2009, Law Council of Australia, October 2009, tendered by Mr Warwick Hunt, NSW Bar Association.

Appendix 4 Model Spent Convictions Bill

Draft
24.9.2009 (35)

South Australia

Spent Convictions Bill 2009

A BILL FOR

An Act to limit the effect of a person's conviction for certain offences if the person completes a period of crime-free behaviour; and for other purposes.

Contents

Draft

Spent Convictions Bill 2009
Contents

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Spent Convictions Act 2009*.

2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

Drafting note—

Subject to local variations.

3—Preliminary

(1) In this Act, unless the contrary intention appears—

adult means a person of or above the age of 18 years;

AUSTRAC means the Australian Transaction Reports and Analysis Centre continued in existence by the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* of the Commonwealth;

child means a person under the age of 18 years;

Commonwealth authority means—

(a) a Commonwealth Minister; or

(b) a Commonwealth Department; or

(c) the Defence Force; or

(d) a body (whether incorporated or not) established or appointed for a public purpose by or under a Commonwealth law, not being—

(i) an incorporated company, society or association; or

(ii) an organisation registered, or an association recognised, under the *Fair Work (Registered Organisations) Act 2009* of the Commonwealth, or a branch of such an organisation or association; or

(e) a body established or appointed by the Governor-General, or by a Commonwealth Minister, otherwise than by or under a Commonwealth law; or

(f) a person holding or performing the duties of an office established by or under, or an appointment made under, a Commonwealth law other than the office of Secretary of a Commonwealth Department; or

(g) a person holding or performing the duties of an appointment made by the Governor-General, or by a Commonwealth Minister, otherwise than under a Commonwealth law; or

(h) a federal court; or

(i) a tribunal established under a Commonwealth law; or

(j) the Australian Federal Police.

Commonwealth Department means an Agency within the meaning of the *Public Service Act 1999* of the Commonwealth;

conviction means a conviction, whether summary or on indictment, for an offence and includes a finding which, under subsection (5), is treated as a conviction for the purposes of this Act or a case which falls within the ambit of subsection (6);

corresponding law means a law of another State or of the Commonwealth that is declared by the regulations to be a corresponding law for the purposes of this Act;

Court means the District Court of South Australia;

Drafting note—

Subject to local variations.

designated Commonwealth position means a position in a Commonwealth authority which the head of the authority has determined to be a designated security assessment position whose duties are likely to involve access to national security information classified as secret or top secret;

designated judicial authority means—

(a) a court or tribunal (including a military tribunal established under a law of the Commonwealth); or

(b) a judicial or quasi-judicial body brought within the ambit of this definition by the regulations;

eligible adult offence means an offence committed by an adult for which—

(a) a sentence of imprisonment is not imposed; or

(b) a sentence of imprisonment is imposed but the sentence is 12 months or less;

eligible juvenile offence means an offence committed while the defendant was a child where, on conviction of the defendant—

(a) a sentence of imprisonment is not imposed; or

(b) a sentence of imprisonment is imposed but the sentence is 24 months or less;

intelligence or security agency means—

(a) the Australian Security Intelligence Organisation; or

(b) the Australian Secret Intelligence Service; or

(c) the Office of National Assessments; or

(d) that part of the Department of Defence known as the Defence Signals Directorate; or

(e) that part of the Department of Defence known as the Defence Intelligence Organisation; or

(f) that part of the Department of Defence known as the Defence Imagery and Geospatial Organisation; or

(g) any other similar agency, office or part of a Commonwealth Department that has a direct involvement in national intelligence or security activities;

justice agency means any of the following:

(a) the Australian Federal Police;

(b) the police force or service of a State;

(c) the Australian Customs and Border Protection Service;

(d) the Australian Commission for Law Enforcement Integrity, the Australian Crime Commission, or any other similar crime or integrity commission, body, office or agency established under a law of the Commonwealth or a State;

(e) the CrimTrac Agency (established on 1 July 2000 as an Executive Agency of the Governor-General of the Commonwealth under section 65 of the *Public Service Act 1999* of the Commonwealth);

(f) AusCheck (established by the Commonwealth on 5 December 2005);

(g) the Australian Securities and Investments Commission;

(h) the Attorney-General for the Commonwealth or a State;

(i) the Director of Public Prosecutions for the Commonwealth or a State, or a person or body performing a similar function under a law of a State;

(j) staff appointed to assist a person or body referred to in paragraph (i);

(k) a government department or agency of the Commonwealth or the State which is concerned, as 1 of its principal or primary duties, with the prosecution of offences or assisting with the prosecution of offences;

(l) the Australian Taxation Office or the Australian Electoral Commission, in connection with any function associated with the prosecution of offences or assisting with the prosecution of offences;

(m) the Department for Correctional Services or an equivalent entity in another State;

(n) the Department responsible for a training centre under the *Young Offenders Act 1993* or an equivalent entity in another State;

(o) the Registrar or administrator of a Commonwealth or State court;

(p) a person or body brought within the ambit of this definition or a corresponding definition by regulations made under this Act or under a corresponding law for the purposes of a corresponding definition;

Drafting note—

Subject to local variations.

minor offence means an offence where, on conviction—

(a) the defendant is discharged without penalty; or

(b) the only penalty imposed on the defendant (disregarding any demerit points that may apply) is a fine not exceeding—

(i) unless an amount applies under subparagraph (ii)—$500; or

(ii) an amount, greater than $500, prescribed by the regulations for the purposes of this definition;

Drafting note—

Some jurisdictions may consider it necessary to include a definition of ***demerit points***.

mutual recognition principle—see subsection (7);

national security information means information affecting the defence, security or international relations of Australia;

official record means a record kept by a court, tribunal, police force or public authority;

overseas jurisdiction means a jurisdiction outside Australia and the external territories;

Drafting note—

A definition of *external territories* may be required in a local jurisdiction (if not already defined).

prescribed eligible offence means an eligible adult offence or an eligible juvenile offence that is a sex offence and that is brought within the ambit of this definition by the regulations;

Drafting note—

This definition is not required if it is decided that sex offences cannot become spent under this Act.

public authority means—

(a) a public or local authority constituted by or under an Act of this State, another State or the Commonwealth; or

(b) a government department of this State, another State or the Commonwealth; or

(c) a statutory body representing the Crown in right of this State, another State or the Commonwealth,

and includes a person performing a function on behalf of the authority, department or body;

Drafting note—

Subject to local variations.

qualification period means the qualification period that applies under section 7;

quashed—a conviction is quashed if—

(a) the conviction is quashed or set aside; or

(b) a finding of guilt, or a finding that a charge has been proved, is quashed or set aside;

recognised jurisdiction—if a law of another State or of the Commonwealth has been declared by the regulations to be a corresponding law, then that State or the Commonwealth (as the case requires) is a recognised jurisdiction;

security has the same meaning as in the *Australian Security Intelligence Organisation Act 1979* of the Commonwealth;

sex offence means an offence prescribed as a sex offence for the purposes of this definition;

spent, for a conviction—see section 4;

spent conviction order means an order under section 9;

Drafting note—

This definition is not required if it is decided that sex offences cannot become spent under this Act—see clause 9 and Schedule 1.

State includes Territory;

this jurisdiction means South Australia;

tribunal means a tribunal constituted by law;

work includes the following:

(a) work—

(i) under a contract of employment or contract for services; or

(ii) in a leadership role in a religious institution or as part of the duties of a religious vocation; or

(iii) as an officer of a body corporate, member of the committee of management of an unincorporated body or association or member of a partnership; or

(iv) as a volunteer, other than unpaid work engaged in for a private or domestic purpose; or

(v) as a self-employed person;

(b) practical training as part of a course of education or vocational training;

(c) acting in a prescribed capacity or engaging in a prescribed activity.

Drafting note—

This definition may need to be adjusted in due course to achieve consistency with other initiatives associated with working with children.

(2) If—

(a) a person is convicted by a court of a number of offences; and

(b) the sentencing court imposes 1 penalty for some or all of the offences,

the penalty so imposed will be taken to apply in relation to each offence for the purpose of determining whether a particular offence is an eligible adult offence or an eligible juvenile offence under subsection (1).

(3) In this Act, a reference to a sentence of imprisonment extends to—

(a) a period of detention under the *Young Offenders Act 1993*;

(b) a sentence of imprisonment or a period of detention that has been suspended (in whole or in part).

Drafting note—

Subject to local variations.

(4) In this Act, a reference to a conviction that is spent includes a reference to the charge to which the spent conviction related and any investigation or legal process associated with the offence or the conviction.

(5) The following findings are treated as convictions for the purposes of this Act:

(a) a formal finding of guilt by a court;

(b) a finding by a court that an offence has been proved.

Drafting note—

Some local variations may be necessary depending on the options open to courts in the relevant jurisdiction.

(6) For the purposes of this Act, if an offence is taken into account for the purposes of sentencing for another offence or offences, it will be taken that there is a conviction for that offence (and that the conviction is capable of being spent).

(7) The ***mutual recognition principle*** is as follows:

(a) a conviction for an offence against a law of a recognised jurisdiction that is spent under the corresponding law of that jurisdiction will be taken to be spent for the purposes of Part 3 and Part 4; and

(b) a conviction for an offence against a law of a recognised jurisdiction that is not spent (or has ceased to be spent) under the corresponding law of that jurisdiction will be taken not to be spent for the purposes of Part 3 and Part 4.

4—Meaning of *spent* conviction

(1) For the purposes of this Act, the conviction of a person for an offence is *spent* if—

(a) the conviction is spent under Part 2; or

(b) the conviction is quashed; or

(c) the person is granted a pardon for the offence.

(2) This section applies subject to the operation of section 6.

5—Scope of Act

(1) The following convictions are capable of becoming spent under this Act:

(a) a conviction for an eligible adult offence;

(b) a conviction for an eligible juvenile offence.

(2) However, the following convictions cannot become spent under this Act:

(a) a conviction of a body corporate;

(b) a conviction for a sex offence;

Drafting note—

This paragraph is required if it is decided that a sex offence cannot become spent under this Act.

(c) a conviction of a class prescribed by the regulations.

(3) A regulation made under subsection (2)(c) does not affect a conviction that has already become spent under this Act.

(4) Nothing in this Act affects—

(a) the enforcement of any process or proceedings relating to any fine or other sum imposed with respect to a spent conviction; or

(b) any process or proceedings in respect of a breach of a condition or requirement applicable to a sentence imposed in respect of a spent conviction; or

(c) the operation of any disqualification, disability or other prohibition imposed in respect of or on account of a spent conviction; or

(d) the imposition or accumulation of demerit points; or

(e) the exercise of any other enforcement power or the institution or undertaking of any other processes or proceedings by a justice agency.

(5) Nothing in this Act affects a claim (or any proceedings arising from a claim) for compensation (including statutory compensation) for injury, loss or damage caused by an offence.

(6) This section applies subject to the operation of section 6.

6—Application of Act

(1) This Act applies to convictions for offences against the laws of this State and convictions for offences against any other law.

(2) In the case of convictions for offences against the laws of a recognised jurisdiction, the mutual recognition principle applies.

(3) In the case of convictions for offences against the laws of any other jurisdiction (including the laws of an overseas jurisdiction), this Act applies with the changes necessary to enable its provisions to apply to those convictions in a way that corresponds as closely as possible to the way in which it applies to convictions for offences against the laws of this jurisdiction.

(4) However, if an offence against the laws of another jurisdiction (including the laws of an overseas jurisdiction), other than a recognised jurisdiction, has no correspondence to an offence against a law of this jurisdiction, then the conviction of the person for the offence is immediately spent for the purposes of this Act.

Drafting note—

A jurisdiction may wish to vest a court with a specific power to be able to declare, on application, whether a law of another jurisdiction corresponds to a law of the jurisdiction.

(5) This Act applies to convictions for offences whether such convictions occurred before or after the commencement of this Act.

Drafting note—

For jurisdictions where spent conviction legislation has been in operation, transitional provisions will be required. It is proposed that offences that have already been spent will continue to be spent (no matter whether or not they would be capable of being spent under this Act), and that offences committed before the commencement of this Act that were capable of being spent under existing legislation will also be capable of becoming spent under this Act—see Schedule 3.

Part 2—Requirements for a conviction to become spent

7—Determination of qualification period

(1) Subject to this section, the *qualification period* for the conviction of a person for an offence is—

(a) in the case of an eligible juvenile offence, other than where the person was dealt with as an adult—5 consecutive years; or

(b) in any other case—10 consecutive years,

from the relevant day for the conviction for the offence.

(2) If during the qualification period for a conviction (the *first conviction*) the person is convicted of another offence (the *second conviction*), the time that has run as part of the qualification period for the first conviction is cancelled and the relevant day for the second conviction becomes a new relevant day for the first conviction (and a conviction for a third offence within the period that then applies will have a corresponding effect on the first and second convictions, and so on for any subsequent conviction or convictions).

(3) In addition—

(a) if at the end of a period that applies under subsection (1) or (2) the person is a registrable offender under the *Child Sex Offenders Registration Act 2006* who is subject to reporting obligations imposed by Part 3 of that Act, the qualification period is extended so as to expire when or if those reporting obligations cease or are suspended under that Part; and

(b) if during the period of extension that applies under paragraph (a) the person is convicted of another offence, the conviction has the same effect on any previous conviction that is subject to the period of extension that a second or subsequent conviction has on a previous conviction or convictions under subsection (2).

(4) For the purposes of subsections (2) and (3)(b), a conviction for a second or subsequent offence will be disregarded if—

(a) the offence is a minor offence (including in a case where the conviction with respect to the minor offence is constituted by a finding under section 3(5)); or

(b) the conviction is quashed; or

(c) the convicted person is granted a pardon.

(5) A period under a preceding subsection may commence before the commencement of this Act and, in such a case, the qualification period will be completed—

(a) on the commencement of this Act; or

(b) on the day on which the qualification period would have been completed if this Act had been in force continuously since the day of the relevant conviction,

whichever is the later.

(6) For the purposes of this section—

(a) the *relevant day* for the conviction for an offence is the day on which the person is convicted; and

(b) a reference to a conviction for an offence does not extend to a conviction for an offence against a law of another jurisdiction (including the laws of an overseas jurisdiction), other than a recognised jurisdiction, that has no correspondence to an offence against a law of this jurisdiction.

8—Spent conviction—general provision

A conviction for an offence, other than a prescribed eligible offence, is spent on completion of the qualification period for the conviction.

Drafting note—

The reference to a *prescribed eligible offence* should be deleted if it is decided that a sex offence cannot become spent under this Act.

9—Spent conviction for a prescribed eligible offence

Drafting note—

This section should be deleted if it is decided that a sex offence cannot become spent under this Act.

(1) A conviction for a prescribed eligible offence is spent if, on application to the Court by the convicted person, the Court makes an order that the conviction is spent.

(2) An application for an order under this section in respect of a conviction—

(a) may not be made until the completion of the qualification period for the conviction; and

(b) may not be made if the Court has refused to make an order under this section in respect of the same conviction within the preceding 2 years.

(3) An application under this section may not be made in respect of a conviction for an offence against the laws of another jurisdiction.

(4) Schedule 1 applies to an application under this section and to proceedings on an application.

(5) The making of an order under this section is at the discretion of the Court and that discretion will be exercised having regard to—

(a) the nature, circumstances and seriousness of the offence;

(b) the length and kind of sentence imposed in respect of the conviction;

(c) the length of time since the conviction;

(d) all the circumstances of the applicant, including the circumstances of the applicant at the time of the commission of the offence and at the time of the application and whether the applicant appears to have rehabilitated and to be of good character;

(e) whether the conviction prevents or may prevent the applicant from engaging in a particular profession, trade or business or in a particular employment;

(f) whether there is any public interest to be served in not making an order.

10—Subsequent conviction after conviction becomes spent

(1) A conviction of a person for an offence (the *first offence*) that is spent is not revived by the subsequent conviction of the person for another offence (the *later offence*).

(2) However, if—

(a) the later offence was committed during the qualification period for the first offence; and

(b) the later offence is an offence for which a conviction during the qualification period for the first offence would have resulted in the cancellation of the time that had already run as part of the qualification period under section 7(2) or (3)(b),

the first offence will cease to be treated as a spent conviction under this Act while the qualification period for the later offence is running.

Part 3—Effect of a conviction becoming spent

Division 1—General provisions

11—Ability to disregard spent convictions

If a conviction of a person is spent—

(a) a question about the person's criminal history is taken not to refer to the spent conviction, but to refer only to any of the person's convictions that are not spent; and

(b) the person is not required to disclose to any other person for any purpose information concerning the spent conviction; and

(c) in the application to the person of an Act, statutory instrument, agreement or arrangement—

(i) a reference to a conviction, however expressed, is taken not to refer to the spent conviction; and

(ii) a reference to the person's character or fitness, however expressed, is not to be taken as allowing or requiring account to be taken of the spent conviction; and

(d) the spent conviction, or the non-disclosure of the spent conviction, is not a proper ground for—

(i) refusing the person any appointment, post, status or privilege; or

(ii) revoking any appointment, status or privilege held by the person, or dismissing the person from any post.

12—Unlawful disclosures—public records

(1) A person is guilty of an offence if—

(a) the person has access to records of convictions kept by or on behalf of a public authority; and

(b) the person discloses information about a spent conviction that the person has gained on account of that access; and

(c) the person knew, or ought reasonably have known, at the time of the disclosure, that the information was about a spent conviction.

Maximum penalty: $10 000.

(2) It is a defence to a charge for an offence against subsection (1) to prove—

(a) that the disclosure was made with the consent of the person whose conviction is spent; or

(b) that—

(i) the person who made the disclosure believed in good faith that the disclosure was within the ambit of an exclusion from the operation of this section under Schedule 2; and

(ii) the disclosure occurred in circumstances where steps had been taken to avoid any breach of subsection (1) by putting in place any systems or safeguards that might reasonably be expected to be provided.

Drafting note—

An alternative enforcement mechanism might be adopted—for example, a complaint to a Privacy Commissioner or other authority.

13—Unlawful disclosures—business activities

(1) A person is guilty of an offence if—

(a) the person, in the course of carrying on a business that includes or involves the provision of information about convictions for offences, discloses information about a spent conviction; and

(b) the person knew, or ought reasonably have known, at the time of the disclosure, that the information was about a spent conviction.

Maximum penalty: $10 000.

(2) It is a defence to a charge for an offence against subsection (1) to prove—

(a) that the disclosure forms part of the ongoing disclosure of the information in materials or in a manner that cannot be reasonably altered to remove information about the spent conviction; and

(b) that the disclosure of the information commenced before the conviction became a spent conviction.

Division 2—Exclusions

14—Exclusions

(1) Schedule 2 sets out exclusions from the operation of Division 1.

(2) Subject to subsection (3), the exclusions do not apply in relation to an offence if—

(a) the conviction has been quashed; or

(b) the person has been granted a pardon for the offence.

(3) Subsection (2) does not apply in relation to the operation of clause 6 of Schedule 2.

Part 4—Miscellaneous

15—Improperly obtaining information about spent convictions

A person must not fraudulently or dishonestly obtain information about a spent conviction from records of convictions kept by or on behalf of a public authority.

Maximum penalty: $10 000.

16—Prerogative of mercy not affected

This Act does not affect the exercise of the Royal prerogative of mercy.

17—Act does not authorise destruction of records

This Act does not authorise or require the destruction by or on behalf of a public authority of a record relating to a spent conviction, a quashed conviction or a pardon.

18—Regulations

(1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.

(2) The regulations may—

(a) be of general or limited application;

(b) vary according to the persons, times, places or circumstances to which they are expressed to apply.

Schedule 1—Provisions relating to proceedings for spent conviction orders

Drafting note—

A jurisdiction may choose to make local variations, especially if the usual practice in that jurisdiction would be to provide for an application to be made to a judge of the relevant Court rather than to the Court itself.

1—Application may relate to more than 1 conviction

An application for a spent conviction order may be made in respect of more than 1 conviction.

2—Notice of application

(1) The Attorney-General and the Commissioner of Police must each be served with an application for a spent convictions order.

(2) The Attorney-General or the Commissioner of Police (or both of them) may intervene in an application for a spent conviction order and, in so doing, may be represented at the hearing of the application.

3—Conduct of proceedings

(1) An application for a spent conviction order must be heard in private unless the applicant consents to the hearing being in public or the Court considers that, in the circumstances of the case, the hearing should be in public.

(2) If a hearing is held in private, the Court may give directions as to who may be present.

(3) If a hearing is held in public, the Court may order that there must not be published by any means any particulars likely to lead to the identification of the applicant.

4—Principles governing hearings

(1) In any proceedings for a spent conviction order—

(a) the Court is not bound by the rules of evidence but may inform itself as it thinks fit; and

(b) the Court must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

(2) The Court may, if satisfied that an application for a spent conviction order is vexatious, misconceived or lacking in substance, dismiss the application without holding a hearing.

Schedule 2—Exclusions

1—Justice agencies

(1) Part 3 Division 1 does not apply to the performance of a function or the exercise of a power by—

(a) a justice agency; or

(b) a person who is acting as a member, officer, employee, agent or contractor of a justice agency.

(2) Part 3 Division 1 does not apply if the disclosure is made, or to be made, to or is made by—

(a) a justice agency; or

(b) a person who is acting as a member, officer, employee, agent or contractor of a justice agency.

(3) Part 3 Division 1 does not apply if a disclosure is made, or to be made, to or is made by a justice agency for the purposes of assessing—

(a) prospective employees or prospective members of the agency; or

(b) persons proposed to be engaged as consultants to, or to perform services for, the agency or a member of the agency.

Drafting note—

Subclause (1) or (2) may be varied by a local jurisdiction to provide that the exclusion only applies for specified purposes, or in relation to specified classes of offences.

2—Commonwealth agencies

Part 3 Division 1 does not apply if a disclosure is made, or to be made, to or is made by—

(a) an intelligence or security agency, for the purpose of assessing—

(i) prospective employees or prospective members of the agency; or

(ii) persons proposed to be engaged as consultants to, or to perform services for, the agency or a member of the agency; or

(b) a Commonwealth authority, for the purpose of assessing appointees or prospective appointees to a designated Commonwealth position; or

(c) a person who makes a decision under the *Migration Act 1958* of the Commonwealth, the *Australian Citizenship Act 2007* of the Commonwealth or the *Immigration Act 1980* of the Territory of Norfolk Island, for the purpose of making that decision; or

(d) AUSTRAC, for the purpose of assessing—

(i) prospective members of the staff of AUSTRAC; or

(ii) persons proposed to be engaged as consultants under subsection 225(1) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* of the Commonwealth; or

(iii) persons whose services are proposed to be made available to AUSTRAC under subsection 225(3) of that Act; or

(e) a person or body, for the purpose of instituting or conducting proceedings for any offence.

3—Designated judicial authorities

(1) Part 3 Division 1 does not apply in connection with proceedings before, or the making of any decision by, a designated judicial authority (including any proceedings associated with jury selection or service or otherwise with respect to the operation of a jury, a decision concerning sentencing, or a decision concerning the granting of bail).

(2) However, a designated judicial authority before which evidence of a spent conviction is admitted must take such steps as are, in the opinion of the designated judicial entity, appropriate to avoid or minimise publication of the evidence.

4—Parole Board

Part 3 Division 1 does not apply in connection with proceedings before, or the making of any decision by, the Parole Board.

Drafting note—

Local variations may be necessary to include bodies that can authorise the release of juvenile offenders.

5—Judicial and associated officers

Part 3 Division 1 does not apply in relation to an assessment of the suitability of a person appointed, or being considered for appointment—

(a) as a judge, magistrate or justice of the peace; or

(b) as a member of a court or tribunal prescribed by the regulations for the purposes of this paragraph.

6—Care of children

(1) Part 3 Division 1 does not apply in relation to—

(a) any administrative, judicial or other inquiry into, or assessment of, the fitness of a person to have the guardianship or custody of a child, or access to a child; or

(b) any assessment of the fitness of a person undertaking, or seeking to undertake, (including without any fee or reward) work or any other activity that directly involves—

(i) the care, control, supervision or instruction of children; or

(ii) otherwise working in close proximity with children on a regular basis; or

(c) any assessment of the fitness of a person undertaking, or seeking to undertake, (including without any fee or reward) work or any other activity that directly involves acting as an advocate for children in legal proceedings; or

(d) without limiting a preceding paragraph, a disclosure required or permitted by or under another law (including a law of another jurisdiction (including a law of an overseas jurisdiction)) in relation to a person who works, or who is seeking to work, with children; or

(e) any—

(i) disciplinary or fitness inquiry or investigation; or

(ii) enforcement action or proceedings (including for the suspension or cancellation of a registration, licence, accreditation or other authorisation or authority),

associated with a person within a preceding paragraph.

Drafting note—

This subclause may be subject to local variations.

For example, a reference to the "fitness" of a person may be inconsistent with the language used in some jurisdictions. A jurisdiction may also decide that it should limit the application of the provision to specified purposes or specified classes of offences.

(2) This clause extends to cases involving circumstances arising outside this jurisdiction.

7—Care of vulnerable people

(1) Part 3 Division 1 does not apply in relation to—

(a) any administrative, judicial or other inquiry into, or assessment of, the fitness of a person to have the guardianship of an aged person or persons with a disability (including an intellectual disability), illness or impairment; or

(b) any assessment of the fitness of a person undertaking, or seeking to undertake, (including without any fee or reward) work or any other activity that directly involves—

(i) the care of aged persons or persons with a disability (including an intellectual disability), illness or impairment in legal proceedings; or

(ii) otherwise working in close proximity with aged persons or persons with a disability (including an intellectual disability), illness or impairment; or

(c) any assessment of the fitness of a person undertaking, or seeking to undertake, (including without any fee or reward) work or any other activity that directly involves acting as an advocate for aged persons or persons with a disability (including an intellectual disability), illness or impairment in legal proceedings; or

(d) any—

(i) disciplinary or fitness inquiry or investigation; or

(ii) enforcement action or proceedings (including for the suspension or cancellation of a registration, licence, accreditation or other authorisation or authority),

associated with a person within a preceding paragraph.

Drafting note—

This subclause may also be subject to local variations along the lines set out in clause 6.

(2) This clause extends to cases involving circumstances arising outside this jurisdiction.

8—Activities associated with a character test

(1) Part 3 Division 1 does not apply in relation to—

(a) any assessment of whether a person who, pursuant to statute, has obtained, or is seeking, registration or enrolment, or a licence, accreditation or other authorisation or authority, in or in relation to an occupation, profession, position or activity, is a fit and proper person or a person of good character; or

Drafting note—

A jurisdiction may limit the operation of this paragraph to specified occupations, professions etc and to specified classes of offences.

(b) any—

(i) disciplinary or fitness inquiry or investigation; or

(ii) enforcement action or proceedings (including for the suspension or cancellation of a registration, licence, accreditation or other authorisation or authority),

associated with a person within the preceding paragraph.

Drafting note—

This subclause may be subject to local variations along the lines set out in clause 6.

(2) This clause extends to cases involving circumstances arising outside this jurisdiction.

9—Firefighting, police and correctional services

(1) Part 3 Division 1 does not apply in relation to a disclosure to an authority concerned with the prevention or fighting of fires about a conviction that relates to the setting or lighting of a fire.

(2) Part 3 Division 1 does not apply in relation to a person employed, or seeking employment, as a police officer.

(3) Part 3 Division 1 does not apply in relation to a person employed in, or seeking employment in, an office or position involving duties connected with the punishment, probation or paroling of offenders.

10—Official records

Part 3 Division 1 does not apply in relation to a disclosure or a disclosure of information where the disclosure is made, in the course of official duties, by a person who has custody of or access to an official record.

11—Archives and libraries

Part 3 Division 1 does not apply to an archive or library (or a person acting in the performance of a function of an archive or library) in accordance with the normal procedures of the archive or library.

12—Reports and authorised publications

Part 3 Division 1 does not apply in relation to a disclosure—

(a) made in the ordinary course of the preparation, publication or use of a textbook, report, article or collection of material published for historical, educational, scientific or professional purposes, or in the ordinary course of any lecture, class or discussion given or held for any such purpose; or

(b) made in connection with the preparation, publication or use of a genuine series of law reports on proceedings in courts or tribunals; or

(c) made in connection with the preparation, publication or use of the official records of a court or tribunal.

13—Non-identifying information

Part 3 Division 1 does not apply if a disclosure does not contain any information that would tend to identify the convicted person.

14—Prescribed exclusions

The regulations may prescribe other exclusions from the operation of section 11, 12 or 13.

Schedule 3—Transitional provisions

1—Transitional provisions

(1) A conviction that is, before the commencement of this Act, spent under the *ABC Act YYYY* will be taken to be a spent conviction under this Act.

(2) A conviction for an offence committed before the commencement of this Act that, before the repeal of the *ABC Act YYYY*, was capable of becoming spent under that Act (assuming the continuing operation of that Act) will be taken to be an eligible adult offence or an eligible juvenile offence (as the case requires) under this Act.

Drafting note—

This provision is relevant to those jurisdictions that already have laws that provide for spent convictions.

Appendix 5 Offences prescribed as sexual offences for the purposes of the spent convictions scheme

Current offences prescribed as sexual offences for the purposes of section 7 of the *Criminal Records Act 1991**

The relevant 30 offences in the *Crimes Act 1900* are:

- 61JA Aggravated Sexual Assault in Company (prescribed by Regulation)
- 611 Sexual assault
- 61 J Aggravated sexual assault
- 61K Assault with intent to have sexual intercourse
- 61 L Indecent assault
- 61 M Aggravated indecent assault
- 61 N Act of indecency
- 610 Aggravated act of indecency
- 61P Attempt to commit offence under sections 61 1-610
- 66A Sexual intercourse--child under 10
- 66B Attempting, or assaulting with intent, to have sexual intercourse with child under 10
- 66C Sexual intercourse--child between 10 and 16
- 66D Attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 16
- 66EA Persistent sexual abuse of a child (prescribed by Regulation)
- 66F Sexual offences--cognitive impairment
- 73 Sexual intercourse with child between 16 and 18 under special care
- 78A Incest
- 788 Incest attempts
- 79 Bestiality
- 80 Attempt to commit bestiality
- 80A Sexual assault by forced self-manipulation
- 80D Causing sexual servitude (prescribed by Regulation)
- 80E Conduct of business involving sexual servitude (prescribed by Regulation)
- 91A Procuring for prostitution
- 91 B Procuring person by drugs for prostitution
- 91D Promoting or engaging in acts of child prostitution
- 91 E Obtaining benefit from child prostitution
- 91 H Production, dissemination or possession of child pornography (prescribed by Regulation)
- 91 G Children not to be used for pornographic purposes
- 578C Publishing Indecent Articles (prescribed by Regulation)

The relevant two offences in the *Summary Offences Act 1988* are:

- 5 Obscene exposure
- 11G Loitering by convicted child sexual offenders near premises frequented by children (prescribed by Regulation)

* Submission 21, NSW Government, Attachment B.

Appendix 6 Minutes

Minutes No. 37
Wednesday 11 November 2009
Members Lounge, Parliament House, Sydney at 1.00pm

1. Members present
Ms Robertson (*Chair*)
Mr Clarke (Deputy Chair)
Mr Donnelly
Mr Ajaka

2. Apologies
Ms Fazio
Ms Hale

3. ***

4. New terms of reference
The Committee noted correspondence received from the Attorney General on Tuesday 10 November 2009 referring terms of reference for an inquiry into whether sex offenders' convictions should be capable of being spent under the *Criminal Records Act 1991* or should they only become spent in limited circumstances.

The Committee deliberated.

Resolved, on the motion of Mr Donnelly: That the Committee adopt the terms of reference received from the Attorney General on 10 November 2009 for an inquiry into spent convictions and sex offenders.

Resolved, on the motion of Mr Donnelly: That, in accordance with paragraph 5(2) of the resolution establishing the Standing Committees dated 10 May 2007, the Chair inform the House that it has adopted the terms of reference received from the Attorney General on 10 November 2009, for an inquiry into spent convictions and sex offenders.

Resolved, on the motion of Mr Ajaka: That the Committee note the indicative timeline prepared by the Secretariat in consultation with the Chair.

Resolved, on the motion of Mr Donnelly: That a press release announcing the commencement of the Inquiry and the call for submissions be distributed to media outlets throughout NSW on Friday 13 November 2009.

Resolved, on the motion of Mr Ajaka: That the Inquiry and the call for submissions be advertised in *The Sydney Morning Herald* and *The Daily Telegraph* and any other appropriate publications as determined by the Secretariat.

Resolved, on the motion of Mr Ajaka: That the Committee write to stakeholders identified by the Secretariat in consultation with the Committee informing them of the Inquiry and inviting them to make a submission.

Resolved, on the motion of Mr Ajaka: That the Secretariat, in consultation with the Chair, draft a discussion paper on the issues to be examined in this inquiry and that the discussion paper be made available to the public to assist in the preparation of submissions.

Resolved, on the motion of Mr Donnelly: That hearings for the inquiry be held on a date to be determined by the Secretariat in consultation with the Committee and that the witnesses that are to be invited to appear be determined by the Secretariat in consultation with the Committee.

5. Adjournment
The Committee adjourned at 1.10pm until Friday 11 December at 9.00am, Room 1102.

Rachel Callinan
Clerk to the Committee

Minutes No. 38
Friday 11 December 2009
Room 1102, Parliament House, Sydney at 9.30 am

1. Members present
Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Ms Voltz
Ms Hale

2. Apologies
Mr Ajaka

3. Change to Committee membership
Ms Voltz was appointed as a member to the Standing Committee on Law and Justice, as reflected in the *Legislative Council Minutes* No. 132, Wednesday 2 December 2009, Item 18.

The Chair, on behalf of the Committee, welcomed Ms Voltz.

The Committee acknowledged and expressed its appreciation of the participation and contribution of Ms Fazio during her membership of the Committee.

4. Minutes
Resolved, on the motion of Mr Donnelly: That draft Minutes Nos 36 and 37 be confirmed.

5. General Correspondence
The Committee noted the following item of correspondence sent:

- ***

The Committee noted the following items of correspondence received:

- ***
- ***

6. ***

7. ***

8. ***

9. Adjournment
The Committee adjourned at 10.05 am *sine die*

Rebecca Main
Clerk to the Committee

Minutes No. 39
Thursday 25 February 2010
Members' Lounge, Parliament House, Sydney at 10.30 am

1. Members present
Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Ajaka
Mr Donnelly
Ms Hale
Ms Voltz

2. Minutes
Resolved, on the motion of Mr Donnelly: That draft Minutes No. 38 be confirmed.

3. General correspondence
The Committee noted the following items of correspondence sent:

- ***

The Committee noted the following items of correspondence received:

- ***
- ***
- 16 February 2010 – From Mr Dale Tolliday, Programs Director, NSW Pre-Trial Diversion of Offenders Program/New Street Adolescent Services, to Chair, indicating that he is unable to prepare a submission and requesting to give oral evidence to the Inquiry into spent convictions for juvenile offenders.
- 22 February 2010 – From Mr Tom Bathurst QC, President of the NSW Bar Association, requesting to give oral evidence to the Inquiry into spent convictions for juvenile offenders.

4. ***

5. Inquiry into spent convictions for juvenile offenders

5.1 Publication of submissions
Resolved, on the motion of Ms Voltz: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of Submission No.'s 2-4, 6-17.

Resolved, on the motion of Ms Voltz: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the partial publication of Submission No. 1 with the author's name and other identifying information removed.

Resolved, on the motion of Ms Voltz: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the partial publication of Submission No. 5 with certain information relating to third parties removed.

Resolved, on the motion of Ms Hale: That the Committee agree to the request from the Commissioner for Children and Young People to make a copy of the Commission's submission available on the Commission's website.

5.2 Hearing arrangements
Resolved, on the motion of Mr Ajaka: That the Committee set aside two hearing days on dates to be confirmed by the Secretariat in consultation with the Chair and subject to the availability of members and witnesses and that the Committee invite the following witnesses to give evidence:

- Government agencies, including Attorney General's Department, Department of Juvenile Justice, NSW Police and other agencies as appropriate
- Author of submission No. 1
- Office of the Director of Public Prosecutions
- Commission for Children and Young People
- Law Society of NSW

- Chief Magistrate, NSW Local Court
- Youth Justice Coalition
- The Salvation Army
- President, Children's Court of NSW
- NSW Ombudsman
- Dale Tolliday, Programs Director, New Street Adolescent Service and Pre-Trial Diversion of Offenders Program
- NSW Bar Association.

6. ***

7. Adjournment
The Committee adjourned at 10.57 am *sine die*.

Madeleine Foley
Clerk to the Committee

Minutes No. 40
Monday 29 March 2010
Room 814-815, Parliament House, Sydney at 9.30 am

1. Members present
Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*) (11:20 am)
Mr Ajaka
Mr Donnelly
Ms Hale
Ms Voltz

2. Apologies
Mr Clarke (for the initial portion of the hearing).

3. Minutes
Resolved, on the motion of Mr Donnelly: That draft Minutes No. 39 be confirmed.

4. Correspondence
The Committee noted the following items of correspondence sent:

- 25 February 2010 – From Chair requesting information on the spent convictions schemes in Western Australia and Queensland to:
  - Mr Phil Clarke, A/D-G Queensland Dept of Justice and Attorney General
  - Ms Cheryl Gwilliam, A/D-G, Western Australia, Dept of Attorney General
  - Judge Antoinette Kennedy, Chief Judge, District Court of Western Australia
  - Mr Karl O'Callaghan, Commissioner, Westerns Australia Police
- ***

The Committee noted the following items of correspondence received:

- 11 March 2010 – From Mr Phil Clarke, A/D-G, Queensland Department of Justice and Attorney General, providing information on Queensland's spent convictions scheme in relation to sexual offences.
- 23 March 2010 – From Superintendent Lawrence Panaia, Judicial Services, Western Australia Police, providing information on Western Australia's spent convictions scheme in relation to juvenile sexual offences.

Resolved, on the motion of Ms Hale: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of the correspondence from Mr Clarke and Superintendent Panaia.

5. Inquiry into spent convictions for juvenile offenders

5.1 Publication of submissions

Resolved, on the motion of Mr Ajaka: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of Submission No.'s 18, 19, 21 and 22.

Resolved, on the motion of Ms Hale: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the partial publication of Submission No. 20 with the author's name and other identifying information removed, at the request of the author.

5.2 Return of questions on notice

Resolved, on the motion of Mr Ajaka: That witnesses at today's hearing and the hearing on 1 April 2010 be requested to return answers to questions on notice by Tuesday 20 April 2010 and Wednesday 28 April respectively.

5.3 Public hearing

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding procedural matters.

The following witnesses from the Legislation, Policy and Criminal Law Review Division, Department of Justice and Attorney General were sworn and examined:

- Ms Gabrielle Carney, Assistant Director
- Ms Lauren Judge, Principal Policy Officer
- Ms Kiersten Perini, Policy Officer.

Ms Carney tendered the following documents:

- *Generation Y and Crime: A longitudinal study of contact with NSW criminal courts before the age of 21*, Crime and Justice Bulletin, Number 96, Bureau of Crime Statistics and Research, August 2006
- *Contact with the New South Wales court and prison systems: The influence of age, Indigenous status and gender*, Crime and Justice Bulletin, Number 78, Bureau of Crime Statistics and Research August 2003
- *JIRS Statistics: Sexual offenders who received sentences of 6, 12 or 24 months imprisonment or less* (confidential, subject to advice from the Department on the document's status)
- *Comparative table: Spent convictions scheme* (confidential, subject to advice from the Department on the document's status).

The evidence concluded and the witnesses withdrew.

The following witnesses from the NSW Commission for Children and Young People were sworn and examined:

- Ms Jan McClelland, Acting Commissioner
- Ms Virginia Neighbour, Director, Working with Children Check.

Mr Clarke joined the meeting.

Ms McClelland tendered the following document:

- *Working with children check: Guidelines.*

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Dale Tolliday, Program Director, NSW Pre-Trial Diversion of Offenders Program and NSW Street Adolescent Services.

The evidence concluded and the witness withdrew.

The public hearing concluded at 12.35pm. The public and the media withdrew.

6. Adjournment

The Committee adjourned at 12.35pm until Thursday 1 April 2010 at 9.30am

Madeleine Foley
Clerk to the Committee

Minutes No. 41
Thursday 1 April 2010
Jubilee Room, Parliament House, Sydney at 9.30 am

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Ajaka
Mr Donnelly
Ms Hale
Ms Voltz

2. Inquiry into spent convictions for juvenile offenders

2.1 Public hearing

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding procedural matters.

The following witness was sworn and examined:

- Magistrate Hilary Hannam, NSW Children's Court.

The evidence concluded and the witness withdrew.

The following witnesses from the NSW Police Force were sworn and examined:

- Detective Superintendent John Kerlatec, Commander, Sex Crimes Squad
- Chief Superintendent Anthony Trichter, Commander, Police Prosecutions.

The evidence concluded and the witnesses withdrew.

The following witnesses from Juvenile Justice, Department of Human Services were sworn and examined:

- Ms Megan Wilson, Executive Director, Office of the Chief Executive
- Ms Natalie Mamone, Chief Psychologist
- Ms Suellen Lembke, Director, Programs.

Mr Donnelly tendered the following document:

- *Secondary Students and Sexual Health 2008*, Powerpoint presentation, Australian Research Centre in Sex, Health and Society, LaTrobe University.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mrs Lyn Cox
- Mr Neville Cox.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Debora Maher, Solicitor, Law Society of NSW
- Mr Warwick Hunt, Bar Council, NSW Bar Association.

Mr Hunt tendered the following documents:

- Model Spent Convictions Bill 2008, Standing Committee of Attorney General, 23 January 2009
- Correspondence from Mr Bill Grant, Secretary-General to Mr Peter Hallahan, Secretary of Senate Legal and Constitutional Affairs Legislation Committee in relation to the Crimes Amendment (Working with Children - Criminal History) Bill 2009.

The evidence concluded and the witnesses withdrew.

Mr Ajaka left the meeting.

The following witness was sworn and examined:

- Ms Jane Sanders, Solicitor, Youth Justice Coalition.

Ms Voltz left the meeting.

The evidence concluded and the witness withdrew.

The following witnesses from Justice Health, Department of Health were sworn and examined:

- Ms Julie Babineau, Chief Executive
- Dr Claire Gaskin, Clinical Director, Adolescent Health.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.25 pm. The public and the media withdrew.

3. Deliberative meeting

Resolved, on the motion of Ms Hale: That the Committee accept and publish, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the following documents tendered during the public hearing:

- Model Spent Convictions Bill 2008, Standing Committee of Attorney General, 23 January 2009
- Correspondence from Mr Bill Grant, Secretary-General to Mr Peter Hallahan, Secretary of Senate Legal and Constitutional Affairs Legislation Committee in relation to the Crimes Amendment (Working with Children - Criminal History) Bill 2009.

4. Adjournment

The Committee adjourned at 5.25 pm *sine die*.

Madeleine Foley
Clerk to the Committee

Minutes No. 42
Tuesday 11 May 2010
Room 1136, Parliament House, Sydney at 2.00 pm

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Ajaka
Mr Donnelly
Ms Voltz

2. Minutes

Resolved, on the motion of Mr Donnelly: That draft Minutes No.'s 40 and 41 be confirmed.

3. ***

4. ***

5. ***

6. Inquiry into spent convictions for juvenile offenders

6.1 Correspondence

The Committee noted the following items of correspondence sent:

- 30 March 2010 – From Principal Council Officer requesting responses to questions on notice from the hearing on 29 March 2010 by 20 April 2010, to:
  - NSW Commission for Children and Young People
  - Mr Dale Tolliday.
- 31 March 2010 – From Principal Council Officer requesting responses to questions on notice from the hearing on 29 March 2010 by 21 April 2010, to:
  - Department of Justice and Attorney General.
- 7 April 2010 – From Principal Council Officer requesting responses to questions on notice from the hearing on 1 April 2010 by 28 April 2010, to:
  - NSW Children's Court
  - NSW Police Force
  - Juvenile Justice, Department of Human Services
  - Mrs Lyn and Mr Neville Cox
  - Law Society of NSW
  - NSW Bar Association
  - Youth Justice Coalition
  - Justice Health, Department of Health.

The Committee noted the following items of correspondence received:

- 13 April 2010 – From Hon Christian Porter MLA, Attorney General, WA, responding to letter from Chair regarding information on spent convictions scheme in WA
- 4 May 2010 – From Ms Megan Wilson, Executive Director, Office of the Chief Executive, Department of Human Services, clarifying evidence given at the hearing on 1 April 2010
- From witnesses providing answers to questions on notice:
  - Mrs Lyn Cox (9 April)
  - Ms Jan McClelland, NSW Commission for Children and Young People (23 April – *article by Righthand and Welch available on request*)
  - Ms Hilary Hannam, NSW Children's Court (27 April)
  - Ms Kathrina Lo, Department of Justice and Attorney General (27 April – *further responses to be provided 11 May*)
  - Dr Claire Gaskin, Justice Health (28 April)
  - Mr John Kerlatec, NSW Police Force (28 April)
  - Ms Katrina Wong, Convenor, Youth Justice Coalition (28 April)
  - Mr Dale Tolliday, Director, New Street Adolescent Service (30 April – *various articles available on request*)
  - Hon. Graham West MP, Minister for Juvenile Justice (4 May)
  - The Law Society of NSW (6 May).

6.2 Publication of answers to questions on notice

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of answers to questions on notice received from:

- Mrs Lyn Cox
- NSW Commission for Children and Young People
- NSW Children's Court

- Department of Justice and Attorney General
- Justice Health
- NSW Police Force
- Youth Justice Coalition
- New Street Adolescent Service
- Juvenile Justice
- The Law Society of NSW.

6.3 Publication of correspondence

Resolved, on the motion of Ms Voltz: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of the correspondence from

- Hon Christian Porter MLA, Attorney General, WA, providing information on the WA spent convictions scheme.
- Ms Megan Wilson, Executive Director, Office of the Chief Executive, Dept of Human Services, clarifying evidence given at the hearing on 1 April 2010.

7. Adjournment

The Committee adjourned at 2.10pm until Monday 31 May 2010, at 9.30am.

Teresa McMichael
Clerk to the Committee

Minutes No. 43
Wednesday 2 June 2010
Members' Lounge, Parliament House, Sydney at 1.05 pm

1. Members present

Ms Robertson (*Chair*)
Mr Donnelly
Ms Hale
Ms Voltz

2. Minutes

Resolved, on the motion of Ms Hale: That draft Minutes No.42 be confirmed.

3. General correspondence

The Committee noted the following items of correspondence received:

- 4 May 2010 – Letter from Acting Hon Justice Bar, Supreme Court of NSW to Chair acknowledging receipt of the Committee's report 41, *The use of victims' DNA*.
- 20 May 2010 – Government response from Hon John Hatzistergos MLC, to the Committee's report 41 *'The use of victims' DNA*.'

4. ***

5. Inquiry into spent convictions for juvenile offenders

5.1 Correspondence

The Committee noted the following items of correspondence received:
From witnesses providing answers to questions on notice:

- Additional answers from Justice Health (14 May)
- Additional answers from Department of Justice and Attorney General (18 May)
- NSW Bar Association (19 May)
- Additional answers from Law Society of NSW (25 May).

5.2 Publication of answers to questions on notice

Resolved, on the motion of Ms Voltz: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of answers to questions on notice from:

- Justice Health (additional answer)
- Department of Justice and Attorney General (additional answer)
- NSW Bar Association
- Law Society of NSW (additional answers).

5.3 Publication of documents provided by Dept of Justice and Attorney General

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of various documents previously provided by the Department of Justice and Attorney General that have since been updated:

- *JIRS Statistics: Sexual offenders who received sentences of 6, 12 or 24 months imprisonment or less* (tabled on 29 March 2010)
- *Comparative table: Spent convictions scheme* (tabled on 29 March 2010)
- *Crimes Act 1900 – Table of Non Conviction Orders for Adults (Local Courts)* (Attachment D to Submission 21)

5.4 Chair's draft report

Resolved, on the motion of Ms Voltz: That the Committee defer consideration of the Chair's draft report entitled *Spent convictions for juvenile offenders* until 29 June 2010 at 9.30 am.

6. Adournment

The Committee adjourned at 1.10 pm until Friday 11 June at 9.30am.

Madeleine Foley
Clerk to the Committee

Draft Minutes No. 46
Tuesday 29 June 2010
Room 1102, Parliament House, Sydney at 9.30 am

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Ajaka
Mr Donnelly
Ms Hale
Ms Voltz

2. Minutes

Resolved, on the motion of Mr Ajaka: That Draft Minutes No. 45 be confirmed.

3. Correspondence

The Committee noted the following item of correspondence received:

- 10 June 2010 – From Jan McClelland, A/Commissioner for Children and Young People to Ms Madeleine Foley, Principal Council Officer, providing comments on factual content of report relating to the functions of the Commission.

4. Consideration of Chair's Draft report: Spent convictions for juvenile offenders

The Chair's tabled her draft report entitled Spent convictions for juvenile offenders, which, having been previously circulated, was taken as being read.

Chapter 1 read.

Resolved, on the motion of Ms Hale: That paragraph 1.2 be amended to omit the words "first and" at the beginning of the third sentence.

Resolved, on the motion of Ms Hale: That paragraph 1.2 be amended to omit the word "supporting" and insert instead the words "the benefits of enabling" in the fourth sentence.

Resolved, on the motion of Ms Hale: That paragraph 1.17 be amended to delete all words after the numeral '9' and insert instead the following words "draws together the recommendations made in previous chapters and sets out the Committee's preferred model for the spending of convictions for juvenile sex offences."

Mr Donnelly moved: That paragraph 1.17 be amended to insert the words "majority of the" before "Committee".

Question put.

The Committee divided.

Ayes: Mr Clarke, Mr Donnelly.
Noes: Mr Ajaka, Ms Hale, Ms Robertson, Ms Voltz.

Question resolved in the negative.

Resolved, on the motion of Ms Voltz: That Chapter 1, as amended, be adopted.

Chapter 2 read.

Resolved, on the motion of Mr Ajaka: That the introductory paragraph be amended to insert a new sentence following the first sentence to read: "A spent conviction is a conviction that is no longer required to be disclosed by the offender in certain circumstances, such as when applying for educational or employment opportunities."

Resolved, on the motion of Ms Hale: That paragraph 2.1 be amended to omit the words "and become" and insert the word "as" in the first sentence.

Resolved, on the motion of Ms Hale: That paragraph 2.1 be amended to insert the words ", as discussed in Chapter 3" following the word "re-offending" in the third sentence.

Resolved, on the motion of Ms Hale: That paragraph 2.5 be amended to insert the word "Currently" at the beginning of the first sentence.

Resolved, on the motion of Ms Hale: That paragraph 2.6 be amended to omit the word "anyway" in the first sentence.

Resolved, on the motion of Ms Hale: That paragraph 2.9 be amended to omit all words and insert instead the following words: "A crime-free period ceases if a juvenile is subject to a control order or is convicted of an offence punishable by imprisonment. In the case of an adult a conviction punishable by imprisonment terminates the good behaviour period."

Resolved, on the motion of Ms Hale: That paragraph 2.10 be amended to insert the words "or imposition of the control order" at the and of the sentence and to insert a new sentence following the first sentence to read: "If the offender commits a subsequent offence within the good behaviour period, the original offence cannot become spent until the completion of the good behaviour period for the second offence."

Resolved, on the motion of Ms Hale: That paragraph 2.12 be amended to omit the word "or" following the word ", nurse" and to insert the words ", or when undergoing a Working With Children Check" at the end of the sentence.

Resolved, on the motion of Mr Donnelly: That Chapter 2, as amended, be adopted.

Chapter 3 read.

Resolved, on the motion of Ms Hale: That paragraph 3.19 be amended to omit the word "will" and insert instead the word "has taken" in the second sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 3.53 be amended to omit the word "is" and insert instead the words "can be" in the first sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 3.55 be amended to insert the words "without in any way diminishing their understanding of the seriousness of their offence" at the end of the second sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 3.56 be amended to insert a new sentence following the final sentence to read: "The Committee understands that the question of the definition of what is a 'less serious sexual offence' deserves careful consideration. This matter is examined in more detail in Chapter 5."

Resolved, on the motion of Mr Donnelly: That a new paragraph be inserted following paragraph 3.66 as follows: "Detective Superintendent Kerlatec expressed the view that he would not support any changes to the spent convictions scheme."

Resolved, on the motion of Ms Voltz: That Recommendation 1 be adopted.

Resolved, on the motion of Ms Voltz: That Chapter 3, as amended, be adopted.

Chapter 4 read.

Resolved, on the motion of Ms Hale: That the introductory paragraph be amended to omit the word "require" and insert instead "ask" in the first sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 4.13 be amended to insert the word "Several" before the word "inquiry" at the beginning of the sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 4.27 be amended to omit the words "causes of" and insert instead the words "factors contributing to" in the third sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 4.28 be amended to insert the words ", including a senior magistrate of the NSW Children's Court," following "some Inquiry participants" in the final sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 4.59 be amended to insert the word "These" at the beginning of the second sentence.

Resolved, on the motion of Ms Hale: That paragraph 4.60 be amended to omit the word "likelihood" and insert instead "possibility" in the second sentence.

Resolved, on the motion of Ms Voltz: That paragraph 4.60 be amended to omit the word "sexual" in the third sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 4.61 be amended to insert the words "in general" following the words "juvenile sexual offenders" and before the words "are unlikely" in the first sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 4.89 be amended to insert "the majority of" following "the Committee recognises that" in the second sentence.

Resolved, on the motion of Mr Ajaka: That Recommendation 2 be adopted.

Resolved, on the motion of Mr Ajaka: That Chapter 4, as amended, be adopted.

Chapter 5 read.

Resolved, on the motion of Ms Hale: That the second introductory paragraph be amended to omit the words "only in" and insert instead the words "unless the circumstances were" and to omit the word "circumstances" following the word "exceptional" in the final sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 5.2 be amended to insert the word "some" following the word "While" at the start of the first sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 5.16 be amended to omit the words "a barrier" and to insert instead the words "potential barriers" in the second sentence.

Resolved, on the motion of Mr Clarke: That Recommendation 3 be adopted.

Resolved, on the motion of Ms Hale: That Chapter 5, as amended, be adopted.

Chapter 6 read.

Resolved, on the motion of Mr Donnelly: That paragraph 6.36 be amended to insert a new sentence following the final sentence to read: "Some Committee members believed that more research was needed before moving above a benchmark sentence of six months."

Resolved, on the motion of Mr Donnelly: That paragraph 6.37 be amended to insert a new sentence following the final sentence to read: "Some Committee members are concerned about the possibility of serious juvenile sexual offences falling beneath a new benchmark sentence of 24 months."

Mr Donnelly moved: That paragraph 6:38 be amended to insert "majority of the" before "Committee" in the first sentence.

Question put.

The Committee divided.

Ayes: Mr Clarke, Mr Donnelly
Noes: Mr Ajaka, Ms Hale, Ms Robertson, Ms Voltz.

Question resolved in the negative.

Resolved, on the motion of Mr Donnelly: That paragraph 6.38 be amended to insert a new sentence following the final sentence to read: "Some Committee members believed that more research was needed before moving above a benchmark sentence of six months."

Ms Voltz moved: That Recommendation 4 be adopted.

Question put.

The Committee divided.

Ayes: Mr Ajaka, Ms Hale, Ms Robertson, Ms Voltz
Noes: Mr Clarke, Mr Donnelly.

Question resolved in the affirmative.

Resolved, on the motion of Mr Donnelly: That a new paragraph be inserted following paragraph 6.59 to read: "Some Committee members believed that, consistent with the Model Bill, there should be the capacity for courts to set up to five-year good behaviour periods for juvenile offenders with respect to serious offences."

Ms Hale moved: That Recommendation 5 be adopted.

Question put.

The Committee divided.

Ayes: Mr Ajaka, Ms Hale, Ms Robertson, Ms Voltz
Noes: Mr Clarke, Mr Donnelly.

Question resolved in the affirmative.

Resolved, on the motion of Mr Donnelly: That Chapter 6, as amended, be adopted.

Chapter 7 read.

Mr Donnelly moved: That amendments be made to insert the words "majority of the" before the word "Committee" in the following paragraphs:

- 7.60 – first sentence
- 7.61 – first and second sentences
- 7.62 – first and second sentences
- 7.63 – first and second sentences.

Question put.

The Committee divided.

Ayes: Mr Clarke, Mr Donnelly
Noes: Mr Ajaka, Ms Hale, Ms Robertson, Ms Voltz.

Question resolved in the negative.

Mr Donnelly moved: That amendments be made to insert the words "majority of the" before the word "Committee" in the following paragraphs:

- 7.90 – first sentence
- 7.91 – first sentence
- 7.92 – second sentence
- 7.94 – first and third sentences.

Further, that paragraph 7.92 be amended to omit the word "therefore" before the word "favours" in the second sentence.

Question put.

The Committee divided.

Ayes: Mr Clarke, Mr Donnelly
Noes: Mr Ajaka, Ms Hale, Ms Robertson, Ms Voltz

Question resolved in the negative.

Mr Ajaka moved: That Recommendation 6 be adopted.

Question put.

The Committee divided.

Ayes: Mr Ajaka, Ms Hale, Ms Robertson, Ms Voltz
Noes: Mr Clarke, Mr Donnelly.

Question resolved in the affirmative.

Resolved, on the motion of Mr Donnelly: That a new paragraph be inserted following paragraph 7.97 to read: "Some Committee members believe that all convictions for sexual offences should be required to be spent by court application."

Resolved, on the motion of Ms Hale: That Chapter 7, as amended, be adopted.

Chapter 8 read.

Resolved, on the motion of Mr Donnelly: That paragraph 8.20 be amended to insert the words " pre-marital sex and" following the words "attitudes towards".

Resolved, on the motion of Mr Donnelly: That Recommendation 7 be amended to omit the words "ensure that" and insert instead the word "advise", and to insert the word "to" before the words "give consideration to" in the first sentence. Further, that the paragraph be amended to omit the words "determine whether" and insert instead the words "consider whether or not" in the second sentence.

Resolved, on the motion of Ms Voltz: That Recommendation 7, as amended, be adopted.

Resolved, on the motion of Mr Ajaka: That Recommendation 8 be adopted.

Resolved, on the motion of Ms Hale: That Recommendation 9 be adopted.

Resolved, on the motion of Mr Donnelly: That Chapter 8, as amended, be adopted.

Chapter 9 read.

Resolved, on the motion of Ms Voltz: That paragraph 9.1 be amended to omit "First and" in the third sentence.

Mr Donnelly moved: That amendments be made to insert the words "majority of the" before the word "Committee" in the following paragraphs:

- Introductory paragraph
- 9.5 – final sentence
- 9.6 – first sentence
- 9.9 – each sentence
- 9.10 – first sentence
- 9.11 – first sentence.

Question put.

The Committee divided.

Ayes: Mr Clarke, Mr Donnelly
Noes: Mr Ajaka, Ms Hale, Ms Robertson, Ms Voltz.

Question resolved in the negative.

Resolved, on the motion of Ms Hale: That paragraph 9.9 be amended to omit "is very likely to" and insert instead "may possibly" in the final sentence.

Resolved, on the motion of Mr Donnelly: That a new paragraph be inserted following paragraph 9.11 to read: "Some Committee members are concerned about the possibility of serious juvenile sexual offences falling beneath a new benchmark sentence of 24 months, and believed that more research was needed before moving above a benchmark sentence of six months. These Committee members believed that, consistent with the Model Bill, there should be the capacity for courts to set up to five-year good behaviour periods for juvenile offenders with respect to serious offences. Further, these Committee members believe that all convictions for sexual offences should be required to be spent by court application."

Resolved, on the motion of Mr Donnelly: That Chapter 9, as amended, be adopted.

Resolved, on the motion of Mr Ajaka: That the draft report, as amended, be the report of the Committee.

Resolved, on the motion of Mr Ajaka: That the Committee present the report to the House, together with transcripts of evidence, submissions, tabled documents, answers to questions on notice, minutes of proceedings and correspondence relating to the Inquiry, except for documents kept confidential by resolution of the Committee.

Resolved, on the motion of Mr Donnelly: That dissenting statements be submitted to the Committee within 24 hours following the distribution of the minutes.

5. *******

6. **Adjournment**
The Committee adjourned at 11:46 am until Wednesday 11 August 2010.

Madeleine Foley
Clerk to the Committee

Appendix 7 Dissenting statement

Dissenting statement – Hon Greg Donnelly MLC

Criminal law in NSW and in other Australian jurisdictions contains specific provisions for sexual offences. In doing so, the criminal law is reflecting society's ongoing expectation and desire to treat such offences with the utmost seriousness. Indeed the maintenance of specific sexual offences in the criminal law highlight society's view that the nature and impact of such transgressions upon another person is a distinct experience which cannot be equated with any other non-sexual physical injury. In regard to sexual offences, the majority of perpetrators are male and the majority of victims are female.

The evidence is that sexual assault and sexual offences are matters of major concern in NSW. The NSW Bureau of Crime Statistics and Research in its Issue Paper No. 45 titled *An Update of Long-Term Trends in Property and Violent Crime in New South Wales: 1990 – 2009* published in April 2010 noted:

> "Over the period 1990-2009 NSW recorded increases in the crime rate of both sexual assault (up 124%) and other sexual offences (up 71%). In both cases, however, the sharpest rises occurred in the mid to late 1990s and the statistical trend test for other sexual offences, as was reported last year, continues to remain stable. Sexual assault, however is the only offence reporting 2009 as the highest rate in the years since 1990 and remains the only offence registering an upward trend over the period 2000 to 2009."

The La Trobe University's Australian Research Centre in Sex, Health & Society published in July last year its *Secondary Students and Sexual Health 2008* report. The report, the fourth of its type, involved nearly 3000 Year 10 and Year 12 students from more than 100 secondary schools from the Government, Catholic and Independent school systems covering all jurisdictions in Australia. One of the key findings of the report was that for young women, experience of unwanted sex had increased significantly between 2002 and 2008 from 28% to almost 38% of those surveyed.

In March this year the Australian Institute of Criminology released its annual report titled *Australian Crime: Facts and Figures 2009*. The report noted that with respect to the national trend in sexual assaults there had been an increase of 51% since 1995, at an average of 4% each year. Of the sexual assaults recorded in 2008, 65% occurred in private dwellings. Where the relationship between the victim and offender was stated, 78% of victims of sexual assault knew the offender.

With respect to the abovementioned statistics, I am well aware of the argument that the figures need to be interpreted with a degree of caution. Indeed it is asserted by some that the figures do not in fact demonstrate an increase in sexual offences but rather an increase in the preparedness of individuals to

formally report such matters to the authorities. These assertions are rarely supported by evidence or cogent argument. However, even if one is to accept the proposition that the trend with respect to sexual crimes is not increasing, the absolute numbers on their own demonstrate that the community is facing a major social problem.

I therefore believe that reform in the areas of law covered by this Inquiry should be approached both cautiously and gradually. Consequently, I find myself dissenting from a number of Committee Comments and Recommendations made in this report. A reading of the Minutes from the Deliberative Meeting held on Tuesday, 29th June will highlight where I dissent from the majority of the Committee.

While I do support the proposition that the Attorney General ensures that the NSW legislation to implement the Model Spent Conviction Bill includes convictions for juvenile sexual offences, I do so with qualification.

In the Model Bill, the proposed benchmark prison sentence for juvenile offenders is 24 months or less and the good behaviour period is five years. I am concerned about the possibility of serious juvenile sexual offences falling beneath a new benchmark sentence of 24 months. I believe that it would be prudent, as proposed by some witnesses, to conduct further research and analysis before moving above the current benchmark of six months.

I also believe that, consistent with the Model Bill, there should be the capacity for NSW courts to set up to five-year good behaviour periods for juvenile offenders with respect to serious offences.

Finally, given the innate nature of these offences, it is my view that all convictions for sexual offences should be required to be spent by court application.

Greg Donnelly MLC
Government Whip