



nsw commission for  
children & young people

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LAW & JUSTICE

Ms Madeleine Foley  
Principal Council Officer  
Standing Committee on Law and Justice  
Parliament House  
Macquarie St  
SYDNEY NSW 2000

Dear Ms Foley

I am writing regarding the Law and Justice Committee's *Inquiry into Spent Convictions for Juvenile Offenders*.

I have attached answers to questions taken on notice during my appearance before the Committee on Monday 29 March 2010. In addition, I have attached answers to questions forwarded prior to my appearance but not asked on the day plus a copy of the article by Sue Righthand and Carlann Welch. I have also attached a corrected proof of the transcript of that day and answers to your questionnaire.

If you require any further information, please contact me on 9286-7278.

Thank you for the opportunity to comment.

Yours sincerely

**Jan McClelland**  
**A/Commissioner**

23 April 2010

**Question:**

***The Hon. Lynda Voltz:** I do not know if you would be able to provide us with breakdowns of these- maybe the Attorney-General's department can- but when they have provided us with the figures of those convicted of sexual intercourse without consent there are 130 people, none of whom, according to this have been given sentences under 12 months. Is it possible to find out the numbers of juveniles convicted of sexual intercourse without consent that may have had a sentence of more than 12 months?*

***Ms McClelland:** We would need to do some more research on that. That is not information that the commission would typically hold, but we could make some inquiries. We would need to probably go to the Attorney General's department or the Bureau of Crime Statistics.*

***The Hon. Lynda Voltz:** And likewise, aggravated sexual assault?*

***Ms McClelland:** We would certainly need to take that on notice.*

***Chair:** That is a good question and we will send it to the Attorney General's Department for definition.*

**Response:**

I understand that the Chair of the Committee requested that this Question be referred for investigation by the Attorney General's Department.

I have received advice that answers to these requests for data from the NSW Bureau of Crime Statistics have been included in the response from the Attorney-General's Department.

**Question:**

*The Hon John Ajaka: You said there are 50 appeals. Are you able to indicate how many are rejected to start with?*

*Ms Neighbour: I have not got the actual figures with me.*

*The Hon John Ajaka: Will you take that on notice?*

*Ms Neighbour: I am happy to take that on notice.*

**Response:**

Under sections 33 H and 33 I of the Commission's Act, people who are prohibited from working with children are able to seek a review of their status from the Commission, the Administrative Decisions Tribunal and in some cases, the Industrial Relations Commission.

The Commission, the ADT and the IRC between them grant around 20 such Orders each year, largely for old and minor convictions (eg carnal knowledge in the 1970s).

These bodies cannot make an Order that exempts the applicant from prohibited status unless the applicant demonstrates they do not pose a risk to children.

The Commission provides figures in its Annual Reports for all applications for review of status as a Prohibited Person. In 2008/09 there were 54 new applications for a review of status. The outcomes were:

21 applications were successful

22 were refused

4 were dismissed

5 were withdrawn by the applicant

2 were wrongly made as the applicant was not prohibited.

## Question:

**The Hon. Lynda Voltz:** Was consideration given in the study to looking at a change in lifestyle over the last few decades or a shift away from high youth employment in the 15-17 year age group in the 1960s and 1970s to what we have today, with youth in that age group being more likely to be still in educational institutions? Has consideration being given in the study to the change in society in terms of employment rates and lifestyle?

**Ms McClelland:** In relation to sexual behaviour?

**The Hon. Lynda Voltz:** No, when they are looking at risk taking behaviour of young people.

**Ms McClelland:** In the study by Sue Righthand and Carlann Welch, one of the factors they identified is a reasonably high level of education in the group of sex offenders they studied, but that is the only reference to education and work that was in it.

**The Hon. Lynda Voltz:** I asked the question only because I recall an Arthur Beetson interview in which he was asked why he did not have these troubles during his days in rugby. He said that he was a bricklayer and that by the time he got to training, he was too exhausted to do anything else other than have a sleep. I wonder if there has been an examination of the shifts in lifestyle of young people.

**Ms McClelland:** I am not aware of any off the top of my head, but certainly it is an interesting question. We can certainly have a look at that.

## Response:

The research by Sarah B. Johnson, Robert Blum and Jay Giedd cited in our submission did not address changes in the lifestyle of young people over time. In terms of employment and education rates and their effect on risk taking and potentially criminal behaviour, there is a range of research comparing crime and economic stress and unemployment rates. A discussion of the effects of long term unemployment, low high school retention and completion rates on property offences over the period 1989-1999 in New South Wales was undertaken by the Bureau of Crime Statistics and Research<sup>1</sup>. I am unaware of any such research relating to the economic impact on sexual offending rates.

Dr Don Weatherburn in his Crime and Justice Bulletin No 54, 'What Causes Crime?'<sup>2</sup> discusses the range of factors to be considered when examining crime over time. These include factors such as unemployment, alcohol consumption, the availability of firearms, family breakdown, sole parent families living in poverty and geographic mobility. He writes that 'the interpretation of these findings is the subject of much dispute'.

I would refer the Committee to Dr Weatherburn for a more detailed response to this question, if required.

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<sup>1</sup> B. Chapman, D. Weatherburn, C.A Kapuscinski, M.Chilvers, S. Roussel, *Unemployment, Schooling and Property Crime*, Crime and Justice Bulletin No. 74, 2002

<sup>2</sup> Don Weatherburn, 'What Causes Crime', Crime and Justice Bulletin No 54, 2002

**Questions forwarded prior to the hearing but not asked:**

**Questions:**

*7. In what situations are people required to complete a Working with Children Check?*

**Response:**

The major groups of people required to have a Working with Children Check (WWCC) are:

- preferred applicants for child related employment
- ministers, priests, rabbis, muftis or other religious leaders or spiritual officials of a religion required to have direct unsupervised contact with children
- authorised foster carers
- students on placement in the Department of Human Services
- Volunteers providing intimate personal care to children with disabilities.
- Volunteers mentoring disadvantaged children in family-like environments
- Adult household members of foster carers, family day carers and home based carers

'Child related employment' is defined in the Commission for Children and Young People Act to mean employment in specified work settings (eg schools, childcare centres etc) where direct unsupervised contact with children is an essential requirement of their role.

The detailed definitions are in Tables 1-4 of the Working With Children Check Guidelines which were tabled at the hearing and are available on the Commission's website: <https://check.kids.nsw.gov.au/employer-guidelines.php>

**Question:**

*8. Are past offenders required to disclose all convictions in the Working with children check, including spent convictions? If so, does this requirement continue indefinitely? Are offenders required to disclose a finding of guilt if no conviction was recorded?*

**Response:**

All applicants for the Working With Children Check must consent to the disclosure of all their criminal records for sex or violence offences, including charges, convictions and spent convictions. The Check is a one-off check at the commencement of employment, and is not repeated unless the person takes a new child-related job.

The *Commission for Children and Young People Act* makes it an offence for a prohibited person to seek, enter or remain in child-related employment.

Volunteers and paid employees must declare at the start of their engagement that they are not prohibited from child-related employment. Prohibiting offences include sex offences that are punishable by 12 months or more imprisonment (regardless of the actual sentence imposed).

If they are found guilty of a prohibiting offence, they must remove themselves from child-related employment. A conviction for a sex offence that is spent or not will prevent a person from working with children.

If a prohibited person receives an order under S.33I or S.33H of the *Commission for Children and Young People Act 1998*, they may sign a declaration that they are not a prohibited person. They no longer have to declare their prohibiting conviction(s).

**Question:**

*9. What review mechanisms are available to applicants if a Working with Children Check determines that a certain conviction prevents them from working with children?*

**Response:**

Under sections 33 H and 33 I of the Commission's Act, people who are prohibited from working with children are able to seek a review of their status from the Commission, the Administrative Decisions Tribunal and in some cases, the Industrial Relations Commission.

The Commission, the ADT and the IRC between them grant around 20 such Orders each year, largely for old and minor convictions (eg carnal knowledge in the 1970s).

These bodies cannot make an Order that exempts the applicant from prohibited status unless the applicant demonstrates they do not pose a risk to children.

The Commission provides figures in its Annual Reports for all applications for review of status as a Prohibited Person.

**Question:**

*10. Describe the purpose and requirements of the Child Protection Register, including:*

- a. Which offences are registrable offences?*
- b. How long are offenders listed on the register?*
- c. Are juveniles listed on the register in the same way as adults?*
- d. What are the reporting requirements for persons listed on the Register?*

**Response:**

NSW Police are best placed to provide a full answer to these questions however as the Child Protection Register impacts the Working With Children Check so I can advise the following.

The Child Protection Register is an operational policing system applied to known sex offenders.

These offenders must let Police know about a range of changes in their lives.

They must inform Police about a change of address or employment, a change of care or relationship - especially if it will involve contact with children - and tell them about any plans for international and interstate travel.

There are different kinds of offences that place a person on the Register and they are referred to as Class one or Class two offences.

Class one offences are those that are very serious in nature such as murder or kidnap of a child, or sexual intercourse with a child.

Juvenile offenders with a Class one offence are placed on the register.

Class two offences are offences such as indecent assault or accessing child pornography.

A juvenile offender with a single Class two offence is not placed on the Register.



**Question:**

*11. Can offenders remain listed on the Child Protection Register, even though a conviction has become spent?*

**Response:**

An adult reports to the register for 15 years for a Class one offence and for 8 years for a Class two offence.

A juvenile reports for half of this time: 7.5 years for a Class one offence and 4 years for a Class 2.

People who have been convicted of a sex offence and placed on the Register are prohibited from Working With Children under section 33B of the Commission's legislation.

I would refer the Committee to NSW Police for more guidance on spent convictions and the operation of the register.

**Question:**

*12. The court application model in the Model Spent Convictions Bill provides that if at the end of the relevant crime-free period, an offender is still subject to reporting requirements through a child sex offenders register, the crime-free period is to be extended so as to expire when those reporting obligations cease. What are the implications of this provision? Do you think that this is necessary?*

**Response:**

There is no implication as far as the Working With Children Check is concerned.

Whether the conviction is spent or not, the Commission will still get it as part of the Working With Children Check.

**Question:**

*13. The Model Spent Convictions Bill proposes that if sex offences are included in the spent convictions scheme, they should become spent through a court application process.*

*a. Your submission (p 5), as well as the submissions from the Children's Court (Sub16) and the Local Court (Sub 12), does not support a court application model. Why do you oppose a court order being required for a conviction to become spent?*

**Response:**

The Commission does not support the option suggested in the discussion paper requiring an application to the court to be made before a juvenile offence is spent.

Our experience with prohibited person status reviews tells us that young people are very reluctant to go through a legal review process.

They experience significant shame and embarrassment through these processes and may be so traumatised by previous court experiences that they resist any process that requires them to attend a court.

To have to do it again to have the conviction spent would make it even worse.

**Question:**

*b. Your submission (p 5) notes that a court application process could disadvantage young people who do not have access to legal information and resources.*

*To address this, the Salvation Army (p 3) recommends that legal aid be made available to applicants, and that information on the application scheme be provided at the time of sentencing. Would this address your concerns about the process?*

**Response:**

It isn't just access to legal and financial resources that disadvantages young people.

The convictions we are specifically referring to are those committed by juveniles who have, after having served six months or less imprisonment, remained crime free.

It is an ordeal for many young offenders to go through the criminal justice system and to have to do it again to have the conviction spent is not helpful.

While we would obviously support legal aid being made available, access to Legal Aid only goes part way to addressing some concerns about having to apply for a conviction to be spent.

The court process would still be daunting for many young people who often need more emotional resources and reasonable support.

Legal Aid resources are limited and may not be sufficient to address all the needs of young people in these situations.

**Question:**

*14. The Model Bill sets out more generous eligibility criteria for spent convictions than currently exist. In NSW, eligible offences include those where the prison sentence is less than 6 months, with a good behaviour period for an adult of 10 years and 3 years for a juvenile. Under the Model Bill, eligible offences include those where the sentence imposed is less than 12 months for an adult and 24 months for a juvenile. The good behaviour period for an adult is 10 years, and 5 years for a juvenile. Given the proposal to broaden the eligibility criteria for all offences, does this impact on your view on whether sex offences should be included in the spent convictions scheme?*

**Response:**

As noted in our submission, the Commission supports Option B as proposed in the Committee's discussion paper.

In relation to young offenders, convictions for sex offences should be capable of being spent just like any other offence provided that a prison sentence of less than six months has been imposed; and the relevant crime-free period of time has elapsed.

The Model Bill proposal relating to sex offences where the sentence imposed is less than 24 months imprisonment for a juvenile and the good behaviour period is 5 years, is significantly different to Option B as proposed in your Discussion Paper.

The Model Bill would clearly include a range of more serious offences than Option B.

**Question:**

*15. Is it appropriate for the Model Bill to take the sentence imposed as the main indicator of the severity of a sex offence rather than the category of offence? The court application model for sex offences lists a number of factors for the court to consider in assessing an application for a spent convictions order. These factors include the seriousness of the offence, the length of sentence imposed, the length of time since the conviction, all the circumstances of the applicant at the time of the offence and the application, and whether there is any public interest to be served in not making the order. Do you have any views on the appropriateness of these assessment criteria?*

**Response:**

As stated in our submission, we do not support a court application process. If this is to be the adopted approach, however, we would answer as follows.

We think the relevant assessment criteria should include:

- the age of the young offender
- the type of offence,
- the length of sentence imposed,
- the length of time since the conviction,
- all the circumstances of the applicant at the time of the offence and the application, and
- whether there is any public interest to be served in not making the order.

**Question:**

*16. Submissions suggest a number of additional factors for the court to consider in assessing an application for a spent convictions order, including whether the sex offender has participated in rehabilitation programs, and a victim's impact statement. Would it be appropriate to consider such additional assessment criteria?*

**Response:**

We do not support a court application process.

However, if this is the adopted approach, then we consider that a victim's impact statement and whether the sex offender has participated in programs to address the offending behaviour to be relevant considerations.

**Question:**

*17. The court application model for sex offences provides that an offender must wait two years after an unsuccessful application for a spent convictions order before re-applying to the courts. Is this period appropriate?*

**Response:**

Should a court order process be adopted we would support the proposal.

The two year period is an appropriate time to allow for a change in circumstances between applications.



**Question:**

*18. The court application model for sex offences requires the Attorney General and the Police Commissioner to be notified of any application for an order for a sex offence to become spent, to give them the opportunity to intervene. Is this appropriate?*

**Response:**

As stated earlier, we do not support a court application process.

However if there is to be such a process it should take into consideration criteria such as:

- the age of the young offender
- the type of offence
- the length of sentence imposed
- the length of time since the conviction
- all the circumstances of the applicant at the time of the offence and the application; and
- whether there is any public interest served in not making the order.

The Attorney General and the Police Commissioner might wish to intervene in respect of one or more of these factors and should therefore be notified of any application for a sex offence to become spent.