NSW GOVERNMENT
Justice & Attorney General

Level 14, 10 Spring Street, Sydney NSW 2000
GPO Box 6, Sydney NSW 2001 | DX 1227 Sydney
Tel 02 8061 9222 | Fax 02 8061 9370
www.lawlink.nsw.gov.au

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

27 APR 2010

Dear Ms Foley

**Inquiry into spent convictions for juvenile offenders**

I refer to your correspondence dated 31 March 2010 forwarding a copy of the transcript of the evidence given by the representatives of the Legislation, Policy and Criminal Law Review Division (LPCLR) of the Department, before the Standing Committee on Law and Justice on Monday 29 March 2010. You also forwarded a copy of questions forwarded to LPCLR prior to the hearing, but which were not asked on the day.

I advise that the transcript has been checked by the relevant officers. Their suggested corrections are noted on the attached revised version.

I also enclose LPCLR's revised responses to the questions that were forwarded prior to the hearing, but which were not asked on the day, and the responses to the questions taken on notice.

I advise that there are still some responses outstanding, mainly relating to statistical information. It is expected this information will be available in the next two weeks and will be forwarded as a matter of priority once it is completed.

A revised version of "Attachment D" which formed part of the original Government submission is also currently being prepared. Due to an oversight, the original Attachment did not include the details of non-conviction orders made by the Children's Court in relation to the relevant offences.

Should you wish to discuss these matters further, please do not hesitate to contact the following officers to discuss these matters further, Ms Lauren Judge on 8061 9240 or Ms Kiersten Perini on 8061 9286.

Yours faithfully

Katrina Do

for **Director General**

## INQUIRY INTO SPENT CONVICTIONS

## RESPONSES BY THE LEGISLATION, POLICY AND CRIMINAL LAW REVIEW DIVISION OF THE DEPARTMENT OF JUSTICE AND ATTORNEY GENERAL

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

**10. The Government submission (p16) notes that it is difficult to determine the severity of an offence based on the category of offence. Could you comment on why the sentence imposed is a more accurate way to measure the seriousness of an offence? Are there any particular minor offences that arguably should be included in the spent convictions scheme, for example the summary offence of extreme exposure in a public place?**

When a court imposes a sentence on an offender it takes a number of matters into consideration. Section 3A of the *Crimes (Sentencing Procedure) Act 1999* sets out the purposes of sentencing which are:

- to ensure that the offender is adequately punished for the offence;
- to prevent crime by deterring the offender and other persons from committing similar offences;
- to protect the community from the offender;
- to make the offender accountable for his or her actions;
- to denounce the conduct of the offender; and
- to recognise the harm done to the victim of the crime and the community.

The Court also takes into account the maximum penalty of the offence, which is a reflection of how seriously Parliament considers the conduct constituting the offence.

The final sentence that an offender receives takes into account all of these considerations. It is therefore a reliable measure of the Court's assessment of the criminality involved in the actual offence, taking into account objective considerations, such as the seriousness of the offence, as well as subjective considerations, such as the personal circumstances of the offender.

In looking at the relevant sex offences which, under the spent convictions regime, are not able to be spent, the only clear examples of minor offences, having regard to the maximum penalties are:

- obscene exposure (which has a maximum penalty of six months imprisonment and/or a fine of $1100),
- act of indecency (which has a maximum penalty of two years if the victim is under 16 years age, or 18 months if the victim is over 18 years).

However, that is not to say that there may not be minor incidences of criminality involved in other sexual offences. 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.

**15. Some submissions oppose the court application model for sex offences because this 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 applications, and that information on the application scheme be provided at the time of sentencing. Is this feasible or appropriate?**

DJAG has sought advice from Legal Aid NSW in relation to this question. Legal Aid NSW has advised as follows:

- The provision of legal aid to applicants in spent conviction matters would require a dedication of resources from a limited pool of legal aid funds.
- Because funding is limited, Legal Aid NSW has to target carefully the services it provides. While legal aid is currently available to all children in criminal cases appearing before the Children's Court, it is not available to all adults in criminal cases. In relation to adults, priority is generally given to applicants who meet the Legal Aid NSW Means Test and who are also facing a possible custodial sentence.
- If the "court application model" is adopted in conjunction with the existing requirements that a conviction can only be spent after a certain number of years, many applicants will no longer be children by the time they are eligible to make an application to the court. Legal Aid NSW would need to amend eligibility policies in order to provide assistance in such matters. 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.
- The recommendation that information be provided to young offenders about the spent conviction scheme at the time of sentencing is feasible within current resources. It is, however 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.

**16. The court application model for sex offences requires the Attorney General and the Police Commissioner be notified of any application for a spent convictions order, to give them the opportunity to intervene. In what circumstances could you envisage that the Attorney General would intervene? What departmental processes would be required to track convictions that are due to be spent?**

If an applicant is applying to have their conviction spent and the Attorney General was notified of that application that would be sufficient tracking.

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.

Any substantive reasons for intervening, such as disputed facts, would be left to the Commissioner of Police to intervene as they would be more closely involved with the original criminal prosecution.

**17. 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?**

DJAG does not express a view at this stage as to the appropriateness of the assessment criteria. DJAG notes that the factors under the court application model to some extent reflect the existing framework, such as the length and kind of sentence imposed, and length of time since the conviction. The additional criteria would introduce subjective factors, such as the steps taken by the offender to rehabilitate themselves (which may include whether or not they have addressed their offending behaviour, their employment situation, their living arrangements, support network, and family circumstances). Generally, these factors will assist the Court in deciding whether or not an applicant is likely to reoffend.

However, in practice, it is likely that Courts will place emphasis on the subjective circumstances of the offender at the time he or she makes an application to determine whether the offender has successfully rehabilitated and is unlikely to reoffend.

**18. Submissions suggest a number of additional factors for the court to consider in assessing an application for a spent convictions order for a sex offence, 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?**

It is arguable that assessment criteria should focus on indicators of rehabilitation, for example that the individual has participated in rehabilitation programs, and is seeking employment or has obtained employment (despite his or her criminal record).

More consideration would need to be given to whether or not a victim's impact statement could assist the court in deciding whether or not a person's conviction should be spent. 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. In some cases, victims may have moved on with their lives and may not want to revisit the matter.

As such, DJAG does not express a view at this stage as to whether or not a victim's impact statement could assist the court in its decision making process. However, it is important to remember that many of the offences that would be capable of being spent – such as obscene exposure – may not necessarily have a victim.

**19. The court application model for sex offences 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? What proportion of sex offenders may be affected by this requirement?**

The Commissioner of Police has the responsibility for the Child Protection Register and as such, the NSW Police Force is the appropriate agency to respond to this question, and in particular what proportion of sex offenders may be affected by this requirement. However, DJAG notes that the extension of the crime free period would mean the offender would be required to wait a longer period before being eligible to have their conviction spent.

***Additional questions provided following the hearing***

**1. The Model Bill allows each jurisdiction to reach its own decision on how sex offences should be dealt with. If NSW decides that convictions for sex offences should be capable of becoming spent, must NSW adopt the court application option outlined in the Model Bill? Or can NSW develop its own model in relation to sex offences?**

There is a general expectation that jurisdictions will implement model laws. However, it is recognised that in some circumstances jurisdictions may wish to depart from model laws due to local considerations. However, if a jurisdiction were to depart from model laws, they would have to have sound policy reasons for doing so.

**2. In relation to the offence of extreme exposure in a public place, could you provide statistics on the number of cases where the accused was not convicted, or where a conviction was not recorded?**

Statistics from the Judicial Commission of NSW indicate that for offenders aged over 18 years of age who pleaded guilty, or were found guilty in the Local Court for the principal offence of 'obscene exposure' in the period from July 2005 to June 2009, there were 562 cases in which the offender was dealt with for the charge of "obscene exposure" as the principal offence. Of these 562 offenders, 75 offenders were dealt with by way of section 10 of the *Crimes (Sentencing Procedure) Act 1999* and were not convicted by the Court of the offence.

For the same period (July 2005 to June 2009), there were 13 cases in the Children's Court in which the young person pleaded guilty, or was found was guilty by the Court for the offence of 'obscene exposure' as the principal offence. Of these offenders, three offenders were dealt with under the *Young Offenders Act 1997* (and therefore not convicted of the offence) and one offender was dealt with by way of section 33(1)(a) of the *Children (Criminal Proceedings) Act 1987,* that is although the Court found the young person guilty, the Court dismissed the charge.

However, it is noted that section 14 of the *Children (Criminal Proceedings) Act 1987* applies in relation to the offence of 'obscene exposure' committed by a young

person. This section states that the Court cannot impose a conviction in relation to an offence for a child under the age of 16 years if dealt with summarily, and has the discretion not to impose a conviction if the child is over the age of 16 years if the offence is dealt with summarily.

**3. The tabled document JIRS *statistics* (p 2) notes that in relation to the offence of 'Sexual intercourse without consent – subject to SNPP (item 7), there were 130 cases from February 2003 to December 2008, none of which appear to have resulted in a sentence of 12 months or less.**

**(a) How many juveniles were convicted of sexual intercourse without consent? And how many of those received a sentence of 12 months or more?**

**(b) In addition, how many juveniles were convicted of aggravated sexual assault? And how many received a sentence of 12 months or more?**

Statistics from the NSW Bureau of Crime Statistics and Research indicate that in the period between 2004 – 2008:

- 5 juveniles were convicted of the offence of "sexual intercourse without consent" (section 61I *Crimes Act 1900).* Of these, 4 juveniles were sentenced to a control order greater than 12 months and 1 juvenile was sentenced to a sentence of imprisonment greater than 12 months.
- 14 juveniles were sentenced to "aggravated sexual assault" (section 61J *Crimes Act 1900).* Of these, 6 juveniles were sentenced to a control order greater than 12 months, 2 juveniles were sentenced to a suspended sentence greater than 12 months, 1 juvenile was sentenced to a bond greater than 12 months and 6 juveniles were sentenced to imprisonment greater than 12 months.
- 5 juveniles were sentenced to "aggravated sexual assault in company" (section 61JA *Crimes Act* 1900). Of these, 4 juveniles were sentenced to imprisonment greater than 12 months and 1 juveniles was sentenced to a control order greater than 12 months.

***Questions taken on Notice during hearing on 29 March 2010***

**1. Can you give the Committee advice as to whether or not the Committee can publish the information [Judicial Information Research System Statistics] or whether it should remain confidential (p.3)?**

The Judicial Commission of NSW has advised that its statistics are available to the public via a subscription service, or at the State Library, and as such the Committee is able to publish this table. However, during discussions with the Judicial Commission of NSW, DJAG has noted an error in the information contained in this table. We are currently rectifying this error and will forward the revised table once this has been completed.

DJAG also notes that the same error has been also located in the Table titled "NSW Judicial Commission Statistics Sexual offenders who received section 10 non-conviction order", Attachment D of the NSW Government Submission that has previously been submitted to the Committee. An amended version of Attachment D will be forwarded to the Committee.

**2. Do you have any evidence of the likelihood of offences being committed outside the spent convictions periods of five or ten years (p.7)?**

DJAG notes that Ms Suellen Lembke, Director Programs, Juvenile Justice NSW gave evidence on this issue on 1 April 2010. Otherwise, DJAG does not have any further information in relation to this matter.

**3. Is there any data that deals with the different types of sexual offences, and are there different types of recidivism rates (p.8)?**

The NSW Bureau of Crime Statistics and Research has advised that they are able to extract data from the "NSW Reoffending database" which may assist with this question. DJAG should be able to provide a response to this question by Friday, 7 May 2010.

**4(a). If a minor offence is committed and the offender is sentenced for under six months – possibly under section 10 or section 33 if the offence relates to a child – and in eight or nine months time the offender commits a second minor offence and then he or she does not commit an offence for the next 10 years, in the current legislation, or even in the model legislation, there is no way that one or two of those offences summarily will be spent. A juvenile could go on a silly rampage and commit one, two or three minor offences. Ten years later, in adulthood, that person could become a model citizen. There is no provision that would allow for those convictions to be spent. Do you have any views on that (p.8)?**

DJAG notes that the crime-free period in the case of a conviction of a court (other than the Children's Court) is any period of not less than 10 consecutive years after the date of the person's conviction during which: (a) the person has not been convicted of an offence punishable by imprisonment, and (b) the person has not

been in prison because of a conviction for any offence and has not been unlawfully at large (section 8 *Criminal Records Act 1991*).

In addition, the crime-free period in the case of certain orders of the Children's Court under section 10 of the *Criminal Records Act 1991* is any period of not less than three consecutive years after the date of the order during which: (a) the person has not been subject to a control order, and (b) the person has not been convicted of an offence punishable by imprisonment, and (c) the person has not been in prison because of a conviction for any offence and has not been unlawfully at large.

Under section 7 of the Model Bill, if the person's first conviction is eligible to be spent, but during the qualification period they receive a 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 so on for any subsequent conviction).

**4(b). What would happen if you had one incident out of which three or four charges were laid and the person was found to be guilty?: Would that be regarded as one offence, or would he automatically be found to have committed three offences (p.8)?**

If a person is found guilty on several charges this may result in convictions for several offences. The crime-free period that would apply is outlined in the response to Question 4(a).

**5. Request for a better description of the offences contained in attachment B of the Government submission (p.9).**

A copy of the relevant existing offences under the *Crimes Act 1900* and *Summary Offences Act 1988* is attached to these responses.

**6(a). Request to provide more information of the different sorts of scenarios that constitute the offence of 'obscene exposure' contrary to section 5 of the *Summary Offences Act 1988* (p.10).**

DJAG is not in possession of this information but notes that Chief Superintendent Trichter from the NSW Police Force gave evidence on this issue on 1 April 2010.

**6(b). Request for breakdown of the number of men and women found guilty of the offence of 'obscene exposure' and whether they are juveniles or adults (p.11).**

DJAG has obtained the following statistics for the offence of "obscene exposure" from the NSW Bureau of Crime Statistics and Research in the period between 2006 – 2008.

Number of finalised charges for Obscene Exposure in the Children's Court

| Year | Age of person charged | Gender | Guilty | Other than Guilty[#] | Total |
|---|---|---|---|---|---|
| 2006 | 10-17 | Male | 7 | 1 | 8 |
| | 18 + | | 4 | 1 | 5 |
| | 18+ | Female | 0 | 1 | 1 |
| 2007 | 10-17 | Male | 2 | 3 | 5 |
| | 18 + | | 2 | 1 | 3 |
| | 18+ | Female | 0 | 0 | 0 |
| 2008 | 10-17 | Male | 7 | 1 | 8 |
| | 18 + | | 0 | 0 | 0 |
| | 18+ | Female | 0 | 0 | 0 |
| | Missing/Unknown | Male | 0 | 0 | 0 |

Number of finalised charges for Obscene Exposure in the Local Court

| Year | Age of person charged | Gender | Guilty | Other than Guilty[#] | Total |
|---|---|---|---|---|---|
| 2006 | 10-17 | Male | 0 | 0 | 0 |
| | 18 + | | 208 | 76 | 284 |
| | 18+ | Female | 11 | 4 | 15 |
| 2007 | 10-17 | Male | 0 | 0 | 0 |
| | 18 + | | 194 | 64 | 258 |
| | 18+ | Female | 6 | 3 | 9 |
| 2008 | 10-17 | Male | 0 | 0 | 0 |
| | 18 + | | 185 | 68 | 253 |
| | 18+ | Female | 10 | 5 | 15 |
| | Missing/Unknown | Male | 1 | 0 | 1 |

**7. Does the Department have a view about where this Committee could look to try to discern what "prevailing community standards" means today (p.10)?**

DJAG does not have a view on the manner or method to be used by the Standing Committee on Law and Justice in conducting this Inquiry.

**8. Request for statistics on how often applications are made in Western Australia to have a conviction spent (p.11)**

The Western Australia District Court was able to do a manual search of their databases and found the following:

---

[#] Includes Dismissed after hearing, no evidence offered, mental health and stood out of list.

[#] Includes Dismissed after hearing, no evidence offered, non-appearance, death of defendant and mental health.

1. In 2008, 18 applications for spent convictions were made to the Court. Three of these involved convictions for sexual assault and all three were successful.
2. In 2009, 13 applications for spent convictions were made to the Court. None of these applications related to convictions for sexual assault.

**9. Has any research been done on the impact of having a record for a sexual offence on children or young person's ability to subsequently obtain employment?**

DJAG notes that Ms Natalie Mamone, Chief Psychologist at Juvenile Justice NSW gave evidence on this issue on 1 April 2010. As Juvenile Justice NSW, with the Commission for Children and Young People, are the appropriate agencies to provide this information, DJAG does not have anything to add to the evidence they may have given.

**10(a). Request to check whether SCAG released a report at the time of the model bill.**

At the SCAG meeting in November 2009, Ministers noted the Model Convictions Bill and agreed to its release on the SCAG website. No report was released with the Model Bill.

**10(b) Request to check accuracy of comparison table between the model legislation and the NSW provisions before it is made public.**

DJAG is still verifying this information and will forward the response once this has been completed.