



INQUIRY INTO SPENT CONVICTIONS FOR JUVENILE OFFENDERS

DISCUSSION PAPER NOVEMBER 2009

PURPOSE OF THE DISCUSSION PAPER

This paper sets out the issues that the Committee will examine during this inquiry and identifies options for resolving those issues. The purpose of the paper is to assist 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. Information about how to lodge a submission is provided at the end of this paper.

TERMS OF REFERENCE

The Attorney General has asked the Committee to conduct an inquiry into whether the current prohibition on spent convictions for juveniles convicted of minor sexual offences should remain. The inquiry will also examine other circumstances in which it may be appropriate for a conviction for a minor sexual offence to be capable of becoming spent. The terms of reference for the inquiry are as follows:

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.ⁱ

BACKGROUND

In November 2009 the Standing Committee of Attorneys-General completed a project to develop a national model Bill for a spent convictions scheme that could be adopted in all jurisdictions.ⁱⁱ The Model Bill leaves aside the issue of sexual offences as one that each jurisdiction needs to consider separately.ⁱⁱⁱ The NSW Attorney General has referred this issue to the Law and Justice Committee for further investigation.

Law in New South Wales

The *Criminal Records Act 1991* places limits on how long information about a person's convictions for which the offender has received a prison sentence of less than six months can be used. The Act provides for a crime-free period after which most minor offences will be treated as spent: ten years from the date of conviction for adults and three years for juvenile offenders.^{iv}

Once a conviction is spent the person is not obliged to disclose it, for example, when applying for employment, insurance, credit or when completing an application for a statutory licence.^v There are some exceptions to this for certain employment situations (such as applying for a position as a judge, police officer or teacher) or proceedings before a court.^{vi}

The basis of the spent convictions scheme is the belief that once a person has served their full sentence and has shown over an extended period that he or she will not re-offend they should have the opportunity to move on without the conviction continuing to mark their name.

There are some limitations to the spent convictions scheme. The following convictions are not capable of becoming spent:

- where a prison sentence of more than six months has been imposed,^{vii}
- convictions against bodies corporate, and
- sexual offences.^{viii}

Sexual offences include those under the *Crimes Act 1900* (sexual assault, indecent assault, sexual intercourse and acts of indecency with children and minors, incest, and child prostitution and child pornography offences)^{ix} and the offence of obscene exposure under the *Summary Offences Act 1988*.^x

Law in other Australian jurisdictions

All Australian jurisdictions, except Victoria and South Australia, have a spent convictions scheme, but the legislation varies from one jurisdiction to the next.

The spent convictions schemes in Tasmania, the Northern Territory and the Australian Capital Territory are largely the same as NSW.^{xi} Convictions for sexual offences, whether the offender was an adult or a juvenile, are not capable of becoming spent in any circumstances.

In Queensland sexual offences are not treated any differently from other offences and they become spent in the same way once the qualifying period of good behaviour has been completed.^{xii} This is so for adult and juvenile offenders alike.

In Western Australia convictions for offences, including sexual offences, whether committed by an adult or a juvenile can become spent by court order rather than through the lapse of time.^{xiii}

ISSUES RAISED BY THE TERMS OF REFERENCE

The main issue for consideration in this inquiry is whether the current prohibition on spent convictions for sexual offences should remain or whether there are certain circumstances in which a sexual offence was committed that should give rise to the possibility of the conviction becoming spent. The Committee's focus is on juvenile offenders although other circumstances that relate to juveniles and adults alike will be examined.

The Committee is only examining sexual offences. It is not examining other offences and is not examining the spent convictions scheme in general. The inquiry will only consider whether convictions for sexual offences that otherwise meet the criteria to become spent should be capable of being spent.

Rehabilitation and community protection

In developing options for reform the Committee will attempt to find the appropriate balance between the need to rehabilitate offenders and the need to protect the community.

Rehabilitating offenders

One of the foundations of the criminal justice system is to encourage the rehabilitation of offenders so that they may become responsible members of society.^{xiv} Spent convictions assist offenders to rehabilitate and reintegrate into the community by limiting the stigma of old criminal convictions for less serious offences.

When the spent convictions scheme was introduced in 1991 the then Attorney General, The Hon John Dowd MLA, stated:

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. Even people who have prospered and who have suffered no real problems as a result of having an old criminal record often feel very insecure because of the possibility that one day they will be embarrassed by details of their past conviction being revealed. After an appropriate period, an old criminal record loses validity as a reliable indicator that a person may reoffend.^{xv}

This rationale was recently affirmed by the current Attorney General who, when speaking about the Committee's inquiry, said that the spent conviction scheme '... aids the rehabilitation of offenders by allowing them to put their past behind them, if they have demonstrated that they deserve it.'^{xvi}

The long-term consequences for young people of being convicted of a sexual offence can sometimes be disproportionate, both in relation to the seriousness of the offence and the risk of reoffending. The Committee will consider whether the rationale for allowing convictions to become spent is equally applicable to sexual offences or applicable in certain circumstances.

Protecting the community

The capacity to access criminal records promotes the public interest in protecting the community by ensuring that at appropriate times – such as when applying for employment – a person’s criminal past can be taken into consideration. The requirement that convictions attracting more than six months imprisonment are not capable of becoming spent reflects the view that there is always a public interest in such serious convictions being known in the appropriate situations. According to former Attorney General Dowd:

Convictions for serious offences should clearly not be covered by the scheme. Limiting the application of the scheme in this way is an attempt to ensure that the benefits of the scheme are available to as many past offenders as possible, without provoking concern or alarm in the community, such as would probably occur if it were thought that details of serious offences could be concealed.^{xvii}

The exclusion of sex offences from the spent convictions scheme is based on the same rationale; namely that sex offences are of such a serious nature that it is in the public interest that they should never be concealed. The Committee will consider whether this rationale remains valid and if the status quo should be maintained.

What is the impact of excluding sexual offences from the spent convictions scheme?

In order to balance the competing public interests at the heart of this inquiry the Committee will explore the implications for offenders convicted of sexual offences, and for the community at large, of the spent convictions scheme not being applicable to sexual offences.

Offenders are required to declare their criminal convictions in certain situations, including when applying for employment, insurance, credit, or when completing an application for a statutory licence. This information can then be taken into account by the decision maker.

Questions: In what situations are past offenders required to disclose their criminal records?

How does this requirement impact past offenders, particularly juvenile offenders?

Are there any limitations on what can be done on the basis of the information disclosed?

A conviction for a sexual offence also has some specific implications, including restrictions on the ability of the offender to work in child related employment^{xviii} and the requirement that certain offenders must be registered on the Child Protection Register.^{xix}

Questions: What is the relationship between the spent convictions scheme and these specific limitations and the implications for offenders?

Are there any other specific implications the Committee should be aware of?

Should convictions for sexual offences be capable of becoming spent?

The terms of reference ask the Committee to consider whether convictions for sexual offences should be capable of being spent under the *Criminal Records Act 1991*.

The Committee will examine whether the nature of sexual offences is such that it is in the public interest that all sexual offences, no matter what the circumstances of the offence, are never capable of becoming spent.

The Committee notes that for all offences, other than sexual offences, the initial determining factor for whether a conviction can become spent is not the type of offence but rather the ‘seriousness’ with which the courts viewed the offence, as demonstrated by the length of the sentence imposed.

Questions: Is the rationale for the blanket exclusion of sexual offences from the spent conviction scheme still valid?

What are the advantages and disadvantages of the exclusion?

In other jurisdiction where sexual offences are not excluded – Western Australia and Queensland – what impact has this had?

If the blanket exclusion is no longer justified, the Committee will consider how best to incorporate sexual offences into the spent convictions scheme. The Committee will consider whether sexual offences should simply be included in the scheme along with other offences, or whether their inclusion should be limited to certain circumstances. These alternatives are explored in the following sections.

Should sexual offences simply be included along with other offences in the spent convictions scheme?

One option is to simply include sexual offences in the spent convictions scheme and treat them in the same manner as other offences. This could be achieved by removing the exclusion of sexual offences from the *Criminal Records Act*.

This option would allow convictions for sexual offences to become spent just like any other offence, as long as the other requirements are met, ie that the conviction did not attract a prison sentence of more than six months, and the relevant crime-free period of time has elapsed (ten years for an adult and three years for a juvenile). This is the approach used in Queensland.

As with any other type of offence, only sexual offences that were judged to be sufficiently ‘minor’ as to attract a prison sentence of less than six months would be capable of becoming spent.

Questions: Should sexual offences be included in the spent convictions scheme like other offences?

What would be the advantages and disadvantages of this approach?

What has been the experience in Queensland of this approach?

Should convictions for sexual offences be included in the spent convictions scheme only in limited circumstances?

If a broad inclusion of sexual offences in the spent convictions scheme is not justified, what circumstances would justify a conviction for a sexual offence becoming spent? The terms of reference identify four possible situations for the Committee to consider.

Where the offence was committed as a juvenile

A juvenile convicted of a sexual offence will never be able to have his or her conviction spent, no matter what the circumstances of the offence, including that the offence involved sexual relations with another minor that were found by the court to be consensual.

The criminal justice system makes a distinction between adults and offenders under the age of 18 based on the idea that youth mitigates culpability and that the need for rehabilitation is greater. For example, juveniles are usually dealt with by the Children's Court where the penalties are different from those imposed on adults because of an emphasis on rehabilitation rather than punishment.^{xx} In a similar vein it may be argued that a distinction should be made under the spent convictions scheme for juveniles convicted of sexual offences.

With regard to criminal records, juveniles face a significant number of years feeling the effects of a conviction for a sexual offence, including years in which their personal and professional lives are still developing.

Questions: Should sexual offences committed by a juvenile be capable of becoming spent?

If so, should all sexual offences committed by a juvenile be capable of becoming spent, or only some?

Where there was a finding of fact that the sexual act was consensual

At present a sexual offence committed by a juvenile that involved a consensual sexual act (as found as fact by a court) with another juvenile is not capable of becoming spent.

In describing the circumstances that may justify a spent conviction for a juvenile the Attorney General referred to '... offences sometimes described as young love offences, which is when a juvenile has consensual sexual intercourse with another juvenile'.^{xxi}

Question: Should sexual offences committed by a juvenile, where the court finds that the sexual act was consensual, be capable of becoming spent?

Where the offences were minor sexual offences

The *Criminal Records Act* defines what constitutes a sexual offence for the purposes of its provisions. It includes a large number of offences contained in the *Crimes Act 1900* (sexual assault, indecent assault, sexual intercourse and acts of indecency with children and minors, incest, and child prostitution and child pornography offences)^{xxii} and the offence of obscene exposure under the *Summary Offences Act 1988*.^{xxiii}

All of these sexual offences are precluded from becoming spent regardless of whether the court may have imposed a sentence of less than six months – there are no exceptions to this.^{xxiv}

The Committee will consider whether some ‘minor’ sexual offences should be capable of becoming spent for adults and juveniles alike. For example, the summary offence of obscene exposure which involves the exposure of a person in a public place.

Question: Should convictions for certain ‘minor’ sexual offences be capable of being spent? If so, which offences?

Where no conviction was recorded

A judge may dismiss an offence or discharge an offender on a good behaviour bond without recording a conviction.^{xxv} In this situation a judge may decide that although a charge is proved the offender, because of their character, background, age, health or mental condition, or because the offence is trivial or there are extenuating circumstances, should not be punished or should be punished only nominally.^{xxvi}

Under the spent convictions scheme, a finding that an offence (other than a sexual offence) has been proved, or that a person is guilty of an offence, without proceeding to a conviction, is spent immediately after the finding is made - the crime-free periods do not apply to these findings.^{xxvii}

A discharge without conviction for a sexual offence, however, will never become spent and the person’s criminal record will show that a finding was made against him or her.^{xxviii} This is because discharges without conviction are defined as convictions for the purpose of the Act and as such they are subject to the same exceptions as other convictions.

Question: Where a court finds that a person is guilty of a sexual offence, but does not proceed to a conviction, should these findings be capable of becoming spent?

Other potential circumstances?

The terms of reference identify four circumstances in which it may be appropriate for a conviction for a sexual offence to become spent for the Committee to consider. There may be other circumstances that the Committee should also consider.

Question: Are there any other circumstances in which sexual offences should be capable of becoming spent that the Committee should consider?

OPTIONS FOR REFORM

The three main options that the Committee will consider are set out in summary below, as well as a discussion of the possible mechanisms for a conviction for a sexual offence to become spent. The Committee is interested to hear what submissions makers think is the best option and why.

Options

A. Convictions for sexual offences should not be capable of being spent

This option involves maintaining the status quo.

B. Convictions for sexual offences should be capable of being spent

This option would involve legislative amendment to allow convictions for sexual offences to become spent just like any other offence, as long as all other requirements of the spent conviction scheme are met, ie:

- the conviction attracted a prison sentence of less than six months, and
- the relevant crime-free period of time has elapsed (ten years for an adult and three years for a juvenile).

As with any other type of offence, only sexual offences that were judged to be sufficiently ‘minor’ as to attract a prison sentence of less than six months would be capable of becoming spent.

C. Convictions for sexual offences should only be capable of being spent in limited circumstances

This option is more restrictive than Option B. It involves identifying sexual offences in certain limited circumstances that could become spent (as long as the other criteria regarding sentencing and crime-free periods were also met). Those circumstances are discussed earlier in this paper.

Mechanism for spending convictions for eligible sexual offences

The Committee will also consider the appropriate procedural mechanism that could accompany any possible widening of the spent convictions scheme (Options B and C).

Lapse of time

At present convictions capable of being spent simply lapse at the completion of the relevant crime-free period and the person is no longer required to disclose the existence of these offences. Both Option B and Option C could operate in this way.

In relation to Option B, a simple legislative amendment to remove the exclusion of sexual offences from the spent convictions scheme would mean that a conviction for a sexual offence that otherwise met the criteria to become spent would lapse.

In relation to Option C, the specific circumstances in which a sexual offence should be included in the spent convictions scheme could be identified and defined in the *Criminal Records Act*. For example, the Act could stipulate that all sexual offences where a conviction was not recorded be capable of becoming spent. Convictions that fall into these categories could then become spent through the lapse of time at the completion of the crime-free period.

Application to the court

Alternatively, an application to the court could be required. A court based mechanism is used in Western Australia where a court in sentencing an offender for an offence, including a sexual offence, can fix a qualifying period for the offence to become spent, or the offender can later apply for an order.^{xxix}

The Model Spent Convictions Bill proposes a procedural model that could be used in relation to Option B or C. The Bill proposes a scheme whereby a person convicted of a 'prescribed eligible offence' who has completed their crime-free period can apply to the court for an order that the conviction is spent.^{xxx} The sexual offences relevant to each jurisdiction could be set out in the definition of 'prescribed eligible offence'.^{xxxi}

Under the Model Bill, in making an order the court is to have regard to a number of factors including 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.^{xxxii} In relation to Option C, the conclusions drawn about the four circumstances that the Committee has been asked to consider could be specifically incorporated in this list of factors for a court to consider.

- Questions:**
- If the spent conviction scheme is widened to include some or all convictions for sex offences, should a court order be required?
 - If so, should this court order be made at the time of sentencing, or upon application after the crime free period has elapsed?
 - Can you suggest any improvements to the model set out in cl 9 of the Model Spent Convictions Bill?

CALL FOR SUBMISSIONS

Submissions addressing the terms of reference can be:

- emailed to: lawandjustice@parliament.nsw.gov.au
- lodged via the Committee's website at: www.parliament.nsw.gov.au/lawandjustice
- mailed to: The Director, Standing Committee on Law and Justice, Legislative Council, Parliament House, Macquarie Street, Sydney NSW 2000.

Further information can be found on the Committee's website or obtained from the Committee Secretariat on telephone 9230 3509 or fax 9230 3416. The Committee will consider requests that a submission remain confidential and not be released to the public. The closing date for written submissions is **Friday 29 January 2010**.

COMMITTEE MEMBERS

The Hon Christine Robertson MLC (<i>Chair</i>)	Australian Labor Party
The Hon David Clarke MLC (<i>Deputy Chair</i>)	Liberal Party
The Hon John Ajaka MLC	Liberal Party
The Hon Greg Donnelly MLC	Australian Labor Party
The Hon Amanda Fazio MLC	Australian Labor Party
Ms Sylvia Hale MLC	The Greens

Endnotes

- ⁱ NSWPD (Legislative Council), 12 November 2009, p2
- ⁱⁱ The project was completed in early November 2009 with the public release of the Model Spent Convictions Bill (hereafter referred to as 'Model Bill'). It is now a matter for each jurisdiction whether the Model Bill is implemented. The Model Bill can be accessed at: [www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/Spent_convictions_Model_Bill.pdf/\\$file/Spent_convictions_Model_Bill.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/Spent_convictions_Model_Bill.pdf/$file/Spent_convictions_Model_Bill.pdf) (accessed 11/11/09)
- ⁱⁱⁱ Model Bill, cl 5(2)(b)
- ^{iv} *Criminal Records Act 1991*, s9 and 10
- ^v *Criminal Records Act 1991*, s12. Records of spent convictions are not deleted. The NSW Police Criminal Records Unit retains information on all charges, court appearances and convictions. Except in the case of some juvenile records in the Children's Court of NSW these records are not automatically destroyed when the convictions they relate to are spent. A spent conviction is not the same as a criminal record being 'expunged' which means obliterated/deleted. Criminal records will only be expunged as a result of a court order: www.lawlink.nsw.gov.au/lawlink/privacynsw/ll_pnsw.nsf/pages/PNSW_04_crimrec4 (accessed 11/11/09)
- ^{vi} *Criminal Records Act 1991*, ss 15 and 16
- ^{vii} This does not include sentences of periodic detention or detaining a person under a control order: *Criminal Records Act 1991*, s 7(4)
- ^{viii} *Criminal Records Act 1991*, s 7. S 7 also states that 'convictions prescribed by the regulations' are not capable of becoming spent (s 7(d)). To date no convictions have been prescribed by the regulations for the purpose of this provision.
- ^{ix} These offences are set out in detail in the *Criminal Records Act 1991*, s 7(4)
- ^x *Summary Offences Act 1958*, s 5
- ^{xi} *Annulled Convictions Act 2003* (Tas), *Criminal Records (Spent Convictions) Act* (NT) and *Spent Convictions Act 2000* (ACT). The Commonwealth also has a spent convictions scheme: *Crimes Act 1914* (Cth), PartVIIC
- ^{xii} *Draft Model Spent Convictions Bill, Consultation Paper*, November 2008, Department of Justice, Victoria, p3. *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld)
- ^{xiii} *Spent Convictions Act 1998* (WA)
- ^{xiv} NSWPD (Legislative Assembly), 27 February 1991, p392
- ^{xv} NSWPD (Legislative Assembly), 27 February 1991, p392
- ^{xvi} NSWPD (Legislative Council), 12 November 2009, p20
- ^{xvii} NSWPD (Legislative Assembly), 27 February 1991, p393
- ^{xviii} *Commission for Children and Young People Act 1998*, Part 7
- ^{xix} *Child Protection (Offenders Registration) Act 2000*
- ^{xx} *The Law Handbook*, 8th Edition, Redfern Legal Centre Publishing, p194
- ^{xxi} NSWPD (Legislative Council), 12 November 2009, p20
- ^{xxii} These offences are set out in detail in section 7(4) of the *Criminal Records Act 1991*
- ^{xxiii} *Summary Offences Act 1958*, s 5
- ^{xxiv} *Criminal Records Act 1991*, s 7(1)(b)
- ^{xxv} *Crimes (Sentencing Procedure) Act*, s 10
- ^{xxvi} *The Law Handbook*, 8th Edition, Redfern Legal Centre Publishing, p101
- ^{xxvii} *Criminal Records Act 1991*, s 8(2)
- ^{xxviii} The same applies for other convictions that are not capable of becoming spent under the Act, ie convictions imposed on bodies corporate and any convictions that may be prescribed by the regulations.
- ^{xxix} *Draft Model Spent Convictions Bill, Consultation Paper*, November 2008, Department of Justice, Victoria, p3. *Spent Convictions Act 1998* (WA)
- ^{xxx} Model Bill, cl 9 and Sch 1. The Bill refers to 'prescribed eligible offences' which is defined as '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': cl 3
- ^{xxxi} Model Bill, c 13
- ^{xxxii} Model Bill, c 19