

**Submission
No 22**

INQUIRY INTO SPENT CONVICTIONS FOR JUVENILE OFFENDERS

Organisation: Monash University
Name: Dr Bronwyn Naylor
Date received: 16/03/2010



15 March 2010

The Director,
Standing Committee on Law and Justice,
Legislative Council, NSW.
Email: lawandjustice@parliament.nsw.gov.au

Submission: Inquiry into Spent Convictions for Juvenile Offenders

General principles

The reintegration of former offenders into the community must be a high priority; governments across the world are recognising the importance re-engaging former offenders in employment and accommodation to reduce the risk of reoffending.¹ At the same time, however, employers and other agencies are using criminal histories to determine access to jobs and other services, thereby reducing access to these vital resources. This is a problem for all former offenders, and particularly for Indigenous communities, where criminal convictions pose further limitations on community development.

The following submission begins from the principle that the provision of information about previous offending should be restricted unless required by reference to risk, that the passage of time substantially reduces the relevance of most records for future behaviour, and that offences should be regarded as 'spent' unless there are exceptional reasons not do so. The arguments proposed in support of this submission are as follows.

1. It is impossible to ascertain the actual risk of a particular individual reoffending. The closest evidence is statistical analysis of recidivism rates. The evidence to date shows that overall a significant number of offenders do reoffend in the first years after the relevant offence. In Australia around 38% of prisoners are reimprisoned within two years of their release; around 45% are reconvicted overall.² However it is widely recognised that the rate of

¹ UK research has highlighted the importance of employment for reducing reoffending. Employment can reduce re-offending by between one third and one half; all efforts must be made to enhance access to employment in order to reduce the risk of future offending out of frustration and poverty: Sentencing and Offences Unit, Home Office, United Kingdom, *Breaking the Circle: A Report of the Review of the Rehabilitation of Offenders Act (2002)*.

² Payne, Jason *Recidivism in Australia: findings and future research* AIC 2007, 6.

recidivism declines with time spent crime-free, and most recidivism occurs within three to five years of the original arrest.³

On average the recidivism rate for sex offenders is around 10-15% after five years.⁴

Importantly, sex offenders are much less likely to reoffend than are (for example) property offenders. A 2006 NSW study of 2,747 offenders released on parole during 2001-2 found that overall 68% of all offenders appeared in court for committing at least one subsequent offence, but sex offenders were less likely to reoffend than others:

Offenders whose most serious index (initial) offence was a sex offence were less likely than average (than the group as a whole) to reoffend at any point – of all offence types, sex offenders were the least likely to reoffend while breach and property offenders were the most likely to reoffend.⁵

2. The existing NSW scheme singles out sexual offences as permanently incapable of being spent. The only basis for this approach appears to be a political one, underpinned by a belief that sexual offenders are particularly likely to reoffend either sexually or generally. Community perceptions about crime and risk are notoriously poorly informed. Gelb reports:

Large-scale surveys of public opinion about crime and punishment in the United States, United Kingdom, Canada, Australia and New Zealand have found that the public has very little accurate knowledge about the criminal justice system. In particular, people have extensive misunderstandings about the nature and extent of crime, about court outcomes and about the use of imprisonment and parole. Consistent results from many of the studies in this field show that people tend to:

- perceive crime to be constantly increasing, particularly crimes of violence;
- over-estimate the proportion of recorded crime that involves violence; and
- over-estimate the percentage of offenders who re-offend.⁶

3. Any scheme should be based on sound evidence and not on ill-informed perceptions of risk. As noted in the Discussion Paper, only one Australian jurisdiction, Queensland, includes sexual offending in its spent convictions scheme. I have not been able to locate any evidence that this has given rise to any problems.
4. The research shows that reoffending rates vary significantly by offence. For example recent US research concluded that the risk of reoffending for person arrested at age 18 for robbery declined to that of their overall age cohort after 7.7 years, whilst the equivalent time for a

³ Blumstein, Alfred and Kiminori Nakamura "'Redemption" in an Era of Widespread Criminal Background Checks' (2009) 263 *NIJ Journal* 10, 11.

⁴ Gelb, Karen *Recidivism of Sex Offenders Research Paper* Sentencing Advisory Council, Melbourne, 2007, 25-6.

⁵ Gelb, 2007, 23, citing Jones *et al.*, 2006. Gelb observes that 'The difference between the likelihood of recidivism for sex offenders and the likelihood of recidivism for all offenders on average was statistically significant.'

⁶ Gelb, 2007, 9.

person aged 18 arrested for aggravated assault was 4.3 years, and for burglary was only 3.8 years.⁷

5. The research also shows that reoffending rates, generally and for sex offences specifically, vary significantly by age, with recidivism rates being higher for offenders who were younger when they first offended. Blumstein and Nakamura found that the 'arrest probability' period for the offender convicted of robbery at age 16 was 8.5 years, compared with 7.7 years if arrested at age 18, and 4.4 years if arrested at age 20.⁸ Gelb reports on studies on sex offender recidivism that different forms of sex offending also have different age-related levels of risk:

Hanson (2001) examined the relationship between age and recidivism for different types of sex offender. For the overall sample of 4,673 adult male sex offenders released from prison or community sentences, the recidivism rate declined steadily with age. However the relationship with age was different for the different groups. The recidivism rate for rapists declined steadily with age, peaking in the 18 to 24 age group. In contrast, the recidivism rate for extra-familial child molesters peaked between the ages of 25 and 35 and showed relatively little decline until after age 50. For incest offenders a different pattern emerged: the recidivism rate peaked in the 18 to 24 age group, dropped markedly after that and then continued to decline steadily.⁹

Reducing the overall statistical risk of reoffending, it should be noted that 'The most common age range of defendants adjudicated for sexual assault (ranging from unwanted touching to rape) in the Australian higher courts in 2004-05 was 45 years and over (28% of all adjudicated defendants), while less than 7% were aged 20-24 years.'¹⁰

6. 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 ten years, linked to the length of the sentence.¹¹
7. Focussing here specifically on the issue of sexual offending, there is no evidence that sexual offenders as a cohort are more likely to reoffend than any other offender cohort. Indeed a recent analysis of Australian and international studies on recidivism found that

⁷ Blumstein, Alfred and Kiminori Nakamura, "Redemption in the Presence of Widespread Criminal Background Checks' (2009)47/2 *Criminology* 327, 339.

⁸ Blumstein, Alfred and Kiminori Nakamura, "Redemption in the Presence of Widespread Criminal Background Checks' (2009)47/2 *Criminology* 327, 339.

⁹ Gelb, 2007, 15 citing Hanson, 2001.

¹⁰ Gelb, 2007, 3.

¹¹ For a summary see Sentencing and Offences Unit, Home Office, United Kingdom, *Breaking the Circle: A Report of the Review of the Rehabilitation of Offenders Act (2002)* 65–74.

- a. Released sex offenders are less likely to reoffend at all than the general group of released offenders. This was the conclusion of the NSW study by Jones et al (2006) cited at point 1 above. Similarly, an earlier Victorian study which followed up rates of recidivism of people released from prison between 1985 and 1986 for a period of more than seven years found that 74% were reconvicted of at least one offence, and 54% were reimprisoned, but reoffending by sex offenders was less frequent:

Offenders with an index (initial) offence of assault had a reconviction rate (77.4%) higher than the average for the whole sample (74%), while homicide (45.9%) and sexual assault (51.2%) offenders had reconviction rates for any offence that were substantially below the sample average. A similar pattern was found for reimprisonment, with property offenders having much higher reimprisonment rates (64.2%) than average for the whole sample (54%), while homicide (18.9%) and sexual assault (34.1%) offenders had reimprisonment rates that were substantially lower than the average.¹²

- b. Released sex offenders also appear to be less likely to reoffend sexually than they are to reoffend generally. A meta-analysis of 95 studies by Hanson and Morton-Bourgon in 2004, examining the recidivism of over 31,000 sex offenders, found that recidivism over 5-6 years varied with the type of subsequent offence:

- the recidivism rate for sexual offences was 13.7% (based on 20,440 offenders across 84 studies);
- the recidivism rate for non-sexual violent offences was 14% (based on 7,444 offenders across 27 studies);
- the recidivism rate for all violent offences (including both sexual and non-sexual violence) was 25% (based on 12,542 offenders across 34 studies); and
- the general recidivism rate for any offence was 36.9% (based on 13,196 offenders across 56 studies).¹³

Research has consistently found that the rates of violent and sexual offenders reoffending with the same type of offence are lower than for other offending. On the other hand, the low rates of reporting for sexual offences are also widely recognised. As Gelb notes, 'the recidivism rates found in the literature are likely to represent conservative estimates'.¹⁴

8. 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. However sex offenders are also clearly not homogeneous: there are very different patterns and risk amongst offenders against adults, and offenders against children – and within that group differences

¹² Gelb 2007, 24 citing Ross and Guarnieri, 1996.

¹³ Gelb, 2007, 25-6 citing Hanson and Morton-Bourgon, 2004.

¹⁴ Gelb, 2007, 22.

between intrafamilial and extrafamilial offenders. Gelb highlights a 1995 NSW study of all prisoners discharged, for two years after release, which found that:

'Overall, the recidivism rate for any offence for sex offenders against adults was 16%, compared with 7% for those whose victims were children... This finding is consistent with more recent research from around the world that shows that rapists tend to have higher rates of recidivism than do child molesters.¹⁵

However studies also tend to suggest that the risk of reoffending is greater amongst offenders who began their sexual offending as adolescents, compared with offenders whose offending began later.¹⁶ If this is shown to be an identifiable group with a high risk of reoffending it should be specifically targeted in any spent convictions scheme.

9. Further, as offences punished by more than 6 months' imprisonment are excluded from the NSW scheme, this presumably excludes from the scheme most armed robberies and manslaughters, all murders, and all or most serious sexual assaults (eg rapes). Sexual offences punished by 6 months or less imprisonment (or a non-custodial sentence) will therefore presumably be limited to indecent touching, and possibly offending involving minors. These may be offences invoking low community concern, such as cases of two minors engaged in underage consensual sexual activity.

Some minor offending such as shop theft is relatively more likely to result in recidivism; in the absence of evidence that minor sexual offences carry a higher risk of recidivism than other forms of offending, these offences should be treated in the same way as any other offence.

The current NSW legislation already limits the spent convictions scheme by a range of means aimed at addressing risk and community safety.

- It limits spent convictions to lesser convictions (for which a prison sentence of 6mth or less has been imposed: s.7);
- It then requires 10 crime-free years (or 3 for juvenile offenders) to have expired.
- At the same time it provides for the continuing disclosure of all offences for particular employment including employment with vulnerable people such as children.

It is submitted here that these are adequate protections and should be the only limits on sexual offences being spent.

One exception which should be investigated is the reported higher recidivism rates for some juvenile sex offenders. In such a case 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 as discussed above. It should be noted that treatment programs for young offenders have been found to be quite

¹⁵ Gelb, 2007, 23, citing Thompson, 1995.

¹⁶ Gelb, 2007, 16-17.

effective, a point that should be taken into account as part of the overall approach to juvenile sex offending.¹⁷

The introduction of a special provision requiring application to court for sex offences should be rejected. It is not justified by the evidence (subject to the above comment on some young offenders). 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.

I would submit that convictions for sexual offences should be dealt with in the same way as for other offences, and should be eligible to be spent in the same way as other offences. The foregoing limitations provide more than adequate protection from any risk.

Dr Bronwyn Naylor
Law Faculty
Monash University.

¹⁷ See Daly, Kathleen 'Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases' (2006) 46 B.J.Crim 334