

## **INQUIRY INTO SPENT CONVICTIONS FOR JUVENILE OFFENDERS**

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**Submission  
of the Office of the Director of Public Prosecutions  
to the NSW Legislative Council's Standing Committee on Law  
and Justice**

**Inquiry into spent convictions for juvenile offenders**

Thank you for the invitation to make submissions to this inquiry concerning whether sex offenders' convictions should be capable of being spent under the *Criminal Records Act 1991* or whether they should become spent only in limited circumstances.

The Office of the Director of Public Prosecutions' (ODPP's) role in the prosecution of offences limits, to some extent, our contribution to this issue, particularly in terms of the impact on offenders and the experience in other jurisdictions. Accordingly, the following submissions are limited to our observations about sexual offences: their prevalence and distinctive characteristics in the criminal justice system, based on our experience in the prosecution of child sexual assault offences in all jurisdictions in NSW and other sexual offences in the District and Supreme Courts.

In respect of the options for a reform of the spent convictions scheme we favour option C, with its process of application to the court after the crime free period has elapsed. In our view the rationale for the exclusion from the scheme of most sexual offences is still valid. (We query, however, that if the rationale is really based on the seriousness of sexual offences, why then is the summary offence of obscene conduct an exempt offence in the current scheme?)

**Prevalence of sexual offences in the criminal justice system**

Sexual offences constitute a significant proportion of personal violence offences prosecuted by this Office. As at October 2009 sexual offences constituted a third of all personal violence matters on hand (including committals, summary prosecutions, sentences and trials). Child sexual assault matters made up 62% of the overall sexual offence matters. For the same period sexual assault trials listed constituted the largest category of personal violence trials (37.6%), with 21% being child sexual assault trials. In relation to trials overall, sexual offences made up 25% of all trials (10.6% adult sexual assault trials, 13.5% child sexual assault trials). It is the Office's experience that the percentage of sexual assault matters proceeding to trial increases as more non-sexual assault offence matters plead at trial than do sexual offence matters.

The term "sexual offence" covers a very wide area of conduct from a fleeting indecent act to persistent sexual misconduct and violent assault. Offences may have been committed due to intoxication or misunderstanding as to consent. 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. In addition and particularly in historical child sexual assault cases and where serious offences were alleged to have been committed, more serious charges are often unavailable due to the time frame. Most sexual assault cases are word against word and the facts presented on a plea by agreement with the victim may not reflect the entirety of the conduct. So 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.

In this context it is also important to consider that numerous inquiries and surveys<sup>1</sup> have repeatedly found that there is a high incidence of sexual assault in the community and much of this is unreported. Further, even after a complaint is made to police the attrition rate is high. The reasons for the high incidence of sexual assault and low reporting are complex; however, in a generalised way it does mean that the matters where a conviction is entered involve a degree of fortitude on the part of the victim which tends to correlate with the degree of harm suffered and hence the serious impact of sexual offending. It is important that the criminal records scheme maintains a hard line towards sexual offending to reinforce the message that this is unacceptable behaviour.

Against this 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 rehabilitative 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.

## **Juveniles and sexual offences**

The ODPP prosecutes all summary child sexual assault matters including matters heard by the Children's Court. It should be noted that the Children's Court has jurisdiction to hear serious sexual offences committed on children by children (for example aggravated sexual intercourse without consent s61J(1) where the aggravation is that the victim is under 16 and aggravated carnal knowledge s66C(4) which can include the offender's being in company). In our experience there is a low incidence of the prosecution of

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<sup>1</sup> Including Heroines of Fortitude Report 1996. Report on Child Sexual Assault Prosecutions, Legislative Council Standing Committee on Law and Justice. 2002 Non Reporting and Hidden Recording of Sexual Assault; Australian Institute of Criminology 2003, Prosecutorial decisions in adult sexual assault cases. Australian Institute of Criminology 2004; A Fair Chance: Proposals for Sexual Assault Law Reform in NSW November 2004. NSW Adult Sexual Assault Interagency Committee. No longer silent: a study of women's help-seeking decisions and service responses to sexual assault. Australian Institute of Criminology 2005. Responding to sexual assault: the way forward. NSW Criminal Justice Sexual Offences Taskforce December 2005 and Breaking the Silence: Creating the Future Aboriginal Child Sexual Assault Taskforce 2006.

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. It is common in these matters to find scant evidence of the complainant's communicating that s/he did not consent to the young offender, so the carnal knowledge provisions are often relied upon. The use of these provisions should not be taken to mean that the activity was "truly" consensual.

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 sexual relationship between a 14 -16 year old female and the males in each case were 16 - 17 years of age. In 3 matters the victim became pregnant and the matter was referred to the police by a guardian. In one other case it came to the attention of the police through a parent complaining, rather than the "victim". In one case the the victim said "no" during the act and the accused stopped. The results of these matters were in the main withdrawal or dismissal or if a plea was entered a bond without conviction was imposed.

### **Model Code Clause 9**

We can suggest no improvement to the model code clause 9.

Office of the Director of Public Prosecutions  
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