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INQUIRY INTO SPENT CONVICTIONS FOR JUVENILE OFFENDERS

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Preamble: Adolescence is a transitional time during which young people gradually assume adult responsibilities. For some, especially young people who have problematic upbringings, who are exposed to the substitute care system or have suffered child abuse, it is a time of turmoil and emotional and social disruption. Such experiences delay the development of maturity and sound judgment, but, despite early adversity, many are able to progress to a reasonable level of adjustment given subsequent corrective emotional experiences.

Most adolescent sex offenders do not commit further sexual offences. Young people who commit sexual offences early in their teenage years are less likely to become repeat offenders as adults compared with young people who commit their first sexual offences in later adolescence. However, many continue to commit nonsexual offences as young adults. The high co-prevalence of sexual and non-sexual offending is at odds with community and legal perspectives expressed in Sex Offender Registration and Community Notification laws that assume that sex offending is a distinct form of offending with unique etiologies and almost certain recidivism, fuelled by a perception that "once a sex offender, always a sex offender." However, the reality is that both adult and young sex offenders are 'versatile' offenders, with non-sexual offences often preceding their first sexual offence, leading to the conclusion that some sexual offences share common causal antecedents with non-sexual offences. These include rebelliousness (sometimes called Conduct Disorder), substance abuse, family conflict and breakdown, impulsivity and anti-social attitudes, among others. Young people who commit only sex offences are less likely to have these risk factors in their profile, or, if they do, they are of lesser severity. A number of typologies are now being proposed to identify subgroups of young sex offenders. These include specialist (ie commit only sex offences) versus versatile (ie commit both sexual and non-sexual offences) offenders; short duration and/or single offence sex offenders versus recidivist sex offending; and pedophilic offenders.

A risk assessment that is undertaken with respect to having sexual offences committed in adolescence spent would require an analysis of the type of offender, the type of offence, the degree of harm associated with each offence and the risk of re-offence.

In this submission, we argue that some sexual offences committed during adolescence should be spent, in order to reduce the prejudice, stigma and disadvantage that accrue to having to disclose such offences to employers, when applying for insurance or credit, when completing an application for a statutory licence, or a working with children clearance, as required for some occupations such as teaching, nursing and the health professions. Such disclosures may hinder psychological adjustment and the assumption of adult responsibilities. If the offence were minor (if this can be defined) and the risk of re-offending low, there is no social purpose served by maintaining the conviction as unspent in offences of this nature.

Questions:

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

Currently, a young person must disclose a sexual offence history when seeking employment. In some cases sexual offence histories have been disclosed to schools where such disclosure has resulted in the expulsion of young people on "character" grounds without their behaviour at school in any other way warranting such expulsion. In these cases, disclosure has occurred through vigilante activity, and less frequently, through unfortunate breaches of privacy by organizations like DoCS. Such disclosures can seriously disadvantage young peoples' progression through school. In other cases of which we are aware, young people have been denied accommodation when it is revealed that they have a conviction for a sexual offence.

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

Young people experiment in occupational and social roles and the requirement for disclosure of their criminal record may truncate such experimentation. We are aware that during prohibited employment processes, young people, convicted of minor sexual offences (indecency) as teenagers were prevented from completing their social work and nursing degrees because they were denied a working with children clearance to undertake the practicum requirements of their degrees. As currently stated, the Act prevents young people from taking on occupational roles that might be of central importance to them. Such restrictions may lead to pessimism in their life course, loss of their assumptive futures, marginalization, and may create problems in fulfilling family obligations. For example, in cases

known to us, young adults who were convicted of a sexual offence as a young person, were ruled ineligible by DoCS to become carers of young children in their extended family who had suffered family breakdown or tragedy. DoCS currently take the view that any conviction for a sexual offence makes a family unsafe. This assessment occurs *a priori* and frequently in the absence of a risk assessment or other investigation of the particular circumstances of the case.

Are there any limitations on what can be done on the basis of the information disclosed?
We are unable to respond to this question.

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

Blanket exclusion is a way to minimize risk to the community. However, this minimization of risk needs to be balanced against risk of harm to individuals whose juvenile sex offence convictions cannot be spent. The question arises as to whether the "risk" of recidivism becomes a greater risk if convictions are spent, compared with convictions remaining unspent. The key issues to consider are:

(i) the likelihood of a risk event occurring, and
(ii) the harmfulness of the event, if it occurs.

There are sex offences that are specific to particular circumstances in a young person's life, and some of these sex offences carry a low risk of harm. These include such offences as "carnal knowledge charges" of consensual sex between minors or consensual sex between a person who is a minor and a person who has exceeded the statutory age but only by a small amount. Deciding to allow such offences to be spent indicates that the possible future harm to the society is less than the possible future harm to the young person, who will be required to disclose this offence in situations that may have a serious impact on his ability to conduct his life as an adult.

Evaluations of recidivism of those placed on extended supervision orders for sex offences show that the recidivism rate may appear artificially high because most of the "breaches" of the order are failures to report rather than commission of new sexual offences. The risk of non-reporting carrying a high risk of harm may occur in high risk offenders, but these constitute a very small minority of the group of young sex offenders under supervision.

For these reasons we do not think the rationale for blanket exclusion is correct because the empirical evidence shows that:

1. Sex offenders have low rates of recidivism compared with other types of offenders
2. Juvenile sex offenders have lower rates of recidivism than adult sex offenders
3. Sex offences are not all of the same severity but are treated as if they were, and such an approach appears to represent an ideological rather than a sensible approach to considering offence severity. Care must be taken not to bow to uninformed community or political pressure to treat all sex offences as equal.

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

There is no simple answer to this question. It is the case that some minor sex offences could be included in spent convictions like other offences. However, for a small group of sex offences, other conditions might apply. For adults, the benchmark that a sex offence that is equivalent to a custodial sentence of 6 months or greater is probably a good place to start, but for juveniles, for whom the sentencing act is different to adult acts, it needs to be ascertained whether the 6 month rule is a good one to use. There are a number of cautions to consider with respect to this course of action. Potentially serious offences may not attract a custodial sentence of 6 months; alternatively, longer detention may occur for someone who has a large number of non-sexual offences, but has exhausted the patience of the court and a heavier sentence is given for a minor offence simply because the court does not know what to do with the young person. There needs to be some research into sentencing trends for young people with sex offences before an appropriate benchmark for spent convictions for young offenders can be identified.

What would be the advantages and disadvantages of this approach?

If a fair way of applying spent convictions to young people could be found, it would reduce the stigmatization applied to young people, allow them to partake in adult activities in a fair and mature way, and reduce the harm done to young people who have made a mistake out of immaturity but who have since matured.

What has been the experience in Queensland of this approach?

Don't know.

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

We are of the opinion that some should be spent; others may be spent but with stricter criteria, while others may not warrant spending due to their severity, risk of recidivism, or potential for harm to others. See previous comments.

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

In developing a new system, it is probably wise to be cautious and to implement such a process in a staged or graded fashion and ascertain the benefits and harms and over cost-benefits of spending a group of minor sexual offences, before proceeding to be more inclusive. There is a small group of highly deviant young people who must be identified and carefully considered as a sub group. Age is a factor, as is frequency of the offence and the type of the offence. For example, recidivistic young sex offenders are more likely to engage in sex offences of a pedophilic type, so great caution is warranted in those cases.

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

We are unequivocally supportive of spending consensual sexual acts, with the proviso that consideration is given to age disparity between the parties, as a crude way of determining the truly consensual nature of the act. An age difference of five or more years could reasonably be construed to indicate that a power imbalance was operating or grooming was being undertaken. In such cases, establishment of informed consent would be more difficult. Of course, the absolute ages of the parties is of paramount concern. Particular consideration should be given to those sex offences involving children under the age of 10, for which it should be assumed that informed consent could not be given for the sexual act.

Should convictions for certain 'minor' sexual offences be capable of being spent? If so, which offences?

In principle, convictions for minor sexual offences should be capable of being spent. The challenge is to define the limits of a 'minor sex offence.' For example, decision makers must develop a hierarchy moving from minor to major based on objectively defined criteria relating to risk and harm.

Challenges for such a classificatory system are significant. For example, some would argue that downloading child pornography may be a minor offence, but when assessed against criteria such as risk and harm, using such material supports the abuse of children, usually those from developing countries or who are otherwise disadvantaged and powerless. So, while there is no proximal harm (the act of downloading the material from the web), the distal harm (ie the exploitation of helpless children to produce the material) is great indeed. Other offences, however, may more readily meet the requirement for a definition of 'minor sex offence.' Cases include urinating in a public place, grabbing a woman by the breast as part of a dare at a party, exposing oneself as part of a dare. Some might argue that frotteurism might also be included in this category.

Sentencing, as previously indicated, does not always reflect the seriousness of the sexual offence, and cannot be used as the arbiter of seriousness without the consideration of other contextual factors. Further, some offences, on the face of it may appear more serious than that determined after a nuanced examination of all the contextual issues that pertained at the time of the offence.

One significant concern arising from spending minor convictions is that there would be a danger that police might start charging young people with more serious offences in order to ensure a custodial sentence or a more lengthy sentence if a sentence were inevitable. Currently, magistrates are probably best placed to determine the seriousness of an offence, as they have access to all the information and evidence available on which to base an opinion.

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?

Such a scenario would be an ideal starting point to test the efficacy of a spent convictions policy for sex offences. The Section 10 rule is usually only applied when there are circumstances reducing the culpability of the offender, or where there are good grounds for thinking the offence is atypical and unlikely to be repeated.

One possibility is that individuals could apply to courts to have their convictions spent and that magistrates could decide such matters on their merits using a set of guidelines or benchmarks that must be satisfied to ensure consistency between courts and jurisdictions. However, such a system would disadvantage adolescent offenders who are unlikely to have the funds, and who lack legal sophistication to avail themselves of such applications, thereby increasing stress and worry at a critical period of a young person's life, so another similar system could be implemented for young

people who are seeking to have their convictions spent.