Submission
No 12

INQUIRY INTO SPENT CONVICTIONS FOR JUVENILE OFFENDERS

Organisation: NSW Local Court

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NEW SOUTH WALES

The Chief Magistrate of the Local Court

10 February 2010

The Director
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Director

Submission on inquiry into spent convictions for juvenile offenders

Thank you for the opportunity to provide a submission in respect of the Standing Committee on Law and Justice's inquiry into spent convictions for juvenile offenders convicted of sex offences.

This inquiry raises a number of related questions as to whether convictions for sexual offences should be capable of becoming spent under the *Criminal Records Act 1991* ('the Act'), and if so, under what circumstances.

In my view, the preferable position would be for no distinction to be drawn between ***minor*** sexual and other offences, in the case of both adult and juvenile offenders, so that the former may be capable of becoming spent.

This would be subject to the sexual offence being 'minor' insofar as it has not resulted in a sentence of more than six months' imprisonment being imposed, as is currently the position under the legislation. I would perhaps add the further qualification that for a sexual offence to be capable of being considered 'minor' under the Act, it must be one where the legislated maximum penalty is 12 months imprisonment or less.

I have set out in more detail below some information on the jurisdiction of the Local Court in dealing with sexual offences, including sentencing considerations. This is followed by some comments on the rationale underpinning the exclusion of sexual offences from the Act and my view as to the preferable scheme by which convictions become spent.

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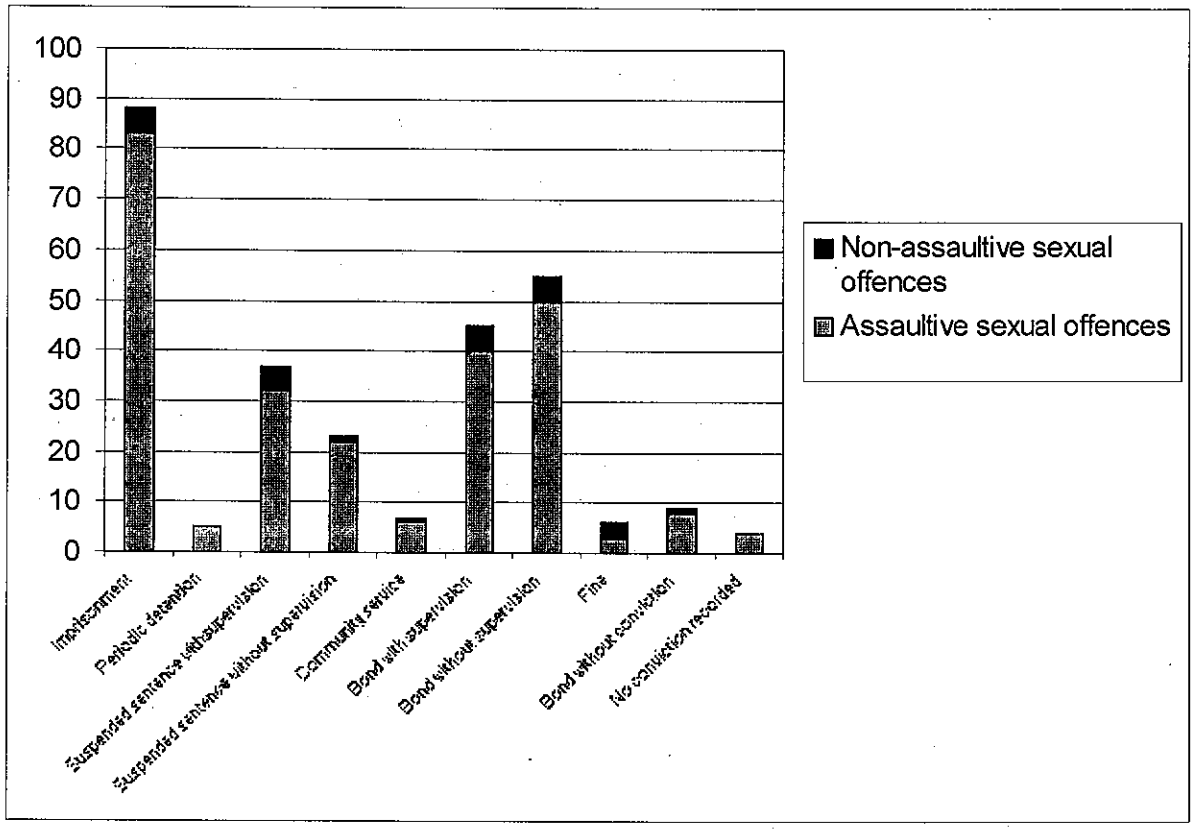
Sexual offences dealt with in the Local Court

The Local Court has jurisdiction[1] to determine summarily a number of the indictable sexual offences listed in section 7 of the Act. For example, production, dissemination or possession of child pornography, sexual intercourse with a child between the ages of 14 and 16, aggravated indecent assault and aggravated acts of indecency are Table 1 offences. Indecent assault and acts of indecency are Table 2 offences. In addition, the Local Court also has jurisdiction to deal with offences of obscene exposure under the *Summary Offences Act* 1988.

Data from the NSW Bureau of Crime Statistics and Research[2] indicates that in 2008, 279 cases in which individuals were found guilty of sexual offences were finalised in the Local Court. Of these, 253 were in relation to sexual assault and the remaining 26 were in relation to non-assaultive sexual offences. Eighty-eight offenders, or 31.5% of those convicted, received sentences of imprisonment. Eighty-three of those were convicted of sexual assault offences and 5 convicted of non-assaultive sexual offences. Of the remaining offenders, 65 (59 for sexual assault offences, 6 for non-assaultive sexual offences) received a period detention or suspended sentence. A further 126 offenders received other non-custodial sentences.

The figure below sets out in more detail the breakdown of penalties imposed by the Local Court for defendants found guilty of a sexual offence in 2008:



[1] *Criminal Procedure Act*, s 260

[2] NSW Bureau of Crime Reporting and Statistics, NSW Criminal Courts Statistics 2008 - annual report (September 2009), Section 1

I note further from the BOCSAR data that in the Children's Courts, 62 cases in which a sexual offence was proven were recorded, all of which involved instances of sexual assault. The largest proportion of juvenile offenders (24, or 38.7%) received a probation order and a further 23 (37.1%) were placed on a bond. Control orders were made against 11 juvenile offenders, or 17.7%. The remaining 4 offenders (6.45%) were dismissed with a caution. [3]

Sentencing of sexual offenders in the Local Court

As can be seen from the data above, it is the experience of the Local Court in dealing with cases of sexual offences falling within the definition in the Act that many are assessed by magistrates as properly requiring a sentence other than imprisonment.

Although many sexual offences will attract sentences of imprisonment in a reflection of judicial and legislative recognition of community attitudes as to the seriousness of sexual crime,[4] as with any general category of offences, individual offences will vary greatly in their objective severity and in the subjective circumstances of the offence and the offender. A sentence of imprisonment is, by its nature, reserved for offences judged to be of a greater seriousness. As the figures above indicate, a substantial minority of all sexual offences dealt with in the Local Court result in sentences of imprisonment being imposed, particularly in instances where the offence involves an assaultive element. However, overall, a greater proportion of offenders receive sentences other than imprisonment.

Sentencing involves numerous considerations. In accordance with section 5(1) of the *Crimes (Sentencing Procedure) Act 1999*, a Court is to impose a sentence of imprisonment only where, having considered all other possible options, it is satisfied that there be no other alternative sentence that is appropriate. Section 5(2) goes on to provide that if the sentence of imprisonment is for a period of 6 months or less, the Court is to give reasons for the decision that no sentence other than imprisonment was appropriate.

In the case of indictable offences heard summarily, the Local Court is bound by jurisdictional limitations imposed under the *Criminal Procedure Act 1986* in that it cannot impose a sentence of imprisonment that is greater than two years' duration.[5] A range of sentencing options is set out in Part 2 of the *Criminal Procedure Act* and a number of factors to be considered by the Court are set out in Part 3. A magistrate sentencing an offender convicted of a sexual offence will take account of the applicable legislation, the appropriate case law, and the guidelines set out in the Judicial Commission Sentencing Bench Book..

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[3] NSW Bureau of Crime Reporting and Statistics, NSW Criminal Courts Statistics 2008 - annual report (September 2009, Section 2

[4] See Judicial Commission Sentencing Bench Book at [20-604] to [20-605]

[5] *Criminal Procedure Act 1986*, s 286 (in respect of Table 1 offences) and s 287 (in respect of Table 2 offences)

Rationale for exclusion of sexual offences from the Criminal Records Act

I note that the Discussion Paper to this Inquiry indicates (at page 4) that:

> The exclusion of sex offences from the spent convictions scheme is based on the... rationale... that sex offences are of such a serious nature that it is in the public interest that they should never be concealed.

The rationale that sexual offences are, by their nature, inherently serious and should thus never be concealed is in many cases appropriate. However, whilst there may be merit in the recognition of the severity of sexual offences generally, the current blanket exclusion of sexual offences from the operation of the Act is incongruous with the reality that not infrequently, particular instances of a sexual offence are judged as being comparatively minor in nature and attracting a lesser sentence. An example would be the offence of obscene exposure under the *Summary Offences Act 1988*, which is punishable by a fine or maximum sentence of imprisonment of 6 months.

The 'public interest' is cited as the rationale for the exclusion of sexual offences from the Act; however, the Act itself also already addresses this issue by providing for a scheme with certain safeguards. Although a person with a spent conviction is not generally required to disclose the conviction, various exclusions are set out in Part 3, Division 2.

Importantly, section 15 requires a person to disclose their conviction if applying for a position such as a police officer, teacher or child-related position of employment.

Section 16 further has the effect of allowing evidence of a spent conviction to be admitted in court or considered in a judicial decision, including a decision on sentencing. This is significant because it enables the Court, if an offender with a spent conviction does subsequently re-offend, to have regard to the person's full criminal record and assess his or her history of prior convictions for the purpose of determining an appropriate sentence in the case of a subsequent offence.

To my mind there is, therefore, no logical reason for those convicted of sexual offences assessed by judicial officers as being relatively minor being excluded from the benefits of the Act after a period of crime-free behaviour. As was noted generally by former Attorney General Dowd:

> Many offenders' only contact with the criminal courts involves relatively minor offences, often committed when they were young.... After an appropriate period, an old criminal record loses validity as a reliable indicator that a person may reoffend. Its maintenance should not therefore prejudice the person's rehabilitation.[6]

The same attitude should in my view be extended to those convicted of minor sexual offences (within the meaning that I have set out above) rather than to stigmatise such individuals as being forever undeserving of the opportunity for a 'clean slate'

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[6] Second Reading Speech, NSWPD (Legislative Assembly), 27 February 1991

that is extended to other minor offenders. Indeed, in the case of juvenile offenders, a 1996 study by the Department of Juvenile Justice found that approximately seventy percent of individuals convicted of offences as juveniles do not go on to re-offend, with first-time offenders convicted of sexual offences actually being 31% less likely to re-offend than other juvenile first-time offenders.[7]

Preferred scheme for spent convictions

This Court's preferred approach would be for convictions for ***minor*** sexual offences to lapse with the passage of time upon completion of a crime-free period of behaviour. This may perhaps be confined in its application to those minor sexual offences where the legislated maximum penalty is 12 months imprisonment or less.

It should be remembered that, like any other offender, the sexual offender's sentence has been determined by a judicial officer after due deliberation as the most appropriate penalty having regard to established legislative guidelines and sentencing procedures.

In my view there is therefore little benefit in maintaining a distinction between minor sexual offences and other minor offences under the Act by having a different process, such as the application process utilised for all "serious" convictions capable of becoming spent under Western Australia's *Spent Convictions Act 1988*, by which convictions for minor sexual offences could become spent. I believe this would simply continue to reinforce the unhelpful perception that offenders who have been convicted of sexual offences assessed by judicial officers as relatively minor, and who have served their sentences and not since re-offended, still deserve to be treated differently from other rehabilitated minor offenders.

The application process contemplated in section 6 of Western Australia's *Spent Convictions Act 1988* requires the judge in exercising his or her discretion whether to grant an application to consider a number of factors:

(a) the length and kind of sentence imposed in respect of the conviction;
(b) the length of time since the conviction was incurred;
(c) whether the conviction prevents or may prevent the applicant from engaging in a particular profession, trade or business or in a particular employment;
(d) all the circumstances of the applicant, including the circumstances of the applicant at the time of the commission of the offence and at the time of the application;
(e) the nature and seriousness of the offence;
(f) the circumstances surrounding the commission of the offence; and
(g) whether there is any public interest to be served in not making an order.

Of those criteria, consideration of the applicant's circumstances at the time of the offence, the nature and seriousness of the offence and the circumstances surrounding its commission are matters which would already have been considered

[7] Cain M, *Recidivism of Juvenile Offenders in New South Wales*, Department of Juvenile Justice (1996), p 36

by the judicial officer at sentencing when determining the appropriate penalty under the *Criminal Procedure Act*.

The other factors set out for consideration in the Western Australian application process similarly add little to the current scheme under the Act. If an applicant's conviction was for a qualifying minor offence and the applicant had otherwise completed a crime-free period of behaviour of the length currently contemplated by the Act (items (a) and (b) of the above list), it seems unlikely that a judicial officer would refuse an application on those grounds. Item (c) is addressed by the safeguards in Part 3, Division 2 of the Act which provide that in any event a conviction is not spent for the purpose of applying for employment in certain professions or industries. If, having regard to the other listed factors, no reasons arise which favour the refusal of an application, it is difficult to imagine what circumstances would nonetheless justify a refusal of the application in the name of the public interest, as contemplated by item (g).

If the purpose of the Act is to enable persons with relatively minor convictions to be relieved from an obligation to disclose those convictions after a period of crime-free behaviour (subject to the exclusions mentioned above), an application process may also be counter-productive. It is well within contemplation that applications by offenders convicted of minor sexual offences for their convictions to become spent might be the subject of media attention and have old offences 'rehashed' before a wider public audience. The impetus for offenders to make an application, notwithstanding the completion of a substantial period of crime-free behaviour, may be lessened if they are confronted with such a prospect. One also wonders at the potential effect such a process might have on the person's continued successful reintegration into the community.

Summary

Should a change to the *Criminal Records Act* to enable convictions for ***minor*** sexual offences to become spent be recommended, the preferred approach would be to treat those offences in the same manner as any other offence capable of becoming spent upon the lapse of time, for both adult and juvenile offenders.

Thank you for the opportunity to contribute to this inquiry.

Should you have any questions in respect of the enclosed submission or wish to discuss and details with me further, please do not hesitate to me.

Yours sincerely

Graeme Henson
Chief Magistrate