

## INQUIRY INTO SPENT CONVICTIONS FOR JUVENILE OFFENDERS

**Organisation:** Children's Court of NSW  
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**Position:** President  
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## *Children's Court of New South Wales*

15 February 2010

To the Director  
Standing Committee on Law and Justice,  
Legislative Council

### **RE: Inquiry into spent convictions for juvenile offenders**

#### **Summary**

The Children's Court does not hold a unanimous view on whether or not convictions for juvenile sex offences, which are wholly disposed of by the Children's Court, should become part of the spent convictions scheme.

Children's Magistrates who are in favour of amending the current spent convictions scheme argue that it is based on a number of false assumptions namely, the need to use the scheme to protect the society from juvenile sex offenders, the nature of juvenile sex offenders and the threat which they pose to the society. According to these members of the Court, by disallowing convictions for juvenile sex offences to be spent, the scheme severely compromises juvenile sex offenders' rehabilitation and reintegration into the society, as a result of which the current spent convictions scheme may expose, rather than protect the society from further re-offending.

Other members of the Court place little reliance on official conviction and re-conviction rates, arguing that sexual offending is highly unreported and under-prosecuted. Further they argue that there is a clear link between juvenile and adult sexual offending, as a result of which there is no rational basis for distinguishing between adult and juvenile sex offenders.

Despite divergent views regarding the need to amend the spent convictions scheme, in the event that such amendments are ultimately made, the Court has come to a compromise position regarding the manner in which sexual offence convictions recorded by the Children's Court should be spent.

The Children's Court is of the view that juvenile sex offences which are prosecuted and finalised in the Children's Court, should not be expressly excluded from the spent convictions scheme. Instead, they should be capable of becoming spent in the usual manner, unless the Crown makes an application for the conviction not to be spent. In these circumstances a Children's Magistrate should be empowered to hear and determine the application.

## Submission

### **Why are juvenile sexual offences excluded from the operation of the spent convictions scheme?**

The *Criminal Records Act 1991* establishes a scheme whereby certain convictions are excluded from a person's criminal history following a specified period of crime-free behaviour. It consequently limits the effect that past transgressions may have on a person's private life.

Section 7(1) of the Act provides:

- (1) All convictions are capable of becoming spent in accordance with this Act, except the following:
  - (a) convictions for which a prison sentence of more than 6 months has been imposed,
  - (b) convictions for sexual offences,
  - (c) convictions imposed against bodies corporate,
  - (d) convictions prescribed by the regulations.

In his second reading speech, the Attorney General at the time, 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."

Mr Dowd then went on to say:

"Convictions for serious offences should clearly not be covered by the scheme."

Mr Dowd's statements suggest that the Act is aimed at serving two roles: enabling offenders to live a life unmarred by minor convictions, while protecting the society from serious offenders, by ensuring that in limited circumstances individuals who come into contact with these offenders are made aware of their offending histories.

The Children's Court agrees with the overall position taken in relation to serious offences. However, in light of the operation of the *Commission for Children and Young People Act 1998*, some members of the Court question the extent to which a complete exclusion of juvenile sexual offence convictions from the operation of the spent convictions scheme is necessary for the protection of the vulnerable sections of our society who may come into contact with juvenile sex offenders.

The *Commission for Children and Young People Act 1998* is intended to protect children:

- (a) by prohibiting certain persons from being involved in child-related employment, and

(b) by means of background checking for child-related employment administered by the Commission and other agencies.<sup>1</sup>

The Act establishes a scheme whereby a "prohibited person" is forbidden from working in a range of roles in which they are likely to come into contact with children. The Act defines a "prohibited person" as:

"A person convicted of a serious sex offence, the murder of a child or a child-related personal violence offence, whether before or after the commencement of this subsection;"<sup>2</sup>

The Act then specifies which offences are deemed as "serious sex offences" and in effect covers all offences contained in Division 10 of the *Crimes Act 1900*.<sup>3</sup> The Act also notes that

"A conviction for an offence includes a finding that an offence is proven, or that a person is guilty of an offence, even though the court does not proceed to a conviction."<sup>4</sup>

The Working With Children Employer Guidelines contain a very comprehensive list of positions and industries from which a person may be prohibited from working<sup>5</sup>. They also make it clear that a "prohibited person" may not engage in these positions on a paid, voluntary or self-employed basis.<sup>6</sup>

According to some members of the Court the legislation and the Guidelines comprehensively limit the range of situations in which a sex offender, including one who at the time of the offence was a juvenile, may come into contact with children. They consequently offer significant protection to children who are considered as most at risk from juvenile sex offenders. If one of the reasons why juvenile sex offenders are precluded from the spent convictions scheme, is to protect the vulnerable members of our society, some members of the Court are of the view that this goal is already achieved by the *Commission for Children and Young People Act 1998* and that additional restrictions through the spent convictions scheme are neither necessary nor warranted.

#### **Are all juvenile sex offences serious, and therefore deserve to be excluded from the spent convictions scheme?**

According to the Attorney General's second reading speech the spent convictions scheme is not intended to apply to convictions for serious offences. On the other hand, the Attorney General did not state why all sexual offence convictions are excluded from the scheme. In these circumstances, the Attorney General's statement suggests that a blanket exclusion of sexual offences arises from their inherently serious nature. Some members of the Children's Court do not support the assumption that all sexual offences regardless of their nature, circumstances in which they occur, or the age of the offender, necessarily amount to serious

<sup>1</sup> *Commission for Children and Young People Act 1998* s31.

<sup>2</sup> *Commission for Children and Young People Act 1998* s33B(1)(a).

<sup>3</sup> *Commission for Children and Young People Act 1998* s33B(1)(a).

<sup>4</sup> *Commission for Children and Young People Act 1998* s33B(3).

<sup>5</sup> NSW Commission for Children & Young People, *The Working With Children Employer Guidelines* (2009), 7.

<sup>6</sup> *Ibid*, 12.

offences. In the experience of some Children's Magistrates this assumption is rarely supported.

Instead, in their experience, very few juvenile sex offenders dealt with by the Children's Court display characteristics or commit their offences in a manner which is serious, and which may give rise to concerns about their future offending. Most sexual offences prosecuted in the Children's Court amount to adolescent or pre-pubescent sexual experimentation, which although bizarre given the offender's age, does not suggest that the offender will become a serious sexual recidivist. Equally, some juveniles convicted of sexual offences in the Children's Court suffer from intellectual or mental disabilities and do not understand the consequences of their behaviour. Finally a small portion of sexual offences involve consensual sex between underage persons, the prosecution of which is usually commenced at the insistence of a parent or guardian of one of the children rather than following a complaint from the victim.

Children's Magistrates who favour the amendments argue that Children's Court statistics, which are maintained by the Judicial Commission of New South Wales, provide a good insight into the nature and prevalence of sexual offending of juveniles dealt with by the Children's Court.

The statistics specifically reveal the following:

- Between July 2005 and June 2009 the most frequently committed juvenile sexual offences were aggravated indecent assault (s61M(1)) the aggravating factor being the fact that the victim was under 16, indecent assault (s61L), sexual intercourse with a child aged 14-16 (s66C(3)), aggravated indecent assault against a child aged under 10 (s61M(2)) and aggravated sexual assault (s61J(1)).
- During the stated time period there were a total of 45 cases of aggravated indecent assault (victim under 16), 38 cases of indecent assault, 22 cases of sexual intercourse with a child aged 14-16, 20 cases of aggravated indecent assault against a child aged under 10 and 20 cases of aggravated sexual assault.
- Of the 45 offenders who committed aggravated indecent assault, 40 had no prior convictions. Twenty offenders were aged 14-15, 19 were aged 16-17 and 6 were aged 12-13. Only one offender received a control order of 13 months, four matters were dismissed and the rest resulted in community-based orders.
- Of the 38 offenders who committed indecent assault 21 had no prior convictions, a majority (20) were aged 16-17, 16 were aged 14-15 and 2 were aged 12-13. Only eight offenders received control orders of 9 months or less, one offender received a caution while the rest received community-based orders.
- Of the 22 offenders who had sexual intercourse with a child aged 14-16, 15 had no prior convictions. A majority (18) were aged 16-17 and the rest were aged 14-15. Only two offenders received a control order of 5 months or less, five matters were dismissed, one offender received a caution and the rest were placed on community-based orders.
- Of the 20 offenders who committed aggravated indecent assault (victim under 10), 15 offenders had no prior convictions. Half of the offenders were aged 14-15, 5 were aged 16-17 and the rest were aged 12-13. No offender received a control

order and only one matter was dismissed. All other offenders received community-based orders.

- Of the 20 offenders who committed aggravated sexual assault, again aggravated by the fact that the victim was aged under 16, 19 offenders had no prior convictions. Fourteen offenders were aged 12-15, five were aged 16-17 and one was aged 10-11. Only two offenders received a control order of 3 months or less. Two matters were dismissed and the rest of the offenders received community-based orders.

As the statistics summarised above demonstrate, juvenile sexual offending is far less common than is perceived by the public. The statistics also indicate that the most common sexual offences are of the less serious kind, with indecent assault and aggravated indecent assault (victim under 16) far outnumbering any other sexual offences.

Juvenile sex offenders are not specialised offenders and if they do re-offend, they are more likely to subsequently commit a non-sexual rather than a sexual offence. As the statistics indicate a significant majority of juvenile sex offenders dealt with by the Children's Court had no prior convictions.

It is interesting to note that the most serious offence of sexual intercourse with a child aged 14-16 was predominantly committed by offenders aged 16-17. Although the Judicial Commission had no data regarding the circumstances in which these offences were committed, the experience of some members of the Court suggests that a portion of these offences are likely to involve consensual sex by children who are below the legal age of consent.

The statistics also indicate that between 2005 and 2009 a very small proportion of juvenile sex offenders received custodial sentences and the ones who did, received short sentences, with the longest being 13 months.

Studies indicate that juvenile offenders usually commit offences of a sexual nature against one victim, and in a third of all cases their offending constitutes incest<sup>7</sup>. They therefore rarely engage in multiple-victim predatory-type behaviour.

The most common motivation behind sexual offending by juveniles appears to be poor conflict resolution. Nevertheless, the majority of cases do not involve coercion (physical or otherwise).<sup>8</sup>

On the other hand, members of the Court who are opposed to the amendments argue that sexual offences are significantly under-reported, partly due to the very fact that most victims of juvenile sex offenders are younger children who may not be aware that what has happened to them is wrong, or who are afraid to report it. As a result of this under-reporting, some members of the Court argue that the statistics are not a reliable guide to the nature and extent of juvenile sexual offending.

Further, according to these members of the Court, the dominance of less serious sexual offences may not truly represent the nature of sexual offending, but may be an outcome of the

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<sup>7</sup> Diana Kenny et al, "Offence and Clinical Characteristics of Australian Juvenile Sex Offenders" (2000)

<sup>7</sup> *Psychiatry, Psychology and Law* 212, 216.

<sup>8</sup> *Ibid.* 217.

prosecutor's decision to proceed with an offence which is easier to prove in the given circumstances.

Finally, some Children's Magistrates hold the view that the authorities are not eager to prosecute juveniles who engage in consensual sexual experimentation and that as a result, convictions recorded under s66C(3) may not reflect instances of underage consensual sexual intercourse but matters in which it is easier to prove an offence under that section rather than one in which the element of consent needs to be addressed (ie sexual assault – s611).

Overall, the Children's Court's experience with juvenile sex offenders does not support the assumption that all sexual offences are serious and that sexual offenders pose a greater risk to the society than other offenders. Sexual offences committed by juveniles who are prosecuted in the Children's Court occur in a wide variety of situations, however only a small fraction of these give rise to future concerns. Most juvenile sex offenders commit their crimes against only one person and have no prior convictions at the time when they are convicted in the Children's Court. Further, a very small number of juvenile sex offenders receive lengthy custodial sentences. As a result, had these offenders not been convicted of a sexual offence their convictions would be capable of becoming spent in the usual manner. In these circumstances, the Court is of the view that despite concerns about the level of reporting a juvenile offender who has committed a sexual offence should not be automatically precluded from the spent convictions scheme.

#### **Do the rates of recidivism among juvenile sex offenders warrant their exclusion from the spent convictions scheme?**

Sex offenders are often perceived as having very high rates of recidivism and therefore posing a significant threat to the society. Although the Attorney General did not specifically refer to this matter in his second reading speech, it is likely to have had an impact on the Parliament's decision to exclude sexual offences from the spent convictions scheme. A number of studies have examined the rates of recidivism among juvenile sex offenders as well as sex offenders generally.<sup>9</sup> These studies do not support the general perceptions regarding the criminal behaviour of juvenile sex offenders.

Recidivism rates among juvenile sex offenders largely follow the same pattern as those of adult sex offenders. Overall, the rate of sexual re-offending among juveniles is quite low, especially when compared to other types of offending<sup>10</sup>, ranging between less than 10 and at the highest 25 per cent. Juveniles who are convicted of a sexual offence and are first time offenders are also less likely to re-offend than other juvenile first time offenders.<sup>11</sup>

The studies do not support the argument that juvenile sex offenders (whether first time offenders or not) are likely to continue sexually offending in the future, and in fact demonstrate that juvenile sex offenders are far more likely to commit further non-sexual offences than ones of a sexual nature.<sup>12</sup> The results also demonstrate that the majority of juvenile sex offenders

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<sup>9</sup> See for example Dr Karen Gelb, Sentencing Advisory Council, *Recidivism of Sex Offenders: Research Paper* (2007); Michael Cain, Department of Juvenile Justice, *Recidivism of Juvenile Offenders in New South Wales*, (1996), Ian Nisbet, Peter Wilson and Stephen Smallbone, "A Prospective Longitudinal Study of Sexual Recidivism Among Adolescent Sex Offenders" (2004) 16 (3) *Sexual Abuse: A Journal of Research and Treatment*, 223.

<sup>10</sup> Nisbet et al, above n 9, 227.

<sup>11</sup> Cain, above n 9, 36.

<sup>12</sup> Nisbet et al, above n 9, 230.

who commit crimes against younger children are not early onset paedophiles despite the fact that they have acted on sexual urges or fantasies about sexual contact with children<sup>13</sup>.

Nevertheless, as already foreshadowed, some members of the Court are of the view that recidivism studies are often conducted over time spans which are too short to produce valid data. In addition, the problem of under-reporting further affects the reliability of recidivism studies among both juvenile and adult sex offenders.

In light of the information currently available, which appears to demonstrate that the rates of recidivism among juvenile sex offenders are not higher than those of other juvenile offenders, there seems to be no basis upon which these offenders should be singled out as posing a greater danger to the society, and excluded from the operation of the spent convictions scheme.

### **In what circumstances are a person's prior convictions disclosed?**

The NSW Police provide a National Criminal History Record Check (NCHRC) for the purposes of:

- Paid employment;
- Some occupational licensing purposes;
- Volunteers in aged care facilities;
- Visa applications;
- Adoption.

NSW Police does not however provide NCHRC for security industry licensing, firearms licensing, Australian permanent residency purposes, insurance claims or child related employment (as this is managed by the NSW Commission for Children and Young People).

### **What is the impact of past sexual offence convictions on rehabilitation and re-offending?**

Given the range of circumstances in which a person's prior convictions may be disclosed, the complete exclusion of sexual offence convictions from the operation of the *Criminal Records Act* has a serious impact on juvenile offenders' private lives. Since these convictions can never become spent, the offenders may be required to disclose their convictions when seeking employment, admission to some educational courses, insurance or credit, in the course of which they are exposed to considerable prejudice. If employers or service providers act upon these prejudices, the young person's efforts at rehabilitation may be significantly compromised. Given that juvenile offenders often come from disadvantaged backgrounds, these additional prejudices may have a devastating effect on the young offender's future.

It is well known that employment, training and education can have a significant impact on an offender's rehabilitation, reintegration into the society and future recidivism. Those offenders who secure employment or embark upon further studies have much lower rates of recidivism than those who fail to establish some form of stability in their lives. In light of these findings, instead of supporting their rehabilitation and abstinence from a life of crime, the current spent convictions scheme creates obstacles for young offenders who are trying to turn their lives around.

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<sup>13</sup> Nisbet et al, above n 9, 231.



The extent to which the disclosure of prior convictions may affect an offender's future is evident from the reliance our society places upon criminal records. According to Naylor et al

"In recent years there has been an exponential increase in the disclosure of criminal history information throughout the world. In Australia, requests to CrimTrac, the national criminal record agency, increased 35 per cent from 1.7 million in 2005-06 to 2.3 million in 2006-07...Over a longer period the increases are more startling...requests to CrimTrac have increased more than sevenfold since 2000.<sup>14</sup>"

In addition, various tertiary courses demand criminal record certificates before an application will even be considered<sup>15</sup>. In many instances a person's criminal history will have very little relevance to the nature of the employment position or training and education, yet will often result in the applicant's rejection or subsequent dismissal. The degree of employment discrimination on the basis of a person's criminal record is so widespread that it accounted for the greatest proportion of all complaints received by the Human Rights and Equal Opportunity Commission, namely 34 per cent<sup>16</sup>. Studies have also found that past offenders are less likely to obtain employment than people with chronic illnesses, disabilities or communication difficulties<sup>17</sup>.

Children's Magistrates who support the amendments agree that the current legislative framework seriously jeopardises a juvenile offender's future education and employment prospects and inhibits their rehabilitation and reintegration into the society. As a result, the present spent convictions scheme may foster further offending and expose rather than protect the society from future risks of harm.

### **Conclusion:**

Although the Children's Magistrates do not hold a unanimous view regarding the need for the proposed legislative amendments, members of the Court have reached a compromise position in the event that the amendments are made.

Juvenile sex offences which are prosecuted and finalised in the Children's Court, should not be expressly excluded from the spent convictions scheme. While the view of one magistrate is that where no application is made on behalf of the Crown, the conviction should only be capable of becoming spent after a conviction free period of ten years, the rest of the Court is of the view that in these circumstances the conviction should be spent after the customary three year conviction free period. If an application against spending a conviction is made, a Children's Court Magistrate should be empowered to hear and determine the application. An appeal from the magistrate's decision will lie with the District Court.

Sincerely

Mark Marien SC  
**President**  
Children's Court of New South Wales

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<sup>14</sup> Bronwyn Naylor, Moira Paterson and Marilyn Pittard, "In the shadow of a criminal record: proposing a just model of criminal record employment checks" (2008) 32 *Melbourne University Law Review* 171, 172.

<sup>15</sup> Naylor et al above n 14, 189.

<sup>16</sup> Human Rights and Equal Opportunity Commission, *Annual Report 2006-07* (2007) 63.

<sup>17</sup> Naylor et al above n 14, 187.