Submission
No 13

INQUIRY INTO SPENT CONVICTIONS FOR JUVENILE OFFENDERS

Organisation: Youth Justice Coalition

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

By email: lawandjustice@parliament.nsw.gov.au

Dear Director,

The Youth Justice Coalition's Submission to the Inquiry into spent convictions for juvenile sex offenders

The Youth Justice Coalition (**YJC**) thanks the NSW Legislative Council Standing Committee on Law and Justice for the opportunity to provide a submission to the Inquiry into spent convictions for juvenile sex offenders.

The YJC notes that although the terms of reference for the Inquiry and the Discussion Paper included sex offences committed by adults, the YJC has chosen to confine its' submission to sex offences committed by juveniles.

Please find attached our submission to the Inquiry. We look forward to your comments. In the meantime, should you have any questions, please do not hesitate to contact Katrina Wong, Convenor of the Youth Justice Coalition on 9559 2899 or at Katrina_Wong@clc.net.au

Yours faithfully

Katrina Wong
Convenor, Youth Justice Coalition

Submission

to the

NSW Legislative Council's Standing Committee On Law and Justice

Inquiry into spent convictions for juvenile sex offenders

By

YJC Youth Justice Coalition

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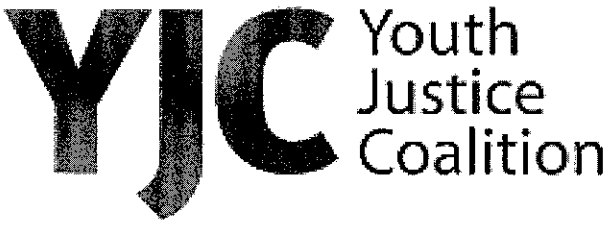
11 February 2010



About the Youth Justice Coalition

The Youth Justice Coalition (YJC) is a network of youth workers, children's lawyers, policy workers and academics working to promote the rights of children and young people in New South Wales.

The YJC aims are to to promote appropriate and effective initiatives in areas of law affecting children and young people; and to ensure that children's and young people's views, interests and rights are taken into account in law reform and policy debate.

How the Youth Justice Coalition was formed

The YJC was formed in early 1987 under the auspices of NCOSS to work around the children's criminal, care and protection legislation introduced in that year. The YJC has been active since 1987 advocating for young people, particularly those involved in the criminal justice or welfare systems

Acknowledgements

The YJC wishes to acknowledge the invaluable contribution of Martin Barker in the preparation and writing of this submission.

Membership of the YJC

- Barnardos Belmore (incorporating the Reconnect program, Streetwork program and Post Release Options Program)
- Bondi Outreach Project
- Catholic Care Sydney
- Central Illawarra Youth Services
- Council of Social Service of New South Wales (NCOSS)
- Crime and Justice Research Network
- Dr Dorothy Bottrell, Lecturer and Convenor, University of Sydney Network for Childhood and Youth Research
- Elaine Fishwick
- Illawarra Legal Centre
- Inner West Community Development Organisation
- Liverpool Youth Accommodation Assistance Company
- Jenny Bargen – CHD partners
- Joanne Morrison, Youth Development Officer – Canterbury City Council
- Jodie Grundy (Community Project Officer (Youth) – Camden Council
- Macarthur Legal Centre
- Marrickville Legal Centre
- Marrickville Youth Interagency
- Marrickville Youth Resource Centre
- National Children's and Youth Law Centre
- Professor Chris Cunneen, NewSouth Global Chair in Criminology, Faculty of Law, University of New South Wales
- Public Interest Advocacy Centre
- Redfern Legal Centre
- Rosemount Youth and Family Services
- Shire Wide Youth Services
- Shopfront Youth Legal Centre
- South Sydney Youth Services
- The Crossing, Mission Australia
- Uniting Care Burnside
- Western NSW Community Legal Centre
- Youth Accommodation Association (YAA)
- Youth Action and Policy Association (YAPA)

Recommendations

1. That Model B as proposed in the Discussion Paper be adopted by the Standing Committee on Law and Justice, allowing eligible sex offences committed by juveniles to be spent.
2. That an eligible sex offence committed by a juvenile be automatically spent after a period of 3 years.
3. That the *Crimes Act 1900* (NSW) be amended to allow consent as a defence to a charge of sexual intercourse with a child under the age of16, where the accused is not more than 2 years older than the child.

BACKGROUND TO THE SUBMISSION

The current spent convictions regime in New South Wales

The current spent convictions regime in New South Wales attempts to strike a balance between competing aspects of the public interest. On one side, the importance of protecting the community from possible harm requires that persons who have committed serious crimes disclose those convictions. On the other side, the importance of rehabilitation and social cohesion requires that those who have committed crimes, but who have served their punishment, be given the opportunity to reintegrate into society without the stigma of a criminal record.

Until now, the policy of the NSW Government has been that persons convicted of sex offences pose a high level of risk to the community and should therefore be permanently obliged to disclose their conviction. However, it is the submission of the YJC that this approach, when applied to juvenile sex offenders, is not based on compelling reasoning or evidence and does not give sufficient weight to the principles of juvenile justice.

The starting point in discussing spent convictions for juvenile sex offenders must be an examination of the purposes for which a person's criminal history is used and the impact that this may have on their life

Criminal record checks in Australia

The last 20 years in Australia have seen a marked increase in the number of requests for criminal record checks. The Australian Federal Police processed more than 600,000 requests for criminal record checks in 2006-07, a 700% percent increase from 1997[1]. The Victorian Police in 1992-93 received 3459 requests for a person's criminal history, while in 2006-07 they received 467,878[2].

This remarkable increase is explained by the frequent use of criminal record checks in the employment process. An applicant for a job is asked by their prospective employer to provide their criminal history or consent to a criminal record check. While such a process is technically voluntary it is not a requirement a job applicant can realistically refuse.

Bronwyn Naylor in her article *"In the Shadow of a Criminal Conviction: Proposing a Just Model of Criminal Employment Checks"* suggests that there

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[1] Australian Federal Police, Annual Report 2006-07 (2007) 106

[2] Bronwyn Naylor, Moira Paterson, Marilyn Pittard, *In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks* (2008) MULR 6

are three factors that encourage employers to ask job applicants about their criminal history[3].

Firstly, at common law there is no restriction on an employer's right to take a person's criminal history into account when deciding whether to employ that person or not. While anti-discrimination laws in some jurisdictions may curtail the use to which an employer can put their knowledge of a person's criminal history, the *Anti-Discrimination Act 1977* (NSW) does not include criminal history as a grounds of possible discrimination. [4] In no jurisdiction is a job applicant afforded a protection equivalent to an employee's protection from dismissal for an unfair or irrelevant reason.

Secondly, there are legal principles that encourage employers to take a person's criminal history into account when deciding whether or not to employ them. Employers have a duty to their employees to provide a safe workplace and engaging a person without first determining whether they pose a potential risk to other employees may be negligent or a breach of contract[5]. Further, an employer can be held vicariously liable for the actions of their employees, including acts of fraud or dishonesty. Employers may wish to protect themselves from exposure such liability, by attempting to exclude those applicants who have a history of fraud or dishonesty offences.

Finally, there are laws in New South Wales and other jurisdictions that mandatorily require employers to obtain a person's criminal history in some circumstances.[6] Applicants for positions involving working with children, such as teachers, must provide their criminal history to their prospective employer.[7] In most cases the existence of a relevant offence, regardless of its seriousness, will automatically exclude the applicant.

Social impact of disclosing a criminal record

Given the widespread use of criminal histories in the employment process, it is important to examine the impact on a person of having to declare a criminal conviction.

Recent studies have shown that 60% of ex-offenders are refused employment because of their criminal history.[8] Discrimination on the basis of a person's criminal history is the largest category of complaint to the Australian Human

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[3] Ibid at 174
[4] *Anti-Discrimination Act 1977* (NSW)
[5] Naylor, above n 2 at 175
[6] See for instance, section 33D *Commission for Children and Young People Act 1998* (NSW)
[7] Section 33D of the *Commission for Children and Young People Act 1998* (NSW)
[8] Naylor, above n 2 at 186

Rights Commission (**AHRC**), at 36 percent.[9] A person who has a criminal record is often regarded by employers as "*undesirable, outside the employers experience and alien*".[10] It is also significant that ex-offenders are less likely to be able to obtain employment than people with chronic illness, physical disability or communication difficulties[11].

The discussion above demonstrates that disclosing a criminal history can have a very significant impact on a person's employment prospects. Not being able to obtain employment places the person at risk of social disadvantage, homelessness and of developing mental or physical health problems.

Reasons for compelling disclosure of criminal record

The use of a person's criminal history and its impact on their life is highly relevant to the discussion of spent convictions for juvenile sex offenders. Given the increasing demand for disclosure of a person's criminal history as a pre-condition to employment; the detrimental effect of having a criminal record on a person's chances of obtaining employment; and the importance of obtaining employment to prevent recidivism, there must be compelling reasons for forcing a person to disclose a conviction when asked.

In the case of a person who has committed a serious criminal offence, such compelling reasons exist. The severity of the crime as indicated by the length of sentence imposed, requires that the community be warned of the risk that the person may pose to their safety. However, in the case of sex offences committed by juveniles it is not clear that such reasons exist.

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[9] Ibid at 187
[10] Ibid at 187
[11] Ibid at 187

SUBMISSION OF THE YOUTH JUSTICE COALITION

PRINCIPLES OF JUVENILE JUSTICE

It is a well-recognised concept internationally and in Australia that young people, because of their age and lack of emotional and developmental maturity, are entitled to special protections in dealing with the criminal justice system. The notion of developing maturity is as much a social concept as it is a legal concept. It has been recognised by the legal system through the development of specialised institutions (such as the Children's Court) and processes for dealing with young offenders. Traditional approaches to dealing with offenders have been shown to be ineffective when dealing with young people and can even facilitate a further downward spiral into crime:

"...Should one legal process fail to address the underlying problems, contact with that process may increase the risk for some children that they will have further, and increasingly adverse, contact with other parts of the legal system." [12]

This has accordingly led to a different approach to dealing with young offenders, involving the examination of the structural causes of juvenile crime with an emphasis of the fundamental principles of rehabilitation and reintegration. These principles currently underpin the juvenile justice system in NSW and are outlined in the Green Paper (1993). Discussion regarding spent convictions for juvenile sex offenders must take these principles into account:

- Prevention, diversion and reintegration should be the primary focus of juvenile justice policy; Victims of crime should be given the opportunity to actively participate, where appropriate, in the juvenile justice system
- Children and adolescents should be treated differently and separately from adults according to their developmental needs;
- The community accept responsibility for the support of juveniles and provide positive opportunities to enable them to become valuable community members;
- Where possible, young offenders should be dealt with in their communities in order to reintegrate them and to sustain and enhance family and community ties. [13]

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[12] Australian Law Reform Commission Report 84: Seen and Heard: priority for children in the legal process"; 1997 at 4.35

[13] Justice Advisory Council of New South Wales (1993). Future Directions for Juvenile Justice in New South Wales - 'Green Paper' Justice Advisory Council of New South Wales: Sydney

Research on the psychological immaturity of children clearly shows a relationship between age and deviance and suggests that young people who have engaged in offending at a young age may not continue to do so. Reversion from deviant to mainstream identities is the norm with progressing age[14]. This reinforces the need to provide young people with further opportunities to assume productive roles in society without continually being reminded that they are "bad people". The current spent convictions regime in NSW unfairly disadvantages young sex offenders and their future prospects of meaningful rehabilitation.

[14] Braithwaite J; Mugford S; *"Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders"*; Spring 1994 *British Journal of Criminology* Vol 34 No 2; 139 -171 at 152

CONFLICT BETWEEN THE NSW SPENT CONVICTIONS REGIME AND THE PRINCIPLES OF JUVENILE JUSTICE

Undermining the possibility of rehabilitation

The 2002 report "*Reducing Reoffending by Ex-prisoners*" produced by the Social Exclusion Unit in the United Kingdom found that accommodation and employment were the key factors in reducing recidivism[15]. Obtaining stable employment provides an offender with money and an occupation as well increasing their chances of integrating back into society. However, as has been discussed above, having to declare a criminal record has a very significant impact on a person's chances of finding employment.

Under the current spent convictions regime, a young person convicted of a sex offence will have to disclose that conviction for their whole life. This will make it harder for them to obtain employment, stigmatise them in the community and increase the likelihood that they will return to the criminal justice system. This undermines the rehabilitative aims of juvenile justice.

Not a realistic indicator of risk

While it is clear that the permanent recording of a sex offence in a young person's criminal history undermines the principle of rehabilitation in juvenile justice, it may be argued that the potential risk that such offenders pose justifies this approach.

However, recent research has indicated that very few juvenile sex offenders go on to commit further sex offences. A 2003 study, "*Recidivism Among Male Juvenile Sex Offenders in Western Australia*", examined the pattern of reoffending amongst a group of juvenile sex offenders. The study found that only 9.5 percent of offenders committed a further sex offence.[16] The study also included a literature review that discussed a 1997 study by Broadhurst and Loh showing a recidivism rate of only 6.8 percent.[17] These findings challenge the policy of protecting the community by forcing juvenile sex offenders to permanently declare their conviction. The findings suggest that such a policy may not be based on sound empirical evidence.

In addition, the 2003 study reported that young people convicted of a sex offence were likely to commit another crime in the future (67.9%), but that crime was most likely to be a property offence (39% of recorded

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[15] Social Exclusion Unit, Office of the Prime Minister (UK), *Reducing Reoffending by Ex-prisoners* (2002) qtd in Nalor, above n 2 at 184

[16] Alfred Allan, Maria Allan, Peter Marshall, Katalin Kraszlan, *Recidivism Among Male Juvenile Sex Offenders in Western Australia* (2003) 2 PPL 359 at 366

[17] Ibid at 361

convictions).[18] This highlights the vulnerability of young people who do commit such offences, and provides further evidence that early intervention and support programs are required to divert them away from the criminal justice system. This is in stark contrast to the current spent convictions regime, which further marginalizes and stigmatises young people who commit sex offences.

Declaring a criminal history is a double punishment

The social impact on a young person of having to declare a conviction for a sex offence is in effect a double punishment. The court, in determining the severity of the sentence to be imposed, makes a decision about what punishment is appropriate in the circumstances of that particular offence. However, having served that sentence, a juvenile sex offender then has to suffer the additional punishment of reduced employment opportunities and increased social marginalisation.

The principles of juvenile justice require that a young person receive a lesser sentence than an adult on account of their reduced level of development and their good prospects of rehabilitation. In contrast, the current spent convictions regime as applied to juvenile sex offenders punishes young people to a similar or greater extent than equivalent adult offenders.

Young people convicted of sex offences are more likely to have experienced abuse or disadvantage

There is a large body of research indicating that a young person who commits a sex offence is likely to have been the victim of previous sexual abuse. The 2001 study, *Child Sexual Abuse: Offender Characteristics and Modus Operandi*, reported that at least 55% of young people convicted of a sex offence had experienced at least one episode of sexual abuse as a child.[19]

This finding is supported by a 2008 literature review undertaken by Dr Wendy O'Brien and published by the Australian Crime Commission. The review, *Problem Sexual Behaviour In Childhood: A Review of the Literature*, included an examination of two studies showing previous sexual abuse as a risk factor associated with young sex offenders.[20]

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[18] Ibid at 367
[19] Stephen Smallbone & Richard Wortley, *Child Sexual Abuse: Offender Characteristics and Modus Operandi* (2001) 193 Trends and Issues in Crime and Criminal Justice 1, 3
[20] Wendy O'Brien, *Problem Sexual Behaviour In Childhood: A Review of the Literature* (2008) Australian Crime Commission

The first of these studies, conducted by Veneziano and Veneziano in 2000, concluded that there was a clear link between prior physical victimisation and sexual offending by young people.[21] They stated that:

"*early developmental trauma and familial dysfunction appear to be more common and severe in the histories of youths with sexual behaviour problems than in those of adult sex offenders*"[22]

Dr O'Brien found that this conclusion was supported by Lovell, who reported that sexual abuse was a factor frequently present in the histories of young sex offenders.[23] Lovell also found that young offenders were more likely to have experienced family instability, disorganisation and violence.[24]

There is a large body of evidence supporting the conclusion that a young person's early experiences are a key risk factor for sex offending. Dr O'Brien quotes child protection specialist Dr Freda Briggs, who states:

"When a child abuses others, enquires should be made as to how the abuser learned what to do. It is possible that behaviour was learned from personal experience (as a victim) or from pornography."[25]

Research conducted by Vimpani in 2002 for the Australian Institute of Family Studies also supports this view. The study found that a young person's social environment was critical in determining their wellbeing and developmental health.[26]

The conclusion of Dr O'Brien's review is that responses to sex offences committed by young people should also be at a systemic level, rather than only at an individual level. This conclusion reflects the principles of juvenile justice outlined above. It emphasises the importance of addressing the circumstances that contribute to youth sex offending, instead of merely punishing the young person for their crime.

Not allowing sex offences to become spent is a policy directed at the individual criminality of the young person. It emphasises the risk that they allegedly pose to the community and does not address the systemic reasons

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[21] J Grant, D Indermaur, J Thornton, G Stevens, C Chamarette & A Halse *Intrafamilial Adolescent Sex Offenders: Pyschological Profile and Treatment* (2009) Australian Institute of Criminology, 2

[22] Veneziano & Veneziano qtd in Wendy O'Brien, *Risk Factors and Correlatives to Problem Sexual Behaviour in Childhood: A Review of the Literature* (2008) Australian Crime Commission at 13

[23] Lovell qtd in O'Brien, above n 19 at 13

[24] Ibid at 13

[25] O'Brien, above n 19, at 14

[26] Vipani qtd in O'Brien, above n 19 at 14

for their offending. In fact, the impact of having to declare their conviction can only exacerbate the systemic disadvantages that contributed to their offending in the first place.

Case Study 1 – Fred, aged 18

Fred is an 18 year-old indigenous man. As a child he was the victim of serious and ongoing sexual abuse from an undisclosed perpetrator. From a young age he moved around living with various relatives because of abuse and neglect by his parents. The trauma of his childhood experiences pushed Fred to drink heavily.

At age 18, Fred approached his youth worker and disclosed that when he was 14 he, on a single occasion, touched a younger cousin (10 years old at the time) in a sexual and non-consensual manner. Fred was feeling extremely guilty about what he had done and was concerned that the might be brought to the attention of the police. Despite being advised of the potential legal ramifications, Fred went to the police and made a full statement about the incident. He was charged with sexual intercourse – child between the age of 10 and 16 and was released on bail. He then voluntarily undertook sex offender counselling, gave up drinking and made positive steps to improve his job prospects.

Rural, remote and regional offenders are disproportionately disadvantaged

The impact of the having to permanently declare a juvenile sex offence is greater for those living in rural, remote and regional areas. There are fewer opportunities for employment and also fewer organisations to support young people in their rehabilitation and reintegration into the community. The negative effects of having to declare a conviction for a sex offence may also be increased in a rural community. This is because of smaller populations and tight-knit social networks, where the impact of labelling and stigmatisation can affect the young person's psychological wellbeing and that of their family.

CONSENSUAL SEXUAL ACTIVITY BETWEEN YOUNG PEOPLE

Criminal offences involving consensual sexual activity

The criminal law in NSW does not recognise the possibility of lawful consensual sexual activity involving a person under the age of 16. Sections 66C and 66D of the *Crimes Act 1900* (NSW) make it a crime to have, or attempt to have, sexual intercourse with a person under the age of 16.[27] While section 61HA deals with consent in relation to sexual assault, it does not apply to section 66C and 66D. Therefore, it is not possible for a person under the age of 16 to consent to sexual intercourse, regardless of the age of the alleged offender.

The law in other Australian jurisdictions

The reality that young people are engaging in sexual activity with other young people has been recognised in other Australian criminal jurisdictions. In Victoria section 45 (4) (b) of the *Crimes Act 1958* (VIC) provides that consent is a defence to a charge of sexual penetration of a child under the age of 16, if the accused was less than 2 years older than the child. All other State and Territory jurisdictions have similar provisions except the Northern Territory.

Sexual activity between young people

It is the submission of the YJC that NSW criminal law does not reflect the current reality of consensual sexual activity between young people in Australia.

It is difficult to get comprehensive picture of sexual activity amongst young people under the age of 16, as there is no recent research in Australia specifically examining their sexual behaviour. However, a 2008 study by the Australian Centre in Sex, Health and Society found that 27.4 percent of Year 10 students in Australia reported having had sexual intercourse.[28] A further 33 percent of Year 10 students reported having had oral sex, an act sufficient to constitute sexual intercourse for the purposes of the *Crimes Act 1900* (NSW)[29]. The study also found that 29.7 percent of Year 10 students' most

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[27] Section 66C of the *Crimes Act 1900* (NSW) prohibits sexual intercourse – child between 10 and 16. Section 66D prohibits attempting, or assaulting with intent, to have sexual intercourse – child between 10 and 16.

[28] Anthony Smith, *Secondary Students and Sexual Health: Results of the 4th National Survey of Australian Secondary Students, HIV/AIDS and Sexual Health* (2008) Australian Research Centre in Sex, Health and Society at 26. The typical age range for young people in Year 10 is 14-16 depending on the State or Territory in which they attend school.

[29] Ibid at 26

recent sexual partner was under the age of 16, while 49.6 percent were aged between 16 and 17[30]. While not conclusive, this study supports the anecdotal evidence of enquires made to the National Children's and Youth Law Centre (NCYLC). These enquires (presented as case studies below) indicate that young people under the age of 16 are engaging in sexual activity with other young people, despite such activity being against the law.

Case Study 2 – Steph, aged 18

"I was wondering what the laws and penalties are surrounding underage sex. A friend at 15 was having sex with her 20 year old boyfriend. 3 years later they are still together. Could he get in trouble for having sex with her at 15 and if so would he be charged the same as if a 45 year old man was having sex with a 14 year old family friend?"

The far-reaching consequences of criminalising such consensual sexual activity is demonstrated in the below case study.

Case Study 3 – Karen (aged 14) and Adam (aged 15)

Karen started going out with her boyfriend Adam when she was 14 and he was 15. Just after Karen's 16th birthday, their child Jay was born. Karen did not put Adam's name on the birth certificate, for fear that he would "get into trouble" for having sex with her while she was under-age.

Even though Adam was very much involved in Jay's life, he had no legal status as Jay's parent. This meant, for example, that he was unable to consent to medical treatment on Jay's behalf. This was a hassle because Karen was working full-time and Adam was Jay's primary carer.

When Jay was 2, Adam and Karen broke up. Karen moved out, taking Jay with her, and wouldn't let Adam see Jay. Adam was very distressed, because he had been Jay's main carer for nearly 2 years. However he was reluctant to go to court seeking contact orders because this might involve admitting to a sexual relationship with Karen when she was under-age.

A barrier to accessing sexual health services

The criminalisation of consensual sexual activity between young people also makes it harder for young people to access sexual health services. Young people under the age of 16 who are involved in a sexual relationship may be

[30] Ibid at 34

in need of professional advice and support regarding contraception, pregnancy or sexually transmitted infections. However, they may be unable to seek help because of concerns about exposing themselves or their partner to criminal charges. Many young people are aware at least in general terms, of mandatory reporting requirements for health care professionals and this may increase their reluctance to seek assistance. This is highlighted in the following case studies:

Case Study 4 – Bill, aged 16

"My girlfriend & I are havin (sic) sex, She is age 15 & will be 16 early next year. I'm 16. My girlfriend has asked me to help her 2 (sic) get on the pill without her parents knowin (sic)...My mum is worried that may get in trouble with the law if she help. Mum thinks it's good idea for her 2 (sic) get on the pill because she doesn't want us have a baby at young age. Is my girlfriend allow[ed] to get on the pill at her age without her parents knowin (sic)? and can we see the doctor at our age and get the pill without her parent (sic)? "

Case Study 5 – Lisa, aged 15

Lisa is a 15 year-old girl and is in a consensual sexual relationship with her 17 year-old boyfriend. The young woman is connected with various government and community organisations and they are aware of her relationship with the young man. The young woman refuses to use health services connected to her accommodation service despite ongoing encouragement to do so. She won't give a reason for her refusal to use the various health services despite being informed it would be confidential and safe. [31]

Conflict of interest for professionals assisting young people

Section 27 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) compels professionals working with young people to inform DoCS if a young person is at risk of significant harm[32]. These mandatory reporting requirements can create conflicts of interest for professionals assisting young people who are sexually active.

The statutory definition of a young person "at risk of significant harm" includes those who have been, or are at risk of being, sexually abused, regardless of consent[33]. In this legislative context, a young person under the age of 16

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[31] Case study provided by the Children's Court Assistance Scheme

[32] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 27

[33] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23 (1) (c)

who is engaged in a sexual activity is deemed to be at risk of significant harm and must be reported, despite the sexual acts being consensual. Therefore, a professional who, in the course of assisting a young person under the age of 16, learns that the young person is involved in consensual sexual activity must make a report to DoCS. The impact of that report on the young person can be significant. They may no longer be able to contact the other young person, they may not be able to access services (such crisis refuges or health services) currently assisting the other person, or they may even be taken into care.

The potential conflict of interest for the professional is even more serious when they are assisting a young person over the age of 16 who is engaged in consensual sexual activity with a young person under 16. The professional would again be obliged to report the matter to DoCS, with potentially catastrophic consequences for the young person. They may be charged with a serious sex offence, be placed on the sex offenders register and face imprisonment or other sanctions.

The criminalisation of consensual sexual activity between young people creates situations in which they may be reluctant to disclose information about their sexual behaviour to professionals who are assisting them. Professionals may also be less likely to question young people about their relationships, applying a "don't ask, don't tell" policy to avoid potential conflicts of interest. This can only have a negative impact on young people and raises barriers to their access to counselling, medical and relationship advice. It also increases the chances that they will engage in sexual activity in circumstances in which there is real danger of abuse or physical harm.

Sexual health education in NSW

The reality that young people under the age of 16 are having consensual sex is also recognised by NSW Government and community organisations. The NSW Board of Studies mandates that all NSW schools provide information on sexual health to young people in Years 7 -10[34]. Youth services also give advice and support on sexual health to young people under the age of 16 whom they are assisting.

Young people are being taught about safe sex, contraception etc before they reach the age of consent. This acknowledges that regardless of legislative policy, some young people are engaging in sexual activity and that it is important that they can readily obtain accurate information and assistance.

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[34] NSW Board of Studies, *Years 7 -10: Syllabus Course Descriptions* (2007) at 28

Consequences of the current spent convictions regime

A conviction for a sex offence can have a potentially devastating effect on that young person's life. The sex offence can never be spent and the young person will have to permanently disclose their conviction for having sexual intercourse with a person under the age of sixteen, regardless of the penalty imposed. Potential employers are not likely to enquire into the circumstances of a conviction for statutory rape, instead choosing not to take the risk of employing the young person. The young person will also be automatically excluded from a wide range of professions, including those involving working with children[35]. It is a matter of great concern to the YJC that such consequences could potentially arise from a consensual act that is legal in the majority of Australian jurisdictions.

Age of consent laws should be amended

The YJC strongly recommends that the NSW Government review the current legislative approach to consensual sexual activity between young people. The NSW *Crimes Act 1900* (NSW) should be amended to allow consent as a defence to a charge of sexual intercourse with a child aged 10 -16, where the accused is less than two years older than the child.

Given that the NSW Government has not publicised any plans to amend the *Crimes Act 1900* (NSW) in the above terms, it is vitally important that the spent convictions regime be adapted to reflect the reality of life for young people in Australia.

Recommendation 1

That the *Crimes Act 1900* (NSW) be amended to allow consent as a defence to a charge of sexual intercourse with a child under the age of 16, where the accused is not more than 2 years older than the child.

[35] Section 33B *Commission for Children and Young People Act 1998* (NSW)

PROPOSED MODELS OF REFORM

The Discussion Paper proposed three separate models for dealing with sex offences committed by juveniles

Model A –Convictions for sex offences should not be capable of being spent

The YJC does not support the adoption of Model A as proposed in the Discussion Paper. Model A would maintain the status quo and would not address the concerns raised in this submission.

Model B – Convictions for sex offences should be capable of being spent

The YJC recommends that Model B, as proposed in the Discussion Paper be adopted by the Standing Committee on Law and Justice.

This recommendation is based on the analysis of the current spent convictions regime above and the additional reasons discussed below.

Promoting rehabilitation

Allowing a young person not to disclose a conviction for a sex offence punished by less than six months imprisonment would be an important step in recognising the importance of juvenile justice principles. Most significantly, it would promote the rehabilitation of the young person.

It would give the young person a second chance and would reduce the stigma and social disadvantage that would otherwise result from having to declare their criminal history. The young person would not have to declare the conviction after three years if they did not commit any further offences during that time. On entering the workforce at the age of 22 or 23, a young person who had committed a minor sex offence while under 18 would no longer have to admit the conviction to a potential employer. This would increase their chances of employment and, as discussed above, reduce the likelihood that they will return to the criminal justice system.

Serious offences must still be declared

Bringing sex offences into line with other offences committed under the spent convictions regime would not increase the risk of harm to the community. As noted above, few juvenile sex offenders go on to commit further sexual offences. In addition, it would only be sex offences that were punished by less than 6 months imprisonment that would be capable of becoming spent. A young person who had committed a serious sex crime would not be able to take advantage of the spent convictions regime and would always have to

disclose their conviction. This gives sufficient weight to the public interest in reducing the potential risk to the community posed by people who have committed serious crimes.

Striking a balance

Adopting Model B would strike an appropriate balance between the competing public interests that the spent convictions regime aims to advance. Compelling young people who commit serious sex offences to disclose their conviction reduces the risk to the community. However, the principles of rehabilitation and juvenile justice are also promoted by allowing juveniles who have been convicted of minor sexual offences to avoid the discrimination and stigma that would otherwise result from having to disclose a criminal record.

Recommendation 2

That Model B as proposed in the Discussion Paper be adopted by the Standing Committee on Law and Justice

Model C – Convictions for sex offences should only be capable of being spent in limited circumstances

The YJC does not recommend that Model C as proposed in the Discussion Paper be adopted by the Standing Committee. Model C would amend the current spent convictions regime to make sex offences capable of being spent only in limited circumstances.

Each of the circumstances raised in the Discussion Paper are addressed below.

Where there was a finding of fact that the sex was consensual

The YJC supports any change to the law that would make convictions for consensual sexual activity between juveniles capable of being spent.

However, limiting sex offences capable of being spent to only those involving consensual sexual activity does not sufficiently address the concerns with the current regime outlined above. While the impact of a conviction for unlawful consensual sexual activity is certainly an area of concern, it is not the only circumstance in which young people may commit sexual offences that should not appear permanently on their record. It is possible that a young person may commit a non-consensual sex offence in circumstances that do not warrant a permanent record. One example of this may be a conviction for child pornography, where a young person has taken photographs of a sexual

partner under the age of sixteen and then emailed that photo to a school friend.

Where the offences were minor sexual offences

Model C as proposed in the Discussion Paper suggests that the spent convictions regime could be amended to only allow convictions for "minor sexual offences" to become spent. This is defined by reference to the type of offence. An example provided in the Discussion Paper is the offence of obscene exposure, which could be classified as a minor sexual offence. Although allowing such a conviction to be spent would be a positive development, defining minor offence by reference to the type of offence is not, in the YJC's submission, the best approach.

An assessment of whether an offence is considered a "minor sexual offence" should be made on a case-by-case basis. All the circumstances of a particular matter should be taken into account, rather than fitting the offence into a pre-defined category. An example of this is consensual sexual activity between young people under the age of 16, which at law is a serious sexual offence. However, the circumstances surrounding the offence do not warrant categorizing it as a serious offence and do not justify a young person having a criminal conviction that is incapable of being spent.

Instead of defining sexual offences by reference to the type of offence committed, the YJC submits that it is the sentence imposed by the Judge or Magistrate that is the best indication of the seriousness of the offence. The sentence reflects a carefully considered judgement about the particular circumstances of that individual case. If a sentence of less than 6 months imprisonment is imposed, this indicates that the offence is not in the most serious category. It is in other words, a minor offence.

The YJC recommends that convictions for minor sex offences should be capable of becoming spent. However, a minor sex offence should not be defined by the type of offence committed, but should be based on the circumstances of each offence, as reflected in the sentence imposed by the court.

Where no conviction is recorded

Limiting sex offences capable of becoming spent to those for which no conviction has been recorded is too narrow an approach. It would not sufficiently address the concerns with the spent convictions regime discussed above. While sex offences for which no conviction has been recorded could certainly be considered minor, it is also possible that minor offences may be committed for which a bond or a term of imprisonment is imposed.

Under the current spent convictions regime, crimes punished by less than six months imprisonment are not considered sufficiently serious to warrant permanent disclosure. The YJC has not found any compelling evidence to support a policy of dealing with sex offences committed by juveniles differently to other crimes. In fact, as discussed above, the evidence shows that young people commit sex offences in a variety of circumstances, not all of which can be considered serious. The mere fact that some form of penalty has been imposed on a young person is not sufficient to establish that the crime was serious enough to justify the heavy burden of a permanent criminal record.

MECHANISM FOR SPENDING CONVICTIONS FOR SEXUAL OFFENCES

The Discussion Paper asked for submission on the mechanism by which sex offences should be spent. Two methods were proposed, both of which are discussed below.

Lapse of time

Allowing convictions to become spent through lapse of time is the option recommended by the YJC.

This would bring sex offences committed by young people into line with other juvenile offences dealt with by the spent convictions regime. This does not raise any issues of access to courts or legal assistance and still allows an appropriate period to pass in which the young person must not reoffend. This approach also has the advantage of requiring only minor amendments to the *Criminal Records Act 1991* (NSW).

Recommendation 3

That an eligible sex offence be automatically spent after a period of 3 years.

Application to a court

The Discussion Paper suggests that the Western Australian model for dealing with sex offences could be adopted. Under such a model, a person must apply to a court in order to have an appropriate sex offence spent. However, this approach raises a number of issues.

Firstly, people who have committed offences are more likely to be disadvantaged and as a consequence less able to access the court system. A person may not have sufficient financial resources to obtain legal representation or may not even know of the existence of the law allowing them to apply. In addition, the person may be exposed to publicity surrounding their application to the court and this would impose an additional punishment

The Discussion Paper also refers to the Model Spent Convictions Bill which requires the court to consider a number of factors in deciding whether to grant an application, including the seriousness and circumstances of the offence. However, it is the Judge or Magistrate who imposes the sentence who is best placed to take such factors into account. If the Judge or Magistrate makes a judgement that the crime is not serious enough to warrant more than 6

months imprisonment, then such a conviction should be capable of becoming spent without further review.

This approach would also require substantial new legislation applying only to sex offences and would continue the distinction between sexual and other offences.

The YJC does not recommend that the Standing Committee adopt court review as a mechanism of spending convictions. However, if the Standing Committee rejects Model B, the YJC would endorse a process of court review in preference to maintaining the status quo.

CONCLUSION

The current spent convictions regime in NSW does not strike the correct balance between protecting the community and rehabilitating juvenile offenders. The principles of juvenile justice emphasise the importance of giving young people the chance to rehabilitate and reintegrate into their community. In contrast, the current approach to spent convictions forces young people who may have been convicted of minor sex offences to disclose those convictions for the rest of their lives. This greatly reduces their chances of obtaining employment and their prospects of rehabilitation.

The *Criminal Records Act 1991* (NSW) should be amended to remove the exception for sex offences when committed by a young person. Bringing sex offences into line with other offences committed by young people still protects the community from possible harm, but increases the chances of a young person successfully reintegrating into their community.

Although not within the terms of reference of this inquiry, the YJC also wishes to make a strong recommendation that the age of consent laws in NSW be amended.