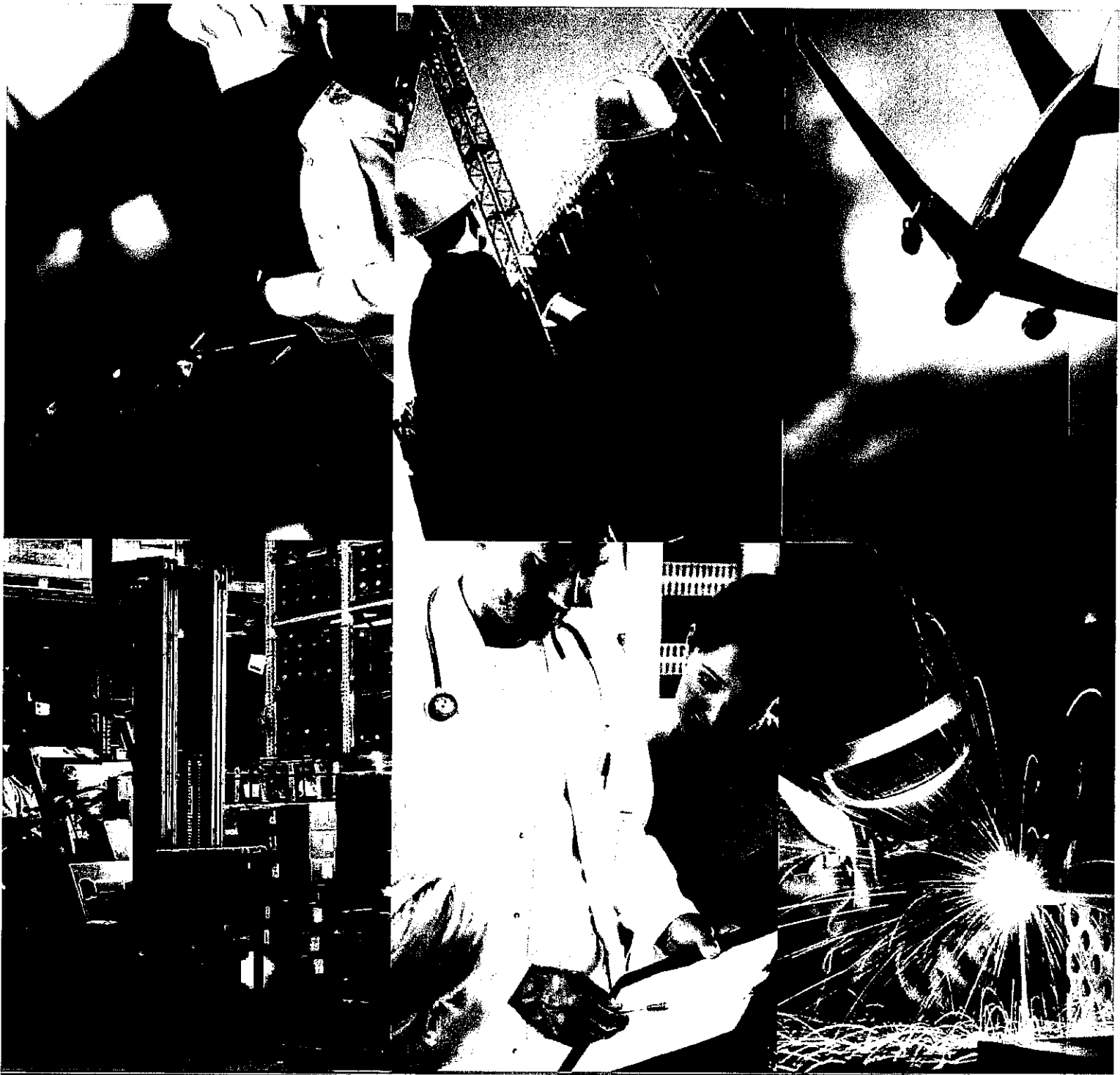


INQUIRY INTO SPENT CONVICTIONS FOR JUVENILE OFFENDERS

Organisation: Australian Federation of Employers and Industries

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SUBMISSION ON BEHALF OF THE AUSTRALIAN FEDERATION OF
EMPLOYERS AND INDUSTRIES (AFEI)

INQUIRY INTO SPENT CONVICTIONS FOR JUVENILE SEX OFFENDERS
TERMS OF REFERENCE

AFEI
Australian Federation of
Employers & Industries

Inquiry Into Spent Convictions for Juvenile Sex Offenders

Terms of Reference

1. The Standing Committee on Law and Justice inquiry into and report on:

Whether sex offenders convictions should be capable of being spent under the *Criminal Records Act 1991 (NSW)*, or should they only become spent in limited circumstances, for example where:

- (a) The offence was committed as a juvenile,
- (b) There was a finding of fact that the sex was consensual,
- (c) The offences were minor sex offences, or
- (d) No conviction was recorded

Overview

Spent Convictions

2. The inquiry will examine the circumstances under which a criminal conviction for sexual offences should be spent, that is, convictions for sexual offences or offences with a sexual connotation may be expunged by operation of amendments to legislation.
3. Sex offences can currently be disclosed to employers where there is a spent conviction. If the offence is by type a sex offence, it has, subject to the limitations discussed below, to be disclosed. It is not, like other criminal offences, a question of the degree of seriousness of the offence, where criminal

offences of any type attracting a prison sentence of more than six months have to be disclosed.

4. Sex offences under the *Crimes Act 1900 (NSW)* include sexual assault, indecent assault, sexual intercourse and acts of indecency with children and minors, incest and child prostitution and child pornography offences. A sex offence under the *Summary Offences Act 1998 (NSW)* is obscene exposure.
5. The inquiry will consider whether sex offender's convictions as an adult and as a juvenile should be spent and hence not disclosed.

The legislative framework for adults

6. Spent convictions carry the benefit of non-disclosure. If the conviction is spent, a convicted person does not have to disclose the conviction to anyone including his/her employer (*Criminal Records Act 1991 s. 12*). For adults, convictions are spent after 10 years, subject to the restrictions set out below.
7. Currently, sex offence convictions cannot be spent, so the non-disclosure rule does not operate. An employer can ask a person with a conviction for a sexual offence whether the person has been convicted of a sexual offence.
8. The disclosure of a conviction for a sexual offence is one of the two main examples of convictions that cannot become spent; the other is where the sentence was more than six months imprisonment.
9. Further, there are occupational exceptions to the non-disclosure rule. Disclosure is permitted if the occupation falls within one of the following identified occupations:

1. Law;
2. Policing;
3. Childcare; and
4. Fire fighting.

The legislative framework for juveniles

10. Under current law employers have very limited access to any employee's previous criminal record as a juvenile, whether for sex offences or otherwise. The employer has limited access to unrecorded convictions, recorded convictions and recorded convictions that become spent.
11. If a conviction for an offence (other than a sexual offence) was not recorded, the conviction would be spent straight away and so the employer would not obtain disclosure.
12. The Children's Court cannot record a conviction against a child under 16 (see: *Children (Criminal Proceedings) Act s.14 (1)*). This is despite the Court's power to impose a penalty. This means that the conviction is spent straight away and the employer would not obtain disclosure.
13. On the other hand, the employer can obtain limited disclosure at the discretion of the courts. The Children's Court has discretion to record a conviction against a child, aged 16 or more. Likewise, the Supreme and District Court may record a conviction against a child of any age.
14. Currently, the factors that the court in the exercise of its discretion might take into account in recording a conviction include:
 - The child's age;
 - The child's mental health or intellectual capacity;

- The seriousness or otherwise of the offence;
 - The particular circumstances of the offence e.g. others may have been more to blame.
15. The employer's access to the criminal activities of its potential employees is restricted by the limited period within which convictions are recorded. Children's convictions are generally spent three years after the date of conviction (*Criminal Records Act 1991 s. 10*), provided that child has not been:
1. Subject to a control order;
 2. Convicted of an offence punishable by imprisonment;
 3. In prison because of a conviction for any offence;
 4. Unlawfully at large.

Access to information generally

16. Consequently, employers obtain limited information about sex offences, which they can use to discharge their legal obligations to protect persons at their workplace from sex offenders.

AFEI's Response

17. The workplace is a section of the community where sex offenders can have access to large groups of vulnerable people in circumstances where the controller of the workplace, usually but not always the employer, has legal obligations to these vulnerable persons. For this reason legislation should take into account the protection of the workforce community from the recidivism of the sex offender. Further, workplaces differ and there needs to be an account taken of the needs of individual businesses with respect to the employment of former sex offenders.

18. In addition to prohibiting sex offenders from working in certain occupations, a concept of reasonableness should be introduced, where legislation would permit employers to argue that it would, in respect of their individual business, be unreasonable to employ former sex offenders.
19. AFEI believes that employers should have the legislative support to meet their legislated obligation to guarantee persons at a workplace that they will not fall victim to a re-offending convicted sex offender. Therefore, where sex offenders have access to a workplace the employer or other controller of the workplace should not be prevented by non-disclosure rules on convictions from being informed of the existence of sex offences.
20. Consequently, convictions for sexual offences should not be capable of being spent. This response accords with option A. of the options set out in the Discussion paper for the Inquiry Into Spent Convictions for Juvenile Offenders.
21. It is in the public interest to ensure that a workplace is an environment which protects employees, young people, old people and people with disabilities against sex offenders. To that end, employers and others such as occupiers who by law are obliged to control their places of work should be provided with the full means of doing so.
22. It is therefore in the public interest that sex offences not be concealed from those who employ or control workplaces. Consequently, these duty holders should, in the proper exercise of their legal obligations, be able to access the records of all sex offenders who do or potentially will have access to the workplace.

23. Sex offenders who have not been rehabilitated could re-offend at a place of work. Any sex offence committed at a place of work by a convicted sex offender affects the victim and may place legal obligations on the employer. An employer is: vicariously liable for the actions of its servants, has occupational health and safety obligations to a broad range of different classes of persons ensure a safe workplace exists and eliminate at the source risks to health and safety and has obligations to prevent the sexual harassment of its employees.
24. Employers engage employees in many industry sectors where people vulnerable to sex offenders are present, including childcare and aged care. However, childcare and aged care are not the only sectors where employers, have responsibilities for persons who are vulnerable to sex offenders. The sectors where persons, vulnerable to sex offenders, are employed, present, or cared for include: social and community services, disability services, supported employment services, health care services, fitness instruction and education. The workplace facilities in which these people are present include: childcare centres, clinics, hospitals, sheltered workshops, home services and schools.
25. Workplaces located in the above sectors contain both employees and non-employees. The persons present at places of work include: persons with disabilities, young persons and other vulnerable persons such as aged persons who might be patients, volunteers or bystanders. The persons present in an employer's workplace may be there in their capacity as: employees, volunteers, patients, school students on work experience or invitees (e.g. an audience of children at an entertainment venue).

26. AFEI is concerned about any change to legislation that has the effect of depriving the employer of access to information relevant to the protection of its business, including the protection of its workforce and others at the workplace.
27. Any further restriction of information relating to a criminal conviction will mean that the employer, carrying legal responsibilities for all its employees, volunteers and invitees at a place of work will be less able to fulfil those legal obligations.
28. Employers wish to be able to undertake a full and informed risk assessment of persons at the employer's workplace. To this end, AFEI members seek personal information about: outstanding charges; criminal convictions and findings of guilt recorded against persons. Nothing short of full information concerning a sex offender in such circumstances will enable a proper risk assessment to be made.

Health, welfare and safety obligations on employers and workplace occupiers at a place of work

General legal obligations on employers

29. The employer has legal obligations to employees and others under: the tort of negligence where there is a broad duty of care, a duty of care implied into all employment contracts, legislated duties under occupational health and safety legislation and discrimination legislation.
30. The imposition of non-disclosure provisions concerning sex offences would thus undermine the employer's capacity to protect itself at law and to protect persons at the employer's workplace.

Specific obligations: the employer's duty of care in negligence and under safety legislation

31. There is both a common law and a statutory duty on employers in New South Wales to take care of their employees.
32. One general duty on employers and persons in control of workplaces is **to ensure** (i.e. guarantee or make certain) a work environment which is safe and without risk to the health of persons at the workplace. It is an offence to contravene this duty (*Occupational Health and Safety Act 2000 (NSW)* section 8 (1)).
33. Any person caring for children has a high duty of care towards them. This means that they must act in the best interests of the child and take all reasonable steps to ensure the child's safety.
34. Under the Occupational Health and Safety Act, the duty is absolute. The duty is non-delegable.
35. The legislation reaches further than the employment relationship. It extends to self-employed persons, occupiers, manufacturers, suppliers, installers labour hire organisation and controllers of workplaces.
36. The duty extends to children who are employees and children who are at a place of work. In other words the duty extends to children who are at a place of work as invitees (e.g. work experience school students) or volunteers.
37. It is an offence to cause or allow a child less than 15 years old to take part in employment that puts the child's physical or emotional wellbeing at risk (*Children and Young Persons (Care and Protection) Act 1998* section 222).

Employers duty of care under discrimination legislation

38. Under section 22 B of the *Anti-Discrimination Act 1977* (NSW) it is unlawful for a workplace participant to sexually harass another workplace participant.
39. A workplace participant includes an employee, volunteer or unpaid worker.
40. An employer has a duty to minimise harassment in the workplace, including the duty to put safe work systems in place to reduce the risk of harassment.
41. Also, the employer may be vicariously liable for the acts of an employee where it can be demonstrated that that the harassment occurred during the course of employment and were directly relevantly related to it.
42. In such circumstances as the above, the presence of a former sex offender at the workplace substantially increases the risk for the employer that harassment will occur.

Discrimination in the disclosure of a Criminal record

43. Under the *Australian Human Rights Commission Act 1986* (Cth) the Australian Human Rights Commission has the power to inquire into discrimination in refusal of employment on grounds of the existence of a criminal record. A defence exists if the refusal of employment is due to the inherent requirements of the job. This defence should be retained and offers an answer to those who assert a former sex offender has no protection against the misuse of a criminal record.

Mandatory Reporting on child safety

44. Child care workers, whether volunteers, managers or who hold paid positions, are required under the Children and Young Persons (Care and Protection—Child Employment) Regulation 2005 (NSW) to make a report to DOCS if they have current concerns about the safety, welfare or wellbeing of a child. This would include reporting the presence of a sex offender.
45. If the employer does not know of the employee's history as a sex offender, then the employer cannot discharge this duty properly. This is another reason why there should be a legislatively sanctioned capacity to provide employers with information about sex offence convictions.

Employer's obligations to screen "prohibited persons" from "child related employment"

Generally

46. The Child Protection (Prohibited Employment) Act provides for the screening of prohibited persons from child related employment or who fail to request disclosure of a persons prohibited employment status.
47. For the purposes of this legislation, a child is a person under 18.
48. Child related employment is defined in section 3 Definitions of the Act to include employment in pre schools, kindergartens, child care centres, wards, hospitals, clubs, counselling services, child health services and entertainment venues.
49. A prohibited person is one who has been convicted of sex offence unless, by Order, the person is declared to be otherwise. In turn, a serious sex offence is, amongst others, an offence of

sexual activity or indecency, punishable by imprisonment for 12 months or more.

50. Disclosure is normally confirmed by the disclosure of the person's criminal record.
51. The Act imposes criminal liability on employers who knowingly employ a prohibited person in child related employment (Section 8 of the Child Protection (Prohibited Employment) Act).
52. Employers must require a person disclose whether the person is a prohibited person and this request must occur prior to commencement of employment. Section 7(1) of the Child Protection (Prohibited Employment) Act.
53. The retention of the legislation concerning disclosure of sex offences is necessary to prevent criminal activities directed towards a child. At its heart is the employer's obligation and ability to access information about the criminal antecedents of child sex offenders.

Review of prohibited persons

54. Prohibited persons who wish to have their prohibited status reviewed may apply to the Administrative Decisions Review Tribunal or in some cases the Industrial Relations Commission.
55. If the tribunal decides the person does not pose a risk to children it may make an order declaring the Act does not apply to the person in those circumstances.
56. In our view a review process exists to allow sex offenders to work in areas that would otherwise be prohibited. It provides a formal process of review, which should be retained.