

Submission  
No 6

## INQUIRY INTO SPENT CONVICTIONS FOR JUVENILE OFFENDERS

Name: Mr Ian Nisbet

Date received: 29/01/2010

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29 January 2010

Dear Ms Robertson,

Please find attached my submission to the Inquiry into spent convictions for juvenile offenders, made in my capacity as a forensic psychologist.

Although the public is rightly concerned about the level of sexual assault in our community, recent research into juvenile sexual offending suggests that this is not a behaviour that the majority young offenders will take with them into adulthood. Inclusion of juvenile sex offenders in the spent conviction scheme may therefore have benefits in terms of assisting their rehabilitation, without significantly increasing risk to the community. There would be a number of challenges, however, in determining criteria for inclusion in the scheme.

For the Committee's information, I have recently completed my PhD thesis on adolescent sexual offending and have had some of the research from my thesis published in the peer-review literature. I was invited to present my PhD research at the NSW Bureau of Crime Statistics and Research 40th Anniversary Symposium last year and I am a registered psychologist and a member of the College of Forensic Psychologists of the Australian Psychological Society.

I have attached a brief CV for the Committee's information. It should be noted that although I currently work for Juvenile Justice, Department of Human Services, my role in that organization is a clinical, rather than a policy, role. I have therefore made an independent submission to the Inquiry as a clinician and researcher and not as a representative of that agency.

Yours sincerely,

Ian Nisbet PhD

**Submission to Standing Committee on Law and Justice:  
Inquiry into Spent Convictions for Juvenile Offenders**

*The nature of Juvenile Sexual Offending*

1. The impact of lifting the prohibition on spent convictions for juveniles who have committed sexual offences is best evaluated by first reviewing the research evidence on juvenile sexual offending. It is acknowledged that most sexual offending (whether perpetrated by juveniles or adults) is unreported. Detected sexual offending therefore represents the “tip of the iceberg.” Despite this, a great deal of research on detected juvenile sexual offending has been published in both Australia and overseas in recent years. This research converges on the following common findings:

- Offenders are almost always male<sup>1</sup>
- The modal age of first charge is 14<sup>2</sup>
- Victims are predominantly children<sup>3</sup>
- Victims are predominantly females<sup>4</sup>
- Victims are often younger siblings or other related children<sup>5</sup>
- Most offenders are dealt with in the Children’s Court and are subject to community-based orders supervised by Juvenile Justice (or equivalent in other jurisdictions)<sup>6</sup>
- Approximately 50% of offenders have previously committed a nonsexual offence<sup>7</sup>, and
- Sexual offending accounts for about 1% of all appearances in the Children’s Court<sup>8</sup>

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<sup>1</sup> I.A. Nisbet and K. Seidler, "Characteristics of Adolescent Sex Offenders in New South Wales," *The Australian Educational and Developmental Psychologist* 18, no. 1 (2001).

<sup>2</sup> K.A. Freeman, E.T. Dexter-Mazza, and K.C. Hoffman, "Comparing Personality Characteristics of Juvenile Sex Offenders and Non-Sex Offending Delinquent Peers: A Preliminary Investigation," *Sexual Abuse: A Journal of Research and Treatment* 17, no. 1 (2005).

<sup>3</sup> S. Righthand and C. Welch, *Juveniles Who Have Sexually Offended: A Review of the Professional Literature* (Washington, DC: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention., 2001).

<sup>4</sup> Nisbet and Seidler, "Characteristics of Adolescent Sex Offenders in New South Wales."

<sup>5</sup> P. Cawson et al., "Child Maltreatment in the United Kingdom: A Study of the Prevalence of Abuse and Neglect.," (London: National Society for the Prevention of Cruelty to Children, 2000).

<sup>6</sup> NSW Bureau of Crime Statistics and Research, "Key Trends in Crime and Justice - NSW - 1997," (Sydney: NSW Bureau of Crime Statistics and Research, 1998).

<sup>7</sup> I.A. Nisbet, P.H. Wilson, and S.W. Smallbone, "A Prospective Longitudinal Study of Sexual Recidivism among Adolescent Sex Offenders," *Sexual Abuse: A Journal of Research and Treatment* 16, no. 3 (2004).

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2. Juvenile sexual offending is also characterised more by offence versatility than specialisation.<sup>9</sup> Juveniles who sexually offend are several times more likely to have a prior nonsexual offence than a sexual offence and, as adults, are approximately six times more likely to re-offend with a nonsexual offence than a sexual offence.<sup>10</sup>
3. Research also suggests that juvenile sexual offending does not tend to persist into adulthood. In the most recently published study of adult sexual recidivism of juvenile sex offenders from NSW, only 9% of participants who committed a sexual offence as a juvenile came to the attention of police for a sexual offence as an adult.<sup>11</sup> Similarly, a study of juveniles who had committed sexual offences in Western Australia found an adult sexual recidivism rate of 9.5%.<sup>12</sup> Appendix A provides a list of recidivism studies published in peer-review journals between 1986-2007 and in which the adult sexual recidivism rates of juvenile sex offenders are low and typically range between 8-14%.

*Public Policy responses to Juvenile Sexual Offending*

4. Notwithstanding the research evidence referred to above, public policy responses to juvenile sexual offending rest on the assumption that juvenile sexual offending is a specialised form of offending with unique antecedents, requiring specialised psychological intervention<sup>13</sup> and specific legislative responses to protect the community from ongoing risk. Such measures include the decision to exclude juvenile sexual offences from the spent conviction scheme. While there is

<sup>8</sup> It is reported that numbers of adolescent (10-18) "persons of interest" proceeded against by the NSW Police Force for sexual offences remained stable during the five years between January 2004 and December 2008 NSW Bureau of Crime Statistics and Research, *Is Juvenile Crime Increasing?* (Bureau of Crime Statistics and Research, 2009 [cited 6 May 2009]); available from [www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwPrint1/bocsar\\_fastfact\\_03](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwPrint1/bocsar_fastfact_03).

In 2008 there were 209 persons of interest proceeded against by the police for sexual offences. It should be noted, however, that this figure represents 0.95% of all adolescent persons of interest proceeded against by police during this period. Similarly, during the period 1992-93 and 1996-97 an average of 119 cases of sexual assault appeared before the NSW Children's Court. This accounted for just 1% of all male appearances during this time NSW Bureau of Crime Statistics and Research, "Key Trends in Crime and Justice - NSW - 1997."

<sup>9</sup> A. van Wijk, S.R.F. Mali, and R.A.R. Bullens, "Juvenile Sex-Only and Sex-Plus Offenders: An Exploratory Study on Criminal Profiles," *International Journal of Offender Therapy and Comparative Criminology* 51, no. 4 (2007).

<sup>10</sup> Nisbet, Wilson, and Smallbone, "A Prospective Longitudinal Study of Sexual Recidivism among Adolescent Sex Offenders."

<sup>11</sup> Ibid.

<sup>12</sup> A. Allan et al., "Recidivism among Male Juvenile Sexual Offenders in Western Australia.," *Psychiatry, Psychology and Law* 10, no. 2 (2003).

<sup>13</sup> G. Ryan, "What Is So Special About Specialized Treatment?," *Journal of Interpersonal Violence* 13, no. 5 (1998).

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evidence that in some cases the propensity to commit sexual offences is a stable and enduring characteristic of some juvenile offenders, it is also clear that these are the minority of cases. Current public policy responses to juvenile sex offenders, which are applied across the board, are therefore based on assumptions that are valid in only a minority cases.

5. There can be no doubt that sexual offences are of a serious nature. If the public interest is primarily for sexual offences and those who commit them to be denounced and condemned, then the rationale of excluding them from the spent conviction scheme remains valid and the status quo should be maintained. If, however, the public interest is the rehabilitation of offenders and community protection, then the question is not so much whether excluding juvenile sexual offences remains valid, as much as identifying when this rationale was *ever* valid? It appears unlikely that evidence could be collected to demonstrate that excluding juvenile sex offenders from spent conviction schemes has ever been a valid way to increase community protection and promote offender rehabilitation.
6. The research evidence conclusively points to the fact that (as a group) juvenile sexual offenders have a low likelihood of sexual recidivism as adults. Therefore it would appear that previous framers of public policy in this area have overestimated the risk posed to the community by juvenile sex offenders. When all things are equal, erring on the side of caution is prudent and wise. In this case, however, there are good reasons for believing all things are not equal. It can be reasonably argued that including juveniles in sex offender registration schemes and excluding them from spent conviction schemes is likely to be antithetical to efforts directed towards their rehabilitation. Perversely, this can actually decrease community safety instead of promoting it.

*Rehabilitation as an objective in sentencing juveniles*

7. Most cases of juvenile sexual offending in NSW are dealt with in Children's Court under section 33 of the *Children (Criminal Proceedings) Act 1987*. Section 17 of the Act, however, directs that children who have committed a serious children's indictable offence are to be dealt with according to law, i.e. they face adult, rather than children's penalties (the principles of s 6 of the *Children (Criminal Proceedings) Act 1987* still apply however).

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8. The sentencing of juveniles who have committed sexual offences has been described by a former president of the Children’s Court of Queensland as “one of the most difficult of all tasks facing a judge.”<sup>14</sup> The process necessarily involves applying the general principles of sentencing such as community protection, denunciation, deterrence and rehabilitation, as well as the principles specific to sentencing children in the relevant jurisdiction.
9. In a decision of the New South Wales Court of Criminal Appeal, a case involving a juvenile sex offender that appeared on the front page of the Sydney Morning Herald, Kirby J (at 41) said:

“In determining whether another sentence was warranted and whether this Court should intervene, the question becomes what is most likely to assist in KBM’s rehabilitation, which is not to say that deterrence and denunciation are completely irrelevant”.<sup>15</sup>
10. Other judges have made similar observations, including Gleeson CJ, when then sitting on the Court of Criminal Appeal, New South Wales in CST (unreported judgement of 12 October 1989), when his Honour accepted a submission that:

“In sentencing young people... the consideration of general deterrence is not as important as it would be in the case of sentencing an adult and considerations of rehabilitation should always be regarded as very important indeed”.<sup>16</sup>
11. There appears to be a consensus among the various appeal courts in Australia that special emphasis needs to be given to the principle of rehabilitation when sentencing juveniles, including those who have committed sexual offences. It follows, therefore, that any legislative reform impacting on juveniles who have committed sexual offences should be evaluated in light of the likely impact on their prospects of rehabilitation. This is where there is currently a sharp divergence between the principles of applying the law to children and promoting rehabilitation, and the recent raft of legislative initiatives targeting sexual offenders, especially juvenile sexual offenders.
12. As noted in the discussion paper, spent convictions assist offenders in their rehabilitation and reintegration into the community by allowing them to put their

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<sup>14</sup> J.M. Robertson DCJ. *Sentencing Juvenile Sex Offenders*, paper given at the Eighth International Criminal Law Congress, Melbourne, 2002.

<sup>15</sup> Regina v KBM [2004] NSWCCA 123 revised – 5/05/2004, *Why Rachel Ward is celebrating the release of a teenage sex offender*, Natasha Wallace, SMH 04/05/04.

<sup>16</sup> Cited in Robertson *ibid*.

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past behind them and allowing them to move on without the conviction continuing to mark their name. It could be argued that this should apply even more so to juveniles, especially bearing in mind the principles of the *Children (Criminal Proceedings) Act 1987*, which include that *children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance.*<sup>17</sup> Prohibiting juveniles who have committed sexual offences from the possibility of having their convictions spent is likely to make it more difficult for them to reintegrate into the community, be rehabilitated, and make a useful contribution to society. In contrast, the appeal judge in the case of KBM referred to above also noted that:

In the case of a young offender there can rarely be any conflict between his interests and the public's. The public have no greater interest than that he should become a good citizen.<sup>18</sup>

13. Given the low rates of adult sexual recidivism among those charged as juveniles with sexual offences, it would appear that the benefits in terms of prospects for rehabilitation for these young people compare favourably with any risk to the community in allowing them to participate in the spent convictions scheme. Any lingering concerns should be also allayed by the fact that many of the young people who may potentially qualify for the spent conviction scheme will continue to be subject to the registration requirements of the *Child Protection (Offenders Registration) Act 2000*.

*Corresponding legislation*

14. As the majority of juvenile sexual offenders victimise children and many of these will be required to register their details for up to seven and a half years (and will also become “prohibited persons” under the meaning of The *Commission for Children and Young People Act 1998*), many juveniles who could potentially access the spent conviction scheme will also come under the *Child Protection (Offenders Registration) Act 2000*. Therefore, juveniles who would obtain a benefit from having their convictions spent would be the minority who have victimised adults and whose sexual offence was not deemed to be serious. After a qualifying period, they would not have to disclose their offence when applying for

<sup>17</sup> s6 (b) Children (Criminal Proceedings) Act 1987

<sup>18</sup> Regina v KBM [2004] NSWCCA 123 revised

a job (including child-related employment), or when applying for credit or when completing an application for a statutory licence.

15. Anyone who committed a serious sexual offence (which currently includes carnal knowledge) against a child (aged up to 16) would remain a “prohibited person” under the *Commission for Children and Young People Act 1998*, regardless of whether their conviction later became spent. That is, even if their conviction became spent under the *Criminal Records Act 1991*, it would remain an offence for them to apply for any child-related employment at any time in the future. They would, however, be able to apply for non child-related employment without disclosing their offence or when applying for credit or when completing an application for a statutory licence. This would constitute an advantage in terms of prospects for reintegration and rehabilitation in comparison to the current situation.

*Incorporating sexual offences into the spent conviction scheme*

16. There would be a number of challenges involved in deciding on criteria for juvenile sexual offences to be incorporated into the spent conviction scheme. Basing inclusion in the scheme on the sentence imposed not attracting a period of detention of greater than six months would not necessarily equate to a presumption of the crime being “minor.” In many cases involving a child victim, and especially where the victim is a sibling of the perpetrator but does not have a previous criminal history, judges and magistrates are (rightly) inclined to impose non-custodial sentences. This is sometimes even the case in relation to penetrative charges that are children’s serious indictable offences (under s17 of the *Children (Criminal Proceedings) Act 1987*). It is certainly not unheard of for a juvenile to be sentenced in a District Court (at law) for a number of children’s serious indictable sexual offences and receive a lengthy community-based sentence. Conversely, a juvenile with a lengthy criminal history for nonsexual offences and who commits a single sex offence may receive a sentence of detention (especially if the sexual offence was committed while they were already serving a community-based order for prior nonsexual offences). The length of a term of detention is therefore not necessarily a reliable indicator whether or not the sexual offence was “minor”.



17. There are also a number of controversies surrounding the legal concept of consent with regard to sexual behaviour. In many ways it is problematic to speak of a person committing a sexual offence that involved a consensual sexual act. If the act was consensual, then no crime was committed. If the person was below the age of 16 they are legally incapable of providing consent. In considering “young love” offences, it is important to remember that even if the offence is one of carnal knowledge, this will still result in the person being a “prohibited person” under the *Commission for Children and Young People Act 1998*, regardless of whether the conviction is ultimately spent. It may also be instructive to recall the opprobrium that resulted from a judge in Queensland in 2007 accepting the sentencing submission of the Crown that a boy aged 13 should not receive a custodial sentence for having sexual intercourse with a 10 year old girl because, among other considerations, the sexual intercourse was “consensual.”<sup>19</sup> Any definition of “consensual” sexual intercourse between juveniles, or between and adult and a juvenile, would need to be very carefully considered.
18. The suggestion that juvenile sexual offences could be spent if no conviction was recorded appears to have merit. The recording of a conviction has previously been used in Queensland to determine if a juvenile who commits a sexual offence is required to register their details under the *Child Protection (Offender Reporting) Act 2004*. The recording of a conviction was also suggested as a threshold for juveniles coming under the NSW *Child Protection (Offenders Registration) Act 2000* in a review of the Act in 2005.<sup>20</sup> The advantage of making the recording of a conviction the threshold for exclusion from the spent conviction scheme is that the judge or magistrate is able to weigh a number of factors that are relevant to each particular case. It is important to remember, however, that section 14 of the *Children (Criminal Proceedings) Act 1987* states that the Court cannot record a conviction against a child who is under 16 years old, no matter what the offence, and the Court has the discretion to refuse to record a conviction for a child aged above the age of 16 years.

<sup>19</sup> Rv. KU, AAC, WY,PAG,KY,KZ,BBL,WZ & YC; ex parte A-G (Qld) [2008] QCA 154 (13 June 2008)

<sup>20</sup> "Review of the Child Protection Register: Report under S 25(1) of the Child Protection(Offenders Registration) Act 2000," ed. NSW Ombudsman (NSW Government, 2005).

*Conclusions and Recommendations*

19. Sexual offences committed by juveniles are a distinct minority of matters dealt with in the Children's Court. In approximately half of these matters, the child has previously committed a nonsexual offence and their sexual offending is part of a broader pattern of antisocial or delinquent behaviour. As adults, it is rare for these people to come to the attention of police for further sexual offences, but it is common for them to be convicted of further nonsexual offences. As such, juvenile sex offenders are at low risk for committing sexual offences as adults but at moderate risk of committing nonsexual offences as adults.
20. Current public policy with regard to juvenile sex offenders appears to be framed around the minority of juveniles who continue to commit sexual offences as adults. One aspect of this public policy is the exclusion of juvenile sex offenders from the spent conviction scheme. There is no evidence that excluding juveniles from this scheme enhances community safety but there are several arguments that exclusion from the scheme may hinder their rehabilitation, and community re-integration, therefore diminishing community safety. It is argued that making convictions for sexual offences capable of being spent can improve prospects for rehabilitation without significantly lowering levels of community safety.
21. The mechanism under which convictions for sexual offences committed as juveniles are to be spent will necessarily be complicated and will involve legislative amendment. It is recommended that one mechanism be whether or not the judge or magistrate recorded a conviction at the time of sentencing.

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*Appendix 1: Recidivism studies of juvenile sex offenders 1986-2007*

Study	Follow up Period	Sexual Recidivism		Nonsexual Recidivism	
		Sex Offenders	Other Offenders	Sex Offenders	Other Offenders
Smith & Monastersky, (1986)	M: 17 months	14% (n = 112)		35% (n = 112)	
Kahn & Chambers, (1991)	M: 20 months	8% (n = 221)		45% (n = 221)	
Rubinstein, Yeager, Goodstein & Otnow-Lewis (1993)	M: 8 years	37% (n = 19)	10% (n = 58)		
Hagan, King & Patros, (1994a)	2 years	8% (n = 50)		46% (n = 50)	
Hagan, King & Patros, (1994b)	2 years	10% (n = 50)		58% (n = 50)	
Brannon & Troyer, (1995)	4 years	3% (n = 36)		14% (n = 36)	
Hagan & Cho, (1996) (Rapists vs Child Molesters)	Minimum 2 years	10%, 8% (n = 50)		54%, 38% (n = 50)	
Sipe, Jensen, and Everett, (1998)	M: 6 years R: 1-14 years	9.7% (n = 164)	3% (n = 142)	16.1% (n = 164)	32.6% (n = 142)
Rasmussen, (1999)	M: 5 years	14.1% (n = 170)		58.8% (n = 170)	
Hagan & Gust-Brey, (1999)	Minimum 10 years	16% (n = 50)		90% (n = 50)	
Langstrom & Grann, (2000)	M: 5 years	20% (n = 46)		65% (n = 46)	
Worling & Curwen, (2000)	M: 6.23 R: 2-10 years	5.17% (n = 58)		39.6% (n = 58)	
Worling, (2001)	M: 6.23 R: 2-10 years	10% (n = 112)			
Miner (2002)	M: 4.29	8% (n = 86)		47% (n = 86)	
Allan, Allan, Marshall & Kraszlan (2003)	M: 4.2 years Maximum: 9 years	9.5% (n = 326)	66.3% (n = 326)		
Waite et al., (2005)	M: 5.2 years R: 1-10 years	4.7% (n = 256)		52.8% (n = 256)	
Vandiver (2006)	R: 3-6 years	4.3% (n = 300)		52.6% (n = 300)	
Caldwell (2007)	M: 5 years R: 4-7 years	6.8% (n = 249)	5.7% (n = 1780)	49.4% (n = 249)	61.6% (n = 1780)

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