



Submission by the North Australian Aboriginal Justice

Agency on the Model Spent Convictions Bill

Introduction

NAAJA supports a unified approach to spent convictions across Australia.

The importance of this issue was highlighted recently by reports that CrimTrac carried out 2.6 million criminal-history checks last financial year, vetting the equivalent of one in eight Australians, a staggering figure given that in 2000-01 only 425,000 CrimTrac checks were undertaken.¹ This increase is concerning given that:

“Although there may be good reasons for employers to check criminal records, the indiscriminate use of checks undermines the intentions of the sentencing court, unnecessarily reduces the labour pool, hinders the rehabilitation of the past offender, excludes ex-offenders from income and social connection, risks the economic and social costs of reoffending, and raises significant privacy and discrimination issues.”²

We also submit that the uniform laws must be easily able to be applied and interpreted. A problem with the current system (other than the lack of uniformity) is that they are “messy and difficult to interpret. As a result, employers often ask people to disclose spent convictions when they should not, and people sometimes do and do not reveal their spent convictions correctly.”³

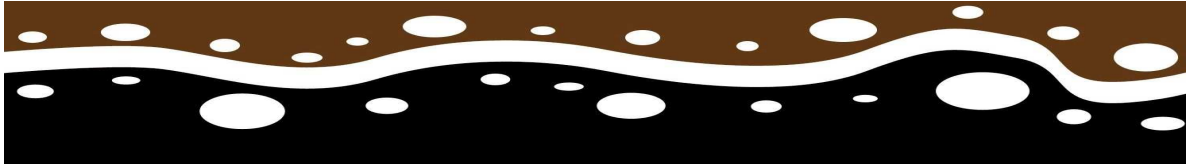
Situation in the Northern Territory

A discussion of the spent conviction regime is extremely relevant in the context of the Northern Territory given that:

¹ “Criminal checks are big business”, Siobhain Ryan, The Australian, January 10 2009, <http://www.theaustralian.news.com.au/business/story/0,,24893687-17044,00.html>

² In the shadow of a criminal record: proposing a just model of criminal record employment checks” Bronwyn Naylor, Moira Paterson and Marilyn Pittard, [2008] MULR 6, p 10 <http://www.austlii.edu.au/au/journals/MULR/2008/6.html#Heading10>

³ “Police Checks - A Human Rights Perspective”, Graeme Innes AM, 2 November 2007, http://www.humanrights.gov.au/about/media/speeches/human_rights/2007/police_checks20071102.html, p



- a) the imprisonment rate in the Northern Territory is over three times higher than the national average; and⁴
- b) 73% of prisoners held in custody in the Northern Territory indicated that they were unemployed prior to incarceration.⁵

However, the fact that at the same time the Northern Territory has the highest recidivism rate in Australia⁶ highlights the limitations of a spent conviction regime where there is insufficient Government attention to addressing the causes of recidivist behaviour.

Executive Summary

In this submission, NAAJA raises the following concerns about the Model Spent Convictions Bill (the **Bill**);

- a) the definition of a conviction;
- b) the offences eligible to be spent;
- c) the situation for sex offenders; and
- d) the definition of minor offence.

Comments on the Model Bill

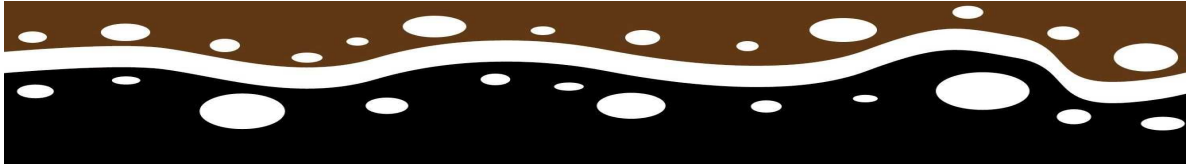
We make the following comments on aspects of the Bill and the Criminal Records (Spent Convictions) Act (the **NT Act**):

⁴ The Northern Territory imprisonment rate is 551.6 per 100,000 relevant population, while the national average is 162.0 per 100,000. Northern Territory Department of Justice Correctional Services Annual Statistics 2007 – 2008 p 12

http://www.nt.gov.au/justice/policycoord/documents/statistics/NTCS%20Annual%20Statistics%202007-08_EBook.pdf

⁵ Northern Territory Department of Justice Correctional Services Annual Statistics 2007 – 2008 p 14

⁶ The NT recidivism rate is 44.6, this is the highest rate in Australia and the national average is 37.5 (the rate refers to all prisoners released following a period of sentenced imprisonment who return to prison in the same jurisdiction within 2 years of their release.) Northern Territory Department of Justice Correctional Services Annual Statistics 2007 – 2008 p 12



1) The definition of a “conviction”

Currently in the NT Act, a criminal record “in respect of a finding that an offence is proved without the court proceeding to a conviction is a spent conviction immediately the finding or order is made”; s 7(2).

However in the Model Bill, convictions which are not recorded by a Court are not immediately spent. Instead, as the definition of conviction includes “a finding by a court that a charge has been proved”, a conviction which is not recorded can only be spent under Part 2 of the Model Bill. This would require a person to wait for the expiry of the relevant qualification period (10 years for an adult and 5 years for a juvenile).

This fails to recognise there are particular reasons why the Court has decided not to enter a conviction, which could include:⁷

- a) the character, antecedents, age, health or mental condition of the offender;
- b) the extent, if any, to which the offence is of a trivial nature; or
- c) the extent, if any, to which the offence was committed under extenuating circumstances.

We recommend that the Model Bill be amended so that (as in the NT Act), a finding of guilt without a conviction being recorded is immediately spent.

Recommendation 1

That the definition of “conviction” in the Model Bill be amended to expressly not include a finding of guilt without conviction.

Recommendation 2

That clause 4(1) be amended to that a finding of guilt without conviction is also listed as being a spent conviction.

2) Offences eligible to be spent

NAAJA supports the increased number of sentences that would be eligible to be spent in the Model Bill as compared to the NT Act. However we are concerned about the

⁷ Sentencing Act, s 8(1)



exclusion of serious crimes through eligibility being limited to sentences 12 months or less for adults and 24 months or less for juveniles.

The choice of 12 months appears to be because this is the mid range between the various spent conviction schemes around Australia.⁸

However, this is different from the majority of schemes around the world which:

“recognise that even people who have been convicted of very serious offences may later be rehabilitated, although they may be required to live crime free lives for a longer period of time, compared to other ex-offenders, before they qualify for protection. It is argued that, where there is evidence of rehabilitation, the removal of the stigma attached to a criminal history should apply equally to serious offences as it does to minor offences.”⁹

This was the position adopted by the Australian Law Reform Commission which stated that:

“The principle underlying any spent conviction scheme is that, as time progresses, the relevance of past offences to making decisions about the offender decreases. For the offender whose life since the offence has been free of further conviction, this is particularly so. And it is so regardless of the offence for which the offender was convicted. Any discussion, therefore, of the range of convictions that should be covered by a spent conviction scheme should start from the premise that strong and persuasive reasons are required before particular classes of offences are excluded, whether because of their innate seriousness or for any other reason.”¹⁰

The Australian Law Reform Commission thus recommended that all convictions, including for serious offences, should be included in the scheme.¹¹ With respect to the position of sex offenders (discussed below), the ALRC’s recommendation is in accordance with the view that differential treatment of sex offenders by the criminal justice system is based upon the false assumption that sex offenders are distinguishable from other offenders.¹² There is also substantial research showing that sexual offenders

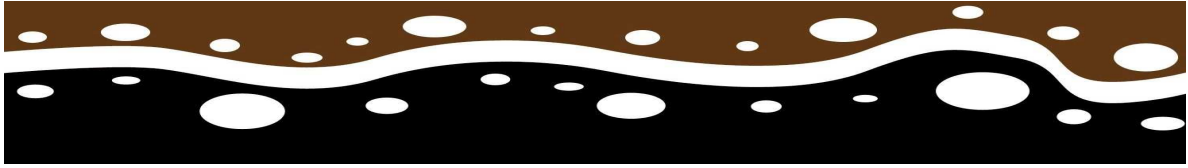
⁸“In the shadow of a criminal record: proposing a just model of criminal record employment checks” Bronwyn Naylor, Moira Paterson And Marilyn Pittard, [2008] MULR 6, p 7
<http://www.austlii.edu.au/au/journals/MULR/2008/6.html#Heading10>

⁹ “Living down the past - Spent convictions schemes in Australia”, Jeanette Knowler, [1994] PLPR 80 p 4
<http://www.austlii.edu.au/au/journals/PLPR/1994/80.html>

¹⁰ Australian Law Reform Commission, ALRC 37 - Spent convictions, 1987, para 44,
<http://www.austlii.edu.au/au/other/alrc/publications/reports/37/chap4.pdf>

¹¹ Australian Law Reform Commission, ALRC 37 - Spent convictions, 1987, Recommendation 13

¹² Recidivism of Sex Offenders Research Paper, Dr Karen Gelb, January 2007, Sentencing Advisory Council, p 31,



are not a homogeneous and coherent group and that there are theoretical and policy dangers of seeing them as such.¹³

Recommendation 3

That the Model Bill be amended so that there is no distinction between types of offences based on whether the offence was a sexual offence or the length of the sentence of imprisonment. This would enable all offences to be eligible to be spent. If this Recommendation were adopted, the method of calculating the qualification period would need to be amended so as to be dated from the completion of the sentence.¹⁴

3) Sexual Offenders

We note with concern the comments by the Northern Territory Attorney General that “sexual convictions are never spent in the Northern Territory and we want to keep it that way”.¹⁵ We believe that these comments are based on some of the “most ingrained myths” about sex offenders - that they are a special type of offender and “that they inevitably reoffend”.¹⁶

We urge the Government to consider the available research about recidivism of sexual offending before making poor policy decisions based on popular misconceptions.

Contrary to the popular view, the research shows that:

“Although sexual offences have very low rates of reporting to police (and thus any studies of recidivism of sexual offences will necessarily represent an under-count of offending behaviour), research based on both official reports of offending and self-reports of offenders shows that sex offenders typically have lower rates of recidivism than do other kinds of offender and that these rates vary for different sub-groups of sex offender.”¹⁷

If Recommendation 3 above is not adopted, we support the model set out in clause 9 with respect to sexual offenders being able to make an application to a Court for a conviction to be spent. This allows evidence to be presented and evaluated as to whether or not the

http://www.sentencingcouncil.vic.gov.au/wps/wcm/connect/Sentencing+Council/resources/file/eb84e10fff28706/Recidivism_Sex_Offenders_Research_Paper.pdf

¹³ Gelb, p 29

¹⁴ This was the approach adopted by the Australian Law Reform Commission. Australian Law Reform Commission, ALRC 37 - Spent convictions, 1987, Recommendation 16.

¹⁵ “Spent Convictions on Lawmakers’ Agenda”, Press Release, 6 November 2008

¹⁶ Gelb, p 19

¹⁷ Gelb, p 21



applicant appears to have rehabilitated (clause 9(5)(d)). A Court would then consider whether or not the offender is part of the larger group of offenders who will not go on to be convicted of further violent offences, or whether the offender is part of the smaller group of offenders who do pose a serious danger of potentially re-offending. Such considerations could be assisted by the expert research about the characteristics that are associated with sexual recidivism.¹⁸

Any reluctance to follow the model in clause 9 must be evaluated with respect to the fact that under the Bill only sexual offences where a sentence of imprisonment has either not been imposed or the sentence is 12 months or less (24 months for a juvenile) could be the subject of an application to be spent.

Figures from 2007 – 2008 show that the majority of people convicted of sexual offences would not be eligible to make an application. The 2007 – 2008 figures show that for sexual assault offences (which constituted only 2% of the total episode commencements),¹⁹ 7 of 29 people received an aggregate sentence length of 12 months or less (5 of who were indigenous). The remaining 22 of the 29 received sentences of 1 year or more (of these 19 were indigenous).²⁰

It is also important to note that the figures for 2007 – 2008 show an alarming rise in the juveniles incarcerated for sexual offences, with 10 juvenile sex offender episodes compared with only 2 in 2006 – 2007.²¹

NAAJA has made repeated submissions about our concerns that in the last few years, we have not experienced a spike in the number of cases of child abuse prosecutions, but instead have witnessed a noticeable increase in the number of prosecutions of teenage relationships (where the age difference between the two people is not large and the younger person has consented to the relationship - leaving aside the legal issue that a person cannot consent before the age of 16). There has also been a marked difference in the way these matters have been dealt with by police and other authorities.²²

¹⁸ Gelb, p 30

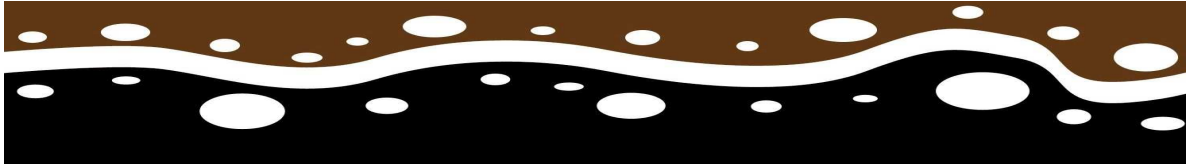
¹⁹ Northern Territory Department of Justice Correctional Services Annual Statistics 2007 – 2008 p 24
http://www.nt.gov.au/justice/policycoord/documents/statistics/NTCS%20Annual%20Statistics%202007-08_EBook.pdf

²⁰ Northern Territory Department of Justice Correctional Services Annual Statistics 2007 – 2008 p 24

²¹ Northern Territory Department of Justice Correctional Services Annual Statistics 2007 – 2008 p 30

²² Joint CAALAS/NAAJA submission to the Senate Select Committee on Regional and Remote Indigenous Communities: www.aph.gov.au/SENATE/committee/indig_ctte/submissions/sub24.pdf; NAAJA submission to the Northern Territory Emergency Response Review Board; <http://www.nterreview.gov.au/subs.htm>

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In our submission, offenders convicted in these types of “teenage relationship” cases highlight the importance of sex offenders having the ability to apply to have their convictions spent.

Recommendation 4

That should recommendation 3 above not be followed, the model in clause 9 should be adopted for sex offenders.

4) The Definition of “minor offence”

In the Model Bill, the definition of minor offence includes a fine not exceeding \$500.

While there is capacity for an amount greater than \$500 to be prescribed by the regulations, we nonetheless submit that \$500 is much too low.

We note that \$500 was the amount chosen by the Australian Reform Commission as not effecting the waiting period.²³ This was in 1987, which highlights that the amount is not appropriate in 2009.

Further evidence is found in the minimum fines for first offenders for some minor traffic offences being over \$500. For example, the minimum fine for a first offence of driving an uninsured or improperly insured vehicle is \$550.²⁴

We note that the current situation in the NT Act is quite different (distinguishing between convictions for traffic offences and non traffic offences).

Recommendation 5

That the amount prescribed for a fine which constitutes a minor offence be substantially increased.

²³ Recommendation 17 - <http://www.austlii.edu.au/au/other/alrc/publications/reports/37/chap2.pdf>

²⁴ Traffic Act s 34(1), Penalty Units Act s 3