

15 September 2021

The Hon. Mark Speakman SC MP
Attorney General
Minister for Prevention of Domestic and Sexual Violence

By email: sean.robertson@minister.nsw.gov.au

Dear Attorney

Children's criminal records and spent convictions

I am writing to you regarding the operation and interpretation of the *Children (Criminal Proceedings) Act 1987* (NSW) (**CCPA**) and the *Criminal Records Act 1991* (NSW) (**CRA**) with respect to children's criminal records. Legal Aid NSW is concerned about the:

1. uncertainty and inconsistency regarding the interaction between section 14 of the CCPA and the CRA
2. lack of transparency about when offences are spent under the CRA, and
3. inconsistency regarding when offences are spent under the CRA.

We would welcome the opportunity to work with your office and the Department of Communities and Justice to develop options for law reform, to achieve greater clarity and consistency of the law regarding children's criminal records and spent convictions.

No convictions under section 14 of the CCPA

There is currently inconsistency in the interpretation of legislation relating to the recording and disclosure of criminal records for children. Section 14 of the CCPA provides that a court is not to record a conviction against a child aged under 16, and has discretion not to record a conviction against a child aged 16 and over. The interaction of this provision with the CRA, which outlines when a conviction becomes spent, is complex and has created considerable uncertainty about when orders imposed under the CCPA become spent.

This has created confusion not only for children and young people and their legal representatives, but also for the courts. The Judicial Commission's Sentencing Bench

Book notes the complexity and ambiguity of the provisions, stating that “it is obvious that the text of the [CRA] could be clearer”.¹

In our experience, many children are advised by magistrates and judges that a decision not to record a conviction means that the matter will not impact detrimentally on future job applications. Unfortunately, this is not the interpretation by the Criminal Records Section of the NSW Police Force, which does not regard *all* matters where no conviction has been recorded by the court as being spent immediately, and thus *does* disclose such matters on National Police Check Certificates.

This has a real impact on our clients, whose rehabilitation prospects are reduced when they find themselves unable to find work or pursue volunteer opportunities as a result of matters disclosed on their police check. It has also resulted in perverse outcomes. For example, in one matter a child appealed the recording of a conviction, so that their employment opportunities would not be hampered by the existence of a criminal record. The District Court on appeal maintained a finding of guilt but, applying section 14 of the CCPA, agreed that a conviction should not have been recorded. Ultimately the matters were still disclosed on criminal record checks and the duration of the appeal process effectively lengthened the period until the conviction became spent.

In another case, a client was sentenced for a drug offence committed while she was under 18. The Children’s Court exercised its discretion not to record a conviction, however the client was subsequently rejected from a volunteer placement when the criminal record check completed as part of the application process disclosed the offence. This client was actively attempting to make positive changes in her life by volunteering, but was hampered in doing so by the disclosure of an offence for which no conviction was recorded.

In our view, non-disclosure of all offences where no conviction is recorded would help to promote the rehabilitation of the child and be consistent with the principle in section 6 of the CCPA that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption.

Lack of transparency about spent convictions

Legal Aid NSW also seeks clarification and consistency of outcomes for children in relation to spent convictions. The Judicial Commission’s Sentencing Bench Book provides a table of children’s sentences and when they are spent. However, the Bench Book notes ambiguity in relation to when at least four of those sentences are spent. The table also does not note whether a non-conviction under section 14 of the CCPA makes any difference to when a sentence is spent. Furthermore, there is no publicly

¹ Judicial Commission of NSW, *Sentencing Benchbook – The Criminal Records Act 1991 and the Children (Criminal Proceedings) Act 1987*, [15-130], at: https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/children_criminal_proceedings_act.html#p15-130.

available table providing the interpretation by the NSW Police Criminal Records Section of when children's sentences are spent, and therefore when it will disclose a sentence on a National Police Check Certificate.

Legal Aid NSW's requests to NSW Police for documents or policies that allow it to determine when children's sentences are spent have been unsuccessful.

With such lack of certainty and transparency, it is not possible for lawyers to adequately advise their clients or for courts to properly exercise their sentencing functions.

Inconsistency regarding when convictions are spent

In our experience, we have seen more serious sentences become spent earlier than less serious ones. For example, section 8(4)(a) of the CRA provides that a good behaviour bond (made under section 33(1)(b) of the CCPA) is spent upon completion of the bond (up to two years). However, a fine is an order that is not caught by sections 8(2), 8(3) or 8(4) of the CRA, and thus may be spent only after the crime-free period of three years or 10 years.² Although the fine is a less serious sentence than a bond, it may take significantly longer to become spent. We are aware of many other anomalous results.

Review

As illustrated above, there appear to be different interpretations of the law, which would support the need for clarification of these provisions. We recommend that the provisions relating to children's criminal records and spent convictions in relation to children, and the interaction between the CPPA and the CRA, be subject to a review by the Department of Communities and Justice, with a public consultation process, in order to simplify and clarify the legislation to ensure consistency of interpretation. We understand that the Law Society of NSW is also supportive of a review.

Thank you for considering this letter. If you require any further information, please contact Meagan Lee, Acting Manager, Strategic Law Reform Unit, on 9219 5629 or 0476 839 974, or at meagan.lee@legalaid.nsw.gov.au.

Yours sincerely



Brendan Thomas
Chief Executive Officer

² *Criminal Records Act 1991* (NSW) ss 9(1), 10(1)