



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 80

The Problem of Old Convictions

DISCUSSION PAPER

MARCH 1984

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THE PROBLEM OF OLD CONVICTIONS - QUESTIONNAIRE

PREFACE

The Commission has completed its first consideration of this matter. This paper however does not necessarily represent the final views of the Commission.

Comments, with reasons where appropriate, on individual issues raised in the discussion paper, on the paper as a whole or on any other matter coming within the Commission's terms of reference, are invited. These comments may be made in writing or by completing the tear-out Questionnaire at the end of this paper or by telephoning the Commission. The Commission requests that comments be submitted to it by 31 May 1984.

Unless advised to the contrary, the Commission will assume that comments received on this discussion paper are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to their comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

A notice has been placed in *The West Australian* offering to send, without charge, a copy of the discussion paper to anyone interested in it and inviting comments thereon. The Commission has also prepared and distributed to a wide range of groups and individuals a shorter issues paper summarising the general issues and seeking details of particular experiences.

The research material on which the discussion paper is based will, upon request, be made available at the offices of the Commission.

This discussion paper is based on material available to the Commission in Perth on 20 January 1984.

PART I: THE PROBLEMS

CHAPTER 1 - INTRODUCTION

1. THE TERMS OF REFERENCE

1.1 The Commission has been asked to consider and report on whether:

"a person's criminal record should be expunged after a stipulated time, and if so, in what circumstances and under what conditions, and as to whether the same should revive in the event of such person sustaining a further conviction."

For the purpose of this paper the Commission has assumed that the term "criminal record" includes all records which contain information relating to convictions for criminal offences, that is, of all acts or omissions which have rendered the person doing the act or making the omission liable to punishment. It therefore includes records relating to offences under the *Criminal Code*, the *Police Act*, traffic offences and a wide range of other offences relating to such matters as liquor, firearms, companies, consumer protection and taxation. Records may also include information relating to charges which have been dismissed or discharged under section 669 of the *Criminal Code* or section 26 of the *Child Welfare Act 1947-1982*.¹

2. THE PROBLEMS

1.2 People with records of offences² may face various difficulties as a result even though they may have long since ceased to offend and may regard themselves as law-abiding members of the community.

- * They may live in fear that the record will be disclosed causing embarrassment or prejudice or worse. They may be deterred by fear of disclosure of the conviction during legal proceedings from coming forward as a witness or commencing a civil action.

¹ Para 3.7 below.

² These offences may have been committed in Western Australia, elsewhere in Australia or in other countries: para 1.8 below.

- * Where the record is in fact disclosed they may suffer embarrassment, prejudice, invasion of privacy, damage or destruction of reputation or family or neighbourhood relationships, or loss of commercial interests.
- * They may lose employment or be denied an opportunity to obtain employment.
- * They may be prevented from entering an occupation or profession.
- * They may be refused credit or insurance.
- * They may be deterred from seeking further office or prevented from obtaining appointment to a government agency.

1.3 Some of these difficulties, such as social embarrassment and prejudice and damage or destruction of family and social relationships are faced also by persons with histories of other problems such as bankruptcy or mental illness. Others of these difficulties result uniquely from criminal convictions. Some offenders may simply seek assurance that society has forgiven them.

1.4 The Commission is, at present, aware of some - but only a few - cases in this State in which people have encountered some of the problems referred to above as a result of criminal convictions. The Commission seeks information as to the degree to which those problems arise in Western Australia. The Commission also seeks information as to any statutes, regulations or practices which present difficulties for people with records of offences. Any desire for confidentiality or anonymity will be respected.

1.5 Apart from the effects of criminal records upon offenders there is also the question of their effects upon the community as a society.

1.6 One of the purposes of a criminal justice system is to rehabilitate offenders or to encourage an offender to rehabilitate himself. The non-disclosure of information about criminal convictions or other protection of ex-offenders may facilitate their rehabilitation in two ways. First, such non-disclosure or protection provides an incentive to rehabilitation. This may not be of great significance as the fear of further conviction and punishment and social

factors such as marriage or secure employment are, no doubt, more important. Secondly, however, to the extent that non-disclosure or other protection prevents discrimination on the basis of the conviction it thereby enables former offenders to develop their potential to undertake employment, to marry and raise a family, and to develop full social and community relationships and not to be unnecessarily tempted or driven to further criminal involvement. The often repeated concept that an offender can repay his "debt to society" is seen to be satisfied. The benefit is to others as well as to the offender. The Commission is aware of course that in many cases, especially those involving personal injuries, the offender can never compensate for the loss to his victim. The purpose of recognising rehabilitation is preventative rather than as a reward.

3. OFFENCES

1.7 In Western Australia any act or omission which under State law renders the person doing the act or making the omission liable to punishment is called an offence. There are three basic categories of offences: crimes, misdemeanours, and simple offences. The most serious offences, for example wilful murder, manslaughter, treason and rape, are crimes. Misdemeanours, the next most serious class,³ include a wide range of offences of varying severity including wounding, assault and removing boundary marks on land. The least serious offences, simple offences, include a very wide range of offences including many traffic and other regulatory offences. An offence not otherwise designated is a simple offence.

1.8 In addition to offences against Western Australian law, people living in Western Australia may have committed offences against the law of another State or country or against the law of the Commonwealth of Australia (either in this State or elsewhere). Commonwealth offences include customs, immigration, social security, taxation and bankruptcy offences.

1.9 The classification of offences and the terms in which they are expressed as well as the available punishments therefore will vary from jurisdiction to jurisdiction. In addition the terms in which Western Australian offences are expressed, the available punishments and indeed the seriousness with which they are viewed by the courts and the community may vary over time.

³ Crimes and misdemeanours together make up the class known as indictable offences, that is offences triable on indictment. It has been recommended that this categorisation of offences be abolished so that all indictable offences would be called crimes: M Murray, *The Criminal Code - A General Review* (1983), 2.

4. RECORDS OF OFFENCES

1.10 Where a person is convicted of an offence, a record of the conviction may be kept in a number of places. Such a record will be held by the court which convicted the defendant in the form of a file relating to the particular charge.⁴ The body responsible for carrying out the prosecution, such as the Crown Law Department, will also have a file relating to the charge. Departments involved with the disposition of a person such as the Prisons Department and the Probation and Parole Services will also have a file relating to the person showing the offence for which he has been convicted.

1.11 The Criminal Records Section of the Police Department maintains a record of offences committed by individuals.⁵ A separate record of traffic offences of individuals is also maintained. Selected records of the Criminal Records Section are sent to the New South Wales Criminal Records Office for central storage and access by other police forces in Australia.

1.12 The Commission understands that as a general rule records of convictions held by the Police Department are not disclosed to persons other than those having a statutory right to access⁶ unless a form of "release waiver" is supplied by the subject of the record. A member of the Police Department is not permitted to disclose information except in the course of his duty as such a member.⁷ Persons employed in the courts, Police Department, Probation and Parole Service and the Prisons Department are generally not permitted to disclose information obtained in the course of their official duties except in the course of those duties.⁸ Such disclosures may be required in response to a subpoena.

⁴ In the Perth Court of Petty Sessions these records are now stored on computer. There are also ordinary manual files relating to each charge.

⁵ A person's criminal record held by the Police Department may also include a record of offences which a person has committed in other States and countries or against the law of the Commonwealth of Australia. At present the Police Department is developing a computerised microfiche system to record and store these records: Police Department of Western Australia, *Annual Report 1982*, 30

⁶ For example s 14(1)(b) of the *Motor Vehicle Dealers Act 1973-1982* provides that the Motor Vehicle Dealers Licensing Board may by notice in writing require the production of any documents relevant to a matter before the Board.

⁷ *Police Regulations 1979*, reg 607.

⁸ Administrative Instruction 711 of the Public Service Board and s 81 of the *Criminal Code*. Administrative Instructions are given pursuant to s 19 of the *Public Service Act 1978-1982*.

1.13 There are also unofficial "records" of convictions. For example, a newspaper may publish a story relating to a person's conviction for an offence. Witnesses and others who attended the trial of an offence will also know of any conviction recorded at the trial.

5. NUMBERS OF CONVICTIONS

1.14 It is not possible to assess readily how many people in Western Australia have convictions or how many have convictions which are more than say five or ten years old. Some indication of the likelihood that a person may have a conviction can be gained from the number of convictions in Western Australia in any year. At the census in 1981,⁹ the population of the State was 1,299,094. In that year 1,759 convictions were recorded in the Supreme and District Courts and 116,930 in Courts of Petty Sessions and Children's Courts, a total of 118,689 convictions. The convictions in the Supreme and District Courts include convictions for the following offences -

| Offence | Number of convictions |
|-----------------------|------------------------------|
| Breaking and entering | 600 |
| Assault | 109 |
| Rape | 50 |
| Armed robbery | 57 |
| Motor vehicle theft | 96 |
| Drug offences | 143 |

The convictions in Courts of Petty Sessions and Children's Courts are generally for minor offences such as those involving drunkenness (13,690) and offensive behaviour (4,853). The convictions in these courts, however, include the following offences -

| Offence | Number of convictions |
|---|------------------------------|
| Breaches of Traffic Act and Regulations | 55,418 |
| Stealing and receiving stolen goods | 7,932 |
| Breaking and entering | 4,708 |
| Assault | 2,451 |
| Wilful damage | 2,107 |
| Drug offences | 1,754 |

⁹ The last year for which figures have been published: *Western Australian Year Book* (1983).

6. EXISTING PROTECTION

1.15 At present a number of means exist in Western Australia for the protection or relief of a person with a conviction or who faces conviction for an offence.¹⁰ Two of these enable a person to avoid having a conviction recorded or for a conviction to be deemed not to be a conviction for any purposes.¹¹ A third involves a prohibition on disclosure of information.¹² Finally a number of remedies are available to people who suffer unjustly as the result of the disclosure of a criminal conviction, for example, an action for wrongful dismissal,¹³ an order for re-employment by the Western Australian Industrial Commission,¹⁴ an appeal against the wrongful refusal of a licence,¹⁵ a complaint to the Parliamentary Commissioner for Administrative Investigations or a complaint to the Committee on Discrimination in Employment and Occupation.

1.16 These means of protection do not, however, overcome or ameliorate all of the problems which may be encountered.

7. IS THERE A NEED FOR REFORM?

1.17 The purpose of this paper is to seek comment on whether there is any need for further legislation or other action in this State and, if so, the form that such legislation or other action should take. It may be that no one approach to reform will be satisfactory and that different problems will require different solutions.

8. ASSUMING THAT THE EXISTING PROTECTION IS INADEQUATE, HOW MUCH FURTHER SHOULD PROTECTION BE EXTENDED?

1.18 The desirability of protecting former offenders who have since rehabilitated themselves in the community from needless disclosure of their past is not the only factor involved in considering whether or not further protection should be provided for people with convictions.

¹⁰ See chapter 3 below for further discussion.

¹¹ Paras 3.2, 3.4 and 3.7 below.

¹² See para 1.12 above and para 3.8 below.

¹³ Para 2.19 below.

¹⁴ Para 2.20 below.

¹⁵ Footnote 7 on page 16.

1.19 There is a need to protect the free flow of relevant information. This has a number of aspects. The most important derives from the belief that convicted persons are more likely to re-offend than others. The problem is to identify areas where that risk, and its consequences, outweigh the social harm caused by retention or disclosure of old criminal records. The sorts of information which should be available and to whom it should be available might be gauged by listing the types of exemption provided by, and under, the United Kingdom *Rehabilitation of Offenders Act 1974*. These include -

- (i) information relevant to criminal proceedings, service disciplinary proceedings and proceedings relating to adoption, guardianship, custody or the care of children;
- (ii) information relevant to national security;
- (iii) information relevant to certain kinds of employment, offices or occupations, such as judicial appointments, employment as police officers or cadets, military, naval, and air force police, employment in the prison service, probation officers, teachers, and other employment in schools which involve access to persons under 18, employment connected with the provision of social services which involves access to the young, the old, the mentally or physically handicapped, or the chronic sick or disabled, employment concerned with the provision of health services which involves access to patients, employment by a youth club, local authority, or other body which is concerned with the promotion of leisure or recreational activities for persons under the age of 18, director, controller, or manager of an insurance company or bank, dealer in securities, or any occupation concerned with the carrying on of a private hospital or nursing home;
- (iv) information relevant to suitability for admission to professions such as medical practitioner, barrister, solicitor, chartered or public accountant, dentist, veterinary surgeon, nurse, midwife, optician or pharmaceutical chemist;
- (v) information relevant to any application relating to firearms, explosives, or gaming and registration as a firearms dealer, licences to deal in securities, and

the registration of private nursing homes or homes for the elderly, disabled, mentally or physically handicapped or children.

Further applications for exemption have been made in the United Kingdom but refused. These include applications in relation to credit providers and insurers.

1.20 Non-disclosure of information about criminal convictions to various decision-makers could lead to incorrect or unwise decisions being made and adversely affect people or organisations to whom decision-makers are responsible.¹⁶ Information relating to convictions may be relevant to employers, to community organisations¹⁷ and to regulatory agencies with responsibility for ensuring that people who enter certain professions or occupations are honest.

1.21 A free flow of information is also necessary to ensure that the apprehension of offenders and the enforcement of the law are not unduly inhibited and that courts have sufficient information about the prior record of convicted persons properly to impose sentence.

1.22 It is also desirable to ensure that any further protections do not hamper criminological research. The community should not be deprived of information about the operation of the criminal justice system essential for decisions concerning changes, alterations and reforms to that system.

9. SOLUTIONS ELSEWHERE

1.23 The problem of old convictions has received attention in a number of other jurisdictions with various approaches being adopted or advocated in order to overcome or ameliorate the different problems confronting people with convictions.¹⁸ Some rely on

¹⁶ For example, a conflict arises between the desire to withhold prejudicial information relating to convictions and the need to protect the free flow of information in relation to an application for an insurance policy for a motor vehicle. Information about previous convictions for traffic offences is usually sought because it is relevant to the insurance company in deciding whether or not to issue a policy or in fixing the premium for the policy: see also para 2.22 below.

¹⁷ For example, where communities are organising a community crime watch system or a system of refuge houses for children who are confronted by a molester.

¹⁸ This matter has been considered in a number of other jurisdictions including the following -

United Kingdom:

preventing or limiting the disclosure of a record, others on sealing or expunging¹⁹ a record, allowing a person to apply for a pardon, the automatic restoration of rights or on making it unlawful to discriminate against a person because of past convictions. In the United Kingdom a combination of a number of these approaches has been adopted in one legislative package. These approaches are outlined and evaluated in chapters 4 to 8 and 10. Chapter 11 analyses the various possible approaches to reform in the light of particular problems.

Living it Down (1972), Report of the Committee set up by Justice, The Howard League for Penal Reform and The National Association for the Care and Resettlement of Offenders (hereinafter cited as "*Living it Down*"); the *Rehabilitation of Offenders Act 1974-1982*.

South Australia:

The Past Records of Offenders and Other Persons (1974), 32nd Report of the Law Reform Committee of South Australia.

Tasmania:

Report on the English *Rehabilitation of Offenders Act 1974* (1976). Also note the Rehabilitation of Juvenile Offenders Bill 1981.

New Zealand:

Report of the Penal Policy Review Committee (1981), Chapter 25.

New South Wales:

Rehabilitation of Offenders (1975), Background Paper of the New South Wales Privacy Committee.

Fiji:

Rehabilitation and the Problem of Old Convictions (1982), Discussion Paper No 2 of the Fiji Law Reform Commission.

Canada:

Criminal Records Act 1970 (Can); *Clemency Review: Issues Paper* (1981), Solicitor General of Canada; *Human Rights Code 1981* (Ont).

There is considerable literature in journal articles some of which is also referred to in this paper. Some of this deals with the United States position.

¹⁹

The terms of reference make specific mention of the concept of expunction. The Commission uses the term "expunction" in the literal sense to mean that the criminal record is destroyed. However, in considering whether or not expunction is a satisfactory method of dealing with perceived problems in this area the Commission has considered not only the advantages and disadvantages of expunction but also the advantages and disadvantages of a number of other possible approaches to reform. It will consider itself free to make suitable recommendations from these various approaches.

CHAPTER 2 - PROBLEMS OF OLD CONVICTIONS UNDER THE PRESENT LAW

2.1 The various problems briefly outlined in paragraph 1.2 above will be discussed in more detail in this chapter.

1. LEGAL DISABILITIES

2.2 In Western Australia people with criminal convictions suffer a number of legal disabilities. Four areas of disability are referred to below.

(a) Disqualification from membership of State Government bodies

2.3 A wide range of statutes which provide for the appointment of members of Government authorities and instrumentalities disqualify persons with certain convictions from appointment as members of the body. For example, a person who has been convicted of an indictable offence is disqualified from being appointed to a wide range of bodies including the Optometrists Board,¹ the Dental Board² and the Motor Vehicle Insurance Trust.³ Under section 12(2) of the *Chiropractors Act 1964-1980*, for example, any person who is convicted of an indictable offence or of an offence against the Act is disqualified from being appointed to or from continuing to hold office as a member of the Chiropractors Registration Board.

(b) Jury service

2.4 Section 5(1)(b) of the *Juries Act 1957-1981* provides that a person convicted of a crime or misdemeanour is not qualified to serve as a juror unless he has received a free pardon. In its report, *Exemption from Jury Service*, the Commission recommended that a person should only be disqualified from jury service (unless he has received a free pardon) where the person has at any time been convicted in Western Australia or elsewhere and sentenced -

- (a) to death, and the sentence has been commuted;

¹ *Optometrists Act 1940-1978*, s 10.

² *Dental Act 1939-1981*, s 10.

³ *Motor Vehicle (Third Party Insurance) Act 1943-1982*, s 3F.

- (b) to imprisonment for life;
- (c) to imprisonment for a term exceeding two years; or
- (d) to imprisonment for an indeterminate period.⁴

(c) Licensing or registration of participants in commercial activities or members of occupational groups and professions

2.5 In Western Australia, as elsewhere, a common method of controlling commercial activities, professions and occupations is by requiring persons who wish to enter them to be licensed or registered. Commonly legislation relating to such licensing or registration requires that the applicant be of a suitable character. A surveyor or medical practitioner must be of "good fame and character".⁵ A legal practitioner must not only be of "good fame and character" but also a "fit and proper" person to be admitted.⁶ A hairdresser must be of "good character".⁷ A real estate agent must be of "good character and repute and a fit and proper person".⁸ In order to obtain a taxi-car licence a person must be of "good repute" and a "fit and proper person to operate a taxi-car".⁹ The use of terms such as "character", "reputation" and "fit and proper" does not necessarily mean that a person with a criminal record will be excluded from the occupation or profession concerned.¹⁰

2.6 The Commission has carried out a survey of eleven authorities responsible for licensing or registering people who wish to pursue various occupations or professions.¹¹ Most reported that they take into account the convictions of applicants. Generally the emphasis is on whether the applicant's offences render him unfit to enter the occupation or profession concerned. Convictions of a minor nature such as those for speeding and illegal parking and convictions committed at an early age followed by some years of good behaviour are likely to

⁴ Law Reform Commission of Western Australia, *Report on Exemption from Jury Service* (Project No 71, 1980), 40, para 3.61. The Commission's recommendations have not yet been implemented.

⁵ *Licensed Surveyors Act 1909-1976*, s 7(i), *Medical Act 1894-1981*, s 11(1)(c).

⁶ *Legal Practitioners Act 1893-1982*, s 20(b).

⁷ *Hairdressers Registration Act 1946-1975*, s 12(1)(a).

⁸ *Real Estate and Business Agents Act 1978-1982*, s 27(1)(b).

⁹ *Taxi-cars (Co-ordination and Control) Act 1963-1981*, s 16(2)(c).

¹⁰ Indeed, if a licensing authority improperly takes a conviction into account, the applicant will be entitled to appeal against the decision where a right of appeal has been created, or to apply to the Supreme Court for a review of the decision by means of the writ of certiorari (unless such review has been expressly excluded) or an application for a declaration or to lodge a complaint with the Parliamentary Commissioner for Administrative Investigations under the *Parliamentary Commissioner Act 1971-1982*, ss 13 and 14.

¹¹ Betting Control Board; Builders' Registration Board; Finance Brokers' Supervisory Board; Hairdressers Registration Board; Insurance Brokers' Licensing Board; Licensing Court of Western Australia; Medical Board of Western Australia; Motor Vehicle Dealers' Licensing Board; Psychologists' Board of Western Australia; Real Estate and Business Agents' Supervisory Board; Taxi Control Board.

be disregarded. A number of authorities naturally reported that a serious view is taken of offences involving dishonesty or fraud. A number of authorities also reported that applications for licences had been refused because of the applicant's record of convictions.

2.7 A number of statutes provide for a person to be delicensed or deregistered if convicted of certain offences. The provisions may vary, depending on whether the license-holder is convicted after registration of -

- (a) a crime or misdemeanour;¹²
- (b) an offence against the Act under which he is registered or licensed;¹³ or
- (c) an offence involving dishonest or fraudulent conduct.¹⁴

2.8 No doubt sometimes persons with convictions for serious criminal offences do not seek a licence or registration because of knowledge or assumption that they will be disqualified thereby. In other cases conviction has been followed by delicensing or deregistration of the convicted person by the appropriate authority unopposed by the convicted person.

(d) Directors of companies

2.9 Section 222(1) (d) of the *Companies (Western Australia) Code* provides that the office of a director of a corporation is vacated if a director is convicted of certain offences including an indictable offence in connection with the promotion, formation or management of a corporation or any offence involving fraud or dishonesty punishable on conviction by imprisonment for a period of not less than three months.¹⁵

2.10 A person convicted of such an offence may not, within a period of five years after his conviction or, if sentenced to imprisonment, after his release from prison, be a director or

¹² *Builders' Registration Act 1939-1983*, s 13(1)(b).

¹³ *Debt Collectors Licensing Act 1964-1966*, s 10(1).

¹⁴ *Employment Agents Act 1976*, s 25(1).

¹⁵ The Supreme Court may also by order prohibit a person from acting as a director of a company for a period not exceeding five years if he was involved in the management of at least two companies in which the manner in which their affairs had been managed was wholly or partly responsible for the company being wound up, being under official management, ceasing to carry on business, being unable to satisfy a levy of execution, being subject to the appointment of a receiver, or a receiver and manager, or entering into a compromise or arrangement with its creditors: *Companies (Western Australia) Code*, s 562.

promoter of, or be in any way concerned in or take part in the management of a corporation.¹⁶ He may, however, apply to the Supreme Court for leave to become a director or promoter of or be concerned in or take part in the management of a corporation.¹⁷

2.11 It should be noted that this provision in two ways satisfies two criticisms that might be made of the problems faced by convicted persons generally. In the first place only those convictions which are sufficiently serious as to come within the terms of the statute operate as a disqualification. Secondly, the disqualification only operates for a limited period of time. In effect therefore the record is spent or expunged after a period considered by the Parliament to be sufficient protection for the public.

2. SOCIAL DISABILITIES

2.12 Apart from legal difficulties which people with old convictions may encounter, they may also suffer social disabilities as a result of public attitudes. Apart from prejudice or embarrassment or damage to social and family relationships people may treat themselves as stigmatised even for life by convictions for relatively minor misbehaviour. A fear of disclosure might cause much anguish. Even in the absence of express provisions preventing convicted persons being appointed to government agencies or to offices such as that of justice of the peace, the fact of a conviction may be taken into account in deciding whether to make such an appointment. Membership of a club or association might be denied once it becomes known that the applicant has been convicted of an offence. People may be deterred from taking an active part in public affairs for fear that an opponent or newspaper might discover the conviction and use it to discredit him. In its report, *Unfair Publication: Defamation and Privacy*, the Australian Law Reform Commission referred to the following example:¹⁸

"In 1970 a man suffered criminal convictions for offences of dishonesty. He had subsequently rehabilitated himself, was married, with children living in a Melbourne suburb, continuously employed for five years. He was active in a branch of a political party, though not currently a candidate for any public office. The man became involved in a dispute on policy issues with another member who apparently reported his record to a newspaper. The man found out that the report was to be printed and saw the editor, begging him not to print as 'it could only be damaging both to myself and to my family'. The editor replied that this was no concern of his. The following day the paper ran a story about the dispute, detailing the name, address and occupation

¹⁶ Ibid, s 227(2).

¹⁷ Ibid.

¹⁸ ALRC 11 (1979), 121, para 229.

of the man and his criminal record. Alongside the report was an editorial commenting: 'Leave this man alone. Get off his back and give him a good old-fashioned Australian: fair go'. On the following day the man was dismissed, on the ground of possible customer reaction. His wife and children suffered embarrassment in their local community."

3. LEGAL PROCEEDINGS

2.13 Information about a person's convictions may be disclosed in a number of circumstances in legal proceedings.

2.14 In criminal proceedings a person charged with an offence and called as a witness cannot be asked, and if asked is not required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that then being heard, or is of bad character, unless -

- (i) the proof that he has committed or been convicted of such other offence is admissible in evidence to show that he is guilty of the offence with which he is then charged;
- (ii) he has personally, or by his advocate, asked questions of the witnesses for the prosecution with a view to establishing his own good character, or he has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses of the prosecution; or
- (iii) he has given evidence against any other person charged with the same offence.¹⁹

2.15 In either civil or criminal proceedings a witness may be questioned as to whether he has been convicted of any indictable offence, and, upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, the cross-examining party may prove such conviction.²⁰ Although not so expressed, this provision seems likely to be construed as subject to the rule that the court may inform the witness that he is not obliged to answer a

¹⁹ *Evidence Act 1906-1982*, s 8(1)(e).

²⁰ *Ibid*, s 23(1).

question which is not relevant to the proceedings except insofar as it affects the credit of the witness by injuring his character.²¹

2.16 In criminal proceedings, after a person has been convicted of an offence evidence of previous convictions is admissible to assist the court in determining the most appropriate sentence to impose. In this State it is not usual for a person's record to be read out in court and the record is therefore normally only disclosed to a small group of people including the prosecutor and the presiding judicial officer. Sometimes, however, the record of convictions is disclosed not only to other persons present in court but, through the press and other media, to the community at large.

2.17 There may also be circumstances in which a criminal record is itself a substantive issue in a case, for example, in an action for defamation.²²

4. EMPLOYMENT

2.18 Perhaps the area in which a criminal conviction can cause the most difficulty for a person is in the area of employment. As was stated recently by the Fiji Law Reform Commission:²³

"From the ex-offender's point of view he finds himself in a dilemma - to tell the truth about this criminal conviction and very likely see his application for a job rejected as a result, or otherwise to conceal the fact and run the risk of his conviction being exposed at a later date."

There is no general legislation in Western Australia which prevents employers discriminating against persons with a criminal record. There are, however, provisions in some other jurisdictions which make such discrimination unlawful unless there is a direct relationship between the employment and the type of conviction.²⁴

2.19 Where an employee is dismissed without appropriate notice because of his criminal record he may be able to maintain a common law action for wrongful dismissal but only to

²¹ Ibid, s 25. The report *Living it Down*, refers to an English case in which a person with convictions for dishonesty brought an action to recover a civil debt eleven years later and was cross-examined about these convictions.

²² Para 2.23 below.

²³ *Rehabilitation and the Problem of Old Convictions* (1982), Discussion Paper No 2, 25.

²⁴ Paras 8 .5 and 8 .6 below.

recover a sum equal to the wages he would have received had he been given the appropriate period of notice. As the employee must attempt to minimise his loss, the amount of damages may also be reduced if it is shown that suitable alternative employment is readily available.²⁵

2.20 At common law reinstatement in employment is not an available remedy for wrongful dismissal. However, the Western Australian Industrial Commission has power to inquire into and make an order relating to the dismissal of or refusal to employ any person including, in the case of dismissal, the re-employment of the person.²⁶

2.21 Apart from these remedies, a person may lay a complaint with the Committee on Discrimination in Employment and Occupation²⁷ where he believes that he has been discriminated against in employment because of his criminal record. This includes cases where another person has been preferred to a person with a conviction for an offence because of that conviction. Where a complaint is made the Committee attempts to ascertain the facts and if it considers that discrimination has taken place attempts to resolve the complaint by conciliation and persuasion. The Commission understands that in the last five years only one complaint of discrimination on the basis of a criminal record has been made to the Committee in this State. That complaint was not finalised as the complainant obtained a position with another firm.

5. INSURANCE

2.22 It is a fundamental principle that a person being a party to a contract of insurance must act in good faith to the insurer. A person who is aware of material facts which are not available to the insurer must disclose those facts. A fact is material if it would influence the judgment of a prudent insurer in determining whether to cover the risk or in fixing the premium. If the insured fails to disclose a material fact, the insurer may avoid the contract.²⁸ If, for example, a woman takes out an insurance policy to cover her own and her husband's jewellery but fails to disclose on the renewal of the policy that prior to the renewal her

²⁵ E I Sykes and D Yerbury, *Labour Law in Australia* (1980), Vol 1, 83.

²⁶ *Industrial Arbitration Act 1979-1982*, ss 23(1) and 29. There are exceptions to this power in paras (a) and (b) of s 23(1).

²⁷ The Committee was established in 1973 by the Commonwealth Government to assist in fulfilling its obligations under International Labour Organisation Convention 111 - Discrimination (Employment and Occupation) 1958. The Chairman of the Committee is a barrister. The other members of the Committee are representatives of the Commonwealth and State Governments, employers and the Australian Council of Trade Unions.

²⁸ K C T Sutton, *Insurance Law in Australia and New Zealand* (1980), 79.

husband had been convicted of offences of dishonesty, the insurer is entitled to repudiate liability on the policy.²⁹ Apart from an applicant's duty to volunteer information, a "basis of contract clause" may also place him under a duty to answer strictly accurately all questions put to him by the insurer.³⁰

6. DEFAMATION

2.23 A person about whom defamatory material is published may sue for defamation against the person responsible for its publication. Material is defamatory if, as a result of its publication, a person's reputation is lowered in the eyes of ordinary citizens of normal intelligence, thereby exposing him to hatred, ridicule or contempt or to being shunned or avoided. To allege that a person has been convicted of an offence is clearly capable of being defamatory. There are, however, a number of defences to an action for defamation including the defence that the statement was true in substance.³¹ Any person can, therefore, at present, publish information about another person's criminal convictions without being liable in a defamation action so long as he can establish that the information published is true in substance.

²⁹ See *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485.

³⁰ K C T Sutton, *Insurance Law in Australia and New Zealand* (1980), 78 and 44-47. The Australian Law Reform Commission in its report, *Insurance Contracts* (ALRC 20, 1982), has recommended amendments to the law relating both to the duty to disclose information and the misrepresentation of facts (paras 183 and 184). Briefly those recommendations are that an insurer who wishes to rely on innocent non-disclosure should warn the insured of his duty of disclosure before the contract is entered into and that an insurer should be entitled to redress for misrepresentation of a fact which the insured knew, or which a reasonable person in his circumstances ought to have known, to be relevant to the insurer's assessment of the risk.

³¹ *Western Australian Newspapers Ltd v Bridge* (1979) 23 ALR 257, 263 and *Gobbart v West Australian Newspapers* [1968] WAR 113, 118. The question of reform of defamation law on a uniform basis throughout Australia is presently under active consideration and is discussed in chapter 5 below.

CHAPTER 3 - PROTECTION UNDER THE PRESENT LAW

3.1 Apart from the restrictions on the disclosure of records by police and public servants referred to in paragraph 1.12 above, a number of other existing legislative provisions in Western Australia are designed to provide protection for people who have been or are liable to be convicted of an offence.

3.2 Perhaps the most important of these are contained in the *Child Welfare Act 1947-1982*. Subject to the conditions referred to below, where a child¹ is convicted of an offence other than wilful murder, murder, manslaughter, treason, or attempting any of these crimes, the conviction is deemed not to be a conviction for any purpose including the purposes of any enactment imposing or authorising or requiring the imposition of any disqualification or disability on a convicted person.² Where a probation order is made, the section does not operate if the child is subsequently dealt with for that offence under any law relating to probation orders in respect of child offenders. In other cases a period of two years must have expired since the date of conviction or the discharge of any sentence or order imposed in relation to the conviction, whichever is the later, before the conviction is deemed not to be a conviction for any purpose.³

3.3 The *Child Welfare Act 1947-1982* also provides for a Children's Court to make a community service order in respect of a child found guilty of an offence without proceeding to conviction. Where such an order is discharged by the performance of the work or the court discharges the order, the court may dismiss the complaint of the offence in respect of which the community service order was made.⁴

¹ That is, a person under the age of eighteen years: *Child Welfare Act 1947-1982*, s 4(1).

² Ibid, s 40. This provision does not affect the right of a court to disqualify a person from holding or obtaining a driver's licence issued under the *Road Traffic Act 1974-1982*: *ibid*, s 40(3)(c).

³ In his report, *The Treatment of Juvenile Offenders* (1982), Professor E J Edwards indicates that information relating to the effect the provision has on children is not readily available and states that (Part 2, 71):

"Children are not likely to be aware of the provisions or to understand them. They are not explained to children nor would it be easy to do so. And since the child concerned is not prevented from disclosing previous convictions, he or she may well be in a dilemma when asked about them by, say, a prospective employer. A conviction is by the statute 'deemed not to be a conviction' but whether the child could truthfully say he or she had never been convicted would be a nice question."

Professor Edwards suggests that consideration be given to repealing or amending the section in relation to the circumstances in which a conviction shall be "deemed not to be a conviction": Part 3, 191. The Commission agrees.

⁴ *Child Welfare Act 1947-1982*, s 39A(1) and (8).

3.4 Another important provision is contained in the *Offenders Probation and Parole Act 1963-1982*. A conviction for an offence in respect of which a probation order is made under the Act is deemed not to be a conviction for any purpose, including the purposes of any enactment imposing or authorising or requiring the imposition of any disqualification or disability on convicted persons, except in relation to -

- (a) the making of the order;
- (b) the making of a community service order;
- (c) any subsequent proceedings that may be taken against the offender under the Act;
- (d) any proceedings against the offender for a subsequent offence.⁵

This provision ceases to apply to the conviction if the offender is subsequently dealt with under the Act for the offence in respect of which the probation order was made. There is no formal procedure for informing an offender that his term of probation has been completed though he may be given this information informally.

3.5 The effect of the deeming provision appears to be to create a legal fiction so that a conviction in respect of which a probation order has been successfully discharged cannot be taken into account where another provision depends on the existence of a conviction for its operation. It may mean, for example, that where a person is required by a statute to disclose whether he has any convictions, he is not required to disclose a conviction in respect of which a probation order has been completed successfully.⁶ However, this may not prevent a licensing authority from taking the circumstances into account in considering whether a person is, for example, of good fame and character.

3.6 The *Road Traffic Act 1974-1982* contains a provision that where the penalty for an offence under the Act varies according to whether the person has been convicted previously of an offence against the Act or the *Traffic Act 1919-1974* any such previous offence must not be taken into account if it was recorded more than 20 years before the commission of the subsequent offence.⁷

⁵ *Offenders Probation and Parole Act 1963-1982*, s 20(1).

⁶ See *R v Kitt* [1977] Crim LR 220.

⁷ *Road Traffic Act 1974-1982*, s 105.

3.7 Other provisions which recognise that a conviction for an offence may have long term consequences are section 669 of the *Criminal Code* and section 26(2) of the *Child Welfare Act 1947-1982*. Section 669(1)(a) applies to "first offenders"⁸ and permits the court to dismiss a complaint for an offence notwithstanding that the person is guilty of the offence charged. Section 26(2) permits a Children's Court, without proceeding to conviction, to dismiss a complaint.

3.8 Another provision in the *Child Welfare Act 1947-1982*, provides that no person, other than the child, shall disclose the child's conviction for an offence, an order for committal to the care of the Department for Community Welfare or the dismissal of a complaint by a Children's Court or Children's Panel except -

- (a) to a court of law;
- (b) to a person acting in the performance of his duties pursuant to any Act; or
- (c) to a person who as part of his duties is concerned with the custody or welfare of the child.⁹

A subsequent conviction for specific offences, including offences under the *Misuse of Drugs Act 1981*, may be published in newspapers, or on radio or television.¹⁰ Where a child is dealt with on a criminal charge in the Supreme Court or the District Court, a judge thereof may, after due consideration of the public interest and the interests of the child, order that no person shall publish any report of the proceedings of the court in relation to the charge.¹¹

3.9 It will have been seen that the existing protections referred to in this chapter may be grouped into certain categories: some avoid the creation of a conviction, and thus of a record of offences at all; others are concerned to limit the effects of a conviction.

3.10 The Commission's terms of reference are concerned with situations in which a conviction has been recorded and thereby a record of offences created. Notwithstanding the existing provisions mentioned above there may be scope for further or different protections

⁸ For the purpose of this provision "first offender" means a "person who has not previously been convicted of an offence otherwise than as a child by a children's court established under the *Child Welfare Act, 1947*".

⁹ Section 126(1).

¹⁰ Section 126(1a) and (2).

¹¹ Section 126(3).

for convicted persons limiting the effects of the conviction. Other possible approaches are discussed in the following chapters. There is a need to consider these possible approaches in the light of the various types of difficulty outlined in chapter 2. Some approaches are more relevant or satisfactory in resolving particular difficulties than are others.

PART II: SOME SUGGESTED SOLUTIONS

CHAPTER 4 - CONCEALING THE EXISTENCE OF CONVICTIONS

4.1 In Part II of this paper a variety of approaches to the problem of balancing the interests of offenders in living down old convictions with those of society in an adequate flow of information are discussed. These methods have all been adopted or recommended for adoption elsewhere in one or other jurisdictions in the English speaking world. However, not all the approaches which are discussed are relevant to all the various forms of disability which might be encountered. Some whilst meeting some difficulties do not tackle others. In any event various objections may also be raised to some approaches based on countervailing factors such as the public interest in the free flow of information. Broadly the various approaches can be grouped into the following categories -

- * approaches centred around the idea of concealing or failing to disclose the convictions in certain situations

- * approaches centred on the idea of obtaining some form of "pardon" or recognition by the community that convictions have been lived down or that the offender is rehabilitated, and

- * approaches based on anti-discrimination, equal opportunity or fair treatment legislation.

4.2 In this chapter a variety of methods of protecting persons from the effect of their criminal convictions are discussed. In the following chapter the question of reform of defamation law and the question of limiting general publication of records of offences is discussed.

4.3 The approaches to reform discussed in these two chapters have in common a desire to conceal at least from certain persons the existence of certain convictions.

1. SEALING OR EXPUNCTION OF A RECORD OF OFFENCES

(a) The law elsewhere

4.4 One approach to reform common in jurisdictions in the United States of America is that involving "sealing" of a criminal record, whereby an official record is sealed but not destroyed. Generally sealing involves a procedure whereby a record is physically removed from a record system and the dissemination of the information contained in it is barred or substantially restricted. In practice sealing could involve deleting index references to a file or maintaining a confidential index of sealed records. The actual record of the offence could be placed in a sealed file or envelope.¹

4.5 A more radical approach, also adopted in some parts of the United States involves "expunction" of the record. "Expunction" in the literal sense means that the official criminal record is destroyed upon the fulfilment of prescribed conditions, for example, the dismissal of a charge,² the discharge of an offender from probation or the expiration of a specific period of time without a further conviction for an offence.³ Where a record has been expunged it cannot be used by the police during investigations of crimes, by courts for sentencing decisions or during court proceedings in relation to the credit of a witness or by licensing authorities.

4.6 In the United States of America the mechanism for invoking laws relating to sealing or expunction generally involves a person petitioning a court in order to obtain a sealing or expunction order. Generally, the courts have a discretion to grant such an order but the criteria differ greatly from jurisdiction to jurisdiction. Courts may be required to consider whether the applicant is of "good moral character", or "rehabilitated", or whether the continued existence and possible dissemination of the record will cause the applicant a "manifest injustice".⁴ In some jurisdictions such an order can only be granted after a specified point, for example the completion of parole or probation or the completion of a period of years without further conviction.⁵

¹ A particular problem arises where the rehabilitated offender was one of several defendants in the original case. In such a case perhaps a copy of the complete file could be sealed and the original file could be censored by blacking out all references to the identity of the rehabilitated offender.

² Such a provision is more extensive than a provision confined to a record of offences.

³ The term "expunction" has, however, been used to include "sealing" the record. It is important however to keep the distinction in mind.

⁴ Search Group Inc, *Sealing and Purging of Criminal History Record Information* (1981), 13-14.

⁵ *Ibid*, 14.

4.7 In Ohio, a court may order that all "official records" relating to the conviction be sealed. The term "official record" includes all records made in the normal course of the performance of a public official's duties.⁶ The clerks of court of most courts in which an order is made apparently distribute the order to the various public officials likely to have a record of the conviction including the county probation department, the city police, the county sheriff, any other arresting agency, the Ohio Bureau of Criminal Identification and Investigation, the Ohio Bureau of Statistics and the Federal Bureau of Investigation.⁷

(b) Discussion

4.8 Both the sealing and the expunction of criminal records would serve to encourage, and to recognise, an offender's efforts at rehabilitation. However, both approaches could hamper police investigations of offences if, for example, the concealed information indicated a pattern of conduct or modus operandi which might help solve a later crime. Further, depending on the approach adopted records might not be available in subsequent court proceedings.⁸ These problems would be insoluble if the records were expunged. If the record was merely sealed, exceptions could be made, for example, for the purpose of police investigations or court proceedings.⁹ However, it would be necessary to develop specific provisions and a mechanism for allowing access to the information. It would also be important to provide guidelines for the publication or distribution of the information. For example, exceptions could be made permitting access to the record by police officers in the course of an investigation, by the person the subject of the record or for criminological research.¹⁰ Provision could also be made for other people with an interest in finding out whether or not a record existed and, if so, in the contents of the record to apply to a court for access to the record on such conditions as the court might impose.¹¹

⁶ J L Wagner, 'Expungement In Ohio: Assimilation Into Society For The Former Criminal' (1975) 8 *Akron LR* 480, 486.

⁷ *Ibid*, 489. The FBI responds to the order by returning the information to the contributing agency: *ibid*, 490.

⁸ For example, in an action for defamation where it is a defence that a statement is true in substance.

⁹ One means adopted in Ohio of tracing a sealed record is by fingerprints. The record of offences, index card and other references to the person's conviction are held in a sealed envelope and given a number. This number is recorded on his fingerprint index. Where he is subsequently arrested and fingerprinted the fingerprint index shows that there is a sealed envelope containing information about his previous conviction: J L Wagner, 'Expungement In Ohio: Assimilation Into Society For The Former Criminal' (1975) 8 *Akron LR* 480, 487-488.

¹⁰ No doubt, on the basis that the researchers did not disclose the information in subject identifiable form.

¹¹ For example because of a civil action for defamation.

4.9 A considerable difficulty with these approaches to reform is that an offence can be recorded in many different places. It is impracticable to expect that all records of an offence could be sealed or expunged.¹² Even if it were practicable it may involve considerable administrative resources. In the United States of America, for this and other reasons, the practice of sealing or expunging records has been described as "a failure" for not providing the relief intended.¹³ As the legislation does not also prevent questions being asked about whether a person has had a record of a conviction expunged or sealed, the intention of the legislature to conceal the record will be avoided if the ex-offender admits in response to a question that he has had a conviction or that his criminal record has been sealed or expunged.

4.10 On the other hand, after considering the range of options available the New Zealand Penal Policy Review Committee concluded that sealing the record of a conviction was its preferred approach although it recommended adoption of a range of other measures also.¹⁴

2. PREVENTING THE DISCLOSURE OF A RECORD OF "SPENT" CONVICTIONS

(a) The law in the United Kingdom

4.11 The United Kingdom *Rehabilitation of Offenders Act 1974-1982* contains a number of means of protecting "rehabilitated offenders". One of these means is to limit the disclosure of information relating to "spent convictions".¹⁵ This is done by making it an offence for a public official responsible for criminal records to disclose to another person information relating to a prosecution, conviction or sentence unless the disclosure is made in the course of his duties.¹⁶ It is also an offence to obtain such information by means of any fraud, dishonesty or bribe.¹⁷ The information may, however, be disclosed to the rehabilitated offender or to another person at the request of the rehabilitated offender.¹⁸

¹² For an account of the difficulties encountered in Ohio see J L Wagner, 'Expungement In Ohio: Assimilation Into Society For The Former Criminal' (1975) 8 *Akron LR* 480, 488-490.

¹³ "The record is still retrievable through secondary sources. It is simply not possible, physically or literally, either to seal or expunge a record": B Kogon and D L Loughery, 'Sealing and Expungement of Criminal Records – The Big Lie' (1970) 61 *The Journal of Criminal Law, Criminology and Police Science* 378, 383.

¹⁴ For the criteria it laid down for suitable legislation see para 11.15 below.

¹⁵ The concept of spent convictions is explained in para 4.19 below.

¹⁶ *Rehabilitation of Offenders Act 1974-1982* (UK), s 9(2).

¹⁷ *Ibid*, s 9(4).

¹⁸ *Ibid*, s 9(3).

4.12 The Secretary of State may by order permit the disclosure of specified information derived from an official record. These exceptions were made in the *Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975*. Exceptions have been made on the grounds of national security, the public interest (mainly the administration of justice), the protection of particularly vulnerable groups such as the old, the young, the sick and the handicapped, and of maintaining confidence in licensing systems.

(b) New Zealand

4.13 In New Zealand this principle has been recognised by the provisions of the *Wanganui Computer Centre Act 1976-1982* which restrict access to computerised Department of Justice, Police Department and Ministry of Transport records to certain limited categories of government departments or agencies and which create criminal offences for wrongful access or disclosure. The Act also contains provision for the purging or destruction of old information. These are matters which will be dealt with in more general discussion in the Commission's report on Privacy.

(c) The proposals of the Tasmanian Law Reform Commission

4.14 In Australia, the Tasmanian Law Reform Commission, although rejecting other aspects of the approach taken in the United Kingdom *Rehabilitation of Offenders Act 1974-1982*, has recommended limitations on the permissible disclosure of a person's criminal record. The Commission recommended that publication out of court of old convictions brought to the court's attention for sentencing purposes should be limited.¹⁹

4.15 The Tasmanian Law Reform Commission also recommended that consideration should be given to making it an offence for an official record-keeper to disclose a person's criminal record except for the purposes of relevant court proceedings, for the purposes of national security or pursuant to a court order. A court order for disclosure should only be made if the applicant showed that he had a sufficient interest in the disclosure of the criminal record, as for example where a person is being considered for a position of special trust or a

¹⁹ Report on the English *Rehabilitation of Offenders Act 1974* (1976), 7.

position involving frequent association with children.²⁰ The report does not spell out all the procedures required for such an application.²¹

4.16 While there are at present some restrictions in Western Australia on the disclosure of official records of convictions,²² there is no provision for a specific court order for the disclosure of a record. The existing provisions could be replaced with a single provision along the lines of that proposed by the Tasmanian Law Reform Commission. Such a provision could be complemented by a provision making it an offence to obtain information about convictions from public records by fraud, dishonesty or bribery.²³ If provision were made for a court order for the disclosure of a record, it would be necessary to consider whether the subject of a record should be joined as a party to the application. It would also be necessary to specify the circumstances in which such an order could be made, for example, that the subject's interest in maintaining the confidentiality of the record was outweighed by the risk of harm to or loss by the applicant or a person whom he was responsible for protecting.

4.17 The approach of preventing the disclosure of an official record of convictions has certain advantages. It does not require the use of substantial administrative resources, it is relatively simple and easy to understand and its effectiveness is not reduced merely because a conviction may be recorded in a number of places. However this approach does not prevent the disclosure of unofficial records or prevent question being asked about a person's record of convictions. Consideration should therefore be given to whether it is necessary to supplement it with other provisions.

3. TREATING QUESTIONS AS NOT REFERRING TO "SPENT" CONVICTIONS

4.18 Another means of protecting "rehabilitated offenders", also contained in the United Kingdom *Rehabilitation of Offenders Act 1974-1982*, is to provide that where a question seeking information with respect to a person's previous convictions, offences, conduct or circumstances is put to him (otherwise than in proceedings before a judicial authority) the

²⁰ Ibid, 8. It is not clear from the report whether or not a record could be disclosed to another police officer in the course of an investigation without a court order, but a court order would seem to be unnecessary.

²¹ For example, it makes no reference to whether the application should be made ex parte or whether the subject of the record should be joined as a party.

²² Paras 1.12 and 3.8 above.

²³ See *Rehabilitation of Offenders Act 1974-1982* (UK), s 9(4).

question must be treated as not relating to "spent convictions".²⁴ Such questions may be asked in many circumstances such as when a person is applying for a job or for membership of a club or association or for insurance. Someone who failed to disclose a spent conviction in these circumstances would, in the United Kingdom, be protected from liability or other prejudice for failure to disclose a spent conviction.²⁵ Any obligation imposed by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person would not extend to requiring disclosure of a spent conviction.²⁶

4.19 Under the United Kingdom legislation a person is treated as a "rehabilitated" person in respect of a conviction and that conviction is treated as "spent" if two conditions are met -

(i) The sentence imposed in respect of that conviction is not excluded from rehabilitation under the Act. Excluded sentences are -

- * imprisonment exceeding thirty months ,
- * imprisonment or custody for life,
- * a sentence of preventive detention, and
- * sentence of detention during Her Majesty's pleasure.²⁷

(ii) The person has not had imposed on him in respect of a subsequent conviction during the "rehabilitation period" a sentence which is excluded from rehabilitation under the Act.²⁸

4.20 The "rehabilitation period" varies depending on the sentence imposed. For a sentence of imprisonment for a term exceeding six months but not exceeding 30 months the period is ten years. The period for a sentence of imprisonment for a term not exceeding six months is seven years. However, if the convicted person is under 17 years of age these periods are reduced by half.²⁹

²⁴ *Rehabilitation of Offenders Act 1974-1982* (UK), s 4(2)(a). The concept of a spent conviction is discussed at length in chapter 9 below.

²⁵ *Ibid*, s 4(2)(b).

²⁶ *Ibid*, s 4(3)(a).

²⁷ *Ibid*, ss 1(1)(a) and 5(1).

²⁸ *Ibid*, s 1(1)(b).

²⁹ *Ibid*, ss 1(1) and 5(2).

4.21 This approach to reform has the advantage that it would not require the use of administrative resources. Further, its effectiveness would not be reduced because a conviction may be recorded in a number of places. It would serve to encourage and would recognise an offender's efforts at rehabilitation. However, it has been the subject of criticism. It has been said that it institutionalises a lie and that:³⁰

"In trying to conceal a record we seek to falsify history - to legislate an untruth. Such suppression of truth ill befits a democratic society. Good intentions are no defence."

4.22 In any case, allowing people to deny the existence of spent convictions is not necessarily a satisfactory solution if, through ignorance of the law or through unwillingness to tell what is in fact a lie, people who are asked questions about previous convictions disclose the true facts. The Commission understands that the APEX Trust in the United Kingdom (which provides an employment service for ex-offenders) considers that the day to day effect of the United Kingdom legislation on the employability of ex-offenders is not encouraging because of "confusion and ignorance that exists amongst offenders, probation officers and employers".³¹

4. PROHIBITING QUESTIONS ABOUT THE RECORD OF OFFENCES OF A "REHABILITATED OFFENDER"

4.23 The South Australian Law Reform Committee considered that relieving people from having to answer questions was unsatisfactory. Instead it recommended that the asking of certain questions should be prohibited. It pointed out that:³²

"Provided the questions can be asked at all, the fact that the person with a past avails himself of his right not to answer is just as damning in getting employment and in various other situations, as if he had in fact disclosed his past."

4.24 The South Australian Law Reform Committee proposed that an administrative authority should be given power to scrutinise questionnaires at the request of those preparing them, for example, insurance companies preparing application forms for insurance cover or

³⁰ B Kogan & D L Loughery, 'Sealing and Expungement of Criminal Records - The Big Lie' (1970) 61 *Journal of Criminal Law Criminology and Police Science* 378, 385. Also Fiji Law Reform Commission, *Rehabilitation and the Problem of Old Convictions* (1982), 14 and Tasmanian Law Reform Commission, Report on the *English Rehabilitation of Offenders Act 1974* (1976), 6.

³¹ This comment was made in a memorandum by the Chief Executive of the Trust dated 29 April 1982. The memorandum is on file with the Commission.

³² Thirty-Second Report, *Past Records of Offenders and Other Persons* (1974), 8.

employers preparing forms for job applicants. If the questionnaire were approved by the authority that would of itself be a defence to any prosecution if the sanction provided by law for asking such questions were a criminal prosecution. Similarly the South Australian Law Reform Committee envisaged that such approval might form the basis of a defence to a claim of wrongful dismissal.

4.25 As with other approaches to reform discussed in this chapter, such a reform would not require the use of substantial administrative resources although it would require some. Its effectiveness would not be reduced because a conviction may be recorded in a number of places.

4.26 Such an approach had previously been considered in the report, *Living It Down* but rejected because it was considered that people should be "free to ask any questions they like".³³ In any case, however, outlawing such questions may not of itself be sufficient. The job history of a person who had served a sentence in prison would show a gap for that period of time. Unexplained gaps would no doubt arouse the suspicion of potential employers and others.

5. LIMITING THE DISCLOSURE OF CONVICTIONS IN LEGAL PROCEEDINGS

4.27 As was pointed out in paragraphs 2.13 to 2.17 above, information about a person's convictions for an offence may be disclosed in civil and criminal proceedings in a number of circumstances. Another approach which could be adopted to reform would be to limit the circumstances in which convictions can be disclosed in legal proceedings. Apart from a desire to protect people from the consequences of the publication of the record of convictions, such an approach might be in the interest of the administration of justice. Fear that a record of convictions could be disclosed during legal proceedings might make some persons reluctant to come forward as a witness to provide evidence in criminal proceedings or to commence an action against another person in civil matters.

4.28 On the other hand, it is generally undesirable to restrict the courts' access to information which may be relevant to the determination of an issue in dispute, for example, where the credibility of a witness or complainant is important. Such a case might arise where

³³ *Living It Down*, 13.

a witness had a prior conviction for perjury.³⁴ A balance needs to be struck between these competing interests.

4.29 In both civil and criminal proceedings, the provision of the *Evidence Act 1906-1982*³⁵ which provides some protection against unfair cross-examination could be strengthened by empowering the courts to refuse to allow questions as to previous convictions unless "satisfied that such cross-examination will really assist in the decision of the case".³⁶ In addition the court, where convictions were disclosed, could be empowered to prohibit the publication out of court of the convictions.

4.30 Another step which could be taken would be generally to empower courts to limit the publication out of court of "spent" convictions disclosed during proceedings including the sentencing process.³⁷

4.31 These limitations would provide a means of avoiding any embarrassment or social problems which might otherwise occur as a result of the disclosure of a person's record of convictions.

4.32 Generally the law of evidence applicable to courts exercising federal jurisdiction in a State is the law of the State in which the action is heard.³⁸ Any changes to the law of evidence in relation to records of convictions would also apply to courts exercising federal jurisdiction in Western Australia. The Australian Law Reform Commission has been asked to consider whether the laws of evidence applicable in proceedings in federal courts and the courts of the Territories should be uniform and, if so, to what extent. If uniform laws were established for such courts, the result could be that the law of evidence relating to records of convictions in Western Australia would differ depending on the court in which the matter was heard. The value of the restrictions suggested above would be reduced if they did not apply to all courts exercising jurisdiction in Western Australia.

³⁴ See also, for example, *R v Paraskeva* [1983] Crim LR 186 where a spent conviction of the complainant for theft was not disclosed to the defence. An appeal against the conviction of the defendant was allowed. The *Rehabilitation of Offenders Act 1974-1982* (UK) did not apply to criminal proceedings (s 7(2)(a)) and the prosecution had a duty to disclose the record of the complainant to the defence. Where there was a conflict of evidence between the complainant and the defendant it was a relevant matter for the jury to be told that the complainant had been dishonest in the past.

³⁵ Para 2.15 above.

³⁶ The Law Reform Committee of South Australia: *Past Records of Offenders and Other Persons* (1974), 13-14.

³⁷ See para 2.16 above as to existing limits on the publication of criminal proceedings.

³⁸ J A Gobbo, D Byrne and J D Heydon, *Cross on Evidence* (2nd Aus Ed, 1979), 33-34.

CHAPTER 5 - RESTRICTING THE PUBLICATION OF INFORMATION RELATING TO OFFENCES

1. INTRODUCTION

5.1 At present there are no general laws in Western Australia which prevent the publication of records of offences. There are, however, special provisions in relation to children¹ and the disclosure of official records by police officers and public servants.² Two approaches which involve placing restrictions on the publication of records of offences are discussed in this chapter.

2. UNFAIR PUBLICATION

(a) Defamation

5.2 As stated in paragraph 2.23 above, it is a defence to an action for defamation in Western Australia that a statement was true in substance. If a person correctly publishes the fact that a person has been convicted of an offence then this defence would be available. No question arises of whether the publication is for the public benefit or in the public interest. In a number of other Australian jurisdictions, however,³ the defence of truth has for many years not been available unless publication of the material is also in the public interest or for the public benefit. This matter has been the subject of debate in recent years during the development of proposals for a uniform national defamation law.⁴ In its report on *Defamation* this Commission agreed with the approach of the Australian Law Reform Commission ("the ALRC") that the law of defamation should be concerned only with damage to reputation caused by the publication of material which is incorrect.⁵ This Commission did, however, recommend that as a compromise a defence of truth and public interest should be created if it appeared that this would be the most likely way in which a uniform defence of justification

¹ Para 3.8 above. For more general provisions see *Justices Act 1902-1982*, ss 101C, 101D, *Criminal Code*, s 399A, *Evidence Act 1906-1982*, ss 26 and 36C. These provisions may however be motivated by other desires than rehabilitation of an offender or protection of his privacy, for example, protection of a complainant or of witnesses and the need for fair trial.

² Para 1.12 above.

³ For example in New South Wales: *Defamation Act 1974-1983* (NSW), s 15(2).

⁴ See generally the report of the Law Reform Commission of Western Australia on *Defamation* (1979) and the report of the Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (ALRC 11, 1979). Proposals are still being developed for a uniform Australian defamation law by the Standing Committee of Attorneys General.

⁵ Report on *Defamation* (1979), para 11.5.

could be obtained. Adoption of such a defence would provide another means by which a person could be permitted to live down a conviction for an offence.

5.3 In the United Kingdom the authors of the report, *Living It Down*, envisaged that the defence that the statement was true in substance would not be available where the allegation related to a spent conviction except in limited circumstances.⁶ This approach was adopted in the Bill implementing the recommendations of the report and was seen as the main means of enforcing the Act because a person would be taking a substantial risk if he published information relating to a spent conviction.⁷

5.4 This approach was criticised on the ground that it endangered the freedom of the press and also because it sought not only to suppress the truth but had the effect of legalising and encouraging lying.⁸ As a result of the criticism of the Bill, it was amended to provide that a person who publishes details of a conviction cannot rely upon the defence of truth or justification if the publication is proved to have been made with malice.⁹ The value of an action for defamation as a means of enforcing the United Kingdom legislation was significantly reduced by this provision.

(b) Privacy

5.5 The ALRC considered that the undesirable publication of material which was true should be governed by laws specifically concerned with privacy. It proposed that a person concerning whom sensitive private facts were published should have an action against the publisher.¹⁰ Sensitive private facts were to be limited to matters relating to the health, private behaviour, home life or personal or family relationships of the person. In such an action the applicant could seek any or all of the following remedies -

- (a) an order for correction;
- (b) an award of damages;
- (c) a declaratory order;

⁶ *Living It Down*, 14-15, paras 30-32, and 28-29, para 66.

⁷ G Dworkin, 'Rehabilitation of Offenders Act 1974' (1975) 38 *Mod LR* 429, 433.

⁸ *Ibid.*

⁹ *Rehabilitation of Offenders Act 1974-1982* (UK), s 8(5).

¹⁰ Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (ALRC 11, 1979), Draft Bill, cls 19 and 20.

(d) an injunction.¹¹

5.6 The ALRC did not intend that a record of an offence would be a sensitive private fact.¹² The ALRC now intends to consider the problem of old convictions in its final report on its Sentencing reference.

5.7 In its report on *Defamation*,¹³ the Western Australian Law Reform Commission concluded that the question of the protection of individuals in respect of the publication of private facts should be deferred until the completion of its reference on the protection of privacy as a whole. The Commission is now involved in drafting a report on that reference. Further consideration will be given to the question of publication privacy in that report. However the particular problems arising in regard to old convictions has been expressly left to the present reference. If provision were made in this State for general privacy protection, information relating to convictions could be expressly subjected to that general protection.

5.8 The inclusion of records of offences in the concept of private sensitive facts in certain circumstances would help to deter the publication of information about those offences and avoid any embarrassment or social problems which might otherwise occur as a result of the publication of the information. An ex-offender could seek to prevent publication by obtaining an injunction. After information was published, an ex-offender could seek damages against the publisher.

¹¹ Ibid, Draft Bill, cl 25(1).

¹² Ibid, 127, para 241.

¹³ Report on Defamation (Project No 8, 1979), paras 11.9 and 11.10.

CHAPTER 6 - APPLICATION FOR A "PARDON"

6.1 In chapter 4 certain approaches based on the concept of concealing or not disclosing the fact of an offender's convictions were discussed. In this and the succeeding chapter two approaches based on the concept of an offender obtaining a "pardon" or recognition that he has lived down his convictions are discussed.

1. THE POSITION IN CANADA

6.2 In Canada a scheme has been created whereby persons convicted under a federal statute or regulation may apply for a "pardon".¹ A person convicted of an indictable offence is only eligible for a pardon if five years have elapsed since the completion of his sentence.² If the offence is one punishable on summary conviction the period is two years.³

6.3 An application for a pardon is made to the Solicitor General of Canada who must refer it to the National Parole Board. Between 1971 and 1978 the number of applications rose from 1,028 to 7,088 per annum. Of 26,822 applications received to 1978 14,941 were granted, 629 refused, 143 revoked and many were still pending.⁴ It has been estimated that over 70% result from a desire to overcome occupational licensing disqualifications.⁵ The Board is required to make "proper inquiries...in order to ascertain the behaviour of the applicant since the date of his conviction".⁶ The intensity of the investigation varies according to the seriousness of the offence, the length of sentence and the length of time since the completion of the sentence.⁷ The most extensive check involves the provision of two references, a criminal activity check by local police, and interviews with the applicant, the people who provided references, the person's present employer (with the applicant's permission) and two previous employers (if any).

¹ This is the term used in Canada. *Criminal Records Act 1970* (Can). See generally, R P Nadin-Davis, 'Canada's Criminal Records Act: Notes on How Not to Expunge Criminal Convictions' (1980-1980) 45 *Saskatchewan LR* 221, hereinafter cited as "Nadin-Davis". The term "pardon" is used in a different sense in Western Australia: para 6.12 below.

² *Criminal Records Act 1970* (Can), s 4(2)(b).

³ *Ibid*, s 4(2)(a).

⁴ Nadin-Davis, 242.

⁵ By G Parry, the Chief of the Clemency and Criminal Records Division of the Canadian National Parole Board cited in Nadin-Davis at 242.

⁶ *Criminal Records Act 1970* (Can), s 4(2). The investigation is carried out by the Royal Canadian Mounted Police.

⁷ Solicitor General of Canada, *Clemency Review: Issues Paper*, Part C (1981), 45 (hereinafter cited as "*Clemency Review*").

6.4 The applicant can request in the application form that his present employer not be contacted. He can also indicate whether or not his referees and past employers are aware of his record so that the police may use as much discretion as possible when contacting them.⁸

6.5 A report is prepared for the Board. If the Board proposes to recommend that a pardon be refused the applicant is notified and given the reasons for the refusal. The applicant may make representations to the Board and the Board is required to reconsider the application.⁹ Criteria for a successful application are:¹⁰

- "(1) Lack of further conviction (in practice, the eligibility period is treated as starting to run following the applicant's last conviction);
- (2) Lack of police 'knowledge' of involvement in criminal activities;
- (3) Lack of outstanding warrants;
- (4) Lack of adverse comment regarding behaviour (eg drunkenness, gambling, police suspicion of involvement in organised crime, etc)."

6.6 The Solicitor General is required to refer all positive recommendations to the Governor in Council. A pardon may then be granted by the Governor in Council.¹¹

6.7 The grant of a pardon:¹²

- "(a) is evidence of the fact that the Board, after making proper inquiries, was satisfied that an applicant was of good behaviour and that the conviction in respect of which the pardon is granted should no longer reflect adversely on his character; and
- (b) unless the pardon is subsequently revoked, vacates the conviction in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which the person so convicted is, by reason of such conviction, subject by virtue of any Act of the Parliament of Canada or a regulation made thereunder."

There is doubt as to the effect of the provision that the pardon "vacates the conviction". It has been argued that it does not "deem convictions never to have occurred"¹³ and that the

⁸ Ibid, 6.

⁹ *Criminal Records Act 1970* (Can), s 4(4).

¹⁰ Nadin-Davis, 233.

¹¹ *Criminal Records Act 1970* (Can), s 4(5).

¹² Ibid, s 5.

conviction still exists but that it should no longer "reflect adversely on a person's character". If this is the case it would mean that a person granted a pardon could not answer "no" to the question: "Have you been convicted of an offence?" It would also mean that a newspaper could report that he had been convicted of an offence and that in an action for defamation the defence of truth would be available.

6.8 A pardon may be revoked if the person is convicted of another offence, or if it is established that he is no longer of good character, or that he knowingly made a false or deceptive statement in relation to his application for the pardon, or knowingly concealed some material particular in relation to such application.¹⁴

6.9 Although the Act was originally seen as providing assistance in rehabilitating offenders, particularly in finding employment, it has primarily been used as a means of removing civil disabilities in respect of occupational licensing.¹⁵ That result could to a large extent alternatively be achieved by reviewing existing occupational licensing legislation and practice to ensure that convictions are only taken into account where they are relevant to the licence being sought.¹⁶

2. DISCUSSION

6.10 The grant of a pardon would mean that any legal disability arising from a conviction would be removed.¹⁷ Where an application was granted, a certificate could be issued stating that a person's rights and duties as a citizen were the same as if he had not been convicted of any offence. This approach would serve to encourage, and would recognise, rehabilitation.

6.11 The pardon, as it operates in Canada, has the advantage that all offenders may make an application once the relevant time period has passed. It avoids the arbitrariness associated with providing, as in the United Kingdom for example, that only offences for which a sentence of imprisonment of less than 30 months was imposed may become spent. As it involves an inquiry into the applicant's character, it may lead to a more reliable decision as to

¹³ Nadin-Davis, 236-237.

¹⁴ *Criminal Records Act 1970 (Can)*, s 7.

¹⁵ Nadin-Davis, 245.

¹⁶ Para 10.3 below.

¹⁷ Such as those referred to in paras 2.3 to 2.10 above.

whether or not he has been rehabilitated than a system based solely on whether a further conviction has been recorded in a particular period of time.

6.12 If such a system were introduced, however, it may not be desirable to do so using the language of a pardon. In Western Australia a pardon, which is granted pursuant to the Royal Prerogative, can clear a person "from all infamy, and from all consequences of the offence. ...It makes him, as it were, a new man, so as to enable him to maintain an action against any person afterwards defaming him in respect of the offence for which he was convicted."¹⁸ A pardon is usually only granted where a person is proven subsequently to be innocent of the offence or at least where there is a serious doubt as to whether or not the convicted person actually committed the offence. A pardon may also be granted where a person has been "...too severely punished; or wrongly convicted (even though probably guilty) by reason of some technical or procedural error; or convicted on the right facts under the wrong law; and whose plight is discovered too late for redress in any judicial court of appeal".¹⁹ It may be undesirable to confuse the existing circumstances in which a pardon may be granted with a procedure to determine whether or not a person had become rehabilitated.

6.13 Instead, provision could be made for a person to apply to a tribunal (such as the Parole Board) for a certificate that the tribunal is satisfied that he is of good behaviour and that the conviction should no longer reflect adversely on his character. Alternatively, provision could be made for a person with a conviction to apply to a court for a declaration that the conviction is vacated from the date of the declaration. The court could make such a declaration if it were satisfied that he was of good character. The hearing could be conducted in camera but on notice to the Attorney General and the Commissioner of Police who would have a right to appear. The effect of the certificate or declaration would be that henceforth the person should be deemed for any purpose giving rise to rights or obligations not to have committed the offence. As a result he would not be obliged to disclose to an insurance company or statutory authority that he had been convicted of the offence. The grant of a certificate or declaration could also have the effect, on notice, of requiring the Police Department or any other department having information relating to the conviction to seal the record of the conviction.

¹⁸ 8 Halsbury, *Laws of England* (4th ed, 1974) para 952. In Western Australia the power of mercy is granted to the Governor under Clause X of the Letters Patent Constituting the Office of Governor of the State of Western Australia. In each case the extent of the pardon will depend on the terms of the pardon itself: A T H Smith, 'The Prerogative of Mercy, The Power of Pardon and Criminal Justice' [1983] *Public Law* 398, 417-419.

¹⁹ C H Rolph, *The Queen's Pardon* (1978), 2.

6.14 Such a scheme would, however, have disadvantages. First, the onus would be on the offender to make the application. It may not be widely used because of ignorance of its existence. This could be overcome to some extent by a publicity campaign.²⁰ Secondly, even if offenders were aware of its existence, they may not be prepared to make an application for fear that their old convictions would be disclosed in the course of the inquiry following the application. In Canada, for example, an inquiry is conducted by the Royal Canadian Mounted Police and it is necessary to provide references. The police carry out interviews with the people who provide references and with the applicant's employer (with the applicant's permission).²¹ One criticism of the operation of the Canadian Act is that old convictions have been made known to employers and others who were previously unaware of them.²² Thirdly, the process involves significant police resources and takes a considerable time to complete. In Canada investigations take from six to eight months to complete.²³ Fourthly, an inquiry can only show that there is no evidence of unsatisfactory behaviour. It will not necessarily disclose that he has been involved in undetected criminal activity.

²⁰ Para 12.1 below.

²¹ Para 6.3 above.

²² Nadin-Davis, 231.

²³ Ibid, 233. Cases can, however, be dealt with as a matter of priority: *ibid*.

CHAPTER 7 - AUTOMATIC RESTORATION OF RIGHTS

7.1 One of the consequences of the pardon scheme in Canada is that it removes any disqualification to which the pardoned person would otherwise be subject by virtue of a conviction. A somewhat similar approach has been proposed by the Fiji Law Reform Commission.¹ That Commission proposed that after a specific conviction-free period (which it suggested should be 10 years) the ex-offender should become a rehabilitated person with full restoration of all rights at law. The Commission did not give examples of the rights concerned. Such a restoration of rights would be automatic, and would not require an investigation as is required in Canada.² A rehabilitated offender could, however, apply for a "rehabilitated certificate" which would provide evidence of his restoration of rights. The Commission considered that such an approach would serve two purposes:³

"The first is that it gives the ex-offender a tangible goal to work towards. Secondly it avoids the criticisms levelled at the record concealment approach and the artificiality of the United Kingdom approach. The approach is positive rather than negative in that instead of covering up the conviction or stating that the conviction is 'spent', the conviction is not tampered with in any way. Instead it is positively asserted that the status of the ex-offender is restored and that he or she is a rehabilitated person."

7.2 The disadvantages associated with an application for status as a rehabilitated offender would be avoided by the adoption of such an approach. It does, however, ignore the reality that a period without further conviction, even a long period, does not necessarily indicate that the offender has been rehabilitated. He may have committed other offences and not been charged or, if tried, the offence may not have been proved. On the other hand a person may be rehabilitated long before the end of the specific conviction-free period. However such an approach to reform would serve to encourage and recognise efforts at rehabilitation, and it has the advantage that it is simple and easy to understand.

¹ Fiji Law Reform Commission, Discussion Paper No 2, *Rehabilitation and the Problem of Old Convictions* (1982). The Commission has not yet issued its final report on this subject.

² Although it is not expressed in the paper, it would appear that the Fiji Law Reform Commission envisaged that a conviction for a subsequent offence once a person had achieved the restoration of rights would not revive the earlier offence and any loss of rights would depend upon the subsequent conviction.

³ Fiji Law Reform Commission, Discussion Paper No 2, *Rehabilitation and the Problem of Old Convictions* (1982), 18.

CHAPTER 8 - ANTI-DISCRIMINATION LEGISLATION¹

8.1 The third approach to reform mentioned in paragraph 4.1 above is that based on anti-discrimination or equal opportunity legislation. This neither conceals the fact of conviction nor seeks to prove or decree that the offender has lived down a conviction. It is based on the proposition that in many situations the fact of conviction is irrelevant or at least not a proper basis for discrimination.

1. THE LAW AND PROPOSALS FOR REFORM ELSEWHERE

8.2 The United Kingdom *Rehabilitation of Offenders Act 1974-1982* provides that a spent conviction,² or any circumstances ancillary thereto, or any failure to disclose a spent conviction or any such circumstances, is not a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment.³ The Act contains no express provision for enforcing this anti-discrimination provision. However, in *Property Guards Ltd v Taylor and Kershaw*⁴ the Employment Appeal Tribunal affirmed a decision of an Industrial Tribunal that dismissals based on spent convictions were unfair. The respondents were awarded compensation for the dismissals.

8.3 The Fiji Law Reform Commission has recommended that it be made unlawful to discriminate against any ex-offender on the grounds of his conviction in the area of employment unless there is a direct relationship between the offence and the employment. This recommendation is wider than the approach in the United Kingdom legislation in that it applies to all ex-offenders and not, as in the United Kingdom, only to an ex-offender's spent convictions. It took this approach because it considered that it would more positively encourage the rehabilitation of offenders.⁵

¹ Such legislation might also be described as equal opportunity legislation.

² Para 4.19 above.

³ *Rehabilitation of Offenders Act 1974-1982* (UK), s 4(3)(b).

⁴ [1982] IRLR 175.

⁵ Discussion Paper No 2, *Rehabilitation and the Problem of Old Convictions* (1982), 27.

8.4 The Fiji Law Reform Commission further recommended that, where a person has become a "rehabilitated offender",⁶ a conviction should not provide a ground for discrimination even if a direct relationship between the offence and the employment exists.⁷

8.5 Anti-discrimination legislation of a general type has been enacted in Ontario.⁸ In a number of common law jurisdictions including New South Wales⁹ and Victoria¹⁰ anti-discrimination or equal opportunity legislation is limited to areas of discrimination such as that based on race, sex, marital status or physical or intellectual impairment. The Ontario Human Rights Code provides that every person has a statutory right to equal treatment with respect to employment without discrimination and a right to freedom from harassment arising out of a record of offences.¹¹ The right to equal treatment with respect to employment is not infringed where the "discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and bona fide qualification because of the nature of the employment".¹²

8.6 A person who believes that a right conferred on him under the Act has been infringed may file a complaint with the Ontario Human Rights Commission which must investigate the complaint and endeavour to effect a settlement.¹³ If the Commission fails to effect a settlement and it appears to it that an inquiry is appropriate, the Commission may request the Minister to appoint a board of inquiry and refer the subject-matter of the complaint to the

⁶ Para 7.1 above.

⁷ Discussion Paper No 2, *Rehabilitation and the Problem of Old Convictions* (1982), 28.

⁸ *Human Rights Code 1981* (Ont).

⁹ *Anti-Discrimination Act 1977-1982* (NSW).

¹⁰ *Equal Opportunity Act 1977-1982* (Vic).

¹¹ *Human Rights Code 1981* (Ont), s 4. The term "record of offences" means a conviction for (s 9(h)):

"(i) an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or

(ii) an offence in respect of any provincial enactment."

The Ontario legislation is analysed in a short note by Ian B McKenna, 'The New Ontario Human Rights Code', [1983] *Public Law*, 365.

In New Zealand the Penal Policy Review Committee has recommended that it be made unlawful from the date of an offender's release or conviction to discriminate, on the basis of a conviction, in the areas covered by the New Zealand *Human Rights Commission Act 1977* (notably employment). Exemptions would be made where there was a direct relationship between the criminal record and the area of concern, for example, a bank should not be required to employ a person recently convicted of dishonesty. Exemptions would expire 10 years after the release or conviction.

The Canadian *Human Rights Act 1977* also makes it unlawful to discriminate against a person on the ground of a conviction for which a pardon has been granted, except in certain classes of employment.

¹² *Human Rights Code 1981* (Ont), s 23(b).

¹³ *Ibid*, ss 31 and 32.

board.¹⁴ After a hearing, if the board finds that a right of the complainant has been infringed by a party to the proceeding, the board may, by order:¹⁵

- "(a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
- (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish."

2. DISCUSSION

8.7 At present, there is no general anti-discrimination legislation in Western Australia¹⁶ and, in particular, no anti-discrimination legislation has been enacted with respect to records of offences. The Committee on Discrimination in Employment and Occupation does, however, deal with complaints in the employment area.¹⁷

8.8 Anti-discrimination legislation of course would refer not only to ex-offenders but to other classes of people who might be considered to be equally or even more deserving. For this reason it may be preferable to deal with ex-offenders by inclusion in general anti-discrimination legislation. Irrespective of the manner in which this approach was implemented, it would facilitate an offender's assimilation into the community and encourage efforts at rehabilitation. The enforcement of such an approach could require the use of administrative resources, such as those of a Human Rights Commission. It would, however, be relatively simple and easy to understand.

8.9 If general anti-discrimination legislation were enacted in Western Australia, one means of enforcing the legislation would be to make it an offence to discriminate in

¹⁴ Ibid, s 35(1).

¹⁵ Ibid, s 40.

¹⁶ It has been reported that the Western Australian Government is considering introducing equal opportunity legislation: 'WAIT Acts after Sex Allegation', *The West Australian*, 1 September 1983, 2; and 'WA Looks At Law to Ban Inequalities', *The West Australian*, 29 September 1983, 4.

It has also been announced that the Commonwealth Government is preparing human rights legislation including an Australian Bill of Rights based on the International Covenant on Civil and Political Rights. This Covenant requires the Government "to respect and to ensure to all individuals the rights recognised in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status": Press Release by the Attorney General, Senator Gareth Evans, *Major Human Rights Legislation Planned*, 25 October 1983.

¹⁷ Para 2.21 above.

employment against a person because of a conviction. Alternatively, where a conviction provided the basis for the rejection of an application for employment or other benefits or privileges, the decision-maker could be required to disclose the reason for the decision in writing. The decision could then be subject to challenge in a court or a human rights commission. The court or commission could be given powers similar to those of the Ontario Human Rights Commission.¹⁸

8.10 If anti-discrimination legislation were considered to be a satisfactory approach, its scope could be extended beyond the area of employment to include other areas such as insurance and credit.

8.11 While its effectiveness would not be reduced because a conviction may be recorded in a number of places, there are other areas which anti-discrimination or equal opportunity legislation does not address, for example, the publication of old convictions in the media or the disclosure of old convictions in the courts.

¹⁸ Para 8.6 above.

CHAPTER 9 - IN WHAT CIRCUMSTANCES SHOULD ANY OF THE FOREGOING PROPOSALS APPLY?

1. INTRODUCTION

9.1 One question which arises for consideration is whether or not any of the proposals for reform discussed in the earlier chapters should be confined to particular circumstances. The United Kingdom *Rehabilitation of Offenders Act 1974-1982* provides an example of legislation in which the protection provided is confined to people who are considered to have earned the right to be treated as if they are rehabilitated, that is to "legal rehabilitation", by the conviction being treated as "spent". Detailed examination of the legislation follows in this chapter. A similar approach could be adopted in this State.

2. TO WHICH OFFENCES SHOULD ANY LEGISLATION APPLY?

9.2 No doubt there are some offences which many would regard as so serious, for example wilful murder, that a conviction for that offence should never entitle the offender to "legal rehabilitation" and to the conviction being treated as spent. Once that approach is taken it is necessary to decide where to draw the line.

9.3 It has been seen however that some approaches to reform are not based on that premiss, for example, the Canadian scheme of pardon discussed in chapter 6.

9.4 The report *Living It Down* recommended that legal rehabilitation should only be possible in respect of offences for which a penalty of less than two years' imprisonment was imposed. The following reasons were given for the selection of this period: ¹

"...in current circumstances this provides a convenient watershed between redeemable offenders and those whom society is likely to regard either as hardened professionals, or as people whose offences have been such that the notion of rehabilitation evokes strong feelings of resentment. A sentence of two years is also the longest which, under our present law, can be suspended."

The authors of *Living It Down* seem to have been concerned with ensuring public acceptance of the scheme they proposed and may have been conservative in the selection of the offences

¹ *Living It Down*, 17, para 36.

to be included in the scheme. The United Kingdom *Rehabilitation of Offenders Act 1974-1982*, which was based on this report, in fact applies to offences in which the sentence of imprisonment imposed does not exceed 30 months.

9.5 There are at least two other means by which the offences could be selected. First, the selection could be made by means of the categories of offences used in Western Australia, namely, simple offences, misdemeanours and crimes.² It may be possible to draw the line at simple offences without too much difficulty but the misdemeanour category contains a wide range of offences.³ For this reason this approach seems to be an unsatisfactory means of selecting the offences.

9.6 Secondly, the selection could be made in accordance with the maximum penalty prescribed for the offence. However, the maximum sentence which may be imposed for an offence does not necessarily reflect the seriousness of the conduct of a defendant because the seriousness of the conduct constituting an offence may vary, for example, in the case of stealing the seriousness of the offence may vary depending on the sum of money or value of the item stolen.

9.7 As well, the appropriate penalty for particular offences and for individual offenders may well change over time as a result of changing social, legislative and judicial attitudes.

9.8 The approach adopted in the United Kingdom therefore appears to be the best approach though it depends on the sentencing practices of judicial officers. On the one hand this may be an advantage because the officer, in fixing the sentence, will take into account the seriousness of the conduct of the defendant, amongst other factors such as age and previous convictions. On the other hand the sentence may be influenced by the judicial officer's temperament or philosophy.

9.9 If this approach were adopted, it would be necessary to select a penalty which would be the maximum penalty for which an offender would be capable of becoming legally rehabilitated. The Commission welcomes comment on the period which should be provided. The following factors could be taken into account in determining that period -

² Para 1.7 above.

³ Ibid.

1. The need to obtain public acceptance for the scheme probably means that it should not apply to serious offences which have attracted substantial sentences.
2. The more serious the offences included in the scheme the greater would be the need to provide exceptions.⁴

9.10 Irrespective of the method of selection, consideration also needs to be given to whether a conviction by or before a court outside Western Australia should be included in any scheme.⁵ If such convictions were not included in the scheme it would add to the complexity of the scheme because of the need to distinguish between convictions for offences in Western Australia and those for offences in other jurisdictions. However, one difficulty in including such offences in the scheme is that different classifications of offences exist as between jurisdictions and penalties for similar offences may also significantly differ between jurisdictions.

9.11 A similar problem arises with respect to an offence against the law of the Commonwealth of Australia. Should any scheme include such an offence whether it is committed in Western Australia or elsewhere in Australia? Whether or not a scheme could apply to Commonwealth offences would depend on the scheme adopted. While the State could not validly enact a law requiring a Commonwealth authority to seal or expunge a record of offences it could prohibit private individuals from asking questions which might lead to the disclosure of a spent Commonwealth conviction.

9.12 Another problem is that an act or omission which constitutes an offence in another jurisdiction may not constitute an offence in Western Australia. It would be anomalous if a person could not become legally rehabilitated in respect of such an act or omission or if such an act or omission could extend the period of time before he became legally rehabilitated in respect of another offence because of the penalty imposed.⁶

⁴ The provision of exceptions is discussed in paras 9.25 to 9.28 below.

⁵ Section 1(4)(a) of the *Rehabilitation of Offenders Act 1974-1982* (UK) provides that that legislation also applies to a conviction by or before a court outside Great Britain.

⁶ This problem has been dealt with in the United Kingdom where s 6(6)(c) of the *Rehabilitation of Offenders Act 1974-1982* provides that a foreign conviction only extends the rehabilitation period if the conduct of the accused would have constituted an offence in Great Britain.

3. HOW MUCH TIME SHOULD ELAPSE BEFORE A CONVICTION CAN BE TREATED AS SPENT?

9.13 Another factor influencing any approach to reform is the question of how much time should elapse before a conviction can be treated as spent.

9.14 If the primary purpose of reform is seen as the rehabilitation of offenders then the speedy integration of the offender into society is desirable. It is then arguable that provisions should operate upon the offender's release from prison or the discharge of the penalty. An ex-offender may have a better chance of obtaining employment if, for example, anti-discrimination legislation made it unlawful for an employer to discriminate against him unfairly because of his conviction.

9.15 On the other hand, if the purpose is seen as recognition of the fact of rehabilitation, rather than as the promotion of rehabilitation, a requirement of the lapse of a period of time without further conviction (the "rehabilitation period") is implied. The report, *Living It Down*, recommended that the period should vary depending on the length of the sentence imposed on the offender so that the longer the sentence, the longer the period before the offender could be treated as being rehabilitated. This approach was based on the view that " ...the more serious the offence, the longer it will be before one can be reasonably sure that the offender has reformed".⁷

9.16 This general approach was adopted in the United Kingdom *Rehabilitation of Offenders Act 1974-1982*. The rehabilitation period for a sentence of imprisonment or corrective training for a term exceeding six months but not exceeding 30 months is ten years from the date of the conviction in respect of which the sentence was imposed. The period for a sentence of imprisonment for a term not exceeding six months is seven years. The period for a fine is five years. In all these cases the rehabilitation period is reduced by half if the convicted person is under 17 years. After the appropriate period without further conviction, the conviction is regarded as being "spent".

9.17 These periods were apparently based to some extent on a study carried out by the United Kingdom Home Office Research Unit. The study involved a random sample of 4,000

⁷ *Living It Down*, 16, para 34.

males convicted of indictable offences in the Metropolitan Police District in 1957. It found that of these 45% were first offenders and the rest had previously been convicted. Of the first offenders 64% remained free of further convictions for five years and 60% for ten years. Less than 4% of the offenders therefore were reconvicted of another indictable offence after five years. Of those with previous convictions 33% remained free of further convictions for five years and 30% for ten years. After ten years the number reconvicted was negligible.⁸ In Australia, the New South Wales Bureau of Crime Statistics and Research has conducted a study modelled on the Home Office study. The New South Wales study involved a random sample of 1,365 people convicted of both indictable and simple offences.⁹ The New South Wales study found that 52.5% of the people in the study had not been reconvicted of a further offence within ten years of the original conviction.¹⁰ Of those people in the survey, 38.3% were reconvicted within a period less than five years after the original conviction. The survey also found that those given a non-custodial sentence were significantly less likely to be reconvicted within ten years than those given a short prison sentence.¹¹ This study tends therefore to support the use of a graduated scale depending on the length of the sentence imposed. However, a graduated scale has the disadvantage of being complex.

9.18 Another factor which might be taken into account in determining how much time should elapse before a conviction can be treated as spent is whether or not the offender has previous convictions. The New South Wales survey showed that offenders with previous convictions were reconvicted more often and more rapidly than first offenders. Of those with

⁸ The details are taken from the account given in the Department of the Attorney General and Justice, New South Wales Bureau of Crime Statistics and Research, Research Report No 6, *Two Studies of Recidivism* (1977), 2 and *Living It Down*, 42-43.

⁹ Research Report No 6, *Two Studies of Recidivism* (1977), 3.

¹⁰ Ibid. The authors of the New South Wales Study made the following comments on the differences in the results of the two studies:

"The differences in the results of the two studies are probably more attributable to differences in sampling than to the differences in the criminal populations of the two countries. The main differences in sampling were that the Bureau's study included females and offences heard in Magistrates Courts. The results showed that females have a lower reconviction rate than males and so their exclusion would slightly increase the overall proportion reconvicted."

The results on the effect of sentence and type of offence indicate that the more serious the first offence, the more likely the person was to be reconvicted and the sooner he was likely to be reconvicted. This suggests that the exclusion of summary offences from the Bureau study would increase the overall reconviction rate but decrease the proportion reconvicted in the later part of the rehabilitation period and make the results more comparable with those from the British study.

Two other factors may have contributed to the higher reconviction rate for NSW. The NSW population from 1965-1975 had a higher proportion of young persons than the British population seven years earlier and young persons have higher reconviction rates. The other is the introduction of the breathalyser in NSW in 1969. Approximately 16,000 breathalyser convictions are made each year. With many more convictions being made in the court in the latter part of the period being studied there is likely to be a higher reconviction rate in these years especially among young males.": *ibid*, 11.

¹¹ *Id*, 5.

previous convictions 52% were reconvicted in less than five years. Only 23% of those with no previous convictions were reconvicted in that period. There was no difference, however, between the two groups in the five to ten years period. In both groups 9% were reconvicted in this period. It was concluded that: ¹²

"There is . . . no statistical reason for distinguishing between first offenders and others in respect of rehabilitation periods greater than five years. However, arguments based on incentive or retribution may suggest a shorter period for first offenders."

9.19 Any approach in which a time is fixed at which a conviction automatically becomes spent, irrespective of the considerations used to fix the particular time, may be seen as rewarding and encouraging rehabilitation. There are, however, conceptual difficulties with such an approach because:¹³

"....a convict who becomes truly rehabilitated earlier than the specified statutory minimum period is not rewarded for doing so . At the same time, a convict who is not truly rehabilitated but is able to satisfy the minimum statutory conditions nevertheless will be 'rewarded' with expungement".

4. WHEN SHOULD THE PERIOD OF TIME COMMENCE TO RUN?

9.20 Another question which arises is when the period of time which must elapse before a conviction can be treated as spent should begin to run. The answer to this must take account of the various forms of sentence which can be imposed including terms of imprisonment, fines, good behaviour bonds, disqualifications (for example, from driving a motor vehicle) and community service orders. The simplest approach would be to base the commencement date on the time when the offender is at liberty to establish his ability to live in the community without reconviction. On this basis, where a person is in custody, the period would commence to run from the end of his detention for the offence, whether on parole (assuming that he successfully completes the parole period) or on completion of the sentence. In other cases, the period could run from the date of conviction. A more complicated approach would involve providing commencement dates depending on the sentence imposed. The following commencement dates could be provided -

1. In the case of a sentence of imprisonment - from the end of detention.

¹² Ibid, 11.

¹³ M A Franklin and D Johnsen, 'Expunging Criminal Records : Concealment and Dishonesty In An Open Society' (1981) 9 *Hofstra LR* 733, 749.

2. In the case of a fine - from the date on which the fine was paid.
3. In the case of a disqualification - from the date on which the disqualification ceased to have effect.
4. In the case of a good behaviour bond - from the date on which the bond ceased to have effect.
5. In the case of a probation order¹⁴ or community service order - from the date on which the order ceased to have effect.

5. WHAT SHOULD BE THE EFFECT OF A SUBSEQUENT CONVICTION?

9.21 Where a person has been convicted of another offence, the following issues arise -

1. Should all convictions which occur during the rehabilitation period operate to delay or prevent a conviction becoming spent?
2. Should a conviction which has become spent be revived by a subsequent conviction?

9.22 Conviction for an offence during the rehabilitation period of another offence in general indicates that the offender has not been rehabilitated. It may, however, be felt that different considerations should apply depending on the seriousness of the subsequent offence. If the scheme operated only in respect of offences for which a penalty of less than 30 months imprisonment were imposed, a distinction could perhaps be made between those offences within the scheme and those outside it. Conviction for an offence outside the scheme during the rehabilitation period could operate to prevent the conviction for the earlier offence becoming spent. Where the subsequent offence was one within the scheme different considerations might apply. If the offence were serious, for example an indictable offence, conviction for that offence could extend the rehabilitation period until the end of the

¹⁴ It would not be necessary to make provision for probation orders if the effect of the completion of probation is to place the offender in the same position as if he had not been convicted of the offence: para 3.4 above.

rehabilitation period for the subsequent offence. In the case of less serious offences, for example a simple offence, this might be considered to be too harsh, for example, if the first offence were an indictable offence and the subsequent offence was a minor traffic offence. In England and Wales, where a person is convicted of a further offence within the scheme, the rehabilitation period which would end the earlier is extended so as to end at the same time as the other rehabilitation period. This provision does not, however, apply where the subsequent offence is a simple offence.¹⁵

9.23 The answer to the question whether or not conviction for a subsequent offence after an earlier offence has become spent should revive the earlier offence may depend on the scope of any exceptions to the scheme. This is discussed in paragraphs 9.25 to 9.28 below. The South Australian Law Reform Committee considered that spent convictions should be revived in the case of charges of perjury.¹⁶

9.24 If it were considered that a subsequent conviction should revive a spent conviction this could apply either generally or in more limited circumstances as, for example, where -

- (a) the subsequent offence was the same as the spent conviction;
- (b) the subsequent offence was -
 - (i) outside the scheme;
 - (ii) an indictable offence within the scheme;
 - (iii) the same offence as the spent conviction; or
- (c) the spent conviction was an indictable offence (that is, an indictable offence within the scheme).

6. SHOULD THERE BE ANY EXCEPTIONS TO THE OPERATION OF THE LEGISLATION?

(a) Consent

9.25 One circumstance in which it would seem desirable to create an exception to the scheme is where the offender himself wishes to have a spent conviction revealed. He could, of

¹⁵ *Rehabilitation of Offenders Act 1974-1982* (UK), s 6(4) and (6).

¹⁶ Thirty-Second Report, *Past Records of Offenders and Other Persons* (1974), 12.

course, disclose the conviction himself. He may, however, wish to go further and have records relating to the conviction disclosed. The records may, for example, contain information which indicate circumstances relating to the offence less serious than a bland statement that he was convicted of a particular offence.¹⁷

(b) Judicial and quasi-judicial proceedings

9.26 Other than consent, any exceptions would tend to reduce the effectiveness of the scheme. In the United Kingdom, however, a number of exceptions have been provided. Under the *Rehabilitation of Offenders Act 1974-1982* records of spent criminal convictions are admissible or may be required to be produced in criminal proceedings, military service disciplinary proceedings, or proceedings relating to adoption or to the guardianship, wardship, marriage, custody, care or control of, or access to, any child, and in a number of other proceedings.¹⁸ In addition, in any proceedings before a judicial authority, if the presiding officer is satisfied that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions or to some circumstances ancillary thereto, that officer may admit or require the evidence in question.¹⁹

(c) Other possible exceptions

9.27 The Secretary of State has also been given power to provide for further exceptions.²⁰ Such exceptions have been made by the *Rehabilitation of Offenders Act 1974 (Exceptions)*

¹⁷ For the position in the United Kingdom see para 4.11 above.

¹⁸ *Rehabilitation of Offenders Act 1974-1982* (UK), s 7(2). The Queen's Bench Division has issued a Practice Direction ([1975] 1 WLR 1065) aimed at keeping the disclosure of spent convictions to a minimum and securing a uniform approach by the courts. The Practice Direction provides:

"(3) During the trial of a criminal charge reference to previous convictions (and, therefore, spent convictions) can arise in a number of ways. The most common is when the character of the accused or a witness is sought to be attacked by reference to his criminal record, but there are, of course, cases where previous convictions are relevant and admissible as, for instance, to prove system.

(4) It is not possible to give general directions which will govern all these different situations, but it is recommended that both court and counsel should give effect to the general intention of Parliament by never referring to a spent conviction when such reference can be reasonably avoided. If unnecessary references to spent convictions are eliminated much will have been achieved.

(5) After a verdict of guilty the court must be provided with a statement of the defendant's record for the purposes of sentence. The record supplied should contain all previous convictions, but those which are spent should, so far as practicable, be marked as such.

(6) No one should refer in open court to a spent conviction without the authority of the judge, which authority should not be given unless the interests of justice so require.

(7) When passing sentence the judge should make no reference to a spent conviction unless it is necessary to do so for the purpose of explaining the sentence to be passed."

¹⁹ *Rehabilitation of Offenders Act 1974-1982* (UK), s 7(3).

²⁰ *Ibid*, ss 4(4) and 7(4).

Order 1975. Under these exceptions questions by or on behalf of any person in order to assess the suitability of people for various professions, offices, employments and occupations, including those of medical practitioner, legal practitioner, nurse, judicial officer, police officer, prison officer, teacher, a person involved with children and a dealer in securities, are excluded from the operation of section 4(2) of the Act.²¹ An attempt was made to identify occupations involving:²²

"(1) close dealing with young people, (2) close dealing with vulnerable people, (3) involvement with the administration of justice, (4) national security, (5) other strong public interests, and (6) access to drugs."

9.28 The Commission understands on the other hand that a large number of requests for further exceptions have been refused, including applications from banks and insurance companies (in respect of staff) and the private security industry. To have acceded to all the applications would have gone a long way towards nullifying the purpose of the Act. The only additional exception which has been granted is in respect of the senior management of banks.²³

(d) Criticism

9.29 Two criticisms have been made of this list of exceptions. First:²⁴

"A shortcoming of the present list is that it permits disclosure of all spent convictions with no provision for determining whether a particular offence is relevant to a judgment of the offender's fitness for the job sought. In effect, rehabilitated offenders well qualified for the excepted job, many of them highly paid and prestigious, may well be inadvertently barred."

Secondly:²⁵

"The effect of these exceptions is to frustrate offenders aspiring to professional positions. This waste of human talents violates the basic principle of penal reform that the offender should be encouraged to further his education and seek responsible jobs."

²¹ *Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975*, Schedule 1. A large number of the exceptions are referred to in para 1.19 above.

²² N P Cohen, 'Forgiving The Criminal Offender British Style: The Rehabilitation of Offenders Act' (1976) 14 *Harvard Journal on Legislation* 111, 121.

²³ *Banking Act 1979* (UK), s 43.

²⁴ N P Cohen, 'Forgiving: The Criminal Offender British Style: The Rehabilitation of Offenders Act' (1976) 14 *Harvard Journal on Legislation* 111, 122.

²⁵ *Ibid*, 122-123.

9.30 It is difficult to avoid such results because of the difficulty of statutorily defining the convictions which are relevant to each occupation.

7. REFEREES

9.31 One problem which the South Australian Law Reform Committee drew attention to was that of a person asked to give a reference in relation to an offender with a spent conviction where the offender applied for a position and was required to provide a reference. Where the referee knows of the spent conviction he is faced with the decision whether or not to disclose the conviction. He may either disclose the conviction and be liable to whatever proceedings are provided for enforcing the scheme or, if he fails to disclose the existence of the conviction, he may be open to an action for giving misleading information to the recipient of the reference. The Committee recommended that referees should not be under an obligation to disclose spent convictions.²⁶ Such a provision is contained in the United Kingdom *Rehabilitation of Offenders Act 1974-1982*. Section 4(3)(a) of this Act provides:

" ...any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's)."

²⁶ Thirty-Second Report, *Past Records of Offenders and Other Persons* (1974), 12, para 11.

CHAPTER 10 - OTHER POSSIBLE APPROACHES TO REFORM

10.1 In this chapter the Commission discusses a range of other possible, although limited, approaches to reform. These may of course complement each other or other, more comprehensive, approaches discussed earlier.

1. AMENDING EXISTING PROVISIONS CONCERNED WITH THE EFFECT OF A PROBATION ORDER

10.2 As was pointed out in paragraph 3.4 above, if an offender complies with a probation order the conviction in respect of which the order was made is deemed not to be a conviction for any purpose. However, the effect of this provision is not clear.¹ In particular it is not clear whether or not this provision is meant to place the offender in the same position he would have been in if the charge had been dismissed. Comment is sought on whether this provision should be amended to give it this effect. This could be done by providing that, where the charge is found to be proved and the court intends to make a probation order, it is empowered to make a probation order without convicting the defendant. If the offender does not breach the order no further action would be taken and no conviction would be recorded. If, however, the order were breached, the court could then proceed to convict the offender.

2. REVIEW OF LEGISLATION DEALING WITH MEMBERSHIP OF GOVERNMENT BODIES AND WITH PROFESSIONAL AND OCCUPATIONAL LICENSING

10.3 Another approach which could be adopted would be to review existing Western Australian legislation which imposes restrictions on the rights, privileges and opportunities of people who have been convicted of offences. Such a review could determine whether or not the legislation was unduly wide in scope or at all necessary, for example, in relation to appointment to Government authorities and instrumentalities² or to occupational licensing.³ In the case of provisions relating to occupational licensing, express provision could be made for the offences or type of offences which would bar a person from obtaining registration or a licence. The Commission seeks comment as to the operation of such legislation.

¹ See para 3.5 above.

² Para 2.3 above.

³ Para 2.5 above.

3. ADVISING OFFENDERS THAT A RECORD IS BEING CONSIDERED AND SEEKING A RESPONSE OR CORRECTION OF ANY ERRORS OR OMISSIONS

10.4 One, limited, approach may be merely to require, where a potential insurer, employer, credit provider, government agency or other body having the power or obligation to make decisions which may adversely affect the interests of a convicted person intends, in making such a decision, to have regard to a record of convictions, the body to inform the offender of that intention and seek any response from the offender before so doing. Such an approach would at least ensure that the offender's side of the story was made known and any errors in the record corrected before any adverse decision was taken. Such a provision might be enforceable by criminal penalty or alternatively by an administrative remedy through a body such as a Human Rights Commission, Privacy Commissioner or Ombudsman.⁴

10.5 The correction of errors in records of offences might also be facilitated by the enactment of legislation such as the Tasmanian *Records of Offences (Access) Act 1981* and the New Zealand *Wanganui Computer Centre Act 1976-1982* which create obligations to permit offenders to view certain prescribed records and provide mechanisms for the correction of errors.

4. GUIDELINES

10.6 The New South Wales Privacy Committee has favoured guidelines rather than legislation. The basic principles adopted by the Committee are that questions should not be asked, or information given, about convictions more than 10 years old; criminal records should not be checked without the subject's knowledge; adverse decisions should not be taken without giving the subject the opportunity for prior discussion; and that all adverse decisions based on criminal records should be subject to appropriate review.

⁴ The Connecticut *Fair Employment Practices Act* has a provision which requires that a person who proposes to attach weight to a conviction when considering an application for a job or licence should disclose his knowledge of it to the offender so that the offender has the opportunity to correct any error or to explain the circumstances.

PART III: WHAT SHOULD BE DONE?
CHAPTER 11 - THE SUGGESTED SOLUTIONS AND
PARTICULAR PROBLEMS

1. INTRODUCTION

11.1 In chapters 1 and 2 the Commission referred to a number of areas in which a person may encounter difficulties arising from his criminal convictions. In chapters 4 to 8 and 10 the Commission discussed various approaches which could be used to deal with these problems.

11.2 The interests which any scheme to protect offenders against the unnecessary or undesirable effects of their conviction should seek to protect might be categorised as follows -

- * a proper attempt should be made to recognise the rehabilitation of offenders so as to enable them to fulfil their human potential, live with dignity and create the conditions in which they can contribute as much as they are able to the well being of the community
- * potential for rehabilitation should be encouraged recognising the cost, both to the individuals concerned and to the community, of criminal activity
- * fairness and justice require that offenders should not be penalised over time and unduly for offences for which court-determined penalties have been met or for youthful patterns of behaviour which are often outgrown.

On the other hand -

- * those responsible for the apprehension, trial and sentencing of law-breakers should not be unduly inhibited in performing their functions
- * proper research and keeping of meaningful statistics should not be inhibited
- * the public interest in individuals and bodies having access to a free flow of appropriate information as to the working of government, administration, the

judicial system, community life, and trade and commerce should not be unnecessary hindered.

11.3 In addition certain further tests might be applied to particular approaches in order to evaluate their advantages and disadvantages. These include -

- * whether or not the approach is administratively costly of time and personnel
- * whether or not the approach is simple and may be readily understood by those affected
- * whether or not the approach offends community attitudes or moral beliefs as to-

openness,
telling the truth,
the seriousness of different types of criminal behaviour and of repetition of criminal behaviour.

11.4 Given these various and often conflicting values, how do the various approaches discussed in this paper compare or contrast? Which of them is most appropriate or inappropriate in particular areas in which prejudice or disability might be encountered?

2. GOVERNMENT APPOINTMENTS AND LICENSING OR REGISTRATION FOR VARIOUS OCCUPATIONS OR PROFESSIONS

11.5 In this area reform might be approached simply by a review of existing legislation which disqualifies convicted persons from membership of a State Government body or to licensing or registration for various occupations or professions. Such a review might determine whether the scope of the disqualification is too wide or at all necessary. Not all convictions should forever prevent people from participating fully in civic or business life. It is undesirable that any appointments or the grant of licences or registration should be based on the concealment or non-disclosure of a criminal record, whether by sealing or expunction or otherwise. Any sealing or expunction scheme or other scheme involving non-disclosure of a record of offences would necessarily involve exceptions in cases such as these.

11.6 Consequently the most appropriate approach to reform may be to review the relevant legislation in order to determine whether or not it imposes unnecessary restrictions on convicted persons, and also to make provision either for an application for a "pardon" or for automatic restitution of civil rights once the conviction is spent. As was pointed out earlier, the Canadian federal scheme for "pardon" applications is apparently used mainly in support of attempts to obtain professional or occupational qualifications.

11.7 Other approaches which might also be of assistance in this area would be to treat questions as not referring to spent convictions, sealing or expunction provisions, provisions preventing the disclosure of records of offences, and legislation prohibiting questions about the record of offences of a rehabilitated offender.

11.8 Depending on the details of the scheme adopted satisfactory protections for both the offender and the community could therefore be worked out in this area in a number of ways.

3. SOCIAL DISABILITIES

11.9 Unlike the matters dealt with in the immediately preceding paragraphs, social disabilities may require more far-reaching solutions. People with convictions may suffer real social disabilities, including embarrassment, in a wide range of circumstances depending on individual or community attitudes to convictions for particular offences. They may be inhibited from seeking employment, political office or social positions for fear of unwanted disclosures. In some cases the adoption of anti-discrimination legislation may be appropriate as for example with social clubs and trade associations or unions. In other areas such as the appointment of justices of the peace publicly announced guidelines might be preferable. Approaches to reform which reduced the possibility that records of offences would be disclosed would however be one more general means of ensuring that people did not suffer such disabilities. Provisions prohibiting the publication of private sensitive facts, including spent convictions,¹ and limiting the publication of convictions disclosed in legal proceedings² might serve to reduce apprehensions and allow prejudice to be more easily overcome.

¹ Paras 5.5 to 5.8 above.

² Paras 4.30 and 4.31 above.

4. LEGAL PROCEEDINGS

11.10 As has been pointed out above,³ information about a person's convictions can be disclosed in civil and criminal proceedings in a number of circumstances. Fear of such a disclosure might make a person reluctant to come forward as a witness or to commence an action against another in a civil matter. On the other hand it would be undesirable to deny to courts access to information relevant to the determination of issues before them. For this reason, the most appropriate response may be to empower courts to limit the publication of spent conviction records out of court.⁴ The existing protection of witnesses against unfair cross-examination could also be strengthened.⁵ Protection could also be provided by making truth and public interest a defence to an action for defamation⁶ or prohibiting the publication of sensitive private facts including records of spent convictions in that concept.⁷ Other approaches which would be of assistance in this area include provision for application for a pardon if that were to result in a conviction being vacated either ab initio or from the date of the pardon,⁸ or amendment to the probation legislation so as to more satisfactorily provide that a conviction is not recorded when a probation order is made and satisfied.⁹

5. EMPLOYMENT

11.11 A number of approaches to reform discussed in this paper would provide a means of ameliorating or overcoming problems which people with convictions may have in obtaining employment. One of these is legislation making it unlawful to discriminate against a person because of a record of offences except where there is a direct relationship between the employment sought and the applicant's conviction.¹⁰ A second approach is to treat questions as not referring to spent convictions.¹¹ Similar approaches include allowing a person to apply for a "pardon"¹² and legislation amending the existing provisions relating to probation orders to more effectively provide that no conviction is recorded in the event that a probation order is

³ Paras 2.13 to 2.17.

⁴ Paras 4.30 and 4.31 above.

⁵ Para 4.29 above.

⁶ Para 5.2 above.

⁷ Para 5.8 above.

⁸ Chapter 6.

⁹ Para 10.2 above.

¹⁰ Chapter 8.

¹¹ Paras 4.18 to 4.22 above.

¹² Chapter 6.

made and complied with.¹³ The "pardon" approach would be effective if the result was that the person was placed in the same position as if he had not been convicted of the offence. However, a person whether or not he has any convictions may feel morally obliged to disclose the conviction despite such legislation. Accordingly another approach would be to prohibit prospective employers from asking applicants whether they have any convictions for offences which have become spent.¹⁴

6. INSURANCE

11.12 Information relating to certain offences can be relevant to insurance companies in deciding whether or not to issue a policy or as to the premium to fix for any policy issued. It is an area in which good faith is important and consequently provisions which curtail the free flow of information appear undesirable. One approach which could be adopted would be to make it unlawful to discriminate against a person unless there is a direct relationship between the offence and the policy the subject of a proposal form.

7. GENERALLY

11.13 As can be readily seen from this short summary the wide range of legal and social disabilities suffered by persons convicted of criminal offences means, in consequence, that a wide range of possible responses have developed in an attempt to alleviate the offender's position. No single response has been perceived as adequately meeting all the problems involved let alone of balancing the countervailing factors.

11.14 In the United Kingdom the *Rehabilitation of Offenders Act 1974-1982* adopts a number of approaches, but the legislation is complex and has been criticised also both for distorting the truth in favour of offenders and on the other hand for the wide range of exemptions to which its provisions do not apply.

¹³ Para 10.2 above.

¹⁴ Paras 4.23 to 4.26 above.

11.15 After reviewing approaches taken elsewhere the New Zealand Penal Policy Review Committee came to the conclusion that the proper approach for New Zealand is in sealing the record rather than its expungement or destruction.¹⁵ It took the view that:

"Some overseas legislation - particularly that adopted in the United Kingdom - is extremely complicated and difficult to understand. The following criteria...appeal...[Any] legislation should :

- Endeavour to provide a system for all. No-one should be denied the removal of disabilities.
- Not distort the truth by creating legal fictions, for example, denying the commission of the offence, or the fact of the conviction and sentence, or creating any civil remedies based on denial of these, such as the right to bring defamation proceedings
- Be administratively viable, ie, not involve the wholesale destruction of inaccessible records or seek to take out of circulation publications containing details of the convictions of any offender.
- Not involve or require any application on the part of the offender requiring the establishment of more bureaucracy, and the investigation of the merits of the application .
- Be simple and easy to understand, so as to reduce the possibility of infringement, permit the offender to know his rights and give him maximum opportunity and incentive to rehabilitate himself. In particular there should not be any multiplicity of rehabilitation periods or commencement or completion dates for different offences or sentences, and exceptions should be avoided."

11.16 This Commission therefore acknowledges, and seeks comment on and examples of the range of problems confronting the many members of the community who have records of old convictions. At the same time the Commission acknowledges the diversity and strength of countervailing factors. The wide range of responses and the need to apply different responses

¹⁵ The New Zealand Penal Policy Review Committee recommended that after an appropriate rehabilitation period without further convictions it would be unlawful to publish details without the convicted person's consent or to ask questions that might tend to disclose the existence of the conviction. It suggested a rehabilitation period that would run from the date of actual release from a custodial sentence, and from the date of conviction if no custodial sentence was imposed. The period it suggested was one of five years in order to acquire protection from republication, and ten years to achieve removal of disabilities arising from a conviction. It suggested a right in exceptional cases to apply to a High Court Judge for dispensation from the prohibition on disclosure after the rehabilitation period has expired. Examples of exceptional cases might include national security and the need for effective sentencing for a later crime. It also suggested extension of the New Zealand *Human Rights Commission Act 1977* to allow a remedy in cases of unlawful publication of a previous conviction. A criminal sanction was not favoured. It also recommended that it be made unlawful from the date of release or conviction of an offender to discriminate, on the basis of a conviction, in the areas covered by the *Human Rights Commission Act 1977*, and especially employment. Exemptions would be permitted where there was a direct relationship between the criminal record and the area of concern. Exemptions would expire ten years after the release or conviction.

to different needs is shown by the survey in this paper of developments in other common law jurisdictions. The Commission seeks comment on the suitability of the various responses to the problems encountered.

CHAPTER 12 - PUBLICITY FOR THE SCHEME

12.1 Whatever scheme were introduced it would be necessary to ensure that knowledge of the scheme was widespread amongst offenders affected by it. This could be achieved by distributing a leaflet explaining the operation of the scheme through prison welfare groups, departments and statutory authorities such as the Department for Community Welfare and the Legal Aid Commission and by voluntary agencies such as the Citizens' Advice Bureau. The leaflet could also be displayed at courts and be made widely available to offenders.

APPENDIX I

SUMMARY OF RECOMMENDATIONS OF THE LAW REFORM

COMMISSION OF TASMANIA IN ITS REPORT ON THE

REHABILITATION OF OFFENDERS ACT 1974 (UK)

"(a) The adoption of special legislation along the lines of the United Kingdom Act is not recommended.

(b) The publication out of court of previous convictions which are brought to the court's attention for sentencing purposes should be limited. There may be cases where the court thinks the public could and should be informed and we would favour leaving the court with a discretion to allow publication rather than having a blanket restriction such as section 37A of the Justices Act (relating to bail applications). Administrative directions if not already given should be given to police prosecutors and Crown Counsel, and if, as seems probable, such directions have already been given, these should be renewed - to hand up the record without reading it aloud. One member of the Committee did not favour giving this direction.

(c) Section 13 of the *Defamation Act 1957* provides that it is lawful to publish in good faith for the information of the public a fair report of the proceedings of Parliament, legal proceedings heard in open court, and certain other proceedings and reports. If the amendment proposed in (b) were adopted and a discretion left in the court whether or not to allow publication of previous convictions then it would seem that some consequential amendment to this section might be necessary to enable a person injured by unauthorised publication of his previous convictions in such reports or proceedings to recover damages.

(d) Section 100 of the *Evidence Act 1910* should be amended so as to require the leave of the judge or magistrate before questioning of a witness about a previous conviction, such application to precede any mention in open court of any alleged previous conviction. We feel that in practice, if such an application were made a condition precedent, there would not be many such applications. In any case, we consider this to be a necessary safeguard for witnesses. The judge or magistrate would thus have the opportunity of determining whether the old conviction was really likely to be relevant to the question of credibility and whether any such relevance was not outweighed by unfair prejudice to the witness. One member of the review Committee dissented from this view and felt that this recommendation would unnecessarily complicate and delay trials.

(e) It has not been possible for the Review Committee or the Commission to satisfy itself as to the extent (if any) to which criminal records are made available on request by employers or other interested persons, particularly by the Police Force or Government departments, or by one Government department to another.

We believe, however, that the government should institute the necessary enquiries to obtain such information, and, unless it is satisfied affirmatively that criminal records are only made available in accordance with the following guidelines legislative and administrative action should be considered:-

(1) The criminal record of a person should not be disclosed except for the purposes of relevant court proceedings or in pursuance of a court order, or for the purposes of National Security.

(2) An application for the disclosure of a person's criminal record (other than for the purposes of relevant court proceedings or National Security) may be made to a judge in chambers by a person who shows upon affidavit that he has sufficient interest. If the judge is satisfied that it is necessary for such disclosure to be made then he may make an order accordingly.

(3) Such an order should not be made lightly and it should be confined to that part of the criminal record which the judge considers to be relevant to the application before him.

(4) In our view, an order could properly be made in the following circumstances (which are given as examples only):

where an employer is considering employing a person in a position of special trust. (Convictions involving dishonesty would be relevant here.)

where a person is being considered for a position involving frequent association with children. (Convictions for sexual offences would be relevant here.)

where an insurer is considering whether to accept various proposals for insurance. (Depending upon the type of risk, convictions for arson or for dangerous driving etc. would be relevant.)

(5) It should be made an offence to divulge a person's previous convictions except where approved by the court which is sentencing such person or except to the extent permitted by a judge's order, or purposes necessary for National Security."

APPENDIX II
SUMMARY OF RECOMMENDATIONS OF
THE FIJI LAW REFORM COMMISSION IN
DISCUSSION PAPER NO 2 – REHABILITATION AND
THE PROBLEM OF OLD CONVICTIONS

The Fiji Law Reform Commission recommended:

- "1. The introduction of legislation to deal with the problems of old convictions.
2. That such legislation should not attempt to conceal the record or introduce legal fictions that attempt to conceal the facts.
3. That a positive approach be adopted which encourages a change in public attitudes and provides a tangible goal for the ex-offender.
4. That every offender be given the opportunity to live down his criminal past bearing in mind that the recidivist or re-offender will automatically disqualify himself from the benefits of the legislation.
5. That after 10 years have elapsed from the date of an ex-offender's release from prison, or conviction in the case of a non-custodial sentence, and the offender has not re-offended he shall become a 'rehabilitated person' and be entitled to a certificate of rehabilitation.
6. The certificate of rehabilitation will positively assert that the ex-offender has rehabilitated himself and that as a result his or her status in society is the same as a person who has not offended. The certificate will affirm that any rights at law or otherwise that the ex-offender may have lost are fully restored.
7. After 5 years it will be an offence to publish or disclose any particulars relating to an old conviction.
8. That in judicial proceedings leave of the Court be obtained before a witness is questioned about a previous conviction.
9. That it should be unlawful to discriminate against any ex-offender on the grounds of his conviction in the area of employment unless there is a direct relationship between the offence and the employment.
10. That after a person achieves rehabilitated person status it will be unlawful to discriminate against him at all in the area of employment even though initially there may have existed a direct relationship."

APPENDIX III
UNITED KINGDOM REHABILITATION OF OFFENDERS ACT 1974¹

c.53 1799

Rehabilitation of Offenders Act 1974

1974 CHAPTER 53

An Act to rehabilitate offenders who have not been reconvicted of any serious offence for periods of years, to penalise the unauthorised disclosure of their previous convictions, to amend the law of defamation, and for purposes connected therewith.

[31st July 1974]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

1. – (1) Subject to subsection (2) below, where an individual has been convicted, whether before or after the commencement of this Act, of any offence or offences, and the following conditions are satisfied, that is to say-
- (a) he did not have imposed on him in respect of that conviction a sentence which is excluded from rehabilitation under this Act ;
 - and
 - (b) he has not had imposed on him in respect of a subsequent conviction during the rehabilitation period applicable to the first-mentioned conviction in accordance with section 6 below a sentence which is excluded from rehabilitation under this Act;

Rehabilitated
person and
spent
convictions

then, after the end of the rehabilitation period so applicable (including, where appropriate, any extension under section 6(4) below of the period originally applicable to the first-mentioned conviction) or, where that rehabilitation period ended before the commencement of this Act, after the commencement of this Act, that individual shall for the purposes of this Act be treated as a rehabilitated person in respect of the first-mentioned conviction and that conviction shall for those purposes be treated as spent.

(2) A person shall not become a rehabilitated person for the purposes of this Act in respect of a conviction unless he has served or otherwise undergone or complied with any sentence imposed on him in respect of that conviction; but the following shall not, by virtue of this subsection, prevent a person from becoming a rehabilitated person for those purposes-

¹ The Act has been amended a number of times since 1974. As these amendments have not altered the scheme in substance they have not been incorporated in this Appendix.

- (a) failure to pay a fine or other sum adjudged to be paid by or imposed on a conviction, or breach of a condition of a recognizance or of a bond of caution to keep the peace or be of good behaviour;
- (b) breach of any condition or requirement applicable in relation to a sentence which renders the person to whom it applies liable to be dealt with for the offence for which the sentence was imposed, or, where the sentence was a suspended sentence of imprisonment, liable to be dealt with in respect of that sentence (whether or not, in any case, he is in fact so dealt with):
- (c) failure to comply with any requirement of a suspended sentence supervision order.

(3) In this Act "sentence" includes any order made by a court in dealing with a person in respect of his conviction of any offence or offences, other than-

- (a) an order for committal or any other order made in default of payment of any fine or other sum adjudged to be paid by or imposed on a conviction, or for want of sufficient distress to satisfy any such fine or other sum;
- (b) an order dealing with a person in respect of a suspended sentence of imprisonment.

(4) In this Act, references to a conviction, however expressed, include references-

- (a) to a conviction by or before a court outside Great Britain; and
- (b) to any finding (other than a finding linked with a finding of insanity) in any criminal proceedings or in care proceedings under section I of the Children and Young Persons Act 1969 that a person has committed an offence or done the act or made the omission charged;

1969 c. 54.

and notwithstanding anything in section 9 of the Criminal Justice (Scotland) Act 1949 or section 13 of the Powers of Criminal Courts Act 1973 (conviction of a person put on probation or discharged to be deemed not to be a conviction) a conviction in respect of which an order is made placing the person convicted on probation or discharging him absolutely or conditionally shall be treated as a conviction for the purposes of this Act and the person in question may become a rehabilitated person in respect of that conviction and the conviction a spent conviction for those purposes accordingly.

1949 c. 94.
1973 c. 62.

2. – (1) Subject to the following provisions of this section, for the purposes of this Act any finding that a person is guilty of an offence in respect of any act or omission which was the subject of disciplinary proceedings shall be treated as a conviction and any punishment awarded in respect of any such finding shall be treated as a sentence.

Rehabilitation of persons dealt with in service disciplinary proceedings.

(2) Subsection (1) above applies only where either or both of the following conditions is satisfied, that is to say-

- (a) the offence in question is an offence to which this sub-section applies; or
- (b) the punishment awarded is a punishment to which this subsection applies.

(3) Subsection (2) above applies to any offence consisting in the commission of a civil offence and to any offence under, and any offence of attempting to commit an offence under, any of the following enactments, or any corresponding enactment previously in force -

- (a) sections 30, 45, 46, 61, 62, 64 and 66 of the Army Act 1955 and the Air Force Act 1955 ; and 1955 c. 18.
1955 c. 19.
- (b) sections 5, 30, 31, 34A, 35, 36 and 37 of the Naval Discipline Act 1957. 1957 c. 53.

(4) Subsection (2) above applies to the following punishments-

- (a) imprisonment;
- (b) cashiering, discharge with ignominy or dismissal with disgrace from Her Majesty's service;
- (c) dismissal from Her Majesty's service; and
- (d) detention for a term of three months or more.

(5) In this Act, " service disciplinary proceedings" means any of the following

- (a) any proceedings under the Army Act 1955, the Air Force Act 1955, or the Naval Discipline Act 1957 whether before a court-martial or before any other court or person authorised thereunder to award a punishment in respect of any offence);
- (b) any proceedings under any Act previously in force corresponding to any of the Acts mentioned in paragraph (a) above;
- (c) any proceedings under any corresponding enactment or law applying to a force, other than a home force, to which section 4 of the Visiting Forces (British Commonwealth) Act 1933 applies or applied at the time of the proceedings, being proceedings in respect of a member of a home force who is or was at that time attached to the first-mentioned force under that section; 1933 c. 6.

whether in any event those proceedings take place in Great Britain or elsewhere.

3. Where a ground for the referral of a child's case to a children's hearing under the Social Work (Scotland) Act 1968 is that mentioned in section 32(2)(g) of that Act (commission by the child of an offence) and that ground has either been accepted by the child and, where necessary, by his parent or been established to the satisfaction of the sheriff under section 42 of that Act, the acceptance or establishment of that ground shall be treated for the purposes of this Act (but not otherwise) as a conviction, and any disposal of the case thereafter by a children's hearing shall be treated for those purposes as a sentence; and references in this Act to a person's being charged with or prosecuted for an offence shall be construed accordingly. Special provision with respect to certain disposals by children's hearings under the Social Work (Scotland) Act 1968. 1968 c. 49.

4. - (1) Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been Effect of rehabilitation.

charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject as aforesaid-

- (a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Great Britain to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and
- (b) a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto.

(2) Subject to the provisions of any order made under subsection (4) below, where a question seeking information with respect to a person's previous convictions, offences, conduct or circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority –

- (a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; and
- (b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent conviction in his answer to the question.

(3) Subject to the provisions of any order made under subsection (4) below, –

- (a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's) ; and
- (b) a conviction which has become spent or any circumstances ancillary thereto, or any failure to disclose a spent conviction or any such circumstances, shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment

(4) The Secretary of State may by order–

- (a) make such provision as seems to him appropriate for excluding or modifying the application of either or both of paragraphs (a) and (b) of subsection (2) above in relation to questions put in such circumstances as may be specified in the order ;
- (b) provide for such exceptions from the provisions of subsection (3) above as seem to him appropriate, in such cases or classes of case, and in relation to convictions of such a description, as may be specified in the order.

(5) For the purposes of this section and section 7 below any of the following are circumstances ancillary to a conviction, that is to say –

- (a) the offence or offences which were the subject of that conviction;
- (b) the conduct constituting that offence or those offences; and
- (c) any process or proceedings preliminary to that conviction, any sentence imposed in respect of that conviction, any proceedings (whether by way of appeal or otherwise) for reviewing that conviction or any such sentence, and anything done in pursuance of or undergone in compliance with any such sentence.

(6) For the purposes of this section and section 7 below "proceedings before a judicial authority" includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person having power–

- (a) by virtue of any enactment, law, custom or practice;
- (b) under the rules governing any association, institution, profession, occupation or employment; or
- (c) under any provision of an agreement providing for arbitration with respect to questions arising thereunder;

to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question.

5. - (1) The sentences excluded from rehabilitation under this Act are–

- (a) a sentence of imprisonment for life;
- (b) a sentence of imprisonment or corrective training for a term exceeding thirty months;
- (c) a sentence of preventive detention; and
- (d) a sentence of detention during Her Majesty's pleasure or for life, or for a term exceeding thirty months, passed under section 53 of the Children and Young Persons Act 1933 or under section 57 of the Children and Young Persons (Scotland) Act 1937 (young offenders convicted of grave crimes);

Rehabilitation periods for particular sentences.

1933 c. 12.
1937 c. 37.

and any other sentence is a sentence subject to rehabilitation under this Act.

(2) For the purposes of this Act –

- (a) the rehabilitation period applicable to a sentence specified in the first column of Table A below is the period specified in the second column of that Table in relation to that sentence, or, where the sentence was imposed on a person who was under seventeen years of age at the date of his conviction, half that period; and
- (b) the rehabilitation period applicable to a sentence specified in the first column of Table B below is the period specified in the second column of that Table in relation to that sentence;

reckoned in either case from the date of the conviction in respect of which the sentence was imposed.

TABLE A
Rehabilitation periods subject to reduction by half
for persons under 17

| <i>Sentence</i> | <i>Rehabilitation period</i> |
|--|------------------------------|
| A sentence of imprisonment or corrective training for a term exceeding six months but not exceeding thirty months. | Ten years |
| A sentence of cashiering, discharge with ignominy or dismissal with disgrace from Her Majesty's service | Ten years |
| A sentence of imprisonment for a term not exceeding six months. | Seven years |
| A sentence of dismissal from Her Majesty's service. | Seven years |
| Any sentence of detention in respect of a conviction in service disciplinary proceedings. | Five years |
| A fine or any other sentence subject to rehabilitation under this Act, not being a sentence to which Table B below or any of subsections (3) to (8) below applies. | Five years |

TABLE B
Rehabilitation periods for certain sentences
confined to young offenders

| <i>Sentence</i> | <i>Rehabilitation period</i> |
|--|------------------------------|
| A sentence of Borstal training. | Seven years |
| A sentence of detention for a term exceeding six months but not exceeding thirty months passed under section 53 of the said Act of 1933 or under section 57 of the said Act of 1937. | Five years |
| A sentence of detention for a term not exceeding six months passed under either of those provisions. | Three years |
| An order for detention in a detention centre made under section 4 of the Criminal Justice Act 1961 or under section 7 of the Criminal Justice (Scotland) Act 1963. | Three years |

1961 c. 39.
1963 c. 39.

(3) The rehabilitation period applicable -

- (a) to an order discharging a person absolutely for an offence; and
- (b) to the discharge by a children's hearing under section 43(2) of the Social Work (Scotland) Act 1968 of the referral of a child's case:

1968 c. 49.

shall be six months from the date of conviction.

(4) Where in respect of a conviction a person was conditionally discharged, bound over to keep the peace or be of good behaviour, or placed on probation, the rehabilitation period applicable to the sentence shall be one year from the date of conviction or a period beginning with that date and ending when the order for conditional discharge or probation order or (as the case may be) the

recognizance or bond of caution to keep the peace or be of good behaviour ceases or ceased to have effect, whichever is the longer.

(5) Where in respect of a conviction any of the following sentences was imposed, that is to say -

- (a) an order under section 57 of the Children and Young Persons Act 1933 or section 61 of the Children and Young Persons (Scotland) Act 1937 committing the person convicted to the care of a fit person; 1933 c. 12.
1937 c. 37.
- (b) a supervision order under any provision of either of those Acts or of the Children and Young Persons Act 1963; 1963 c. 37.
- (c) an order under section 58 or 58A of the said Act of 1937 committing the person convicted to custody in a remand home or to detention in a place chosen by a local authority, or (as the case may be) committing him for a period of residential training;
- (d) an approved school order under section 61 of the said Act of 1937;
- (e) a care order or a supervision order under any provision of the Children and Young Persons Act 1969; or 1969 c. 54.
- (f) a supervision requirement under any provision of the Social Work (Scotland) Act 1968:

the rehabilitation period applicable to the sentence shall be one year from the date of conviction or a period beginning with that date and ending when the order or requirement ceases or ceased to have effect, whichever is the longer.

(6) Where in respect of a conviction any of the following orders was made, that is to say-

- (a) an order under section 54 of the said Act of 1933 committing the person convicted to custody in a remand home;
- (b) an approved school order under section 57 of the said Act of 1933 ; or
- (c) an attendance centre order under section 19 of the Criminal Justice Act 1948; 1948 c. 58.

the rehabilitation period applicable to the sentence shall be a period beginning with the date of conviction and ending one year after the date on which the order ceases or ceased to have effect.

(7) Where in respect of a conviction a hospital order under Part V of the Mental Health Act 1959 or under Part V of the Mental Health (Scotland) Act 1960 (with or without an order restricting discharge) was made, the rehabilitation period applicable to the sentence shall be the period of five years from the date of conviction or a period beginning with that date and ending two years after the date on which the hospital order ceases or ceased to have effect. whichever is the longer. 1959 c. 72.
1960 c. 61.

(8) Where in respect of a conviction an order was made imposing on the person convicted any disqualification, disability, prohibition or other penalty, the rehabilitation period applicable to the sentence shall be a period beginning with the date of conviction and ending on the date on which the

disqualification, disability, prohibition or penalty (as the case may be) ceases or ceased to have effect.

(9) For the purposes of this section -

- (a) "sentence of imprisonment" includes a sentence of detention in a young offenders institution in Scotland and a sentence of penal servitude, and "term of imprisonment" shall be construed accordingly;
- (b) consecutive terms of imprisonment or of detention under section 53 of the said Act of 1933 or section 57 of the said Act of 1937, and terms which are wholly or partly concurrent (being terms of imprisonment or detention imposed in respect of offences of which a person was convicted in the same proceedings) shall be treated as a single term;
- (c) no account shall be taken of any subsequent variation, made by a court in dealing with a person in respect of a suspended sentence of imprisonment, of the term originally imposed; and
- (d) a sentence imposed by a court outside Great Britain shall be treated as a sentence of that one of the descriptions mentioned in this section which most nearly corresponds to the sentence imposed.

(10) References in this section to the period during which a probation order, or a care order or supervision order under the Children and Young Persons Act 1969, or a supervision requirement under the Social Work (Scotland) Act 1968, is or was in force include references to any period during which any order or requirement to which this subsection applies, being an order or requirement made or imposed directly or indirectly in substitution for the first-mentioned order or requirement, is or was in force.

1969 c. 54.
1968 c. 49.

This subsection applies-

- (a) to any such order or requirement as is mentioned above in this subsection ;
- (b) to any order having effect under section 25(2) of the said Act of 1969 as if it were a training school order in Northern Ireland; and
- (c) to any supervision order made under section 72(2) of the said Act of 1968 and having effect as a supervision order under the Children and Young Persons Act (Northern Ireland) 1950.

1950 c. 5.
(N.I.).

(11) The Secretary of State may by order-

- (a) substitute different periods or terms for any of the periods or terms mentioned in subsections (1) to (8) above; and
- (b) substitute a different age for the age mentioned in subsection (2)(a) above.

6. - (1) Where only one sentence is imposed in respect of a conviction (not being a sentence excluded from rehabilitation under this Act) the rehabilitation period applicable to the conviction is, subject to the following provisions of this section, the period applicable to the sentence in accordance with section 5 above.

The rehabilitation period applicable to a conviction

(2) Where more than one sentence is imposed in respect of a conviction (whether or not in the same proceedings) and none of the sentences imposed is excluded from rehabilitation under this Act, then, subject to the following provisions of this section, if the periods applicable to those sentences in accordance with section 5 above differ, the rehabilitation period applicable to the conviction shall be the longer or the longest (as the case may be) of those periods.

(3) Without prejudice to subsection (2) above, where in respect of a conviction a person was conditionally discharged or placed on probation and after the end of the rehabilitation period applicable to the conviction in accordance with subsection (1) or (2) above he is dealt with, in consequence of a breach of conditional discharge or probation, for the offence for which the order for conditional discharge or probation order was made, then, if the rehabilitation period applicable to the conviction in accordance with subsection (2) above (taking into account any sentence imposed when he is so dealt with) ends later than the rehabilitation period previously applicable to the conviction, he shall be treated for the purposes of this Act as not having become a rehabilitated person in respect of that conviction, and the conviction shall for those purposes be treated as not having become spent, in relation to any period falling before the end of the new rehabilitation period.

(4) Subject to subsection (5) below, where during the rehabilitation period applicable to a conviction-

- (a) the person convicted is convicted of a further offence ; and
- (b) no sentence excluded from rehabilitation under this Act is imposed on him in respect of the later conviction;

if the rehabilitation period applicable in accordance with this section to either of the convictions would end earlier than the period so applicable in relation to the other, the rehabilitation period which would (apart from this subsection) end the earlier shall be extended so as to end at the same time as the other rehabilitation period.

(5) Where the rehabilitation period applicable to a conviction is the rehabilitation period applicable in accordance with section 5(8) above to an order imposing on a person any disqualification, disability, prohibition or other penalty, the rehabilitation period applicable to another conviction shall not by virtue of subsection (4) above be extended by reference to that period; but if any other sentence is imposed in respect of the first-mentioned conviction for which a rehabilitation period is prescribed by any other provision of section 5 above, the rehabilitation period applicable to another conviction shall, where appropriate, be extended under subsection (4) above by reference to the rehabilitation period applicable in accordance with that section to that sentence or, where more than one such sentence is imposed, by reference to the longer or longest of the periods so applicable to those sentences, as if the period in question were the rehabilitation period applicable to the first-mentioned conviction.

(6) Subject to subsection (7) below, for the purposes of subsection (4)(a) above there shall be disregarded-

- (a) any conviction in England and Wales of an offence which is

- not triable on indictment;
- (b) any conviction in Scotland of an offence which is not excluded from the jurisdiction of inferior courts of summary jurisdiction by virtue of section 4 of the Summary Jurisdiction. (Scotland) Act 1954 (certain crimes not to be tried in inferior courts of summary jurisdiction); and
- (c) any conviction by or before a court outside Great Britain of an offence in respect of conduct which, if it had taken place in any part of Great Britain, would not have constituted an offence under the law in force in that part of Great Britain.

1954 c. 48.

(7) Notwithstanding subsection (6) above. a conviction in service disciplinary proceedings shall not be disregarded for the purposes of subsection (4)(a) above.

7. - (1) Nothing in section 4(1) above shall affect –

- (a) any right of Her Majesty, by virtue of Her Royal under this prerogative or otherwise, to grant a free pardon, to Act, etc. quash any conviction or sentence, or to commute any sentence;
- (b) the enforcement by any process or proceedings of any fine or other sum adjudged to be paid by or imposed on a spent conviction;
- (c) the issue of any process for the purpose of proceedings in respect of any breach of a condition or requirement applicable to a sentence imposed in respect of a spent conviction; or
- (d) the operation of any enactment by virtue of which, in consequence of any conviction, a person is subject, otherwise than by way of sentence, to any disqualification, disability, prohibition or other penalty the period of which extends beyond the rehabilitation period applicable in accordance with section 6 above to the conviction.

Limitation on rehabilitation under this Act, etc.

(2) Nothing in section 4(1) above shall affect the determination of any issue, or prevent the admission or requirement of any evidence, relating to a person's previous convictions or to circumstances ancillary thereto -

- (a) in any criminal proceedings before a court in Great Britain (including any appeal or reference in a criminal matter) ;
- (b) in any service disciplinary proceedings or in any proceedings on appeal from any service disciplinary proceedings;
- (c) in any proceedings relating to adoption or to the guardianship, wardship, marriage, custody, care or control of, or access to, any minor, or to the provision by any person of accommodation, care or schooling for minors;
- (d) in any care proceedings under section 1 of the Children and Young Persons Act 1969 or on appeal from any such proceedings, or in any proceedings relating to the variation or discharge of a care order or supervision order under that Act;
- (e) in any proceedings before a children's hearing under the Social Work (Scotland) Act 1968 or on appeal from any such hearing;
- or
- (f) in any proceedings in which he is a party or a witness, provided

1969 c. 54.

1968 c. 49.

that, on the occasion when the issue or the admission or requirement of the evidence falls to be determined, he consents to the determination of the issue or, as the case may be, the admission or requirement of the evidence notwithstanding the provisions of section 4(1).

In the application of this subsection to Scotland, "minor" means a child under the age of eighteen, including a pupil child.

(3) If at any stage in any proceedings before a judicial authority in Great Britain (not being proceedings to which, by virtue of any of paragraphs (a) to (e) of subsection (2) above or of any order for the time being in force under subsection (4) below, section 4(1) above has no application, or proceedings to which section 8 below applies) the authority is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question notwithstanding the provisions of subsection (1) of section 4 above, and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions.

(4) The Secretary of State may by order exclude the application of section 4(1) above in relation to any proceedings specified in the order (other than proceedings to which section 8 below applies) to such extent and for such purposes as may be so specified.

(5) No order made by a court with respect to any person otherwise than on a conviction shall be included in any list or statement of that person's previous convictions given or made to any court which is considering how to deal with him in respect of any offence.

8. - (1) This section applies to any action for libel or slander begun after the commencement of this Act by a rehabilitated person and founded upon the publication of any matter imputing that the plaintiff has committed or been charged with or prosecuted for or convicted of or sentenced for an offence which was the subject of a spent conviction.

Defamation
actions.

(2) Nothing in section 4(1) above shall affect an action to which this section applies where the publication complained of took place before the conviction in question became spent, and the following provisions of this section shall not apply in any such case.

(3) Subject to subsections (5) and (6) below, nothing in section 4(1) above shall prevent the defendant in an action to which this section applies from relying on any defence of justification or fair comment or of absolute or qualified privilege which is available to him, or restrict the matters he may establish in support of any such defence.

(4) Without prejudice to the generality of subsection (3) above, where in any

such action malice is alleged against a defendant who is relying on a defence of qualified privilege, nothing in section 4(1) above shall restrict the matters he may establish in rebuttal of the allegation.

(5) A defendant in any such action shall not by virtue of subsection (3) above be entitled to rely upon the defence of justification if the publication is proved to have been made with malice.

(6) Subject to subsection (7) below a defendant in any such action shall not, by virtue of subsection (3) above, be entitled to rely on any matter or adduce or require any evidence for the purpose of establishing (whether under section 3 of the Law of Libel Amendment Act 1888 or otherwise) the defence that the matter published constituted a fair and accurate report of judicial proceedings if it is proved that the publication contained a reference to evidence which was ruled to be inadmissible in the proceedings by virtue of section 4(1) above.

1888 c. 64.

(7) Subsection (3) above shall apply without the qualifications imposed by subsection (6) above in relation to-

- (a) any report of judicial proceedings contained in any bona fide series of law reports which does not form part of any other publication and consists solely of reports of proceedings in courts of law, and
- (b) any report or account of judicial proceedings published for bona fide educational, scientific or professional purposes, or given in the course of any lecture, class or discussion given or held for any of those purposes.

(8) In the application of this section to Scotland -

- (a) for the reference in subsection (1) to libel and slander there shall be substituted a reference to defamation;
- (b) for references to the plaintiff and the defendant there shall be substituted respectively references to the pursuer and the defender; and
- (c) for references to the defence of justification there shall be substituted references to the defence of veritas.

9. - (1) In this section-

"official record" means a record kept for the purposes of its functions by any court, police force, Government department, local or other public authority in Great Britain, or a record kept, in Great Britain or elsewhere, for the purposes of any of Her Majesty's forces, being in either case a record containing information about persons convicted of offences; and

Unauthorized disclosure of spent convictions

"specified information" means information imputing that a named or otherwise identifiable rehabilitated living person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which is the subject of a spent conviction.

(2) Subject to the provisions of any order made under subsection (5) below,

any person who, in the course of his official duties, has or at any time has had custody of or access to any official record or the information contained therein, shall be guilty of an offence if, knowing or having reasonable cause to suspect that any specified information he has obtained in the course of those duties is specified information, he discloses it, otherwise than in the course of those duties, to another person.

(3) In any proceedings for an offence under subsection (2) above it shall be a defence for the defendant (or, in Scotland, the accused person) to show that the disclosure was made -

- (a) to the rehabilitated person or to another person at the express request of the rehabilitated person; or
- (b) to a person whom he reasonably believed to be the rehabilitated person or to another person at the express request of a person whom he reasonably believed to be the rehabilitated person.

(4) Any person who obtains any specified information from any official record by means of any fraud, dishonesty or bribe shall be guilty of an offence.

(5) The Secretary of State may by order make such provision as appears to him to be appropriate for excepting the disclosure of specified information derived from an official record from the provisions of subsection (2) above in such cases or classes of case as may be specified in the order.

(6) Any person guilty of an offence under subsection (2) above shall be liable on summary conviction to a fine not exceeding £200.

(7) Any person guilty of an offence under subsection (4) above shall be liable on summary conviction to a fine not exceeding £400 or to imprisonment for a term not exceeding six months, or to both.

(8) Proceedings for an offence under subsection (2) above shall not, in England and Wales, be instituted except by or on behalf of the Director of Public Prosecutions.

10. - (1) Any power of the Secretary of State to make an order under any provision of this Act shall be exercisable by statutory instrument and an order made under any provision of this Act except section 11 below may be varied or revoked by a subsequent order made under that provision.

Orders.

(2) No order shall be made by the Secretary of State under any provision of this Act other than section 11 below unless a draft of it has been laid before, and approved by resolution of, each House of Parliament.

11. - (1) This Act may be cited as the Rehabilitation of Offenders Act 1974.

Citation,
commencement
and extent.

(2) This Act shall come into force on 1st July 1975 or such earlier day as the Secretary of State may by order appoint.

(3) This Act shall not apply to Northern Ireland.

**THE PROBLEM OF OLD CONVICTIONS
QUESTIONNAIRE**

The Law Reform Commission of Western Australia is seeking information concerning any difficulties which arise from the existence or disclosure of records of criminal convictions.

Comment may be made by completing and returning this tear-out Questionnaire or by writing or telephoning the Commission.

NAME:

ADDRESS:

PHONE:

Unless advised to the contrary, the Commission will assume that your answers and comments are not confidential and that you agree to the Commission quoting from or referring to them, in whole or part, and to your comments being attributed to you. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

Do you request such confidentiality or anonymity?

The Commission would welcome comment (with personal experiences or reasons where appropriate) on any matter arising out of its enquiry and in particular on the following -

The need for reform

1. Is it necessary or desirable to introduce legislation to protect people with old convictions against disclosure or use of those convictions? (Yes/No)

Reasons: (Details of any personal experiences will be especially valuable.)

Areas in which reform is required

2. In which of the following areas is reform required -

(a) Disqualification from membership of State Government bodies
(YES/NO)

Comment:

(b) Licensing or registration of various occupations or professions (YES/NO)

Comment:

(c) Social disabilities such as embarrassment, invasion of privacy, or destruction of social or family relationships (YES/NO)

Comment:

(d) Legal proceedings (YES/NO)

Comment:

(e) Employment (YES/NO)

Comment:

(f) Insurance (YES/NO)

Comment:

(g) Credit? (YES/NO)

Comment:

3. Are there any other areas in which you think reform is required? If so, please list those areas and explain any difficulties which you may know have been encountered.

The approach to reform

4. The Commission seeks your comment on which approach or approaches to reform should be adopted in the area of -

(a) Disqualification from membership of State Government bodies

(b) Licensing or registration of various occupations or professions

(c) Social disabilities such as embarrassment, invasion of privacy, or destruction of social or family relationships

(d) Legal proceedings

(e) Employment

(f) Insurance

(g) Credit

(h) Other areas

Spent convictions

If some of the suggested approaches to reform were adopted, decisions would be required as to when and in what circumstances convictions might be regarded as spent. The following questions are designed to obtain comment on the circumstances in which convictions might be regarded as spent.

5. (a) Which offences should be capable of becoming spent?
(paragraphs 9.2 to 9.12)
- (b) How much time should elapse before a conviction can be treated as spent?
(paragraphs 9.13 to 9.19)
- (c) When should the period of time commence to run ?
(paragraph 9.20)

- (d) What should be the effect of a subsequent conviction on a spent conviction?
(paragraphs 9.21 to 9.24)

- (e) Should there be any exceptions to the operation of the legislation and, if so, what exceptions should be made?
(paragraphs 9.25 to 9.30)

- (e) Should any obligation on referees to disclose information extend to disclosing spent convictions?
(paragraph 9.31)

Anti-discrimination legislation

- 6. If anti-discrimination legislation were introduced, should it -
 - (a) apply to all people with convictions, unless there is a direct relationship between a conviction and any employment or insurance sought or any other benefit sought; or
 - (b) be confined to preventing discrimination on the basis of a conviction which has become spent?

- 7. Should anti-discrimination legislation apply only to the area of employment or extend to other areas such as insurance or credit?