



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 80

The Problem of Old Convictions

REPORT

JUNE 1986

To: **THE HON J M BERINSON MLC**
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972-1985*, I am pleased to present the Commission's report on the Problem of Old Convictions.

J A Thomson
Chairman
30 June 1986

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1985*.

The Commissioners are -¹

Dr J A Thomson, Chairman
Mr R S French
Mr P W Johnston
Mr C W Ogilvie

The officers are

Executive Officer and Director of Research -

Dr P R Handford

Research Officers -

Mr M G Boylson
Mr R W Broertjes
Mr A A Head

The Commission's offices are on the 16th floor, St Martins Tower, 44 St George's Terrace, Perth, Western Australia, 6000. Telephone: (09) 325 6022.

¹

Mr H H Jackson was a Commissioner until 20 April 1986. He approves the text of, and the recommendations made in, this report, which was substantially completed during his term of office.

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Abbreviations

Reference is made in this report to a number of papers. They are referred to in the abbreviated form shown below. References are also given to the paragraphs in which a particular paper is discussed in detail.

ALRC Discussion Paper	Australian Law Reform Commission, Discussion Paper on <i>Criminal Records</i> (No 25, 1985) (para 1.15; Appendix V paras 71 to 77)
<i>Clemency Review</i>	Canadian Solicitor General's Department, <i>Clemency Review: Issues Paper</i> (1981) (Appendix V paras 19 and 20)
<i>Living it Down</i>	<i>Living it Down - The Problem of Old Convictions</i> (1972) - the report of a Committee set up by Justice (the British section of the International Commission of Jurists), the Howard League for Penal Reform, and the National Association for the Care and Resettlement of Offenders (Appendix V para 29)
HK Discussion Paper	Hong Kong Attorney General, <i>A Spent Conviction Scheme for Hong Kong: A Proposal</i> (1984) (Appendix V footnote 93)
NSWPC Background Paper	New South Wales Privacy Committee, Background Paper on <i>Rehabilitation of Offenders</i> (1975) (Appendix V paras 66 and 67)
NZ Discussion Paper	New Zealand Department of Justice, Discussion Paper on <i>Living Down a Criminal Record: Problems and Proposals</i> (1985) (Appendix V paras 84 to 87)
SA Discussion Paper	South Australian Attorney General's Department, Discussion Paper on <i>Rehabilitation of Offenders: Old Criminal Convictions</i> (1984) (Appendix V paras 61 and 62)
SALRC Report	South Australian Law Reform Committee, Report relating to <i>The Past Records of Offenders and Other Persons</i> (No 32, 1974) (Appendix V para 60)
Search Group	Search Group Inc, <i>Sealing and Purging of Criminal History Record Information</i> (No 27, 1981) (Appendix V paras 2 and 3)

WALRC Discussion Paper

Western Australian Law Reform Commission, Discussion
Paper on *The Problem of Old Convictions* (Project No 80,
1984)

(para 1.8)

Summary

In this report, the Commission makes recommendations for legislation to limit the effects of old convictions. Its recommendations implement the proposition that, after a specified number of years without further convictions, a conviction can become "spent". In outline, its recommendations are as follows.

When a conviction becomes spent

In some cases, convictions should become spent automatically, once specified conditions are complied with. In other cases, convictions should not become spent automatically, but if specified conditions are complied with there should be a right to apply to a judge who, after holding an inquiry, will declare the conviction spent if satisfied that it is proper to make such an order.

A conviction could become spent in one of the following ways:

- (1) *Convictions for which a sentence other than a sentence of imprisonment was imposed*
Convictions in this category may be declared spent by a magistrate, if five years have elapsed since the date of the conviction, and no further convictions (other than very minor convictions) have been incurred during this period.

If not previously declared spent, such convictions should become spent automatically ten years after the date of the conviction, if no further convictions (other than very minor convictions) have been incurred during this period.

- (2) *Convictions for which a sentence of imprisonment for not more than one year was imposed*
Convictions in this category should become spent automatically if the appropriate period (ten years, plus the length of the sentence of imprisonment imposed) has elapsed since the date of the conviction, and no further convictions (other than very minor convictions) have been incurred during this period.

- (3) *Convictions for which a sentence of imprisonment for more than one year was imposed*

Convictions in this category should not become spent automatically, but should only become spent if declared spent by a District Court judge. It should not be possible to make an application for a conviction to be declared spent unless the appropriate period (ten years, plus the length of the sentence of imprisonment imposed) has elapsed since the date of the conviction.

Effects of a conviction becoming spent

The effects of a conviction becoming spent should be that -

- (1) Discrimination against a person on the ground of a spent conviction should be unlawful. It should be dealt with in the same way in which discrimination on other grounds is now dealt with in Western Australia under the *Equal Opportunity Act 1984-1985*.
- (2) References to convictions in legislation should be deemed to refer to non-spent convictions only, unless the context indicates otherwise.
- (3) References to a person's character or fitness in legislation should not be interpreted as permitting or requiring account to be taken of spent convictions, unless the context indicates otherwise.
- (4) Questions about a person's criminal record should be taken to refer only to non-spent convictions.
- (5) Obligations to disclose information about convictions should be taken to extend only to non-spent convictions.
- (6) However, information about spent convictions should continue to be available in court proceedings.

- (7) Disclosure of information about spent convictions from official records should continue to be dealt with by internal disciplinary procedures and existing offence provisions.
- (8) In other circumstances, disclosure of information relating to spent convictions should not be a criminal offence, nor should there be any change in the law relating to civil liability for defamation.

Particular problems

Special provisions are recommended to deal with particular problems, such as the effect of subsequent convictions, concurrent and cumulative sentences of imprisonment, and special orders that criminal courts may make.

Destruction of records

Ten years after a conviction has become spent (either automatically or by order of a judge) it should be possible to apply to the Commissioner of Police to request that the official police record of the conviction be destroyed.

Amendments to other legislation

The *Child Welfare Act 1947-1985*, which already contains broadly similar provisions applying to children convicted of offences in Children's Courts, should be amended to ensure that the effect of these provisions is the same as the effect of a conviction becoming spent. Similar amendments should be made to the provisions of the *Offenders Probation and Parole Act 1963-1985* dealing with probation orders.

Part I - The Problem

Chapter 1

INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission was asked to examine 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."

2. THE PROBLEM

1.2 When a person is convicted of an offence¹ by a criminal court,² the court will normally impose a punishment of one kind or another,³ such as a period of imprisonment, or a fine.⁴ However, even after the punishment is complete, the criminal record will remain in existence.

¹ An offence is an act or omission which renders the person doing the act or making the omission liable to punishment: *Criminal Code*, s 2.

² Serious offences ("indictable" offences) are tried by a judge and a jury in the District Court or the Supreme Court, except that offences for which the penalty is strict security life imprisonment, offences for which the maximum term of imprisonment that can be imposed is imprisonment for life and offences of sexual assault and aggravated sexual assault must be tried in the Supreme Court: *District Court of Western Australia Act 1969-1985*, s 42. Less serious offences ("simple offences") are tried summarily in Courts of Petty Sessions. Courts of Petty Sessions also hold committal proceedings in cases of indictable offences, to determine whether accused persons should be committed for trial on indictment. In some cases, persons charged with indictable offences can instead elect to be tried summarily by a Court of Petty Sessions. On Courts of Petty Sessions generally, see the Commission's discussion paper on *Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55 Part II, 1984). Children's Courts have jurisdiction over all offences committed by persons under the age of 18, except wilful murder, murder, manslaughter, treason, or attempting any of these offences: *Child Welfare Act 1947-1985*, s 20.

³ A court can, on convicting an offender, discharge the offender in the circumstances set out in the *Criminal Code*, s 669(1)(b). It can also, in certain circumstances, even though it finds the offender guilty, dismiss the case without proceeding to conviction: *id*, s 669(1)(a). Children's Courts are given a like power by the *Child Welfare Act 1947-1985*, s 26(2). In addition, under the *Police Act 1892-1985*, s 137, justices are not bound to convict if the offence is of so trivial a nature as not to merit punishment. On section 669 of the *Criminal Code*, see further paras 11.24 to 11.27 below.

⁴ As to the various punishments available to the court, see further paras 2.4 to 2.6 below.

It will be preserved in one or more of a number of official record systems⁵ such as the criminal record system maintained by the Western Australia Police (or, for young offenders, that of the Department of Community Services), the record of the court which convicted the offender, and the records of government departments such as the Prisons Department or the Probation and Parole Service. In addition, it will be preserved in various unofficial sources such as newspapers. From the time of conviction onwards, the offender is a person with a criminal record - a person who, at some time in the past, was convicted of an offence.

1.3 The most comprehensive criminal record system, that maintained by the police, contains information relating to all convictions for criminal offences committed in Western Australia.⁶ It includes records relating to offences under the *Criminal Code*, the *Police Act 1892-1985*, the *Misuse of Drugs Act 1981*, traffic offences, and a wide variety of other offences relating to such matters as liquor, firearms, companies, consumer protection and taxation. It also includes information relating to charges which have been dismissed.⁷ In some cases, it also contains information relating to offences committed elsewhere in Australia or in other countries.⁸

1.4 Persons with criminal records may encounter various difficulties, which may persist even though they have long since ceased to commit offences and may regard themselves as law-abiding members of the community.⁹ These difficulties are likely to include -

- * Finding, or keeping, employment
- * Obtaining a licence to pursue a particular occupation, such as being a real estate agent or taxi driver
- * Becoming admitted to a profession
- * Becoming a director of a company
- * Obtaining credit or insurance
- * Obtaining permission to reside in, or become a citizen of, Australia, or to travel to other countries

⁵ On official criminal records, see paras 2.9 to 2.14 below and Appendix III.

⁶ Subject to minor qualifications discussed in para 2.9 below.

⁷ Under *Criminal Code*, s 669, *Child Welfare Act 1947-1985*, s 26(2) or *Police Act 1892-1985*, s 137: see footnote 3 above. On s 669 of the *Criminal Code*, see also paras 11.24 to 11.27 below.

⁸ See Appendix III para 20.

⁹ For a more detailed discussion of these difficulties, see ch 3 below and Appendix IV.

- * Participation in public life, for example by standing for Parliament or local government office, becoming a member of a statutory body, becoming a justice of the peace or serving on a jury.

1.5 Apart from specific difficulties such as these, persons with old convictions may simply live in fear that their record may be disclosed. If this happens, they may suffer embarrassment, prejudice, interference with privacy, loss of reputation and injury to family, social or business relationships.

1.6 The question for the Commission is whether these difficulties should be mitigated by a scheme under which a person's criminal record becomes expunged after a stipulated time. In the literal sense, the expunging of a record would involve the erasing of that record from the record systems in which it is held. In a more general sense, however, "expunction" covers a variety of devices for reducing the effect of a criminal record, including limiting access to the record, granting a "pardon", not disclosing the existence of the record and prohibiting discrimination against convicted persons. Schemes of various kinds exist in other jurisdictions,¹⁰ and limited forms of protection are already provided for in Western Australian legislation.¹¹ The Commission has interpreted the term "expunction" in this more general sense, and has considered a number of possible alternative ways of dealing with the problem.

1.7 Persons with criminal records are not the only group whose interests must be considered. The work of the police in preventing and detecting offences must not be impeded. The courts should not be hampered in their task of trying offenders and imposing appropriate sentences. The community has an interest in criminal records not being concealed in cases where, as a result, harm is likely to be suffered by third parties. At the same time, the community has an interest in a fair and humane system of criminal justice and the encouragement of former offenders to become responsible and law-abiding citizens, and will benefit from the contribution made by former offenders.

¹⁰ For a more detailed discussion of a number of these schemes, see ch 5 below and Appendix V.

¹¹ See paras 3.6 to 3.18 below.

3. THE COURSE OF THE REFERENCE

(a) The discussion paper and issues paper

1.8 In 1984, after conducting preliminary inquiries,¹² the Commission issued a discussion paper¹³ which considered in detail the problems encountered by persons with old convictions, and the various possible solutions which might be adopted. With the particular objective of obtaining as much information as possible about the variety and extent of the problem of old convictions as experienced by people in Western Australia, the Commission also produced a short issues paper,¹⁴ highlighting the major problems and possible solutions. Both the discussion paper and the issues paper incorporated a questionnaire. Copies of the issues paper were circulated throughout Western Australia. Notices drawing attention to these papers were distributed to courts, prisons, local authorities and certain Government departments for display on notice boards, and advertisements appeared in the press. The matter received considerable newspaper coverage, and a member of the Commission was interviewed on two ABC radio programs and on all the major commercial radio stations.

1.9 Over a hundred people completed questionnaires, wrote to or telephoned the Commission, came to the Commission for a personal interview, or participated by telephone in the radio programs mentioned in the previous paragraph. Nearly all of these had experienced difficulties as a result of having a criminal record. Their experiences and views have been of considerable value to the Commission in drawing up its final recommendations.¹⁵ In addition to those who responded, there may well be many other people in Western Australia who have had similar experiences.

(b) Consultation with affected persons and groups

1.10 Besides obtaining the views of people who had encountered problems as a result of having a criminal record, the Commission consulted persons and bodies who had experience of the problem of old convictions from a different perspective, such as the police, government departments and statutory agencies. Commission members and officers visited the Western

¹² In which the Commission received assistance from Mr B G Tennant, Social and Law Reform Campaigner.

¹³ *The Problem of Old Convictions* (Project No 80), in this report cited as WALRC Discussion Paper.

¹⁴ *The Problem of Old Convictions: An Issues Paper* (1984).

¹⁵ More detailed reference to information from these responses is made in ch 3 below.

Australia Police Headquarters and saw the police criminal record system in operation. Information was obtained from other official bodies who keep records of convictions. Discussions were held with the Commissioner for Equal Opportunity. In addition, comments were sought from a variety of persons and groups who could view the issue from the perspective of ordinary law-abiding community members. The Commission is grateful to all those who supplied information, offered comment, or in many other ways rendered assistance.¹⁶

(c) Liaison with other bodies conducting similar inquiries

1.11 The problem of old convictions is currently receiving attention in nearly all Australian jurisdictions. In April 1986, the Queensland Parliament passed the *Criminal Law (Rehabilitation of Offenders) Act*¹⁷ which provides particular forms of protection for persons convicted of less serious offences, where the conviction is more than ten years old and no subsequent serious convictions have been incurred. Though there is no such legislation in any other State or Territory, the matter is being considered by Attorney General's Departments in South Australia, New South Wales and the Northern Territory, and by the Victorian Law Department. The Commission has consulted officers of each of these bodies during the course of its reference. The New South Wales Privacy Committee has also considered the matter, and the Commission has exchanged information with this committee.

1.12 The Australian Law Reform Commission¹⁸ commenced work on a reference on criminal records in 1984. The ALRC is examining the extent to which it is possible, within the limits of Commonwealth legislative power, to control or limit the dissemination of information relating to criminal records.

1.13 It is desirable that legislation on the problem of old convictions at State and Commonwealth level should, as far as possible, not be inconsistent.¹⁹ Criminal records, such as those maintained by the Western Australia Police, contain records of both State and Commonwealth offences. If possible, the same regime should apply to both categories of

¹⁶ A list of those persons and organizations who assisted the Commission, other than those who sought anonymity, is set out in Appendix I.

¹⁷ At the time of submission of this report, the Act had not been proclaimed.

¹⁸ Hereafter referred to as ALRC.

¹⁹ Under *Constitution* (Cth), s 109, in the event of inconsistency between a Commonwealth law and a State law, the latter becomes invalid. On the relationship between State and Commonwealth legislation on spent convictions, see para 7.49 below.

offences. The problem of old convictions is a national problem. The police forces in each State and Territory and the Australian Federal Police work in close co-operation with each other. People move from one place to another, and organizations such as employers and insurance companies, who have an interest in the criminal records of their employees or clients, commonly do business in many parts of Australia. Uniform, or compatible, Commonwealth and State legislation on old convictions would thus be desirable.

1.14 The Commission and the ALRC have made research and other information available to each other. An officer of the Commission visited Sydney and attended an ALRC consultants meeting. Representatives of the two Commissions have held discussions on their respective proposals.

1.15 The Commission's recommendations were summarized at the beginning of this report. In December 1985, the ALRC set out its proposals in a discussion paper.²⁰ Though their proposals have been developed independently, the two Commissions agree on the basic philosophy which should underpin a scheme dealing with the problem of old convictions. There are some differences of specific detail, most of which are due to variations in local conditions and the fact that one scheme is to operate at State and the other at federal level. The ALRC proposals may also be modified in the light of comments received on its discussion paper. Nonetheless, the ALRC scheme, as presently proposed, is in large measure consistent with that recommended by the Commission. The proposals of the two Commissions could form a suitable basis for uniform Commonwealth and State legislation.

²⁰ Discussion paper on *Criminal Records* (No 25, 1985), in this report cited as ALRC Discussion Paper.

Chapter 2

THE PRESENT POSITION

1. CRIME AND PUNISHMENT

(a) Offences

2.1 In Western Australia, any act or omission which renders the person doing the act or making the omission liable to punishment is called an offence.¹ There are three basic categories of offences: crimes, misdemeanours and simple offences.² The most serious offences, for example wilful murder, murder, manslaughter, treason and sexual assault,³ are crimes. Misdemeanours, the next most serious class of offences, include a wide range of offences, from wounding and assault to removing boundary marks on land. The least serious offences, simple offences, cover a very wide range of offences including many traffic and other regulatory offences. An offence not otherwise designated is a simple offence.⁴

2.2 In addition to offences against Western Australian law, people now living in Western Australia may have committed offences against the law of another State or country. The classification of offences and the terms in which they are expressed will vary from jurisdiction to jurisdiction.

2.3 People living in Western Australia may also have committed offences against the law of the Commonwealth of Australia.⁵ These offences may have been committed either in Western Australia or elsewhere. Commonwealth offences committed in Western Australia

¹ *Criminal Code*, s 2. Note that some statutes, such as the *Public Service Act 1978-1984*, use the term "offence" to describe disciplinary infractions. Such "offences" are not to be regarded as criminal offences: *R v White, ex parte Byrnes* (1963) 109 CLR 665.

² *Criminal Code*, s 3. Crimes and misdemeanours together make up the class known as indictable offences, that is, offences triable on indictment. (For the distinction between trial on indictment and summary trial, see ch 1 footnote 2 above. As there noted, some indictable offences may be tried summarily.) It has been recommended that this categorisation of offences be abolished, so that all indictable offences would be called crimes: M J Murray QC, *The Criminal Code - A General Review* (1983), 2.

³ The *Acts Amendment (Sexual Assaults) Act 1985*, ss 8-10 abolished the crime of rape and replaced it with the crimes of sexual assault and aggravated sexual assault.

⁴ *Criminal Code*, s 3.

⁵ Commonwealth offences include offences under the *Crimes Act 1914-1985*, customs, immigration, social security, tax and bankruptcy offences.

would result in prosecution in Western Australian criminal courts, to the extent to which they have been invested with federal criminal jurisdiction.

(b) Penalties

2.4 The statutory provision which sets out a particular criminal offence usually prescribes a specific maximum punishment on conviction for that offence. The sentences most commonly imposed in Western Australia are -⁶

- * Imprisonment
- * Community service order⁷
- * Probation order⁸
- * Entering into a recognizance (often called a bond)
- * Loss or suspension of motor driver's licence
- * Fine

In addition, there are a number of other orders which may be made, such as compensation and restitution orders, restraining orders and orders to undergo drug and alcohol treatment.⁹ Instead of imposing punishment, the court can in certain circumstances convict and discharge the offender conditionally or unconditionally, or dismiss the charge without proceeding to conviction.¹⁰

⁶ See Australian Bureau of Statistics (Western Australia): *Court Statistics: Higher Criminal Courts - Western Australia 1983-84* (1985), 3. For a list of the punishments which may be inflicted under the *Criminal Code*, see s 18. One punishment there listed, whipping, is in practice obsolete, and its abolition was recommended by M J Murray QC, *The Criminal Code - A General Review* (1983), 19, 117, 433.

⁷ See *Offenders Probation and Parole Act 1963-1985*, Part IIA.

⁸ See *Offenders Probation and Parole Act 1963-1985*, Part II and, in the case of offences committed by children dealt with in Children's Courts, *Child Welfare Act 1947-1985*, ss 34, 34B-34D. A probation order is for most purposes deemed not to be a conviction: *Offenders Probation and Parole Act 1963-1985*, s 20; *Child Welfare Act 1947-1985*, s 40. These provisions are dealt with in paras 11.1 to 11.23 below.

⁹ There are also some special orders which may be made on the conviction of children, such as ordering the child to be detained in strict custody until the Governor's pleasure is known or committing the child to the care of the Department for Community Services: *Criminal Code*, s 19(6a).

¹⁰ *Criminal Code*, s 669 (see paras 11.24 to 11.27 below). The *Child Welfare Act 1947-1985*, s 26(2) gives broadly similar powers to Children's Courts dealing with young offenders.

(c) Imprisonment and parole

2.5 Imprisonment is the most serious of the penalties listed in the previous paragraph, and may be distinguished from the other penalties in that in all those cases the convicted person remains in the community. The statutory provision setting out a particular offence will specify the maximum period of imprisonment which may be imposed on conviction for that offence. Imprisonment is normally for a finite term, but for particular offences a court is permitted, or required, to impose a sentence of life imprisonment or strict security life imprisonment. Further, a court may order that a convicted person be detained at the Governor's pleasure on the ground that the person is a habitual criminal,¹¹ or otherwise.¹²

2.6 Convicted persons are usually released before the end of the period of imprisonment specified by the court, which is thus simply a maximum period. Where the court sets a minimum term of imprisonment, on completion of the minimum term the convicted person becomes eligible for release on parole.¹³ If no minimum term is fixed, the convicted person is not eligible for release on parole. However, all persons serving finite terms of imprisonment are entitled to receive a remission of one third of their sentence.¹⁴ Persons serving a sentence of life imprisonment or strict security life imprisonment may be released on parole on the discretion of the Governor,¹⁵ but in the case of persons serving a sentence of strict security life imprisonment no such order may be made until 20 years have been served except where the Governor is of the opinion that special circumstances exist.¹⁶ Habitual criminals detained at the Governor's pleasure may not be released on parole until they have been so detained for two years or such lesser period as the Governor orders.¹⁷ Other convicted persons detained at the Governor's pleasure may be released on parole at any time.¹⁸

¹¹ *Criminal Code*, s 661.

¹² *Id.*, s 662.

¹³ *Offenders Probation and Parole Act 1963-1985*, s 37, and see also s 41(1)(a). There is usually a special remission of three days for each completed month of the minimum term: see s 39(2) and regulations made thereunder.

¹⁴ *Prisons Act 1981-1985*, s 29.

¹⁵ *Offenders Probation and Parole Act 1963-1985*, s 42(1).

¹⁶ *Id.*, s 42(2).

¹⁷ *Id.*, s 41(1)(b).

¹⁸ *Id.*, s 41(1)(c) and (d). The Probation and Parole Service advised the Commission that in practice such persons are never held in detention for less than one year.

2. STATISTICS OF CRIME AND PUNISHMENT

2.7 It is not possible to assess how many people in Western Australia have been convicted of offences, or how many have convictions which are more than, for example, five or ten years old. However, some indications can be gleaned from the number of convictions recorded annually. Between 1 July 1983 and 30 June 1984, for example, a total of 170,325 convictions were recorded against 130,231 persons by criminal courts in Western Australia.¹⁹ As is clear from these figures, in some instances more than one conviction was recorded against a particular person in particular proceedings. Also, no doubt, there are particular individuals against whom criminal proceedings were brought on more than one occasion during the year, so that the same individual counts as several different "persons" for the purposes of these figures. Nevertheless, the fact that the annual number of convictions is as high as this, out of a population of approximately 1.4 million,²⁰ shows that the number of people in Western Australia with a criminal record must be considerable.²¹

2.8 In some cases, a conviction results in the imposition of more than one penalty. 157,686 penalties were imposed on the 130,231 persons convicted between 1 July 1983 and 30 June 1984.²² In 7,242 of these cases (a little over 4.5 per cent) sentences of imprisonment or detention were imposed.²³ In all other cases, the sentences were non-custodial sentences. Most of the 7,242 sentences of imprisonment were for a comparatively short period. In only 997 cases were persons imprisoned for more than six months, and of these only 663 involved imprisonment for more than one year.²⁴

3. CRIMINAL RECORDS²⁵

2.9 The most comprehensive records of convictions are those kept by the Criminal Records Section of the Western Australia Police and, for young offenders, those kept by the Department for Community Services. The police record system contains records of

¹⁹ See Appendix II Table 1. For details of the kinds of offences committed, see Appendix II Table 2.

²⁰ In the year 1 July 1983 to 30 June 1984, the mean resident population of the State was 1,347,600: Australian Bureau of Statistics (Canberra), *Australian Demographic Statistics, September and December Quarters 1984* (1985), Table 5.

²¹ The Criminal Records Section at Police Headquarters in Perth has conviction records on approximately 312,000 persons: see Appendix III para 7.

²² See Appendix II Table 3.

²³ Ibid.

²⁴ See Appendix II Table 4.

²⁵ See Appendix III for a more detailed survey.

practically all convictions imposed by criminal courts in Western Australia. The police hold records of all convictions in respect of which the convicted person was arrested, fingerprints taken at the time of arrest providing conclusive proof of that person's identity. Convictions resulting from proceedings initiated by summons, where no fingerprints are taken, are added to existing records if the convicted person can be positively identified as a person with an existing record, otherwise they are held as separate records. The only limitation on the comprehensiveness of the record is that records of convictions for Commonwealth offences resulting from proceedings commenced by summons are not held.²⁶ The Records Section of the Department for Community Services keeps records of all convictions recorded by Children's Courts in Western Australia against young offenders. Both the police criminal records and the Department for Community Services records are computerized.

2.10 The police have separate record systems for traffic convictions and traffic infringements. Certain Government departments keep records of particular classes of convictions. Of these, the most important are the records kept by the Prisons Department and the Probation and Parole Service. The Prisons Department keeps records of all convicted persons who serve sentences of imprisonment, however short. The Probation and Parole Service keeps records of convictions where a probation order or a community service order is made, where a sentence of imprisonment is imposed which makes the convicted person eligible to be considered for release on parole, and where the court calls for a report on the convicted person. The courts in which criminal proceedings take place also keep their own records of those proceedings. In the case of Children's Courts, the records are used for the compilation of the Department for Community Services records. A characteristic of all the record keeping systems mentioned in this paragraph is that, unlike the police criminal records and the Department for Community Services records, they are not comprehensive, but are specialized collections of particular classes of conviction records. In some cases, the records are manual rather than computerized. The court records are generally kept chronologically, though some courts maintain an index which allows all convictions against a particular person in that court to be extracted.

2.11 Police criminal records and Department for Community Services records are also important in that, in particular circumstances, they are disclosed to courts or to third parties. The police criminal record is disclosed when required by the court in subsequent criminal

²⁶ Records of convictions for all Commonwealth offences are held by the Australian Federal Police.

proceedings against the convicted person, as is the Department for Community Services record. The police criminal record is also disclosed when required under legislation,²⁷ or when the subject of the record consents. Applicants for jobs or occupational licences are in practice often requested to furnish a copy of their criminal record, or to consent to the employer or licensing board obtaining it.

2.12 The other record systems under discussion are essentially records kept for the internal administrative purposes of the court or department concerned. They are not generally made available to third parties, and in any case would not necessarily provide a comprehensive picture of an individual's criminal record.

2.13 As to the length of time for which records are kept, practice varies. The police record will be destroyed at the request of the record subject if that person is acquitted, but otherwise is not destroyed.²⁸ Department for Community Services records are likewise not destroyed. In some other cases, however, records are eventually destroyed. Some police traffic records are destroyed after seven years, and others after 20 years. Records of Courts of Petty Sessions are kept for 53 years, but Supreme and District Court records are kept indefinitely.

2.14 The unauthorized disclosure of records is likely to result either in internal disciplinary proceedings or in proceedings for a criminal offence. Unauthorized disclosure from police records would be dealt with by disciplinary procedures set out in the *Police Act 1892-1985*.²⁹ The *Public Service Act 1978-1984*³⁰ provides for disciplinary proceedings in respect of unauthorized disclosure by public servants. More specific provisions appear in the *Prisons Act 1981-1985*³¹ and the *Offenders Probation and Parole Act 1963-1985*.³² The *Criminal Code*³³ provides that a public servant who discloses secret information commits an offence.

2.15 As well as the official records dealt with in this section, there may be a number of unofficial records of convictions. The most important unofficial sources will be the details of court proceedings published in newspapers and held in newspaper files. For those cases

²⁷ Eg *Juries Act 1957-1984*, s 17; *Security Agents Act 1976-1985*, s 13(3); *Motor Vehicle Dealers Act 1973-1985*, s 13(3).

²⁸ Except that the manual files are destroyed when the person concerned is over 80.

²⁹ S 23.

³⁰ S 44.

³¹ S 98.

³² S 51.

³³ S 81.

which are reported in law reports, such reports provide another source of information about convictions.

Chapter 3

THE EFFECTS OF OLD CONVICTIONS

1. INTRODUCTION

3.1 Persons with criminal records may encounter difficulties in a number of areas - in finding or keeping employment, in a variety of other areas of their day-to-day life, such as finance, travel and legal proceedings, in holding public office or fulfilling civic duties, or in their family and social life.

3.2 In some circumstances, persons with criminal records are confronted with specific statutory provisions, either in Western Australian or Commonwealth legislation, which prevent them doing something - for example, entering certain fields of employment or holding certain offices. In other cases, the problem arises not from any legislative provision but from the attitude of other people, such as employers.

3.3 In its discussion paper, the Commission asked for information concerning difficulties arising from the existence or disclosure of records of convictions, and the responses confirmed the extent and variety of these difficulties.

3.4 It would be going too far to suggest that a conviction should be disregarded as soon as the convicted person has served a sentence of imprisonment or satisfied whatever other penalty is imposed as a result of the conviction. However, the passage of a substantial period of time without further convictions may put the matter in a different light. In some circumstances at least, it is arguable that with the passage of time the conviction has become irrelevant to the particular context in which it is raised, such as a particular employment or office. In these circumstances, the Commission believes that, for reasons specified in chapter 4, the convicted person should no longer be treated differently from other members of the community.

3.5 In a number of instances, existing statutes imposing some sort of disability on convicted persons distinguish between convictions which are recent and those which are older in date. This is especially evident in legislation enacted in the last ten years. In other

instances, the law imposes disabilities on all convicted persons without making any distinction as to the age of the conviction or any other circumstances. Here those with old convictions may encounter the same kinds of difficulties as those whose convictions are more recent.

2. LEGISLATION DISTINGUISHING BETWEEN OLDER AND MORE RECENT CONVICTIONS

3.6 Statutory provisions enacted during the last decade which distinguish between older and more recent convictions include the following.

(a) *Child Welfare Act 1947-1985*

3.7 In most cases, children who commit offences are tried and sentenced by a Children's Court. Sections 40 and 126A of the *Child Welfare Act 1947-1985*¹ reduce the consequences of such convictions.² Section 40 applies to convictions for all offences except wilful murder, murder, manslaughter, treason, or attempts to commit any of these offences. Where a child is convicted of any offence other than these, and a period of two years has expired since the date of the conviction or the discharge of any sentence or order imposed in relation to the conviction, whichever is the later, the conviction is deemed not to be a conviction for any purpose, including the purposes of any enactment imposing or authorizing or requiring the imposition of any disqualification or disability on a convicted person.³ The provision also applies where a probation order is made, and the child is not subsequently dealt with for the offence under any law relating to probation orders in respect of child offenders.

3.8 Section 126A provides that where a conviction is by section 40 deemed not to be a conviction, then in any proceedings, other than proceedings for that or a subsequent offence in the Children's Court or on indictment, no evidence of that conviction is admissible. Further,

¹ Added to the Act by the *Child Welfare Act Amendment Act (No 2) 1976*, ss 50 and 114.

² Sidenotes describe the persons affected as "rehabilitated offenders" (s 40) and "rehabilitated persons" (s 126A), but neither term is used in the sections themselves.

³ Except that -

(1) the conviction is still regarded as a conviction for the purposes of the making of the order, or any other order arising out of the conviction, or any other record thereof, and of any subsequent proceedings against the offender (either under the *Child Welfare Act* or on indictment) in relation to the offence or a subsequent offence;

(2) the provision does not affect the right to appeal against conviction, the revesting or restoration of property in consequence of a conviction, or the right of a court to disqualify a person from holding or obtaining a driver's licence.

except for the purposes of the Act or of any court of law, no person, other than the child, may disclose the fact of such a conviction. Contravention of this provision is an offence carrying a maximum penalty of a fine of \$200 or imprisonment for three months.⁴

3.9 These provisions are further dealt with in chapter 11.⁵

(b) *Road Traffic Act 1974-1985*

3.10 At present there is no general scheme limiting the consequences of old convictions of adult offenders equivalent to that provided for young offenders under the *Child Welfare Act*. There are, however, a number of statutes which distinguish between old convictions and more recent convictions, and limit the effect of old convictions in particular circumstances.

3.11 The *Road Traffic Act 1974-1985*⁶ provides that where a person is convicted of an offence against the Act, and the penalties for that offence vary according to whether the person has been convicted previously of an offence against the Act,⁷ convictions recorded more than 20 years before the conviction for the offence in question shall not be taken into account. In effect, therefore, a conviction for an offence under the *Road Traffic Act* becomes spent after 20 years if there are no subsequent convictions.

(c) *Companies (Western Australia) Code*

3.12 The *Companies (Western Australia) Code*, enacted in 1981, distinguishes between old convictions and those of more recent date. It provides that the office of a director of a corporation is vacated if the director is convicted of specified offences, which include offences in connection with the promotion, formation or management of a corporation, or offences involving fraud or dishonesty punishable on conviction by imprisonment for a period of not less than three months.⁸ A person convicted of any of these offences may not, within a period of five years of conviction, or, if sentenced to imprisonment, within a period of five

⁴ S 142.

⁵ See paras 11.1 to 11.14 below.

⁶ S 105.

⁷ Or its predecessor, the *Traffic Act 1919-1974*.

⁸ S 222(1)(d).

years after release from prison, be a director or promoter of, or be in any way concerned or take part in the management of, a corporation without the leave of the Supreme Court.⁹

3.13 It will be noted that only those convictions which are sufficiently serious to come within the terms of the statute operate as a disqualification, and that the disqualification only operates for a limited period of time. There is also a power for a court to grant exemption from the disqualification in appropriate cases.

(d) *Credit (Administration) Act 1984-1985*

3.14 It is common for statutes requiring a licence to pursue a particular occupation to provide that a licence will not be granted unless the licensing body considers the applicant to be a person of good character and repute and a fit and proper person to hold a licence.¹⁰ The fact that the applicant has a criminal record will not automatically disqualify the applicant from obtaining a licence, but it may be a ground for refusal on the part of the licensing body. Such statutes also generally provide that a licence will be withdrawn on conviction of any offence involving fraud or dishonesty, or for any offence rendering the holder unfit to carry on the occupation in question. Unlike most of these statutes, the *Credit (Administration) Act 1984-1985* distinguishes between older and more recent convictions. It provides that an application for a credit provider's licence will be refused if the applicant is not a fit and proper person to be the holder of a licence. The Commercial Tribunal (which is entrusted by the Act with the responsibility of granting licences) may, in determining whether the applicant is a fit and proper person, have regard to the fact that the applicant has been convicted of, or served any part of a term of imprisonment for, an offence in Western Australia or elsewhere involving fraud or dishonesty during the period of ten years preceding the making of the application.¹¹ If there are grounds for believing that a licensee has, within the period of ten years preceding the grant of the licence, been found guilty of an offence involving fraud or dishonesty punishable on conviction by imprisonment for three months or more, various alternatives are available to the Tribunal, including cancellation of the licence.¹²

⁹ S 227(2).

¹⁰ For examples, see Appendix IV para 4.

¹¹ S 12.

¹² S 23.

3.15 This Act thus distinguishes not only between older and more recent convictions, but also between serious and less serious offences.

(e) *Juries Act 1957-1984*

3.16 The *Juries Act 1957-1984* contains provisions disqualifying persons with convictions from serving on a jury in certain circumstances.¹³ The Act was amended in 1984 as a result of the recommendations of the Commission,¹⁴ and now distinguishes between those who have recent convictions and those whose criminal records are several years old. Unless a person has been convicted and sentenced to imprisonment for a term exceeding two years, or for life, or for an indeterminate period (in which case the person is disqualified from jury service for life), a person is only disqualified from jury service if that person has served any part of a sentence of imprisonment, been on parole in respect of any such sentence, been found guilty of an offence and detained in an institution for juvenile offenders, or been the subject of a probation order, at any time within the last five years.

3.17 Before the 1984 amendment, a conviction for a crime or misdemeanour disqualified a person from serving on a jury for life.¹⁵ Some of those who contacted the Commission in response to its discussion paper (which was issued before the amendment) regretted that their criminal record made them ineligible for jury service. In many cases, these persons will now be eligible for jury service once the five year period has expired.

(f) *Local Government Act 1960-1985*

3.18 A recent amendment to the *Local Government Act 1960-1985* again distinguishes between older and more recent convictions.¹⁶ A person who has, within the last preceding period of five years, been convicted of an offence under section 174 (which relates to the disclosure of interests by members of councils and committees) cannot be the mayor or president or a councillor of a municipality.

¹³ S 5(b).

¹⁴ Report on *Exemption from Jury Service* (Project No 71, 1980).

¹⁵ *Juries Act 1957-1981*, s 5(1)(b).

¹⁶ S 67(1)(ba), inserted by *Local Government Amendment Act 1985*, s 3.

3. THE EFFECTS OF OLD CONVICTIONS IN OTHER SITUATIONS

(a) Specific disabilities and difficulties: the law and practice

3.19 The legislation dealt with in the preceding section of this chapter shows that on a number of occasions in recent years the Parliament of Western Australia, in imposing disabilities on persons as a result of convictions, has distinguished between older and more recent convictions. In such cases, convictions therefore become "spent" after a specified period. In addition, the provisions in question sometimes distinguish between more and less serious offences, or offences which are relevant to the purposes of the statute and those which are not.

3.20 In other cases, legislation makes no such distinctions, but imposes disabilities on all persons with convictions, whether those convictions are old or new. Sometimes, although there are no legislative provisions, other rules and practices have a similar effect.

3.21 These rules, statutory and otherwise, cover a variety of different situations.¹⁷

(i) Employment

3.22 Some statutory provisions provide that persons with a record of convictions are not permitted to enter a particular occupation. In addition, many statutes regulating entry to professions or the granting of licences to pursue particular occupations provide that applicants must be of good character. A record which includes a conviction for a serious offence, especially one involving fraud or dishonesty, is likely to disqualify a person from being admitted to a profession or being granted a licence. Application forms, not only for entry to a profession or for the grant of a licence but also for many other kinds of employment, commonly ask applicants to disclose whether they have any previous convictions.

¹⁷ For further details, see Appendix IV.

(ii) Other areas

3.23 There are many other areas in which persons with criminal records may encounter difficulties, for example obtaining credit, hire purchase or insurance, becoming an Australian citizen or obtaining a visa to visit a foreign country.

3.24 In other cases, although a conviction will not generally act as a disqualification, it will have to be disclosed, as for example on applying for a learner's permit to drive a motor vehicle.

3.25 Information about previous convictions may be disclosed in legal proceedings in a number of circumstances, and this may make persons with convictions reluctant to commence civil proceedings or appear as witnesses.

(iii) Public office and civic duties

3.26 Persons with criminal records are likely to encounter difficulties if they seek to enter public office or perform civic duties. Convictions, or convictions of particular kinds -

- * disqualify a person from being a member of either House of the Western Australian Parliament;
- * disqualify a person from being elected or nominated as a member of many State Government bodies;
- * may make it difficult for a person to become a justice of the peace.

(b) Specific disabilities and difficulties: experience of convicted persons¹⁸

3.27 In the situations dealt with above, the disabilities imposed on convicted persons may be appropriate, and the difficulties they encounter may be no more than anyone would expect - at least, where the conviction is a recent conviction. However, as the responses to the

¹⁸ The experiences related in this section assume the correctness of the facts brought to the notice of the Commission. It is thus assumed that the persons concerned suffered in various ways because of their convictions, and not for some other reason. This will not necessarily be so, but obviously the experiences cannot be cross-checked with the other parties involved. Whether individual accounts are correct in all respects or not, the Commission is reasonably satisfied that experiences of the sort detailed do in fact occur.

Commission's discussion paper confirm, these situations also cause difficulties for persons whose convictions are several years old, even where there have been no further convictions in the intervening period.

(i) *Employment*

3.28 The chief problem experienced by the majority of the persons with criminal records who contacted the Commission was obtaining or keeping employment. In some cases, the persons concerned had long records or had committed serious offences, but in other cases the record consisted of a single conviction for a fairly trivial offence. Often convicted persons were still experiencing problems although the conviction had been incurred many years ago. In one case, for example, a man claimed to have been refused employment because of a conviction more than forty years previously.

3.29 The employment problems experienced by those who contacted the Commission can be divided into a number of categories. Some people told the Commission that they had been unsuccessful in obtaining employment because of their criminal record. In some cases this had happened over and over again. Others had been successful in getting jobs, but had been dismissed, or been asked to resign, when their employer found out about their criminal record. Others had resigned through fear of their record being discovered. Some were still in employment but were afraid of what would happen if their employer, or the general public, became aware of their record. Of those who had been successful in obtaining a job in spite of their record, a number had not disclosed previous convictions, and the majority of these persons expressed regret at having to lie in order to obtain employment. Often they had been driven to do this after disclosing convictions on previous occasions and being refused employment in consequence.

3.30 Other people told the Commission how fears of their record being disclosed had prevented them from seeking employment. Some were afraid to apply for any kind of job. Others had limited their field of choice and given up particular ambitions because of fear about their criminal record coming to light. In such cases, people were being prevented from fulfilling their full potential, to the detriment not only of themselves but probably of the community also.

3.31 The existence of problems such as these was confirmed by the Western Australia Committee on Discrimination in Employment and Occupation,¹⁹ which has recently received complaints of discrimination against convicted persons. In some cases, the convictions in question were more than ten years old.

3.32 A number of those who contacted the Commission had tried unsuccessfully to obtain licences to pursue particular occupations: among those specifically mentioned were licences to be taxi drivers, real estate agents, car salesmen, nurses and finance brokers. In one case, a person claimed to have been refused a real estate agent's licence because of a 20 year old conviction for wilful exposure. He had previously been refused a taxi driver's licence. In another case, a person with a 20 year old gambling conviction claimed to have been prevented, at various times, from obtaining licences to be a money lender, a finance broker and a real estate agent.

3.33 The Commission carried out a survey of a number of licensing bodies²⁰ to determine their attitude to past convictions when considering applications for a licence. All except one said that previous convictions were taken into account, and several confirmed that cases have occurred within the last five years in which applications for a licence were refused on the ground of the applicant's criminal record. Most of the bodies said that they had no set guidelines as to previous convictions, but considered each case on its merits. Offences involving fraud and dishonesty were regarded very seriously by all the authorities concerned. Less serious offences, such as traffic convictions, were likely to be overlooked. Much depended on how long ago the conviction was recorded, the age of the convicted person at that time and that person's subsequent history. The licensing body usually obtained information as to past convictions from the applicant. In some cases,²¹ this was supplemented by checking with the police record, either under powers specifically conferred by the Act in question, or with the consent of the applicant.²²

¹⁹ As to which, see Appendix IV para 7.

²⁰ Betting Control Board; Builders Registration Board; Finance Brokers Supervisory Board; Hairdressers Registration Board; Insurance Brokers Licensing Board; Licensing Court; Medical Board; Motor Vehicle Dealers Licensing Board; Psychologists Board; Real Estate and Business Agents Supervisory Board; Taxi Control Board.

²¹ Motor Vehicle Dealers Licensing Board; Betting Control Board; Real Estate and Business Agents Supervisory Board; Taxi Control Board.

²² See para 2.11 above and Appendix III paras 16 and 17.

(ii) *Other areas*

3.34 Those who responded to the Commission's discussion paper had experienced difficulties in several other areas besides employment. In each area, it was possible for criminal records to affect people in a number of ways.

- * They might be unable to attain an objective because of the record.
- * They might attain this objective but suffer embarrassment through having to reveal the record in order to do so.
- * They might attain this objective without revealing the record, and live in fear of it coming to light.
- * They might attain a particular objective without revealing the record, and suffer adverse consequences when others became aware of it.
- * They might be dissuaded by fear of exposure of the record from seeking to attain the objective in question, so denying themselves and others the benefits resulting from fulfilment of their true potential.

3.35 Among the difficulties encountered were the following -

- * Several people told the Commission that they had been refused credit or hire purchase because of their record. In most of these cases the record included offences involving dishonesty.
- * Some people, in order to obtain insurance, had had to reveal an old criminal record and had suffered embarrassment in consequence.
- * Others told the Commission that they had suffered embarrassment at having to reveal old convictions when applying for a learner's permit. In some instances the conviction bore no relation to driving. In one case, a person applying for a learner's permit had had to disclose his conviction for indecent exposure.

- * A number of respondents had either experienced or foresaw problems in relation to legal proceedings. Some said that they would never commence a civil action or appear as a witness, for fear that their record might be brought up in court. Another person had become involved in legal proceedings against his will, having been subpoenaed as a witness in a prosecution brought by his employer, and was worried that his employer would discover his criminal record if he was cross-examined about it.
- * Others claimed that convictions had been brought up in subsequent criminal proceedings against them - in one case, it was alleged, an 11 year old Children's Court conviction.²³ It seems that, in at least some of these instances, the record was made public in court.
- * In one case a person, though resident in Australia for many years, claimed that his application for Australian citizenship had been rejected because of street trading offences.
- * A number of people had experienced difficulties in getting visas because of their criminal record. Others regretted the fact that old convictions had to be disclosed when applying for a visa. Others had refrained from applying for passports or visas for fear that relatives would discover their record - in one instance, an offence committed many years previously. In the majority of these cases, a visa was being sought to visit the United States. The United States Consul General in Western Australia told the Commission that whether a visa would be refused depended on the nature and seriousness of the offence, and whether the convictions were recent.

(iii) *Public office and civic duties*

3.36 In some cases, those who related their experiences to the Commission had encountered difficulties in relation to public office or civic responsibilities.

²³ In England, a person with convictions for dishonesty brought an action to recover a civil debt 11 years later and was cross-examined about these convictions: *Living it Down*, para 1(f).

- * One person told the Commission that he had refused an invitation to be nominated for a safe seat in Parliament because of the possibility that his criminal record would become known as a result.
- * A number of people said that they had been asked if they were willing to be nominated for particular local government offices, but had refused because of their record and their fear that it might be brought to public notice.
- * Some wanted to seek appointment as a justice of the peace but felt they could no longer do so, or feared being asked to become a justice of the peace because of their criminal record.

(c) General problems

(i) Social problems

3.37 Apart from specific difficulties of the types referred to above, the fact of having a criminal record can have a more general effect on a person's life. A person may have to suffer the embarrassment of revealing the record to friends and relatives, or conceal its existence and live in fear that they may somehow find out about it. Some people expressed such sentiments to the Commission. In several cases these people had endured this problem for many years. Retired people expressed the wish that offences committed many years previously could now be forgotten, that in some way they could feel forgiven by society for their past misdeeds and that "the slate could be wiped clean".

(ii) Unwanted publicity

3.38 In many cases, a person with a criminal record would be sufficiently embarrassed if information as to that record was communicated to even a restricted circle of family and friends. If such information were given wider circulation through being communicated by the media, the embarrassment would be much greater, and some of the specific problems dealt with in the preceding sections of this chapter might also arise. However, there is no means in Western Australia by which a person can prevent or seek any other remedy for the undesired publication of information about that person's criminal record, if it is true, since truth is a

complete defence to an action for defamation.²⁴ In some other Australian jurisdictions, individuals have more protection against the unwanted publication of private facts. In New South Wales, in order to establish a defence to an action for defamation, it must be shown not only that the information was true but also that it related to a matter of public interest,²⁵ and in Queensland, Tasmania and the Australian Capital Territory, that the publication was for the public benefit.²⁶

3.39 Proposals for a uniform law of defamation throughout Australia have been under discussion in recent years. The Commission²⁷ and the ALRC²⁸ both recommended that truth should be a complete defence to defamation, though the Commission as a compromise to obtain uniformity was prepared to agree to a defence of truth and public benefit. The ALRC recommended that there should be a separate remedy for the publication of sensitive private facts. Either recommendation might have provided a remedy for the unlawful disclosure of old convictions. However, since the discussions on uniform law have now terminated without agreement being reached,²⁹ neither suggested reform is likely to be adopted in Western Australia.

4. CONCLUSION

3.40 The responses to the Commission's discussion paper showed that there are a considerable number of people who encounter difficulties of many kinds because of old criminal convictions. These experiences are no doubt mirrored by those of many other West Australians.

3.41 It is clear that the trend in recent legislation favours making a distinction between those whose convictions are recent and those whose convictions are older in date. The imposition of disabilities appropriate where convictions are recent cannot generally be justified where they are many years old. In the next chapter the Commission examines the

²⁴ The common law defence of truth remains unaffected by s 356 of the *Criminal Code*, which provides a defence to a charge of criminal defamation if defamatory matter is true and publication is for the public benefit: *West Australian Newspapers Ltd v Bridge* (1979) 141 CLR 535.

²⁵ *Defamation Act 1974-1984* (NSW), s 15.

²⁶ *Criminal Code* (Qld), s 376; *Defamation Act 1957* (Tas), s 15; *Defamation Act 1901-1909* (NSW), s 6, still applicable in ACT: see (ACT) *New South Wales Acts Application Ordinance 1984*, Schedule 2, Parts 10-11.

²⁷ Report on *Defamation* (Project No 8, 1979), paras 11.1-11.5.

²⁸ Report on *Unfair Publication: Defamation and Privacy* (No 11, 1979), paras 120-126, 206-250.

²⁹ See Attorney General of Western Australia, Press Release, 3 May 1985.

question whether, in view of the evidence in this chapter, the legislative trend should be continued by enacting a more general scheme of protection for those with old convictions.

Chapter 4

THE NEED FOR A SPENT CONVICTION SCHEME

4.1 In other jurisdictions, including one Australian State,¹ the problem of old convictions has been addressed by legislative schemes which, in one way or another, limit the effect of a criminal record.² A general characteristic of these schemes is that, before the protection provided by the legislation begins to operate, the convicted person has to demonstrate, usually through the passing of a period of years without a further conviction, that the conviction has become "spent". In this report the Commission refers to such schemes as "spent conviction schemes".

4.2 In the Commission's opinion, the difficulties experienced by persons with old convictions, described in chapter 3, indicate the desirability of adopting a spent conviction scheme in Western Australia. The scheme would adopt, on a more general level, the policy already evident in a number of legislative provisions which distinguish between recent convictions and those which are some years old.³

4.3 A spent conviction scheme to deal with the problem of old convictions can be justified on a number of grounds -

- * Persons who have been convicted of offences should not necessarily have to suffer the consequences for the rest of their lives. It is unfair to continue to impose disabilities on persons convicted many years ago, if they have demonstrated, by not incurring further convictions, that their convictions should no longer reflect on their character and reputation.

- * Convictions can eventually become irrelevant as a yardstick by which to judge convicted persons, whether the judgment relates to their suitability for employment, their fitness to hold public office, or any other purpose. Initially, a conviction is a public matter. Though the actual record of the conviction is

¹ See *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).

² See ch 5 below.

³ See paras 3.5 to 3.18 above.

not generally available to third parties, the fact of the conviction will have to be disclosed in numerous situations, and is a matter of legitimate concern to the public, who, in many circumstances, have an interest in the conduct and character of the convicted person. However there may come a point when the conviction is no longer a matter of legitimate public concern. At this point, access to information about the existence and circumstances of the conviction will be, at best, of marginal utility in assessing the current character or predicting the behaviour of the convicted person. In those circumstances, the convicted person's interest in privacy may outweigh the public interest in disclosure of the past record.

- * A spent conviction scheme offers an incentive to convicted persons to become rehabilitated, and rewards them if they do so by limiting the effect of their old convictions. The passing of a number of years without a further conviction is not a guarantee that a convicted person will never commit further offences, and it may be that in the case of more serious offences some additional requirement must be satisfied before a conviction can be regarded as spent. However, the passing of time without further convictions will generally provide good evidence of rehabilitation. Evidence about recidivism suggests that, if a convicted person is going to commit further offences, this will generally happen in the first few years after conviction. The longer the period of time after conviction without further convictions being incurred, the less likely it is that the convicted person will again be convicted.⁴

⁴ According to the Prisons Department of Western Australia, which analysed the records of all persons serving a first sentence of imprisonment who had been released from prison between 1975 and 1983, a majority of those sentenced to imprisonment will return to serve a further sentence, but the vast majority of those who are going to return to prison will do so within three years of release, and thereafter the possibility of return diminishes considerably: Recidivism Research Group, *Preliminary Report: Recidivism in the Western Australian Prison Population* (1985). The figures distinguish between aboriginal and non aboriginal prisoners. Of male aboriginal prisoners first released in 1975, nearly 85 per cent had returned after three years, a figure which had risen to about 90 per cent over five years and about 92 per cent after seven years. For non aboriginal male prisoners first released in the same year, there were over 65 per cent who had returned within three years, and after five years this had risen to about 74 per cent, but the figure had only risen to about 77 per cent after seven years and was still under 80 per cent after nine years. The figures for those released in subsequent years exhibit a similar trend. This study confirms the results of earlier studies. In England, the Home Office Research Unit found that among first offenders, 64 per cent remained free of further convictions for five years and 60 per cent for ten years. After ten years free of convictions, the reconviction rate was minimal: *Living it Down*, Appendix C. Broadly similar findings were made in two reports from the United States Bureau of Justice Statistics: J F Wallerstedt, *Returning to Prison* (1984); L A Greenfield, *Examining Recidivism* (1985). See also ALRC Discussion Paper, Appendix B.

- * These benefits of a spent conviction scheme not only assist persons with old convictions but may also operate for the good of society generally. The community has an interest in the just and fair treatment of its citizens, in the recognition, in appropriate circumstances, of rights of privacy, and in encouraging offenders to become rehabilitated. It is desirable in itself for the community to be forgiving, but there are also more tangible benefits. If ex-offenders become law-abiding members of the community, they may assist the community in a positive way, and the community gains the fruits of their endeavours.

4.4 Other considerations must of course be taken into account in any spent conviction scheme. It is important that -

- * The police should not be in any way impeded in the proper performance of their functions of preventing and detecting crimes and apprehending offenders.
- * The courts should not be hampered in carrying out their responsibilities of trying offenders and passing appropriate sentences, by limiting the information available to them.
- * Individuals, the government, commercial and professional organizations and community groups have an interest in the free flow of information, and should not be placed in a situation where there is any danger of harm being suffered through unavailability of information about a person's criminal record.
- * Undue restrictions should not be placed on research, if the results of that research are likely to be beneficial to the community.

4.5 A spent conviction scheme must accommodate all these considerations. It is also important that a spent conviction scheme should be simple to understand, and convenient and inexpensive to operate.

4.6 In the Commission's opinion, the scheme which it recommends in this report fulfils these criteria. At the same time, it answers a need that presently exists for a way of limiting

the effects of old convictions, and so will benefit both individuals with old convictions and the community as a whole.

Chapter 5

POSSIBLE ALTERNATIVES

1. INTRODUCTION

5.1 Legislation dealing with the problem of old convictions exists in many jurisdictions throughout the world¹ - in common law countries such as the United Kingdom, the United States and Canada, in virtually all European civil law countries, in communist countries such as the USSR and Yugoslavia, and in many other countries from Japan to Vanuatu. In other countries, proposals for legislation have been made by law reform commissions and similar bodies.

5.2 The Commission has concentrated its attention on the legislative schemes in the United Kingdom, the United States and Canada, and on schemes or proposed schemes in other parts of Australia and New Zealand.² This has enabled the Commission, in formulating a spent conviction scheme for Western Australia, to take account of experience elsewhere.

5.3 Virtually all schemes are based on the central concept of a conviction becoming spent.³ The effect of a spent conviction varies from one scheme to another, as does the way in which a conviction becomes spent. Some schemes cover all convictions, and others are limited to less serious convictions.

2. THE EFFECT OF A SPENT CONVICTION

(a) Concealment of the record

5.4 Legislation in United States jurisdictions⁴ generally provides that, when a conviction has become spent, the official criminal record of that conviction will be either sealed or

¹ For a general review, see *Living it Down*, Appendix D; ALRC Discussion Paper, Appendix D.

² Appendix V contains a detailed review with further references; see also WALRC Discussion Paper, chs 4-10.

³ The major exceptions are the sealing and expunction legislation in some United States jurisdictions, anti-discrimination legislation in British Columbia, and anti-discrimination legislation proposed in the ALRC Discussion Paper and the NZ Discussion Paper.

⁴ See also Appendix V paras 2 to 5.

expunged. Sealing involves a procedure whereby the record is physically removed from the record system and thereafter access to the record, or communication of it, is barred or substantially restricted. Expunction involves the destruction of the record, which means that it cannot thereafter be used for any purpose.

5.5 Sealing and expunction as adopted in the United States have been criticized on a number of grounds.⁵

- * Though "sealing" means that the record remains available for restricted purposes, such as court proceedings, expunction results in the destruction of the record, which is therefore no longer available for purposes such as criminal investigation or criminological research.
- * Sealing or expunging a record does not of itself prevent questions being asked about whether a person has a record of a conviction which has been sealed or expunged. Such legislation is thus limited in its usefulness unless it is accompanied by a right to deny the existence of the conviction.⁶
- * Sealing and expunction can only be ordered with respect to official records such as police records. It is impracticable to expect that all records of an offence could be sealed or expunged. Even if it were practicable, it would require considerable administrative resources.

5.6 The United States experience shows that legislation which deals with only one aspect of the problem of old convictions will not be completely successful.

(b) Declaration of rehabilitation

5.7 In contrast to the United States legislation, the Canadian federal scheme, instituted by the *Criminal Records Act 1970*,⁷ adopts the approach of declaring that the offender has become rehabilitated. After a specified period of time, a convicted person may apply for a

⁵ See in particular B Kogon and D L Loughery, *Sealing and Expungement of Criminal Records - The Big Lie* (1970) 61 *Journal of Criminal Law, Criminology and Police Science* 378, 383-386.

⁶ Some United States jurisdictions recognize such a right: Appendix V para 3.

⁷ See also *id.*, paras 7 to 18.

"pardon". A pardon, if granted, does not conceal the existence of the conviction, but amounts to a declaration that it should no longer reflect adversely on the person's character. A pardon vacates the conviction and removes any disqualification under statute to which the convicted person is subject. The official record of the conviction is henceforth kept separate from other records. It cannot be disclosed to anyone except under authority from the Solicitor General, and cannot be used in criminal investigations and prosecutions.

5.8 A recent investigation⁸ criticized the Canadian scheme on a number of grounds. It noted in particular that, since the Act does not deem convictions never to have occurred, convicted persons could not, in answer to a question, deny that they had been convicted. Another criticism made of the Canadian scheme was that the prohibition on the use of records of pardoned convictions in criminal investigations and prosecutions seriously hampers the work of the police and prosecution authorities. New proposals currently under discussion would allow offenders to deny the existence of convictions which have become spent, but would allow judicial and law enforcement officers access to records of such convictions in specified circumstances.

(c) Non-discrimination

5.9 Another approach to the problem of old convictions, also found in Canada, both at federal level and in some Provinces, is to make use of equal opportunity or anti-discrimination legislation.⁹ This legislation neither conceals the fact of old convictions nor depends on a finding that the convicted person has become rehabilitated. The legislation is based on the proposition that in many situations the fact of conviction is irrelevant, or at least not a proper basis for discrimination. Federal legislation makes it unlawful to discriminate against a person on the ground of a pardoned conviction, except in certain classes of employment.¹⁰ Legislation in Ontario provides that discrimination in employment on the basis of a pardoned conviction is unlawful, unless the conviction is relevant to the nature of the employment.¹¹ The legislation in British Columbia goes further and provides that discrimination in employment on the basis of any conviction is unlawful, unless the conviction relates to the employment in question.¹²

⁸ See *Clemency Review*, and Appendix V paras 19 and 20.

⁹ See also Appendix V paras 21 to 28.

¹⁰ *Human Rights Act 1977* (Canada).

¹¹ *Human Rights Code 1981* (Ontario).

¹² *Human Rights Code 1979* (British Columbia).

(d) A variety of approaches

5.10 Under the United Kingdom *Rehabilitation of Offenders Act 1974*,¹³ after a specified period of years free of further convictions, a convicted person is to be treated as rehabilitated. The most notable feature of this Act is that, unlike the United States and Canadian schemes, which in general tend to limit the effect of a spent conviction only in one or two particular ways, it adopts a variety of approaches to the problem - evidence of a recognition that no one approach is sufficient on its own. A spent conviction has the following effects -

- * Generally, the convicted person is to be treated for all purposes in law as a person who has not been convicted.
- * Evidence of spent convictions is not admissible in court, except in criminal proceedings and certain other cases.
- * Questions about convictions can be treated as not relating to spent convictions.
- * Obligations to disclose information do not require the disclosure of spent convictions.
- * Discrimination on the basis of a spent conviction is not a proper ground for dismissing or excluding a person from any office or employment.
- * Disclosure of information about spent convictions from official records is an offence.
- * An action for defamation lies against any person disclosing a spent conviction, if the disclosure is made maliciously - in other words, where the alleged defamation relates to a spent conviction, truth is no longer a complete defence.

5.11 Subsequent proposals for spent conviction schemes have generally imitated the United Kingdom scheme in adopting a variety of different measures, including most of the

¹³ See also Appendix V paras 29 to 58.

devices adopted in the United Kingdom.¹⁴ The Queensland legislation, which resembles the United Kingdom Act in many respects, also adopts several different protective measures.¹⁵ However, some features of the United Kingdom scheme, such as the restriction on truth as a defence to defamation, have been criticized, and a major disadvantage of that scheme is that large numbers of exceptions have been authorized by subordinate legislation.¹⁶ There are thus wide areas where the provisions listed above do not apply. As a result, the Act has been made very complex to understand and its effectiveness has been considerably reduced.

3. HOW A CONVICTION MAY BECOME SPENT

5.12 In the legislative schemes under discussion, convictions generally become spent in one of two ways. One possibility is to allow a conviction to become spent automatically after the passage of a number of years without further convictions. Another alternative is to require an investigation by a court, a tribunal or some executive official to determine whether a conviction should be declared spent. There is usually a qualifying period of a number of conviction-free years before the convicted person can make application.

(a) Schemes requiring an investigation

5.13 The Canadian federal scheme¹⁷ is the leading example of a scheme which requires an investigation before a conviction can become spent. As mentioned above,¹⁸ the object of the investigation is to determine whether the offender should be declared a rehabilitated person. The majority of the sealing and expunction schemes in the United States require an application to a court, which has a discretion whether or not to grant a sealing or expunction order.

5.14 It may be that the holding of an investigation to determine whether a conviction should become spent is more satisfactory than simply requiring a number of conviction-free years, but such inquiries also have disadvantages. There is a risk of disseminating

¹⁴ Eg ALRC Discussion Paper; NZ Discussion Paper; SA Discussion Paper; HK Discussion Paper.

¹⁵ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) - see Appendix V paras 78 to 82.

¹⁶ *Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975* (UK). The *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) is also subject to many exceptions.

¹⁷ *Criminal Records Act 1970* (Canada).

¹⁸ Para 5.7.

information about the conviction over a wider area than before, and they are time-consuming and expensive.

5.15 The future of the Canadian scheme is currently under discussion, and it has been proposed that investigation should be replaced, either in some or in all cases, by the principle that convictions can become automatically spent after an appropriate period.

(b) Schemes under which convictions become spent automatically

5.16 The United Kingdom scheme¹⁹ is the leading example of a scheme based entirely on the principle that convictions should become spent automatically after a certain period of time without further convictions. The period varies from ten years to six months according to the nature of the sentence imposed and various other circumstances. The ten year period applies to a sentence of imprisonment not exceeding 30 months, the maximum sentence which comes within the Act.

5.17 The Act has been criticized for having a variety of different periods. It has been argued that this makes it very complex and that convicted persons are therefore unlikely to be able to determine their position under the Act without assistance. More recent proposals, such as the Queensland scheme,²⁰ have tended to aim for simplicity by having only one, or at the most two, different periods.²¹ It is not easy, however, to achieve simplicity and at the same time fairly reflect the differences between more and less serious offences. Moreover, the United Kingdom scheme and the Queensland scheme are both limited to convictions carrying a sentence of not more than 30 months' imprisonment. If a scheme under which convictions become automatically spent attempts to include more serious convictions within its ambit, the inevitable result is a large number of periods covering different cases.²²

(c) A combination of both approaches

5.18 In 1975 a paper produced for the New South Wales Privacy Committee²³ recommended a combination of both alternatives. Less serious convictions would become

¹⁹ *Rehabilitation of Offenders Act 1974* (UK).

²⁰ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).

²¹ See also the scheme proposed in the HK Discussion Paper.

²² Eg the scheme proposed in the SA Discussion Paper.

²³ NSWPC Background Paper.

spent automatically, after five years in the case of a non-custodial sentence and ten years in the case of a sentence involving imprisonment for a maximum of two years. Convictions for more serious offences would only become spent after an inquiry. Similar proposals have been made by the ALRC²⁴ and in Canada.²⁵

4. CONCLUSION

5.19 The Commission believes that legislation based only on one approach to the problem of old convictions is unlikely to provide a totally satisfactory solution. The United Kingdom legislation, because it incorporates a number of different measures, has much to commend it. However it also has a number of shortcomings, such as the variety of different periods which must elapse before particular convictions become spent, and the large number of exceptions.

5.20 Like the United Kingdom scheme, the scheme which the Commission recommends in this report incorporates a variety of different measures. However, the Commission's scheme seeks to avoid the disadvantages of the United Kingdom scheme, and to incorporate the more desirable features of existing and proposed schemes in the United States, Canada, Australia and New Zealand, together with ideas not to be found in any other scheme. In addition, the Commission's recommended scheme builds on existing police practice as to the keeping of criminal records,²⁶ and on existing legislation such as the *Equal Opportunity Act 1984-1985* and other legislation dealt with in chapter 3.²⁷

5.21 The Commission's recommended scheme is summarized at the beginning of this report. In the following chapters it is discussed in detail.

5.22 The Commission envisages that its recommendations could be implemented by the enactment of a *Spent Convictions Act* and an amendment to the *Equal Opportunity Act 1984-1985*. It also recommends amendments to the *Child Welfare Act 1947-1985* and the *Offenders Probation and Parole Act 1963-1985*. Draft provisions to give effect to the Commission's recommendations are set out in Appendices VI, VII, VIII and IX.²⁸ The Commission

²⁴ See ALRC Discussion Paper.

²⁵ See Appendix V para 19.

²⁶ See paras 2.9 to 2.14 above and Appendix III paras 4 to 21.

²⁷ See paras 3.5 to 3.18 above.

²⁸ These provisions have been drafted without the assistance of Parliamentary Counsel. References in this report to the "Draft Bill" are references to the draft Spent Convictions Bill set out in Appendix VI.

recognizes, however, that its recommendations can be implemented in other ways and by different drafting techniques.

Part II - The Commission's Recommendations

Chapter 6

WHEN A CONVICTION BECOMES SPENT

1. THE SCHEME IN OUTLINE

6.1 Under the spent conviction scheme recommended by the Commission, there is a distinction between "major convictions" and "minor convictions".

- * A person would incur a major conviction if that person is convicted of an offence and the penalty imposed by the court is or includes a sentence of imprisonment for more than one year.
- * A person would incur a minor conviction if that person is convicted of an offence and the penalty imposed by the court does not include any such sentence.¹

6.2 A conviction would become spent (with effects dealt with in chapter 9 below) in the following circumstances.

- (a) A minor conviction would become spent automatically at the end of the period specified in paragraph 6.3 below, provided that the convicted person has not during this period been convicted of another offence.²

However, a minor conviction in respect of which the penalty imposed does not include a sentence of imprisonment would become spent if, on application being made by the convicted person to a magistrate, the magistrate makes an

¹ Draft Bill, cl 4(1) and (4).

² Draft Bill, cl 5(1). The Commission recommends below that a conviction in respect of which either no penalty is imposed or the penalty imposed is a fine of not more than \$100 should not prevent an earlier conviction becoming spent automatically: see paras 7.23 to 7.26 below.

order declaring that the conviction is spent. It would not be possible to make such an application unless at least five years have elapsed since the date of the conviction, and the convicted person has not during this period been convicted of another offence.³

- (b) A major conviction would become spent if, on application being made by the convicted person to a District Court judge, the judge makes an order declaring that the conviction is spent.⁴ It would not be possible to make such an application until after the expiry of the period specified in paragraph 6.3 below.⁵

6.3 The period after which a minor conviction (if not previously declared spent) becomes spent automatically under recommendation (a) above, or after which it becomes possible to make an application for a major conviction to be declared spent under recommendation (b) above, is -

- (1) in the case of a conviction the penalty for which does not include a sentence of imprisonment, ten years, reckoned from the date of the conviction;
- (2) in the case of a conviction the penalty for which is or includes a sentence of imprisonment, ten years plus the sentence of imprisonment imposed (irrespective of what portion of that sentence is actually served), reckoned from the date of the conviction.⁶

2. BASIC PRINCIPLES

6.4 The scheme set out above is founded on the following basic principles.

- (1) The provisions of the scheme should deal with all convictions, even for the most serious offences.

³ Draft Bill, cl 7. The Commission recommends below that a conviction in respect of which either no penalty is imposed or the penalty imposed is a fine of not more than \$100 should not prevent an earlier conviction from being declared spent under this provision: see paras 7.23 to 7.26 below.

⁴ This recommendation will also apply to a minor conviction which, because of a subsequent major conviction, can no longer become spent automatically: see paras 7.22 and 7.26 below.

⁵ Draft Bill, cl 8.

⁶ Draft Bill, cl 9(1) to (3).

- (2) The scheme should make a distinction between convictions which become spent automatically (minor convictions) and convictions which can only become spent on application (major convictions).
- (3) The category of minor convictions should be limited to convictions in respect of which a sentence other than a sentence of imprisonment, or a sentence of imprisonment for not more than one year, was imposed; all other convictions should be major convictions.
- (4) The period which must elapse before a minor conviction becomes spent automatically, or a major conviction may be declared spent, should, in the interests of simplicity, be the same in all cases, except in so far as is necessary to allow for the length of any sentence of imprisonment imposed; and it should run from the date of conviction.
- (5) That period should be ten years, plus the length of the sentence of imprisonment imposed, if any.
- (6) In the case of minor convictions in respect of which a sentence of imprisonment was not imposed, it should not be necessary in all cases to have to wait for ten years before a conviction can become spent. It should be possible, once five years have elapsed since the date of conviction, to apply to a court for the conviction to be declared spent.
- (7) Applications for major convictions to be declared spent should be heard by a District Court judge. Applications for minor convictions to be declared spent (in those cases where this is possible) should be heard by a magistrate.

6.5 These principles are discussed in this chapter. Various special problems are discussed in the next chapter.

3. CONVICTIONS COVERED BY THE SCHEME

6.6 Under the Commission's recommendations, the proposed spent conviction scheme will cover all convictions.⁷

6.7 The spent conviction schemes and proposed schemes in other jurisdictions discussed in chapter 5 can be divided into two groups. On the one hand there are schemes such as the United Kingdom *Rehabilitation of Offenders Act 1974* and the Queensland *Criminal Law (Rehabilitation of Offenders) Act 1986* which only apply to a limited range of convictions. These Acts only apply to convictions in respect of which a sentence other than a sentence of imprisonment, or a sentence of imprisonment for not more than 30 months, is imposed. For more serious convictions, no relief is provided. On the other hand the Canadian *Criminal Records Act 1970* covers all convictions, even for the most serious offences. A conviction for a very serious offence, such as murder, is unlikely to become spent under such a scheme, and very stringent conditions would have to be satisfied. Nevertheless, the scheme allows the possibility that convictions for very serious offences may become spent.

6.8 The Commission's view is that it is desirable for the spent conviction scheme recommended in this report to be comprehensive, so that even convictions for the most serious offences can become spent if appropriate conditions are met.⁸ Accordingly, there are no convictions which are excluded from the ambit of the scheme.

4. THE MEANS BY WHICH CONVICTIONS BECOME SPENT

6.9 As was said in chapter 5, under other spent conviction schemes, existing or proposed, convictions generally become spent either after an investigation or after a stipulated number of years have elapsed without a further conviction being incurred. The Canadian *Criminal Records Act 1970* is a leading example of the former kind of scheme. However, this scheme

⁷ For the purposes of Western Australian law, the scheme will apply to all convictions imposed by courts in Western Australia, whether the conviction is for an offence against Western Australian State law or Commonwealth law, and also to convictions incurred outside Western Australia: see paras 7.43 to 7.49 below.

⁸ An argument in favour of allowing very serious offences such as murder to become spent (subject to specified conditions) is that offences such as murder may be caused by extenuating, non-recurring factors, for example a wife who murders her husband after years of ill-treatment. The recidivism rate for murder is lower than for many other offences: see eg Recidivism Research Group, *Preliminary Report: Recidivism in the Western Australian Prison Population* (1985), 15; P Burgoyne, *Homicide and Recidivism* (1979).

is expensive both in money terms and in terms of the time involved. The United Kingdom *Rehabilitation of Offenders Act 1974* is the major example of the latter kind of scheme, though, as explained above,⁹ it only applies to convictions in respect of which a sentence of not more than 30 months' imprisonment was imposed.¹⁰ The scheme proposed in the South Australian discussion paper is also one in which convictions would become spent automatically but, unlike the United Kingdom scheme, it would apply to all convictions, even the most serious. The seriousness of the offence would be reflected by variations in the length of the period before which a conviction could become spent.¹¹

6.10 In the Commission's opinion, if the proposed scheme is to cover all convictions, including the most serious, neither alternative is an appropriate model. Instead, the Commission favours a scheme which makes a distinction between serious and less serious offences. Convictions for serious offences ("major convictions") should only become spent after a careful investigation of all the circumstances. However, convictions for less serious offences ("minor convictions") do not need to be dealt with in this way, but should become spent automatically after an appropriate period of years has elapsed without further convictions. Thus the costs involved in inquiries to determine whether convictions should be declared spent will be lessened, and at the same time the long waiting periods necessitated by a scheme such as the South Australian proposed scheme will be avoided. A two-tier scheme of this nature was recommended in a paper prepared for the New South Wales Privacy Committee in 1975,¹² and a similar scheme has been proposed by the ALRC.¹³

6.11 Requiring an examination of the circumstances before major convictions can become spent may involve some expenditure and delay. The Commission considers, however, that this is preferable to requiring an exceptionally long period before major convictions can become spent automatically, or not allowing them to become spent at all.¹⁴

⁹ Para 5.17.

¹⁰ In these respects, the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) follows the United Kingdom Act.

¹¹ SA Discussion Paper, 26-28.

¹² NSWPC Background Paper, para 6.

¹³ ALRC Discussion Paper, paras 39-43.

¹⁴ The Commission, in formulating the details of its recommendations, has endeavoured to minimize the costs involved, for example by recommending that applications for major convictions to be declared spent should be heard by a District Court judge, rather than a specially created body: see paras 6.34 to 6.37 below.

5. THE DIVISION BETWEEN MAJOR AND MINOR CONVICTIONS

6.12 Under the Commission's recommendations, convictions for which the penalty imposed is or includes a sentence of imprisonment for more than one year would be classified as major convictions. Convictions for which the penalty does not include any such sentence would be minor convictions.

6.13 The distinction between major and minor convictions could have been based on the existing classification of offences as either indictable or simple, but this is unsuitable because many indictable offences are triable summarily at the option of the accused. It could have been based on a categorization of the particular offence committed, but this would be fairly complex, and the issue of categorization would have to be addressed every time a new offence was created. Moreover, sentences for particular offences, such as theft, vary widely, reflecting the infinite variations in circumstances which mark the offence as more or less serious. The simplest method therefore seems to be to classify the conviction as major or minor according to the sentence imposed. This method is also the most appropriate, since the sentence is the means by which society expresses its view of the convicted person's conduct. Most existing or proposed schemes which distinguish between more and less serious convictions, or limit their ambit to less serious convictions, make this distinction on the basis of the sentence imposed.

6.14 Where, then is the line to be drawn? The New South Wales Privacy Committee paper chose a sentence of two years' imprisonment as the maximum for which a conviction could become spent automatically.¹⁵ The choice was influenced by the fact that this was the longest sentence a magistrate could impose in a summary manner in New South Wales.¹⁶ *Living it Down*, the report which led to the United Kingdom *Rehabilitation of Offenders Act 1974*, chose the same period because "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".¹⁷ The Act however increased the maximum to 30 months.¹⁸

¹⁵ NSWPC Background Paper, para 6.

¹⁶ *Id.*, para 7.3.

¹⁷ *Living it Down*, para 36.

¹⁸ Cf *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), which has a similar maximum.

6.15 In Western Australia, there is no general limit to the sentences which may be imposed by a Court of Petty Sessions on summary conviction. The only limit is that imposed by the statutory provision creating the offence in question.¹⁹ In any event, the English example may not be relevant because there the aim was to fix the outer limits of the scheme, and not to determine the distinction between two categories of offences within it.

6.16 One obvious distinction is between custodial and non-custodial sentences.²⁰ Most of the sentences imposed by courts, such as fines, bonds, community service orders and the like, allow the offender to remain in the community. Imprisonment, which takes the offender out of the community, is a mark of a more serious offence.

6.17 The Commission recognises the logic behind such an approach. However, it does not believe that this is the most suitable point to make the division between major and minor convictions. In Western Australia, many people receive short sentences of imprisonment for relatively trivial offences,²¹ such as drunkenness or disorderly conduct. For example, between 1 July 1983 and 30 June 1984, of an estimated total of 6,930 persons who received sentences of imprisonment in courts other than Children's Courts, 3,844 received sentences of not more than one month in length. Many of these would be until the rising of the court (ie less than a day) or for only one or a few days. A further 1,447 received sentences of more than one but not more than three months' duration.²² The Commission does not feel that it would be appropriate, in cases such as these, to require an investigation before the conviction could be adjudged spent. If shorter sentences are brought into the major conviction category, the case-load of the decision-making body could increase sharply.

6.18 In order to assist in determining where the distinction between major and minor convictions should be made, the Commission conducted a survey of recent cases in Western Australia in which the Court of Criminal Appeal has given a decision on the sentence to be

¹⁹ There are simple offences which carry long periods of imprisonment, eg. untrue statements or non-disclosure in a prospectus under *Companies (Western Australia) Code*, s 108, the penalty for which is a fine of \$20,000 or five years' imprisonment, or both.

²⁰ The scheme proposed by the ALRC rests its distinction between "major offences" and "minor offences" on this basis: see ALRC Discussion Paper, paras 39, 61-67.

²¹ In this respect, the situation in Western Australia may be different from that in other States and Territories. For a comparison of imprisonment rates in Australian jurisdictions, see eg. (1986) 7 Reporter (Australian Institute of Criminology Quarterly) 14.

²² See Appendix II Table 4.

imposed in a particular case.²³ The following are cases in which the Court of Criminal Appeal held that sentences of imprisonment for less than two years were appropriate.

- (1) An 18 year old youth assaulting a police officer - 14 days.
- (2) Breach of a restraining order under the *Justices Act 1902-1985* - 14 days.
- (3) Assault on a Marine and Harbours Department Inspector - 14 days.
- (4) Driving without a licence following a number of previous convictions for the same offence - one month.
- (5) 16 counts of obtaining unemployment benefit while in receipt of other income - a total of two months.
- (6) Driving while disqualified from holding the appropriate licence - four months.
- (7) Driving while under the influence of alcohol and driving while disqualified - four months.
- (8) Stealing as a servant - five months.
- (9) Manslaughter by striking a fellow-patient in hospital - six months.
- (10) Assaulting a man who had been committing adultery with the defendant's wife - six months.
- (11) Unprovoked unlawful assault - nine months.
- (12) Four counts of breaking, entering and stealing and four counts of stealing food, drink and petrol from sporting clubs - a total of 12 months.
- (13) Stealing \$13,000 from his employer over a five month period - 12 months.

²³ The survey covered all cases reported in the Western Australian Case Digest in *Brief* (the journal of the Law Society of Western Australia) between February 1984 and March 1986.

- (14) Indecent dealing with a boy under the age of fourteen - 18 months.
- (15) Assault - 18 months.
- (16) Breaking and entering, though playing a subordinate role to another person (who received three years) - 18 months.
- (17) Cultivation of cannabis with intent to sell or supply - 18 months.
- (18) Obtaining a motor vehicle with intent to defraud, by false representations about credit rating - 18 months.
- (19) Assault on a car driver, as one of a gang of five - 18 months.
- (20) False pretences by selling a motor vehicle which was on hire purchase - 18 months.
- (21) Eleven counts, including four counts of stealing and receiving, and one serious case of dangerous driving - a total of 21 months.

6.19 In the Commission's view, it is appropriate to bring within the definition of a minor conviction not only all cases in which a sentence other than a sentence of imprisonment was imposed, but also all cases in which the convicted person received a sentence of imprisonment for one year or less. This conclusion is in part based on the above cases, as reflective of current sentencing practice in Western Australia. Convictions for which a sentence of imprisonment for one year or less was imposed can safely be allowed to become spent automatically, after the specified period has expired, if there are no further convictions. Those where a longer sentence was imposed are more serious in nature, and even if the specified period expired without further convictions it would not be desirable for these convictions to become spent without an investigation being held. Though there are bound to

be some disputed cases, on balance the Commission considers that this is a distinction the community would find acceptable.²⁴

6. THE PERIOD WHICH MUST ELAPSE BEFORE A CONVICTION BECOMES SPENT

(a) One basic period

6.20 The period which must elapse before a minor conviction becomes spent automatically, or an application may be made to have a major conviction declared spent, is called in this report the spent conviction period. The Commission recommends that this period should be ten years from the date of conviction, plus a period equal to the period of imprisonment imposed, if any.²⁵

6.21 In the interests of simplicity, it is desirable to have a single spent conviction period which applies in all cases, or at least as few different spent conviction periods as possible.²⁶ However, to provide an adequate safeguard for the interests of society, it is desirable that the spent conviction period imposed should in some way reflect the seriousness of the offence. The Commission's approach combines a single basic rule with the flexibility necessary to cater for varying terms of imprisonment.

²⁴ The vast majority of convictions will be minor convictions. Of an estimated 139,938 punishments imposed in respect of the most serious offence committed by 116,660 persons convicted in courts other than Children's Courts between 1 July 1983 and 30 June 1984, only 571 were sentences of imprisonment for a period longer than one year: Appendix II Tables 3 and 4.

²⁵ This is a general principle to which there are some exceptions. The Commission recommends in paras 6.31 to 6.33 below that in the case of a minor conviction not involving imprisonment, it should be possible to apply to a magistrate for the conviction to be declared spent five years after the date of conviction, if no further convictions (other than very minor convictions) have been incurred. If not declared spent, the conviction would become spent automatically ten years after the date of conviction, if no further convictions (other than very minor convictions) have been incurred. The alternative under which a conviction in this category may become spent after five years is not included within the definition of "spent conviction period" given in the text. Further, there are cases in which the spent conviction period will be calculated differently from the way stated in the text: see paras 7.2 to 7.6 and 7.32 to 7.42 below.

²⁶ The large number of different periods in the *Rehabilitation of Offenders Act 1974* (UK) is one of its major disadvantages. In contrast, the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), though generally based on the United Kingdom Act, has a single spent conviction period for all adult offenders.

(b) Running from the date of conviction

6.22 The spent conviction period would run from the date of conviction, whether or not a sentence of imprisonment was imposed.²⁷ This is the principle adopted by the United Kingdom and Queensland Acts and most other schemes or proposed schemes.

6.23 It has been suggested that in the case of a conviction carrying a sentence of imprisonment it would be more appropriate for the period to run from the date of release, since the convicted person can only begin to establish credibility when back in the community, and it seems wrong that the spent conviction period should be running while the convicted person is in prison.²⁸

6.24 However, measuring the spent conviction period from the date of release is impracticable, for two reasons. First, if the spent conviction period is measured from the date of release, the date on which the period ends will not be known at the time of conviction. Secondly, the police criminal record does not show the date of actual release from prison. It is essential for the police record to show when a conviction becomes spent, and if the spent conviction period were to run from the date of release it would be necessary to set up administrative machinery to ensure that the necessary information was supplied by the Prisons Department to the police and entered on the police criminal record.

6.25 Further, in some cases the convicted person is released on parole, and until discharged from the sentence of imprisonment is regarded as still being under sentence for the offence.²⁹ In these circumstances, it seems inappropriate for the spent conviction period to begin from the date of release.

6.26 These difficulties do not occur if the spent conviction period is measured from the date of conviction. The date on which the conviction will become spent, or on which application may be made to have it declared spent, is immediately known to all, including the convicted person, and the police computer can be programmed to show that date without the necessity

²⁷ In some cases the court will not impose sentence immediately, but adjourn the proceedings before imposing sentence, for example in order to obtain a pre-sentence report. Nonetheless, for the purposes of the spent conviction scheme, the spent conviction period should be calculated as from the date of conviction.

²⁸ See SALRC Report, 9; NZ Discussion Paper, para 5.25.

²⁹ *Offenders Probation and Parole Act 1963-1985*, s 43.

for the police to acquire and process extra information. The date of release from prison, whether on parole or not, is irrelevant.

6.27 It should be noted that under the Commission's recommendations the spent conviction period will generally be longer than if measured from the date of release. This is because the spent conviction period consists of a basic ten-year period plus the period of imprisonment imposed. In most cases, a person is released from prison before the end of that period.³⁰ If the ten-year period began to run from the date of release, the overall period would be shorter.

7. THE LENGTH OF THE PERIOD

6.28 The determination of the length of time that should elapse before a conviction becomes spent is a difficult question. The longer that period is, the longer it will be before convicted persons can finally put the record behind them and be treated in exactly the same way as other members of society. On the other hand, the period has to be long enough to ensure that convicted persons deserve the fresh start that the spent conviction scheme will give them.

6.29 The Commission recommends that the spent conviction period should be ten years, plus the length of the sentence of imprisonment imposed, if any. In the Commission's assessment, most people would agree that ten conviction-free years would show that the pattern of a convicted person's life had changed and that the person had achieved stability.

6.30 A ten year period is specified in a number of schemes or proposed schemes in other jurisdictions.³¹ That period is also consistent with recidivism research, which suggests that a period of ten years plus the length of the sentence of imprisonment imposed is long enough to ensure that convicted persons are unlikely to commit further offences. If convicted persons are going to commit further offences then they are likely to do so within three years of release from prison.³²

³⁰ See para 2.6 above.

³¹ Notably by the ALRC Discussion Paper, applying both to convictions for which a non-custodial sentence is imposed, which would be capable of becoming spent automatically, and to convictions resulting in the imposition of a sentence of imprisonment, which would only become spent on application. In the latter case, as in the scheme proposed in this report, the length of the sentence of imprisonment imposed would be added to the ten year period: ALRC Discussion Paper, paras 40, 58-60.

³² See ch 4 footnote 4 above.

8. APPLICATIONS FOR CERTAIN MINOR CONVICTIONS TO BE DECLARED SPENT AFTER A SHORTER PERIOD

6.31 Although in general a ten-year spent conviction period is appropriate, there are some convictions for relatively trivial offences which should not necessarily remain unspent for such a long period. If an offence is not serious enough for the court to impose a sentence of imprisonment, and it is clear that the convicted person is unlikely to commit further offences, the benefits of the conviction becoming spent should be made available sooner. This could be achieved by providing that such convictions should become automatically spent after, for example, five years. However, in the Commission's view the problem is more appropriately dealt with by allowing such convictions to be declared spent after investigation of all the circumstances.

6.32 This alternative should not be available immediately on conviction. The Commission recommends that the convicted person should be able to make an application only after at least five years have elapsed since the date of conviction, without any further convictions being incurred. This period, while it might not be enough to show that a conviction should become spent automatically, would show that there is enough evidence to allow the matter to be put before a suitable body which, after investigation, would decide whether the conviction should become spent.

6.33 Thus, where a person incurs a minor conviction and is not sentenced to imprisonment, the person will have an alternative. Once five years have elapsed without further convictions,³³ the convicted person can make an application for the conviction to be declared spent. Alternatively the convicted person can wait another five years, after which, if there are no further convictions,³⁴ the conviction will become spent automatically.

9. THE BODIES WHICH HEAR APPLICATIONS

6.34 In two situations, the Commission has recommended that convictions may be declared spent after investigation into all the circumstances. In the case of major convictions, this is the only way in which they can become spent. Minor convictions would normally become

³³ Other than very minor convictions: see paras 7.23 to 7.26 below.

³⁴ Ibid.

spent automatically at the end of a specified period, but minor convictions not resulting in imprisonment might be declared spent sooner.

6.35 In the Commission's view, the jurisdiction to decide whether convictions should become spent should be entrusted to the courts, rather than to special tribunals or to an administrative body such as the Commissioner of Police.³⁵ Offenders are convicted and sentenced by the courts, and it is therefore appropriate that they should decide whether convictions should be declared spent.

6.36 The District Court is the court in which the great majority of trials on indictment take place. Its judges are therefore familiar with a wide range of criminal matters, and are experienced in imposing appropriate sentences. The Commission recommends that the responsibility of deciding whether a major conviction should be declared spent should be entrusted to a judge of the District Court.

6.37 Summary offences are dealt with by Courts of Petty Sessions - usually by a stipendiary magistrate. When an application is made for a conviction not involving a sentence of imprisonment to become spent, that conviction is likely to have been imposed by a magistrate sitting in a Court of Petty Sessions. These courts sit in all areas of the State. The Commission therefore recommends that a magistrate should determine whether such a conviction can be declared spent.

10. TRANSITIONAL PROVISIONS

6.38 It is important that the spent conviction scheme recommended in this report should apply not only to those who are convicted after the legislation comes into effect, but also to convictions incurred before then. This will enable the legislation to deal not only with those who might encounter the problem of old convictions in the future, but also with those who are experiencing problems at the present time, such as those people whose difficulties were described in chapter 3.

³⁵ The ALRC Discussion Paper, paras 43-44 suggests that the Commissioner of Police should have jurisdiction to decide whether convictions for "major offences" should become spent, with an appeal to the Administrative Appeals Tribunal. However, the Commission's view is that the decision whether a conviction should be declared spent is essentially a judicial determination, and should not be entrusted to the Commissioner of Police, whose proper role is that of an interested party, rather than the person in whose hands the decision should rest.

6.39 Accordingly the Commission recommends that, where a conviction was imposed before the date of commencement of the legislation implementing the spent conviction scheme -

(1) If the conviction is a minor conviction, it should become spent on whichever is the later of -

- (a) the date of commencement of the legislation;
- (b) the date on which the conviction would have become spent if the legislation had been in force on the date when the conviction was imposed and had continued in force after that date.

(2) An application, either to a District Court judge in respect of a major conviction³⁶ or to a magistrate in respect of a minor conviction where a sentence of imprisonment is not imposed, for an order declaring that the conviction is spent, should not be possible before whichever is the later of -

- (a) the date of commencement of the legislation;
- (b) the first date on which application could have been made if the legislation had been in force on the date when the conviction was imposed and had continued in force after that date.³⁷

6.40 Some examples will show how these provisions would operate. If the spent conviction scheme comes into operation on 1 January 1987, a minor conviction not involving a sentence of imprisonment incurred on 1 July 1974 will become spent on 1 January 1987, and a similar conviction incurred on 1 July 1980 will become spent on 1 July 1990. If the conviction incurred on 1 July 1974 is a major one, and a sentence of two years' imprisonment was imposed, it will become possible to make an application for it to be declared spent on 1

³⁶ Or a minor conviction which, because of a subsequent major conviction, can no longer become spent automatically: see paras 7.22 and 7.26 below.

³⁷ Draft Bill, cl 11.

January 1987. An application for a major conviction imposed on 1 July 1980 and involving a sentence of two years' imprisonment may be made as from 1 July 1992.

Chapter 7

PARTICULAR PROBLEMS

1. PARTICULAR KINDS OF SENTENCE

7.1 The provisions of the spent conviction scheme as outlined in chapter 6 are appropriate for the most common sentences imposed by a court on conviction, such as imprisonment for a fixed term of years, and non-custodial sentences such as fines, bonds, community service orders, compensation and restitution orders, and so on.¹ However, there are a number of other orders which criminal courts in Western Australia may make. They may be classified as follows -

(1) *Custodial sentences of indefinite duration*

- * Life imprisonment.
- * Strict security life imprisonment.²
- * Detention in strict custody until the Governor's pleasure is known and, thereafter, in safe custody in such place or places as the Governor may, from time to time, direct.³
- * Detention during the Governor's pleasure in a prison.⁴

(2) *Sentences of imprisonment until a particular condition is satisfied*

- * Imprisonment until a fine is paid.⁵
- * Imprisonment until a recognizance is entered into.⁶

(3) *Delayed sentences*

Discharge of the offender upon entering into a recognizance on condition that the offender shall appear and receive judgment at some further sitting of the court or when called on.⁷

¹ See para 2.4 above.

² *Criminal Code*, s 18.

³ *Id.*, ss 18, 19(6a)(a).

⁴ *Id.*, ss 18, 661, 662.

⁵ *Id.*, s 19(5).

⁶ *Id.*, s 19(6).

⁷ *Id.*, s 19(8), s 656.

(4) *Disqualifications, disabilities, prohibitions and other like penalties*

Such penalties would usually be imposed in addition to some other penalty. An example would be disqualification from holding or obtaining a driver's licence.⁸

These orders require special provisions.

(a) **Custodial sentences of indefinite duration**

7.2 Life imprisonment and strict security life imprisonment are punishments imposed for very serious offences. For example, a person convicted of wilful murder is liable to a mandatory punishment of strict security life imprisonment or life imprisonment. A person convicted of murder is liable to a mandatory punishment of life imprisonment. The difference between strict security life imprisonment and life imprisonment is that persons undergoing a sentence of strict security life imprisonment will not be reviewed for parole purposes until they have served twenty years, whereas persons serving a sentence of life imprisonment may be reviewed for such purposes after a shorter period.⁹

7.3 In a number of cases, the *Criminal Code* provides that persons may be sentenced to imprisonment or detention for an indeterminate period. Persons under 18 convicted of an offence punishable with imprisonment may instead be ordered to be detained in strict custody until the Governor's pleasure is known and, thereafter, in safe custody in such place or places as the Governor may from time to time direct.¹⁰ Persons declared to be habitual criminals can be sentenced to detention during the Governor's pleasure in a prison on the expiration of a fixed term of imprisonment imposed for a particular conviction.¹¹ A similar sentence can be imposed on persons convicted of an indictable offence, whether on the expiration of a term of imprisonment, or immediately.¹²

7.4 Since these are sentences of indefinite duration, it is impossible to adopt the general principle of the proposed spent conviction scheme and apply to them at the time of the conviction a spent conviction period for a fixed number of years. It is better in such cases to

⁸ *Road Traffic Act 1974-1985*, s 74.

⁹ *Offenders Probation and Parole Act 1963-1985*, s 42.

¹⁰ *Criminal Code*, s 19(6a)(a).

¹¹ *Id.*, s 661.

¹² *Id.*, s 662.

reckon the spent conviction period from the date on which the sentence is completed. This will be either the date of release or, if release is on parole, the date on which parole is successfully completed. In Western Australia, persons serving sentences of strict security life imprisonment, life imprisonment or detention during the Governor's pleasure are always released on parole.¹³ Persons released on parole, until discharged from their sentence of imprisonment or detention, are regarded as still under sentence.¹⁴

7.5 In these cases, it should not be possible for the conviction to become spent automatically. It should only become spent on the order of a District Court judge, after a full investigation. These convictions should therefore be regarded as major convictions.¹⁵ It should not be possible to make an application for the conviction to be declared spent until ten years after the date on which the sentence is completed.

7.6 The Commission therefore recommends that in cases where a person is convicted of an offence and sentenced to -

- (1) life imprisonment or strict security life imprisonment;
 - (2) imprisonment for an indeterminate period, including
 - (i) detention in strict custody until the Governor's pleasure is known and, thereafter, in safe custody in such place or places as the Governor may from time to time direct under section 19(6a)(a) of the *Criminal Code*,
 - (ii) detention during the Governor's pleasure in a prison under section 661 or section 662 of the *Criminal Code*,
- (a) such a conviction should be regarded as a major conviction;¹⁶

¹³ *Offenders Probation and Parole Act 1963-1985*, s 42. The period of parole is such period, not exceeding five years, as the Governor thinks fit.

¹⁴ *Id*, s 43.

¹⁵ The Probation and Parole Service informed the Commission that, even in the case of a sentence of detention during the Governor's pleasure not preceded by a sentence of imprisonment (under s 662(b) of the *Criminal Code*), in practice the period of imprisonment is never less than one year.

¹⁶ Draft Bill, cl 4(1) and (2).

- (b) the period which must elapse before an application may be made for the conviction to be declared spent should be ten years, reckoned from the date on which the convicted person is discharged from that sentence.¹⁷

(b) Sentences of imprisonment until a particular condition is satisfied

7.7 Under section 19(5) of the *Criminal Code*, a person sentenced on conviction on indictment to pay a fine may be sentenced to be imprisoned until the fine is paid, in addition to any other punishment to which the person is sentenced. Imprisonment for non-payment of the fine shall not extend for a term longer than two years, and shall not, together with the fixed term of imprisonment, if any, extend for a term longer than the longest term for which the person might be sentenced to be imprisoned without fine.

7.8 In practice, when this provision is invoked, the person is usually imprisoned for a period specified by the judge unless the fine is paid before the expiry of that period. The period of imprisonment actually served is thus usually fairly short. In the interests of simplicity, the Commission therefore recommends that, unless a finite term of imprisonment is also imposed, the sentence should be regarded as one not involving imprisonment.¹⁸

7.9 Under section 19(6) of the *Criminal Code*, a person convicted on indictment of an offence not punishable with strict security life imprisonment may, instead of, or in addition to, any punishment to which the person is liable, be ordered to enter into a recognizance to keep the peace and be of good behaviour for a time to be fixed by the court, and may be ordered to be imprisoned until the recognizance is entered into. Imprisonment for not entering into the recognizance is not to extend for a term longer than one year, and shall not, together with the fixed term of imprisonment, if any, extend for a term longer than the longest term for which the person might be sentenced to be imprisoned without fine.

7.10 To be consistent with its previous recommendation, the Commission recommends that unless a finite term of imprisonment is also imposed, the sentence should be regarded as one not involving imprisonment.¹⁹

¹⁷ Id, cl 9(4).

¹⁸ Id, cl 10(1).

¹⁹ Id, cl 10(2).

7.11 In the cases dealt with in this section, unless a fixed term of imprisonment in excess of one year is also imposed, the conviction will be a minor conviction.

(c) Delayed sentences

7.12 Under section 19(8) of the *Criminal Code*, where a person is convicted of any offence not punishable with strict security life imprisonment, the court may, instead of passing sentence, discharge the person upon entering into a recognizance, on condition that the person should appear and receive judgment at some future sittings of the court, or when called upon.²⁰

7.13 In this case, the Commission recommends that, for the purpose of determining the spent conviction period, the sentence imposed in relation to the offence, if a sentence is imposed on the person in subsequent proceedings, should be that sentence. Otherwise, the sentence should be regarded as one not involving imprisonment.²¹

(d) Disqualifications, disabilities, prohibitions and other like penalties

7.14 On conviction, the sentence may be or may include a disqualification, disability, prohibition or other similar penalty.²² This may be for a fixed or indeterminate period, or for life.²³ In such cases the disqualification may well endure longer than any other penalty imposed. In general, it would be desirable for the conviction not to become spent until the expiration of the disqualification. However, when the disqualification is for an indeterminate period or for life, this might mean that the conviction would never become spent. In the Commission's view, this would be too harsh a rule.

7.15 The Commission therefore recommends that -

- (1) where, in addition to any other sentence, a disqualification is imposed on the convicted person, it should not be taken into account in determining the spent conviction period;

²⁰ See also *Criminal Code*, s 656.

²¹ Draft Bill, cl 10(3). In the latter case, the spent conviction period will be ten years.

²² In this section referred to as a disqualification.

²³ For example, a person convicted for a third time of driving under the influence of alcohol is to be permanently disqualified from holding or obtaining a driver's licence: see *Road Traffic Act 1974-1985*, s 63(2)(c).

- (2) where the only sentence imposed is a disqualification, the sentence should be regarded as one not involving imprisonment.²⁴

In the latter case, the spent conviction period will be ten years.

7.16 In a case where the disqualification was for a longer period than the spent conviction period, or was for an indeterminate period or for life, the conviction would be allowed to become spent for all other purposes, but the disqualification would remain in existence. Inevitably, that disqualification may affect the convicted person in certain respects even though the conviction is otherwise spent. For example, a person with a life disqualification from holding a motor driver's licence may be refused employment which involves driving a motor vehicle. In such circumstances, the person could not complain of discrimination on the ground of a spent conviction.²⁵

7.17 The existence of a disqualification will also delay or prevent the eventual destruction of the record of a spent conviction.²⁶

2. SUBSEQUENT CONVICTIONS

(a) Introduction

7.18 The discussion so far has assumed that the convicted person has only a single conviction. In such a case that conviction will become, or may be declared, spent at the end of the spent conviction period.

7.19 If, before a conviction becomes spent, a convicted person is convicted of another offence, a more complex problem is created. On the one hand, it would be wrong for the subsequent conviction to be always ignored, so that the earlier conviction could become spent irrespective of further convictions. On the other hand, it may be too harsh to confine the spent conviction scheme to once-only offenders by providing that a subsequent conviction forever prevents the original conviction from becoming spent.

²⁴ Draft Bill cl 9(6).

²⁵ On discrimination, see paras 9.2 to 9.11 below.

²⁶ See para 10.9 below.

7.20 In the Commission's view, the effect of subsequent convictions should differ according to whether the earlier conviction is a minor conviction, capable of becoming spent automatically, or a major conviction, only capable of being declared spent after an inquiry.

(b) Effect on convictions which can become spent automatically

7.21 Under the Commission's recommendations, minor convictions will become spent automatically if the appropriate period elapses without the convicted person incurring further convictions. If, however, the convicted person incurs another minor conviction during this period, the earlier conviction should not become spent²⁷ until the requirements necessary for the subsequent conviction to become spent have been satisfied. This will give the convicted person another opportunity to establish that the earlier conviction should, along with the later conviction, become spent.

7.22 Where the subsequent conviction is a major one, this shows that the convicted person is no longer a person whose convictions should be allowed to become spent without a full inquiry. It should no longer be possible for the earlier minor conviction to become spent automatically. That conviction, like the later major one, should become spent only if, on application to a District Court judge, the judge declares that the conviction is spent.²⁸

7.23 Not all minor convictions should have the effect of delaying an earlier conviction becoming spent automatically. The object of the spent conviction period is to show, over a comparatively long period of time, that the pattern of the convicted person's life has changed, as evidenced by the absence of further convictions. Convictions for very minor offences of a regulatory nature, or other essentially trivial offences, do not show the same sort of criminal or dishonest intent as convictions for more serious offences. They should not stop the running of the spent conviction period appropriate to an earlier conviction - though they will of course generate a spent conviction period of their own.

²⁷ Subject to the exception outlined in paras 7.23 to 7.26.

²⁸ The Commission recommends in paras 7.29 to 7.31 below that a subsequent conviction should not be a bar to making an application in respect of an earlier conviction. Thus, though the subsequent major conviction will prevent the minor conviction becoming spent automatically at the end of the appropriate period, it will not prevent an application to have the minor conviction declared spent being made at that point. However, the subsequent major conviction is a factor which may well influence the judge against granting the application.

7.24 The definition of this category of convictions is not an easy matter. In the United Kingdom, though subsequent convictions have an effect similar to that recommended above, summary convictions are exempted from this rule.²⁹ In the Commission's view, this exception is much too wide to be adopted in Western Australia, where many quite serious offences are classified as simple offences.³⁰ The Queensland legislation also exempts convictions for simple offences, but seeks to cut down the ambit of the exception by allowing the court imposing such a conviction to declare that the conviction should postpone the time when an earlier conviction becomes spent, if satisfied that to do so is in the public interest.³¹ In the Commission's opinion, it is not desirable to require courts to consider this issue in relation to every summary conviction, since it would increase the time taken to deal with cases and encourage discussion of previous convictions in court.

7.25 In the Commission's view, the category of convictions which do not prevent earlier convictions becoming spent has to be drawn more narrowly than in the United Kingdom or Queensland, and it should be done by reference to the penalty imposed for the conviction in question, rather than according to the classification of the offence, or being left to the discretion of the court.³² The Commission considered whether, in addition to a limitation based on the penalty imposed, there should be a limitation on the number of subsequent convictions which would not delay an earlier conviction becoming spent - for example, a limitation to one subsequent conviction, with the second having the consequences recommended above.³³ However, this would delay convictions becoming spent in many deserving cases, simply because the convicted person had incurred more than one trivial conviction for a regulatory offence during the spent conviction period. The Commission has concluded that the best solution to the problem lies in limiting the exception to convictions for which comparatively trivial penalties are imposed, without limiting the number of subsequent convictions which will be discounted. Accordingly it recommends that this category should be limited to cases where either no penalty is imposed³⁴ or where the penalty imposed is a fine of not more than \$100, or such greater sum as is prescribed.

²⁹ *Rehabilitation of Offenders Act 1974* (UK), s 6(6).

³⁰ See para 6.15 above.

³¹ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), s 11(2).

³² Cf the discussion of the distinction between major and minor convictions in paras 6.12 to 6.19 above.

³³ Para 7.21.

³⁴ See, for example, *Criminal Code*, s 19(6) (on conviction, a person may be ordered to enter into a recognizance to keep the peace and be of good behaviour instead of or in addition to any punishment to which the person is liable); id, s 19(7) (on summary conviction, a person may be discharged upon entering into a recognizance to keep the peace and be of good behaviour instead of being sentenced to any punishment to which the person is liable); id, s 19(8) (on conviction court may, instead of passing

7.26 The Commission therefore recommends that where, during the spent conviction period applicable to a minor conviction -

- (1) the convicted person is convicted of an offence for which either no penalty is imposed or the penalty imposed is a fine of not more than \$100 (or such greater sum as is prescribed), this should have no effect on when the original conviction becomes spent automatically;
- (2) the convicted person incurs any other minor conviction, the original conviction should only become spent automatically if the conditions necessary for the subsequent conviction to become spent automatically have been satisfied;
- (3) the convicted person incurs a major conviction, it should no longer be possible for the original conviction to become spent automatically, but the original conviction (like the subsequent conviction) should only be capable of becoming spent on application to a District Court judge.³⁵

7.27 In the case of a minor conviction in respect of which a sentence of imprisonment is not imposed, after five years free of further convictions the convicted person would be able to apply to a magistrate to have the conviction declared spent. This is an opportunity allowing convictions for less serious offences to become spent after a comparatively short period. If, during that period, the convicted person incurs a further conviction, that opportunity should no longer be available. In that event, the convicted person's position would be as set out in paragraphs 7.21 or 7.22 above. However, as recommended above in paragraphs 7.23 to 7.25, special considerations apply to convictions for very minor offences. Subsequent convictions of this kind should not deprive the convicted person of the right to apply to a magistrate after five years to have an earlier conviction declared spent.³⁶

sentence, discharge the offender on entering into a recognizance, on condition that the offender shall appear and receive judgment at some future sittings or when called on); id s 669(1)(b) (on conviction, a person with specified previous convictions may be discharged unconditionally or conditionally on entering into one or more of the recognisances provided by section 19(6), (7) and (8)).

³⁵ Draft Bill, cl 5.

³⁶ Alternatively, the convicted person may delay applying until it is possible to include both the original conviction and the subsequent conviction in the same application. In para 8.9 below, the Commission recommends that it should be possible to make an application in respect of more than one conviction.

7.28 The Commission therefore recommends that if, during the period which must elapse before an application can be made to a magistrate to have the conviction declared spent -

- (1) the convicted person is convicted of an offence for which either no penalty is imposed or the penalty imposed is a fine of not more than \$100 (or such greater sum as is prescribed), this should have no effect on the convicted person's right to apply to have the conviction declared spent;
- (2) the convicted person incurs any other minor conviction, it should no longer be possible to make such an application.³⁷

(c) Effect on convictions which can only become spent on application to a District Court judge

7.29 Where a conviction can only become spent on application to a District Court judge,³⁸ a subsequent conviction need not postpone the right to make an application in respect of the original conviction. The convicted person's full record will be disclosed to the judge, and the judge can take subsequent convictions into account in arriving at a decision. It is most unlikely that a judge would declare the original conviction spent if there is a subsequent conviction for a serious offence, or a repeated history of convictions for petty offences involving dishonesty.

7.30 Where the judge declares a conviction spent in spite of subsequent convictions, this will not affect the subsequent convictions. They can only become spent when the requirements of the spent conviction scheme appropriate to them are satisfied.³⁹

7.31 The Commission therefore recommends that -

- (1) it should be possible to make an application to have a major conviction (or a minor conviction which can no longer become spent automatically because of

³⁷ Draft Bill, cl 7(3).

³⁸ I.e. a major conviction, or a minor conviction which, as the result of the convicted person incurring a subsequent major conviction during the spent conviction period, is no longer capable of becoming spent automatically.

³⁹ If the convicted person has more than one conviction which can only become spent if declared spent by a District Court judge, it will be possible to include all such convictions in the same application, if in the case of all convictions concerned the relevant conditions are met: see para 8.9 below.

a subsequent major conviction) declared spent even though, during the period which must elapse before such an application can be made, the convicted person incurs further convictions;

- (2) the further convictions should be a factor which the judge takes into account in deciding whether the original conviction should become spent.⁴⁰

3. CONCURRENT AND CUMULATIVE SENTENCES OF IMPRISONMENT

(a) Introduction

7.32 In some cases, a person is convicted of more than one offence on the same date. If a sentence of imprisonment is imposed in respect of both convictions, the court may order that those sentences shall be either concurrent (that is, the sentences will begin at the same time) or cumulative (that is, the sentences will be served one after another).⁴¹

7.33 In other cases, a person may be convicted of an offence when already serving a period of imprisonment in respect of an earlier conviction. It is not uncommon for a person who has committed a number of offences to be proceeded against in respect of various of those offences on a number of separate occasions within a comparatively short period.⁴² In such a case, if the person is sentenced to imprisonment in respect of the subsequent conviction, the court may order that that sentence shall either run concurrently with or be cumulative upon the existing sentence.

⁴⁰ Draft Bill, cll 8 and 17.

⁴¹ See generally *Criminal Code*, s 20.

⁴² The State Government has announced that it intends to amend the *Criminal Code* by introducing a system of taking offences into consideration, based on that in operation in the United Kingdom: Attorney General of Western Australia, Media Statement, 29 October 1985. D A Thomas, *Principles of Sentencing* (2nd ed 1979), 374, describes the English system as follows (references omitted):

"The practice of taking offences into consideration is a convention under which, if a court is informed that there are outstanding charges against a prisoner who is before it for a particular offence, the court can, if the prisoner admits the offences and asks that they should be taken into account, give a longer sentence than it would if it were dealing with him only on the charge mentioned in the indictment. Taking an offence into consideration does not create a conviction in respect of that offence, and the offender may not enter a plea of *autrefois convict* if he is subsequently charged with the offence, although it is contrary to normal practice to institute subsequent proceedings in relation to offences taken into consideration unless the conviction for the principal offence is quashed on appeal."

Under this system, the situation referred to in the text may become less common.

(b) On the same date

7.34 A person convicted of two or more offences on the same date may be ordered to serve sentences of imprisonment in respect of more than one of these offences. In that case, it will be necessary to determine the total period of imprisonment, in order to ascertain whether the conviction is a minor or a major conviction, and when it will become, or may be declared, spent.

7.35 The Commission recommends that -

- (1) where two or more sentences of imprisonment are ordered to be served concurrently, they should be regarded as a sentence of imprisonment equal to the length of the longest sentence;
- (2) where two or more sentences of imprisonment are ordered to be served cumulatively, they should be regarded as a sentence of imprisonment equal to the total length of the sentences imposed.⁴³

7.36 Some examples from actual cases will illustrate the operation of these rules.⁴⁴

- (1) A was convicted of the importation and possession of cannabis resin. A was sentenced to six years' imprisonment on each count, to be served concurrently. This would be regarded as a sentence of six years' imprisonment.
- (2) B was sentenced to six months' imprisonment for possession of cannabis with intent to sell or supply, and four months' imprisonment for driving while disqualified, to be served cumulatively. This would be regarded as a sentence of ten months' imprisonment.
- (3) C was convicted on two charges of incest, and sentenced to four years' imprisonment on each charge, to be served cumulatively. This would be regarded as a sentence of eight years' imprisonment.

⁴³ Draft Bill cl 4(3).

⁴⁴ These cases are taken from the Western Australian Case Digest, published in *Brief* (the journal of the Law Society of Western Australia) from February 1984 onwards. They are all cases in which the sentences imposed were reviewed by the Court of Criminal Appeal.

- (4) D was convicted on two counts of unlawful carnal knowledge, eight counts of indecent dealing and two counts of aggravated assault. He was sentenced to three years' imprisonment on each conviction for unlawful carnal knowledge, to be served cumulatively, and a total of 30 months' imprisonment on the convictions for indecent dealing and aggravated assault, to be served concurrently with the other sentences. This would be regarded as a sentence of six years' imprisonment.

(c) On a subsequent date

7.37 A person convicted of an offence when serving a sentence of imprisonment imposed as the result of an earlier conviction may be ordered to serve a further sentence of imprisonment cumulative upon the earlier sentence.⁴⁵ In that case it will be necessary to determine the length of time which must elapse before the second conviction becomes spent.

7.38 The spent conviction period for the second conviction can be reckoned from the date on which the existing sentence is completed. However, this would mean that at the time of the second conviction it would not be possible to say when that conviction will become, or may be declared, spent.

7.39 There is an alternative which would not have this disadvantage. The spent conviction period for the second conviction would be the length of time which has yet to elapse before the earlier conviction becomes spent, plus the length of the sentence of imprisonment imposed in respect of the second conviction. For example, a person may be convicted and sentenced to two years' imprisonment. After serving six months of the sentence that person is convicted of another offence and sentenced to three years' imprisonment cumulative upon the sentence now being served. The spent conviction period for the second conviction will be 14 years six months. The spent conviction period for the original conviction had 11 years six months to run; to determine the spent conviction period for the second conviction, this period is increased by the length of the new period of imprisonment imposed. It can be seen that under this alternative it will be possible to state the spent conviction period applying to the second conviction at the time when it is incurred.

⁴⁵ For statutory provisions giving courts power to impose such a sentence, see *Criminal Code*, s 20, *Justices Act 1902-1985*, ss 150, 167(6).

7.40 The Commission prefers the second alternative. One should be able to ascertain when a conviction will become, or may be declared, spent at the time it is imposed. The Commission therefore recommends that where a sentence of imprisonment is ordered to be served cumulatively upon a sentence of imprisonment imposed in respect of an earlier conviction, the period before the later conviction can become or may be declared spent should be the sum of -

- (a) the length of time which, on the date of the later conviction, has yet to elapse before the earlier conviction can become or may be declared spent;
- (b) the sentence of imprisonment imposed in respect of the later conviction.⁴⁶

7.41 A person convicted of an offence when serving a sentence of imprisonment imposed as the result of an earlier conviction may be ordered to serve a further sentence of imprisonment concurrently with the existing sentence. Here, there is no problem in determining the spent conviction period appropriate to the subsequent conviction. The fact that the convicted person is already serving another sentence of imprisonment is irrelevant for this purpose, since the new sentence begins immediately. The ordinary rules for determining the spent conviction period, as recommended above,⁴⁷ will apply.

7.42 Whether the sentence of imprisonment now imposed on the convicted person is ordered to be served concurrently with or cumulatively upon the existing sentence, the fact of the subsequent conviction will affect the time when the earlier conviction can become, or may be declared, spent. This matter was dealt with earlier.⁴⁸

4. STATE, COMMONWEALTH AND FOREIGN CONVICTIONS

(a) The Commission's recommendations

7.43 Under the scheme proposed by the Commission, convictions will become spent for the purposes of Western Australian law. The scheme will apply to all convictions imposed by

⁴⁶ Draft Bill, cl 9(5).

⁴⁷ Paras 6.3 and 6.20 to 6.30.

⁴⁸ See paras 7.18 to 7.31 above.

courts in Western Australia, whether the conviction is for an offence against Western Australian State law or the law of the Commonwealth.⁴⁹

7.44 It is desirable that the proposed scheme should also take into account convictions incurred outside Western Australia, whether in another State or Territory (and whether for an offence against State, Territory or Commonwealth law) or overseas.⁵⁰ Such convictions would be relevant in two respects -

- (1) It should be possible for any conviction incurred outside Western Australia to become spent in Western Australia, for the purposes of Western Australian law.
- (2) Any conviction incurred outside Western Australia, if incurred before an earlier conviction has become spent, should have the same effect on that conviction as if the later conviction had been incurred in Western Australia.⁵¹

7.45 The Commission therefore recommends that, for the purposes of the spent conviction scheme, "offence" should be defined so as to cover State offences, Commonwealth offences and foreign offences. "State offences" should be defined as meaning an offence under the law either of Western Australia or another State or Territory.⁵²

7.46 Penalties imposed in respect of a conviction differ somewhat from country to country, and even from State to State. The Commission recommends that a sentence imposed by a

⁴⁹ Convictions for offences against Commonwealth law imposed in Western Australia are recorded on the Western Australia police criminal record, if the proceedings are commenced by the arrest of the suspected offender and the offender is fingerprinted: see para 2.9 above and Appendix III para 5.

⁵⁰ A conviction recorded elsewhere in Australia will be recorded on the Western Australia police criminal record if the police become aware of it, which would happen if the convicted person is charged with a subsequent offence in Western Australia and information is requested from the Central Fingerprint Bureau in New South Wales. It is thus possible at present for a person with a conviction in Western Australia to be convicted of a subsequent offence in another State without the Western Australia Police becoming aware of it. However, negotiations are under way for the setting up of a Central Names Index System (see Appendix III para 20). When this is established, police in all States and Territories will be able to search the Central Names Index and records of convictions held in another State or Territory will be supplied on request. It will thus be possible to check whether a person has a conviction elsewhere in Australia which would affect the running of the spent conviction period appropriate to an earlier conviction. However, the police are unlikely to become aware of a conviction in a foreign country unless such information is obtained through Interpol. The Western Australia Police would not obtain such information unless a person had been charged with an offence in Western Australia and the police suspected that the person had a criminal record in another country.

⁵¹ For the effect of subsequent convictions, see paras 7.18 to 7.31 above.

⁵² Draft Bill, cl 3, definitions of "offence," "State offence," "Commonwealth offence," "foreign offence".

court in another jurisdiction should be regarded as if it were a sentence of a kind most nearly corresponding to a sentence that may be imposed by a court in Western Australia.⁵³

(b) Constitutional law issues

7.47 The application of the scheme to interstate and Commonwealth convictions raises some issues of constitutional law.⁵⁴

7.48 Where convictions for offences against the law of another State are deemed to be spent pursuant to the Commission's proposed spent conviction scheme, the effect will be confined territorially to Western Australia. It is not constitutionally possible to cause the conviction to be spent in the State in which it was incurred.

7.49 As regards convictions for Commonwealth offences (whether incurred in Western Australia or elsewhere) complications may arise by reason of section 109 of the Commonwealth *Constitution*. The Western Australia scheme may for the purposes of Western Australian law be effective to alter the way in which a Commonwealth offence will be regarded in relation to events and transactions regulated by Western Australian law. It would however be invalid if it attempted to give the Commonwealth offence an effect directly inconsistent with that provided by Commonwealth legislation,⁵⁵ or if Commonwealth legislation sought to make its provisions exhaustive in the sense that no State Act should be taken to address Commonwealth offences at all.

5. SHOULD SPENT CONVICTIONS REVIVE?

7.50 The Commission was asked to consider whether a spent conviction should revive in the event of the convicted person incurring a subsequent conviction after the original conviction has become spent. It could be argued that the original conviction should revive, because a person who has again been convicted no longer deserves the protection of the spent

⁵³ Id, cl 10(4).

⁵⁴ As to similar problems arising out of sealing and expunction legislation in the United States, see *Dickerson v New Banner Institute Inc* (1983) 460 US 103, discussed by L L Triplett (1985) 71 Virginia Law Review 1239.

⁵⁵ An example would arise if a Commonwealth law prohibited discrimination in respect of Commonwealth convictions spent after a period of five years, whereas Western Australian law prohibited such discrimination only after a period of ten years.

conviction scheme. However, on balance, it seems more desirable that a conviction, once it has become or has been declared spent, should remain spent.

7.51 In the first place, the available evidence⁵⁶ suggests that it would be a rare occurrence for a convicted person, having gone at least ten years free of further convictions, to be convicted of another offence.⁵⁷ In addition, if the earlier conviction were declared spent on application, either by a District Court judge or a magistrate, the judge would not have made such an order unless satisfied that it was appropriate to do so.

7.52 In the second place, the problems which a person would experience in such a situation, for example the difficulty of finding or keeping employment, would occur because of the new conviction rather than the old conviction. Whether an old conviction revives or not would seem to make little difference.

7.53 There thus seems little point in complicating the machinery of the spent conviction scheme by providing that convictions, once spent, should revive. The vast majority of schemes or proposed schemes in other jurisdictions provide that convictions, once spent, do not revive. The Canadian federal legislation, under which a pardoned conviction can revive,⁵⁸ has been criticized on this ground.⁵⁹ The Queensland legislation, under which a conviction can revive even though the "rehabilitation period" has expired,⁶⁰ seems open to the same criticism.

7.54 Accordingly, the Commission recommends that a conviction should not be revived by a subsequent conviction after the earlier conviction has become spent.

⁵⁶ See ch 4 footnote 4 above.

⁵⁷ Other than relatively trivial offences of the kind which the Commission has recommended should not delay an earlier conviction becoming spent: see paras 7.23 to 7.26 above.

⁵⁸ *Criminal Records Act 1970* (Canada), s 7.

⁵⁹ See Appendix V para 17.

⁶⁰ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), s 11.

Chapter 8

PROCEDURAL MATTERS

1. CONVICTIONS SPENT AUTOMATICALLY

8.1 In chapter 6, the Commission recommended that minor convictions should, on the fulfilment of certain conditions, become spent automatically. Where a conviction becomes spent automatically, the convicted person should be able to apply for a spent conviction certificate.¹ The most suitable person to issue such a certificate would be the Commissioner of Police.

8.2 The application for the certificate should list all convictions of the applicant, whether incurred in Western Australia or elsewhere. This will place the onus on the convicted person to produce information relevant to the question whether the conviction has become spent which may not be on the police criminal record, for example information about convictions in another country.

8.3 If the Commissioner of Police is satisfied, on the basis of the information contained in the application and any inquiries conducted by the police, that the conviction has become spent, a spent conviction certificate should be issued.² This should state that the Commissioner of Police, having made appropriate inquiry, is satisfied that the conviction has become spent.

8.4 The making of a fraudulent statement in order to obtain a spent conviction certificate should be an offence.³ A certificate obtained by fraud would be void and of no effect.

¹ Where a conviction is declared spent on application, a spent conviction certificate would be unnecessary, since a copy of the court order would confirm that the conviction has become spent.

² Draft Bill, cl 6(1).

³ Id, cl 6(2).

2. APPLICATIONS FOR CONVICTIONS TO BE DECLARED SPENT

(a) Introduction

8.5 In chapters 6 and 7, the Commission recommended that -

- (1) Major convictions should not become spent automatically, but could, after the expiry of the appropriate period (ten years plus the length of the sentence of imprisonment imposed) be declared spent by a judge of the District Court.⁴
- (2) Where, during the spent conviction period applicable to a minor conviction, the convicted person incurred a major conviction, it should no longer be possible for the minor conviction to become spent automatically. However, after the expiry of the appropriate period (ten years, plus the length of the sentence of imprisonment imposed, if any) it could be declared spent by a judge of the District Court.⁵
- (3) Minor convictions in respect of which no sentence of imprisonment was imposed, though they would become spent automatically after a period of ten years without further convictions, could be declared spent by a stipendiary magistrate after a period of five years without further convictions.⁶

8.6 In the following paragraphs the Commission makes recommendations as to the procedure that should govern applications for a conviction to be declared spent. It recommends that the procedural rules should be the same, whether the application is one which must be made to a District Court judge or a stipendiary magistrate.⁷

(b) The application

8.7 The application should be in writing. It should set out all previous convictions, whether in Western Australia or elsewhere. It should also give details of the employment

⁴ See paras 6.2, 6.6 to 6.11 and 6.34 to 6.37 above.

⁵ See paras 7.22 and 7.29 above.

⁶ See paras 6.2 and 6.31 to 6.37 above.

⁷ Draft Bill, cl 12. In the remainder of this chapter, unless the context indicates otherwise, the term "judge" means both a judge of the District Court and a stipendiary magistrate.

history of the applicant since the date of the conviction in respect of which the application is being made, and of any other matters which are prescribed in regulations.⁸ For example, the Commission envisages that applicants might be required to set out relevant details of their life history, other than those concerned with employment, since the conviction, such as marriage, divorce, the birth or adoption of children and so on.

8.8 The judge should have a power, exercisable by notice in writing, to require the applicant to give further information in relation to the application.⁹

8.9 It should be possible to make an application in respect of more than one conviction.¹⁰

(c) Parties to the application

8.10 The Commissioner of Police should be made a party to the application, and notice of the application should be served on the Commissioner. The Commissioner should be able to submit a written statement setting out reasons why the application should or should not be granted, or to appear at the hearing and make submissions either personally or through any person the Commissioner authorizes.¹¹

8.11 The Attorney-General should be able to intervene in the application, and contest or argue any question arising in relation to the application. When the Attorney-General intervenes, the Attorney-General should be deemed to be a party to the application.¹²

(d) The hearing

8.12 The Commission recommends that applications for convictions to be declared spent should be heard in private, unless the applicant requests that the hearing should be in public, or the judge considers that, in the circumstances of the case, the hearing should be in public.¹³

⁸ Id, cl 13(1).

⁹ Id, cl 13(2).

¹⁰ Id, cl 13(3). For examples of situations in which applications might be made in respect of more than one conviction, see ch 7 footnotes 36 and 39.

¹¹ Draft Bill, cl 14(1).

¹² Draft Bill, cl 14(2); cf *Family Court Act 1975-1982*, s 87.

¹³ Id, cl 15(1).

8.13 In so recommending, the Commission is departing from the normal principle that court proceedings should be held in public. On balance, it believes that this departure is justified in view of the nature of the proceedings and the possibility that convicted persons may otherwise be deterred from making applications to have convictions declared spent. If, however, it is thought that the normal principle should apply and that applications should be heard in public, the judge should have power to order, in an appropriate case, that the proceedings should be held in private.

8.14 The judge should have power -

- (1) where the hearing is in private, to give directions, in writing or otherwise, as to who may be present;
- (2) where the hearing is in public, to order that no particulars likely to lead to the identification of the applicant are to be published. Failure to comply with such an order, except with lawful excuse, should be an offence.¹⁴

(e) Alternatives to holding a hearing

8.15 The judge should have power -

- (1) if satisfied that an application is frivolous, vexatious, misconceived or lacking in substance, to dismiss the application without holding a hearing;
- (2) if satisfied that it is appropriate to do so, to make an order declaring the conviction spent without holding a hearing.¹⁵

(f) When the judge may declare a conviction spent

8.16 If the necessary conditions for the making of the application are complied with, and there are no subsequent convictions, other than convictions in respect of which either no penalty is imposed or the penalty imposed is a fine of not more than \$100 (or such greater

¹⁴ Id, cl 15(2) to (4).

¹⁵ Id, cl 16.

sum as is prescribed)¹⁶ the judge should make the order unless satisfied, having regard to the circumstances, that it is inexpedient to do so.¹⁷

8.17 In the case of an application to a stipendiary magistrate for a minor conviction to be declared spent, the application could not be made unless the above conditions were complied with, and so the recommendation made in the previous paragraph will apply in all cases. In the case of an application to a District Court judge for a major conviction to be declared spent, the application may be made even though there are subsequent convictions.¹⁸ In such a case, the judge should not make an order declaring the conviction spent unless satisfied, having regard to the circumstances, that such an order should be made.

8.18 The circumstances which should be taken into account are -

- * The length and kind of sentence imposed in relation to the conviction.
- * The length of time since the date of the conviction.
- * Whether the conviction prevents or may prevent the applicant from engaging in a particular profession, trade or business or in a particular employment.
- * All the circumstances of the applicant, including the circumstances of the applicant at the time of the commission of the offence and at the time the application was made.
- * The nature and seriousness of the offence.
- * The circumstances surrounding the commission of the offence.

¹⁶ See paras 7.23 to 7.26 above.

¹⁷ Though technically the applicant is only required to prove the number of years since the conviction and the absence of subsequent convictions, in practice the applicant will produce evidence of all the circumstances in his favour. The Commissioner of Police will therefore have an opportunity to submit countervailing evidence or argument.

¹⁸ This will also apply when an application is made for a minor conviction to be declared spent which, because of a subsequent major conviction, can no longer become spent automatically.

- * Whether the applicant has since the conviction been convicted of another offence and, if the applicant has been so convicted, the nature of the subsequent offence and the penalty imposed in relation to it.
- * Whether there remains any public interest to be served in not making an order.

These matters should be set out in the legislation implementing the spent conviction scheme.¹⁹

(g) Costs

8.19 As a general rule, parties to the application should each pay their own costs. However, the judge should have power to award such costs as the judge thinks fit in any case where the judge dismisses the application without holding a hearing on the ground that it is frivolous, vexatious, misconceived or lacking in substance,²⁰ or in any case where the judge is satisfied that there are circumstances which justify doing so.²¹

(h) Order to be sent to Commissioner of Police

8.20 Where the judge issues an order declaring the conviction spent, a copy of the order should, as soon as practicable, be sent to the Commissioner of Police, so that the fact that the conviction has been declared spent may be entered on the applicant's criminal record.²²

(i) Appeals

8.21 An appeal against the decision of the judge should lie to a single judge of the Supreme Court, but only when the grounds of appeal involve a question of law.²³

(j) Bar on subsequent applications

8.22 Where an application to have a conviction declared spent is dismissed, the applicant should be prohibited from making another application in relation to that conviction for a

¹⁹ Draft Bill, cl 17.

²⁰ See para 8.15 above.

²¹ Draft Bill, cl 18; cf *Equal Opportunity Act 1984-1985*, s 128.

²² Draft Bill, cl 19.

²³ Id, cl 20; cf *Liquor Act 1970-1985*, s 15(2).

period of two years, running from the day on which the judge dismissed the previous application.²⁴

²⁴ Draft Bill, cl 21.

Chapter 9

THE EFFECT OF A CONVICTION BECOMING SPENT

1. INTRODUCTION

9.1 The Commission's view is that legislation dealing with the problem of old convictions must deal with that problem in a variety of ways if it is to be totally satisfactory.¹ The most important feature of the United Kingdom *Rehabilitation of Offenders Act 1974* is that, once convictions become spent, this takes effect in a number of different ways.² Most of the proposals for legislation on old convictions put forward since 1974, while they may differ markedly as to the question of when and how convictions should become spent, broadly follow the United Kingdom approach in relation to the effects of a spent conviction.³ The Commission's recommendations are consistent with the general pattern being established.

2. DISCRIMINATION

(a) Extension of *Equal Opportunity Act 1984-1985* to discrimination on the ground of spent convictions

9.2 In the view of the Commission, once a conviction becomes spent, discrimination against a person on the ground of a spent conviction should be unlawful. If a conviction has become spent, a person should not be treated less favourably than others because of that person's past criminal record.

9.3 Anti-discrimination legislation is now to be found in many common law jurisdictions. In most cases, this legislation covers discrimination on the ground of race or sex, and very often discrimination on the basis of religious or political beliefs and affiliations. It commonly covers discrimination in a variety of contexts, both in employment and in other areas such as the provision of accommodation, goods, services and facilities and the membership of clubs

¹ See paras 5.19 and 5.20 above.

² See para 5.10 above.

³ Eg NSWPC Background Paper, SA Discussion Paper, HK Discussion Paper, NZ Discussion Paper, ALRC Discussion Paper. The effects of spent convictions under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) are more limited, although this Act is generally based on the United Kingdom Act.

or trade associations. Discrimination is usually dealt with, in the first instance, by conciliation procedures. Court proceedings are only resorted to when conciliation fails.

9.4 In Ontario, the problem of old convictions was dealt with by extending the general anti-discrimination legislation dealing with discrimination in employment to cover discrimination on the ground of spent convictions.⁴ In the United Kingdom, by contrast, the legislation dealing generally with discrimination on the ground of race and sex⁵ (which incorporates conciliation procedures) was not extended to spent convictions. Instead the *Rehabilitation of Offenders Act 1974* deals with discrimination against persons with spent convictions in relation to employment.⁶

9.5 In Western Australia, the *Equal Opportunity Act 1984-1985* makes unlawful discrimination on the ground of sex, marital status or pregnancy, race, and religious or political beliefs or affiliations.⁷ The provisions of the Act cover discrimination in work against applicants and employees, commission agents and contract workers, and discrimination by partnerships, professional or trade organizations, qualifying bodies and employment agencies. Apart from work situations, discrimination in a number of other areas is made unlawful - in education, as respects access to places and vehicles,⁸ the provision of goods, services, facilities and accommodation, and the membership of clubs. The Act creates the office of Commissioner for Equal Opportunity, whose functions include investigating complaints and attempting to deal with them through the conciliation process. Should this fail, the matter can be referred to the Equal Opportunity Tribunal.

9.6 In the Commission's view, discrimination in Western Australia on the ground of a spent conviction should be included in the *Equal Opportunity Act*. This is preferable to adopting a more limited provision along the lines of that found in the United Kingdom *Rehabilitation of Offenders Act*. It is not only in the employment area that a person needs to be protected from discrimination on the ground of that person's past criminal record. The more general protection conferred by the *Equal Opportunity Act* is appropriate. In addition,

⁴ See (Ontario) Human Rights Code 1981, s 4.

⁵ *Race Relations Act 1976* (UK), *Sex Discrimination Act 1975* (UK).

⁶ See *Rehabilitation of Offenders Act 1974* (UK), s 4(3)(b).

⁷ The Act uses the words "religious or political conviction". However the word "conviction" has not been used in the text, so as to avoid confusion with the question of criminal convictions.

⁸ But not as to discrimination on the ground of religious or political beliefs or affiliations.

the conciliation procedure of the Act will provide a satisfactory way of resolving many instances of discrimination on the basis of spent convictions.

9.7 The new provisions should include all the situations of discrimination dealt with in the other Parts of the *Equal Opportunity Act*, except discrimination in relation to access to places and vehicles, which is inappropriate to discrimination on the basis of spent convictions,⁹ and discrimination by persons proposing to form a partnership, which in the Commission's view should be excluded. Though discrimination by intending partners against a person on the ground of sex, marital status, pregnancy, race, and religious or political beliefs or affiliations is unlawful, different considerations apply where the question is whether would-be partners should be able to exclude a person on the basis of that person's spent convictions. The close personal trust and confidence reposed by partners in each other makes any attempt to regulate the choice of partners on such grounds inappropriate.

9.8 The Commission therefore recommends that the *Equal Opportunity Act 1984-1985* be amended by extending its provisions to deal with discrimination on the basis of a spent conviction in the following areas -

- (a) Discrimination in work
 - Discrimination against applicants and employees
 - Discrimination against commission agents
 - Discrimination against contract workers
 - Discrimination by professional or trade organizations
 - Discrimination by qualifying bodies
 - Discrimination by employment agencies

- (b) Discrimination in other areas
 - Education
 - Goods, services and facilities
 - Accommodation
 - Clubs

⁹ This ground of discrimination is also omitted from Part IV of the Act which deals with discrimination on the basis of religious or political beliefs or affiliations.

Application forms¹⁰

A suggested draft amendment appears in Appendix VII.¹¹

(b) **Limitation of discrimination provisions to spent convictions**

9.9 In British Columbia the anti-discrimination legislation dealing with discrimination in employment has been extended to cover discrimination on the ground of convictions, whether spent or not.¹² Similar proposals have been made in New Zealand¹³ and by the ALRC.¹⁴ It is argued that for a convicted person, especially one sentenced to a period of imprisonment, the most difficult problem is finding employment, and that this problem arises immediately - in the case of someone sentenced to imprisonment, immediately on release. If protection is granted only several years later, after the conviction becomes spent, it will be of more limited assistance.

9.10 However, the British Columbia provision is limited in its effect. Discrimination is not unlawful where the conviction relates to the employment in question. The proposals mentioned in the previous paragraph contain similar limitations providing that discrimination should not be unlawful if there is a "direct relationship" between the criminal record and the area of concern¹⁵ or if the discrimination is not "unreasonable, having regard to the circumstances".¹⁶

9.11 The Commission's terms of reference require it to consider and report on whether a person's criminal record should be expunged after a stipulated time. Any recommendation for

¹⁰ According to this provision, where it is unlawful in particular circumstances to discriminate against a person in doing a particular act, it is also unlawful to request or require that person to provide, in connection with or for the purposes of the doing of the act, information which other persons would not be requested or required to provide: *Equal Opportunity Act 1984-1985*, ss 23, 49, 65. In such circumstances the conciliation machinery of the Act could be set in motion.

¹¹ This amendment is drafted in terms of discrimination on the ground of "record of offences". This term is defined by clause 5 to mean, inter alia, discrimination on the ground of a conviction which has become spent under the provisions of the *Spent Convictions Act* which this report recommends should be enacted. The term "record of offences" is used to avoid confusion with discrimination on the ground of religious or political conviction (see footnote 7 above) and to incorporate, apart from convictions which have become spent under the *Spent Convictions Act*, various orders which do not involve conviction dealt with in ch 11 below.

¹² See *Human Rights Code 1979* (British Columbia), s 8.

¹³ NZ Discussion Paper, para 5.3.

¹⁴ ALRC Discussion Paper, paras 32-34.

¹⁵ NZ Discussion Paper, para 5.3.

¹⁶ ALRC Discussion Paper, para 34.

anti-discrimination legislation covering all convictions, as opposed to spent convictions, would therefore be outside its terms of reference. In any case, the Commission is satisfied that the recommended extension of the *Equal Opportunity Act* should be limited to discrimination on the basis of spent convictions. Though the Commission would not condone discrimination against persons whose convictions had not become spent, anti-discrimination provisions which were not limited to spent convictions would impose too great a restriction on employers and others. It would not be satisfactory to try to limit the ambit of such provisions by using criteria of direct relationship or reasonableness, because this would introduce an element of uncertainty. In the Commission's view, the fact that a conviction can become spent after a number of years - in the case of a conviction for which a sentence of imprisonment is not imposed, five years, if a magistrate declares the conviction spent¹⁷ - will offer encouragement to convicted persons not to commit further offences.

3. INTERPRETATION OF WRITTEN LAWS

(a) References to convictions

9.12 In chapter 3 above, reference was made to the fact that many statutes provide that a conviction for an offence, or specified offences, or offences in a specified category, will impose a disqualification upon the convicted person. Such provisions are found in the legislation dealing with qualifications for being a member of the Western Australian Parliament,¹⁸ and are common in statutes dealing with membership of boards, committees and other Government bodies. They do not usually provide for any limitation on the age of the conviction.¹⁹

9.13 In the Commission's view, once a conviction has become spent, it should no longer act as an absolute bar in such circumstances. If the convicted person has satisfied the requirements of the spent conviction scheme, then that person's spent conviction should not be placed in the same category as a non-spent conviction.

¹⁷ See paras 6.2 and 6.31 to 6.33 above.

¹⁸ *Constitution Acts Amendment Act 1899-1984* (WA), s 32(b).

¹⁹ See paras 3.22 and 3.26 above and Appendix IV paras 6 and 25.

9.14 Accordingly, the Commission recommends that references in written laws²⁰ of the State to a conviction of a person for an offence should not include references to a spent conviction, unless the contrary intention appears.²¹ This will affect many provisions in existing legislation, including those referred to above.²²

9.15 It will still be possible for Parliament to enact a statutory provision imposing a disqualification on persons with convictions, including spent convictions. However, it will be necessary for the legislation so to provide by express words or necessary intendment.

9.16 The provisions in existing legislation referred to in chapter 3,²³ which in some cases differ in their details from the Commission's recommended spent conviction scheme, would remain as particular exceptions to the general rule, unless amended to bring them into line with the Commission's recommendations. The Commission does not see such amendment as essential to the proper operation of the spent conviction scheme, since particular areas are governed by special policy considerations which were determined when the legislation in question was enacted. The *Juries Act 1957-1984*,²⁴ however, unlike the other statutes under discussion, limits the effect of convictions only in relation to less serious offences. When a person is convicted and sentenced to imprisonment for a term exceeding two years, or for life, or for an indeterminate period, there is still a life disqualification from jury service. The Commission recommends that the *Juries Act* should be amended so as to provide that in such cases a person should be disqualified from jury service only until the conviction was declared spent.

(b) Requirements as to character

9.17 Chapter 3 also made reference to the fact that many statutes regulating entry to professions or the granting of licences to pursue particular occupations provide that a person must be of good character, or a fit and proper person, or contain other similar requirements.²⁵

²⁰ That is, all Acts for the time being in force and all subsidiary legislation for the time being in force: *Interpretation Act 1984-1985*, s 5.

²¹ Draft Bill, cl 22(1). Cf *Rehabilitation of Offenders Act 1974* (UK), s 4(1); ALRC Discussion Paper, para 37. Contrast *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), ss 6 and 9, which appear to provide that references to convictions in other legislation are not affected by the Act.

²² Para 9.12.

²³ See paras 3.5 to 3.18 above.

²⁴ See paras 3.16 and 3.17 above.

²⁵ See paras 3.14 and 3.22 above and Appendix IV paras 2 and 4.

Though a conviction would not automatically mean that the convicted person could no longer be considered a person of good character, it might have that consequence.

9.18 The Commission believes that many authorities charged with the duty of assessing a person's character already discount old convictions if it is appropriate to do so. However, in the Commission's view, the spent conviction scheme should contain a specific direction that references in statutes to a person's good character, fitness, propriety or other similar references should not be interpreted as permitting or requiring account to be taken of spent convictions. The Commission therefore recommends that a provision in these terms should be incorporated in the proposed spent conviction scheme.²⁶

9.19 Even without such a direction, many authorities would no doubt take the general intention of the proposed scheme into account in discharging their functions. However, a specific direction will bring about greater certainty. A similar direction is to be found in the Queensland legislation.²⁷

9.20 As with references to convictions in statutes, it will be possible to enact statutory provisions which require particular authorities, in assessing a person's suitability for a particular purpose, to have regard to all convictions including spent convictions. Again, however, it will be necessary for the legislation so to provide by express words or necessary intendment.

4. QUESTIONS ABOUT CONVICTIONS

(a) Questions to be treated as not referring to spent convictions

9.21 A most important problem arises when persons are asked questions about their convictions. Such questions may be put by a potential employer, or in a variety of other situations, for example where a convicted person is seeking credit or insurance. The question may be asked face to face, or may appear in an application form. A number of instances of such questions and the difficulties that they cause were given in chapter 3. If the spent conviction scheme is to provide relief from the problem of old convictions, then it is most

²⁶ Draft Bill, cl 22(2).

²⁷ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), s 9.

important to ensure that the convicted person will not have to disclose spent convictions in answer to such questions.

9.22 The United Kingdom *Rehabilitation of Offenders Act 1974* dealt with this problem by providing that questions seeking information with respect to a person's previous convictions, offences, conduct or circumstances were to be treated as not relating to spent convictions, or any circumstances ancillary to spent convictions, and that the answer could be framed accordingly.²⁸ Most of the schemes since proposed in other jurisdictions have included a similar provision.²⁹

9.23 In the Commission's opinion, a similar provision should be incorporated in the proposed Spent Convictions Act. The Commission therefore recommends that questions about a convicted person put to a person by or by authority of any other person or body should not be taken to relate to a spent conviction, unless a written law makes express provision to the contrary.³⁰

9.24 It will be noted that -

- (1) the above recommendation replaces the rather more complex United Kingdom formulation by the phrase "questions about a convicted person".³¹ This is intended to include questions such as "Have you ever been arrested or tried for an offence?", or "Have you ever had any convictions which are spent?". It is also intended to include questions about convictions which are deemed not to be convictions, such as questions about probation orders or dismissals under section 669(1)(a) of the *Criminal Code*.³²
- (2) The recommendation, like the United Kingdom provision, is wide enough to cover not only questions to the person questioned about that person's own convictions, but also questions about the convictions of third parties.

²⁸ S 4(2).

²⁹ See *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), s 8; ALRC Discussion Paper, para 37; SA Discussion Paper, 23; HK Discussion Paper, para 38.

³⁰ Draft Bill, cl 23(1).

³¹ The provision in the Draft Bill is based on the similarly worded clause 49(1) of the Draft Criminal Information and Records Bill in Appendix A of the ALRC Discussion Paper.

³² As to which, see paras 11.15 to 11.27 below.

- (3) The recommendation, like the Commission's recommendations as to the interpretation of written laws,³³ provides that the general principle will not operate if a written law which authorizes a person or body to ask questions about convicted persons provides to the contrary.

(b) Should questions about spent convictions be prohibited?

9.25 It has been suggested that to allow questions to be treated as not relating to spent convictions may not give sufficient protection, since questions relating to spent convictions may still be asked. It is important that the spent conviction scheme should be as simple as possible, so that convicted persons may know whether or not their convictions are spent, and that they should know of their right to treat questions as not relating to spent convictions. But, at least where the question is asked face to face, a momentary hesitation may be enough to raise a suspicion in the mind of the questioner. Some law reform bodies have therefore suggested that questions relating to spent convictions should be prohibited.³⁴

9.26 In England, *Living it Down* took the opposite view. It said that in a free society individuals and organizations should be free to ask what questions they liked.³⁵ It would be wrong to make the asking of questions a criminal offence, and it was hard to see how a civil remedy against the questioner could operate.

9.27 The Commission agrees with the sentiments expressed in *Living it Down*, but nonetheless sees the ultimate aim of the provision recommended above as educative. It hopes that, in the long term, questioners will abandon the practice of asking questions about spent convictions.

9.28 To this end, the Commission recommends that Government departments, statutory authorities and local government bodies should amend application forms and other questionnaires so as to ensure that questions about spent convictions are not asked, and that the content of questions is limited to the needs of the questioner.³⁶ For example, an authority

³³ See paras 9.12 to 9.20 above.

³⁴ NSWPC Background Paper, para 9.3; SALRC Report, 8; NZ Discussion Paper, para 5.9.

³⁵ Para 26(e).

³⁶ In paras 9.2 to 9.8 above, the Commission recommended that the *Equal Opportunity Act 1984-1985* should be amended to include discrimination on the ground of a spent conviction. S 145 of the *Equal Opportunity Act* requires Government and public authorities to prepare and implement an equal

concerned to find out whether an applicant for a job had convictions for offences involving dishonesty might ask "Have you ever been convicted of offences involving dishonesty, other than convictions which have become spent?". Implementation by the Government along these lines may lead to similar action being taken by the private sector.

5. OBLIGATIONS TO DISCLOSE INFORMATION ABOUT CONVICTIONS

9.29 In certain circumstances, particular persons have obligations to disclose relevant information, even when not specifically asked for it - for example, persons wishing to take out insurance. Such obligations arise either under the terms of a contract or from general obligations such as a fiduciary duty. In these circumstances persons may be under a duty to disclose spent convictions.

9.30 The United Kingdom *Rehabilitation of Offenders Act 1974* provides that such obligations shall not extend to requiring persons under an obligation to disclose a spent conviction or any circumstances ancillary to a spent conviction, whether the conviction is their own or another's.³⁷

9.31 In the opinion of the Commission, a similar provision should be included in its proposed spent conviction scheme. The Commission accordingly recommends that an obligation imposed on any person by any written law of the State, or by the principles and rules of common law or equity, or by the provisions of any agreement or arrangement, to disclose matters relating to a convicted person, should not require the disclosure or acknowledgement of the spent conviction, unless, in the case of an obligation imposed by a written law, the written law makes express provision to the contrary.³⁸

opportunity management plan in order to achieve the objects of the Act. This includes a review of recruitment techniques and selection criteria with a view to the identification of any discriminatory practices.

³⁷ S 4(3)(a). A similar provision is proposed in the ALRC Discussion Paper, para 37. The *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), s 8 provides that it is lawful to deny the existence of spent convictions, except upon occasions when the Act is to be construed so as "not to prejudice a provision of law or rule of legal practice or to relieve from a responsibility."

³⁸ Draft Bill, cl 23(2). In practice, the impact of this provision on insurance will be limited, because insurance, other than State insurance, is a Commonwealth matter. However, the ALRC Discussion Paper proposes a provision in similar terms to the Commission's recommendation. If this proposal results in legislation at Commonwealth level, this will cover the insurance area. It should be noted that the provisions of the Commonwealth *Insurance Contracts Act 1984-1985* limit the ambit of obligations to disclose to a greater degree than did the previous law: see Appendix IV para 13.

6. PROCEEDINGS BEFORE COURTS AND TRIBUNALS

9.32 The United Kingdom *Rehabilitation of Offenders Act 1974* imposes limitations on the use of spent convictions before courts and tribunals. Evidence of spent convictions is inadmissible, and persons may not be asked, and if asked are not required to answer, questions which cannot be answered without acknowledging spent convictions.³⁹ These provisions, however, are subject to many exceptions. They do not apply to criminal proceedings, service disciplinary proceedings, proceedings relating to children, proceedings in which a person is a party or a witness, if that person consents, or in any case in which the court is satisfied that justice cannot be done except by admitting evidence of, or questions about, spent convictions. All these exceptions are set out in the Act.⁴⁰ In addition, the Act allows the Home Secretary to authorize further exceptions in subordinate legislation,⁴¹ and a large number of exceptions have been ratified.⁴² Limitations on the use of spent convictions before courts and tribunals also appear in Australian legislation or proposed legislation on spent convictions.⁴³

9.33 In Western Australia the *Evidence Act 1906-1985* would permit questions about spent convictions, but only where such evidence is relevant to the proceedings in question. Under section 23, a witness may be questioned as to whether the witness has been convicted of any indictable offence, and if the witness denies or does not admit the fact, or refuses to answer, the cross-examining party may prove the conviction. However under section 25, if any question put to a witness on cross-examination relates to a matter not relevant to the proceeding, except in so far as it affects the credit of the witness by injuring the witness's character, it is the duty of the court to decide whether or not the witness should be compelled to answer the question, and the court may, if it thinks fit, inform the witness that the witness is not obliged to answer it. In exercising this discretion, the court is to have regard to whether the truth of the imputation conveyed by the question would seriously affect the court's opinion as to the witness's credibility, whether such imputation relates to matters so remote in time or of such character that the truth of the imputation would not affect the court's opinion of the

³⁹ S 4(1).

⁴⁰ S 7(2) and (3).

⁴¹ S 7(4).

⁴² See Appendix V para 35.

⁴³ See SA Discussion Paper, 24-26; ALRC Discussion Paper, para 37. The *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), s 8(2) provides that where a person has lawfully denied the existence of spent convictions, evidence shall not be admissible in any proceeding to show the claim to be false. No proceedings are excepted from this provision.

witness's credibility, or only affect it to a slight degree, and whether there is a great disproportion between the importance of the imputation made against the witness's character and the importance of the witness's evidence.

9.34 In the Commission's view, no limitations should be placed on the evidence that may be made available before a court. The existing provisions of the *Evidence Act* ensure that spent convictions will only be taken into account where they are relevant to the proceedings before the court. The disclosure of evidence as to spent convictions in court may bring those convictions to the notice of people who were otherwise unaware of them, for example if the details are reported in a newspaper. However, this does not justify limiting the evidence which may be put before a court, when such a limitation may seriously affect the conduct of prosecutions for perjury and other cases. Moreover, by not imposing such a limitation, the need for complex exceptions such as those found in the United Kingdom Act is avoided.

9.35 The Commission therefore recommends that the provisions of the spent conviction scheme relating to questions about, and obligations to disclose matters relating to, spent convictions should not apply to proceedings before courts and tribunals applying the laws of evidence.⁴⁴

9.36 In Western Australia, 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. However, it is not the practice for a person's record to be read out in court. The record is normally only disclosed to a small group of people including the prosecutor and the presiding judicial officer. The Commission endorses this practice, and believes that courts and tribunals should make every effort to reduce reference to spent convictions to an absolute minimum.

9.37 In the United Kingdom, where there is no limitation on the admissibility of evidence of spent convictions in criminal proceedings,⁴⁵ the need for minimising reference to spent convictions was emphasised in practice directions.⁴⁶ In the South Australian discussion paper, which similarly proposes that limitations on the admissibility of evidence of spent convictions should not apply in criminal proceedings, it is suggested that provisions broadly

⁴⁴ Draft Bill, cl 24(1).

⁴⁵ See para 9.32 above.

⁴⁶ See Appendix V para 33.

similar to those in the United Kingdom practice direction should be incorporated in legislation on spent convictions.⁴⁷

9.38 In the Commission's view, the legislation implementing the spent conviction scheme should provide that a court or tribunal before which evidence of a spent conviction is admitted should take such steps as are reasonably available to it to avoid or minimise publication of that evidence, and it so recommends.⁴⁸

9.39 The objective of the proposed spent conviction scheme may be assisted by a practice direction with provisions along the following lines.

- (a) Counsel should never refer to spent convictions where such reference can be reasonably avoided.
- (b) 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.
- (c) In criminal proceedings, when passing sentence, the judge should make no reference to spent convictions unless it is necessary to do so for the purpose of explaining the sentence to be imposed.

7. DISCLOSURE OF SPENT CONVICTIONS

9.40 The recommendations made in the preceding sections of this chapter are designed to ensure that a convicted person will not have to disclose spent convictions to another, either in response to a question or under some obligation to disclose information, except in proceedings before courts and tribunals applying the law of evidence, and that if another person knows of the convicted person's spent convictions, discrimination against the convicted person on that account will be unlawful.

9.41 Another possible situation is that a person who knows of another's criminal record may disclose that information to a third person. To what extent should such disclosure be

⁴⁷ SA Discussion Paper, 24-25.

⁴⁸ Draft Bill, cl 24(2).

controlled or limited, where the convictions in question are spent? The situation differs according to whether the disclosure is from an official record, or is simply information being passed by one person to another.

(a) Disclosure from official records

9.42 As described in chapter 2, the most important official records of convictions are those kept by the police and, for young offenders, the Department for Community Services. Records of convictions are also kept by courts and some other Government departments. The police record is sometimes disclosed to third parties, either under a statutory provision or with the consent of the convicted person.⁴⁹ Information from the other records mentioned above is not usually disclosed to third parties.

9.43 It is already the practice of the police, when furnishing copies of criminal records to third parties, to omit certain information, such as dismissals under section 669 of the *Criminal Code* and probation orders.⁵⁰ Under a recommendation made earlier in this chapter, obligations to disclose information, whether required by statute, imposed by the principles and rules of common law or equity, or arising under an agreement or arrangement, will not require the disclosure of a spent conviction.⁵¹ It is assumed that the police will adopt the practice of omitting spent convictions from criminal records provided to third parties or, in a case where a person's convictions are all spent, of reporting that the person does not have a criminal record. Disciplinary procedures are available if records are improperly disclosed.⁵²

9.44 The position with regard to disclosure of information contained in other official records is similar. Provisions in a number of statutes create penalties for improper disclosure.⁵³

9.45 The United Kingdom *Rehabilitation of Offenders Act 1974* provides that the unauthorized disclosure of information about spent convictions from official criminal records is an offence.⁵⁴ It also creates another offence, of obtaining information about spent

⁴⁹ See para 2.11 above and Appendix III paras 15 to 17.

⁵⁰ See Appendix III paras 15 to 17.

⁵¹ See paras 9.29 to 9.31 above.

⁵² See Appendix III paras 18 and 19.

⁵³ See para 2.14 above and Appendix III paras 33, 36 and 39.

⁵⁴ S 9(2).

convictions from official criminal records by means of any fraud, dishonesty or bribe.⁵⁵ Proposals for spent conviction legislation in other jurisdictions generally incorporate similar offences.⁵⁶

9.46 In the Commission's view, in Western Australia the existing provisions in statutes and regulations act as a sufficient sanction against the disclosure of information about spent convictions from official criminal records. The Commission therefore does not recommend the creation of a new offence to provide a sanction against such disclosures.

9.47 In some situations, existing offences will cover the obtaining of information about spent convictions by means of fraud, dishonesty or bribe. However, to ensure that such conduct is prohibited in all situations, the Commission recommends that it should be an offence to obtain information about a spent conviction from any official criminal record by means of any fraud, dishonesty or bribe.⁵⁷

9.48 The detailed practice of the bodies who keep official records of convictions varies.⁵⁸ Some record systems are now computerized, and others are in the process of becoming computerized. In most cases, the system already incorporates a requirement of logging accesses to information contained in the records. The Commission recommends that it should become standard practice for all official record keepers to log accesses to records. Accesses should be recorded against the record of the convicted person, and according to the name of the person granted access, with cross-references between the two. This enables a check to be made on the persons who have had access to the criminal record of a particular individual, and on the accesses allowed to a particular inquirer. Accesses should not simply be recorded on a daily basis.

⁵⁵ S 9(4).

⁵⁶ See eg HK Discussion Paper, para 47; SA Discussion Paper, 29-30, and cl 10 of the draft Rehabilitation of Offenders Bill in Appendix No 3. See also the proposals in the NZ Discussion Paper and the ALRC Discussion Paper dealt with in para 9.53 below.

⁵⁷ Draft Bill, cl 25.

⁵⁸ See paras 2.9 to 2.14 above and Appendix III.

(b) Disclosure of information about spent convictions in other situations

9.49 The problem of disclosure of information about a spent conviction by one person to another has produced a number of different responses in legislation and proposed legislation on spent convictions.

(i) Civil sanctions

9.50 In the United Kingdom, the Rehabilitation of Offenders Bill in its original form excluded the defence of truth in actions for defamation in respect of statements that a person had been convicted, if the conviction had become spent.⁵⁹ A person who made reference to a spent conviction would therefore have had no defence to the action and would have been liable in damages, even though the statement was true. The provisions of the Act as finally passed, which deprive a person who discloses information of a defence if the person acted maliciously,⁶⁰ are more limited.

9.51 In Australian jurisdictions where truth alone is not a sufficient defence to defamation, public interest or public benefit also being required,⁶¹ a person who disclosed information about spent convictions might be liable in an action for defamation, even if the information was true, if the communication of that information was not seen to be in the public interest or for the public benefit. However, the Commission has previously recommended that truth alone should remain a complete defence to defamation,⁶² and it endorses that recommendation.

9.52 Defamation will however be available to deal with the disclosure of information about spent convictions if that information is not accurate in every material particular.

⁵⁹ See annotations to *Rehabilitation of Offenders Act 1974* in *Current Law Statutes Annotated 1974* (by J Rear), General Note to s 8; G Dworkin, *Rehabilitation of Offenders Act 1974* (1975) 38 MLR 429, 433-434. For criticism of the original proposal, see SALRC Report, 12-13.

⁶⁰ S 8.

⁶¹ See para 3.38 above.

⁶² Report on *Defamation* (Project No 8, 1979), paras 11.1-11.5. However, the Commission was prepared to agree to a defence of truth and public benefit in order to achieve uniformity throughout Australia.

(ii) *Criminal sanctions*

9.53 The Queensland legislation, instead of adopting a civil sanction for disclosure of information about spent convictions, makes disclosure of spent convictions a criminal offence,⁶³ subject to specified exceptions, including reports of judicial proceedings and reports made pursuant to any provision of law.⁶⁴ This is the major device adopted by the Act for limiting the effect of a spent conviction. Elsewhere there are proposals that disclosure of information about spent convictions should be made a criminal offence. In South Australia it has been proposed that the malicious disclosure of a "stale conviction" should be a criminal offence, subject to a defence of consent, and exceptions in the case of certain reports of judicial proceedings.⁶⁵ In New Zealand it has been suggested that a breach of the ban on publishing details of a person's criminal record should be an offence.⁶⁶ The ALRC has proposed that allowing access to, or disclosure or communication of information from, a criminal record of a spent conviction should be an offence, subject again to a number of defences.⁶⁷

9.54 The Commission has recommended above that existing offence provisions dealing with unauthorized disclosure of information contained in official records should be maintained.⁶⁸ In the Commission's opinion, a more general offence restricting the disclosure of information about spent convictions, while it would provide extra protection for convicted persons, would at the same time constitute an unjustifiable restriction on the freedom not only of individuals but also of the press. A newspaper would not be able to make reference to a person's past convictions unless it was able to establish that they had not become spent. In some cases, for example public figures, reference to spent convictions might be a legitimate subject of press comment. Biographers could also encounter considerable difficulties. Wide-ranging exemptions would be necessary, and this would make any such provision extremely complex.

9.55 The Commission acknowledges that the *Child Welfare Act 1947-1985* provides that it is an offence for a person to disclose a conviction which the Act deems not to be a

⁶³ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), ss 6 and 12.

⁶⁴ *Id.*, s 7.

⁶⁵ SA Discussion Paper, 29-30.

⁶⁶ NZ Discussion Paper, paras 5.9, 5.16.

⁶⁷ ALRC Discussion Paper, para 37, and see cl 50 of the draft Criminal Information and Records Bill in Appendix A.

⁶⁸ Para 9.46.

conviction.⁶⁹ Whether or not it is appropriate to provide such protection, including reporting restrictions, in the case of convictions of young offenders,⁷⁰ in the Commission's view it is not appropriate to provide such protection for convictions of adults, as respects which there are no similar reporting restrictions.

9.56 The Commission therefore recommends that there should not be any criminal sanction for disclosing information about spent convictions, apart from the existing provisions referred to above.⁷¹

⁶⁹ S 126A: see paras 3.8 above and 11.1 below. The Commission understands that no prosecutions have ever been brought under this section, and that the Department for Community Services regards it as an ineffective deterrent against the disclosure of such convictions.

⁷⁰ The *Child Welfare Act 1947-1985*, s 126 sets out restrictions on the reports of proceedings involving children.

⁷¹ Paras 9.43 and 9.44.

Chapter 10

DESTRUCTION OF RECORDS

1. GENERAL RECOMMENDATIONS

10.1 Once a conviction has become spent, whether automatically or by order of a judge, the convicted person will be protected in a number of ways. Discrimination on the basis of the conviction will be unlawful; statutory provisions dealing with "convictions" will not apply; the convicted person will not have to acknowledge or disclose the existence of the conviction; and the police will not disclose the conviction, except to a court in subsequent criminal proceedings against the convicted person.

10.2 At present, the official police records of convictions are not destroyed.¹ This contrasts with the position in some United States jurisdictions, where the official criminal record is expunged after it has become a certain number of years old and no further convictions have been recorded.²

10.3 Where a person's convictions are many years old, and there are no subsequent convictions, the relevance of keeping that record may be questioned. This matter was the subject of discussion in *Living it Down*³ and in a paper produced for the New South Wales Privacy Committee.⁴ *Living it Down* rejected the destruction of records on a number of grounds, as follows -

- (1) the records could be needed for criminological research;
- (2) the records should always be available for police intelligence work;
- (3) the records should remain available so that reference could be made to them by public authorities appointing people to sensitive positions;

¹ Except in the circumstances specified in para 2.13 above and Appendix III paras 8 and 9.

² See para 5.4 above and Appendix V paras 2 and 3.

³ Para 26(a).

⁴ NSWPC Background Paper, para 9.7.

- (4) courts, when sentencing an offender, had to know of all convictions.

10.4 The Privacy Committee paper took a different view, and recommended that, once a specified number of years had elapsed after a conviction had become spent, the record should be destroyed, if there were no subsequent convictions. It did not find the contrary arguments in *Living it Down* convincing. It took the view that:

- (1) the waiting period would allow adequate time for criminological research;
- (2) old records, with no subsequent convictions, could not possibly be of much use to the police;
- (3) an old record, with no history of subsequent convictions, could not be relevant as evidence of a person's present fitness for appointment to a particular position;
- (4) records of convictions old enough to be destroyed were unlikely to be relevant for sentencing purposes.

10.5 The Commission is in general agreement with the arguments in the Privacy Committee paper. It notes also that the principle of destroying old records has already been adopted in Western Australia in relation to traffic convictions, which are expunged after an appropriate period.⁵

10.6 The fact that the official criminal record of a conviction has become irrelevant with the passage of time is a strong reason for destroying it, but it is not the only reason. The destruction of the record would be a way of signifying to convicted persons that an old conviction has been finally and completely forgotten. A number of those who contacted the Commission in response to its discussion paper sought some official expression that "their slate had been wiped clean".⁶ The destruction of the official criminal record would be an appropriate way of signifying this.

⁵ See para 2.13 above and Appendix III para 22.

⁶ See para 3.37 above.

10.7 In the Commission's view, both because after the passage of a sufficient period of time a criminal record becomes for all practical purposes irrelevant, and to show the convicted person that the conviction has finally been officially forgotten, it is desirable that criminal records of spent convictions should eventually be destroyed. In the Commission's view, a period of ten years from the date on which the conviction becomes spent would be a sufficient period. At such a point the conviction would (in the case of a minor conviction declared spent by a magistrate⁷) be at least fifteen years old, and might well be older, since minor convictions will not become automatically spent until ten years after the date of conviction or, in the case of a conviction carrying a sentence of imprisonment, ten years plus the period of imprisonment imposed.⁸ Major convictions declared spent by a District Court judge would also be over twenty years old, since a period of ten years plus the period of imprisonment imposed would have to elapse before the conviction became spent.⁹

10.8 It would of course be a necessary requirement that no further conviction should be incurred after the original conviction became spent, except for very minor offences. The Commission recommended earlier in this report that a conviction for an offence for which either no penalty is imposed or the penalty imposed is a fine of not more than \$100 (or such greater sum as is prescribed) should not prevent a conviction from becoming automatically spent,¹⁰ and likewise a conviction of this nature should not affect the running of the period before which the record of a conviction might be destroyed. Relatively trivial offences, such as careless driving or failing to clear a bushfire break, would not prejudice the general impression to be gained from an otherwise clean sheet over a period of fifteen or twenty years. After such a period without further convictions (other than relatively trivial ones) the criminal record could justifiably be regarded as irrelevant and of no further use.

10.9 The Commission has considered the possibility that records of convictions, or at least records of minor convictions, might be automatically destroyed once the conditions suggested above have been satisfied. In the case of criminal records stored on computer, the computer could be programmed to do this. The alternative is that a record could be destroyed on application to the Commissioner of Police. The disadvantage of an application scheme for the convicted person is that, once again, the person has to admit the fact of the conviction to

⁷ See paras 6.2 and 6.31 to 6.33 above.

⁸ See paras 6.2 to 6.3, 6.6 to 6.11 and 6.20 to 6.30 above.

⁹ Ibid.

¹⁰ See paras 7.23 to 7.26 above.

someone in authority. Automatic destruction of records, however, is not favoured by the Commissioner of Police, on the ground that it is important that, before a record is destroyed, the police should have an opportunity to check their records, and perhaps check with other police forces.¹¹ The Commission agrees with the view of the Commissioner of Police that it should be necessary to make an application to have a record destroyed. The application should be supported by a statutory declaration stating that the convicted person has not since the conviction became spent been convicted of any offence, other than a trivial offence of the kind mentioned above,¹² and was not subject to any disqualification, disability, prohibition or other like penalty as a result of the conviction. Unless the Commissioner had reasonable grounds to believe that any of the facts and matters set out in the declaration were false, the Commissioner should cause the police criminal record of the conviction to be destroyed.¹³

10.10 In principle, destruction of the record would entail the removal of all information relating to the conviction from the computerized record, or the destruction of all information relating to the conviction contained in a manual file. If, however, it were thought sufficiently important to retain non-identifying information relating to the conviction for research purposes, the Commission's objectives would be achieved by the removal from the record of the name of the convicted person and any other identifying information.

2. TRANSITIONAL PROVISIONS

10.11 It is important that, if possible, the scheme recommended above should apply to convictions incurred before the legislation implementing the scheme comes into force, so that people who already have old convictions can benefit from it. Some convictions incurred in the past would have become spent automatically long before the date on which the legislation implementing the scheme comes into force, if that legislation had been in force at the date of the conviction.

¹¹ Letter from Commissioner of Police to Commission dated 27 September 1985.

¹² Para 10.8.

¹³ Draft Bill, cl 26.

10.12 The Commission therefore recommends that -

- (1) Where -
 - (a) a conviction was imposed before the date of commencement of the legislation implementing the spent conviction scheme, and
 - (b) had this legislation been in force on the date of the conviction and continued in force after that date, the conviction would have become spent automatically; and
 - (c) a period of not less than ten years has elapsed since the date on which the conviction would have become so spent -

the convicted person should have a right to apply to the Commissioner of Police for the police criminal record of that conviction to be destroyed.

- (2) The application should be supported by a statutory declaration stating that the convicted person has not since the conviction in question been convicted of another offence, other than a trivial offence of the kind mentioned above,¹⁴ and is not subject to any disqualification, disability, prohibition or other like penalty as a result of the conviction.
- (3) Unless the Commissioner of Police has reasonable grounds to believe that any of the facts and matters set out in the declaration are false, the Commissioner should cause the police criminal record of that conviction to be destroyed.¹⁵

10.13 This recommendation is confined to convictions which can become spent automatically. It does not seem possible to extend it to cases where the conviction could only have become spent on application. There is no knowing whether or not the application would have been granted, and if so, when.

¹⁴ Para 10.8.

¹⁵ Draft Bill, cl 27.

3. LIMITS

10.14 The above recommendations would apply only to the official police criminal record kept by the Criminal Records Section of the Scientific Branch at Police Headquarters in Perth. However, the Commission recommends that, once the official record of a conviction has been destroyed, the police should take all reasonable steps to destroy any ancillary or duplicate records of the conviction, for example any record that has been kept in a local police station.

Chapter 11

ORDERS WHICH DO NOT INVOLVE CONVICTION

1. CONVICTIONS UNDER THE *CHILD WELFARE ACT 1947-1985*

(a) The statutory provisions

11.1 The *Child Welfare Act 1947-1985* provides a comprehensive scheme of protection, broadly similar to the Commission's recommended spent conviction scheme, for persons convicted of an offence as a child in a Children's Court.¹ By section 40, once a period of two years has expired since the date of the conviction, or the discharge of any sentence or order imposed in relation to the conviction, whichever is the later, the conviction is, except in specified circumstances,² deemed not to be a conviction for any purpose, including the purposes of any enactment imposing or authorizing or requiring the imposition of any disqualification or disability on a convicted person.³ The same applies when a probation order is made with respect to a child, and the child is not subsequently dealt with for the offence under any law relating to probation orders in respect of child offenders.⁴ Where under section 40 a conviction is deemed not to have been made, evidence of the conviction is not admissible in court proceedings,⁵ and disclosure of the conviction by any person is an offence.⁶ Records of Children's Court convictions are kept both by the police and by the Department for Community Services.⁷

(b) Comment

11.2 The wording of section 40 has proved to be unsatisfactory. Professor E J Edwards in his report *The Treatment of Juvenile Offenders*, submitted in 1982, said that -

¹ See also paras 3.7 and 3.8 above.

² A conviction under the *Child Welfare Act* is regarded as a conviction in relation to -

(1) the making of the order, or any other order arising out of the conviction, or any other record thereof: s 40(2)(c);

(2) any subsequent proceedings that may be taken against the offender under the *Child Welfare Act* or on indictment in relation to that offence or for a subsequent offence: s 40(2)(d).

³ S 40(2)(b).

⁴ S 40(2)(a).

⁵ S 126A(1).

⁶ Ss 126A(2), 142.

⁷ See paras 2.9 to 2.14 above, Appendix III paras 4 to 33.

"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."⁸

11.3 The Commission's discussion paper produced some evidence to justify the concern expressed by Professor Edwards. One respondent, who had been convicted in a Children's Court some years previously, wanted to apply for a real estate agent's licence, but was uncertain whether he could answer "no" to a question whether he had a criminal record.

11.4 A more recent report⁹ again refers to the fact that the wording of section 40 has made it difficult to administer. For the purposes of discussion it puts forward a proposal that section 40 should be repealed and that other sections of the Act under which orders are made should make clear whether or not the order in question constitutes a conviction.

(c) Recommendations relating to the Child Welfare Act

11.5 It appears that the intention behind the *Child Welfare Act* provisions was to bring about an effect broadly similar to the effect of a conviction becoming spent under the Commission's recommended scheme. The *Child Welfare Act* and other legislation should be amended to make it clear that section 40 of the *Child Welfare Act* has this effect.

11.6 The Commission therefore recommends that -

(1) Section 40 of the *Child Welfare Act 1947-1985* should be amended so as to provide that -

(a) the effect of deeming a conviction not to be a conviction is that -

⁸ Pt 2, 71.

⁹ Department for Community Services, report on the Review of *Departmental Juvenile Justice Systems* (1986), 154.

- (i) references to "convictions" in statutory provisions should be read as excluding convictions deemed not to be convictions by section 40;
 - (ii) references to a person's good character, fitness, propriety, or other similar references in statutory provisions should not be interpreted as permitting or requiring account to be taken of such convictions;
 - (iii) questions about a convicted person should be treated as not referring to such convictions;
 - (iv) obligations to disclose matters relating to a convicted person should be treated as not referring to such convictions;
- (b) where a conviction is deemed not to be a conviction by section 40, and not less than ten years have elapsed without a subsequent conviction being incurred, other than a conviction for which either no penalty was imposed or the penalty imposed was a fine of not more than \$100 (or such greater sum as is prescribed),¹⁰ it should be possible to apply to the Director-General for Community Services for the Department's criminal record of the conviction to be destroyed.
- (2) The amendment to the *Equal Opportunity Act 1984-1985* recommended above,¹¹ whereby discrimination against a person on the basis of a spent conviction would be unlawful, should apply also to discrimination against a person in respect of a conviction which is deemed not to be a conviction by virtue of section 40 of the *Child Welfare Act*.

11.7 Appendices VII and VIII contain draft amendments designed to give effect to these recommendations.

¹⁰ See paras 7.23 to 7.26 above.

¹¹ Paras 9.2 to 9.8.

11.8 The provisions of the *Child Welfare Act* dealing with convictions which are deemed not to be convictions diverge from the proposed spent convictions scheme in two respects. Evidence of a conviction deemed not to be a conviction is not admissible in court proceedings,¹² whereas the Commission recommends that there should not be any equivalent limitation on the admissibility of evidence of spent convictions.¹³ Disclosure by any person of a conviction deemed not to be a conviction is an offence,¹⁴ whereas the Commission recommends that disclosure of a spent conviction should not be an offence except under existing provisions which are limited to the disclosure of information from particular official records.¹⁵

11.9 The Commission recommends that there should be no alteration to the provisions of the *Child Welfare Act* mentioned in the previous paragraph. The special circumstances attending convictions of children in Children's Courts may well require more comprehensive protection than is desirable in the case of convictions of adults.

(d) Recommendations as to the application of the spent conviction scheme

11.10 Since the *Child Welfare Act* already makes provision for convictions of children in Children's Courts to become spent, there is no need for the proposed spent conviction scheme to apply to such convictions. The period which must elapse before a child's conviction is deemed not to be a conviction is shorter than the period which must elapse before an adult's conviction will become spent, but such a distinction seems appropriate.¹⁶

11.11 Children's Courts have no jurisdiction to hear a complaint of wilful murder, murder, manslaughter, treason or attempts to commit any of these offences. In such cases, only committal proceedings are held in the Children's Court, and the trial takes place in the

¹² S 126A(1).

¹³ Paras 9.32 to 9.35.

¹⁴ Ss 126A(2), 142.

¹⁵ See paras 9.53 to 9.56 above.

¹⁶ The *Rehabilitation of Offenders Act 1974* (UK), which applies to convictions both of adults and of children, provides that the various "rehabilitation periods" which it prescribes are to be halved in the case of persons who at the date of conviction are under 17 years of age: s 5(2)(a). The *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) contains provisions similar in effect: s 5(1), definition of "rehabilitation period".

Supreme Court.¹⁷ In addition, a Children's Court may send a child to the Supreme Court or District Court for trial or sentence instead of hearing and determining the complaint itself.¹⁸

11.12 The conviction of a child by the Supreme Court or the District Court will be recorded in the police criminal record, and not in the record kept by the Department for Community Services.¹⁹ In other words, such a conviction is treated in the same way as a conviction of an adult.

11.13 In the Commission's view, for the purposes of the spent conviction scheme, the conviction of a child in such circumstances should likewise be treated in the same way as the conviction of an adult. The spent conviction scheme should apply, and there should be no special rules.

11.14 The Commission therefore recommends that -

- (1) The spent conviction scheme should not apply to convictions of children in Children's Courts;
- (2) Where children are convicted or sentenced in the Supreme Court or the District Court, the ordinary rules of the spent conviction scheme should apply.²⁰

2. PROBATION ORDERS UNDER THE OFFENDERS PROBATION AND PAROLE ACT 1963-1985

(a) The statutory provisions

11.15 Section 20 of the *Offenders Probation and Parole Act 1963-1985* provides that a conviction for an offence in respect of which a probation order is made under the Act shall, except in specified circumstances,²¹ be deemed not to be a conviction for any purpose,

¹⁷ *Child Welfare Act 1947-1985*, s 20(8). The District Court has no jurisdiction in such cases: *District Court of Western Australia Act 1969-1985*, s 42.

¹⁸ *Child Welfare Act 1947-1985*, s 20(4).

¹⁹ See para 2.9 above and Appendix III para 27.

²⁰ Draft Bill, cl 28.

²¹ By s 20(1), a probation order is not deemed to be a conviction in relation to -

- (i) the making of the order;
- (ii) the making of a community service order (which can be made in addition to a probation order: s 20B(9));

including the purposes of any enactment imposing or authorizing or requiring the imposition of any disqualification or disability on a convicted person.²² The provision is similar to that in the *Child Welfare Act* dealing with probation orders made against children.²³

(b) Comment

11.16 This provision is drafted in the same terms as the *Child Welfare Act* provision dealt with above²⁴ and therefore suffers from the same defects. It may mean that persons placed on probation for an offence could say that they have never been convicted or do not have a criminal record,²⁵ but the matter is not clear. Many people treat a probation order as equivalent to a conviction, although the statute deems it not to be a conviction. Probation orders are recorded in the police criminal record disclosed to courts in subsequent criminal proceedings against the person, but are not shown on the record supplied to third parties such as licensing bodies.

11.17 These problems were illustrated by a case brought to light as a result of the Commission's discussion paper. A person against whom a probation order had been made applied for a job and did not disclose the probation order because he thought that its effect was that he was deemed not to have a conviction. He obtained the position and when his employer found out about the order a week after he started work, he was dismissed.

11.18 The Probation and Parole Service, in a submission to the Commission, said that the provision had been a source of some concern.

"Although a conviction in respect of which a Probation Order is made is deemed not to be a conviction, the WA Police Department lists the event in a person's list of convictions.

(iii) any subsequent proceedings that may be taken against the offender under the provisions of the Act (as to which see paras 11.22 and 11.23 below);

(iv) any proceedings against the offender for a subsequent offence.

²² S 20(1).

²³ S 40(2)(a): see para 11.1 above.

²⁴ See paras 11.1 to 11.4 above.

²⁵ In *R v Kitt* [1977] Crim LR 220, it was held that the *Powers of Criminal Courts Act 1973* (UK), s 13, which deems absolute and conditional discharges and probation orders not to be convictions for any purpose, allowed a person who had been made the subject of a conditional discharge to state that she had not been convicted.

The attitude of some Government departments is to treat a person placed on probation as if that person has been convicted.

In some instances following representation by this Service some departments and Government instrumentalities have reinstated probationers. Persons on probation applying to join the Armed Forces are invariably told to re-apply after the expiry of the probation period.

While the spirit and intention of this Section of the Act appears to be to avoid any discrimination or disqualification in practice our experience is that a certain degree of disability is suffered by persons placed on probation."

(c) Recommendations relating to the Offenders Probation and Parole Act

11.19 Again, it is clear that the intention behind the provision was that a probation order should be given an effect broadly similar to a spent conviction under the Commission's recommended scheme. The *Offenders Probation and Parole Act* and other legislation should be amended to make it clear that section 20 has this effect.

11.20 The Commission therefore recommends that -

- (1) section 20 of the *Offenders Probation and Parole Act 1963-1985* should be amended so as to provide that -
 - (a) the effect of deeming a conviction not to be a conviction is that -
 - (i) references to "convictions" in statutory provisions should be read as excluding convictions deemed not to be convictions by section 20;
 - (ii) references to a person's good character, fitness, propriety, or other similar references in statutory provisions should not be interpreted as permitting or requiring account to be taken of such convictions;

- (iii) questions about a convicted person should be treated as not referring to such convictions;
 - (iv) obligations to disclose matters relating to a convicted person should be treated as not referring to such convictions;
- (b) where a conviction is deemed not to be a conviction by section 20, and not less than ten years have elapsed without a subsequent conviction being incurred, other than a conviction for which either no penalty is imposed or the penalty imposed is a fine of not more than \$100 (or such greater sum as is prescribed),²⁶ it should be possible to apply to the Commissioner of Police for the police criminal record of the conviction to be destroyed.
- (2) The amendment to the *Equal Opportunity Act 1984-1985* recommended above,²⁷ whereby discrimination against a person on the basis of a spent conviction would be unlawful, should apply also to discrimination against a person in respect of a conviction which is deemed not to be a conviction by virtue of section 20 of the *Offenders Probation and Parole Act*.

11.21 Appendices VII and IX contain draft amendments designed to give the effect of these recommendations.

(d) Recommendations as to the application of the spent conviction scheme

11.22 The provisions of section 20 of the *Offenders Probation and Parole Act* cease to apply to a conviction if the offender is subsequently dealt with for the offence in respect of which the probation order was made.²⁸ Although there is no need for the spent conviction scheme to apply to the probation order itself, in such circumstances the spent conviction scheme should apply to the subsequent order.

11.23 The Commission therefore recommends that the spent conviction scheme should not apply to a conviction in respect of which a probation order is made under the *Offenders*

²⁶ See paras 7.23 to 7.26 above.

²⁷ Paras 9.2 to 9.8.

²⁸ Section 20(2).

Probation and Parole Act unless the offender is subsequently dealt with for the offence in respect of which the probation order is made.²⁹

3. DISMISSALS UNDER SECTION 669(1)(a) OF THE CRIMINAL CODE

(a) The statutory provisions

11.24 Under section 669(1)(a) of the *Criminal Code*, where a person is charged with an offence not punishable with more than three years' imprisonment, if it appears that having regard to the youth, character or antecedents of the offender, the trivial nature of the offence, or any extenuating circumstances, it is inexpedient to inflict punishment, the court may, in the case of a first offender as defined by the section,³⁰ dismiss the charge without proceeding to conviction.³¹ A dismissal under section 669(1)(a) is recorded on the police criminal record even though the offender has not been convicted.³² This is obviously necessary so that on another occasion it can be ascertained whether or not a person is a first offender.

(b) Recommendations

11.25 A dismissal under section 669(1)(a), since it is not a conviction, is very similar to a probation order, which is deemed by the *Offenders Probation and Parole Act 1963-1985* not to be a conviction.³³ Unlike convictions of adult offenders, which only become spent after a specified period of time, and convictions of children in Children's Courts, which are only deemed not to be convictions after a specified period of time, probation orders and dismissals are regarded as not amounting to convictions from the beginning.

11.26 A dismissal should therefore have the same effect as a spent conviction. In particular -

- (1) discrimination against a person on the basis of a dismissal should be unlawful;

²⁹ Draft Bill cl 28.

³⁰ A person who has not previously been convicted of an offence otherwise than as a child by a Children's Court under the *Child Welfare Act 1947-1985*: s 669(1a).

³¹ Alternatively, under s 669(1)(b) a person can be convicted and discharged unconditionally or conditionally upon entering into a recognizance. This latter provision is not limited to first offenders as defined by s 669(1a), but includes certain other categories of offender: s 669(1b). The other provisions in s 669(1)(a) must be satisfied. In such a case the court convicts the offender, but does not impose a penalty.

³² See Appendix III para 6.

³³ See para 11.15 above.

- (2) references to convictions in statutory provisions should be read as excluding dismissals;
- (3) references to a person's good character, fitness, propriety or other similar references in statutory provisions should not be interpreted as permitting or requiring account to be taken of dismissals;
- (4) questions about a convicted person should be treated as not referring to dismissals, and obligations to disclose matters relating to a convicted person should be similarly treated;
- (5) where not less than ten years have elapsed since the dismissal without a subsequent conviction being incurred, other than a conviction for which either no penalty is imposed or the penalty imposed is a fine of not more than \$100 (or such greater sum as is prescribed),³⁴ it should be possible to apply to the Commissioner of Police for a record of the dismissal to be destroyed.

11.27 The Commission therefore recommends that -

- (1) The amendment to the *Equal Opportunity Act 1984-1985* recommended above,³⁵ whereby discrimination against a person on the basis of a spent conviction would be unlawful, should apply also to discrimination against a person on the basis of a dismissal under section 669(1)(a) of the *Criminal Code*;
- (2) For the purposes of the proposed spent conviction scheme, a dismissal under section 669(1)(a) of the *Criminal Code* should be treated in the same way as a conviction which has become spent.³⁶

³⁴ See paras 7.23 to 7.26 above.

³⁵ Paras 9.2 to 9.8.

³⁶ Draft Bill, cl 29.

Chapter 12

THE QUESTION OF EXCEPTIONS

1. THE COMMISSION'S RECOMMENDATION

12.1 The United Kingdom *Rehabilitation of Offenders Act 1974*, under which convictions may become spent in certain circumstances, has been referred to in this report on a number of occasions. One feature of this scheme is that, even after a conviction has become spent, there are a number of exceptional situations in which particular provisions of the scheme do not operate. Apart from certain exceptions set out in the Act itself,¹ the Home Secretary is given power to grant further exceptions under subordinate legislation.² The exceptions so granted are set out in the *Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975*.³

12.2 Most of the exceptions so granted exempt particular offices, employments or occupations from the operation of particular sections of the Act.⁴ Although a conviction has become spent, in these areas it is still possible for evidence of spent convictions to be given in court proceedings, or for questions about spent convictions to be asked, or for a spent conviction to be a ground for dismissing or excluding a person from a particular office, profession, occupation or employment. The basis on which exceptions were granted or refused is not entirely clear. It appears that each particular request was dealt with on its merits. Some general principles emerge for example, a number of exceptions appear to be concerned with safeguarding the administration of justice.⁵ Other exceptions appear to be designed to safeguard children or other specially vulnerable classes of people from particular types of offender. These latter exceptions take the form of exempting from the operation of the Act particular occupations and employments in which a person would come into contact with such classes.⁶ However, not all the exceptions can be justified on any such general basis.

¹ Eg, s 4(1), which provides that evidence of spent convictions is not admissible in court proceeding, and that questions about spent convictions may not be asked in court, does not apply to criminal proceeding: s 7(2)(a).

² S 4(4) (exemptions from provisions on effect of rehabilitation); s.7(4) (exemption of particular kinds of proceedings from Act); s.9(6) (exemption from offence provisions of disclosure of specified information from official records).

³ Referred to in this chapter as the Exceptions Order.

⁴ For details see Appendix V para 35, 39, 40 and 47.

⁵ Eg, exemptions in respect of judicial appointments, the Director of Public Prosecutions, prosecutors, justices' clerk, police officers, prison officers and probation officers.

⁶ Eg, teachers, proprietors of independent schools, employment by a local authority in connection with the provisions of social services, employment concerned with the provision of health services, employment by a youth club or similar body and employment within a cadet force concerned with naval military or air force training for persons under the age of 18.

The overall result is that the existence of these exceptions creates gaps in the protection of the Act. The fact that the exceptions appear in subordinate legislation, rather than in the Act itself, is another disadvantage, because reading the Act alone gives a false impression of the breadth of the scheme.⁷

12.3 The Commission's view is that it is undesirable to create exceptions to a spent conviction scheme in this way. Instead, it is much better to draw the boundaries of the scheme in a way that ensures that, in cases where it is felt that the scheme should not confer protection on convicted persons, the conviction will not become spent. One advantage of such an approach is that the scheme will be much simpler to understand and operate than the United Kingdom scheme.

12.4 The Commission endorses the following comments of the ALRC in its discussion paper:

"[T]he scheme must be readily accessible to and understandable by every police officer, every journalist, every personnel record-keeper, indeed, every Australian citizen and organisation. It must be simple, straightforward, and without exceptions, particularly hidden exceptions by which departments and organisations, after special pleading, might be able to have themselves excluded from the scheme. The scheme must be able to accommodate, for example, the legitimate fears of education authorities in relation to persons who have committed sexual offences against children, and of legal profession admission bodies about persons with previous convictions of offences of dishonesty."⁸

12.5 Under the scheme recommended by the Commission, the only convictions which will become spent automatically are minor convictions, that is, convictions for offences for which a sentence other than imprisonment, or a sentence for imprisonment for not more than one year, was imposed.⁹ These convictions will only become spent automatically if a period of ten years, or, in the case of persons sentenced to imprisonment, ten years plus a period equal to

⁷ The *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) is also subject to wide exceptions. Its provisions are subject to any provision of law or rule of practice that requires disclosure of a person's criminal history: s 4(1). In addition, particular professions, occupations and callings may be exempted by Order in Council: s 4(2). Most provisions of the Act exempt persons who are expressly required by law to make disclosure, or persons or authorities which are expressly required by law to have regard to a person's criminal history: ss.6(c), 9(1)(a) and (b), and the Parole Board: ss 6(c), 9(2). The police are exempt from the non-disclosure requirement: s 7(2), as also are reports judicial proceedings, and reports or disclosures made pursuant to any provision of law requiring disclosure of convictions that have become spent: s 7(1): Authority to disclose old convictions in particular cases can be granted by permit issued by the Minister for Justice and Attorney General: s 10

⁸ ALRC Discussion Paper, para 69.

⁹ See paras 6.2 and 6.6 to 6.11 above.

the length of the sentence imposed, has elapsed, and during this period the convicted person has not been again convicted of any offence, apart from an offence for which either no penalty is imposed or the penalty imposed is a fine of not more than \$100 (or such greater sum as is prescribed).¹⁰ In other words, the only convictions which can become automatically spent are those for less serious offences;¹¹ and such convictions would only become automatically spent after a substantial conviction-free period.

12.6 In the Commission's view the limitations which have been placed on the proposed scheme ensure that it fulfils the needs outlined above, and appropriately distinguishes between those convictions which remain relevant even after the passage of without further convictions and those which as a result of the passage of time can be disregarded. The Commission therefore sees no need for any exceptions to the proposed provisions whereby, under specified conditions, some convictions will become automatically spent.¹²

12.7 The contrast between this aspect of the Commission's recommended scheme and the United Kingdom Act should carefully noted. Under the United Kingdom Act, the range of convictions which can become spent automatically is much wider since it permits convictions in respect of which a sentence to 30 months' imprisonment is imposed to become automatically.¹³ Again, the period which must elapse before conviction becomes spent is much shorter, being only ten years from the date of conviction even for a conviction carrying a sentence of 30 months' imprisonment, and in cases where no sentence of imprisonment was imposed being as little as five years.¹⁴ Finally, a conviction may become spent even though during this period the convicted person commits another offence, providing it is not an indictable offence.¹⁵ This category permits a much wider range of offences to be committed without preventing an earlier conviction becoming spent than under Commission's

¹⁰ See paras 7.28 to 7.26 above.

¹¹ For examples of offences which will fall into this category, see para 6.18 above.

¹² The ALRC Discussion Paper, paras 39, 61-67, differs from the Commission's recommendations in confining the conviction which become automatically spent to convictions for which a non-custodial sentence is imposed. This means any conviction for which a sentence of imprisonment is imposed, however short, can only become spent on application. The Commission has already given reasons why, in its opinion, convictions carrying a short sentence of imprisonment should not be excluded from becoming spent automatically: see para 6.17 to 6.19 above. The Commission does not believe that allowing such convictions to become spent automatically makes the provision of any exceptions necessary.

¹³ *Rehabilitation of Offenders Act 1974* (UK), ss 1(1) and 5.

¹⁴ *Id*, s 5.

¹⁵ *Id*, s 6(6).

recommendations. To allow a scheme whereby convictions can become spent automatically to operate over a wide range no doubt makes it necessary to allow exceptions.¹⁶

The Commission prefers to draw the boundaries of the scheme more conservatively and so make exceptions unnecessary.¹⁷

12.8 In the scheme recommended by the Commission, the provision for minor convictions to become spent automatically is supplemented by provisions whereby major convictions can become spent on application to a judge of the District Court.¹⁸ In addition, minor convictions not resulting in a sentence of imprisonment (which can eventually become spent automatically) can be declared spent on application to a magistrate¹⁹ In these situations, the fact that the conviction is declared spent only after an appropriate inquiry by a judicial officer, who will have the benefit of a police report, makes it unnecessary to create any exceptions. In cases where, even after the passage of time, the conviction remains relevant for any reason, it will not be declared spent. The Commission has recommended that the following matters should be taken into account in making a decision as to whether a conviction should be declared spent -²⁰

- * the length and kind of sentence imposed in relation to the conviction;
- * the length of time since the date of the conviction;
- * whether the conviction prevents or may prevent the applicant from engaging in a particular profession, trade or business or in particular employment;
- * all the circumstances of the applicant, including the circumstances of the applicant at the time of the commission of the offence and at the time the application was made;

¹⁶ The points made in this paragraph also apply to the *Criminal (Rehabilitation of Offenders) Act 1986* (Qld), which in these respects has been modelled on the United Kingdom Act: see ss 3(1) and (2), 11(2).

¹⁷ In relation to the prevention of discrimination against convicted persons, the schemes proposed in the ALRC Discussion Paper and the NZ Discussion Paper go beyond discrimination on the basis of a spent conviction to include discrimination on the basis of any conviction. However, in each case it is necessary to qualify the suggested provision. The ALRC Discussion Paper, para 3. provides that such discrimination is unlawful only if it is not reasonable, having regard to the circumstances of the case. The NZ Discussion Paper, paras 5.3 and 5.4 suggests that the bar on discrimination would apply unless there is a direct relationship between the criminal record and a particular area of concern. The direct relationship test would cease to apply once the conviction became spent. For discussion of these recommendations, see paras 9.9 to 9.11 above. The Commission sees the need for such exceptions as a convincing argument that discrimination provisions should not extend beyond spent convictions.

¹⁸ See paras 6.2, 6.6 to 6.11 and 6.3. to 6.37 above.

¹⁹ See paras 6.2 and 6.31 to 6.37 above.

²⁰ See para 8.18 above.

- * the nature and seriousness of the offence;
- * the circumstances surrounding the commission of the offence;
- * whether the applicant has since the conviction been convicted of another offence and, if the applicant has been so convicted, the nature of the subsequent offence and the penalty imposed in relation to it;
- * whether there remains any public interest to be served in not making an order.

12.9 The United Kingdom Act does not have any provision whereby convictions can be declared spent on application. In contrast, the Canadian *Criminal Records Act 1970*, under which convictions can only become spent on application, does not incorporate any exceptions. Again, the United States sealing and expunction statutes, which in most cases require an application to be made to a court, do not generally incorporate exceptions.

12.10 The Commission therefore recommends that there should not be any provision in the proposed spent conviction scheme whereby its provisions, or some of them, do not operate in particular cases even though a conviction has become spent. This recommendation is based on the Commission's view that the scheme as recommended provides appropriate protection for the public.

2. DIFFERENCE KINDS OF EXCEPTIONS

12.11 The Commission emphasises that in its opinion exceptions are, in principle, undesirable and unnecessary. However, if the Government decides that there should be exceptions, in order to give expression to particular policy considerations, the Commission would advise that the formulation of these exceptions should not follow the United Kingdom example, which is unsatisfactory on several grounds.

12.12 First, exceptions should be set out in the statute itself, not in subordinate legislation. Omitting exceptions from the statute itself means that a person who consults only the statute gains a false impression of the scope of the scheme.²¹ It is most important that the scheme should be readily accessible and comprehensible.

²¹ Compare the HK Discussion Paper, where the exception. are nearly as wide as under the United Kingdom *Rehabilitation of Offenders Act*, but are set out in the draft bill itself: see Appendix V footnote 93.

12.13 Secondly, if the aim is to ensure that persons with convictions of particular kinds are not appointed to particular positions, it is undesirable to provide that the provisions of the Act should not apply at all in respect of these positions. For example, the United Kingdom Exceptions Order provides that a number of the provisions of the Act are not to apply in relation to employment as a teacher. The object of this exception may be to ensure that persons who have committed sexual offences against children are not appointed to teaching positions. The result, however, is that all would-be teachers have to disclose all their convictions for all offences of whatever kind, whether or not they have become spent, and a large exception is created in the protection provided by the Act.

12.14 An alternative might be to suggest a test of whether the conviction was directly related to a particular area of concern,²² or whether it was reasonable to take it into account in particular circumstances.²³ Though such tests might answer the problem presented in the previous paragraph, in that they would limit the ambit of a particular exception to convictions which are relevant for that purpose, they are nonetheless unsatisfactory, because they create uncertainty. For example, an important feature of the scheme recommended by the Commission is the right of convicted persons to treat questions as not relating to spent convictions. It would place a heavy burden on convicted persons to require them to make an accurate assessment of whether a spent conviction was "directly related" to a particular job for which they are applying, or whether it was "unreasonable, having regard to the circumstances" to disclose it.

12.15 If particular problems necessitate exceptions, the approach, in the Commission's view, would be to provide convictions for particular offences should be incapable becoming spent automatically, or at all. To refer again to example used in the previous two paragraphs, the legislation on spent convictions could provide that convictions for particular offences against children²⁴ should not be able to become spent automatically, or should not be able to become spent at all. The result would be that persons with such convictions would not the benefit of the spent conviction scheme, either in relation applying for jobs as teachers or for any other purpose. Although such a provision would not succeed in confining the disqualifying effect of such convictions to areas in which it was necessary, it would avoid the undesirable

²² As does the NZ Discussion Paper in relation to discrimination on the basis of non-spent convictions: see footnote 17 above.

²³ As does the ALRC Discussion Paper in relation to discrimination on the basis of convictions: *ibid.*

²⁴ For example, indecent treatment of children under fourteen: *Criminal Code* s 183, and indecent dealing with girls under sixteen: *id.*, s 189.

consequences of other possible techniques for creating exceptions. In one sense, such a provision would not be an exception at all, since the conviction would not become spent. In that sense it would be consistent with the Commission's basic philosophy as expressed in this chapter, namely that the proper way to deal with problems such as these is to draw the boundaries of the scheme in such a way as to exclude them from the scheme.

Chapter 13

SUMMARY OF RECOMMENDATIONS

1. WHEN A CONVICTION BECOMES SPENT

Major and minor convictions

- (I) For the purposes of the proposed spent conviction scheme -
- (a) a person would incur a major conviction if that person is convicted of an offence and the penalty imposed by the court is or includes a sentence of imprisonment for more than one year .
 - (b) a person would incur a minor conviction if that person is convicted of an offence and the penalty imposed by the court does not include any such sentence.

*Paragraphs 6.1. 6.12 to 6.19
Draft Bill. cl 4(1) and (4)*

Minor convictions to become spent automatically

- (2) Unless previously declared spent under the provision recommended in Recommendation 3 below, a minor conviction should become spent automatically at the end of the appropriate period, provided that the convicted person has not during this period been convicted of another offence.

*Paragraphs 6.2. 6.6 to 6.11
Draft Bill. cl 5(1)*

Some minor convictions to be declared spent early on application to a magistrate

- (3) A minor conviction in respect of which the penalty imposed does not include a sentence of imprisonment should become spent if, on application being made by the convicted person to a magistrate, the magistrate makes an order declaring that the conviction is spent. It should not be possible to make such an application unless at least five years have elapsed since the date of the conviction, and the convicted person has not during this period been convicted of another offence.

*Paragraphs 6.2. 6.31 to 6.37
Draft Bill. cl 7*

Major convictions to be declared spent on application to a District Court judge

- (4) A major conviction should become spent if, on application being made by the convicted person to a District Court judge, the judge makes an order declaring that the conviction is spent. It should not be possible to make such an application until after the expiry of the appropriate period.

*Paragraphs 6.2. 6.6 to 6.11. 6.34 to 6.37
Draft Bill. cl 8*

The spent conviction period

- (5) The appropriate period, for the purposes of recommendations 2 and 4 above, is -
- (a) in the case of a conviction the penalty for which does not include a sentence of imprisonment, ten years, reckoned from the date of the conviction;
- (b) in the case of a conviction the penalty for which is or includes a sentence of imprisonment, ten years plus the sentence of imprisonment imposed (irrespective of what portion of that sentence is actually served), reckoned from the date of the conviction.

*Paragraphs 6.3. 6.20 to 6.30
Draft Bill. cl 9(1) to (3)*

Transitional provisions

- (6) Where a conviction was imposed before the date of commencement of the legislation implementing the spent conviction scheme -
- (a) if the conviction is a minor conviction, it should become spent on whichever is the later of -
- (i) the date of commencement of the legislation,
- (ii) the date on which the conviction would have become spent if the legislation had been in force on the date when the conviction was imposed and had continued in force after that date.

- (b) An application, either to a District Court judge in respect of a major conviction, or to a magistrate in respect of a minor conviction where a sentence of imprisonment is not imposed, for an order declaring that the conviction is spent, should not be possible before whichever is the later of -
- (i) the date of commencement of the legislation;
 - (ii) the first date on which application could have been made if the legislation had been in force on the date when the conviction was imposed and had continued in force after that date.

*Paragraphs 6.38 to 6.40
Draft Bill. cl 11*

2. PARTICULAR PROBLEMS

Particular kinds of sentence

- (7) In cases where a person is convicted of an offence and sentenced to -
- (1) Life imprisonment or strict security life imprisonment;
 - (2) Imprisonment for an indeterminate period, including
 - (i) detention in strict custody until the Governor's pleasure is known and, thereafter, in safe custody in such place or places as the Governor may from time to time direct under section 19(6a)(a) of the *Criminal Code*,
 - (ii) detention during the Governor's pleasure in a prison under section 661 or section 662 of the *Criminal Code*,
- (a) such a conviction should be regarded as a major conviction;
- (b) the period which must elapse before an application may be made for the conviction to be declared spent should be ten years, reckoned from the date on which the convicted person is discharged from that sentence.

*Paragraphs 7.2 to 7.6
Draft Bill, cll 4(1) and (2), 9(4)*

- (8) Where, under section 19(5) of the *Criminal Code*, a person is sentenced to be imprisoned until a fine is paid, in addition to any other punishment to which the

person is sentenced, the sentence should be regarded as one not involving imprisonment unless a finite term of imprisonment is also imposed.

*Paragraphs 7.7 and 7.8, 7.1 1
Draft Bill. cl 10(1)*

- (9) Where, under section 19(6) of the *Criminal Code*, a person is sentenced to be imprisoned until a recognizance is entered into, instead of or in addition to any other punishment to which the person is liable, the sentence should be regarded as one not involving imprisonment unless a finite term of imprisonment is also imposed.

*Paragraphs 7.9 to 7.11
Draft Bill. cl 10(2)*

- (10) Where, under section 19(8) of the *Criminal Code*, a person is discharged upon entering into a recognizance, on condition that the person should appear and receive judgment at some future sittings of the court, or when called upon, for the purpose of determining the spent conviction period, the sentence imposed in relation to the offence, if a sentence is imposed on the person in subsequent proceedings, should be that sentence; otherwise, the sentence should be regarded as one not involving imprisonment.

*Paragraphs 7.12 and 7.13
Draft Bill. cl 10(3)*

- (11) (a) Where, in addition to any other sentence, a disqualification, disability, prohibition or other like penalty is imposed on the convicted person, it should not be taken into account in determining the spent conviction period;
- (b) Where the only sentence imposed is a disqualification, disability, prohibition or other like penalty, the sentence should be regarded as one not involving imprisonment.

*Paragraphs 7.14 to 7.16
Draft Bill. cl 9(6)*

The effect of a subsequent conviction on a conviction capable of becoming spent automatically

- (12) Where, during the spent conviction period applicable to a minor conviction -

- (a) the convicted person is convicted of an offence for which either no penalty is imposed or the penalty imposed is a fine of not more than \$100 (or such greater sum as is prescribed), this should have no effect on when the original conviction becomes spent automatically;
- (b) the convicted person incurs any other minor conviction, the original conviction should only become spent automatically if the conditions necessary for the subsequent conviction to become spent automatically have been satisfied;
- (c) the convicted person incurs a major conviction, it should no longer be possible for the original conviction to become spent automatically, but the original conviction (like the subsequent conviction) should only be capable of becoming spent on application to a District Court judge.

*Paragraphs 7.21 to 7.26
Draft Bill. cl 5*

(13) In the case of a minor conviction in respect of which the penalty imposed does not include a sentence of imprisonment, if, during the period of at least five years which must elapse before an application can be made to a magistrate to have the conviction declared spent -

- (a) the convicted person is convicted of an offence for which either no penalty is imposed or the penalty imposed is a fine of not more than \$100 (or such greater sum as is prescribed), this should have no effect on the convicted person's right to apply to have the conviction declared spent;
- (b) the convicted person incurs any other minor conviction, it should no longer be possible to make such an application.

*Paragraphs 7.27 and 7.28
Draft Bill. cl 7(3)*

The effect of a subsequent conviction on a conviction which can only become spent on application to a District Court judge

- (14) (a) It should be possible to make an application to have a major conviction (or a minor conviction which can no longer become spent automatically because of a subsequent major conviction) declared spent even though, during the period

which must elapse before such an application can be made, the convicted person incurs further convictions.

- (b) The further convictions should be a factor which the judge takes into account in deciding whether the original conviction should become spent.

*Paragraphs 7.29 to 7.31
Draft Bill. cl 8 and 17*

Concurrent and cumulative sentences of imprisonment

- (15) Where a person is convicted of two or more offences on the same date, and -

- (a) two or more sentences of imprisonment are ordered to be served concurrently, they should be regarded as a sentence of imprisonment equal to the length of the longest sentence;
- (b) two or more sentences of imprisonment are ordered to be served cumulatively, they should be regarded as a sentence of imprisonment equal to the total length of the sentences imposed.

*Paragraphs 7.34 to 7.36
Draft Bill. cl 4(3)*

- (16) Where a sentence of imprisonment is ordered to be served cumulatively upon a sentence of imprisonment imposed in respect of an earlier conviction, the period before the later conviction can become or may be declared spent should be the sum of -

- (a) the length of time which, on the date of the later conviction, has yet to elapse before the earlier conviction can become or may be declared spent;
- (b) the sentence of imprisonment imposed in respect of the later conviction.

*Paragraphs 7.37 to 7.40
Draft Bill. cl 9(5)*

Convictions incurred outside Western Australia

- (17) (a) It should be possible for any conviction incurred outside Western Australia to become spent in Western Australia, for the purposes of Western Australian law.
- (b) Any conviction incurred outside Western Australia, if incurred before an earlier conviction has become spent, should have the same effect on that conviction as if the later conviction had been incurred in Western Australia.

*Paragraphs 7.43 to 7.45
Draft Bill, cl 3, definition of
"offence", "State offence",
"Commonwealth offence",
"foreign offence"*

- (18) A sentence imposed by a court in another jurisdiction should be regarded as if it were a sentence of a kind most nearly corresponding to a sentence that may be imposed by a court in Western Australia.

*Paragraph 7.46
Draft Bill, cl 10(4)*

Should spent convictions revive?

- (19) A conviction should not be revived by a subsequent conviction after the earlier conviction has become spent.

Paragraphs 7.50 to 7.54

3 PROCEDURAL MATTERS

Convictions spent automatically - spent conviction certificate

- (20) (a) Where a conviction has become spent automatically, the convicted person should be able to apply to the Commissioner of Police for a spent conviction certificate. The application should list all convictions of the applicant, whether incurred in Western Australia or elsewhere. If the Commissioner of Police is satisfied that the conviction has become spent, a spent conviction certificate should be issued. The certificate should state that the Commissioner of Police,

having made appropriate inquiry, is satisfied that the conviction has become spent.

- (b) The making of a fraudulent statement in order to obtain a spent conviction certificate should be an offence.

*Paragraphs 8.1 to 8.4
Draft Bill. cl 6*

Applications for convictions to be declared spent

- (21) The procedural rules governing applications for convictions to be declared spent should be the same whether the application is one which must be made to a District Court judge or a stipendiary magistrate.

*Paragraphs 8.5 to 8.6
Draft Bill. cl 12*

The application

- (22) The application should be in writing, and should set out all previous convictions, whether in Western Australia or elsewhere. It should also give details of the employment history of the applicant since the date of the conviction in respect of which the application is being made, and of any other matters which are prescribed in regulations. The judge should have a power, exercisable by notice in writing, to require the applicant to give further information in relation to the application. It should be possible to make application in respect of more than one conviction.

*Paragraphs 8.7 to 8.9
Draft Bill. cl 13*

Parties to the application

- (23) The Commissioner of Police should be made a party to the application, and notice of the application should be served on the Commissioner. The Commissioner should be able to submit a written statement setting out reasons why the application should or should not be granted, or to appear at the hearing and make submissions either personally or through any person the Commissioner authorizes.

- (24) The Attorney General should be able to intervene in the application, and contest or argue any question in relation to the application. When the Attorney General intervenes, the Attorney General should be deemed to be a party to the application.

*Paragraphs 8.10 and 8.11
Draft Bill, cl 14*

The hearing

- (25) (a) The hearing should be in private, unless the applicant requests that the hearing should be in public, or the judge considers that, in the circumstances of the case, the hearing should be in public.
- (b) The judge should have power -
- (i) where the hearing is in private, to give directions, in writing or otherwise, as to who may be present;
 - (ii) where the hearing is in public, to order that no particulars likely to lead to the identification of the applicant are to be published. Failure to comply with such an order, except with lawful excuse, should be an offence.

*Paragraphs 8.12 to 8.14
Draft Bill, cl 15*

Alternatives to holding a hearing

- (26) The judge should have power -
- (a) if satisfied that an application is frivolous, vexatious, misconceived or lacking in substance, to dismiss the application without holding a hearing;
 - (b) if satisfied that it is appropriate to do so, to make an order declaring the conviction spent without holding a hearing.

*Paragraph 8.15
Draft Bill, cl 16*

When the judge may declare a conviction spent

- (27) (a) In the case of an application to a stipendiary magistrate for a minor conviction to be declared spent, the magistrate should make the order unless satisfied, having regard to the circumstances set out below, that it is inexpedient to do so.
- (b) In the case of an application to a District Court judge for a conviction to be declared spent –
- (i) if there are no subsequent convictions, other than convictions in respect of which either no penalty is imposed or the penalty imposed is a fine of not more than \$100 (or such greater sum as is prescribed), the judge should make the order unless satisfied, having regard to the circumstances set out below, that it is inexpedient to do so;
 - (ii) otherwise, the judge should not make the order unless satisfied, having regard to the circumstances set out below, that the order should be made.
- (c) The circumstances which should be taken into account are –
- (i) the length and kind of sentence imposed in relation to the conviction;
 - (ii) the length of time since the date of the conviction;
 - (iii) whether the conviction prevents or may prevent the applicant from engaging in a particular profession, trade or business or in a particular employment;
 - (iv) all the circumstances of the applicant, including the circumstances of the applicant at the time of the commission of the offence and at the time the application was made;
 - (v) the nature and seriousness of the offence;
 - (vi) the circumstances surrounding the commission of the offence;
 - (vii) whether the applicant has since the conviction been convicted of another offence and, if the applicant has been so convicted, the nature of the subsequent offence and the penalty imposed in relation to it;

- (viii) whether there remains any public interest to be served in not making an order.

*Paragraphs 8.16 to 8.18
Draft Bill. cl 17*

Costs

- (28) As a general rule, parties to the application should each pay their own costs. However, the judge should have power to award such costs as the judge thinks fit in any case where the judge dismisses the application without holding a hearing on the ground that it is frivolous, vexatious, misconceived or lacking in substance, or in any case where the judge is satisfied that there are circumstances which justify doing so.

*Paragraph 8.19
Draft Bill. cl 18*

Order to be sent to Commissioner of Police

- (29) Where the judge issues an order declaring the conviction spent, a copy of the order should, as soon as practicable, be sent to the Commissioner of Police, so that the fact that the conviction has been declared spent may be entered on the applicant's criminal record.

*Paragraph 8.20
Draft Bill. cl 19*

Appeals

- (30) An appeal against the decision of the judge should lie to a single judge of the Supreme Court, but only when the grounds of appeal involve a question of law.

*Paragraph 8.21
Draft Bill. cl 20*

Bar on subsequent applications

- (31) Where an application to have a conviction declared spent is dismissed, the applicant should be prohibited from making another application in relation to that conviction for a period of two years, running from the day on which the judge dismissed the previous application.

*Paragraph 8.22
Draft Bill. cl 21*

4. THE EFFECT OF A CONVICTION BECOMING SPENT

Discrimination

(32) The *Equal Opportunity Act 1984* should be amended by extending its provisions to deal with discrimination on the basis of a spent conviction in the following areas -

(a) Discrimination in work

Discrimination against applicants and employees

Discrimination against commission agents

Discrimination against contract workers

Discrimination by professional or trade organizations

Discrimination by qualifying bodies

Discrimination by employment agencies

(b) Discrimination in other areas

Education

Goods, services and facilities

Accommodation Clubs

Application forms

*Paragraphs 9.2 to 9.8
Draft Equal Opportunity Amendment Bill, cl 6*

(33) The discrimination provisions recommended in Recommendation 32 should be limited to spent convictions.

Paragraphs 9.9 to 9.11

References to convictions in written laws

(34) References in written laws of the State to a conviction of a person for an offence should not include references to a spent conviction, unless the contrary intention appears.

*Paragraphs 9.12 to 9.15
Draft Bill, cl 22(1)*

Amendment of the *Juries Act 1957-1984*

- (35) The *Juries Act 1957-1984* should be amended so as to provide that where a person is convicted and sentenced to imprisonment for a term exceeding two years, or for life, or for an indeterminate period, a person should be disqualified from jury service only until the conviction was declared spent.

Paragraph 9.16

Requirements as to character

- (36) References in written laws of the State to a person's good character, fitness, propriety or any other like references should not be interpreted as permitting or requiring account to be taken of spent convictions, unless the contrary intention appears.

*Paragraphs 9.17 to 9.20
Draft Bill. cl 22(2)*

Questions about convictions

- (37) Questions about a convicted person put to a person by or by authority of any other person or body should not be taken to relate to a spent conviction, unless a written law makes express provision to the contrary.

*Paragraphs 9.21 to 9.24
Draft Bill. cl 23(1)*

- (38) Government departments, statutory authorities and local government bodies should amend application forms and other questionnaires so as to ensure that questions about spent convictions are not asked, and that the content of questions is limited to the needs of the questioner.

Paragraphs 9.25 to 9.28

Obligations to disclose information about convictions

- (39) An obligation imposed on any person by any written law of the State, or by the principles and rules of common law or equity, or by the provisions of any agreement or arrangement, to disclose matters relating to a convicted person should not require the disclosure or acknowledgement of the spent conviction unless, in the case of an

obligation imposed by a written law, the written law makes express provision to the contrary.

*Paragraphs 9.29 to 9.31
Draft Bill. cl 23(2)*

Proceedings before courts and tribunals

- (40) The provisions of the spent conviction scheme relating to questions about, and obligations to disclose matters relating to, spent convictions should not apply to proceedings before courts and tribunals applying the laws of evidence.

*Paragraphs 9.32 to 9.35
Draft Bill. cl 24(1)*

- (41) The legislation implementing the spent conviction scheme should provide that a court or tribunal before which evidence of a spent conviction is admitted should take such steps as are reasonably available to it to avoid or minimise publication of that evidence.

*Paragraphs 9.36 to 9.38
Draft Bill. cl 24(2)*

Disclosure of spent convictions

- (42) The existing provisions in statutes and regulations act as a sufficient sanction against the disclosure of information about spent convictions from official criminal records, and therefore no new offence to provide a sanction against such disclosures should be created.

Paragraphs 9.42 to 9.46

- (43) It should be an offence to obtain information about a spent conviction from any official criminal record by means of any fraud, dishonesty or bribe.

*Paragraph 9.47
Draft Bill, cl 25*

- (44) It should be standard practice for all official record keepers to log access to records.

Paragraph 9.48

- (45) No limitation should be placed on the defence of truth in actions for defamation.

Paragraphs 9.50 to 9.52

- (46) There should not be any criminal sanction for disclosing information about spent convictions, apart from the existing provisions referred to in Recommendation 42.

Paragraphs 9.53 to 9.56

6. DESTRUCTION OF RECORDS

General recommendation

- (47) (a) Where a period of not less than ten years has elapsed since the date on which a conviction became spent, the convicted person should have a right to apply to the Commissioner of Police for the police criminal record of that conviction to be destroyed.
- (b) The application should be supported by a statutory declaration stating that -
- (i) the convicted person has not during the period since the conviction became spent been convicted of another offence, other than an offence for which either no penalty was imposed or the penalty imposed was a fine of not more than \$100 (or such greater sum as is prescribed);
 - (ii) the convicted person is not subject to any disqualification, disability, prohibition or other like penalty as a result of the conviction.
- (c) Unless the Commissioner of Police has reasonable grounds to believe that any of the facts and matters set out in the declaration are false, the Commissioner should cause the police criminal record of that conviction to be destroyed.

*Paragraphs 10.1 to 10.10
Draft Bill. cl 26*

Transitional provisions

- (48) (a) Where -
- (1) a conviction was imposed before the date of commencement of the legislation implementing the spent conviction scheme, and

- (2) had this legislation been in force on the date of the conviction and continued in force after that date, the conviction would have become spent automatically, and
- (3) a period or not less than ten years has elapsed since the date on which the conviction would have become so spent,

the convicted person should have a right to apply to the Commissioner of Police for the police criminal record of that conviction to be destroyed.

- (b) The application should be supported by a statutory declaration stating that -
 - (i) the convicted person has not since the conviction in question been convicted of another offence, other than an offence for which either no penalty was imposed or the penalty imposed was a fine of not more than \$100 (or such greater sum as is prescribed);
 - (ii) the convicted person is not subject to any disqualification, disability, prohibition or other like penalty as a result of the conviction.
- (c) Unless the Commissioner of Police has reasonable grounds to believe that any of the facts and matters set out in the declaration are false, the Commissioner should cause the police criminal record of that conviction to be destroyed.

*Paragraphs 10.11 to 10.13
Draft Bill, cl 27*

Limits

- (49) Recommendations 47 and 48 apply only to the official police criminal record as kept by the Criminal Records Section of the Scientific Branch at Police Headquarters in Perth. However, once the official record of a conviction has been destroyed, the police should take all reasonable steps to destroy any ancillary or duplicate records of the conviction.

Paragraph 10.14

7. ORDERS WHICH DO NOT INVOLVE CONVICTION

Convictions under the *Child Welfare Act 1947-1985*

- (50) Section 40 of the *Child Welfare Act 1947-1985* should be amended so as to provide that -
- (a) The effect of deeming a conviction not to be a conviction is that -
 - (i) references to "convictions" in statutory provisions should be read as excluding convictions deemed not to be convictions by section 40;
 - (ii) references to a person's good character, fitness, propriety, or other similar references in statutory provisions should not be interpreted as permitting or requiring account to be taken of such convictions;
 - (iii) questions about a convicted person should be treated as not referring to such convictions;
 - (iv) obligations to disclose matters relating to a convicted person should be treated as not referring to such convictions.
 - (b) Where a conviction is deemed not to be a conviction by section 40, and not less than ten years have elapsed without a subsequent conviction being incurred, other than a conviction for which either no penalty was imposed or the penalty imposed was a fine of not more than \$100 (or such greater sum as is prescribed), it should be possible to apply to the Director-General for Community Services for the Department's criminal record of the conviction to be destroyed.
- (51) The amendment to the *Equal Opportunity Act 1984-1985*, whereby discrimination against a person on the basis of a spent conviction would be unlawful, should apply also to discrimination against a person in respect of a conviction which is deemed not to be a conviction by virtue of section 40 of the *Child Welfare Act*.

*Paragraphs 11.1 to 11.7
Child Welfare Act draft
sections 40(2a) to (2c)
Draft Equal Opportunity
Amendment Bill. cl 5*

- (52) There should be no alteration to section 126A of the *Child Welfare Act*.
Paragraphs 11.8 and 11.9
- (53) The spent conviction scheme should not apply to convictions of children in Children's Courts.
- (54) Where children are convicted or sentenced in the Supreme Court or the District Court, the ordinary rules of the spent conviction scheme should apply.
Paragraphs 11.10 to 11.14
Draft Bill. cl 28

Probation orders under the *Offenders Probation and Parole Act 1963-1985*

- (55) Section 20 of the *Offenders Probation and Parole Act 1963-1985* should be amended so as to provide that -
- (a) the effect of deeming a conviction not to be a conviction is that -
 - (i) references to "convictions" in statutory provisions should be read as excluding convictions deemed not to be convictions by section 20;
 - (ii) references to a person's good character, fitness, propriety, or other similar references in statutory provisions should not be interpreted as permitting or requiring account to be taken of such convictions;
 - (iii) questions about a convicted person should be treated as not referring to such convictions;
 - (iv) obligations to disclose matters relating to a convicted person should be treated as not referring to such convictions.
 - (b) where a conviction is deemed not to be a conviction by section 20, and not less than ten years have elapsed without a subsequent conviction being incurred, other than a conviction for which either no penalty was imposed or the penalty imposed was a fine of not more than \$100 (or such greater sum as is prescribed), it should be possible to apply to the Commissioner of Police for the police criminal record of the conviction to be destroyed.
- (56) The amendment to the *Equal Opportunity Act 1984-1985*, whereby discrimination against a person on the basis of a spent conviction would be unlawful, should apply

also to discrimination against a person in respect of a conviction which is deemed not to be a conviction by virtue of section 20 of the *Offenders Probation and Parole Act*.

Paragraphs 11.15 to 11.21
Offenders Probation and Parole Act draft
sections 20(1a) to (1c)
Draft Equal Opportunity Amendment Bill. cl 5

- (57) The spent conviction scheme should not apply to a conviction in respect of which a probation order is made under the *Offenders Probation and Parole Act* unless the offender is subsequently dealt with for the offence in respect of which the probation order is made.

Paragraphs 11.22 and 11.23
Draft Bill. cl 28

Dismissals under section 669(1)(a) of the *Criminal Code*

- (58) The amendment to the *Equal Opportunity Act 1984-1985*, whereby discrimination against a person on the basis of a spent conviction would be unlawful, should apply also to discrimination against a person on the basis of a dismissal under section 669(1)(a) of the *Criminal Code*.

- (59) For the purposes of the proposed spent conviction scheme, a dismissal under section 669(1)(a) of the *Criminal Code* should be treated in the same way as a conviction which has become spent.

Paragraphs 11.24 to 11.27
Draft Equal Opportunity Amendment Bill. cl 5
Draft Bill, cl 29

8 EXCEPTIONS

- (60) There should not be any provision in the proposed spent conviction scheme whereby its provisions, or some of them, do not operate in particular cases, even though a conviction has become spent.

Paragraphs 12.1 to 12.10

J A THOMSON,
Chairman

R S FRENCH

P W JOHNSTON

C W OGILVIE

30 June 1986

Mr H H Jackson was a Commissioner until 20 April 1986. He approves the text of, and the recommendations made in, this report, which was substantially completed during his term of office.

Appendix I

PERSONS AND ORGANIZATIONS WHO HAVE ASSISTED THE COMMISSION¹

WESTERN AUSTRALIA

Australian Association of Social Workers (Western Australia)
Australian Bureau of Statistics (Western Australia)
Australian Society of Accountants
Barristers Board
Betting Control Board
Builders Registration Board
Central Law Courts (Magistrates' Courts Administration)
Civil Rehabilitation Council
Commissioner of Police
Committee on Discrimination in Employment and Occupation
Corporate Affairs Office
Council for Civil Liberties
Crown Law Department
Department for Community Services
Department of Foreign Affairs (Commonwealth)
Department of Immigration and Ethnic Affairs (Commonwealth)
Equal Opportunity Commission
Finance Brokers Supervisory Board
Fire Brigades Board
Hairdressers Registration Board
Institute of Chartered Accountants in Australia
Insurance Brokers Licensing Board
Insurance Council of Australia
Land Valuers Licensing Board
Licensing Court
Medical Board
Motor Vehicle Dealers Licensing Board
Nurses Board
Occupational Therapists Registration Board
Optometrists Registration Board
Police Scientific Branch
Police Traffic Branch
Primary Industry Association
Prisons Department
Probation and Parole Service
Psychologists Board
Public Service Board
Real Estate and Business Agents Supervisory Board

¹ Other than those who sought anonymity.

Rural and Industries Bank
Settlement Agents Supervisory Board
Taxi Control Board
Mr B G Tennant, Social and Law Reform Campaigner
United States Consul General, Western Australia

ELSEWHERE

Australian Law Reform Commission
Canadian Solicitor-General's Department
Canadian Law Reform Commission
Fiji Law Reform Commission
Mr G Greenleaf, Lecturer in Law, University of New South Wales
"Justice" (British Section of International Commission of Jurists),
United Kingdom
New South Wales Attorney-General's Department
New South Wales Privacy Committee
New Zealand Department of Justice
Northern Territory Attorney-General's Department
Ontario Human Rights Commission
Mr J Phillips, Senior Lecturer in Law, Melbourne University, Victoria
Mr I Potas, Australian Institute of Criminology, Canberra
South Australian Attorney-General's Department
Tasmanian Law Reform Commission
United Kingdom Home Office
Victorian Law Department

Appendix II

STATISTICS OF CRIME AND PUNISHMENT

1 July 1983 to 30 June 1984

In the tables which follow, the numbered columns indicate:

- (1) Supreme Court and District Court
- (2) Courts of Petty Sessions (except Perth and East Perth)
- (3) Courts of Petty Sessions (Perth and East Perth)¹
- (4) Children's Courts
- (5) Total

Table 1

OVERALL TOTALS

	(1)	(2)	(3)	(4)	(5)
Persons convicted	1,121	61,742	53,797	13,571	130,231
Total convictions	2,581	76,325	66,503	24,916	170,325
Punishments imposed in respect of most serious offences for which each person convicted	1,339	74,065	64,534	17,748	157,686
Total punishments imposed	2,959	92,177	80,316	32,598	208,050

NOTE: Between 1 July 1984 and 30 June 1985, in the Supreme Court and District Court, 1,286 persons incurred 3,369 convictions. 1,556 punishments were imposed in respect of the most serious offence for which each person was convicted. The total number of punishments imposed was 3,943.

¹ The actual figures for the Perth and East Perth Courts of Petty Sessions for the year 1 July 1983 to 30 June 1984 are not yet available. The figures for these courts given in these tables are estimates based on the actual figures for Courts of Petty Sessions other than Perth and East Perth, calculated on the basis that there were an estimated 70,000 complaints in the Perth and East Perth Courts, as opposed to 80,338 complaints in other Courts of Petty Sessions.

Table 2**PERSONS CONVICTED: MOST SERIOUS OFFENCE**

	(1)	(2)	(3)	(4)	(5)
Homicide (including driving causing death)	26	8	7	2	43
Other offences against the person	131	1,566	1,365	570	3,632
Sexual offences	96	13	11	184	304
Robbery and extortion	92	-	-	29	121
Breaking and entering	373	419	365	1,966	3,123
Fraud	52	403	351	168	974
Other theft	175	2,783	2,425	3,482	8,865
Property and environment offences	15	1,170	1,019	621	2,825
Offences against good order (including drunkenness)	51	20,669	18,009	2,625	41,354
Drug offences	109	1,465	1,277	417	3,268
Motor vehicle traffic offences	-	30,328	26,425	3,266	60,019
Other offences	1	2,918	2,543	241	5,703
TOTAL	1,121	61,742	53,797	13,571	130,231

Table 3**PERSONS CONVICTED: PUNISHMENTS IMPOSED IN RESPECT OF MOST SERIOUS OFFENCE**

	(1)	(2)	(3)	(4)	(5)
Persons Convicted	1,121	61,742	53,797	13,571	130,231
Death ²	1	-	-	-	1
Imprisonment/detention ³	667	3,347	2,916	312	7,242
Care and control	5	-	-	1,389	1,394
Community service order	153	429	374	1,621	2,577
Probation order	245	407	355	881	1,888
Supervision order	-	-	-	7	7
Bond	50	1,209	1,053	804	3,116
Loss or suspension of motor driver's licence	24	8,002	6,972	1,550	16,548
Fine	135	50,873	44,327	4,789	100,124
Restitution/compensation	11	2,206	1,922	1,393	5,532
Other	45	3,951	3,443	411	7,850
Dismissal	3	3,641	3,172	4,591	11,407
TOTAL	1,339	74,065	64,534	17,748	157,686

² The death sentence was abolished by the *Criminal Code Amendment Act 1984*.

³ Including sentences of detention during the Governor's pleasure: see *Criminal Code*, ss 661 and 662.

Table 4**PERSONS IMPRISONED: MOST SERIOUS OFFENCE BY DURATION OF
AGGREGATE MAXIMUM TERM**

	(1)	(2)	(3)	(4)	(5)
Not exceeding:					
1 month	2	2,053	1,789	64	3,908
3 months	4	771	672	78	1,525
6 months	63	386	336	27	812
1 year	81	108	94	51	334
2 years	186	25	22	44	277
3 years	112	4	3	33	152
4 years	87	-	-	4	91
5 years	38	-	-	3	41
10 years	76	-	-	-	76
Over 10 years	17	-	-	-	17
Not stated	1	-	-	8	9
TOTAL	667	3,347	2,916	312	7,242

Sources

Australian Bureau of Statistics (Western Australia), *Court Statistics: Higher Criminal Courts - Western Australia 1983-84* (1985), Tables 3 and 11

Id, *Court Statistics: Higher Criminal Courts - Western Australia 1984-85* (1986), Tables 3 and 11

Id, *Court Statistics: Courts of Petty Sessions (Excluding Perth and East Perth Courts) - Western Australia 1983-84* (1986), Tables 3 and 10

Id, *Court Statistics: Children's Courts 1983-84* (1985), Tables 3 and 10

In addition to the above published tables, the Australian Bureau of Statistics (Western Australia) supplied the Commission with other computerized analyses of the statistical data which were of considerable assistance in compiling the figures used in this Appendix. The figures incorporate some minor corrections to the published figures which were given to the Commission.

Appendix III

RECORDS OF CONVICTIONS

1. INTRODUCTION

1. Official records of convictions in courts in Western Australia are kept by a number of government departments and other official bodies. However, the only comprehensive record systems are -

(1) the Western Australia Police criminal record system;

(2) the Department for Community Services record system (for young offenders).

2. These are the authoritative records which are used when it is necessary to produce to a court the previous record of a person who has been convicted of an offence. The police record can also be made available to certain government departments or statutory agencies under particular legislative provisions.

3. Certain other government departments, such as the Prisons Department and the Probation and Parole Service, keep records of particular classes of convictions for their own administrative purposes. Courts in which offenders are convicted keep records of those convictions, again for administrative purposes. None of these records can be said to present a comprehensive picture of a person's criminal history in the same way as the police and Department for Community Services records.

2. POLICE CRIMINAL RECORDS

4. The Criminal Records Section, together with the Fingerprint Bureau, is housed in a separate secure section of Police Headquarters in Perth.

(a) Records held

5. The Criminal Records Section holds records of all convictions in Western Australia in respect of which the convicted person was arrested, whether the offence was a State or a

Commonwealth offence. Where a person is arrested, that person is fingerprinted. This provides conclusive proof of the person's identity. In the case of convictions where proceedings were initiated by summons, without an arrest, no fingerprints are taken. However, records of such convictions are also stored in the police criminal record system. If the convicted person can be positively identified as a person with an existing record, then the offence is added to that person's record. Otherwise, these convictions are held as separate records. It is only in the case of State offences that the police criminal record system holds records of convictions resulting from proceedings initiated by summons. Records of convictions for Commonwealth offences resulting from proceedings so commenced are not held.¹

6. The record gives the name, any aliases and the date of birth of the convicted person, together with the person's fingerprint classification. In respect of each offence, it states the court in which the conviction was recorded, the date, the offence or offences and the sentence or sentences imposed. If the convicted person is released on parole, it records the date of release, and the date on which parole will be completed. In other cases, however, there is no record of the length of imprisonment actually served, or whether a fine was paid, these not being matters relevant for police purposes. In addition to convictions, the record shows orders by a court made under section 669 of the *Criminal Code* without proceeding to conviction.² This procedure is available only in the case of first offenders and it is therefore necessary for these orders to be shown in the record. The record also shows cases in which a probation order was made, though such cases are deemed not to be convictions.³

7. The criminal record system is partly computerized and partly manual. Since 1983, new records have been stored on computer. The details are also stored on microfilm so that there is a means of access to the record if the computer is "down". Older records, together with fingerprints, are held in manual files.⁴ Where a person whose past record is held on a manual file is again arrested and the file becomes active once more, the record is transferred

¹ The Australian Federal Police hold records of convictions for offences against Commonwealth laws, both where the convicted person was arrested and where proceedings were initiated by summons. These records are not produced in court.

² See para 11.24 above.

³ See paras 11.1 and 11.15 above.

⁴ These are being progressively converted to microfiche.

to the computer and the manual file is microfilmed and then destroyed. There are approximately 57,000 records stored on computer⁵ and 255,000 manual records.

(b) Removal of records from the system

8. Apart from a case where a person whose record is held on a manual file is again arrested, manual files are only destroyed in cases where the persons concerned are over 80 years of age. Before being destroyed, these files are microfilmed.

9. Where a person who has been arrested and fingerprinted is acquitted, that person may request that the record and fingerprints be destroyed.⁶ This is done in the person's presence by putting the record and fingerprints through a shredder, or, if there is also any history of convictions, by altering the record to delete references to the offence of which the person has been acquitted. In the absence of such a request, the police retain the record and fingerprints.

(c) Access by police personnel

10. Though the computerized record system is maintained on the same electronic data processing system as the traffic and motor driver's licence systems which the police also operate, each system is separate, with separate and exclusive access.

11. When an offender's record is required, the offender is identified by a fingerprint. The fingerprint system allows aliases, changes of name and so on to be noted and duplication of files avoided.

12. If a police officer wishes to obtain information about a person's criminal record a request must be made to the record section either personally or by telephone and the officer must give his or her service number. The service number enables the records staff to check that the officer concerned is still a member of the force. In the case of a request by telephone, the records section telephones the police station concerned to check that the request has been made by a police officer from a police station.⁷ Applications for access are not logged.

⁵ Western Australia Police Department Annual Report 1985, 39.

⁶ *Police Act 1892-1985*, s 50AA(2).

⁷ Between 1 July 1984 and 30 June 1985, 683,979 name searches of the computerized records were carried out: Western Australia Police Department Annual Report 1985, 39.

13. Access to records stored on the computer can be obtained only from terminals in the Criminal Records Section. If access is sought from another terminal the information cannot be obtained and the computer alerts the operators that unauthorized access has been sought. An inquiry is then held into the circumstances in which the attempt at access was made.

14. Investigators with State and federal departments do not have access to police criminal records except with the consent of the subject or with legislative authority.⁸ However, police may exercise access on behalf of other departments.

(d) Disclosure of the record to third parties

15. The major instance of disclosure of the police record is when the convicted person's record is required by a court in subsequent criminal proceedings against that person. In this case the full record is disclosed to the court, including dismissals under section 669 of the *Criminal Code* and details of probation orders. Other dismissals and findings of not guilty are not disclosed to the courts.

16. In addition, the record is disclosed when this is required under legislation, for example, for the purpose of preparation of jury lists⁹ or the licensing of occupations such as security agents¹⁰ and motor vehicle dealers.¹¹ In such cases, details of proceedings resulting in orders under section 669 and probation orders are removed from the record. The Crown Law Department is notified of breaches of bond, and the Probation and Parole Service is notified of breaches of parole.

17. Apart from such cases, disclosure of the record can take place only with the consent of the convicted person.¹² A person may also apply for a police clearance certificate. This shows whether or not any convictions have been recorded and, if so, what offences were

⁸ Eg. *Credit (Administration) Act 1984-1985*, s 10; *Income Tax Assessment Act 1936-1985* (Cth), s 264.

⁹ *Juries Act 1957-1984*, s 17.

¹⁰ *Security Agents Act 1976-1985*, s 13(3).

¹¹ *Motor Vehicle Dealers Act 1973-1985*, s 13(3).

¹² For example, although the *Taxi-Car Control Act 1985* contains no requirement authorizing the Taxi Control Board to obtain a copy of the criminal record of an applicant for a taxi driver's licence, as a matter of practice such persons are asked to consent to the Board obtaining a copy of the record from the police. Under the *Casino Control Act 1984-1985*, s 21(1), when an application is being made for a casino gaming licence, the Casino Control Committee may require the consent in writing of any person associated with the applicant to the disclosure of background information, such as criminal records.

committed. It does not show dismissals under section 669, convictions in Children's Courts for offences committed as a child or offences for which a probation order was made.

(e) Sanctions for improper disclosure

18. Police Orders contain instructions to the effect that information about conviction records is not to be disclosed. If records are improperly disclosed, disciplinary procedures are available. Police Regulations provide that:

"A member or cadet shall not -

- (a) give any person any information relating to the Force or other information that has been furnished to him or obtained by him in the course of his duty as a member or cadet; or
- (b) disclose the contents of any official papers or documents that have been supplied to him in the course of his duty as a member or cadet or otherwise,

except in the course of his duty as a member or cadet."¹³

19. Failure to comply with regulations is an offence against the discipline of the Police Force,¹⁴ and may result in a caution or the imposition of any of a number of penalties, including a reprimand, a fine not exceeding \$200, reduction in rank or salary, suspension or dismissal.¹⁵

(f) Interstate and international co-operation

20. Information on convictions for serious offences, such as many thefts and robberies and all drug convictions, is sent to the Criminal Records Bureau in New South Wales. All Australian police forces have access to this record. The Western Australia Police also receive information about convictions for serious offences from other police forces in Australia and this is recorded on the Western Australia Police criminal record. Information is also sent to

¹³ Police Regulations 1979-1986, para 607.

¹⁴ Id, para 1601.

¹⁵ *Police Act 1892-1985*, s 23(4).

Interpol, when it is sought for the purposes of a criminal investigation. Negotiations are now under way for the setting up of a national police Central Names Index System, including a national fingerprint system. Both will be computerized. When this happens, police in all States and Territories will be able to search the central names index, and records of convictions held in another State or Territory will be supplied on request.

21. The Australian Federal Police have access to the Western Australia Police criminal record in the same manner as officers of the Western Australia Police.

3. OTHER POLICE RECORDS

(a) Traffic Convictions

22. The records kept by the Traffic Branch of the Western Australia Police are separate from the records kept by the Criminal Records Section. The traffic records system is in the process of being computerized. It contains records of all convictions for offences under the *Road Traffic Act 1974-1985*¹⁶ and regulations. In the case of less serious offences, the record is retained for seven years before being destroyed. Records of convictions for more serious offences, including cases in which a driving licence was suspended for a long period, or for life, unauthorized use of a motor vehicle, and all alcohol-related offences, are kept for 20 years, or until a life disqualification is lifted. In either category the record is destroyed after it has been held for the required period whether or not subsequent convictions have been recorded.

23. There is obviously some overlap with the police criminal record system, in that in many instances the record of a traffic conviction will be kept in both record systems. Where a person is convicted of a traffic offence, both records will be made available to the court for the purpose of passing sentence. It is likely, however, that there will be some differences between the two records. It may be that some very minor traffic offences will not appear on the police criminal record. The chief concern of the police criminal record system is to keep records of convictions where the accused was arrested and fingerprinted, whereas in the vast majority of traffic matters proceedings will be initiated by summons. This consideration apart, however, the police criminal record will be comprehensive, whereas the traffic record

¹⁶ Or its predecessor, the *Traffic Act 1919-1974*.

will not, since convictions are removed from the traffic record after a given number of years, but are not expunged from the criminal record except in the circumstances set out above.¹⁷

24. The Traffic Branch makes available copies of its record to the subject of the record, or to other persons or bodies with the subject's consent. In addition, it supplies the record to various government departments, both State and federal.

(b) Traffic infringements

25. Records of traffic infringements, that is, cases where the matter is dealt with under the infringement notice procedure set out in the *Road Traffic Act* and no court proceedings result,¹⁸ are dealt with by another section within the Traffic Branch, but are stored separately from records of traffic convictions. The record remains on computer for four years, and is then stored manually. Such infringements are not in law regarded as convictions. However, if a person accumulates twelve or more demerit points, this results in the person's motor driver's licence being suspended, and this is recorded on the person's record of traffic convictions. This record is kept for seven years.

4. DEPARTMENT FOR COMMUNITY SERVICES RECORDS

26. The Records Section of the Department for Community Services is housed in the Department's head office in Perth.

(a) Records held

27. The Records Section keeps records of all convictions recorded by Children's Courts in Western Australia against young offenders.¹⁹ These are compiled from Children's Courts records forwarded by the court concerned to the Department for Community Services. The record is stored on computer, as opposed to the records of the individual Children's Courts which are kept manually. The record specifies the court in which the conviction was

¹⁷ Appendix III paras 8 and 9.

¹⁸ See *Road Traffic Act 1974-1985*, s 102, and the Commission's discussion paper on *Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55 Part II, 1984), paras 4.23 to 4.32.

¹⁹ In cases where an adult appears before a Children's Court, for example in a case where an adult is charged with incest, the record is kept in the police criminal record system but not by the Department for Community Services.

recorded, the date of the hearing and the penalty imposed. All orders made are recorded, even though in some cases the court will not proceed to conviction although the child is found guilty of an offence.²⁰ The system contains the records of approximately 30,000 children.

28. In contrast to the police records system, no fingerprint records are kept. The subject of the record is identified by various personal details which are entered - full name, address, date of birth, and parents' names. When it is sought to ascertain whether a person convicted of an offence has a previous record, it is this information which is used for identification purposes.

29. In some cases, for example where the person concerned is placed on probation, a manual file is created in addition to the entry of the information on the computer record. When a person reaches the age of 18 and is therefore no longer classified as a young offender, identifying information is sometimes removed from the computer record. However, in such cases the information will still be ascertainable by consulting the manual file. The manual files are not destroyed.

(b) Access by Department for Community Services personnel

30. Officers of the Department for Community Services have access to the record, but must first confirm their identity by entering a password on the computer. The password may limit the information to which particular officers or their sections are allowed access. All accesses are logged.

(c) Disclosure of the record

31. When a person is to be brought before a Children's Court, steps are taken by that court to ascertain whether the person has a previous record. In the metropolitan area, the computerized record is produced to the court. In country areas, where computer terminals are not available, a microfiche system is used. Records are updated fortnightly and sent on microfiche to country offices. When a record is required, a copy of the microfiche record is taken and produced in court.

²⁰ For example, in making a probation order, a community service order or when dismissing a complaint under the *Child Welfare Act 1947-1985*, s 26(2).

32. Unlike the police criminal record system, there are no situations in which the Department for Community Services record will be made available to other bodies such as licensing boards.

(d) Sanctions for improper disclosure

33. Improper disclosure of information from the record would result in disciplinary action being taken against the officer concerned. According to administrative instructions made under the *Public Service Act 1978-1984*,²¹ officers shall not, except in the course of their official duty and with the express permission of the head of their department or sub-department, give to any person information furnished to or obtained by them in the course of their official duty, or disclose the contents of official papers or documents supplied to or seen by them in the course of their official duty. Under section 44 of the Act, officers of the Public Service who disobey a lawful order, commit any breach of the provisions of the Act, commit any act of misconduct or are negligent or careless in the discharge of their duties, are liable to a variety of penalties including a reprimand, a fine and dismissal. In addition, the *Criminal Code* makes the disclosure of official secrets a criminal offence. Persons employed in the Public Service who publish or communicate any fact which comes to their knowledge by virtue of their office and which it is their duty to keep secret, or any document which comes to their possession by virtue of their office and which it is their duty to keep secret, except to some person to whom they are bound to publish or communicate it, are guilty of a misdemeanour, and liable to imprisonment for two years.²²

(e) Interstate and international co-operation

34. There is no system whereby the Department for Community Services exchanges information about the records of young offenders with similar bodies in other jurisdictions. It would be possible to ascertain whether a particular individual had convictions in Children's Courts in other jurisdictions by making inquiries of the equivalent of the Department for Community Services in the jurisdiction concerned.

²¹ Public Service Board Administrative Instruction 711, made under s 19 of the Act.

²² *Criminal Code*, s 81.

5. RECORDS OF OTHER GOVERNMENT DEPARTMENTS

(a) Prisons Department

35. The Prisons Department keeps records of all convicted persons who serve sentences of imprisonment, however short.²³ The records show when prisoners were received, the length of their sentence, and when they were released. All sentences of imprisonment passed on a convicted person are kept on the same record. Records are not destroyed.²⁴ The record system is in three sections. The original documents are kept on paper files. These are also kept on microfiche. The computerized record contains some, but not all, of the information contained in the original file.

36. The records are kept for the purposes of the Prisons Department. Access to records by a third party can only be authorized by the Director. Access has sometimes been permitted for research purposes. Information is sometimes released to other government departments, such as the Police Department, the Department for Community Services and the Commonwealth Department of Immigration, or to foreign embassies. Unauthorized disclosure of information contained in the records would be a breach of section 44 of the *Public Service Act*,²⁵ or if committed by a prison officer, would be a breach of the similar provisions of section 98 of the *Prisons Act 1981-1985*.

(b) Probation and Parole Service

37. The Probation and Parole Service keeps manual records of convictions in all cases in which it becomes involved, that is, cases where -

- (i) the convicted person is put on probation;
- (ii) a community service order is imposed;
- (iii) the court requests a report on the convicted person;

²³ The records cover all sentences of imprisonment, whether served in prison or in police lock-ups. They also include details of all persons detained in prison pending trial, but not of those so detained in police lock-ups.

²⁴ They are kept even after the death of the prisoner concerned, for research purposes.

²⁵ See Appendix III para 33 above.

- (iv) the convicted person receives a sentence of imprisonment which makes the person eligible to be considered for release on parole.²⁶

38. In the first three of the above cases, the office would receive notification from the court concerned. In the fourth case, the notice would come from the Prisons Department.

39. Current files are stored alphabetically, and non-current files are stored chronologically according to the date on which the case originated. However, these files are indexed so that a particular person's file may be discovered. Some non-current files are stored on microfilm. Once a microfilm is made, the paper file is destroyed. The information is not released to third parties: according to section 51 of the *Offenders Probation and Parole Act 1963-1985*, members of the Parole Board, parole officers, probation officers and other officers shall not produce documents or disclose information coming under their notice in the performance of their duties, either to any court or to any person, except for the purposes of the Act, or where ordered to do so by a court or judge, or in cases approved by the Attorney General from time to time.

6. COURT RECORDS

(a) Supreme Court and District Court

40. The Supreme Court and the District Court each keep manual records of all criminal proceedings taking place in the court. The records specify the date of the proceedings, the offence with which the accused is charged, the result of the proceedings and, where a conviction is entered, the sentence.²⁷ In addition, the court keeps files relating to each case, containing the charge sheet, depositions and other papers. These records are kept indefinitely.

41. In all criminal cases dealt with by the Supreme and District Courts, copies of the indictments are kept by the Prosecutions Section of the Crown Law Department. The file gives details of all appearances and appeals, and of the result of the proceeding. The filing

²⁶ As to which, see para 2.6 above.

²⁷ This is the official record of the conviction, and a certified copy can be used to prove the conviction in other proceedings, eg before the Criminal Injuries Compensation Assessor. Access to this record is not permitted except by authority of the Principal Registrar of the Supreme Court or the Registrar of the District Court.

system is manual. Each indictment is regarded as a separate file, and the indictments are kept numerically. An indexing system makes it possible to extract all proceedings involving a given individual.

42. The Crown Law Department furnishes information from the records to the Commissioner of Police, and in appropriate cases to the Prisons Department or the Probation and Parole Service. In certain cases, information would be made available to the public on inquiry - for example, information as to the result of a case heard on the day the inquiry was made.

(b) Courts of Petty Sessions

43. Each Court of Petty Sessions keeps records of the cases it deals with. The Perth Court of Petty Sessions is a convenient example. It keeps records of all proceedings both manually and (since 1982) on computer. The manual record consists of the complaint and other documents relating to the case, and is stored chronologically by the number of the complaint. The computer system gives the complaint number, information as to the complaint, and the result of the case. After about two years, the record is removed from the live section of the computer file and stored in a historical file. The manual records are kept for 53 years. They are eventually microfilmed.

44. These records are kept for the court's own purposes. For example, they allow court staff to check on whether fines have been paid. Access to the computer system is by means of a key, and staff are only allowed access to that part of the system which is relevant to their work. Other Courts of Petty Sessions can, on inquiry, obtain information from the records - each court's records deal only with convictions in that court.

Appendix IV

THE CONSEQUENCES OF CONVICTION¹

1. Incurring a criminal conviction can result in the convicted person becoming subject to disabilities, or encountering difficulties, in a number of areas.

1. EMPLOYMENT

(a) The law and practice

(i) *The professions*

2. In the case of admission to the professions, the legislation which regulates such admission generally provides that the applicant must be a person of good character. A legal practitioner, for example, must be a person of good fame and character, and a fit and proper person to be admitted to the profession.² Dentists, chiropractors and optometrists must be persons of good character.³ Medical practitioners and veterinary surgeons must be persons of good fame and character,⁴ and psychologists must be persons of good character and reputation.⁵ Entry to the accountancy profession is not controlled by statute, but both the Australian Society of Accountants and the Institute of Chartered Accountants in effect require applicants to be of good character. Most professions ask applicants for admission to disclose on the application form whether they have any previous convictions.⁶

3. The fact that an applicant for admission to one of these professions has a criminal record does not necessarily mean that the applicant will be unable to satisfy the good character requirement, but it is relevant as evidence to the admitting body to assist it in making a proper determination. A record which includes a conviction for a serious offence, especially one involving fraud or dishonesty, is likely to disqualify a person from admission.

¹ See generally F Rinaldi, *Civil Consequences of Conviction in Australia*, in D Chappell and P Wilson, *the Australian Criminal Justice System*, (2nd ed 1977), 355; ALRC Discussion Paper, Appendix C.

² *Legal Practitioners Act 1893-1984*, s 20.

³ *Dental Act 1939-1984*, s 44; *Chiropractors Act 1964-1985*, s 20; *Optometrists Act 1940-1978*, s 34.

⁴ *Medical Act 1894-1985*, s 11; *Veterinary Surgeons Act 1960-1984*, s 20.

⁵ *Psychologists Registration Act 1976*, s 24.

⁶ All the professions mentioned in this paragraph have such a requirement except the legal profession and one of the accountancy bodies (The Australian Society of Accountants). In the case of dentists, the question is limited to offences in connection with professional misconduct.

(ii) Licensing requirements

4. A number of trades and other occupations are regulated by statute. These statutes generally provide that persons who wish to pursue such trades or occupations must obtain a licence from the appropriate licensing body. A licence will not be granted unless that body considers the applicant to be a person of good character and repute and a fit and proper person to hold a licence. For example, requirements of this kind apply in respect of licences to act as a credit provider,⁷ debt collector,⁸ auctioneer,⁹ builder,¹⁰ employment agent,¹¹ estate agent,¹² finance broker,¹³ dental prosthetist,¹⁴ optical dispenser,¹⁵ motor vehicle dealer,¹⁶ or hairdresser.¹⁷ As with the professions dealt with above,¹⁸ the fact that the applicant for a licence has previous convictions does not necessarily mean that the applicant will not be considered a fit and proper person to hold a licence. Much depends on the number of convictions and the nature and seriousness of the offences involved.¹⁹

(iii) Other employment

5. In cases outside the categories dealt with above, there are generally no statutory restrictions on the pursuit of particular occupations. Though legislation may govern particular spheres of employment - for example, the Public Service is regulated by the *Public Service Act 1978-1984* - such legislation does not generally provide any statutory requirement as to the past history of potential employees. Other occupations are unregulated by statute. In these cases, however, applicants for employment may be asked to disclose past convictions

⁷ *Credit (Administration) Act 1984-1985*, s 12.

⁸ *Debt Collectors Licensing Act 1964-1985*, s 9.

⁹ *Auction Sales Act 1973-1985*, s 8.

¹⁰ *Builders Registration Act 1939-1984*, s 10.

¹¹ *Employment Agents Act 1976-1985*, s 22.

¹² *Real Estate and Business Agents Act 1978-1985*, s 27.

¹³ *Finance Brokers Control Act 1975-1982*, s 27.

¹⁴ *Dental Prosthetists Act 1985*, s 18.

¹⁵ *Optical Dispensers Act 1966-1984*, s 5.

¹⁶ *Motor Vehicle Dealers Act 1973-1985*, s 15 (motor vehicle dealer), s 16 (yard manager), s 17 (salesman), s 17A (car market operator).

¹⁷ *Hairdressers Registration Act 1946-1975*, s 12.

¹⁸ Appendix IV paras 2 and 3.

¹⁹ 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 a review has been expressly excluded) or an application for a declaration, or in appropriate cases to lodge a complaint with the Parliamentary Commissioner for Administrative Investigations under the *Parliamentary Commissioner Act 1971-1985*, ss 13 and 14.

and this information may be relevant in deciding whether to offer them employment. The application form for a vacancy in the Public Service, for example, asks applicants whether they have ever been convicted of any offence in any court.

6. There are a few statutory provisions which disqualify convicted persons from pursuing particular employments or occupations even though no professional admission or licence is required to pursue them. For example, the *Companies (Western Australia) Code* prevents persons with certain convictions from being a director or promoter of, or being in any way concerned or taking part in the management of, a corporation.²⁰ Other examples appear in Commonwealth legislation. For instance, the *Defence Act 1903-1985*²¹ provides that persons shall not be permitted to serve in the Defence Forces if they have been convicted of a crime which, in the opinion of the Naval Board, the Military Board or the Air Board, is such as to render them unsuitable for service in the Defence Forces.

7. Persons who believe that they have been discriminated against in employment because of a criminal record may lay a complaint with the Committee on Discrimination in Employment and Occupation.²² The cases with which the Committee can deal include 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. It has no other powers. The Committee in Western Australia has not received many complaints of discrimination on the basis of a criminal record,²³ but the Commission understands that recently there has been an increase in the number of complaints.

8. Apart from this there is no general legislation in Western Australia which prevents employers discriminating against persons with a criminal record. The Equal Opportunity Commissioner has wide-ranging powers to deal with discrimination under the *Equal*

²⁰ Ss 222(1)(d) and 227(2): see paras 3.12 and 3.13 above.

²¹ S 123F(1)(a).

²² The Committee was established in 1973 by the Commonwealth Government to assist in fulfilling its obligations under International Labour Organization Convention 111 - Discrimination (Employment and Occupation) 1958. Under the Commonwealth Human Rights and Equal Opportunity Commission Bill, introduced into the Commonwealth Parliament in October 1985, the State Equal Opportunity Commissioner, acting as agent for the Commonwealth Human Rights Commission, would take over the function of the Committee.

²³ Before 1984, only one complaint had been received in a period of five years.

Opportunity Act 1984-1985, but the Act does not at present cover discrimination on the basis of a criminal record.²⁴

9. Persons who already have a job may be dismissed or forced to resign if an old conviction comes to light. Where persons are dismissed without appropriate notice because of a criminal record, they may be able to maintain a common law action for wrongful dismissal. However, they will only be able to recover a sum equal to the wages they would have received if given the appropriate period of notice. Since they must attempt to minimise their loss, the amount of damages may be reduced if it is shown that alternative employment is readily available.²⁵

10. The question of unfair dismissal may also be raised by referring the matter to the Industrial Relations Commission.²⁶ The Commission, if the matter cannot be resolved by conciliation, has wide powers to make a number of orders, including reinstatement, which is not an available remedy for wrongful dismissal at common law.

2. OTHER AREAS

11. There are many other areas of life in which persons with criminal records may encounter difficulties.

(a) Credit

12. Persons with a record of convictions may be denied credit on account of those convictions. In many cases application forms require details of previous convictions.

(b) Insurance

13. Persons with a criminal record may have difficulties in obtaining insurance. Persons taking out insurance are under a duty to act in good faith to the insurer, and must therefore disclose all material facts of which they are aware and which are not available to the insurer.

²⁴ For the Commission's recommendations for amendment of the *Equal Opportunity Act*, see paras 9.2 to 9.8 above.

²⁵ E I Sykes and D Yerbury, *Labour Law in Australia* (1980), vol 1, 83; W B Creighton, W J Ford and R J Mitchell, *Labour Law* (1983) paras 10.25-10.26.

²⁶ *Industrial Relations Act 1979-1985*, ss 23 and 29.

Failure to disclose a material fact gives the insurer the right to avoid the contract. For example, where a woman took out an insurance policy to cover her own and her husband's jewellery, and failed to disclose on renewal of the policy that prior to the renewal her husband had been convicted of offences of dishonesty, the insurer was entitled to repudiate liability on the policy.²⁷ These principles of common law and equity, developed by the courts over the course of time, are now set out in the Commonwealth *Insurance Contracts Act 1984-1985*.²⁸

(c) Driver's licences

14. Further problems for persons with convictions occur in the area of driver's licences. The Traffic Board has power under the *Road Traffic Act* to refuse to issue, or to cancel, suspend or refuse to renew a driver's licence where the applicant is not of good character, or should not, by reason of the number or nature of the applicant's convictions for offences under the Act, be the holder of a driver's licence.²⁹ It is not necessary to disclose convictions when applying for the grant or renewal of a driver's licence. However, such disclosure is necessary when applying for a learner's permit.³⁰

(d) Legal proceedings

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

16. The *Evidence Act 1906-1985* provides that 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 the person has committed or been convicted of or been charged with any offence other than that then being heard, or is of bad character, unless -

²⁷ *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485.

²⁸ See especially Pt II (Duty of the Utmost Good Faith), Pt IV (Disclosures and Misrepresentations). Insurance, other than State insurance, is a matter within the legislative power of the Commonwealth: *Constitution*, (Cth) s 51(xiv).

²⁹ *Road Traffic Act 1974-1985*, s 48(1).

³⁰ In addition, under s 96 of the *Road Traffic Act 1974-1985*, the Commissioner of Police may furnish to the Road Traffic Board details of the convictions (in Western Australia or elsewhere) or traffic infringements of any person who holds, or has applied for the grant of, a driver's licence or learner's permit.

- (i) the proof that the person has committed or been convicted of the other offence is admissible in evidence to show that the person is guilty of the offence with which the person is then charged;
- (ii) the person has personally, or by the person's advocate, asked questions of the witnesses for the prosecution with a view to establishing the person's own good character, or has given evidence of 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 for the prosecution; or
- (iii) the person has given evidence against any other person charged with the same offence.³¹

17. In either civil or criminal proceedings a witness may be questioned as to whether the witness has been convicted of any indictable offence, and, upon being so questioned, if the witness either denies or does not admit the fact, or refuses to answer, the cross-examining party may prove the conviction.³² Although not so expressed, this provision seems likely to be construed as subject to the rule that the court may inform the witness that the witness is not obliged to answer a question which is not relevant to the proceedings except in so far as it affects the credit of the witness by injuring the witness's character.³³

18. 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 Western Australia 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. If the record is disclosed in court it would become known to others present in court and, if reported in the press or other media, to the community at large.

³¹ S 8(1)(e).

³² Id, s 23(1).

³³ Id, s 25.

(e) Residence and citizenship

19. Residence and citizenship are governed by Commonwealth law. In each case, convictions may have serious consequences. A person who is not an Australian citizen may be deported on the order of the Minister for Immigration and Ethnic Affairs if, before entry, the person was convicted of a crime and sentenced to imprisonment for one year or more.³⁴

20. Previous convictions have to be disclosed when applying for Australian citizenship, and a criminal record check is made. A condition of the grant of Australian citizenship is that the applicant must be of good character,³⁵ and an applicant for citizenship who makes a false representation or conceals a material circumstance may be deprived of citizenship.³⁶

(f) Travel

21. The issue of passports is again a matter governed by Commonwealth law. A passport will not be issued to a person if the person is under a condition of parole, recognizance, surety or bail to remain in Australia or to refrain from obtaining a passport.³⁷

22. The issue of visas to visit a foreign country is a matter for the country concerned. The United States Consul General in Western Australia told the Commission that applicants for a visa are asked whether they have a record of convictions. If so, they are asked to obtain a copy of the record and send it to the Consulate.

3. PUBLIC OFFICE AND CIVIC DUTIES

23. Further difficulties confront persons with a criminal record if they seek to enter public life or perform civic duties.

(a) Parliament

24. The *Constitution Acts Amendment Act 1899-1984* provides that persons are disqualified from being members of either House of the Parliament of Western Australia if

³⁴ *Migration Act 1958-1984* (Cth), ss 16 and 18.

³⁵ *Australian Citizenship Act 1948-1985* (Cth), s 14.

³⁶ *Id.*, s 21.

³⁷ *Passports Act 1938-1985* (Cth), s 7B(b).

they have been "in any part of Her Majesty's dominions attainted or convicted of treason or felony".³⁸ This would disqualify a person convicted of a crime in Western Australia.³⁹

(b) State Government bodies

25. The statutes which establish Boards, Committees and other State Government bodies often provide that a conviction for an indictable offence will disqualify a person from being elected or nominated as a member of such a body.⁴⁰

(c) Local Government

26. In certain circumstances, a criminal record may disqualify a person from holding local government office. The *Local Government Act 1960-1985* provides that a person who has been convicted of an offence under section 174 (which relates to the disclosure of interests by members of councils and committees) cannot be the mayor or president or a councillor of a municipality.⁴¹

(d) Service as a justice of the peace

27. There is no provision in the *Justices Act 1902-1985* which specifically disqualifies persons with a criminal record from becoming justices of the peace. Nonetheless it is likely

³⁸ S 32(b). "Felony" was the term formerly used in England to denote the more serious category of indictable offence. The distinction between felonies and misdemeanours was abolished by the *Criminal Law Act 1967* (UK), s 1. "Attainder" was the extinction of civil rights and capacities which formerly took place when a person who had committed treason or felony was sentenced to death.

³⁹ Reference in a statute to a "felony" is to be taken as a reference to a crime under the provisions of the *Criminal Code: Criminal Code Act 1913*, s 3(1).

⁴⁰ Eg Dental Board: *Dental Act 1939-1984*, s 10; Hairdressers Registration Board: *Hairdressers Registration Act 1946-1975*, s 5(10); Hospital Boards: *Hospitals Act 1927-1985*, Schedule, para 2(c); Motor Vehicle Insurance Trust: *Motor Vehicle (Third Party Insurance) Act 1943-1985*, s 3F; Optometrists Board: *Optometrists Act 1940-1978*, s 10; Painters Registration Board: *Painters Registration Act 1961-1983*, s 7(3); Radiological Council: *Radiation Safety Act 1975-1984*, s 14(4); Veterinary Surgeons Board: *Veterinary Surgeons Act 1960-1984*, s 10; Aboriginal Affairs Planning Authority: *Aboriginal Affairs Planning Authority Act 1972-1985*, Schedule, s 2; Builders' Registration Board: *Builders' Registration Act 1939-1984*, s 5B(1); Chiropractors Registration Board: *Chiropractors Act 1964-1985*, s 12(2). Such a provision is by no means universal. No such provision applies to membership of, for example, the Psychologists Board, the Medical Board, the Finance Brokers Supervisory Board, the Insurance Brokers Licensing Board, the Motor Vehicle Dealers Licensing Board, the Betting Control Board, the Real Estate and Business Agents Supervisory Board or the Taxi Control Board. In some instances, the provision takes a different form. For example, a person is only disqualified from membership of the Fire Brigades Board if undergoing a sentence of imprisonment: *Fire Brigades Act 1942-1985*, s 14.

⁴¹ S 67(1)(ba).

that persons with a record of convictions (apart possibly from very minor convictions) would experience some difficulty in securing appointment.⁴²

(e) Jury service

28. The *Juries Act 1957-1984* contains provisions disqualifying persons with convictions from serving on a jury in certain circumstances.⁴³ This Act was amended in 1984 as a result of the recommendations of the Commission.⁴⁴ Unless a person has been convicted and sentenced to imprisonment for a term exceeding two years, or for life, or for an indeterminate period, a person is only disqualified from jury service if the person has served any part of a sentence of imprisonment, been on parole in respect of any such sentence, been found guilty of an offence and detained in an institution for juvenile offenders, or been the subject of a probation order, at any time within the last five years.⁴⁵

(f) Miscellaneous

29. There are other civic responsibilities of a minor nature which persons may be dissuaded from assuming because of a criminal record. For example, persons who wish to participate in the safety house scheme organized by the Safety House Association of Western Australia have to sign a statutory declaration declaring that they have not been convicted of any offence of dishonesty, any offence involving damage to property, or any offence against the person of another except as a child before a Children's Court.⁴⁶ In the Shire of Wanneroo, persons who wish to set up day care centres for children are required by the shire to disclose all convictions (including traffic matters) recorded against them or their spouses.

⁴² See the Commission's discussion paper on *Courts of Petty Sessions - Constitution, Powers and Procedure* (Project No 55 Part II, 1984), para 2.4.

⁴³ S 5(b).

⁴⁴ Report on *Exemption from Jury Service* (Project No 71, 1980).

⁴⁵ See also paras 3.16 and 3.17 above. For the Commission's recommendations for amendment of the *Juries Act*, see para 9.16 above.

⁴⁶ Letter from the Safety House Association of Western Australia to the Commission, 31 October 1985.

Appendix V

SPENT CONVICTION SCHEMES IN OTHER JURISDICTIONS

1. This Appendix surveys legislation and proposals for legislation limiting the effects of old convictions in the United States, Canada, the United Kingdom, Australia and New Zealand.

1. THE UNITED STATES¹

(a) The legislative provisions

2. Legislation dealing with the problem of old convictions has existed in a number of jurisdictions in the United States of America for some years.² The legislation takes one of two forms -

- (1) The sealing of the official criminal record. This generally involves a procedure whereby a record is physically removed from the record system and thereafter access to the record, or communication of it, is barred or substantially restricted.
- (2) The expunction (that is, the destruction) of the criminal record. This prevents the record thereafter being used for any purpose.

¹ See generally WALRC Discussion Paper, paras 4.4 to 4.10; Search Group, *passim*; A R Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status* (1966) Washington University Law Quarterly 147; B Kogon and D L Loughery, *Sealing and Expungement of Criminal Records - The Big Lie* (1970) 61 Journal of Criminal Law, Criminology and Police Science, 378; J L Wagner, *Expungement in Ohio: Assimilation into Society for the Former Criminal* (1975) 8 Akron Law Review, 480; K A Henson, *Criminal Procedure: Expunction - Fact or Fiction?* (1978) 31 Oklahoma Law Review, 978; L S Bueth, *Sealing and Expungement of Criminal Records: Avoiding the Inevitable Social Stigma* (1979) 58 Nebraska Law Review, 1087; W S Easton, *Expunging Criminal Records: A Judge's Perspective* (1981) 27 Wayne Law Review, 1391; M A Franklin and D Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society* (1981) 9 Hofstra Law Review, 733.

² Over forty States now have such legislation: Search Group, 13.

3. In general, it is necessary for a convicted person to apply to a court to obtain a sealing or expunction order, and the court has a discretion whether or not to grant it. The conditions which must be satisfied vary from jurisdiction to jurisdiction. The 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 "manifest injustice". In some jurisdictions, the order can only be granted after a specified period, for example the completion of parole or probation or the expiration of a specified period of years without further convictions.³ Sealing or expunging a record does not of itself prevent questions being asked about whether a person has a record of a conviction which has been sealed or expunged. Thus, a number of jurisdictions provide an ancillary form of protection by authorizing a person who has obtained a sealing or expunction order to deny the occurrence of the event to which the record relates.⁴

(b) Comment

4. The concept of "sealing" a record belongs to an era before the storage of criminal records on computer. A computer record cannot literally speaking be sealed, although access can be restricted by suitably programming the computer. The concept of "expunging" a record again originally belongs to the era of manual records, but is easily translatable to computerized records. A computer record can be expunged, and a computer can be programmed to do this automatically. It is also possible for a computer to be programmed to remove the name and so make the record anonymous.

5. If the record is sealed, it remains available for restricted purposes, such as subsequent court proceedings against the convicted person. Expunction, however, results in the destruction of the record, which is therefore no longer available for purposes such as criminal investigation or criminological research. Both sealing and expunction are limited in that they can only be ordered with respect to official records such as police records. It is impracticable to expect that all records of an offence could be sealed or expunged.

(c) Courts' inherent expunction powers

6. Recent decisions have confirmed that courts have inherent powers to expunge criminal records, as part of the function of courts to control court records and agents of the court in

³ Id, 14.

⁴ Ibid.

order to reduce or eliminate unfairness to individuals.⁵ The court has to decide whether expunction will yield a benefit to the convicted person commensurate with the disadvantages to the public from the elimination of the record and the burden on the court in issuing, enforcing and monitoring an order. It seems that courts will also be prepared, in appropriate circumstances, to forbid the disclosure of court records, or order the sealing of a court file.

2. CANADA

(a) *Criminal Records Act 1970*⁶

7. The Canadian *Criminal Records Act 1970* provides that after a certain period of time, a convicted person may apply for a "pardon", the effect of which, if granted, is to declare that the person has become rehabilitated. The old conviction is not concealed, but offset by the finding of a tribunal that it should no longer reflect adversely on the person's character. The importance of this legislation is underlined by the fact that in Canada (unlike Australia) criminal law is a federal matter, and the major criminal offences are set out in the Canadian *Criminal Code*.

(i) *The legislative provisions*

8. The *Criminal Records Act* provides that persons convicted under a federal statute or regulation may, two years after conviction, in the case of an offence punishable on summary conviction, or five years after conviction, in the case of an indictable offence,⁷ apply for a "pardon."⁸

9. The application is made to the Solicitor-General of Canada, who must refer it to the National Parole Board. The Board is required to make "proper enquiries . . . in order to ascertain the behaviour of the applicant since the date of his conviction".⁹ This investigation is carried out by the Royal Canadian Mounted Police. The intensity of the investigation

⁵ See *State of Minnesota v CA* (1981) 304 NW2d 353, and other authorities cited therein.

⁶ See generally WALRC Discussion Paper, paras 6.2 to 6.14; R P Nadin-Davis, *Canada's Criminal Records Act: Notes on How Not to Expunge Criminal Convictions* (1981) 45 Saskatchewan Law Review, 221 (hereafter cited as Nadin-Davis); *Clemency Review*, passim.

⁷ *Criminal Records Act 1970* (Canada), s 4(2).

⁸ This is the term used in Canada. The term "pardon" is used in a different sense in Western Australia: see Appendix V para 18 below.

⁹ *Criminal Records Act 1970* (Canada), s 4(2).

varies according to the seriousness of the offence, the length of sentence and the length of time since the completion of the sentence.¹⁰ The most extensive check involves the provision of two references, a criminal activity check by the local police and interviews with the applicant, the referees, the applicant's present employer (if the applicant gives permission) and two previous employers (if the applicant has two previous employers). The applicant can request in the application form that the applicant's present employer not be contacted. The applicant can also indicate whether or not the applicant's referees and past employers are aware of the applicant's record so that the police may use as much discretion as possible when contacting them.¹¹

10. A report is then prepared for the Board. If the Board proposes to recommend that a pardon be refused the applicant is notified and given the reason for the refusal. The applicant may make representations to the Board and the Board is then required to reconsider the application.¹² If the applicant has no further convictions, is not known by the police to be involved in criminal activities or wanted on any other charge, and if there is no adverse comment on the applicant's behaviour, then the application is likely to be successful.¹³ If the Board makes a positive recommendation, the Solicitor-General refers it to the Governor-General, who may then grant a pardon.¹⁴

11. The granting of a pardon is evidence of the fact that the Board was satisfied that the conviction should no longer reflect adversely on the convicted person's character, and, unless the pardon is subsequently revoked, vacates the conviction and removes any disqualification under statute to which the convicted person is subject by reason of the conviction.¹⁵ Federal records pertaining to the conviction are kept separate from other records. Their disclosure to anyone, including law enforcement and judicial officials, is not permitted except under authorization from the Solicitor-General. They are therefore not available for use in criminal investigations and prosecutions.

12. The *Criminal Records Act* does not deem convictions never to have occurred. The applicant could not answer "No" to the question "Have you been convicted of an offence?"

¹⁰ *Clemency Review*, Part C, 4-5.

¹¹ *Id.*, 6.

¹² *Criminal Records Act 1970* (Canada), s 4(4).

¹³ Nadin-Davis, 233.

¹⁴ *Criminal Records Act 1970* (Canada), s 4(5).

¹⁵ *Id.*, s 5.

A newspaper could report that the applicant has been convicted of an offence and if sued for defamation rely on the defence of truth. However, applicants for employment in government or government related jobs may not be asked questions requiring the disclosure of a conviction for which a pardon has been granted,¹⁶ and the Canadian *Human Rights Act 1977*¹⁷ 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.

13. A pardon may be revoked if the person to whom it has been granted is convicted of another offence, or if it is established that the person is no longer of good conduct, or knowingly made a false or deceptive statement in relation to the application for a pardon, or knowingly concealed some material particular in relation to the application.¹⁸

(ii) *Comment*

14. Approximately 77,000 applications under the Act were received between 1971 and 1985. Of applications processed between 1971 and 1983, about 98 per cent were granted.¹⁹ It was originally envisaged that a particularly important consequence of the Act would be to assist convicted persons in finding employment. However, it has primarily been used as a means of removing civil disabilities in respect of occupational licensing.²⁰

15. The most important feature of the Canadian scheme is that the question of whether a conviction is to be regarded as 'spent' is determined as a result of an administrative investigation followed by a judicial inquiry. Another important feature of the Canadian scheme is that it applies to all offenders once the relevant period of time since conviction has elapsed. There is no necessity to distinguish between "more serious" and "less serious" offences, as there is under most other schemes.

¹⁶ Id, s 8.

¹⁷ Preserved by s 26 of the Canadian Charter of Rights and Freedoms, contained in the *Constitution Act 1982*: (Canada) see W S Tarnopolsky and GA Beaudoin, (eds), *The Canadian Charter of Rights and Freedoms: Commentary* (1982), iii; *Re Singh and Minister of Employment and Immigration* (1985) 17 DLR (4th) 422, 430.

¹⁸ *Criminal Records Act 1970* (Canada), s 7.

¹⁹ Letter from Solicitor-General of Canada to Commission, November 1985.

²⁰ Nadin-Davis, 245.

16. The scheme may be criticized in some important respects.²¹ A major disadvantage is the administrative cost involved in the process of investigation and hearing. It is also possible that, however careful the police are in their investigations, persons who were previously ignorant of the applicant's conviction may become aware of it as a result.²² This may deter a number of qualified persons taking advantage of the scheme. Further, the relief provided by a pardon may be thought inadequate since the existence of a pardoned conviction cannot be denied, while the prohibition on the use of federal records of pardoned convictions in criminal investigations and prosecutions seriously hampers the work of the police and prosecution authorities.

17. The fact that a pardon can be revoked has also been criticized. As stated above,²³ the grounds for revocation are not limited to the commission of another criminal offence. It has been said that a person who has been pardoned in respect of a conviction is thereby rendered liable to be punished by the revocation of the pardon for behaviour which is less than criminal.²⁴

18. It should be noted that the Canadian legislation is using the term "pardon" in a context different from that in which it is commonly used in Australia, the United Kingdom and elsewhere. A pardon, as it is understood in Australia and the United Kingdom, is normally granted where a person has subsequently been proved to be innocent of the offence for which the person was convicted, or where there is a serious doubt whether the person committed the offence.²⁵ The pardon issued under the Canadian scheme does not cast any doubt on whether the person was properly convicted of the offence, but simply declares that the conviction in respect of which the pardon is granted should no longer reflect adversely on the person's character. However, a pardon as it is understood in Australia and the United Kingdom only removes the effects of a conviction and cannot remove the conviction itself.²⁶ The same could be said of a pardon under the Canadian scheme.

²¹ Letter from Solicitor-General of Canada to Commission, November 1985, summarizing the conclusions of the *Clemency Review* Project Team submitted in 1983.

²² Nadin-Davis, 231.

²³ Appendix V para 13.

²⁴ Nadin-Davis, 240-241.

²⁵ See *Halsbury's Laws of England* (4th ed, 1974) vol 8, para 952; A T H Smith, *The Prerogative of Mercy, The Power of Pardon and Criminal Justice* [1983] Public Law 398, 417-419.

²⁶ *R v Foster* [1985] QB 115.

(iii) *Review of the legislation*

19. In 1981 the Solicitor-General of Canada initiated a review of the operation of a number of "clemency powers", including the *Criminal Records Act*. The *Clemency Review* Project Team put forward its proposals in 1983. It identified the shortcomings of the scheme noted above - the expense and administrative burden, the inability to deny the conviction and the effect of the scheme in hampering criminal prosecution. It proposed a number of reforms, which included determining the waiting period by the length of sentence actually imposed, rather than by the classification of the offence; in minor cases granting a pardon automatically, without application or investigation, if there were no subsequent convictions; allowing a pardoned offender to deny the existence of the conviction; and allowing judicial and law enforcement officers access to records of pardoned offenders in specified circumstances.

20. These proposals are currently being studied, along with other suggestions put forward by the Solicitor-General's Department. The alternative proposals abandon the pardon approach in favour of a "records management" approach. The conviction would become spent automatically after a specified crime-free period. The need for application and investigation would disappear. The offender would be able to deny the existence of a spent conviction and unauthorized disclosure of the records of the spent conviction would be prohibited. After a further period, records of spent convictions would be destroyed. The scheme would apply to all offences under federal legislation, other than those for which a life or indeterminate sentence was imposed.

(b) Equal opportunity legislation²⁷

21. Some Canadian legislation, both at federal and at Provincial level, controls the effects of convictions by making use of equal opportunity or anti-discrimination legislation. In one case, this legislation covers discrimination on the basis of any convictions, rather than just spent convictions.

²⁷ See generally WALRC Discussion Paper paras 8.1 to 8.6; I B McKenna, *The New Ontario Human Rights Code* [1983] Public Law 365; S C Coval and J C Smith, *Compensation for Discrimination* (1982) 16 University of British Columbia Law Review 71.

(i) *British Columbia*

22. In British Columbia, the *Human Rights Code* seeks to prevent any discrimination against a person on the ground of a criminal record. It provides:²⁸

"Every person has the right of equality of opportunity based on bona fide qualifications in respect of his occupation or employment, or in respect of an intended occupation, employment, advancement or promotion; and, without limiting the generality of the foregoing,

(a) no employer shall refuse to employ, or to continue to employ or to advance or promote that person, or discriminate against that person in respect of employment or a condition of employment; and

(b) no employment agency shall refuse to refer him for employment,

unless reasonable cause exists for the refusal or discrimination."

The legislation then lists the grounds that do not constitute a reasonable cause. Following provisions relating to race, religion, colour, age, marital status, ancestry, place of origin, political belief and sex, it provides that:²⁹

"A conviction for a criminal or summary conviction charge shall not constitute reasonable cause unless the charge relates to the occupation or employment, or to the intended occupation, employment, advancement or promotion of a person."

23. The Code goes on to lay down a procedure for dealing with a complaint. If attempts to reach a settlement by conciliation are unsuccessful, the matter may be referred to a Board of Inquiry, which, if it finds the complaint justified, may order the person who has contravened the Act to cease the contravention and refrain from similar conduct in the future. The Board has power to make various orders to compel compliance with the Act, and also to award restitution or compensation.

²⁸ *Human Rights Code 1979* (British Columbia), s 8(1).

²⁹ *Id.*, s 8(2)(d).

24. The operation of the Code is illustrated by *McCartney v Woodward Stores*.³⁰ The complainant was employed by the store as a stockroom clerk. He failed to disclose that nine years previously, when aged seventeen, he had been convicted of shoplifting. He subsequently applied for a transfer to a higher position, as a maintenance worker on the night-shift, which required a security check. His criminal record was discovered and he was dismissed. A Board of Inquiry ordered that he should be reinstated to his position as a stockroom clerk. However, it found that the employer had reasonable cause for refusing to promote him to the higher position for which he had applied on the ground that his previous conviction was sufficiently related to the position to justify the refusal. On appeal, this decision was upheld by the Supreme Court of British Columbia.³¹

(ii) *Ontario*

25. In Ontario, the *Human Rights Code* also covers discrimination on the ground of a criminal record. However, unlike the British Columbia Code, it is limited to discrimination on the ground of old convictions. The Code provides that every person has a right to equal treatment with respect to employment without discrimination on a number of grounds broadly similar to those set out in the British Columbia legislation, including "record of offences".³² The legislation provides that:³³

"Record of offences' means a conviction for,

- (1) an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or
- (2) an offence in respect of any provincial enactment."

26. The right to equal treatment with respect to employment is not infringed where the discrimination in employment is for reasons of record of offences if the record of offences of the applicant is a reasonable and bona fide qualification because of the nature of the employment.³⁴

³⁰ (1982) 3 Canadian Human Rights Reporter para 9766.

³¹ (1983) 4 Canadian Human Rights Reporter para 11461.

³² *Human Rights Code 1981* (Ontario), s 4.

³³ Id, s 9(h).

³⁴ Id, s 23(b).

27. The complaints procedure is broadly similar to the British Columbia legislation.

(iii) *Federal legislation*

28. The federal *Human Rights Act 1977* contains provisions similar to those in force in Ontario. The Act makes it unlawful to discriminate against a person on the ground of a conviction for which a pardon has been granted under the *Criminal Records Act 1970*, except in certain classes of employment.

3. UNITED KINGDOM³⁵

(a) Introduction

29. The United Kingdom *Rehabilitation of Offenders Act 1974*,³⁶ which in general implemented the recommendations contained in the report *Living it Down* issued in 1972, provides that, after a specified period of years free of further convictions (other than for minor offences), the convicted person is to be treated as a rehabilitated person and the conviction as spent.³⁷ The period varies from ten years to six months according to the nature of the sentence imposed and various other circumstances. The ten year period applies to a sentence of imprisonment not exceeding 30 months, the maximum sentence brought within the provisions of the Act.

(b) Effect of conviction becoming spent

30. The effect of the conviction becoming spent is that access to the record is limited in a variety of ways, and discrimination against the convicted person is made unlawful.

³⁵ See generally WALRC Discussion Paper paras 4.11 and 4.12, 4.18 to 4.26, 5.3 and 5.4, 8.2, 9.1 to 9.31; Home Office, *A Guide to the Rehabilitation of Offenders Act 1974* (1975); B Harris, *A Guide to the Rehabilitation of Offenders Act 1974* (1976); the annotations to the *Rehabilitation of Offenders Act* in *Current Law Statutes Annotated 1974* by J Rear; P Sieghart, *The Rehabilitation of Offenders Act 1974* [1975] New LJ 760 and 784; G Dworkin, *Rehabilitation of Offenders Act 1974* (1975) 38 MLR 429 (hereafter cited as Dworkin); N P Cohen, *Forgiving the Criminal Offender British Style: The Rehabilitation of Offenders Act* (1976) 14 Harvard Journal on Legislation 111 (hereafter cited as Cohen).

³⁶ For the text of the Act, see WALRC Discussion Paper, Appendix III. Legislation in other jurisdictions based on the Act includes *Rehabilitation of Offenders Act 1977* (Bermuda); *Rehabilitation of Convicted Persons Law 1981* (Cyprus); *Penal Code Act 1981* (Vanuatu), ss 57-58.

³⁷ S 1(1). The Act refers to the period as the "rehabilitation period".

(i) *General principle and court proceedings: section 4(1)*

31. Section 4(1) provides generally that a person whose conviction has become spent is to be treated for all purposes in law as a person who has not been convicted of the offence in question.³⁸ It then states two specific ways in which this principle is to be put into operation. First, no evidence is admissible in court proceedings to prove that the person has been convicted of the offence in question.³⁹ Secondly, questions relating to a person's past which cannot be answered without acknowledging or referring to a spent conviction must not be asked, and if asked need not be answered.⁴⁰

32. It is questionable whether giving a person the right not to answer is a satisfactory solution, because this would be tantamount to admitting the existence of a spent conviction. It may be that the section should specifically say that the question may be treated as not relating to spent convictions.⁴¹ Apart from the Act, it may be possible to rule out questions relating to spent convictions on the ground that they are not material.⁴²

Proceedings to which section 4(1) does not apply

33. A number of types of proceeding are excluded from section 4(1). The most important exclusion is in respect of criminal proceedings, in which evidence of previous convictions of the defendant or any other person⁴³ is still admissible. Thus, the court continues to have the defendant's complete record before it notwithstanding that the convictions may be deemed spent under the Act. However, practice directions have been issued to provide guidance on

³⁸ The section in fact reads: "who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence . . ." The reference in s 4(1)(a) (see footnote 39 below) is in similar terms.

³⁹ S 4(1)(a).

⁴⁰ S 4(1)(b), which in fact refers to "acknowledging or referring to a spent conviction or any circumstances ancillary thereto". According to s 4(5) "circumstances ancillary to a spent conviction" are any of the following -

- (a) the offence which was the subject of that conviction;
- (b) the conduct constituting that offence;
- (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.

⁴¹ As does s 4(2), which deals with questions asked outside court: see Appendix V para 37 below.

⁴² See *R v Sweet-Escott* (1971) 55 Cr App R 316.

⁴³ For a case in which evidence of the complainant's previous conviction was ruled admissible, see *R v Paraskeva* [1983] Crim LR 186.

references to spent convictions in the light of the Act.⁴⁴ The practice direction applying to Crown Courts requests courts to give effect to the intention of Parliament by never referring to a spent conviction when such reference can reasonably be avoided, and provides that -

- (i) on the statement of the defendant's record with which the court is provided for the purposes of sentence, spent convictions should be specially marked;
- (ii) spent convictions should not be referred to in open court without the judge's authority;
- (iii) the judge when passing sentence 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.

The practice directions are not binding, and a conviction will not necessarily be quashed because the practice direction is breached.⁴⁵ However, it appears that the practice direction is generally followed.⁴⁶ As long as this is the case the fact that the Act is inapplicable to criminal proceedings will have little practical consequence.

34. Section 4(1) is also excluded in respect of service disciplinary proceedings⁴⁷ and various proceedings involving minors, such as adoption, guardianship, custody and proceedings in respect of children in need of care and protection.⁴⁸

35. In addition, evidence of spent convictions may be admitted in any proceedings before a judicial authority where the authority is satisfied in all the circumstances that justice cannot otherwise be done.⁴⁹ Further, the Home Secretary may by order direct that certain bodies may admit evidence of spent convictions.⁵⁰ Orders made under this provision exempt disciplinary proceedings against lawyers, doctors, dentists, accountants, members of a variety of other professions, and police constables, and a large number of other proceedings involving

⁴⁴ Crown Courts: Practice Note [1975] 2 All ER 1072; Magistrates Courts: Home Office Circular, 98-1975, Part IV (24 June 1975).

⁴⁵ See *R v Smallman* [1982] Crim LR 175.

⁴⁶ Cohen, 132.

⁴⁷ S 7(2)(b).

⁴⁸ S 7(2)(c) and (d).

⁴⁹ S 7(3), see *Reynolds v Phoenix Assurance Co* [1978] 2 Lloyd's Rep 22.

⁵⁰ S 7(4).

licences of one kind or another, including, for example, firearms, explosives, securities, insurance and unit trusts, and persons who seek to manage abortion clinics or nursing homes.⁵¹ These wide exceptions granted under subordinate legislation create a gap in the protection afforded by the Act, and have given rise to criticism of the Act's provisions.⁵²

Other exceptions and qualifications to section 4(1)

36. A person who is a party or a witness to any proceedings may consent to the disclosure of the person's spent conviction in such proceedings, in which case section 4(1) does not apply.⁵³ Section 4(1) does not affect the right to obtain a free pardon, the enforcement of a fine, and the operation of a disqualification imposed as the result of a conviction.⁵⁴

(ii) Questions: section 4(2)

37. Persons may also be asked questions otherwise than in court proceedings - for example, where they are seeking employment, credit or insurance. Section 4(2) provides that questions about a person's previous convictions, offences, conduct or circumstances put to that person or to any other person otherwise than in court proceedings should be treated as not relating to spent convictions, and that the person questioned is not to be under any liability in law by reason of any failure to acknowledge or disclose a spent conviction.⁵⁵

38. A possible drawback of this provision is that, because of the complexity of the provisions of the Act relating to rehabilitation periods,⁵⁶ convicted persons may fail to take advantage of the protection afforded by section 4(2) through ignorance or uncertainty as to whether or not their convictions have become spent. A possible alternative would have been to prohibit the asking of certain questions, but *Living it Down* rejected this suggestion, on the ground that people should remain free to ask what questions they like.⁵⁷

⁵¹ *Rehabilitation of Offenders Act 1974* (UK) (Exceptions) Order 1975 (hereafter cited as Exceptions Order), Schedule 3.

⁵² See Cohen, 120-123; Editorial, *Convictions never to be Spent* (1975) 125 New LJ 633.

⁵³ S 7(2)(f).

⁵⁴ S 7(1).

⁵⁵ Or any circumstances ancillary to a spent conviction: see Appendix V footnote 40 above.

⁵⁶ As to which see Appendix V paras 54 and 55 below.

⁵⁷ Para 26(e).

Exceptions

39. The Home Secretary can grant exceptions to section 4(2).⁵⁸ The Exceptions Order exempts questions asked in order to assess the suitability of a person for admission to the professions mentioned above,⁵⁹ or for various offices or employments, including judges and various other offices and employments connected with the administration of justice, police, prison officers, probation officers, teachers and a number of other occupations which involve contact with minors or persons suffering from mental disorder or other disabilities.⁶⁰

40. The order also excludes the provisions of section 4(2) in a number of cases in which, in order to assess a person's suitability for a particular occupation, questions about the person's previous criminal record are asked of third parties. These cases include dealers in firearms and explosives, securities, insurance and unit trusts, and persons who seek to manage abortion clinics or nursing homes. Finally, there is an exception in relation to any question asked for the purpose of safeguarding national security.⁶¹

41. Again, the wide range of exceptions creates a gap in the protection given by the Act. However, the order authorizing these exceptions imposes an important limitation. Persons being questioned will only be denied the protection of section 4(2) if at the time the question is asked they are informed that, by virtue of the order, spent convictions are to be disclosed.⁶² Thus - assuming such persons are aware of their rights under section 4(2) - they should not be left in any doubt as to whether they must tell the whole truth.

(iii) *Obligations to disclose: section 4(3)(a)*

42. An obligation to disclose particular information may be imposed under the terms of a contract, or by the general law as the result of the relationship of the parties. Thus, for example, in an insurance contract the person taking out insurance is usually under an obligation to disclose all material facts. A criminal record may be material in such circumstances. There are other relationships, classified by the law as fiduciary relationships -

⁵⁸ S 4(4).

⁵⁹ Appendix V para 35.

⁶⁰ Exceptions Order, s 3.

⁶¹ Ibid.

⁶² Ibid.

solicitor and client, trustee and beneficiary, principal and agent and so on - where there is a similar obligation to disclose.

43. Section 4(3)(a) provides that obligations imposed on a person by any rule of law or by the provisions of any agreement or arrangement to disclose matters to any other person shall not extend to requiring that person to disclose a spent conviction (whether the conviction is the person's own or another's).⁶³

Exceptions

44. The Home Secretary can grant such exceptions to section 4(3)⁶⁴ as seem to him or her to be appropriate. However, the Exceptions Order does not contain any exceptions to section 4(3)(a).

(iv) *Non-Discrimination: section 4(3)(b)*

45. To deal with the situation where the convicted person's record has, in spite of the above provisions, become known to an employer or prospective employer, section 4(3)(b) provides that a spent conviction, or any failure to disclose a spent conviction,⁶⁵ shall not be a proper ground for dismissing or excluding a convicted person from any office, profession, occupation or employment, or for prejudicing the person in any way in any occupation or employment.

46. In the case of dismissal from employment on the ground of an old conviction, an employee can pursue the normal remedies.⁶⁶ However, in the case of exclusion from employment, the Act is declaratory only, for, apart from statutory prohibitions against race and sex discrimination in employment⁶⁷ such conduct gives rise to no remedy, civil or

⁶³ Or any circumstances ancillary to a spent conviction: see Appendix V footnote 40 above.

⁶⁴ S 4(4).

⁶⁵ Or any circumstances ancillary to a spent conviction: see Appendix V footnote 40 above.

⁶⁶ Thus in *Property Guards Limited v Taylor and Kershaw* [1982] IRLR 1, the dismissal of security guards for failure to disclose spent convictions was held to be unfair, in accordance with the provisions of section 4(3)(b).

⁶⁷ *Race Relations Act 1976* (UK), Part II; *Sex Discrimination Act 1975* (UK), Part II.

criminal.⁶⁸ It seems that section 4(3)(b) has proved effective, in spite of the lack of sanctions.⁶⁹

Exceptions

47. The Exceptions Order⁷⁰ provides that section 4(3)(b) shall not apply to the dismissal or exclusion of a person from the professions, offices, employments or occupations mentioned above⁷¹ in relation to section 4(2), or to any action taken for the purpose of safeguarding national security. Again, these wide exemptions limit the protection afforded by the Act.

(c) Enforcement

48. Apart from particular cases in which the unauthorized disclosure of records is made a criminal offence, it was not thought suitable to impose criminal penalties as a sanction for contravention of the provisions set out above. Instead, it was envisaged that the principal means by which the Act would be enforced was in civil actions for defamation.

(i) *Unlawful disclosure*

49. Section 9 provides for two criminal offences relating to unauthorized disclosure of a spent conviction:

- (1) The unauthorized disclosure of an official record of a spent conviction by a person who has custody of or access to that record in the course of the person's official duties,⁷² if the person knew or had reasonable cause to suspect that the record related to a spent conviction.⁷³ It is a defence to show that the disclosure was made to, or at the request of, the subject of the record.

⁶⁸ "An employer . . . may refuse to employ [a workman] from the most mistaken, capricious, malicious or morally reprehensible motives that can be conceived, but the workman has no right of action against him": *Allen v Flood* [1898] AC 1, 172 per Lord Davey.

⁶⁹ Cohen, 138.

⁷⁰ S 4.

⁷¹ Appendix V para 35.

⁷² As to which, see *X v Commissioner of Police of the Metropolis* [1985] 1 All ER 890.

⁷³ S 9(2).

- (2) The obtaining of information relating to a spent conviction from an official record by means of any fraud, dishonesty or bribe.⁷⁴

50. These offences are limited to "official records", namely, records kept for the purposes of their functions by courts, police, government departments or local or other public authorities.⁷⁵ The Home Secretary may make an order exempting the disclosure of information in specified cases,⁷⁶ but so far no exceptions have been made.

(ii) *Actions for defamation*

51. Subject to the above provisions, it was contemplated that the Act would be enforced by a civil action for defamation brought by the injured party. At common law, truth is an absolute defence to defamation, and so the disclosure of another's criminal record would not give rise to liability. The bill as originally introduced into Parliament provided that the defence of truth would not be available in cases where the defendant alleged that the plaintiff had committed a crime which the Act deemed never to have been committed. However, this provision was abandoned during the course of the bill's passage through Parliament, as was an alternative suggestion that publication of a spent conviction should be justified only if it was both true and in the public interest.⁷⁷ The suggestion eventually adopted was that the defence of truth should not be available in a case where publication of a spent conviction was proved to have been made with malice.⁷⁸ The effect of this provision is to convert an absolute defence into a qualified defence, thus aligning it with fair comment and qualified privilege, the other major defences to defamation actions, which can both be defeated by proof of malice.⁷⁹ These defences are expressly preserved.⁸⁰ The provision may still have some value as a deterrent to publication of a person's spent convictions, but is a much weaker sanction than originally intended.

⁷⁴ S 9(4).

⁷⁵ S 9(1).

⁷⁶ S 9(5).

⁷⁷ See Dworkin, 433-434. The Interim Report of the Committee on Defamation (the Faulks Committee) (1974) Cmnd. 5571 criticized the provisions of the bill, and recommended that actions for defamation should be entirely excluded from its scope.

⁷⁸ S 8(5).

⁷⁹ In *Herbage v Pressdram Ltd* [1984] 2 All ER 769, it was held that the same principles as in fair comment and qualified privilege applied to this limitation on the defence of justification.

⁸⁰ Ss 8(3) and (4).

(d) Convictions to which the Act applies

52. The Act does not apply to convictions in respect of which the sentence imposed exceeds 30 months' imprisonment.⁸¹ Sentences of imprisonment for a term exceeding 30 months, of imprisonment or custody for life, of preventive detention and of detention during Her Majesty's pleasure are expressly excluded.⁸²

53. In a number of respects the concept of what constitutes a conviction for the purposes of the Act is wider than the accepted meaning of the term. It includes an absolute or conditional discharge, a probation order and a finding in proceedings concerning children in need of care and protection that an offence has been committed.⁸³

(e) The "rehabilitation period"

54. Instead of providing a single "rehabilitation period" applicable to all convictions, the Act provides for a number of different periods applicable to different circumstances. This is one reason for its complexity: there are no fewer than 21 different provisions setting out rehabilitation periods applicable in particular circumstances. The basic scheme, as recommended in *Living it Down* and accepted by the Act, was to provide three different periods, each running from the date of conviction, as follows:

- (1) Ten years, for a sentence of imprisonment for a term exceeding six months but not exceeding 30 months;
- (2) Seven years, for a sentence of imprisonment not exceeding six months;⁸⁴
- (3) Five years, for a fine.⁸⁵

⁸¹ S 1(1)(a); s 5(1).

⁸² S 5(1). *Living it Down*, para 36, recommended that the maximum term to which its proposal should apply was a period of imprisonment for two years, on the basis that this provided a convenient dividing line between redeemable offenders and hardened professionals or people whose offences were such that the notion of rehabilitation would invoke strong feelings of resentment. It is not clear why this period was extended. The reach of the Act was increased by the extension, but it may be that this has caused an increase in the number of bodies applying for exemption under s 4(4).

⁸³ S 1(4).

⁸⁴ Six months is the maximum term of imprisonment which may be ordered by a Magistrates Court on summary conviction, although Magistrates can send an offender to the Crown Court for sentence if they are of the opinion that such a term of imprisonment is insufficient: *Magistrates' Courts Act 1980* (UK), s 31(1).

In the case of persons under seventeen on the date of conviction, the period is halved.⁸⁶

55. There are another 17 provisions which set out rehabilitation periods applicable in particular cases.⁸⁷ Some of these provisions relate to special sentences confined to young offenders or mental patients. Others are of more general importance, and deal with absolute and conditional discharges, probation orders and binding over orders. The imposition of different periods for different categories of sentence has the merit of trying to be fair, but this is only achieved at the cost of simplicity.

(f) Subsequent Convictions

56. The provisions of the Act which deal with the effect of subsequent convictions during the rehabilitation period are also complicated. In summary, they are as follows:

- (1) If, during the rehabilitation period applicable to the original conviction, the person incurs a conviction which cannot become spent under the Act,⁸⁸ the original conviction cannot become spent.⁸⁹
- (2) If, during the rehabilitation period applicable to the original conviction, the person incurs a further conviction which may become spent under the Act, and one conviction would become spent before the other, the former conviction will not become spent until the latter becomes spent.⁹⁰
- (3) However, if the subsequent conviction is for a summary offence only, this does not affect the running of the rehabilitation period for the earlier conviction. A separate rehabilitation period will be imposed in respect of the summary conviction.⁹¹

⁸⁵ S 5(2).

⁸⁶ Ibid.

⁸⁷ Ss 5(2) to (9).

⁸⁸ In this and the other provisions dealt with in this paragraph, the Act refers to whether a "sentence" is "excluded from rehabilitation".

⁸⁹ S 1(1).

⁹⁰ S 6(4). For a particular exception, see s 6(5).

⁹¹ S 6(6).

57. Once the rehabilitation period has been completed and the conviction has become spent, the conviction does not cease to be spent even if another conviction is later incurred.⁹² There will, of course, be a new rehabilitation period in respect of the subsequent conviction, provided that the sentence imposed does not exclude it from becoming spent under the Act.

(g) Comment

58. The *Rehabilitation of Offenders Act* has a number of features that make it an interesting attempt to deal with the problem of old convictions. In particular, it recognizes that the problem has several different aspects and that a variety of different measures are necessary to deal with it. However, the Act suffers from a number of defects. One important criticism of it is its complexity. It imposes a large variety of rehabilitation periods for different kinds of offences and different circumstances, and this makes it very difficult for the ordinary person to know whether or not the period has elapsed. The difficulty of understanding the Act is compounded by the complex way in which it has been drafted, and in particular the extensive cross-referencing between different sections. In addition, the considerable number of exceptions means that the protection given by the Act is weakened. A further problem is that since the exceptions are contained in subordinate legislation the provisions of the Act give a misleading impression of its scope.⁹³

⁹² For a particular exception, see s 6(3).

⁹³ In these respects the proposals in the HK Discussion Paper offer an interesting contrast. The paper incorporates a draft Bill. The scheme proposed is generally based on the United Kingdom Act, but is much more simply drafted. The scheme is more limited in its scope than the United Kingdom Act, applying only to first offenders who have not been sentenced to imprisonment, or to a fine exceeding 2,000 Hong Kong dollars (equivalent to about 400 Australian dollars). There is a single spent conviction period: a person covered by the scheme will "become rehabilitated" if a period of three years elapses without the person being again convicted of an offence, other than minor traffic or similar offences carrying a fixed penalty. It seems that the original conviction may revive even after a conviction becomes spent: the draft Bill introduces the provisions on the effect of rehabilitation with the words "for so long as that individual is not again convicted of an offence". The exceptions to the scheme are modelled on the United Kingdom scheme, but are somewhat narrower, and are set out in the legislation itself, not in subordinate legislation. The legislation does not apply to the following kinds of proceedings:

- (1) Proceedings to recover a fine.
- (2) Where a condition imposed in respect of a spent conviction is breached.
- (3) Where the spent conviction may result in some disqualification.
- (4) Where a court is considering the punishment to be imposed for subsequent criminal conduct.
- (5) Where the interests of an infant are involved.
- (6) Where the offender consents.
- (7) Where the court is satisfied that justice cannot otherwise be done.

In addition the legislation is not to apply to proceedings in respect of admission to, or disciplinary proceedings against a member of, a number of professions (those excluded by the United Kingdom legislation) of the public service, or to proceedings in respect of applications for licences.

4. AUSTRALIA

59. Queensland is the only Australian jurisdiction which has so far legislated on the problem of old convictions. However, proposals for legislation have been made in several other States, and in the Commonwealth.

(a) South Australia

(i) *The South Australian Law Reform Committee's Report*

60. Prior to the enactment of the United Kingdom *Rehabilitation of Offenders Act 1974*, the report *Living it Down* was referred to the South Australian Law Reform Committee. The Committee's report made recommendations for a scheme which was in general based on the *Living it Down* proposals but differed from them in certain particular respects.⁹⁴ This report was not implemented.

(ii) *The Attorney General's Department Discussion Paper*

61. More recently, the matter has been examined by the South Australian Attorney General's Department, which issued a discussion paper in November 1984.⁹⁵ The paper contained a draft Rehabilitation of Offenders Bill. The bill in general adopts the provisions of the United Kingdom *Rehabilitation of Offenders Act 1974*. It proposes that, once a conviction becomes stale - the bill's equivalent of a spent conviction - access to the record of the conviction should be limited. Evidence of the conviction should not be admissible in court proceedings, though, as in the United Kingdom, this does not apply to criminal proceedings; and questions should be treated as not relating to spent convictions.⁹⁶ There are no specific provisions on discrimination, but the discussion paper contemplates that such provisions might be incorporated in a general anti-discrimination statute.

⁹⁴ South Australian Law Reform Committee, *Report relating to the Past Records of Offenders and Other Persons* (No 32, 1974), in this report cited as SALRC Report.

⁹⁵ Discussion Paper on *Rehabilitation of Offenders: Old Criminal Convictions* (1984), in this report cited as SA Discussion Paper.

⁹⁶ The South Australian Law Reform Committee had gone further and proposed that certain questions should be prohibited: SALRC Report, 7-8.

62. Compared with the United Kingdom Act, there are three major differences. First, unlike the United Kingdom Act, which only applies to convictions in respect of which a sentence of not more than 30 months' imprisonment is imposed, the draft bill has no upper limit. It therefore provides for a wide variety of periods which must elapse before a conviction is regarded as a "stale conviction", varying from two years where an offender is discharged on conviction without penalty to forty years for life imprisonment (in each case running from the date of conviction). Secondly, in contrast to the wide exceptions provided for by subordinate legislation made under the United Kingdom Act, the South Australian draft bill contains no provision for permitting exceptions by subordinate legislation. The only exceptions contained in the bill are those found in the United Kingdom Act itself.⁹⁷ Thus, both in the range of offences covered, and in the lack of exceptions, the provisions of the South Australian draft bill are much more far-reaching than the United Kingdom Act. Thirdly, whereas the main sanction contemplated by the United Kingdom Act is a civil action for defamation, the draft bill provides that, subject to specified defences, the malicious disclosure of a stale conviction is to be a summary criminal offence. This goes much further than the offences provided by the United Kingdom Act which are limited to the unauthorized disclosure of official records.

63. The South Australian Government has not yet made any decision to act on these recommendations.⁹⁸

(b) Tasmania

(i) The Tasmanian Law Reform Commission Report

64. In 1976 the Tasmanian Law Reform Commission was requested to examine the United Kingdom *Rehabilitation of Offenders Act* with a view to making recommendations for similar legislation suitable to Tasmania. The Commission reported later the same year⁹⁹ and recommended against the adoption of legislation based on the United Kingdom Act. The report was critical of the United Kingdom Act in a number of respects, but principally on the ground that it was undesirable to deem convictions not to have occurred, and to allow people

⁹⁷ Eg. in respect of criminal proceedings: see Appendix V para 33 and 34 above.

⁹⁸ Information from South Australian Attorney General's Department, June 1986.

⁹⁹ Tasmania Law Reform Commission, *Report and recommendations on the provisions of the English Rehabilitation of Offenders Act 1974* (No 9, 1977).

to assert that they had no convictions when in fact this was not the case. It also saw difficulty in defining the limits of the exceptions permitted under the United Kingdom scheme. The Tasmanian situation was rather different, in particular in that truth was not a complete defence to defamation,¹⁰⁰ and so the sanctions provided by the United Kingdom Act could not operate in the same way. The publisher of the fact of a person's conviction would have to justify the publication as being for the public benefit. In addition, in a small community such as Tasmania, it was questioned whether legislation restricting the disclosure of a person's conviction would make very much difference. Instead of reform along United Kingdom lines, the Tasmanian Commission suggested guidelines to govern the disclosure of criminal records, and that the Government should initiate inquiries to determine whether employers and Government departments complied with the suggested guidelines.

(ii) *Subsequent developments*

65. No legislative action resulted from this report. A Bill based on the United Kingdom Act but limited to juvenile offenders - the Rehabilitation of Juvenile Offenders Bill - was introduced into the Tasmanian Parliament in March 1981, but was not proceeded with.¹⁰¹

(c) **New South Wales**

(i) *The Privacy Committee's background paper*

66. As part of a general study of criminal records and privacy in New South Wales, the New South Wales Privacy Committee in 1975 issued a background paper on rehabilitation of offenders,¹⁰² which made proposals for legislation designed to achieve the aims of protecting the privacy of past offenders and facilitating their rehabilitation. The proposals were based in part on the United Kingdom Act. Thus, the basic proposal was for a scheme whereby convictions would automatically become spent after a given period, applying to cases where the sentence imposed did not exceed two years' imprisonment. The proposed rules as to the period which must elapse before a conviction would become spent were, however, much simpler than those in the United Kingdom Act. There were to be only two periods, five years

¹⁰⁰ See para 3.38 above.

¹⁰¹ However, the *Records of Offences (Access) Act* (Tas), passed in the same year, imposes certain duties on those who keep criminal records to provide copies to the subject of the record and correct errors.

¹⁰² New South Wales Privacy Committee, Background Paper: *Rehabilitation of Offenders* (1975), in this report cited as NSWPC Background Paper.

for a non-custodial sentence and ten years for a custodial sentence, in each case reckoned from the date of conviction.

67. The background paper went beyond the United Kingdom scheme in that it put forward other provisions to deal with more serious offences. In such cases, convictions could be declared spent after application and inquiry, in a way similar to the scheme provided in the Canadian *Criminal Records Act*.¹⁰³ It also suggested that records should be eventually destroyed - five years after the conviction became automatically spent, or on the granting of an application to have the conviction declared spent.

(ii) *Subsequent developments*

68. The Privacy Committee did not adopt the views put forward in the background paper. Its view was that the problem was better dealt with by administrative guidelines than by legislation.¹⁰⁴ This was in line with its attitude to the problem of privacy protection generally. However, in 1982 the Committee reassessed its view and declared itself in favour of legislation protecting privacy.¹⁰⁵

69. Previously the New South Wales Government had rejected the Privacy Committee's guideline approach to the problem of old convictions.¹⁰⁶ The question of legislation on old convictions is being considered by the New South Wales Attorney General's Department.

(d) **Victoria**

70. In April 1984, the Victorian Attorney General, Hon J H Kennan MLC, announced that a system of expunging the records of old convictions was under consideration in the Victorian Law Department.¹⁰⁷ This followed an amendment of the Victorian *Crimes Act* which provided that prior convictions in the Children's Court could not be used against a convicted

¹⁰³ See paras 5.7 and 5.8, 5.13 to 5.15 and Appendix V paras 7 to 20 above.

¹⁰⁴ See New South Wales Privacy Committee, report on *The Collection, Storage and Dissemination of Criminal Records by the Police* (1979); New South Wales Privacy Committee, report on *The Use of Criminal Records in the Public Sector* (1979).

¹⁰⁵ New South Wales Privacy Committee, Annual Report 1982, para 2.1.

¹⁰⁶ See New South Wales Privacy Committee, Five Years 1975-1980, 33.

¹⁰⁷ See [1984] Law Institute Journal 466.

person in a subsequent criminal trial more than ten years later.¹⁰⁸ The matter is still under consideration.

(e) The Commonwealth of Australia

71. The Australian Law Reform Commission, which commenced work on a reference on criminal records in 1984,¹⁰⁹ issued a discussion paper, incorporating a draft Criminal Information and Records Bill, in December 1985.¹¹⁰

72. The discussion paper endorses the ALRC's recommendations on information privacy - that is, the interest of a person in controlling the information held by others about him or her - as set out in its report on privacy,¹¹¹ and points out that these proposals would apply to criminal record information.¹¹² The other proposals made in the discussion paper are as follows.

73. Discrimination on the ground of criminal record would be unlawful, providing that such discrimination was unreasonable in the circumstances of the case. The legislation would be generally similar in form to Commonwealth sex and race discrimination legislation¹¹³ and, as in that legislation, the Commonwealth Human Rights and Equal Opportunities Commission would have inquiry and conciliation functions.¹¹⁴

74. It should be possible for a conviction to become spent after a given period free of further convictions. In the case of convictions for minor offences (offences in respect of which a custodial sentence was not imposed) a conviction would become spent automatically after ten years, provided that during that period the convicted person had not been convicted of another offence. In the case of convictions for major offences (offences in respect of which

¹⁰⁸ See *Crimes (General Amendment) Act 1984* (Vic), s 24.

¹⁰⁹ See also paras 1.12 to 1.15 above.

¹¹⁰ Discussion paper on *Criminal Records* (No 25, 1985), in this report cited as ALRC Discussion Paper.

¹¹¹ Report on *Privacy* (No 22, 1983). The ALRC had recommended:

- (1) the recognition of a person's right to get access to records of personal information about him or her, and to correct them if inaccurate, misleading, incomplete, out of date or irrelevant;
- (2) the strengthening of existing laws protecting the parties to confidential relationships and the security of confidential information;
- (3) the appointment of a Privacy Commissioner whose functions would include the monitoring of record keeping practices.

¹¹² ALRC Discussion Paper, paras 28-31.

¹¹³ *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth).

¹¹⁴ ALRC Discussion Paper, paras 32-34.

a custodial sentence was imposed) a conviction would only become spent if, on application to the Commissioner of Police, the Commissioner so ordered. An application could not be made before the expiration of a period of ten years commencing at the date of expiration of the sentence imposed. The Commissioner's decision would be reviewable by the Administrative Appeals Tribunal.¹¹⁵

75. The effects of a conviction becoming spent would be as follows -

- (1) In laws imposing a disability on a person with convictions, "conviction" would be read as excluding reference to spent convictions, unless the law makes express provision to the contrary.
- (2) A person or body (including a court or tribunal) exercising a power or function, or performing a duty conferred or imposed by or under a Commonwealth law, would be prohibited from having regard to spent convictions. There would, however, be an exception in the case of courts and tribunals applying the law of evidence. These bodies could, with leave, have regard to the spent convictions of a person giving evidence to prove that the evidence should or should not be accepted if, under the laws of evidence, such evidence would be admissible to prove that matter and the evidence has substantial probative value as to the person's credibility. Evidence of a spent conviction would also be admissible in some other cases, including -
 - (a) where the convicted person consented;
 - (b) where the proceedings are in connection with the spent conviction;
 - (c) in criminal proceedings, where given in connection with the determination of the penalty to be imposed on a convicted person in respect of the conviction, or in respect of the conviction of that person for another offence.

¹¹⁵ Id, paras 39-44.

- (3) Questions about a convicted person, and obligations under a Commonwealth law to disclose matters relating to a convicted person, should not be taken to relate to spent convictions. A person would thus not be required to give information about a spent conviction.
- (4) Allowing access to, or disclosing or communicating information from, a criminal record about a spent conviction would be an offence. This would apply not only to the records of official bodies such as the police and government departments, but also to others recording information about convictions, such as employers. A number of defences are proposed, for example that the defendant was not aware that the conviction was a spent conviction.¹¹⁶

76. Official record keepers would be placed under obligations to -

- (1) keep a record of persons who were allowed access to criminal records, or to whom information from such criminal records was disclosed or communicated;
- (2) store separately (as far as practicable) records of spent convictions;
- (3) notify persons to whom information relating to the conviction has been disclosed, or who had obtained access to the record, that the conviction had become spent.¹¹⁷

77. On application by a convicted person, the Privacy Commissioner¹¹⁸ would be empowered to order that a criminal record of a spent conviction should be destroyed.¹¹⁹

(f) Queensland

78. In May 1984, the Queensland Minister for Justice and Attorney General, Mr N J Harper, announced proposals for legislation for the "sealing" of criminal records.¹²⁰ In April

¹¹⁶ Id, paras 37-38.

¹¹⁷ Id, paras 45-47.

¹¹⁸ Whose establishment was recommended in the ALRC's report on *Privacy* (No 22, 1983): see Appendix V footnote 111 above.

¹¹⁹ ALRC Discussion Paper, para 48.

1986, the Queensland Parliament passed the *Criminal Law (Rehabilitation of Offenders) Act*.¹²¹

79. In many respects, the Act is based on the United Kingdom *Rehabilitation of Offenders Act 1974*.¹²² Like that Act, it only applies to convictions in respect of which either a custodial sentence is not imposed or the offender receives a custodial sentence not exceeding 30 months.¹²³ Like the United Kingdom Act, convictions in this category become spent¹²⁴ after a "rehabilitation period" of ten years measured from the date on which the conviction is recorded,¹²⁵ if there are no further convictions.¹²⁶ Unlike the United Kingdom Act, however, this period applies to all convictions covered by the Act. The United Kingdom provisions imposing shorter periods in particular cases have not been adopted, except that in the case of convictions of children the rehabilitation period is halved.¹²⁷

80. As in the United Kingdom, a subsequent conviction (other than for a simple offence) during the rehabilitation period will prevent the conviction becoming spent.¹²⁸ The Queensland Act also provides that a subsequent conviction (other than for a simple offence) after the rehabilitation period has run will revive the conviction.¹²⁹ However, a conviction for a simple offence will prevent the conviction becoming spent or revive a spent conviction if the court imposing the subsequent conviction is satisfied that, having regard to the public interest, the conviction should have this consequence.¹³⁰

81. The principal effect of the conviction becoming spent is that, under section 6, disclosure of the conviction (except by the convicted person) is prohibited. Contravention of this or any other provision of the Act is an offence carrying a maximum penalty of a \$5,000 fine.¹³¹ Section 8 provides that where a conviction has become spent it is lawful for convicted

¹²⁰ See *Brisbane Courier Mail*, 9 May 1984.

¹²¹ At the time of submission of this report, the Act had not been proclaimed.

¹²² See Appendix V paras 29 to 58 above.

¹²³ S 3(2).

¹²⁴ The Act does not use the term "spent conviction". It speaks of the rehabilitation period becoming expired.

¹²⁵ S 3(1), definition of "rehabilitation period".

¹²⁶ Apart from convictions which under s 11 do not stop the rehabilitation period running.

¹²⁷ S 3(1), definition of "rehabilitation period".

¹²⁸ S 11.

¹²⁹ *Ibid.*

¹³⁰ S 11(2).

¹³¹ S 12. Prosecutions have to be authorized by the Minister for Justice and Attorney General. The offence provision is potentially very wide. S 5 provides that a person shall not be required or asked to disclose convictions that are not part of the person's criminal history (eg a conviction which is deemed not to be a

persons to claim, on oath or otherwise, that they have not been convicted. In such circumstances evidence is not admissible in any proceeding to show that the claim is false.¹³²

Section 9 provides that any person or authority charged with the function of assessing a person's fitness to be admitted to a profession, occupation or calling or for any other purpose shall disregard spent convictions.

82. There are, however, a considerable number of exceptions. The Act is to be construed so as not to prejudice any provision of law or rule of legal practice that requires disclosure of a person's criminal history,¹³³ and particular professions, occupations and callings can be exempted from the Act by Order in Council.¹³⁴ Section 6 does not apply to reports of judicial proceedings and reports or disclosures made pursuant to any provision of law requiring disclosure of convictions that have become spent,¹³⁵ or to the activities of the police.¹³⁶ Neither section 6 nor section 9 applies where persons are expressly required by law to make disclosure, where authorities are required by law to make disclosure, or where authorities are expressly required by law to have regard to a person's criminal history.¹³⁷ Neither section applies to the Parole Board.¹³⁸ Authority to disclose spent convictions in particular cases can be granted by a permit issued by the Minister for Justice and Attorney General.¹³⁹

(g) Northern Territory

83. The Commission understands that the question of limiting the effects of old convictions is under consideration in the Northern Territory Attorney General's Department.

5. NEW ZEALAND

84. The question of expunging old criminal records was dealt with in the report of the New Zealand Penal Policy Review Committee, issued in 1981.¹⁴⁰ The Committee's

conviction, such as one in respect of which a probation order is made). It appears that the asking of such questions is an offence under the Act.

¹³² S 8(2).

¹³³ S 4(1).

¹³⁴ S 4(2).

¹³⁵ S 7(1).

¹³⁶ S 7(2).

¹³⁷ Ss 6(c), 9(1)(a) and (b).

¹³⁸ Ss 6(c), 9(2).

¹³⁹ S 10.

¹⁴⁰ Ch 25. See R Barrington, *Sealing the Criminal Record* [1982] New Zealand Law Journal 131.

recommendations formed the basis of a discussion paper issued by the Department of Justice¹⁴¹ in 1985.¹⁴²

85. The discussion paper proposes that -

- (1) All offenders would be protected against discrimination in employment.
- (2) After a five year period, publication of the record of a conviction would become unlawful.
- (3) After ten years, all disabilities flowing from an old conviction would be removed.
- (4) After ten years, records of convictions, except those imposed in respect of the more serious offences, would be destroyed.

86. It is noteworthy that, in one respect, the New Zealand proposals are not limited to spent convictions. The discussion paper takes the view that finding employment is the most important problem facing convicted persons, and that the time of greatest need is immediately after conviction or completion of sentence. It concludes that it would be wrong to prohibit discrimination in employment only in respect of spent convictions. At the same time, however, there would be cases where a person's criminal history would be relevant to the particular job for which the person was applying, such as where an applicant for a teaching position had a conviction for sex offences against young children. The discussion paper therefore proposes that, from the date of conviction, or, in the case of a custodial sentence, from the date of release from custody, it should be unlawful to discriminate against anyone with a criminal record, except where a direct relationship exists between the criminal record and the area of concern. However, after ten years, the direct relationship exception would no

¹⁴¹ New Zealand Department of Justice (Law Reform Division) discussion paper on *Living Down a Criminal Record: Problems and Proposals* (1985), in this report cited as NZ Discussion Paper. The proposals contained in the Fiji Law Reform Commission Discussion Paper on *Rehabilitation and the Problem of Old Convictions* (No 2, 1982) are also based in large measure on the Penal Policy Review Committee's Report. See WALRC Discussion Paper, paras 7.1 and 7.2 and Appendix II.

¹⁴² Two years previously, a private member's bill, the Rehabilitation of Offenders Bill 1983, based on the *Rehabilitation of Offenders Act 1974* (UK), had been introduced into the New Zealand Parliament but lapsed.

longer be applicable, and discrimination would be unlawful even if there was a direct relationship.

87. Other novel features of the New Zealand proposals are that:

- (1) The "rehabilitation period" would differ for different purposes. The period after which publication of a conviction would be prohibited would be shorter than the period after which disabilities would be removed, and records of convictions destroyed.
- (2) In the case of custodial sentences, the period would be calculated from the date of release, on the basis that a convicted person can only begin to establish evidence to justify a conviction becoming spent after release, when the person is once again in the community and at risk.¹⁴³

¹⁴³ The South Australian Law Reform Committee had recommended the adoption of a similar principle: SALRC Report, 9.

Appendix VI

DRAFT SPENT CONVICTIONS BILL 198[]

(No. of 198[])

ARRANGEMENT

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A BILL

F O R

AN ACT to limit the effects of spent convictions.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:-

PART I - PRELIMINARY

Short title

1. This Act may be cited as the *Spent Convictions Act 198*[].

Commencement

2. This Act shall come into operation on a day to be fixed by proclamation.

Definitions

3. In this Act, unless the contrary intention appears -

"Commissioner of Police" means the Commissioner of Police appointed under section 5 of the *Police Act 1892*;

"convicted person" means a natural person who has been convicted of an offence;

"offence" means an act or omission which renders the person doing the act or making the omission liable to punishment, whether a State offence, a Commonwealth offence or a foreign offence;

"State offence" means an offence against or arising under a State law, whether that of Western Australia or another State, or the law of the Northern Territory or Norfolk Island;

"Commonwealth offence" means an offence against or arising under a Commonwealth law and includes an offence against or arising under a law that was in force in -

(a) the territory of Papua New Guinea before 16 September 1975;

(b) the territory of Nauru before 31 January 1968.

"foreign offence" means an offence against the law of a foreign country.

"police criminal record" means the record of convictions kept by the Criminal Records Section of the Scientific Branch of the Western Australian Police at Police Headquarters in Perth.

"spent conviction" means a conviction which has become spent automatically under section 5 or has been declared spent under sections 7 or 8.

PART II - WHEN A CONVICTION BECOMES SPENT

Major and minor convictions

4. (1) For the purposes of this Act, a person incurs a major conviction if that person is convicted of an offence, or of two or more offences on the same date, and the penalty imposed by the court is or includes a sentence or sentences of imprisonment for more than one year, or for an indeterminate period, or for life.

(2) In subsection (1), a sentence of imprisonment for an indeterminate period includes sentences of -

- (a) detention in strict custody until the Governor's pleasure is known and, thereafter, in safe custody in such place or places as the Governor may, from time to time, direct, under section 19(6a)(a) of the *Criminal Code*;
- (b) detention during the Governor's pleasure in a prison under section 661 or section 662 of the *Criminal Code*.

(3) For the purposes of determining the period of imprisonment under subsection (1) -

- (a) where two or more sentences of imprisonment are ordered to be served concurrently, they shall be regarded as a sentence of imprisonment equal to the length of the longest sentence;
- (b) where two or more sentences of imprisonment are ordered to be served cumulatively, they shall be regarded as a sentence of imprisonment equal to the total length of the sentences imposed.

(4) For the purposes of this Act, a person incurs a minor conviction if that person is convicted of an offence, or of two or more offences on the same date, and the penalty imposed by the court does not include any sentence specified in subsection (1).

Convictions becoming spent automatically

5. (1) Unless previously declared spent under section 7, a minor conviction shall become spent automatically at the expiration of the prescribed period, provided that the convicted person has not during this period been convicted of another offence other than an offence for which either no penalty is imposed or the penalty imposed is a fine of not more than \$100 (or such greater sum as is prescribed).

(2) If during the prescribed period the convicted person incurs a minor conviction, other than for an offence mentioned in subsection (1), the original conviction shall not become spent automatically until the conditions necessary for the subsequent conviction to become spent under subsection (1) are satisfied.

(3) If during the prescribed period the convicted person incurs a major conviction, the original conviction shall no longer become spent automatically, but shall only become spent by order of a District Court judge under section 8.

Spent conviction certificate

6. (1) Where a conviction has become spent under section 5, the Commissioner of Police shall, on application by the convicted person certify in writing that the conviction has become spent.

(2) Any person who makes a fraudulent statement in order to obtain a spent conviction certificate commits an offence.

Penalty: \$1,000.

Convictions which may become spent on application to a magistrate

7. (1) This section applies only to minor convictions in respect of which the penalty imposed does not include a sentence of imprisonment.

(2) A conviction to which this section applies shall become spent if, on application being made by the convicted person to a magistrate, the magistrate makes an order declaring that the conviction is spent.

(3) Such an application may only be made if -

(a) at least five years have elapsed since the date of the conviction, and

- (b) the convicted person has not during this period been convicted of another offence, other than an offence for which either no penalty is imposed or the penalty imposed is a fine of not more than \$100 (or such greater sum as is prescribed).

Convictions which may become spent on application to a District Court judge

8. (1) A major conviction, or a minor conviction which may no longer become spent automatically, shall become spent if, on application being made by the convicted person to a District Court judge, the judge makes an order declaring that the conviction is spent.

(2) Such an application may not be made until after the expiry of the prescribed period.

The prescribed period

9. (1) In this section "the prescribed period" means the period which must elapse before -

- (a) a minor conviction becomes spent automatically, or
- (b) a major conviction, or a minor conviction which can no longer become spent automatically, may be declared spent on application to a District Court judge.

(2) In all cases, save for those dealt with in subsections (3) to (6), the prescribed period is ten years, reckoned from the date of the conviction.

(3) If the penalty imposed in respect of the conviction is or includes a sentence of imprisonment other than a sentence of imprisonment specified by subsection (4), the prescribed period is a period, reckoned from the date of conviction, of ten years plus the sentence of imprisonment imposed, irrespective of what portion of that sentence of imprisonment is actually served.

- (4) (a) If the penalty imposed in respect of the conviction is or includes a sentence of imprisonment for an indeterminate period, or for life, the prescribed period is ten years, reckoned from the date on which the convicted person is discharged from that sentence;
- (b) In paragraph (a), a sentence of imprisonment for an indeterminate period shall include the sentences specified in section 4(2).

(5) Where a sentence of imprisonment is ordered to be served cumulatively upon a sentence of imprisonment imposed in respect of an earlier conviction, the prescribed period applying to the later conviction shall be the sum of -

- (a) the length of time which, on the date of the later conviction, has yet to elapse before the earlier conviction can become or may be declared spent;
- (b) the sentence of imprisonment imposed in respect of the later conviction.

(6) Where a disqualification, disability, prohibition or other like penalty -

- (a) is imposed on the convicted person in addition to some other sentence, then the disqualification, disability, prohibition or other like penalty shall not taken into account in determining the prescribed period;
- (b) is the only sentence imposed on a convicted person, the prescribed period shall be ten years, reckoned from the date of conviction.

Particular sentences

10. For the purposes of this Act -

(1) Where, under section 19(5) of the *Criminal Code*, a person is sentenced to be imprisoned until a fine is paid, in addition to any other punishment to which the person is sentenced, the sentence shall be regarded as a sentence not involving imprisonment unless a finite term of imprisonment is also imposed.

(2) Where, under section 19(6) of the *Criminal Code*, a person is sentenced to be imprisoned until the person enters into a recognizance, with or without sureties, to keep the peace and be of good behaviour, either instead of or in addition to any other punishment to which the person is liable, the sentence shall be regarded as one not involving imprisonment unless a finite term of imprisonment is also imposed.

(3) Where, under section 19(8) of the *Criminal Code*, a person has been convicted of any offence not punishable with strict security life imprisonment, and the court, instead of passing sentence, discharges the person upon the person entering into a recognizance, with or without sureties, conditioned that the person shall appear and receive judgment at some further sittings of the court, or when called upon, the sentence imposed in relation to the offence -

(a) if a sentence is imposed on the person in subsequent proceedings, shall be that sentence;

(b) otherwise, shall be regarded as a sentence not involving imprisonment.

(4) A sentence imposed by a court outside Western Australia shall be regarded as if it were a sentence of a kind most nearly corresponding to a sentence that may be imposed by a court in Western Australia.

Convictions imposed before Act comes into force

11. (1) Where a conviction was imposed before the date of commencement of this Act, the following provisions shall apply.

(2) A minor conviction shall become spent automatically on whichever is the later of the following -

- (a) the date of commencement of this Act;
- (b) the date on which the conviction would have become spent automatically if this Act had been in force on the date when the conviction was imposed and had continued in force after that date.

(3) An application, either to a District Court judge in respect of a major conviction or a minor conviction which may no longer become spent automatically, or to a magistrate in respect of a minor conviction of the kind to which section 7 applies, for an order declaring that the conviction is spent, may be made on whichever is the later of the following -

- (a) the date of commencement of this Act;
- (b) the first date on which application could have been made if this Act had been in force on the date when the conviction was imposed and had continued in force after that date.

PART III - APPLICATIONS FOR CONVICTIONS TO BE DECLARED SPENT

General

12. (1) The provisions of this Part apply where a convicted person (in this Part referred to as "the applicant") makes an application for an order declaring a conviction to be spent, either under section 7 or under section 8.

(2) In this Part "judge" means either a magistrate hearing an application under section 7 or a District Court judge hearing an application under section 8.

The application

13. (1) The application shall be in writing and shall set out -

- (a) all previous convictions, whether incurred in Western Australia or elsewhere;
- (b) the employment history of the applicant since the date of the conviction in respect of which the application is being made;
- (c) such other matters as may be prescribed.

(2) The judge may, by notice in writing given to the applicant, require the applicant to give further information in relation to the application.

(3) An application may be made in respect of more than one conviction.

Parties to the application

14. (1) (a) The Commissioner of Police shall be made a party to the application, and notice of the application shall be served upon the Commissioner of Police;

- (b) The Commissioner of Police may -
 - (i) submit to the judge a written statement setting out reasons why the application should or should not be granted;
 - (ii) appear at the hearing and make submissions either personally or through any person the Commissioner of Police authorizes.

- (2) (a) The Attorney General may intervene in the application, and contest or argue any question arising in relation to the application.
- (b) Where the Attorney General intervenes in the application, the Attorney General shall be deemed to be a party to the application.

The hearing

15. (1) The hearing shall be in private unless -

- (a) the applicant requests that the hearing should be in public; or
- (b) the judge considers that, in the circumstances of the case, the hearing should be in public.

(2) Where the hearing is in private the judge may give directions (in writing or otherwise) as to who may be present.

(3) Where the hearing is in public the judge may order that there shall not be published by any means any particulars likely to lead to the identification of the applicant.

(4) A person who, except with lawful excuse, fails to comply with an order made under subsection (3) commits an offence.

Penalty: \$1,000.

Alternatives to holding a hearing

16. The judge may -

- (a) if satisfied that an application is frivolous, vexatious, misconceived or lacking in substance, dismiss the application without holding a hearing;

- (b) if satisfied that it is appropriate to do so, make an order declaring that the conviction is spent without holding a hearing.

When judge may declare conviction spent

17. (1) In the case of an application under section 7, the magistrate shall make the order unless satisfied, having regard to the circumstances set out in subsection (3), that it is inexpedient to do so.

- (2) In the case of an application under section 8, the District Court judge -
 - (a) if there are no subsequent convictions, other than convictions in respect of which either no penalty is imposed or the penalty imposed is a fine of not more than \$100 (or such greater sum as is prescribed), shall make the order unless satisfied, having regard to the circumstances set out in subsection (3), that it is inexpedient to do so.
 - (b) otherwise, shall not make the order unless satisfied, having regard to the circumstances set out in subsection (3), that the order should be made.
- (3) The circumstances referred to in subsections (1) and (2) are -
 - (a) the length and kind of sentence imposed in relation to the conviction;
 - (b) the length of time since the date of the conviction;
 - (c) whether the conviction prevents or may prevent the applicant from engaging in a particular profession, trade or business or in a particular employment;
 - (d) all the circumstances of the applicant, including the circumstances of the applicant at the time of the commission of the offence and at the time the application was made;

- (e) the nature and seriousness of the offence;
- (f) the circumstances surrounding the commission of the offence;
- (g) whether the applicant has since the conviction been convicted of another offence and, if the applicant has been so convicted, the nature of the subsequent offence and the penalty imposed in relation to it;
- (h) whether there remains any public interest to be served in not making an order.

Costs

18. (1) Except as provided by subsection (2), each party to an application shall pay the party's own costs.

(2) Where the judge dismisses the application without holding a hearing under section 16(1)(a), or where the judge is of the opinion in a particular case that there are circumstances which justify doing so, the judge may award such costs as the judge thinks fit.

(3) Costs awarded under subsection (2) may be registered as a judgment debt in a court of competent jurisdiction.

Order to be sent to Commissioner of Police

19. Where the judge issues an order declaring that the conviction is spent, a copy of the order shall, as soon as practicable, be sent to the Commissioner of Police.

Appeal

20. An appeal against a decision of the judge on an application under sections 7 or 8 shall lie to a single judge of the Supreme Court, but only when the grounds of appeal involve a question of law.

Bar on subsequent applications

21. Where an application to have a conviction declared spent is dismissed the applicant may not make another application in relation to that conviction before the end of a period of two years running from the date on which the judge dismissed the first-mentioned application.

PART IV - EFFECT OF A CONVICTION BECOMING SPENT

Interpretation of written laws

22. (1) A reference in a written law of the State (other than this Act) to a conviction of a person for an offence shall not include a reference to a spent conviction, unless the contrary intention appears.

(2) A reference in a written law of the State to a person's good character, fitness, propriety, or any other like reference shall not be interpreted as permitting or requiring account to be taken of a spent conviction, unless the contrary intention appears.

Disclosure or acknowledgement of spent convictions

23. (1) Questions about a convicted person put to a person by or by authority of any other person or body shall not be taken to relate to a spent conviction, unless a written law of the State makes express provision to the contrary.

(2) An obligation imposed on any person by any written law of the State, or by the principles and rules of common law or equity, or by the provisions of any agreement or arrangement, to disclose matters relating to a convicted person shall not require the disclosure or acknowledgement of the spent conviction unless, in the case of an obligation imposed by a written law, the written law makes express provision to the contrary.

References to convictions before courts and tribunals

24. (1) Section 23 shall not apply to proceedings before courts and tribunals applying the laws of evidence.

(2) A court or tribunal before which evidence of a spent conviction is admitted shall take such steps as are reasonably available to it to avoid or minimise publication of that evidence.

Obtaining information about spent convictions from official criminal records

25. (1) For the purposes of this section, an "official criminal record" means a record kept for the purposes of its functions by any police force, court, government department, local or other public authority in Western Australia, being in each case a record containing information about persons convicted of offences.

(2) Any person who obtains information about a spent conviction from any official criminal record by means of any fraud, dishonesty or bribe commits an offence.

Penalty: \$1,000.

PART V - DESTRUCTION OF RECORDS

General

26. (1) Where a period of not less than ten years has elapsed since the date on which a conviction became spent, the convicted person may apply to the Commissioner of Police for the police criminal record of that conviction to be destroyed.

- (2) The application shall be supported by a statutory declaration stating that -
- (a) the convicted person has not during the period since the conviction became spent been convicted of another offence, other than an offence

for which either no penalty was imposed or the penalty imposed was a fine of not more than \$100 (or such greater sum as is prescribed);

- (b) the convicted person is not subject to any disqualification, disability, prohibition or other like penalty as a result of the conviction.

(3) Unless the Commissioner of Police has reasonable grounds to believe that any of the facts and matters set out in the declaration are false, the Commissioner of Police shall cause the police criminal record of that conviction to be destroyed.

Convictions imposed before Act comes into force

27. (1) Where -

- (a) a conviction was imposed before the date of commencement of this Act, and
- (b) had this Act been in force on the date of the conviction and continued in force after that date, the conviction would have become spent under section 5; and
- (c) a period of not less than ten years has elapsed since the date on which the conviction would have become so spent;

the convicted person may apply to the Commissioner of Police for the police criminal record of that conviction to be destroyed.

(2) The application shall be supported by a statutory declaration stating that -

- (a) the convicted person has not since the conviction in question been convicted of another offence, other than an offence for which either no penalty was imposed or the penalty imposed was a fine of not more than \$100 (or such greater sum as is prescribed);

- (b) the convicted person is not subject to any disqualification, disability, prohibition or other like penalty as a result of the conviction.

(3) Unless the Commissioner of Police has reasonable grounds to believe that any of the facts and matters set out in the declaration are false, the Commissioner of Police cause the police criminal record of that conviction to be destroyed.

PART VI - ORDERS WHICH DO NOT INVOLVE CONVICTION

Orders which do not involve conviction

28. The following are not regarded as a conviction for the purposes of this Act -

- (a) a conviction which is deemed not to be a conviction by section 40 of the *Child Welfare Act 1947*;
- (b) a conviction which is deemed not to be a conviction by section 20 of the *Offenders Probation and Parole Act 1963*;
- (c) a dismissal under section 669(1)(a) of the *Criminal Code*.

Treatment of dismissals

29. For the purposes of this Act a dismissal under section 669(1)(a) of the *Criminal Code* shall be treated in the same way as a conviction which has become spent.

PART VII - MISCELLANEOUS

Prerogative of mercy

30. This Act shall not affect the exercise of the Royal prerogative of mercy.

Regulations

31. The Governor may make regulations for or with respect to any matter that by this Act is permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Appendix VII

DRAFT EQUAL OPPORTUNITY AMENDMENT BILL 198[] (No. of 198[])

ARRANGEMENT

Clause

1. Short title and principal Act
2. Commencement
3. Long title amended
4. Section 3 amended
5. Section 4 amended
6. Part IVA inserted
7. Sections 80, 140 and 146 amended

A BILL

F O R

AN ACT to amend the *Equal Opportunity Act 1984*.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:-

Short title and principal Act

1. (1) This Act may be cited as the *Equal Opportunity Amendment Act 1984* [].
- (2) In this Act the *Equal Opportunity Act 1984** is referred to as the principal Act.

[*Amended by Act No 98 of 1985]

Commencement

2. This Act shall come into operation on a day to be fixed by proclamation.

Long title amended

3. The long title of the principal Act is amended by adding, after the words "religious or political conviction", the words "record of offences".

Section 3 amended

4. Section 3, paragraph (a) of the principal Act is amended by deleting the words "race or religious or political conviction" and substituting the words "race, religious or political conviction or record of offences".

Section 4 amended

5. Section 4 of the principal Act is amended by adding, after the definition of "race", the following:

"record of offences" means any of the following -

- (a) a conviction which has become spent under the provisions of the *Spent Convictions Act 198*[];
- (b) a conviction for an offence committed by a child which is under section 40(2) of the *Child Welfare Act 1947* deemed not to be a conviction;
- (c) a conviction in respect of which a probation order is made which is under section 20 of the *Offenders Probation and Parole Act 1963* deemed not to be a conviction;
- (d) a dismissal under section 669(1)(a) of the *Criminal Code*."

Part IVA inserted

6. The principal Act is amended by adding, after Part IV, Part IVA, as follows:

"PART IVA - DISCRIMINATION ON THE GROUND OF RECORD OF OFFENCES

Division 1 - General

Discrimination on ground of record of offences

66A. (1) For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of record of offences if, on the ground of -

- (a) the record of offences of the aggrieved person;
- (b) a characteristic that appertains generally to persons with a record of offences; or
- (c) a characteristic that is generally imputed to persons with a record of offences,

the discriminator treats the aggrieved person less favourably than in the same circumstances or in circumstances that are not materially different, the discriminator treats or would treat a person without a record of offences.

(2) For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of record of offences if the discriminator requires the aggrieved person to comply with a requirement or condition -

- (a) with which a substantially higher proportion of persons who do not have a record of offences comply or are able to comply;
- (b) which is not reasonable having regard to the circumstances of the case; and
- (c) with which the aggrieved person does not or is not able to comply.

Division 2 - Discrimination in work

Discrimination against applicants and employees

66B. (1) It is unlawful for an employer to discriminate against a person on the ground of the person's record of offences -

- (a) in the arrangements made for the purpose of determining who should be offered employment;
- (b) in determining who should be offered employment; or
- (c) in the terms or conditions on which employment is offered.

(2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's record of offences -

- (a) in the terms or conditions of employment that the employer affords the employee;
- (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;
- (c) by dismissing the employee; or
- (d) by subjecting the employee to any other detriment.

Discrimination against commission agents

66C. (1) It is unlawful for a principal to discriminate against a person on the ground of the person's record of offences -

- (a) in the arrangements the principal makes for the purpose of determining who should be engaged as a commission agent;
- (b) in determining who should be engaged as a commission agent; or
- (c) in the terms or conditions on which the person is engaged as a commission agent.

(2) It is unlawful for a principal to discriminate against a commission agent on the ground of the commission agent's record of offences -

- (a) in the terms or conditions that the principal affords the commission agent as a commission agent;
- (b) by denying the commission agent access, or limiting the commission agent's access, to opportunities for promotion, transfer or training, or to any other benefits associated with the position as a commission agent;
- (c) by terminating the engagement; or
- (d) by subjecting the commission agent to any other detriment.

Discrimination against contract workers

66D. It is unlawful for a principal to discriminate against a contract worker on the ground of the contract worker's record of offences -

- (a) in the terms or conditions on which the principal allows the contract worker to work;
- (b) by not allowing the contract worker to work or continue to work;

(c) by denying the contract worker access, or limiting the contract worker's access, to any benefit associated with the work in respect of which the contract with the employer is made; or

(d) by subjecting the contract worker to any other detriment.

Professional or trade organizations etc

66E. (1) This section applies to an organization of employees and to an organization of employers.

(2) It is unlawful for an organization to which this section applies or for a committee of management of such an organization or for a member of such a committee of management to discriminate against a person who is not a member of the organization on the ground of the person's record of offences -

(a) by refusing or failing to accept the person's application for membership;
or

(b) in the terms or conditions on which the organization is prepared to admit the person to membership.

(3) It is unlawful for an organization to which this section applies or for the committee of management of such an organization or for a member of such a committee of management to discriminate against a person who is a member of the organization on the ground of the person's record of offences -

(a) by denying the person access, or limiting the person's access, to any benefit provided by the organization;

(b) by depriving the person of membership or varying the terms of membership; or

(c) by subjecting the person to any other detriment.

Qualifying bodies

66F. It is unlawful for an authority or body that is empowered to confer, renew, extend, revoke or withdraw an authorization or qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation to discriminate against a person on the ground of the person's record of offences -

- (a) by refusing or failing to confer, renew or extend the authorization or qualification;
- (b) in the terms or conditions on which it is prepared to confer the authorization or qualification or to renew or extend the authorization or qualification; or
- (c) by revoking or withdrawing the authorization or qualification or varying the terms or conditions upon which it is held.

Employment agencies

66G. It is unlawful for an employment agency to discriminate against a person on the ground of the person's record of offences -

- (a) by refusing to provide the person with any of its services;
- (b) in the terms or conditions on which it offers to provide the person with any of its services; or
- (c) in the manner in which it provides the person with any of its services.

Education

66H. (1) It is unlawful for an educational authority to discriminate against a person on the ground of the person's record of offences -

- (a) by refusing or failing to accept the person's application for admission as a student; or
- (b) in the terms or conditions on which it is prepared to admit the person as a student.

(2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's record of offences -

- (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or
- (b) by expelling the student or subjecting the student to any other detriment.

Goods, services and facilities

66I. It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's record of offences -

- (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;
- (b) in the terms or conditions on which the firstmentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

- (c) in the manner in which the firstmentioned person provides the other person with those goods or services or makes those facilities available to the other person.

Accommodation

66J. (1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's record of offences -

- (a) by refusing the other person's application for accommodation;
- (b) in the terms or conditions on which accommodation is offered to the other person; or
- (c) by deferring the other person's application for accommodation or according to the other person a lower order of precedence in any list of applicants for that accommodation.

(2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's record of offences -

- (a) by denying the other person access, or limiting the other person's access, to any benefit associated with accommodation occupied by the other person;
- (b) by evicting the other person from accommodation occupied by the other person; or
- (c) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person.

(3) Nothing in this section applies to or in respect of the provision of accommodation in premises if -

- (a) the person who provides or proposes to provide the accommodation or a near relative of that person resides, and intends to continue to reside, on those premises; and
- (b) the accommodation provided in those premises is for no more than 3 persons other than a person referred to in paragraph (a) or a near relative of such a person.

Clubs

66K. (1) It is unlawful for a club, the committee of management of a club, or a member of the committee of management of a club to discriminate against a person who is not a member of the club on the ground of the person's record of offences -

- (a) by refusing or failing to accept the person's application for membership;

or

- (b) in the terms or conditions on which the club is prepared to admit the person to membership.

(2) It is unlawful for a club, the committee of management of a club, or a member of the committee of management of a club to discriminate against a person who is a member of the club on the ground of the person's record of offences -

- (a) in the terms or conditions of membership that are afforded to the member;
- (b) by refusing or failing to accept the member's application for a particular class or type of membership;
- (c) by denying the member access, or limiting the member's access, to any benefit provided by the club;

- (d) by depriving the member of membership or varying the terms of the member's membership; or
- (e) by subjecting the member to any other detriment.

Application forms, etc.

66L. Where, by virtue of a provision of Division 2 or this Division, it would be unlawful in particular circumstances for a person to discriminate against another person, on the ground of the other person's record of offences, in doing a particular act, it is unlawful for the firstmentioned person to request or require the other person to provide, in connection with or for the purposes of the doing of the act, information (whether by way of completing a form or otherwise) that persons with no record of offences would not, in circumstances that are the same or not materially different, be requested or required to provide."

Sections 80, 140 and 146 amended

7. The following sections of the principal Act are amended by deleting the words "race or religious or political conviction" and substituting the words "race, religious or political conviction or record of offences" -

- (a) section 80, opening words;
- (b) section 80(b)(i);
- (c) section 80(e);
- (d) section 140(a);
- (e) section 146(2)(a)(i).

Appendix VIII

CHILD WELFARE ACT 1947-1985 (EXTRACTS) AND DRAFT AMENDMENTS

The provisions are printed as they would appear if amended. The words crossed out would be deleted, and the words in italics would be inserted.

Rehabilitated offenders

40. (1) The provisions of this section do not apply to, or in relation to persons convicted of, wilful murder, murder, manslaughter or treason or of attempting any of those crimes.

(2) Where a child is convicted of an offence and -

(a) a probation order is made with respect to that child in relation to the offence and the child has not been subsequently dealt with for that offence under any law relating, whether in the State or elsewhere, to probation orders in respect of child offenders; or

(b) a period of two years has expired since -

(i) the date of conviction; or

(ii) the discharge of any sentence or order imposed in relation to the conviction,

whichever is the later,

that conviction shall, subject to the provisions of this section, be deemed not to be a conviction for any purpose except in relation to -

- (c) the making of the order, or any other order arising out of the conviction, or any other record thereof; or
- (d) any subsequent proceedings that may be taken against the offender under this Act or on indictment in relation to that offence or for a subsequent offence.

(2a) *Without limiting the generality of subsection (2),*

- (a) *a reference in a written law of the State to a conviction of a person for an offence shall not include a reference to a conviction to which subsection (2) applies, unless the contrary intention appears;*
- (b) *a reference in a written law of the State to a person's good character, fitness, propriety, or any other like reference, shall not be interpreted as permitting or requiring account to be taken of a conviction to which subsection (2) applies, unless the contrary intention appears;*
- (c) *questions about a convicted person put to a person by or by authority of any other person or body shall not be taken to relate to a conviction to which subsection (2) applies, unless a written law of the State makes express provision to the contrary;*
- (d) *an obligation imposed on any person by any written law of the State, or by the principles and rules of common law or equity, or by the provisions of any agreement or arrangement, to disclose matters relating to a convicted person shall not require the disclosure or acknowledgement of a conviction to which subsection (2) applies unless, in the case of an obligation imposed by a written law, the written law makes express provision to the contrary.*

(2b) (a) *Where a period of not less than ten years has elapsed since the date on which a conviction was under subsection (2) deemed not to be a conviction, the*

offender may apply to the Director-General for the Department's criminal record of that conviction to be destroyed.

- (b) *The application shall be supported by a statutory declaration stating that –*
- (i) *the offender has not during the period since the conviction was deemed not to be conviction been convicted of another offence, either in a children's court or in nay other court, other than an offence for which either no penalty was imposed or the penalty imposed was a fine of not more than \$100 (or such greater sum as is prescribed);*
 - (ii) *the offender is not subject to any disqualification, disability, prohibition or other like penalty as a result of the conviction.*
- (c) *Unless the Director-General has reasonable ground to believe that any of the facts and matters set out in the declaration are false, the Director-General shall cause the Department's criminal record of that conviction to be destroyed.*

(2c) (a) *Where –*

- (i) *a conviction was imposed before [date of commencement of amending Act]; and*
- (ii) *had subsection (2b) been in force on the date of the conviction and continued in force after that date, the conviction would have been deemed not to be a conviction under subsection (2), and*
- (iii) *a period of not less than ten years has elapsed since the date on which the conviction was deemed not to be a conviction,*

the offender may apply to the Director-General for the Department's criminal record of that conviction to be destroyed.

- (b) *The application shall be supported by a statutory declaration stating that –*
- (i) *the offender has not since the conviction in question been convicted of another offence, either in a children’s court or in any other court, other than an offence for which either no penalty was imposed or the penalty imposed was a fine of not more than \$100 (or such greater sum as was prescribed);*
 - (ii) *the offender is not subject to any disqualification, disability, prohibition or other like penalty as a result of the conviction.*
- (c) *Unless the Director-General has reasonable grounds to believe that the facts and matters set out in the declaration are false, the Director-General shall cause the Department’s criminal record of that conviction to be destroyed.*
- (3) The provisions of this section do not affect -
- (a) the right of any person to appeal against his conviction or to rely thereon in bar of any subsequent proceedings for the same offence;
 - (b) the re-vesting or restoration of any property in consequence of the conviction;
 - (c) the right of a court to disqualify a person from holding or obtaining a driver's licence issued under the *Road Traffic Act 1974*; or
 - (d) the operation of section 39C(1) of this Act.

Disclosure of convictions of rehabilitated persons

126A. (1) Where a conviction is deemed not to have been made pursuant to section forty of this Act then in any proceedings, other than proceedings for that or a subsequent offence in the children's court or on indictment, no evidence of that conviction shall be admissible.

(2) Except for the purposes of this Act or of any court of law, a person, other than the child, shall not disclose the fact of a conviction which by virtue of section forty of this Act is deemed not to have been a conviction.

Appendix IX

OFFENDERS PROBATION AND PAROLE ACT 1963-1985 (EXTRACTS) AND DRAFT AMENDMENTS

The provisions are printed as they would appear if amended. The words crossed out would be deleted, and the words in italics would be inserted.

Conviction on which probation granted to be disregarded for certain purposes

20. (1) Subject to the following paragraphs of this section, a conviction for an offence in respect of which a probation order is made under this Act shall be deemed not to be a conviction for any purpose, ~~including without limiting the generality of the foregoing, the purposes of any enactment imposing or authorizing or requiring the imposition of any disqualification or disability on convicted persons~~, except in relation to -

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

(1a) Without limiting the generality of subsection (2),

- (a) a reference in a written law of the State to a conviction of a person for an offence shall not include a reference to a conviction to which subsection (1) applies, unless the contrary intention appears;*

- (b) *a reference in a written law of the State to a person's good character, fitness, propriety, or any other like reference, shall not be interpreted as permitting or requiring account to be taken of a conviction to which subsection (1) applies, unless the contrary intention appears;*
 - (c) *questions about a convicted person put to a person by or by authority of any other person or body shall not be taken to relate to a conviction to which subsection (1) applies, unless a written law of the State makes express provision to the contrary;*
 - (d) *any obligation imposed on any person by any written law of the State, or by the principles and rules of common law or equity, or by the provisions of any agreement or arrangement, to disclose matters relating to a convicted person shall not require the disclosure or acknowledgement of a conviction to which subsection (1) applies unless, in the case of an obligation imposed by a written law, the written law makes express provision to the contrary.*
- (1b) (a) *Where a period of not less than ten years has elapsed since the date on which a conviction was under subsection (1) deemed not to be a conviction, the offender may apply to the Commissioner of Police for the police criminal record of that conviction to be destroyed.*
- (b) *The application shall be supported by a statutory declaration stating that -*
- (i) *the offender has not during the period since the conviction was deemed not to be a conviction been convicted of another offence, other than an offence for which either no penalty was imposed or the penalty imposed was a fine of not more than \$100 (or such greater sum as is prescribed);*
 - (ii) *the offender is not subject to any disqualification, disability, prohibition or other like penalty as a result of the conviction.*

(c) *Unless the Commissioner of Police has reasonable grounds to believe that the facts and matters set out in the declaration are false, the Commissioner of Police shall cause the police criminal record of that conviction to be destroyed.*

(1c) (a) *Where -*

(i) *a conviction was imposed before [date of commencement of amending Act], and*

(ii) *had subsection (1b) been in force on the date of the conviction and continued in force after that date, the conviction would have been deemed not to be a conviction under subsection (1), and*

(iii) *a period of not less than ten years has elapsed since the date on which the conviction was deemed not to be a conviction,*

the offender may apply to the Commissioner of Police for the police criminal record of that conviction to be destroyed.

(b) *The application shall be supported by a statutory declaration stating that -*

(i) *the offender has not since the conviction in question been convicted of another offence, other than an offence for which either no penalty was imposed or the penalty imposed was a fine of not more than \$100 (or such greater sum as is prescribed);*

(ii) *the offender is not subject to any disqualification, disability, prohibition or other like penalty as a result of the conviction.*

(c) *Unless the Commissioner of Police, has reasonable grounds to believe that the facts and matters set out in the declaration are false, the*

Commissioner of Police shall cause the police criminal record of that conviction to be destroyed.

(2) Where an offender is subsequently dealt with under this Act or under a law of another State or a Territory corresponding to Division 1 of Part IIIA of this Act for the offence in respect of which the probation order was made, the provisions of subsection (1) of this section cease to apply to the conviction.

(3) The foregoing provisions of this section do not affect the right of an offender to appeal against his conviction or to rely thereon in bar of any subsequent proceedings for the same offence or the revesting or restoration of any property in consequence of the conviction.

(4) A person who feels himself aggrieved by a summary conviction of a court of summary jurisdiction for an offence in respect of which a probation order is made may, pursuant to those provisions of Part VIII of the *Justices Act 1902*, that relate to an ordinary appeal under that Act, appeal against that conviction notwithstanding that no imprisonment is adjudged thereby without the option of a fine.