

## Problem of Old Convictions

### Terms of Reference

In April 1982 the Commission was asked, as a matter of priority, to examine and report on whether a person's criminal record should be erased after a stipulated time, and, if so, in what circumstances and under what conditions.<sup>1</sup>

### Background of Reference

The subject originally formed part of the Commission's reference on the withdrawn Project No 65(l)<sup>2</sup> and as a result the Commission had already carried out research into certain aspects of the new reference when it was received.

The reference was prompted by various difficulties faced by people with a record of criminal convictions. In Western Australia any act or omission which under state law renders the person doing the act or making the omission liable to punishment is called an offence. A record of the offence could be held in a number of places from the relevant court records to individual police departments. Because of the potential of unwarranted disclosure of criminal records, ex-offenders faced a variety of problems associated with their past convictions even where they may have long since ceased to offend and may regard themselves as law-abiding members of the community. The protections that were in place to protect against disclosure were regarded as being ineffective to ameliorate all of the problems a person in this situation could encounter.<sup>3</sup> Fear of disclosure and the resultant embarrassment or prejudice this could provoke was isolated as the main cause of concern, with a variety of further difficulties premised on this factor. These included issues ranging from reluctance to participate in legal action either as a witness or plaintiff, fear of relationship destruction, loss of commercial interests, discrimination in employment opportunities and credit/insurance refusal to deterrence from seeking public office or prevention from obtaining appointment to a government agency. The Commission recognised that any suggestions for reform in this area required a balance to be struck between the interests of the ex-offender, the needs of the police and the courts in the administration of the justice and the need to protect the free flow of relevant information for purposes of government and commerce.

In March 1984 the Commission released a detailed discussion paper addressing these issues. A shorter issues paper was also published summarising the general issues and seeking public submissions concerning particular experiences. A number of proposals were put forward for public discussion including proposals centred around the idea of concealing or failing to disclose in certain situations to treating the convicted person after a specified period of time as if they have no conviction.

### Nature and Extent of Consultation

As part of its research, the Commission examined overseas schemes dealing with the sealing or expunction of criminal records, the rehabilitation of offenders, and the avoidance of discrimination against convicted people. The Commission further corresponded with the United Kingdom Home Office with respect to the operation of the *Rehabilitation of Offenders Act 1974* (UK) which allows those convicted of certain offences to treat themselves as having no conviction.

To widen the consultation process an advertisement was placed in *The West Australian* offering to send a copy of the discussion and issues papers to interested persons with the purpose of encouraging public

<sup>1</sup> Prior to 1983 the project was titled 'Expunction of Criminal Records'.

<sup>2</sup> Law Reform Commission of Western Australia, *Privacy*, Project No 65 (l) (referred 1976, withdrawn 1986).

<sup>3</sup> See Law Reform Commission of Western Australia, *Report on the Problem of Old Convictions*, Discussion Paper, Project No 80 (1984) 10.

submissions on the subject. The papers received considerable publicity both in newspapers and on radio programmes. Submissions were received from an broad range of individuals and groups including the Equal Opportunity Commission, Police Scientific Branch, Prisons Department, Finance Brokers' Supervisory Board, Psychologists' Board, Public Health Service, United States Consul General, Australian Law Reform Commission, Canadian Solicitor-General's department, the British Section of the International Commission of Jurists, the United Kingdom Home Office, and a number of other people with specialist knowledge or interest in the issues involved.<sup>4</sup>

At the time of the reference many other jurisdictions in Australia<sup>5</sup> and overseas had considered the problem of old convictions and some had enacted legislation to address the issues. The Commission therefore had the advantage of being able to learn from the experiences of those jurisdictions and consider the merit of legislative change either proposed or implemented elsewhere. The Commission submitted its final report on the subject in June 1986.<sup>6</sup>

### Recommendations

The Commission recommended a legislative scheme consisting of two draft Bills, the Equal Opportunity Amendment Bill and the Spent Convictions Bill, which were annexed to the final report. The draft Bills essentially limited the effects of old convictions and incorporated the majority of the 60 detailed recommendations. The Commission recommended that convictions which could be regarded as spent should be divided into three categories:

- (a) convictions for which a sentence other than imprisonment was imposed;
- (b) convictions for which the imprisonment sentence was not more than one year; and
- (c) convictions for which the imprisonment sentence was over a year.

Determinations could then be ascertained accordingly, varying from a prescribed time period of ten years before a conviction could be regarded as spent to a requirement that a conviction be regarded as spent only after judicial declaration.

The Commission determined that the following effects should follow a spent conviction:

- Discrimination against a person on such grounds should be unlawful and dealt with in the same way as all existing discrimination, under the *Equal Opportunities Act 1984* (WA).
- Unless the context indicates otherwise the only references to convictions in legislation should be in relation to those that are unspent and legislative references to a person's character or fitness should not be interpreted as permitting or requiring account to be taken of spent convictions.
- Questions about a person's criminal record and obligations to disclose information about convictions should be taken to refer only to non-spent convictions.
- Information about spent convictions should continue to be available in court proceedings.
- Disclosure of information about spent convictions from official records should continue to be dealt with by internal disciplinary procedures and existing offence provisions.
- 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.

4 For an exhaustive list of contributors see Law Reform Commission of Western Australia, *Report on the Problem of Old Convictions*, Project No 80 (1986) 165–166.

5 Queensland was the only state that had legislated on the problem of old convictions. However, proposals for legislative reform had been made in several other states and in the Commonwealth.

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

Special provisions were recommended to deal with particular problems, such as the effect of subsequent convictions, concurrent and cumulative sentences of imprisonment, and special orders that the court may make. The Commission also recommended certain amendments to other legislation including the *Child Welfare Act 1947 (WA)*, which already contained broadly similar provisions applying to children convicted of offences. A comprehensive outline of all the recommendations may be found in chapter 13 of the Commission's final report.

### Legislative or Other Action Undertaken

In 1988, Parliament passed the *Spent Convictions Act 1988 (WA)* which substantially implemented the Commission's recommendations. The *Acts Amendment (Spent Convictions) Act 1989 (WA)* implemented the majority of the remaining recommendations.