PENAL POLICY REVIEW COMMITTEE

REPORT OF WORKING PARTY NO. 5

EXPUNGEMENT OF CRIMINAL RECORDS

NOVEMBER 1981

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NO. 5 WORKING PARTY PENAL POLICY REVIEW COMMITTEE

1. TERMS OF REFERENCE

1.1 The terms of reference for the committee are:

"To consider the principle of expunging criminal records after an appropriate period of time in respect of persons who have appeared before a Court."

2. INTRODUCTION

2.1 Criminal convictions can carry with them disabilities in many areas of life, such as employment, obtaining various licences, taking out insurance, obtaining credit, serving on a jury, obtaining a visa, becoming an adoptive or foster parent, and serving as a volunteer in youth welfare organisations. Of these the disadvantage suffered in obtaining employment constitutes the most serious impediment to the rehabilitation of an offender; but the disabilities may not be limited even to these categories. The possibility of unwanted disclosure of the past can have damaging psychological effects, and, for example, lead offenders to fear entering into public office, or giving evidence in Court.

2.2 The stigma attaching to a criminal conviction may remain with the offender for the rest of the offender's life even though that person has lived a blameless existence thereafter.

In considering these problems the Tasmanian Law Reform Commission in its 1977 report found:

> "In every community there will be found persons who, having infringed the law and paid the penalty imposed by the Courts, are ever after penalised for their offence by the subsequent disclosure or risk of disclosure of its existence. No matter what period of exemplary behaviour follows the commission of that offence, the offender always lives with the fear that the skeleton in his cupboard may be discovered and his reputation destroyed along, perhaps with his marriage and his livelihood."

2.3 The problem particularly affects the young offender who may have only immature appreciation of the effect of the conviction in later life although he may suffer the consequences for the whole of his adult life.

2.4 Given the very real stigma and consequences which attach to the holder of a criminal record the challenge is to overcome the handicap of the person who is adjudged to have paid his debt to society. In doing so there should be incentive not to re-offend, and offenders should be assisted in rejoining the community by removal of the impediments once respectability has been re-established by a conviction free period.

3. SUBMISSIONS TO THE PENAL POLICY REVIEW COMMITTEE ON THE PROBLEM

3.1 Fifty three submissions were directed specifically to the terms of reference. Only two of those argued that there should be no expungement of criminal records. There appeared therefore to be almost universal recognition of the problem, and various solutions were suggested. The Working Party, conscious that public acceptance for the principle is necessary for the introduction of expungement of criminal records, finds strong support in those submissions. Various recommendations and suggestions contained in the submissions are considered dealt with or adopted, as the case may be, later in this report.

4. SPECIFIC EXAMPLES OF PROBLEMS

In order to give a better understanding of the nature of the problems experienced by those having a criminal record, three examples of specific problems given in the report of the Committee chaired by Lord Gardiner, "Living it Down", which led to British legislation on expungement of records

are first given, together with two New Zealand examples. (Further examples from "Living it Down" appear in Appendix I to this report.)

They are as follows:

4.1.1 In 1929 Joan, then eighteen, was convicted of soliciting. A few years later she married and has ever since led the life of a good citizen. Two of her three children have married and she now has four grandchildren. Neither her husband nor her children know of her conviction. She has always known that if, for any reason, she becomes newsworthy, any newspaper could publish it. Since it was true, she would have no remedy or redress. No newspaper has yet done so, although others in a similar position have not been so fortunate; but she has lived her whole life under this shadow. Even now, at sixty-two, it is something which she knows may explode under her feet at any time.

4.1.2 When Charles was a young man he was convicted of a sex offence. Later he married, settled down, did well in business and became a respectable and respected member of his community. Twenty years after his conviction he was found goulty of a minor motoring offence, and his old conviction was read out in court and reported in the local press.

4.1.3 James had some early convictions for dishonesty. He then settled down and ran a respectable business in his local town. Eleven years after his last conviction he brought an action in the local county court to recover a civil debt, and found himself cross-examined by the defendant's counsel about his old convictions.

4.1.4 Ian, twenty years ago, was convicted of theft, and fined. There was widespread publicity. He did not lose his job but he had his salary significantly reduced and he was demoted. It was suggested, and he

agreed that he resign from a sports body in which he was an officer. Later he became a director of a number of large New Zealand companies and became heavily engaged in community affairs, and from time to time has been required to travel abroad. He is subject to investigation whenever a visa is required and on two occasions has had to undergo investigation in New Zealand in order to obtain local licences. Although Police enquiries have always been discreet, he is forever living in fear of his travel plans being disrupted and the possible consequences of disclosure to his teenage family.

4.1.5 Approximately seven years ago Ray was convicted of robbery, and imprisoned. When he completed his sentence he re-established himself. His employers but not other staff were told of his background. He now enjoys the respect of a very large number of junior staff working under him and he is concerned that it might be lost overnight if there is any indiscreet re-publication of his conviction.

5. OBJECTIVES

5.1 A recognised goal of penal policy is rehabilitation. The expungement of criminal records is seen as part of that rehabilitative process. When the penalty set by the Court has been paid, offenders should not be penalised again and again. If rehabilitation is to be complete, the community must accept that offenders can become respectable citizens, and no longer hold their past against them.

5.2 If people re-establish their reputation it should not again be put in jeopardy by republication of past events. In principle the offender should not be less able to obtain employment, nor should he suffer other permanent disabilities.

5.3 To hasten the process of rehabilitation disabilities should, commensurate with the competing interests of the community, be removed and reputation restored as soon as possible. As part of the rehabilitative process the offender should be given that prospect in the foreseeable future, so as to create good incentive not to re-offend. It is in the community's interest to utilise fully the skills of its critizens as well as to create a climate which will minimise the prospect of re-offending.

5.4 The objectives therefore are threefold:

- protect reputation regained
- encourage and assist the individual offender regain his self-respect
- promote and remove barriers to rehabilitation

6. RECORD CONCEALMENT AND DEFINITION OF TERMS

6.1 The Working Party adopts the statement of the Secretary for Justice in his submission which is in the following terms.

"The record concealment approach to the problem of the criminal record victim has as its rationale, the belief that if the fact of conviction can be hidden from public view, then it can no longer influence people in their attitudes towards offenders. If a person does not know of another's criminal record, and cannot find out about it, then he cannot penalise the latter because of it.

Record concealment itself can take a variety of forms. Sealing of court records is the method adopted in some jurisdictions, especially in the United States. In this way an attempt is made to conceal a record from public view, without actually destroying it.

Expungement of the conviction record is another widely used device. There the record is not just hidden but actually obliterated, so that no trace of it remains. The legal event of conviction is, in theory, erased."

6.2 The following brief definitions of terms commonly used may be useful.

"Sealing", a record of proceedings is merely sealed from public view, without actually destroying it.

"Expungement". This literally means that the record of proceeding is erased - as if it had never happened in the first place. The legal event of a previous conviction is in theory erased.

"Removal of disabilities" means the elimination or limitation of the legal and social effects of conviction.

"Rehabilitation Period": Period of time free of re-offending required for removal of disabilities. It may run from completion of sentence or start of sentence, or some other event.

7. OVERSEAS SOLUTIONS

7.1 In Appendix II to this report is contained a summary of various overseas solutions with, where it seemed appropriate, some comment from the Working Party. There being no legislation in New Zealand, examination of overseas solutions was desirable in order to lead to a better understanding of the problem and to learn from the experience and solutions in other countries. These solutions vary considerably, for instance the length of the rehabilitation periods may depend on the seriousness of the offence, the severity of the penalty, the nature of the offence (some offences are excluded altogether), and can have different dates of commencement. They must therefore be approached carefully and given consideration, not only in light of these variables, but in light of the particular solution in the legislation concerned, for example by either sealing of expungement of the record, or the removal of disabilities arising. The Working Party has not been able to review all such legislation. The following legislation was reviewed by or referred to the Working Party.

Country	Period	Commencing
West Germany	5 years minor offences 10 years serious offences	From conviction
Canada	2-5 years	
United Kingdom	10 years for imprisonment Between 6 months and 2 1/2 years 7 years for under 6 months imprisonment 5 years for fine or sentence less imprisonment 6 months for absolute discharge (These periods being halved for offenders under age 17)	From conviction
Bermuda	7 years (with exceptions for sentences of more than 5 years and some offences)	Expiry of sentence
Yugoslavia	After 3 years Full expungement after 10 years	Expiry of sentence
Belgium	5 years minor offences 10 recidivists	
Austria	4-10 years	
Netherlands	4-8 years	
Japan	5-10 years	
Sweden	10 years	From conviction

7.2 The Working Party also notes at this point that objections have been levelled against record concealment statutes. A powerful criticism has been made by Kogon and Loughery in their article: "Sealing and Expungement of Criminal Records - The Big Lie "The Journal of Criminal Law, Criminology and Police Science v.6. no.3 pp 385,388.

> "In trying to conceal a record we seek to falsify history - to legislate an untruth. Such suppression of truth ill befits a democratic society. Good intentions are no defence. To enable an offender to deny that he has a criminal record when in fact he has one is to help him deny a part of his identity.

In encouraging him to lie, the society communicates to him that his former offender status is too degrading to acknowledge, and that it is best forgotten or repressed, as if it had never existed at all. Such self delusion and hypocrisy is the very model of mental ill health - the reverse of everything correctional philosophy stands for .....

One suspects that at the root of the problem is the fact that our correctional philosophy and practice are incongruent in respect to record concealment - as in many other aspects of criminal justice administration. We are not clear about this business of records; we are in fonclict about it. We are, therefore, endlessly fussing with the removal of selected records from view - only to discover that they crop up again somewhere else .....

Actually, the real issue is not the record, but the social attitude toward it ....

Our often-stated objective of helping an offender to make a new start in life can be achieved by leaving the slate as is and by helping him by .... leaving the record alone, and developing programmes designed to change attitudes about offenders, via education and supporting legislation."

8. A NEW ZEALAND SOLUTION

8.1 It will become evident later in this report that the Working Party favours removal of disabilities and protection of reputation, by sealing of the record, rather than expungement. Rehabilitation is achieved in two stages.

8.2 In coming to this conclusion we considered that New Zealand legislation should:

- Endeavour to provide a system for all. No-one should be denied the removal of disabilities.

- Not distort the truth by creating legal fictions, for example denying the commission of the offence, the fact of the conviction and sentence, or creating any civil remedies based on denial of these.

- Be administratively viable i.e. not involve the wholesale destruction of inaccessible records or seek to take out of circulation publications containing details of the convictions of any offender.

- Not involve or require any application on the part of the offender requiring the establishment of more bureaucracy, and the investigation of the merits of the application.

- Be simple and easy to understand, so as to reduce the possibility of infringement, permit the offender to know his rights and give him maximum opportunity and incentive or rehabilitate himself. In particular there should not be any multiplicity of rehabilitation periods or commencement or completion dates for different offences or sentences, and exceptions should be avoided.

9. REHABILITATION PERIOD

9.1 Once the desirability of removing the disabilities arising from criminal records is accepted, the issue then arises as to what, if any, preconditions there should be for the offender to qualify.

9.2 There are implications for publishers in prohibiting the circulation of information relating to convictions, and for employers in compelling them to either disregard convictions or preventing them from gaining access to information regarding convictions; but the public interest in rehabilitation must also be balanced against the public interest in ensuring the community is informed of the propensity of any individual to perform criminal acts, and the likely extent and the nature of certain criminal acts, so the ensuing risk or danger to person and property can be assessed.

9.3 In many overseas jurisdictions, particularly European, the name of the offender is not published, although a description of his activity is. In New Zealand even alleged offenders' names are liable to publication with the exception of those who are dealt with under the Children and Young Persons Act, 1968.

9.4 It is not directly within the terms of reference to recommend a change in the practice of publication of the names of offenders and the Working Party doubts whether a change to automatic suppression of the name or particulars which would enable the offender to be identified, is politically acceptable. In theory the rehabilitation period could commence immediately with the suppression of the name of the offender and particulars, and the various protections immediately put into place. The Working Party recognises the strength of the community's claim to know the nature and extent of the types of offences being committed, and also the names of the offenders, so that it might better protect itself against them. In any event an offender cannot expect to receive the benefits of rehabilitation immediately; he must first establish credibility.

9.5 It is important that the offender not be accorded protection while he is still offending. It would be anomalous and illogical to remove disabilities at the expense of other interests.

9.6 It is also important to ensure that the offender serves the sentence imposed. An offender sentenced to a term of imprisonment who escapes, and fails to serve out the sentence has little claim to the protections to be afforded. Similarly if an offender fined or ordered to pay a sum of money fails to do so, it is doubtful whether the disabilities suffered should be removed. However it would be an enormous task to

determine when and if the fines had been paid. Further, fines are sometimes varied depending on the offender's ability to pay. and in some instances are paid by instalments. Sometimes in the case of minor offences, the offender might never receive notice of the fine. So apart from the administrative difficulty of permanently recording the date of 'payment' as well as the date of conviction, it would be fairer to the offender to run the period from the date of conviction regardless of when the fine is paid but allow the offender to have the benefits of rehabilitation provided the fine is paid. Thus an impoverished offender would not be penalised by his inability to pay and an offender paying by instalments would not have to wait until the fine was fully paid. However the Working Party still believes that there is a competing public interest in ensuring that the penalty imposed by the Court is satisfied.

9.7 This approach can in the Working Party's opinion be usefully extended to all non-custodial sentences, for example, a suspended sentence.

To take four different sentences:

- 12 months imprisonment
- 12 months probation
- Appear for sentence within 12 months if called upon to do so
- Payment of $200 fine

It would be anomolous to commence the rehabilitation period for the first as from the same date as the last three. (Credibility can be established only when the offender is at risk in the community).

The Working Party therefore recommends that for custodial sentences, the rehabilitation period should date from release from custody, but that for non custodial penalties it should date from conviction.

9.8 The conclusion reached therefore by the Working Party is that supression of the offender's name and details should await demonstration of his entitlement to the protections it is proposed to afford by his being able to assure the community that such protection is deserved.

9.9 Restrictions on Convicted Offenders

Professional groups tend to require candidates for admission to them to be of "good repute" and "proper" persons, as generally do special trade groups such as secondhand dealers, motor vehicle dealers or other licensees such as massage parlour operators. Similarly a criminal conviction can debar an offender from becoming a Justice of the Peach if by reason of that conviction, he is thought not to be "a fit and proper" person. Further there are some explicit statutory restrictions imposed on convicted offenders in New Zealand. For example persons convicted of certain offences are not entitled to go onto racecourses. Persons are disqualified from serving on any jury who have been sentenced to imprisonment for life or for a term of 3 years or more, or to preventive detention, and are disqualified from serving if they have within the preceding 5 years been sentenced

to imprisonment for a term of 3 months or more, or to borstal training.

9.10 Nature or Seriousness of Offence

The overseas legislation referred to all took into consideration the nature or the seriousness of the offences either dealing differently with them on the basis of differing periods of rehabilitation or in some instances, excluding some altogether. The Working Party, faced with finding a possible method of differentiating between offenders on the basis of their conviction for different types of offence, either by nature or seriousness (based on category or maximum sentence) came to the conclusion that there was no simple satisfactory basis for identifying offences by either category, or seriousness. The maximum penalties for many crimes and even more offences, depended in part on when the enacting legislation was last reviewed and it would have taken a very suspect value judgment to come to any conclusion on the basis of maximum penalty as to which was more or less serious than the other. There is also the problem of the degree of culpability in the commission of offences. For example, while one might be inclined to deal more harshly with a very serious rape case (for which the maximum penalty is 10 years) there could be little justification in dealing more harshly with that offender than say the offender convicted of manslaughter who received probation because of mitigating circumstances, although liable to 14 years imprisonment. While some categories, for example crimes relating to property, and public order could be identified, there are many offences which are beyond classification in this manner. Certainly no comprehensive categorisation was possible. The only basis on which it could have done was by the exclusion of certain offences, e.g. murder, from the scheme altogether, and this was not thought desirable for various reasons. It has been established that of all the serious offenders, it is the murderer who was least likely to re-offend. However there is no statistical information which would suggest any offender who tends to specialise in any particular category of offence as opposed to type of offence, is more or less likely to re-offend. The Working Party recommends that nature or seriousness of offence not be used as a basis for rehabilitation.

9.11 Length or Nature of Sentence

Initially the Working Party thought that the approach adopted in the United Kingdom had much to commend it in as much as it seemed reasonable to expect a person who had committed an offence for which he received a lengthy term of imprisonment to wait for a longer period before being deemed "rehabilitated". This, it seemed met the objection referred to in the previous paragraph, namely the differing degrees of culpability. On further consideration it could be seen that the United Kingdom solution led to the line being somewhat arbitrarily drawn and a proliferation of periods which caused considerable confusion. Indeed the United Kingdom Act and subsidiary regulation almost defy interpretation and make it almost impossible to determine its effect in certain circumstances. Certainly its understanding is beyond most lay people. The Working Party came to the conclusion that problems arose when the period commenced from the commission of the offence, and that the greater danger imposed on the community by the offender who committed serious offences could be dealt with in very large part by commencing the rehabilitation period from the completion of sentence. For those receiving non-custodial sentences therefore the period would commence from conviction but

those serving a sentence of 7 years imprisonment would not have the period start to run until release. It would take the latter some 7 years longer without remission, to complete the rehabilitation period. By avoiding any variation in the rehabilitation period depending upon the nature or severity of the sentence, or of the offence, the scheme would have the very real benefit of being simple and easy to understand, and the other benefits referred to in 8.2 of this Report. We have taken the view that the period should run from release and not from completion of sentence because it is from that time the offender begins establishing his credibility in the community. The Working Party recommends that length or nature of sentence not be used as a basis for rehabilitation.

9.12 Age of Offender

The United Kingdom legislation provided for halving the rehabilitation periods for young offenders, and there were 7 submissions in favour of special consideration for young offenders.

For the same reasons of uniformity and simplicity the Working Party recommends that there be no variation in the rehabilitation period because of age. It came to this conclusion reluctantly because of the young offenders diminished responsibility and lack of awareness of the effects on later life. Against this the young are much more likely to re-offend. Further the young offender is afforded protection by the Children and Young Persons Act 1968 in that if dealt with by that Act no name or particulars enabling the offender to be identified can be published. That protection is automatic for those under the age of 16 and reasonably probable for those over that age and under the age 17, with the exception of those charged with murder or manslaughter. Thus to some extent the consequences of publication of the name or identifying circumstances are avoided and the offender's current employment is protected. If the offender is sentenced to imprisonment at a young age any existing employment is lost in any event. The Working Party was not prepared to recommend that young offenders should be treated as rehabilitated immediately from the completion of the sentence. Therefore there seemed little point in giving special consideration to the young offender, when the benefits were likely to accrue only in adulthood.

9.13 What Period?

After much consideration the Working Party came to the conclusion that the period of rehabilitation should be varied on the basis of the identifiable objectives of the scheme, not on the basis of the nature or severity of the sentence or offence, or the age of the offender. There are two broad objectives i.e. the protection of reputation regained, and the removal of disabilities arising from conviction. Any period fixed for the restriction of publication has implications for publishers and the freedom of communication of information, but those are of a different dimension to those of the employer, the insurance company or the professional group, all of which are in special relationship with the offender. The implications are dealt with at greater length later in this Report. There could be no great objection to denying the news media the right to republish particulars of the offender relatively shortly after conviction, and even less after release from serving a term of imprisonment. The Working Party thinks that the public right to be informed can be more quickly foregon for public benefit than private rights arising from a special relationship. Clearly to prevent the prospective employer from ascertaini

a prospective employee's criminal history is a more serious matter.

9.14 The Working Party was conscious that whatever period or periods were fixed upon there had to be a fair measure of public acceptance. As already recorded only two of the 53 submissions made by the public to the Committee opposed any expungement of criminal records; submissions favoured varying rehabilitation periods. In summary, those not opposing expungement recommended as follows:

Under 2 years	(2)
2 years	(1)
3 years	(2)
5 years	(15)
7 years	(5)
10 years	(8)
More than 10 years	(3)
Time not specified	(13)
Some reduction and consideration for youth	(7)
Variable periods based on seriousness averaging 4-5 years	(6)

9.15 In all there was overwhelming acceptance of the principle and very strong identification with a 5 year rehabilitation period and somewhat less support for a 10 year period. Few of the submissions however suggested when the period should commence to run, nor was there regular recognition of the differing objectives of expungement. For the reasons now to be expanded upon, the Working Party recommends that there be a rehabilitation period of 5 years for the protection from republication and 10 years for the removal of the disabilities arising from conviction. The 10 year period for removal of disabilities was common in overseas legislation. Further in the addendum to his submission the Secretary for Justice recommended such a period. While the Working Party had fixed the period before the addendum was received, it nevertheless added weight to its determination.

9.16 The statistics and studies available were reviewed. As earlier stated these did not indicate any particular category of offence with greater or lesser likelihood of re-offending, but it was hoped to identify a suitable rehabilitation period either based on age, sentence or offence, and this was achieved. The statistics referred to are more particularly detailed in Appendix III.

9.17 The Working Party concluded that it was very unlikely that there would be any re-offending after 5 years from the commission of the last offence and that after 10 years the prospects of re-offending were negligible indeed. The Working Party considers that further research may show that it has been conservative in its approach, particularly when the time periods are to begin from the completion of custodial sentences. In the absence of that research it felt inhibited in recommending shorter periods, and recommends that appropriate longterm research be undertaken.

10. IMPLICATIONS OF RESTRICTIONS ON PUBLICATION

10.1 The Working Party has recommended that, on completion of a five year rehabilitation period, published reference to previous convictions should be proscribed so as to free the rehabilitated person from further anxiety and to protect regained reputation.

10.2 The Working Party does not consider this recommendation conflicts with the established practice of most publishers, although it may cause concern in some sections of the community. In practice it is rare for publishers to give currency to reports of offences beyond the immediate event, or indeed, for the public to have more than a passing interest in old convictions.

10.3 In 1975 the New Zealand Press Council, a body on which publishers, journalists and the public are represented, issued an adjudication on a complaint before it. It stated, in part:

> "There is, too, force in the argument that a man who has served his sentence should be allowed to dwell in obscurity. Only in exceptional circumstances would there be justification for rejecting such a principle. It is certainly not enough to justify publication on the general ground that the public has an interest in an aftermath of a sensational trial. Nor is it enough to appeal in some vague way to the public interest. An editor needs to isolate and weigh with special care the various interests and conflicts that are included before taking a step that may wreck plans for a man's rehabilitation".

10.4 There has been no major editorial or other dissent from that 1975 statement. The working party hopes that, in 1981, there will be no major dissent from the view that protection of the privacy of the rehabilitated person should now be assured by statute rather than left to editorial discretion.

10.5 If such restraint is to be given statutory force, it must be supported by effective sanctions. The Working Party has considered this issue carefully, and finds itself quite opposed to the concept of the United Kingdom legislation which created the fiction that convictions could be deemed never to have occured. The Working Party does not propose such adrastic remedy as tightening the present defamation law, as was done by the Rehabilitation of Offenders Act 1974 in the United Kingdom. Under that legislation, if a statement is made of a rehabilitated person that he has committed an offence, that person may sue for defamation, maintaining that he is accused of an offence he did not commit, and the publisher is denied the defence of justification if the publication is held to have been made with malice.

10.6 One commentator noted that this was a landmark in the English law of defamation, since it was the first breach in the hitherto sacred fortress of "truth" as an absolute value in the law. Without springing particularly to the defence of that fortress, the Working Party finds this landmark in the English Act as distasteful as other sections of it based on the same fiction.

10.7 There is ample support for this view. In an interim report in February 1974, before the Bill then in the Commons had become law, the Committee on Defamation headed by Mr Justice Faulks said:

> "In principle, we view with disfavour the creation by this Bill of a special class of person about whom the truth cannot safely be told after a specified period. We think it is in the public interest that truth should at all times remain a defence in actions for defamation."

10.8 The Committee suggested, as Lord Goodman had done earlier when the Bill was first before the House of Lords, that defamation be excluded entirely from the scope of the rehabilitation legislation. This advice was not followed. Similar legislation in Bermuda in 1977 explicitly excluded from its application any civil proceedings for defamation.

10.9 Before the United Kingdom legislation was passed, the report of Lord Gardiner's committee, on which it was based, had been referred to the Law Reform Committee of South Australia for report. In a commentary put before that Committee, the Chief Justice of South Australia expressed himself strongly as follows:

> "If I understand the recommendations correctly, it is proposed that after the expiry of the rehabilitation period, truth, subject to the exceptions mentioned in the report, should no longer be a defence to an action for defamation based on a disclosure of the previous offences. Surely this is wrong. Libel and slander are torts. Damages are given for an injury to the reputation by the imputation of falsehoods. The award of damages for the disclosure of the truth seems to me to be utterly contrary to principle, and not only to the principles of the common law, but to those of abstract jurisprudence. Roman Law had the same provision as ours. A truthful imputation could not be an iniuria. I view with apprehension any departure from this principle. If it is desired to prevent the publication of prior convictions, I would prefer this to be achieved by the creation of summary offences rather than by the award of damages to unmeritorious plaintiffs".

10.10 The South Australian Law Reform Committee agreed with the Chief Justice and said the proper sanction would be by the provision of the apposite summary offence or offences.

10.11 This working party supports that view. The remedy advocated does not require any amendment to the present law of defamation. The Working Party recommends statutory prohibition of publication of reference to past convictions, with an adequate scale of penalties. Breaches of such a provision by responsible news media would be rare, and unintentional rather than malicious. Substantial maximum penalties should provide safeguards against any blatant breach. To compensate the victim the court should be given the power to award a large proportion of any fine in a manner analogous to the provisions of section 45A of the Criminal Justice Act 1954 which enables the court to award portion of the fine to the victim of a physical assault.

10.12 It is recommended that no attempt should be made to interfere with publications already in existence, for example, newspapers, which contain evidence of convictions for which the offender could be treated as rehabilitated and publication of professional journals such as case law text books and law reports continue unimpeded.

10.13 A question of concern is whether details of past offences, when tendered to the court during proceedings arising from a new offence, should become available for publication in reports of those proceedings. This question arises because the Working Party recommends that previous convictions should only be available to the court for the rehabilitation period of ten years.

10.14 There are four situations which may arise -

(a) Where mention is made of a prior offence within five years of completion of sentence or date of conviction then publication would be lawful.

(b) Where mention is made of a prior offence after five years then publication in respect of a person acquitted would be in breach of the five year time limit.

(c) Where mention is made of a prior offence after five years then publication in respect of a person reconvicted would be lawful, because the offender would forfeit the benefit of disabilities gained during the rehabilitation period, unless the court in its discretion prohibited republication.

(d) After ten years the absolute limit on publication would apply.

In the case of (b) and (c) above the eventual outcome governs the lawfulness of publication. During the trial, publication of previous convictions would be unlawful, but if the person is found guilty publication would become lawful unless the court made an order to the contrary as set out above.

11. FURTHER CONSEQUENCES OF CONVICTION: EMPLOYMENT

11.1 Clearly the most crucial area of rehabilitation for offenders, is that of employment. Equally clearly, the time of greatest need is the period immediately after conviction or completion of sentence. The need however is not confined to getting a first job after conviction or release. For many, the fear of sudden disclosure of past offences, and of the effect that disclosure may have on employers' attitudes, haunts them through long years after the events.

11.2 The Secretary for Justice, in his submission, pointed out that even in occupations where there is no specific qualifying bar arising from past convictions, a criminal record operates as a potential disability in most fields of employment. He said this view is supported by such New Zealand literature as exists on the topic. Even though employers may be relatively well-disposed toward employing persons with a criminal record, that record remains a definite handicap, especially in times of substantial unemployment such as exists today. People with criminal records are considered a poor risk by employers. It was suggested, although only speculatively, that because of the high crime rate among Maoris, the disadvantage of a criminal record may weigh particularly heavily against Maoris. American evidence confirms the suggestion that employment opportunities of minority group persons are disproportionately affected because of their higher crime rate.

11.3 In the New Zealand public service, when a department wishes to appoint an applicant who has declared a conviction other than a minor traffic conviction, the department must refer details of the offence in writing to the State Services Commission, which decides whether the appointment be made. In its 1980 manual of appointment, the Commission says this requirement is of particular importance when appointments are made to jobs in law enforcement and related areas.

11.4 In a reply to an inquiry from the working party, the State Services Commission said:

> "When an applicant indicates on the PS.17A that a criminal conviction under the law exists the interviewing department is expected to invite the applicant to provide details of the crime and conviction. The information is conveyed to the Commission for consideration. A decision as to the desirability or otherwise of approving appointment is made solely on the information as provided by the applicant.
>
> In general terms divulgence of a criminal record is not a barrier to employment in the Public Service which, whenever possible, accepts a responsibility in the field of rehabilitation. However, some departments, such as Customs and Inland Revenue to name two, could be seen to have certain sensitive areas. Each case is determined solely in relation to the admitted offence and the nature of the position sought."

11.5 Offenders are barred from certain jobs in the private sector because of statutory requirements that a licence or registration be refused to applicants who are not of good character or who are not fit and proper persons.

11.6 In no aspect of rehabilitation is the need to weigh the interests of the individual against the reasonable requirements of society--the public interest-- more finely balanced than in the employment area. Much of the legislation enacted in other countries to outlaw discrimination against a person on the grounds of a criminal history provides that discrimination is not unlawful if it can be shown that there is a direct relationship between the ex-offender's criminal history and the job, service or benefit for which he has applied. The Secretary for Justice believed such provisions were necessary to assist the criminal record victim, but he thought they should be narrowly defined and sparingly applied so they would not be misused to deny the rehabilitated person the right to live down the past. To that the Working Party broadly subscribes.

11.7 The Working Party is strengthened in its view that such provisions should be very carefully written by its own recent inquiries in London. Organisations working for the rehabilitation of ex-prisoners have found that the purely expungement approach of the United Kingdom legislation does little to help change social attitudes toward offenders or to aid them in gaining employment. We were told that, in the view of at least some competent observers, the 1974 Act has not

achieved nearly as much as had been hoped for. This is attributed partly to the very wide range of exemptions and exceptions to the Act made by subsequent regulations, and partly to an evident tendency for the purpose of the Act to be circumvented, especially by potential employers.

11.8 We were told that employers, especially large organisations, are able to use the skills of their security staffs (often including former members of the police force) to obtain information about job applicants, including past convictions if any. Social workers assisting ex-prisoners have also found employers reluctant to hire persons whose five, seven, or ten years of qualification for rehabilitation have not expired. Some claim they have found the legislation almost a handicap rather than a help in seeking jobs for recently discharged persons.

11.9 Some social workers in Britain hope the 1974 Act may be amended by shortening the qualifying terms and by raising the present "ceiling" of two and a half years on sentences qualifying for rehabilitation. In the meantime, there seems to be fairly wide acceptance that the present legislation has not fulfilled its laudable aims.

11.10 The Working Party's basic recommendation is that, from date of release from custody, or date of conviction for non custodial penalties it should be unlawful to discriminate, in any of the areas covered by existing human rights legislation, against anyone with a criminal record unless it can be shown that there is a direct relationship between the criminal record and the area of concern.

11.11 This direct relationship must apply in some instances in employment and related fields. This appears to be recognised already in the quoted letter from the State Services Commission. It is vital that the criteria for this direct relationship yardstick be defined in any legislation with sufficient clarity and explicitness to protect both employers and offenders. There should be provision for any person who considers he has been discriminated against unfairly because of a criminal record to complain to the Human Rights Commission.

11.12 It is self-evident that employers must not be obliged to engage recently convicted persons whose offence related directly to the field in which employment is sought. It is not suggested for instance that a bank be obliged to hire a person recently convicted for an offence of dishonesty. Those considering applicants for work with children, e.g. driving a school bus or supervising recreation areas, are entitled to ask an applicant if he has recent convictions. If any are for sexual offences, these would clearly fall within the scope of a direct relationship.

11.13 There are difficulties in defining a direct relationship, but acceptable criteria could be defined in the legislation without undue complexity. Subject to this very important qualification, the working party believes that there should be no discrimination against offenders from the time of completion of sentence.

11.14 If this is accepted, should the direct relationship qualification, which in itself must maintain barriers against a number of those with a criminal record, remain valid for the rest of the lifetime of those whom it does affect?

11.15 The Working Party thinks not. It realises that this may be an area of some controversy, but believes there must come a time when the former offender who has continued to live a blameless life must earn entitlement to a complete absence of discrimination in employment as in other aspects of rehabilitation. There is support for this point of view in the legislation of a number of American States which recognises that the time which has elapsed since the criminal offence weakens the direct relationship. (See Appendix II United States of America).

11.16 Again, due weight must be given to the public interest. It has been said earlier that, in respect of protection from undue publicity for past offences, five years of good conduct is thought to be an adequate qualifying period. However, in the sensitive area of employment and related matters, having regard to the quite proper concerns of prospective employers, it is recommended that a period of ten years should elapse before the direct relationship criteria would cease to apply. In other words, there would be a ten year qualifying period before the offender could regard his past conviction as having become irrelevant in every respect.

11.17 Statutory provision should be made that the direct relationship test cease to apply to any job application if the offender has not been convicted of any new offence for ten years after conviction or completion of sentence. Then the criminal record would no longer provide a ground for lawful discrimination, even though it might earlier have fallen within the direct relationship test. Indeed the Working Party considers that it should be made unlawful to ask questions verbally or in writing designed to show that a person has convictions before the ten year period, as well as lawful to refuse to answer any such questions. The Committee is referred to the extract from the South Australian report on the asking of questions quoted in Appendix II.

11.18 The Working Party reaffirms its belief that in principle exceptions undermine the purpose of rehabilitation but recognises with reluctance that in the public interest it may be deemed necessary to recognise some exceptions to eliminating the direct relationship criteria after ten years. The fine balance already referred to, between public and private interest, may require this in such areas as national security or law enforcement.

11.19 It may be held, for instance, that persons convicted of certain crimes should not qualify, even after ten blameless years, for employment in the police force, in highly sensitive areas of government, or in positions of particular social responsibility, e.g. the care of children.

11.20 The Working Party recommends that there be a review of all statutory and regulatory provisions and departmental procedures which specifically prohibit persons with a criminal conviction from obtaining a benefit (such as the right to procure a firearm), or engaging in employment or any other activity, which would encourage the reintegration of an offender into society. Such a review should be undertaken with a view to narrowing the scope of such prohibitions and bars and, where consistent with the public interest, eliminating them altogether.

11.21 If professional bodies which have the right to regulate admission to certain professions, such as medicine, law and accountancy, feel strongly that termination of the direct relationship test after ten years would unduly limit their existing powers of discipline within their membership, they should be required to state their case to the review body. The same course should be required of any national security or law enforcement body claiming the right to be exempt.

11.22 Any minimal exceptions to be recognised in the public interest would best be determined after the review recommended above. The review should be completed before legislation is draft, and the Working Party feels strongly that any exceptions should be provided for explicitly in the legislation.

11.23 This is the view of the majority. However, one of the Working Party was opposed to creating exceptions on the following grounds:

(a) It detracts from the objective of creating a simple easily understood and administered scheme.

(b) Where an offender could be given the incentive of obtaining a clean slate on expiry of the rehabilitation period, any statement of his regained opportunities would have to be hedged by the exceptions created, and to the offender at least this would throw doubt on the credibility of the whole scheme. There would also be (correctly perhaps) some suspicion in his mind that he was not thought of as having fully paid his penalty.

(c) Once exceptions to ending the direct relationship test after ten years are permitted there is very real difficulty in determining which group or body is entitled to be granted an exemption. For example, if the New Zealand Law Society is exempted, why not the Institute of Architects, and if all professions (which cannot be easily identified in any event) why not trades such as Plumbers and Gasfitters whose members often go into private property. If the Police, why not the Public Service as a whole. Each could cite good reasons and it would be almost impossible to draw the line between them on logical grounds.

(d) The number of exceptions is likely to expand rather than reduce and by each extension the scheme as a whole will be weakened. The most substantial reason for the failure of the United Kingd legislation seems to have been the creation of a large number of employment exceptions. If every identifiable group of employers were able to gain an exemption from the scheme it would be emasculated, taking from the offender the most essential ingredient for rehabilitation, i.e. employment.

(e) It is in the public interest that citizens' talents be put to best available use for example that a rehabilitated medical practitioner be able to practise as such.

(f) The rehabilitation period of 10 years was determined because there was only negligible prospect of re-offending after that time. Trades or professions were more likely to seek an exception because of prejudice or fear of loss of credibility in the eyes of the public than concern and with the risk of reoffending.

12. IMPLICATIONS FOR INSURERS

12.1 As well as the employer, the indemnifier has important private rights affected by these recommendations, particularly in the area of property insurance, where knowledge of previous convictions, for example, for theft or arson, are bound to affect the insurer's decision on whether to accept the risk. The obligation of the insured has always been to make full disclosure of all relevant facts, the relationship being one of uberrimae fides or utmost good faith. The Working Party is bound to acknowledge that sealing or expungement of the record will impose a regimen unacceptable to the insurance industry. Nevertheless the very real objections in principle, do not in the Working Party's opinion warrant a departure from the scheme, for the following reasons:-

(a) simplicity of the scheme and the desirability to avoid exceptions
(b) the negligible prospect of any reoffending by an offender more than 10 years after he has paid the penalty for his last offence
(c) the little real bearing that commission of offences not related directly to insurance risk should have an acceptance of that risk.

12.2 It is not suggested that there should be any change to the existing obligation to disclose whether the risk has been declined elsewhere or any cover refused or policy cancelled, which can be expected to catch most if not all offenders who have defrauded insurance companies.

12.3 Insurance companies along with all other sections of the community have a vested interest in procuring "rehabilitation" and should be expected to make their contribution along with the rest of the community.

12.4 <u>The Working Party therefore recommends that no exception be created for the insurance industry.</u>

13. RETENTION OF RECORDS

13.1 The primary concern of the Working Party has been to find a solution which gives the maximum rehabilitation to convicted persons and while the basic approach has been that of removing disabilities that flow from conviction the deletion of departmental criminal history records has also been considered.

Wanganui Computer Centre Records:

13.2 There is provision for the deletion of criminal history records already in the Wanganui Computer Centre Act 1976 with the final responsibility for setting limits on the retention of records resting with the Policy Committee and therefore it is only possible for this Working Party to make recommendations. It is recommended that whatever decisions that committee comes to, should be embodied in an amendment to the Wanganui Computer Centre Act.

13.3 The Working Party is aware that the Policy Committee has delayed its decisions on the subject pending the release of the Penal Policy Review Committee report.

13.4 The Wanganui Computer Centre Policy Committee in tentative recommendations to the Minister of State Services in 1980 suggested that with respect to criminal histories, records should be purged after twenty years if a subject has five convictions or less and was sentenced to not more than six months imprisonment on any conviction and has not offended during the last twenty years. The recommendations saw a need for some exceptions, but the general conclusion for these were that records should remain until the person is aged 70, or 20 years from the date of the last conviction whichever was the latest. For those offenders their records would remain effectively for the rest of their lives. From the point of view of rehabilitation legislation this Working Party considers that twenty years is too long a period and indeed none of the overseas legislation studied suggested such a long period of time before regarding an offender as rehabilitated.

13.5 There is a strong argument for making the rehabilitation period, and the maximum length of time that records should be retained on the Wanganui Computer, the same. This Working Party, subject to the provisos discussed in the following paragraphs recommends accordingly, the objectives of rehabilitation being of higher priority than other reasons that might be given for retaining records longer than 10 years from date of conviction, or release from custody. Individuals have the right to request from the Privacy Commissioner details of information held about them in the Wanganui Computer System. If an offender, after a ten year conviction free rehabilitation period, were to request a printout and find his previous offences still recorded, he would have the right to be sceptical about the effectiveness of rehabilitation. Retaining the individual's record would thus seriously undermine the credibility of rehabilitation legislation, and from an individual's point of view make any legislation meaningless.

13.6 The Working Party has recommended that after ten years of conviction free conduct following conviction or release, the records of previous convictions should not be produced in Court or be used as a reason for refusing employment. Therefore the Working Party believes that it is logical to recommend to the Policy Committee that it adopts the same period for the deletion of records from the Wanganui Computer system.

13.7 The Working Party is however mindful of the fact that elsewhere in this report it has recommended that a review be carried out to determine if in fact any exceptions to the direct relationship test should be recognised in the public interest. If that review were to

determine that any exceptions should be recognised then it would be necessary to decide whether the deletion of Wanganui Computer Centre records after ten years would conflict with these exceptions. Police operational requirements may constitute such an exception. This issue was strongly debated by the Working Party, and produced individual responses. Possible ways of reconciling the apparent contradiction between the principle of rehabilitation and the case that might be made by the Police were discussed. However, the Working Party was agreed that it may be too readily assumed that reasons of law enforcement and national security are automatic exceptions. Any claim to an exception should be critically examined.

13.8 There is no objection to records of convictions being retained, for research purposes, beyond ten years, provided that all identification of the individual offender is removed.

13.9 The Police: Records, Fingerprints, Photographs

Records held by the Police for their own operational and administrative requirements contain information about criminal convictions and it is not suggested that there should be any attempts to remove these manual records. The situation is different in respect of fingerprints and photographs. The Working Party is aware that it is the Police intention in principle to adopt the periods set by the Policy Committee for the deletion of computer records for the destruction of fingerprints and photographs provided those retention periods are operationally acceptable.

13.10 Justice Department - Sentencing Records, Criminal Record Book and Court Files

These records are voluminous, and they are dispersed throughout the country in specific Justice Department institutions, district probation offices, courts and head office. They are, like the Police records, required for administrative purposes and access to them is limited to Justice Department personnel and researchers. The Working Party envisages that as rehabilitation takes effect, these records will become superfluous to requirements and will be destroyed as opportunity permits.

14. Public attitude to Rehabilitation

14.1 The Working Party mentioned earlier in this report that public support for the principles of rehabilitation was needed if it were to be introduced successfully. While any legislation will have an effect on the public attitudes, it was thought desirable to attempt to influence public opinion, and hence a programme giving publicity to the desirable objective of the scheme is recommended.

15. RECOMMENDATIONS

15.1 The Working Party believes the objectives to be sought are threefold:

- Protect reputation regained
- Encourage and assist the individual offender to regain his self-resp
- Promote and remove barriers to rehabilitation(5.4)

To achieve these objectives it favours removal of disabilities, with rehabilitation periods varying according to the objective, rather than literal expungement.

15.2 In coming to this conclusion we considered that New Zealand legislation should:

- Endeavour to provide a system for all. No-one should be denied the removal of disabilities.

- Not distort the truth by creating legal fictions, for example denyi the commission of the offence, the fact of the conviction and senter or by creating any civil remedies based on denial of these.

- Be administratively viable i.e. not involve the wholesale destructi of inaccessible records or seek to take out of circulation publications containing details of the conviction of any offender.

- Not involve or require any application on the part of the offender requiring the establishment of more bureaucracy, and the investigation of the merits of the application.

- Be simple and easy to understand, so as to reduce the possibility of infringement, permit the offender to know his rights and give him maximum opportunity and incentive to rehabilitate himself. In particular there should not be any multiplicity of rehabilitation periods or commencement or completion dates for different offences or sentences, and exceptions should be avoided. (8.2).

15.3 Specific recommendations are:-

(1) That for custodial sentences, the rehabilitation period should date from release from custody, but that for non-custodial penalties it should date from conviction. (9.7).

(2) That otherwise the required rehabilitation periods should not vary according to the nature or severity of the sentence or the nature or seriousness of the offence. (9.10, 9.11).

(3) That the rehabilitation periods should not vary according to the age of the offender. (9.12).

(4) That the rehabilitation period be five years to qualify for protection from publication of references to previous convictions, and ten years for removal of disabilities arising from conviction. (9.15).

(5) That appropriate long-term research be undertaken to establish whether the five and ten year rehabilitation periods now recommended could safely be reduced. (9.17).

(6) That restrictions on publication after five years be sanctioned not by any amendment to existing defamation law, but by the recognition of appropriate summary offence or offences, with an adequate scale of penalties. (10.11).

(7) That, to compensate victims, courts be empowered to award a substantial proportion of any fine in terms of the previous recommendation in a manner analogous to section 45A of the Criminal Justice Act 1954. (10.11).

(8) That no attempt be made to interfere with publications already in existence, for example, newspapers, which contain evidence of convictions for which the offender could be treated as rehabilitated, and that publication of professional journals such as case law text books and law reports continue unimpeded. (10.12).

(9) That details of persons convictions should only be available to the Court for the rehabilitation period of ten years. (10.13).

(10) That, from date of release from custody, or from date of conviction for non-custodial penalties, it should be made unlawful to discriminate, in any of the areas covered by existing human rights legislation, against anyone with a criminal record unless it can be shown that there is a direct relationship between the criminal record and the area of concern. (11.10).

(11) That the criteria for this direct relationship yardstick be defined by statute with sufficient clarity to protect employers, offenders and others, and that provision be made for any person who considers he has been discriminated against unfairly because of a criminal record to complain to the Human Rights Commission (11.11).

(12) That a period of ten years should elapse before the direct relationship criteria would cease to apply. (11.16).

(13) That it be made unlawful to ask questions verbally or in writing designed to show that a person has convictions dating back before the ten year period, as well as lawful to refuse to answer any such questions. (11.17).

(14) That there be a review of all statutory and regulatory provisions and departmental procedures which specifically prohibit persons with a criminal conviction from obtaining a benefit (such as the right to procure a firearm), or engaging in employment or any other activity which would encourage the reintegration of an offender into society; that such a review be undertaken with a view to narrowing the scope of such prohibitions and bars and, where consistent with the public interest, eliminating them altogether. (11.20).

(15) That if professional bodies feel strongly that an absolute abolition of the direct relationship test even after ten years would unduly limit their existing powers of discipline within their membership, they should be required to state their case before the review body; that the same course should be required of any national security or law enforcement body claiming the right to be exempted. (11.21).

(16) That the proposed review be completed before legislation is drafted, and that any exceptions be provided for explicitly in the legislation. (11.22).

(17) That no exception be created for the insurance industry. (12.4).

(18) That whatever decisions are reached by the Wanganui Computer Centre Policy Committee on retention of records within its jurisdiction, should be embodied in an amendment to the Wanganui Computer Centre Act. (13.2).

(19) That subject to certain provisos, the rehabilitation period, and the maximum time that records should be retained on the Wanganui Computer, should be the same. (13.5).

(20) That a programme giving publicity to the desirable objectives of a rehabilitation scheme be undertaken. (14.1).

APPENDIX I

FURTHER EXAMPLES FROM "LIVING IT DOWN"

1. In 1949, Matthew was convicted of a series of thefts. He later settled down and in 1961 married a woman of strong religious beliefs. They opened a boarding house in a seaside town, and later turned it into a convalescent home for old people. Everyone agreed that it was very well run and efficiently staffed. He became a much respected member of the community, doing public work and helping people in trouble. Through carelessness, he exceeded the number of patients permitted without a licence. He was taken to Court, his record was exposed, and he had to abandon all the fruits of his new life, leave the town and change his name.

2. Hugh, aged twenty-three was made redundant at his factory. He applied for a job as a postman. A week later he was told that inquiries had not proved satisfactory and that he could not be employed. It emerged that when he was twelve he and some other boys had sheltered from the rain in a barn and had been reported by the farmer for trespassing and taking eggs. They denied taking any eggs and the farmer withdrew the charges. But they had had their fingerprints taken and were on the police records, although they had not even been prosecuted.

3. When Robert was a youth, he committed a series of house-breaking offences and was sent to prison, although he was a first offender. After his release, he found work as a shop assistant. In his spare time he took "O" and "A" levels, a university degree and a professional qualification. Later, he married a girl who knew nothing of his conviction, and they had three children. Eventually, he secured a lectureship at a university in the Commonwealth. No question about previous convictions appeared on the application form for the post. He sold his house and furniture, both he and his wife gave up their jobs, and they took the children away from school and disposed of the family's pets. Four days before they were due to leave, the university discovered about the conviction, which was then fourteen years old. (They found out through the High Commission which had had it confirmed by the Criminal Record Office). The University cancelled the passages and terminated Robert's appointment, compensating him only for the actual expenses he had incurred. It took him another six years to find a comparable job.

4. When George was convicted of having no "L" plates on his motor cycle, the Court was told that several years before he had been convicted of indecent exposure.

5. John was convicted of dishonesty seven years ago. He has since worked and saved, and wants to invest his savings in a small business. His solicitor has told him that he will not be able to obtain the necessary insurances.

APPENDIX II

OVERSEAS LEGISLATION

Alternative Approaches to Expungement

Overseas legislation on expungement seeks to achieve its aims by a variety of approaches. Two major ones can be identified: those that focus on the record of conviction as the principal problem and attempt to assist the offender by shielding his record from public gaze (United Kingdom) and secondly those that concentrate upon the legal and social disabilities which a criminal record may inflict and seek to remove them - a removal of disabilities approach (Canada, much European legislation the anti-discrimination legislation enacted by many American states). Apart from restoring a loss of civil rights some legislation taking this approach to criminal records goes further and also focusses on adverse public attitudes towards convicted persons. It attempts to bring about a change in those attitudes and to foster a wider public acceptance of persons with a criminal record.

Overseas legislation may also be classified as to whether the provisions operate automatically, or require the convicted person to apply for the benefit, which the court/tribunal has the discretion to grant or withhold. An example of the former is Germany, where access to criminal records is restricted after five years for minor offences and ten years for serious ones. Restriction means that police will not mention the conviction in certificates of good conduct (which are important for getting jobs).

Moreover, after 10 years the entry is cancelled so that even in court, the offender can deny having been convicted.

Canada and many of the states of the United States of America are examples of the discretionary approach which uses the device of a pardon. The effect of a pardon of this kind is to restore the offender's civil rights, or in some cases those rights specified in the pardon. It does not cancel the conviction but is intended as evidence of good subsequent behaviour. Such pardons have to be applied for by the offender and are granted only when some time has elapsed (2 or 5 years in Canada depending upon the nature of the offence). There is usually an investigation of the offender's behaviour, which may inform employers and others of a conviction, they were previously unaware of. This and the fact that the initiative for applying was left to the offender, are reasons why this form of discretionary approach is not advocated by this Working Party.

United Kingdom: The Rehabilitation of Offenders Act 1974

The legislation finally adopted in the United Kingdom, the Rehabilitation of Offenders Act 1974, whilst purportedly based upon the recommendations of Lord Gardiner's committee, contained in Living it Down; is really a variant of the record concealment approach.

Broadly what the Act says is this: (from the Law Reform Commission's Report to the Parliament of Tasmania, 1977, p.5).

> "(a) Anyone who has ever been convicted of a crime or offence and not been sentenced to more than 2 1/2 years in prison, will become a 'rehabilitated person' at the end of a 'rehabilitation period' -

provided that he has not been convicted again during that period of an indictable offence, i.e. something more than a minor one. At the end of this period, his conviction will be treated as 'spent'.

(b) For most purposes (but not all), the law will treat a spent conviction as if it had never happened, so that the offender, can start again with a clean sheet. In general, there will be no need to disclose spent convictions, and a rehabilitated person cannot (in most cases) be prejudiced later if it comes out that he failed to disclose a spent conviction.

(c) The Act also makes it an offence to disclose information about spent convictions from official records otherwise than in the course of someone's official duties.

The English Act has therefore determined the matters in which persons may be eligible to become 'rehabilitated persons' by reference to the degree of gravity assigned to those offences by the Courts when originally meting out penalty. In deciding what penalty to impose, the Courts, in each individual case, must assess the gravity of the offence, and the sentence is therefore treated as a yardstick of the seriousness of the offence for the purposes of rehabilitation. The line having been drawn at 2 1/2 years imprisonment, some cases of (e.g.) rape may be eligible, while others are not.....

As to the length of the rehabilitation period the United Kingdom Act has provided four fixed periods:-

(a) Ten years for anyone sent to prison for between 6 months and 2 1/2 years;
(b) Seven years for someone sent to prison for 6 months or less;
(c) Five years for someone fined or given some sentence other than imprisonment;
(d) Six months for an 'absolute discharge', under the English procedure.

There are also variable rehabilitation periods for certain sentences, such as probation orders, or being sent to certain approved schools. Suspended sentences are calculated as if put into execution. If the offender re-offends during the rehabilitation period by committing any offence triable in a Crown Court the earlier period will be extended to expire with the period appropriate to the later offence.

As to the effect of rehabilitation the Act says that, with some exceptions, a rehabilitated person shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction."

These periods are halved with respect to juvenile offenders, i.e. under age 17 years at date of conviction.

The exceptions to the Living it Down principle are quite wide and are set down-in Regulations made under the Act. A person with a criminal record must disclose even a spent conviction, if asked, when applying for certain types of jobs, e.g. a doctor, teacher, nurse, traffic warden. Further he must tell the truth in certain types of court proceedings, including criminal proceedings.

The principal difficulty which Lord Gardiner's committee commented upon, is the unalterable fact that something which has once happened cannot afterwards be made to unhappen. This is best expressed in The Living it Down report, p. 14.

> "The difficulty is fundamental, and it is logically impossible to overcome it. It follows that any attempt to put a person who has been convicted into the same position as one who has not will involve some degree of artificiality, or appear as an unrealistic device. But there are degrees of unreality, and our concern has been to devise a system which achieves our object with as little artificiality as possible. What we have tried to find as a practical method whereby an offender who has rehabilitated himself into society can conduct his affairs, if he so wishes, as if he had never offended at all - and that without fear of penalty of legally effective contradiction - rather than a method designed to achieve the revocation of the irrevocable, such as the destruction or sealing up of records, or the grant of a later pardon.
>
> In our view, the best way in the United Kingdom to encourage society to treat as rehabilitated those who have in fact rehabilitated themselves by their conduct, is for the law itself to treat them in that way. The simplest means of achieving that end is to provide that, where a person has so rehabilitated himself, the courts will not (with certain necessary exceptions) admit any evidence to the contrary."

The Working Party has reservations about the approach of the Rehabilitation of Offenders Act. Probably the most important criticism is that the Act by its artificality does not resolve the fundamental difficulty acknowledged by Lord Gardiner. It is undesirable to permit people with impunity to assert that which is in fact false. While the creation of legal fiction may make something "unhappen" the fact remains that if a person has been convicted nothing can alter that fact and the law ought not to lend itself to a wholly fictitious pretence that something is true which is patently false.

The South Australian Law Reform Committee in its 1974 report attempted to alleviate the inherent illogicality of the United Kingdom legislation by prohibiting the asking of questions of people who might have a criminal record. (Thirty-Second Report of the Law Reform Committee of South Australia to the Attorney General relating to the Past Records of Offenders and Other Persons. p.8).

> "Our basic recommendation is that it is the asking of questions which ought to be prohibited, not relieving people from having to answer the questions or from the consequences of answering them without disclosing prior convictions in other cases. Provided the questions can be asked at all, the fact that the person with a past avails himself of his right not to answer is just as damning in getting employment and in various other situations, as if he had in fact disclosed his past. In our view what has to be prohibited is asking the questions, not saving the man from having to answer or from the consequences of his not answering..... This in its turn raises difficulties with regard to a person framing a questionnaire. There ought to be some authority which has the power to scrutinise questionnaires at the request of those preparing them and if the questionnaire is approved by the scrutinising authority that should of itself be a defence to any prosecution if the sanction provided by law is criminal prosecution and likewise to any action for wrongful dismissal. A majority of the Committee would

> further recommend ..... that questions or evidence tending to show that a person has committed, been charged with or convicted of an offence in respect of which the rehabilitation period has run should, with exceptions referred to later in this report be inadmissible in Court proceedings."

The difficulty with this approach is the practical problem of enforcing a prohibition on asking questions. Nevertheless the Working Party favours that prohibition rather than permitting or 'legalising' untruthful answers.

A major criticism of the Act is its complexity. As has been said elsewhere;

> "parts of it defy the comprehension of lawyers let alone laymen."
>
> (The Modern Law Review, v. 38. p.434-5)

although the Home Office produced a simplified explanation for public consumption. It would be difficult for an offender, without seeking legal advice, to determine when he had become a rehabilitated person. Such a situation is undesirable. Part of the complexity results from the wide variation in waiting periods for a conviction to become spent.

The Gardiner committee also reasoned that the more serious the offence the longer it will be before one can be reasonably sure that the offender has reformed. Apart from resting on no empirical evidence (criminological findings suggest that crimes of serious personal violence or sexual molestation are the least likely to be repeated), this reasoning imposes a double penalty on such offenders. Firstly the Court's penalty is likely to be more severe and then having repaid their debt they must wait a longer period of time to become rehabilitated. The Gardiner committee might have argued that more serious offences deserve a longer waiting period; but this is a retributive argument, alien to a rehabilitative approach.

The complexity of the British legislation was very effectively bypassed by the Bermudan legislation (The Rehabilitation of Offenders Act 1977). It's simplicity concentrating upon one period of rehabilitation; seven years, to commence from the expiry of the sentence. The Act, however, still saw the need to exclude certain types of sentences.

The Bermudan Legislation has a most ingenuous solution to the problem of asking questions of offenders about past convictions:

> "a person shall not in any such proceedings be asked, and, if asked shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto."

Section 4(1)a The Rehabilitation of Offenders Act 1977.

The Working Party has been unable to find any information evaluating this Act.

The Tasmanian Solution

The Tasmanian Law Reform Commission in 1976, while rejecting the adoption of special legislation along the lines of the United Kingdom Act, suggested a solution to criminal records which follows neither the expungement, nor removal of disabilities approach outlined previously. Its recommendations

focussed upon the circumstances under which criminal records should be made available; the limitations on publication, out of court, of previous convictions; and changes to the Evidence Act 1910 requiring witnesses to be questioned about previous convictions. (adapted from the Secretary for Justice's submission, pp 18-19)

"It recommended that criminal records only be made available in accordance with the following guidelines:

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

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

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

The Commission also recommended that limitations be put on the publication, out of court, of previous convictions which are brough to the court's attention for sentencing purposes. It was felt, however, that the court should be given a discretion to allow publication where this was in the public interest. Directions should also be given to police prosecutors and Crown counsel to hand up the record without reading it aloud."

As far as the Working Party can ascertain, no legislation has so far followed the Commission's report.

Canada

Canada has passed two relevant Acts, the Criminal Records Act of 1970 approaching the problem by expunging the record after the granting of a pardon, and the Human Rights Act 1977 which provides that in addition to such matters as race, colour and sex, a criminal record for which a pardon has been granted shall be a prohibited ground for discrimination - a removal of disabilities approach.

Under the Criminal Records Acts as summarised in Living it Down p.45:

> "a convicted person may apply for a 'pardon' after two years in summary cases, or five years in others, from the end of the penalty imposed by the sentencing court. The Parole Board investigates the case, and if satisfied that the applicant has been of good behaviour, recommends a pardon to the Solicitor-General of Canada. If the Parole Board decides not to recommend a pardon, the applicant can make representations. The Governor may grant the pardon after reference by the Solicitor-General. A pardon vacates the conviction and removes any legal disqualifications consequent on it. The record must then be held separately from other records and must not be disclosed to anyone without the

> Solicitor-General's consent. The pardon can be revoked by the Governor in Council if it was obtained by deception or if the applicant ceases to be of good conduct. The Crown alone is prohibited from asking its potential employees any questions requiring them to disclose pardoned convictions."

By so doing, the Canadian government clearly demonstrated its commitment to solving the problem of the person with a criminal record. The benefits of a pardon have been described by the Canadian National Parole Board:

> "A pardon may be necessary in obtaining certain licences or for bonding purposes. It may be helpful in obtaining employment, a visa, or passport, or for granting entry or membership into an organisation."

The Canadian legislation seems to have avoided some of the difficulties and complexities that have flowed from the United Kingdom approach. It does not for instance, allow people who have been granted a pardon, the right to deny the fact of their criminal record.

The Secretary of Justice comments that (pp 21-22):

> "However people with a pardon are encouraged to tell anyone who enquires that they have a pardon for an offence which occurred some time ago, and that they were subject to an investigation to make sure that they deserved a pardon."
>
> "In addition, the application form for a pardon requires an applicant to list at least five persons to whom those investigating the applicant can refer in confidence. Critics point out that this requirement may result in the publication of the applicant's criminal record to those who were previously unaware of it, or who may have forgotten about it (despite the warning on the application form not to include relatives, employers, or employees, and to asterisk those who are unaware of the applicant's convictions). The whole procedure has also been described as 'cumbersome'. It certainly seems to require quite a substantial organisation which would need additional resource commitments.
>
> Critics argue that the success of the legislation is dependent on the degree to which people are prepared to accept and recognise the fact of the offender's pardon. There is really little incentive in the legislation for others, especially employers, to change their attitudes towards those with a criminal record. The legislation removes disabilities imposed by legislation but not those which are imposed on the offender by society itself, disabilities which are often more insidious and thus more devastating in their effect."

But the carrying out of this investigation and the onus on the offender to apply for a pardon, is in the Working Party's opinion, two of the major areas of criticism of the Canadian approach.

Partly because of the limitation mentioned the Canadian Human Rights Act was passed in 1977. As far as a person with a criminal record is concerned, this Act complements the earlier legislation, and seeks to reinforce its educative function. Again the Working Party quotes from the Secretary of Justice (pp23-24):

> "To this effect, people who allege that they have been discriminated against because they have a criminal conviction, even though they have been granted a pardon for it, can complain to the Canadian Human Rights

Commission, which, if the complaint is upheld, may award compensation or have made available to complainants, the opportunities or privileges denied to them as a result of the discriminatory practice. However it is permissible under the Act to discriminate against a person on the grounds of a pardoned criminal conviction in the field of employment, if the discrimination is based on a 'bona fide' occupational requirement.

Although the Canadian Human Rights Act does attempt to provide a degree of protection to criminal record victims, it can be argued that the legislation is too narrow in its scope. While all people with a criminal conviction are able to qualify for a pardon after the specified period of good behaviour since conviction, the Act does nothing to help those who suffer unjustified discrimination in the period between completion of their sentence, and the grant of a pardon, if indeed the latter is ever sought. As many writers on the subject of the criminal record victim point out, the period immediately following conviction or the completion of sentence as the case may be, is often the time when an offender most needs to be free from discrimination if he is to avoid recidivism and rehabilitate himself. To deny protection against discrimination to offenders until they have demonstrated that they have rehabilitated themselves fails to appreciate that it is often the presence or absence of discrimination which determines whether or not rehabilitation will be achieved.

Thus it can be argued that the Canadian legislation is really of help only to those offenders who are fortunate enough, or of such a strong will, as to be able to negotiate the rough road to rehabilitation despite the discrimination directed against them. It may be that such persons do not really need such legislation anyway."

UNITED STATES OF AMERICA

Within the United States of America the policy for removing conviction records is a state responsibility and there are therefore wide differences between individual states.

New Jersey's expungement statute is closest to that recommended by this Working Party, in that there is a single ten year time period from the date of a conviction for which there was a suspended sentence, or fine of not more than $1,000. The offender must lead a conviction free life for the ten years, however the onus is on the offender to petition the court for expungement relief.

Washington, Idaho, Utah and California have provisions that permit the selective annulment of conviction in the case of an offender who has successfullly completed a sentence of probation. Again, the onus is on the offender to apply to the sentencing court. California's legislation goes somewhat further and distinguishes between midemeanours and felonies, and the length of time that must lapse before an offender may apply; and also incorporates greater leniency for offenders who committed an offence while under the age of 21. A legal fiction is created for these offenders for whom it is deemed that the offence never occurred and they may answer accordingly to any question relating to the event. This state also makes special provision where an offender is convicted of multiple offences which result in sentences that either run consecutively or concurrently. For the purposes of expungement life imprisonment is to be defined as carrying a maximum penalty of imprisonment for 50 years. This would be an alternative way of incorporating life imprisonment within the ambit of the provisions of expungement legislation.

The Kansas statute applies only if the offender was under 21 at the time of the offence, and the sentence has been completed. The offender, who must petition the court, must then be treated in all respects as though he had not been convicted, except that the record may be considered for sentencing purposes upon a subsequent conviction.

Alongside explicit expungement legislation many states have also enacted 'fair employment practices' legislation which proscribes discrimination on the ground of a criminal record from the very date of the recording of the conviction. Many states for example, Washington, Connecticut, have dealt with the problem of the relevancy of the criminal record for particular types of employment by the use of the 'direct relationship test'. The general prohibition on discrimination on the grounds of a criminal record is lifted where there exists a direct relationship between the employment activity in which the ex-offender wishes to work and the offence(s) for which he has a conviction record. An employer may ask the question as to whether the job applicant has a conviction. He may also ask for details. However, he must not discriminate against the offender because of this unless he can demonstrate that there is a 'direct relationship' between the conviction and the nature of the offence. Some states recognise that the passing of time weakens this direct relationship. For instance the state of New York which enacted such legislation in 1977 goes even further in specifying the factors to be considered concerning a previous criminal conviction. The public agency, or private employer, must consider the following:

> "(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offences.
>
> (b) The specific duties and responsibilities necessarily related to the licence or employment sought.
>
> (c) The bearing, if any, the criminal offence or offences for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
>
> (d) The time which has elapsed since the occurrence of the criminal offence or offences.
>
> (e) The seriousness of the offence or offences.
>
> (f) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
>
> (g) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public."
>
> ("Correction Laws Article" 23.A S753).

The legislation, although limited only to employment matters applies to all licenses private employers and public agencies. An offender denied employment is entitled to a statement of the reasons for such denial in a written form from the employer within thirty days. There is also provision for employers to give consideration to a Certificate of good Conduct or Certificate of Relief of Disabilities, but these are given to less than 3% of the national ex-offender population.

APPENDIX III

STATISTICAL INFORMATION AVAILABLE AND RELATED STUDIES

It was necessary to look at available statistics to help the Working Party answer several questions, namely: could the seriousness of offences be a basis for limiting the scope of rehabilitation legislation?; was there a particular age after which offending dropped or ceased all together?; and should there be special time periods for offenders below certain ages?

There are various New Zealand statistics which provide marginal assistance. Unless otherwise stated all are contained in the New Zealand Justice Statistics 1976. 1977 to 1979 statistics are available for the Supreme Court. Part A of the 1977-1978 Justice Statistics are also available.

The first group of the 1976 Justice Department statistics is to be found on pages 6, 7 and 8 being Supreme Court Persons Sentenced, Magistrates' Courts Distinct Cases and Children's Court Distinct Cases. They provide percentages of offending in various categories and give some indication of the prevalence of various types of offence.

Taken in conjunction with the second category of statistics on offences and length of sentence it would be possible to identify the probable length of sentence for the type of offence and provide some basis for differentiating between categories of offences for the purpose of varying the qualifying period for expungement. Offences and length of Sentence are dealt with in Table 12. A third group or category of statistics consists of Ages and Length of Sentence (Table 55) and Age of Prisoners (Found in Table E of the Annual Report of the Department of Justice, 1980). The simple Table E "Age of Prisoners" in the Justice Department Report is as follows:

Age Group	1979
Under 20	1541
20-24	1571
25-29	708
30-39	567
40 and upward	398
Total	4755

The same information can be obtained in more detailed form from page 13 of the Department's statistics "Distinct Persons Imprisoned by Age, Sex and Ethnic Origin, 1972 to 1976".

These tables establish conclusively that the age group at greatest risk is the 17 to 20 age group and that the risk thereafter declines at an ever increasing rate. Table 55 is particularly interesting because it establishes (with the exception of borstal training, a sentence limited to young offenders) that 15 and 16 year olds and to a lesser extent 17 year olds are unlikely to receive lengthy terms of imprisonment, but that the 17, 18, 19, 20, age groups taken together are incarcerated more frequently and for greater periods of time. It can also be seen quite clearly that as the offender grows older he is less likely to be sentenced to prison, and the term of imprisonment reduces markedly. The tendency may be better shown on a graph than by tables of statistics.

The fourth category of "Offences and Ages" found in Table 56 is the most comprehensive set of statistics and enables consideration of the type of offending by age. These statistics would make it possible to make further differentiation between not only categories of offence, but age eligibility, but it would be an involved exercise.

The final, vaguely relevant but unhelpful, category of statistics is the "Frequency of Offending" statistics found on page 13. They make it quite clear that there is a very high probability of re-offending but do not go any further than re-establishing that the probability of re-offending is substantial.

Statistics might conceivably:

1. Establish any greater or lesser likelihood of re-offending depending on the seriousness of the offences committed.

2. Identify any groups of offences which carry a greater or lesser probability of re-offending.

3. Identify any penalties either by type or severity which reduce the probability of re-offending.

4. Identify any age groups at greater risk of re-offending, or any other groups at similar risk.

5. Establish whether there is any lapse of time after conviction or service of the sentence when re-offending becomes less likely.

There are no detailed New Zealand statistics that are capable of providing evidence for 1 or 2, other than the generally accepted rule of thumb that property offenders tend to re-offend in comparison with those convicted of a serious violent offence against the person, such as murder. Overseas studies show that the seriousness of offences or groupings of offences are unlikely to determine the liklihood of re-offending, but the most important characteristic is rather the number of offences already committed. The general conclusion of overseas research into 3, looking in the main at the differences between custodial versus non custodial sentences, shows that the type of penalty has little effect on the likelihood of re-offending. The group at greatest risk of reoffending is that which has started to re-offend when young, and in terms of a particular age group the majority of offenders are concentrated especially in the 17-20 year age group. There is some substance to the general saying that offending is a young man's occupation.

There has been research which helps establish when after conviction or completion of sentence re-offending is most likely. A crucial time period is between 3 - 9 months after completion of sentence, regardless of the penalty. Statistics show that three years from completion of sentence re-offending substantially diminishes, and after ten years the reconviction rate is minimal. New Zealand data to support this is based on recidivism studies according to type of penalty: borstal training, Detention centre, Periodic Detention and Probation Brief details of these are available on page 12 and 13 of the Secretary of Justice's submission and in the Annual Report of the Department of Justice. The conclusion from these is that the bulk of re-offending occurs before the 2 1/2-3 year period after completion of the previous sentence.

There has been the indirect research in the Home Office report entitled "The Sentence of the Court, a Handbook for Courts on the Treatment of Offenders". These tables indicate the re-conviction rate at 5 years for various age groups - the 5 year period being taken from the date of the earlier conviction and not release on sentence. Quite clearly there is a correlation between the age and likelihood of re-offending within a 5 year period. As stated, with almost all types of sentence the proportions re-convicted within 5 years decrease progressively as the offender's age increases.

Statistics find that in any attempt to establish a period after which it is very unlikely an offender will re-offend, not only should the peak reoffending time be taken into account but age should be taken into consideration and the period of qualifying time for the expungement increased not reduced in respect of younger offenders. However these statistics cited in "Living it Down" do make it clear that there is little as prospect of re-offending after 10 years.

The only other statistics or studies are:

i. A study by the Department of Social Welfare. While this contains re-offending rates for offenders making their first court appearances at various ages the study is of court appearances up to age 16, only. It is probably impossible to deduce any significance from the contents or statistics contained in the study.

ii. The study conducted by Forsyth and Love of re-offending of probationers. The study is in respect of persons placed on probation only and covers a period of 5-6 years. The report contains figures for re-conviction by years following probation sentence, which probably establish the greater probability that re-offending will occur within the first year, and then that there will only be one re-conviction.