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Reform
Commission

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SPENT CONVICTIONS

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Participants

The Commission

The Division of the Commission constituted under the Law Reform Commission Act 1973 for the purposes of this report comprised the following Members of the Commission:

President
The Honourable Xavier Connor, AO, QC, LLB (Melb)

Commissioner in charge
Dr RA Hayes, LLB (Melb), Ph D (Monash)

Commissioners
Mr RW Harmer, BA, LLB (Syd)
Mr TH Smith, QC, BA, LLB (Melb) Retired 1986
Mr G Zdenkowski, BA, LLB (Syd)

Officers of the Commission

Secretary and Director of Research
Stephen Mason, BA, LLB MTCP (Syd) (from 1986)
IG Cunliffe, BA, LLB (ANU) (to 1986)

Legislative drafting
Stephen Mason, BA, LLB, MTCP (Syd)
Philippa Horner, B Juris (NSW), LLB (ANU), on secondment from the Office of Parliamentary Counsel, Canberra, prepared the draft legislation attached to the Commission's Discussion Paper

Legal staff
Mary Fisher, LLB (Adel)
Principal Law Reform Officer

The following members of the Commission's staff worked on the preparation of the Commission's Discussion Paper:
Richard Phillipps, BA (Griff), LLB (NSW) (to April 1985)
Anthony D Young, BA, LLB (NSW)
Senior Law Reform Officers
Valerio Manera, B Comm (NSW) (1983–4)
on secondment under the Executive Development Scheme
Eileen Plumb, BA, LLB (Syd) (1985)
Law Reform Officer

The Commission acknowledges the assistance provided by Susan MacAlpine, B Juris, LLB (NSW), Associate to Dr Hayes, in the preparation of this report.

Principal Executive Officer
Barry Hunt, BA (Syd)

Library
Joanna Longley, BA (Lib) (CCAE) (from 1986)
Virginia Pursell, BA (NSW), Dip Lib (CCAE) (to 1986)
Librarians
Susan Collins
Library Officer

Word Processing/Secretarial
Maria Capitani
Jennifer Clark (part-time)
Anna Hayduk (part-time)
Cheryl Nilson
Anna Raso (part-time)
Amanda Seeley

***Consultants to the Commission**
Senior Sergeant B Alchin, Australian Federal Police
Mr D Biles, Deputy Director, Australian Institute of Criminology
Mr D Boucher, Attorney-General's Department, Canberra
Meetropolitan Commander A Bolton, Victoria Police
Dr D Cohen, Paediatric Section, Royal Alexandra Hospital for Children
Inspector P Duffy, Australian Federal Police
Mr G Greenleaf, Lecturer in Law, University of New South Wales
Ms P Horner, Office of Parliamentary Counsel, Canberra
Mr T Keady, Department of Attorney-General and Justice, New South Wales

Summary of recommendations

General conclusion

Difficulties for former offenders

1. This report is concerned with the difficulties faced by former offenders arising out of their criminal records. An appropriate response must balance the offender's need to return to full citizenship against the public interest in the prevention and detection of crime, and in appropriate decision making in judicial and other contexts. The Commission's general conclusion is that these difficulties may be be appropriately reduced, if not avoided, by

- minimising the negative consequences that attach to old (spent) convictions
- making it unlawful to discriminate unreasonably against a person on the basis of his or her criminal record, and
- establishing controls on the collection, storage and dissemination of criminal record information by the police and by other record keepers.

This report makes recommendations for the first two (paragraph 8).

Access to criminal records

2. Questions about the controls to be imposed on criminal record information have been the subject of previous reports by this Commission in its references on *Privacy* and *Criminal Investigation*. The Commission re-iterates its recommendation in the Criminal Investigation report that there be a specialist, multi-disciplinary task force to develop rules controlling criminal record keeping and checking on a national basis (paragraph 13).

Spent convictions scheme

Introduction

3. *Rationale for spent convictions scheme.* An old conviction, followed by a substantial period of good behaviour, has little, if any, value as an indicator of how the former offender will behave in the future. In such circumstances

reliance on the old conviction will generally result in serious prejudice to the offender which will outweigh to a great degree its value as an indicator of future behaviour. Consequently, it is in accordance with sound social policy that the old conviction be regarded as spent (paragraph 15).

Interpretation of laws

4. References in Commonwealth laws and the laws of the Territories (other than the Northern Territory and Norfolk Island) to convictions should be interpreted as not including reference to spent convictions unless there is express legislative provision to the contrary. However, protections presently afforded to former offenders under existing laws which prohibit or otherwise restrict disclosure or use of information about a conviction should not be diminished (paragraph 17).

Taking spent convictions into account

5. *Spent convictions not to be taken into account.* Spent convictions should generally not be able to be taken into account in making decisions about the offender, whether in a legal context or not. This rule should also apply to facts about spent convictions, including the fact that the person committed an offence, or was arrested or charged with an offence which is the subject of a spent conviction (paragraphs 19–20).

6. *Remedies.* It is not appropriate that failure to comply with the obligation should attract a criminal penalty. Other remedies available, including injunctions, declarations, and judicial and administrative review of decisions, offer more appropriate relief (paragraph 21).

7. *Exemptions.* There should be specific exemptions for the Australian Federal Police and Commonwealth agencies when exercising powers in relation to national security and criminal intelligence. The courts should be authorised expressly to continue to use spent convictions in sentencing. Obligations to have regard to spent convictions that are expressly imposed by statute should continue to have effect (paragraph 22).

Acknowledging spent convictions

8. *No need to acknowledge.* In the absence of express legislative provision to the contrary there should be no obligation to acknowledge a spent conviction. The protection should extend to questions about charges, arrest and other matters relating to a spent conviction (paragraph 27). Failure to acknowledge a spent conviction should not in itself prevent a person from obtaining a remedy

in a legal or administrative proceeding to which he or she is otherwise entitled, nor should it give rise to a civil liability (paragraph 28).

9. ***Exemptions.*** There should be exemptions for the courts in sentencing an offender. Obligations to furnish information about spent convictions that are expressly imposed by statute should continue to have effect (paragraph 29).

Disclosure of spent convictions

10. There should be no general prohibition on disclosure along the lines of the Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld). Such a provision would be difficult to observe and would involve unwarranted restrictions on freedom of speech (paragraph 33).

General exemptions

11. ***Courts and tribunals.*** Courts and tribunals applying laws of evidence should not be further restricted by the obligation to disregard spent convictions. As to use of prior convictions in establishing a tendency to do a particular act or have a particular state of mind, or in assessing the credibility of parties or witnesses, the Commission's recommendations in its report on *Evidence* should be adopted: leave should be required to adduce the evidence of a prior conviction, which ought to have substantial probative value as to credibility. The Director of Public Prosecutions should be able to take the fact of prior convictions, including spent convictions, into account in determining whether to prosecute (paragraph 40).

12. ***Other exemptions.*** Where the relevance of a particular spent conviction to decision making, and the public interest in having it available to be used, is clearly demonstrated, it should be possible for the decision maker to be exempted from aspects of the scheme. A national, expert, body to consider claims for exemption should be established (see recommendation 2) (paragraph 42). Exemptions should be affected by regulation. But the scheme should not be delayed while the body is being established. The Governor-General should be able to exclude by regulation specified persons or classes of persons from the operation of certain consequences of the spent convictions scheme[1] Proposed safeguards include that the Governor-General should be satisfied that

- the convictions covered by the exemption are substantially relevant to the exercise of a power, or the performance of a duty or function, for which they may be taken into account

[1] One member of the Division dissents: see App B.

- the harm that might be caused if the convictions, or convictions of the kind, concerned had to be disregarded substantially outweighs the harm to a convicted person that would be caused by taking them into account

- persons entitled to demand acknowledgement of the convictions must be lawfully entitled to take them into account.

Exemption regulations should only have effect for five years to ensure continuing Parliamentary scrutiny (paragraph 43).

Convictions included in the scheme

13. All convictions, including for serious offences, should be included in the scheme (paragraph 47).

How convictions become spent

14. The spent convictions scheme should be self-executing. No tribunal need be involved (paragraph 53).

When convictions become spent

15. *10 year waiting period.* Subject to special provision for offences committed as a child, a conviction should become spent after the expiration of a single waiting period (paragraph 59). The line must be drawn at a time when the conviction can reasonably be regarded as generally no longer relevant to decisionmaking about the offender and the offender regarded as having 'paid his or her debt to society'. Ten years is a generally accepted starting point and should be adopted (paragraph 60).[2] For convictions by a childrens' court or like court, the period should be two years. Where however, children are convicted of serious offences, they should be treated as adults (paragraph 61).

16. *Commencement of waiting period.* Generally, the waiting period should commence on completion of the sentence imposed.[3] Where no sentence is imposed or where the sentence is satisfied forthwith, the period should start at once.

- Indeterminate sentences should be taken to be completed when the convicted person is unconditionally released from imprisonment or detention, or, where the release from detention is subject to conditions, when they are fulfilled

[2] For dissent, see App B.
[3] For dissent, see App B.

- A conviction that occurred before the commencement of a scheme should become spent on the day the conviction would have become spent if the scheme had been in force at the time the conviction occurred or on the date of the commencement of scheme, whichever occurs later

- A conviction in respect of which a pardon has been given should become spent on the day the pardon takes effect

- A conviction for an offence against the law of foreign country should become spent at once unless the offence could have constituted an offence in Australia (paragraph 62)

- Where the offence is proved but no conviction is recorded, the offence should be considered spent at once, or on the completion of any sentence imposed, whichever is later (paragraph 63).

17. *Good behaviour.* The waiting period should be conviction free (paragraph 64). But convictions that are quashed, set aside, have been pardoned or incur only a fine of $500 (or some other amount prescribed) should have no effect on the waiting period (paragraph 65).

Revival

18. The Queensland provision for revival of a spent conviction if the offender is again convicted after the end of the waiting period should not be adopted (paragraph 66).

Implementation

19. These proposals should be implemented by Commonwealth legislation t' t applies to Commonwealth agencies and to persons in the Australian Capital Territory, in relation to Commonwealth, State or Territory, or foreign offences. The Commonwealth should not seek to implement the recommendations by any more exhaustive exercise of Commonwealth legislative power. To ensure that Commonwealth, State and Territory schemes operate consistently, the Commonwealth scheme should recognise as spent those convictions that are recognised as spent under any State or Territory scheme. The States and Territories should be encouraged to adopt similar provisions. The Commonwealth should encourage, through the Standing Committee of Attorneys-General and in other ways, implementation of these proposals at the State and Territory levels in a broadly uniform and consistent way (paragraph 69).

Discrimination against former offenders

Ground of discrimination

20. Former offenders who are unreasonably discriminated against on the basis of their criminal record should have a legitimate ground of complaint. Existing protections (such as federal and State anti-discrimination legislation) and the spent convictions scheme, are not enough (paragraphs 70–5).

Non-legislative reform

21. *Regulations.* Regulations should be made under the Human Rights and Equal Opportunity Commission Act 1986 (Cth) to declare that discrimination on the ground of criminal record, or facts relating to a conviction (see recommendation 5) is covered by the equal opportunity provisions of that Act (paragraph 78).

22. *HREOC action.* The Human Rights and Equal Opportunity Commission should formally acknowledge that unreasonable discrimination on the ground of a criminal record falls within the 'other status' provisions of the International Covenant on Civil and Political Rights and therefore within the general responsibility of the Human Rights and Equal Opportunity Commission (paragraph 78).

New anti-discrimination legislation

23. *Sex Discrimination Act model.* To give real protection to former offenders, Commonwealth legislation should be enacted along the lines of the Sex Discrimination Act 1984 (Cth) making it unlawful to discriminate unreasonably on the ground of criminal record (paragraph 79). The Commonwealth should encourage adoption of similar anti-discrimination provisions by the States and Territories (paragraph 80). Federal legislation should not limit State protections that would be capable of operating concurrently (paragraph 83).

24. *Definition of discrimination.* Discrimination should be defined in terms of less favourable treatment of former offenders because of their record, that is not reasonable having regard to the circumstances. Discrimination on the ground of criminal record should be confined to direct discrimination, as defined under the Sex Discrimination Act 1984 (Cth) and equivalent discrimination legislation (paragraph 85). There should not be a separate category of indirect discrimination, as exists under that Act (paragraph 88–9).

25. *Convictions covered.* The protection should extend to all convictions, whether they are 'spent' or not (paragraph 92).

26. *Areas of discrimination.* It should be unlawful to discriminate in the following areas that relate to employment:

- applicants and employees
- commission agents
- contract workers
- qualifying bodies
- registered organisations, and
- employment agencies.

In other areas it should be unlawful to discriminate in relation to

- provision of education
- provision of goods, services and the availability of facilities
- provision of accommodation in certain circumstances
- disposal of land
- membership of a club, and access to benefits of a club, or
- administration of Commonwealth laws and programs.

These are consistent with the areas covered by the Sex Discrimination Act 1984 (Cth). Given the voluntary nature of a partnership and the wide liability of partners for the debts of each other, partnerships should not be included. Nor should the provisions apply to questions asked in application forms, or to clubs, unless the clubs are licensed (paragraph 94).

27. *Declarations.* To assist bodies uncertain about the reasonableness of their actions, the Human Rights and Equal Opportunity Commission should be empowered to declare that a specified act does not constitute discrimination for the purposes of the scheme. There should be a provision for an appeal to the Administrative Appeals Tribunal for review of these declarations (paragraph 95).

28. *Exemptions.* The proposals should not apply to determinations or decisions of the Human Rights and Equal Opportunity Commission or of a court or tribunal, the Director of Public Prosecutions when deciding whether to prosecute or to public authorities in relation to sentencing matters. The proposals should not apply to anything done by a court or tribunal when applying the laws of evidence or imposing a penalty. There should also be an exemption for acts done under statutory authority, be it any Commonwealth, State or Territory law, on the same basis as in the Sex Discrimination Act 1984 (Cth).

Voluntary organisations should be expressly exempted, in relation to membership and in relation to benefits, services and facilities provided to members. It is not appropriate to adopt the other specific exemptions provided under the Sex Discrimination Act 1984 (Cth) (paragraph 95).

29. *Implementation.* The Human Rights and Equal Opportunity Commission should have the same powers and functions to deal with questions of unreasonable discrimination on the ground of criminal record as it enjoys in relation to matters arising under the Sex Discrimination Act 1984 (Cth) or under the Racial Discrimination Act 1975 (Cth). These include power to inquire into complaints and powers of conciliation and determination. Broadly similar mechanisms should be available. Beyond this, the Commission makes no detailed recommendations for administrative arrangements to be adopted by the Human Rights and Equal Opportunity Commission. These are best determined by that Commission (paragraph 98).

1. Introduction

Introduction

1. This Report arises from a suggestion made by the Commission, and agreed to by the then Attorney-General, Senator the Honourable Gareth Evans QC, that a separate inquiry be held on the question whether a former offender's criminal record should be legally obliterated and, if so, how long this should happen after the record is created. The inquiry is a further stage in the Commission's review of the sentencing of Commonwealth and Australian Capital Territory offenders. It was envisaged that the Commission would build on its work on the Sentencing Reference and that its work on privacy, child welfare and defamation would also be relevant.[1] In announcing the inquiry, the then Attorney-General said:

> The questions have great significance for the rehabilitation of criminal offenders, bearing heavily on their ability to gain employment and resume normal places in the community. A Federal law to allow convicted criminals to 'live it down' would be a very significant contribution to the fairer administration of criminal justice.[2]

Course of the inquiry

2. In accordance with its usual practice, the Commission consulted widely with groups and individuals affected by the dissemination of criminal record information, including former offenders and those who collect, disseminate and use such information. Discussions have been held with, for example, the police, corrective services and child welfare authorities at the State and federal levels. In late 1985, the then Secretary and Director of Research, Ian Cunliffe, held discussions about spent conviction schemes and related matters with a number of authorities in Europe, North America and Japan. In December 1985, the Commission issued Discussion Paper No 25, *Criminal Records,* setting out a number of proposals and recording the results of the Commission's research. This paper was sent to some 700 individuals and organisations. In addition, the Commission's proposals were publicised in the press and the electronic media including a number of talkback radio interviews. These were very successful in generating public response. During August and September 1986,

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[1] ALRC 22, ALRC 18, ALRC 15, ALRC 11.

[2] Senator Gareth Evans, *Press Release* (3 June 1984).

public hearings were held in Melbourne, Sydney and the Northern Territory. The Commission received a large number of submissions, both written and by telephone, many of which were presented in confidence.[3] In preparing this Report, the Commission has received considerable assistance from a number of authorities and non-government bodies. Particular mention must be made of the Australian Institute of Criminology, whose Deputy Director, David Biles, an honorary consultant to the Commission, prepared a detailed paper on recidivism research which was published in the Discussion Paper.[4] The Administrative Review Council provided detailed and useful comments on a number of administrative matters connected with the Commission's proposals in the Discussion Paper. The New South Wales Privacy Committee gave the Commission the benefit of much of their experience in handling complaints connected with the dissemination of information about criminal history. Finally, the Human Rights Commission, and its successor, the Human Rights and Equal Opportunity Commission and members of State police forces and the Australian Federal Police provided valuable and detailed assistance.

Concerns of former offenders

Access to information

3. During the course of the Commission's inquiry, and particularly during the Commission's public hearings, concern was expressed about three related problems that affect former offenders. The first of these is the extent to which criminal record information is freely available within the community. Police forces throughout Australia exchange criminal history information. They are progressively moving to computerise and centralise their criminal record information holdings. Fears were expressed to the Commission that unauthorised access to these police records could be easily obtained, particularly by employers and even by people who, on any standard, ought not to find out about an individual's criminal history. The question of the procedures adopted by police record keepers for dealing with inquiries about, for example, applicants for employment is dealt with later in this chapter.[5] The flow of information, including information about former offenders, in the public sector, and particularly the public sector controls upon the use and disclosure of that information, were exhaustively analysed by the Commission in its Report on *Privacy*.[6] A

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[3] A list of persons making submissions appears at the end of this report. This list does not include the names of those who wished to remain anonymous.

[4] ALRC DP 25 App B.

[5] Para 9–13.

[6] ALRC 22 para 937–53.

particular concern is that a former offender can never be sure when access is being given to information about him or her, to whom it has been given or for what purpose it might be used.

Discrimination

4. Discriminatory practices based on race, gender or handicap have largely been declared unlawful. The concern expressed to the Commission was that there are virtually no limits on a person's power to discriminate against another, no matter how unfairly and unreasonably, on the ground of criminal record. The fact that a person has committed an offence continues to be a basis for unfairly excluding the person from a great number of the advantages of membership of society, not the least being work. It is not only the fact of a conviction that leads to prejudice. Having been arrested for an offence, or even only having been under suspicion of crime, might be enough for some people to form an unfairly adverse judgment about a former offender.

Specific disabilities

5. Perhaps the largest number of complaints to the Commission focused on the specific difficulties – in many cases legal disabilities – suffered by former offenders. In this respect, the Commission's experience parallels that of the Law Reform Commission of Western Australia.[7] For example, a conviction might legally disable a person from holding office, from pursuing an activity for which a licence is necessary (for example, taxi driving) or from practising a profession or trade. It might disqualify a person from being a member of a professional statutory body, such as a dental board. The disqualification might be automatic, complete and unreviewable. It might remain forever. In these instances, having a conviction is as much a disqualification as not having the necessary formal educational qualification. There is always the possibility of getting a degree. There is little possibility of getting rid of a conviction. In other areas, the fact of a conviction might only be indirectly relevant. For example, a person might have to be 'fit and proper', or 'of good character', before being admitted to practise a profession. The admitting authority may make its decision about 'good character' in the light of information about past convictions. It might admit. It might not. A conviction might even legally disable a person from travelling out of, or settling in, Australia. There are many other areas where a conviction is a legal disability.[8]

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[7] WALRC 80 para 3.27–3.38; see also Probation and Parole Service (Qld) (R Butel) *Submission 79* (26 February 1987).

[8] Specific examples of the disabilities flowing from a criminal record are set out in ALRC DP 25 App C; see also WALRC 80 para 3.1–3.40.

Need to reduce the impact of a former conviction

6. The justification for reform in this area was addressed in some detail in the Commission's Discussion Paper.[9] In summary, there is a strong case for doing something about the problems faced by former offenders. If nothing were done, society would be needlessly depriving itself of the talents and energies of people in whose positive development it has a distinct interest. It would be encouraging offenders to stay trapped in a vicious circle of crime, prison and more crime. On the other hand, other aspects of the public interest need to be considered.

- *Freedom of expression:* the claims, highly valued by all members of the community, to freedom of expression and freedom of information. Barriers should not be put on the availability, dissemination and use of information without adequate justification
- *Criminal investigation:* the claim of governments, law enforcement agencies, business and the community as a whole to use the very best methods available to prevent and detect criminal activity and to apprehend offenders
- *Informed decision making:* the interest in being able to make the best and most informed judgments possible about admission to professional practice, occupation or trade, appointment or election to office and employment, and promotion
- *Administration of justice:* the interest in efficient and fair administration of justice, including decision making, review and sentencing, particularly with a view to ensuring that courts and tribunals are provided with all relevant and necessary information, and
- *Victims:* the interests of victims, to many of whom the legal system already seems unduly solicitous of the needs and interests of those guilty of crime.[10]

Australian and overseas responses

7. The Commission's Discussion Paper included a lengthy appendix detailing the approach of a number of overseas jurisdictions to some of these concerns.[11] In countries with which Australia compares itself, including the

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[9] ALRC DP 25 para 1–17; see also WALRC 80 ch 3–4.
[10] ALRC DP 25 para 6.
[11] id, App D.

United Kingdom, the United States, Canada, Continental Europe, the USSR, Japan and Pacific countries, the question has been addressed by establishing spent conviction schemes under which limits are placed on the effects of old convictions. In some jurisdictions, there are requirements for records to be destroyed or 'sealed up'. Within Australia, Queensland has already introduced legislation to declare some convictions spent. In November 1986, the Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) came into force. The Law Reform Commission of Western Australia has published a report recommending such a scheme in that State.[12] In South Australia, the Attorney-General's Department has published a discussion paper. There is progress in other States and in the Northern Territory, each of which is developing proposals for a similar scheme.[13] The New South Wales Privacy Committee has also been active in this area.[14]

Outline of report

8. This report addresses each of the concerns identified in submissions to the Commission. In chapter 2, the Commission recommends a detailed scheme for declaring convictions spent after a specified period. The scheme limits the use that can be made of, and the consequences attaching to, an old and irrelevant conviction. In doing so, the Commission has drawn on existing and proposed spent conviction schemes both within Australia and overseas.[15] The recommendations would apply in the Commonwealth sector and in the Territories but are drawn so as to recognise, and work effectively with, existing and proposed spent conviction schemes in other Australian jurisdictions. Chapter 3 deals with the extent to which discrimination against former offenders on the basis of their convictions ought to be regarded as unlawful, and an effective remedy provided by law. The recommendations in chapter 3 are closely modelled on the existing anti-discrimination regimes at both State and federal levels. The rest of this chapter considers controls upon the ability of individuals and organisations to gain access to criminal record information held by police and others.

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[12] WALRC 80.

[13] See eg Rehabilitation of Juvenile Offenders Bill 1981 (Tas).

[14] See below para 12.

[15] See ALRC DP 25 App D; eg Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld); Rehabilitation of Offenders Act 1974 (UK); WALRC 80; NZDP.

Access to criminal records

Need for regulation

9. The first of the problems identified in submissions to the Commission is the extent to which official information about a person's criminal history should be accessible. Many of the disabilities faced by former offenders flow from the fact that a record of the conviction exists in a number of information systems. It becomes accessible to a wide variety of decision makers. The ability to 'live it down' therefore depends, to some extent, on the limitations placed on access to criminal record information and its subsequent use. Unless some controls are placed on the flow of criminal record information, the aim of any spent convictions scheme, or anti-discrimination laws, will not be fully achieved.

Controls on police record processing

10. Police regulations in each jurisdiction impose an obligation on each member of the police force not to disclose without authority information acquired in the course of duty.[16] The regulations do not limit the extent to which there can be authorised disclosure.[17] In the case of the Australian Federal Police, administrative guidelines also govern record keeping practices, to ensure the security and accuracy of police records and to impose restrictions on the disclosure of information and controls in the collection of criminal data.[18] A National Exchange of Police Information Management Group has been established to co-ordinate and oversee arrangements for the exchange of police information on a national basis and to facilitate lawful access to information currently held by each jurisdiction for law enforcement purposes in Australia.[19]

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[16] Police Rules 1977 (NSW) r 50, 52; Australian Federal Police (Discipline) Regulations (Cth) r 13; Police Regulations 1979 (Vic) r 402(u), (w), (x); Police Regulations 1952 (SA); Police Regulations 1974 (Tas) r 47(d)(vi), (vii), (viii); Police Rules 1978 (Qld) r 80(2)(a)(v); Police Regulations 1979 (WA) para 607; in the Northern Territory there is no specific offence, rather a general offence of failure to comply with general orders and instructions.

[17] Police records are generally accessible upon authorised request from government bodies in relation to suitability for employment, naturalisation, residency status, visa control, licensing and the grant of certain administrative benefits.

[18] Australian Federal Police General Order 17A. Controls affecting release and dissemination of criminal record information are formulated in accordance with the administrative directions of the Commissioner. There is no State equivalent of General Order 17A.

[19] It consists of a representative from the Australian Federal Police, all State and Territory Police Forces, the National Police Research Unit, the Australian Bureau of Criminal Intelligence and the Department of Special Minister of State, the latter representing all other Commonwealth agencies. Other State/Territory agencies are to be represented by the State/Territory Police Force: National Exchange of Police Information Management Group 1985.

Secondary record holders

11. The police are the major source of criminal record information. Other record keepers include the courts, the media, the legal profession, insurance companies, credit reporters and a number of government departments and statutory authorities enforcing statutory obligations. Each record keeper is a potential source of information for those with an interest in a person's criminal history. Controls on the activities of these record keepers vary from organisation to organisation. Employees of public authorities are usually subject to secrecy provisions.[20] In other cases, however, the information is a matter of a public record, and the controls on availability are purely administrative. For private organisations, further disclosure of criminal record information may only be regulated by internal management decisions.

Recommendation

12. *Previous reports.* The question of controls on the flow of criminal record information has been addressed in a number of reports by this Commission and other bodies.

- *Ward report.* In 1973, the Computerisation of Criminal Data Committee recommended that there be
  - limits on the disclosure of criminal record information
  - provision for an administrative appeal mechanism for individuals who consider that their privacy had been infringed, or that their public sector employment had been denied, on the basis of a criminal record, and
  - a Parliamentary Joint Security Committee which would define guidelines controlling storage, access, use and security of criminal record information.[21]
- *Criminal Investigation Report.* In 1975 this Commission made a number of recommendations on the use of criminal intelligence information in its report on criminal investigation. It proposed that an expert committee should be established to make detailed recommendations on
  - the collection, storage and dissemination of criminal record data
  - the expunging of criminal records after an appropriate time

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[20] eg Crimes Act 1914 (Cth) s 70.

[21] Ward Report para 10.3 proposal (4).

- the mechanisms by which individuals might secure review and correction of sensitive intelligence data concerning themselves, and
- the machinery to be established to provide redress in cases where police or departmental powers with respect to collection, storage and use of criminal information data are abused or misused.[22]

Specific proposals included the following:

- it should be an offence for a police officer or ex-officer to copy or communicate official information
- a statutory duty should be imposed on the Secretary of the relevant Department to take necessary measures to ensure the security and accuracy of police criminal records
- access to criminal record information from a police officer should be only in accordance with statute
- any individual should have a right to apply for a copy of his or her own criminal history record, and
- employers should be prohibited from requiring an employee or an applicant for employment to produce a copy of, or details from, a criminal record.[23]

- *Privacy Report.* In the Commission's *Privacy Report,* recommendations were made for the enactment of information privacy principles setting standards for the collection, storage, use and disclosure of personal information.[24] These would extend to criminal record information whether held by the public sector or private sector record keepers such as credit bureaus, employment agencies or private investigators. The Privacy Bill 1986 (Cth), introduced into the Parliament in conjunction with the Australia Card Bill 1986 (Cth), implemented some of the recommendations in the Privacy Report but in a much more limited way than set out in the Report. In particular, information held by police agencies was excluded from the ambit of the Bill. The Bill has been rejected twice by the Senate.

- *New South Wales Privacy Committee.* The New South Wales Privacy Committee has prepared many reports recommending limits on the use

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[22] ALRC 2 para 230–45.

[23] A draft Bill incorporating these proposals was subsequently introduced into federal parliament on two occasions but both lapsed: Criminal Investigation Bill 1977 (Cth); Criminal Investigation Bill 1981 (Cth); Cth Hansard (H of R), (21 May 1977) 562; Cth Hansard (Sen) (16 November 1981) 2289.

[24] ALRC 22 para 1195.

and dissemination of criminal record information.[25] As well as providing a clear set of principles which may be adopted to regulate the collection, use and disclosure of criminal record data, the Committee has been instrumental in encouraging beneficial changes to the practices of the New South Wales Police in this area.

13. *A specialist task force.* The Commission reiterates its recommendations made in the *Criminal Investigation Report* for a specialist multidisciplinary task force, composed of State and federal authorities, to monitor, and make recommendations for controls upon, the use of criminal record information. The role of such a body in a spent convictions scheme is discussed in chapter 2. It is not proposed to add to these earlier reports a further review of the need for controls on access to, and storage and dissemination of police and other criminal record information.[26] These matters have already been the subject of extensive reports both by this Commission and other bodies.

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[25] eg NSWPC Background Paper; NSWPC 45; NSWPC 45A; see also (J Nolan) *Submission 13* (1 February 1985), *Submission 33* (28 February 1986).

[26] But see App B.

2. Spent convictions

Introduction

Discussion Paper

14. In December 1985 the Commission set out a series of proposals for a spent convictions scheme. These, together with a draft Bill, were issued in a Discussion Paper.[1] The Commission received many submissions commenting on these proposals. Although there was general support for the rationale underlying the Commission's proposals, there was a wide variety of opinion about appropriate schemes for implementation. There were several common themes.

- *Simplicity.* Record-keepers, decisionmakers, and former offenders need to be able to understand their rights and obligations under a spent convictions scheme.[2]

- *Cost and administrative practicality.* The scheme must be inexpensive. Unnecessarily complex, time-consuming, and costly administrative requirements should not be imposed on decision makers.[3]

- *Uniformity.* There should be a uniform, or at least a consistent, approach by the States, the Australian Capital Territory, the Northern Territory and the Commonwealth.

- *Exemptions from the effects of a spent convictions scheme.* A number of submissions argued that the public interest in effective administration of justice, and criminal intelligence activity, required that exemptions should be recognised in the scheme. Further submissions suggested that some old convictions could be relevant to making decisions in certain sensitive areas of employment, admission to certain professions and the granting of certain kinds of licence.[4]

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[1] ALRC DP 25.

[2] eg Law Reform Commission (NSW) (P Byrne) *Submission 80* (5 May 1986); National Police Working Party (Insp P Duffy) *Submission 61* (22 September, 1986); Correctional Services (SA) (MJ Dawes) *Submission 68* (8 October 1986).

[3] See submissions cited below para 34–7.

[4] eg see submissions cited below para 41.

Rationale

15. The rationale underlying any scheme under which old convictions become spent is based on their general irrelevance to decision making. The older a conviction becomes, the less relevance it has in predicting the person's future conduct.[5] At some time it will be possible to say with reasonable confidence that, in almost all foreseeable circumstances, a criminal conviction has simply become irrelevant to judgments or decisions about the offender. This approach is firmly based on the limited predictive value, and hence the limited relevance, of past conduct. It provides the rationale for proposals set out in this chapter and reflected in the provisions of the Draft Spent Convictions Bill 1987.[6]

Outline of proposals

16. After the expiration of 10 years an old conviction should be regarded as spent. The effect of a conviction becoming spent would be felt in the following areas:

- interpretation of Commonwealth laws
- the extent to which decision makers can take account of spent convictions
- the extent to which offenders should be required to acknowledge spent convictions.

Effect of a conviction becoming spent

Interpretation of laws

17. *References to convictions.* There are many references in legislation to convictions.[7] Generally, under such legislation, convicted persons are denied advantages or benefits, or their access to them is restricted. In general, the legislation makes no distinction between old convictions and more recent convictions. No account is taken of the fact that a particular conviction may no longer have any relevance to the decision to be made under the legislation. It is not desirable, and it is inconsistent with principle, that old convictions which have become spent under the scheme because of their general irrelevance should be accorded the same legislative status as a more recent conviction. Accordingly, references in statutes to the conviction of a person for an offence should

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[5] WALRC 80 para 4.3.
[6] App A.
[7] ALRC DP 25 App C.

be interpreted as not including reference to a spent conviction.[8] A similar recommendation was made by the Law Reform Commission of Western Australia.[9] Where, for particular policy reasons, a Parliamentary decision is made to allow spent convictions to be taken into account or to be disclosed contrary to this recommendation, express provision should be made in the relevant legislation. However this reform should not detract from the protection provided to former offenders under existing Commonwealth laws which prohibit or otherwise restrict disclosure or use of a conviction.[10]

18. *Effect of recommendation.* The way in which this recommendation will operate can be seen by considering its effect on, for example, the Juries Ordinance 1967 (ACT) s 10(a) which provides that persons convicted of an offence and sentenced to imprisonment for more than one year are not qualified to serve as jurors. The Commission's recommendations would limit this provision so that only those persons whose unspent convictions resulted in more than one year's imprisonment would be disqualified. The recommendation would not, however, alter the ultimate effect of provisions in Acts such as the Conciliation and Arbitration Act 1904 (Cth) s 132B and the Customs Act 1901 (Cth) s 183CC(4)(a), (4A)(a), already expressed in terms of convictions occurring within the preceding five or ten years.[11] Nor will it alter those laws which prohibit disclosure of information about spent convictions. The proposal, for constitutional reasons, can have no effect on the Constitution s 44(ii), which disqualifies persons convicted of treason from being elected or sitting as members or senators of the Federal Parliament. This question is subject to consideration by the Constitutional Commission.[12]

Duty to disregard spent convictions

19. *Recommendation.* Consistently with the rationale of the scheme, spent convictions should not generally be able to be taken into account in making decisions about the offender. In particular, persons making decisions or exercising judgment under statutory powers or duties should not be able to take spent convictions into account in doing so.[13] This would apply, for example, in assessments for admission to professions, employment in particular occupa-

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[8] See Draft Bill cl 10.

[9] WALRC 80 draft Spent Convictions Bill cl 22(1); a contrary conclusion appears to have been reached in Queensland: Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 3(3), 4(1).

[10] See draft Bill cl 10(2).

[11] For further examples of legislative provisions directly or indirectly affected, see ALRC DP 25 App C.

[12] Constitutional Commission 1986; see also Senate Standing Committee report.

[13] See draft Bill cl 11.

tions, and granting of licences. Other Australian spent conviction schemes and proposals provide that spent convictions cannot be used in assessments of good character or fitness.[14] Even without such a direction, many authorities would no doubt take the general intention of the scheme into account in discharging their functions. However, a specific direction would create greater certainty.[15] This obligation should not be limited to the exercise of statutory powers and duties. Decisions made outside a statutory context can have an equally damaging effect on an offender's life where old convictions are taken into account by the decision maker. For this reason, the obligation to disregard spent convictions should apply to anyone who is exercising a power or performing a duty or function whether or not it is conferred or imposed by law.[16]

20. *Facts about convictions.* The duty to disregard spent convictions should also extend beyond the fact of the spent conviction to facts about the conviction, including that the person committed the offence, or was arrested or charged with an offence which is the subject of a spent conviction.[17] To limit the spent conviction scheme to the bare fact of conviction would be unduly restrictive and would not address the reality that details about arrests and charges can be just as damaging. This proposal reflects a number of submissions which claimed that proposals about spent convictions should extend to information about charges, cautions and convictions against which appeals had been successfully taken.[18]

21. *Sanctions.* The question of the appropriate means of enforcement now arises. In Queensland, a person who contravenes the obligation to disregard spent convictions commits an offence punishable by a fine of up to $5 000.[19] By contrast, under the Western Australian proposal, failure to comply with

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[14] WALRC 80 para 9.18; Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 9. So far as the Western Australian proposals are concerned, it would appear that the WALRC included specific reference to this matter to make it clear that they were approving what they believed to be the general practice of many authorities charged with assessing a person's character of discounting old convictions in appropriate cases.

[15] See Draft Bill cl 11(2); WALRC 80 para 9.19.

[16] Draft Bill cl 11(2).

[17] See draft Bill cl 3(4), 11(1)(b).

[18] See eg Council of Civil Liberties (NSW) (T Robertson) *Submission 47* (20 August 1986) 1. Deputy Chairman, Human Rights Commission (PH Bailey OBE), *Submission 33* (18 February 1986) 2 sought extension of the proposals to controls on police arrest and contact records together with juvenile records for neglect and delinquency. The NSW Privacy Committee (J Nolan), *Submission 13* (1 February 1985), *Submission 35* (28 February 1986) made a detailed submission setting out when a person's criminal record should include warnings, cautions, citations administered by the police to alleged offenders together with details of charges, *nolle prosequis,* recognisances under the Crimes Act and convictions successfully appealed against.

[19] Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 9(1), 12(1).

the obligation attracts no criminal penalty. The Commission has concluded that the Western Australian position is to be preferred. In a large number of cases in which the question will arise, it would simply be inappropriate to bring the full weight of the criminal law to bear on decision makers. Other remedies, already available under the general law, offer far more appropriate relief. These remedies include injunctions, declarations and, in the context of decisions by administrators, judicial and administrative review of decisions.[20]

22. *Exemptions.* The underlying rationale for the proposal that there should be a duty to disregard spent convictions is based on the strong probability that a spent conviction will be irrelevant to the particular decision in question. Clearly, there will be specific instances where an old conviction will still be relevant or where overriding national interests exist.

- *Police and national security.* The Australian Federal Police, and Commonwealth agencies when exercising powers in relation to national security, should not be required to ignore spent convictions. The importance to Australia of these police and security functions outweighs the interests of the offender. Police use and interchange of criminal record information for criminal intelligence purposes should similarly continue notwithstanding the fact that, for certain purposes, convictions which might form part of the information have become spent.[21] Similar exemptions were recommended in the Discussion Paper, and received considerable support in submissions.[22]

- *Sentencing.* In sentencing offenders the courts should also be expressly authorised to continue to use spent convictions. This should be the case whether the information is provided by the prosecution or by a person authorised or directed by the court to provide a pre-sentence report.[23] So also, the Attorney-General and parole authorities should not be re-

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[20] In the Australian Capital Territory, injunctions and declarations are available from the Magistrates' Court: in that jurisdiction, the expense of Supreme Court litigation to correct a decision taken in contravention of this recommendation would be less.

[21] See draft Bill cl 11(5)(a), (b).

[22] eg Department of Defence (Brigadier RS Buchan) *Submission 40* (25 March 1986); DPP ACT (K Twigg) *Submission 99* (18 March 1986) 3-5; I Potas, *Submission 42* (17 April 1986) 3; Police Department (Vic) (Asst Commr N Newnham and Cmdr Bolton) *Submission 96* (5 March 1986) 5.

[23] The question of the extent to which use of prior convictions should be allowed in sentencing is a matter being considered by the Commission in its reference on Sentencing. As part of that overall assessment of the use of convictions in the sentencing process generally, further recommendations specifically about spent convictions might ultimately have to be made. The Commission has already published an Interim Report in this Reference: ALRC 15.

quired to disregard spent convictions in making an order in relation to the offender's imprisonment.

23. *Arguments for further exemptions.* Many organisations argued that they should be allowed to take spent convictions into account. For example, it was argued that it is necessary to take spent convictions into account in the vetting of jury members to avoid bias;[24] that spent convictions have relevance for decisions concerning eligibility for pensions[25] and that spent convictions should be taken into account for the purposes of the Firearms and Dangerous Weapons Act 1973 (NSW) and the Securities Industry Act 1980 (NSW).[26] A large number of organisations, including the police, argued that they needed to know certain details of spent convictions for the purposes of employment, particularly in sensitive positions in education, in child care and in positions of trust.[27] The question of a general exemption mechanism providing scope for meeting these concerns on a case by case basis is addressed in paragraphs 41–3.

Acknowledging spent convictions

24. *Need for a power to avoid acknowledgement.* In many instances a member of the public can reasonably demand details of an offender's past conviction. However, there comes a time when the public no longer has a legitimate interest. At this stage, the offender should not be required to acknowledge the old conviction. There should, accordingly, be no requirement that people who are asked questions about themselves or others, or who are under obligations to disclose details about themselves or others, should have to give information about spent convictions. This should apply whether the obligation arises under statute, at common law or in equity, or by agreement. It would, for example,

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[24] DPP (ACT) Act (K Twigg) *Submission 39* (18 March 1986).

[25] Department of Defence (Bridagier RS Buchan) *Submission 40* (25 March 1986).

[26] J de Meyrick *Submission* 58 (12 September 1986) 3.

[27] Department of Defence (Brigadier RS Buchan) *Submission 40* (25 March 1986); DPP ACT (K Twigg) *Submission 39* (18 March 1986) 3–5; Ministry for Education (Vic) (MK Collins) *Submission 53* (29 August 1986); Teachers Board (SA) (HW Parsons) *Submission 61* (18 September 1986) 1; Department of Labour (Vic) (R Dight) *Submission 52* (28 August 1986) 1; Public Service Board, Canberra (M Bonsey) *Submission 57* (10 September 1986) 2; Territories Department (AR Headley) *Submission 46* (20 June 1986) 1; J de Meyrick *Submission 58* (12 September 1986) 3; Commissioner for Public Employment (SA) (A Strickland) *Submission 60* (16 September 1986) 1; Chamber of Commerce and Industry (SA) (LM Thomson) *Submission 67* (3 October 1986); Privacy Committee (NSW) (J Nolan) *Submission 35* (28 February 1986) 5.

cover questions asked in applications for credit or insurance, for a passport and for employment. This recommendation[28] is consistent with the approach in Western Australia and the United Kingdom.[29]

25. *Statutory lie.* One means of achieving this would be to make it lawful for those persons with spent convictions to deny, whether on oath or otherwise, the existence of the spent conviction. This approach is sometimes described as the 'statutory lie' approach. It was adopted in the Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 8(1).[30] The Commission received a number of submissions which objected to this approach on two grounds:

- it is wrong for a legislature to give a person statutory authority to lie, and
- no statutory provision can rewrite history.[31]

The Commission agrees. The only real advantage of a statutory lie provision is that it enables people with old convictions to control the situation and to release only the amount of information they are willing to release. But this is outweighed by the conceptual and ethical problems.

26. *Prohibiting questions.* A further approach, for which there is some support,[32] is simply to prohibit questions about spent convictions. The onus would be on the questioner not to ask certain kinds of questions. However, this approach has attracted strong criticism.

> At first sight such a proposal looks attractive, but on closer scrutiny it turns out to have very undesirable features. To be effective, such a restriction would itself have to be enforced by law, so that people who asked questions going beyond the suggested formula would become guilty of an offence. In a country like ours, that cannot be right: people must go on being free to ask any questions they like. . . . Rather . . . we think that the law would be better employed in setting an example by treating convictions of long ago as spent and irrelevant, so that their burden is removed from the rehabilitated offender, and he is made free to answer such questions on that basis.[33]

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[28] Draft Bill cl 12

[29] WALRC 80 draft Spent Convictions Bill cl 23(2); Rehabilitation of Offenders Act 1974 (UK) s 4(2). It also accords with the Commission's proposals in ALRC DP 25.

[30] See also SADP, 23.

[31] J de Meyrick *Submission 58* (12 September 1986) 1; Department of Correctional Services (SA) (MJ Dawes) *Submission 68* (8 October 1986) 2; Chairman, Melbourne Stock Exchange Ltd (I Roach) *Submission 65* (23 September 1986) 2; Privacy Committee (NSW) (J Nolan) *Submission 33* (28 February 1986) 8; Victoria Police (Asst Commr N Newnham and Supt A Bolton) *Submission 38* (5 March 1986) 5.

[32] Rehabilitation of Juvenile Offenders Bill 1981 (Tas) cl 8(b); NZDP para 5.9.

[33] Living it Down, para 26(e).

Again, the Commission agrees. In any event, any prohibition on asking questions about spent convictions would have to be backed up by a statutory lie provision: if the questioner contravened the prohibition, the offender could not, in the absence of a statutory lie provision, deny the existence of the conviction.

27. *Recommendation.* The Commission has concluded that the appropriate legislative response should be to provide that there be no obligation to disclose a spent conviction.[34] If, for some particular reason, the obligation is needed, it should have to be established expressly by legislation. As with the earlier proposals that spent convictions be disregarded, this protection should extend to questions about charges, arrest and other matters relating to a spent conviction.[35] This approach was supported by a number of submissions arguing that there should be controls on the manner of asking questions about previous convictions and that there should be safeguards from discrimination against a person who declines to provide information about spent convictions.[36] The proposal should also extend not only to questions asked of a former offender about his or her own record but also to questions asked of anyone about the record of a third party.[37]

28. *Civil liability.* Under the present law, failure to comply with obligations to disclose matters relating to old offences might create a civil liability independently of any criminal liability that might arise. In particular, an insured's duty of disclosure, and an insured's duty to display the utmost good faith, could be taken to require the insured to disclose to an insurer, in connection with a policy of insurance, the fact of a spent conviction. The remedy the insurer has for a breach of these duties is a civil remedy, namely damages or, in some cases, cancellation of the insurance contract or the refusal of a claim.[38] Offenders should be relieved of these civil liabilities for the same reason that underlies the general recommendation concerning acknowledgement of spent convictions. Under the present law, failure to make full disclosure may sometimes prevent a person from obtaining relief. Again, failure to acknowledge a spent conviction should not in itself prevent a person from obtaining a remedy in a legal or administrative proceeding.[39]

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[34] See draft Bill cl 12.

[35] See draft Bill cl 3(4), 12(1)(e), 12(2)(e); cf WALRC 80 para 9.24.

[36] Department of Correctional Services (SA) (MJ Dawes) *Submission 68* (8 October 1986) 2; Chairman, Melbourne Stock Exchange Ltd (I Roach) *Submission 65* (23 September 1986) 2; J de Meyrick *Submission 58* (12 September 1986) 1; see NZDP para 5.9. Discrimination is dealt with in ch 3.

[37] Draft Bill cl 12; WALRC 80 para 9.24.

[38] Insurance Contracts Act 1984 (Cth); ALRC 20.

[39] See draft Bill cl 14.

29. *Exemptions.* Later recommendations in this chapter[40] provide for regulations to be made exempting persons from specific provisions of the spent convictions scheme. Apart from this mechanism the Commission has concluded that no further special exemptions are required to these recommendations except in the following areas:

- *Sentencing an offender.* Consistently with the earlier recommendation about disregarding spent convictions, there should be no barrier on the sentencing court requiring the disclosure of a spent conviction.[41]
- *Express statutory provision.* Obligations to furnish information about spent convictions that are expressly imposed by statute should continue to have effect.

Disclosure

30. *Prohibiting disclosure?* Disclosure of a spent conviction is generally undesirable because of the danger that undue weight will be given to it by the decision makers to whom it is disclosed. Many submissions to the Commission, especially from individuals, also pointed to the embarrassment that can be caused by unnecessary disclosure of old convictions. However, most spent conviction schemes do not place a general limitation on disclosure over and above provisions about acknowledgement of convictions.[42] The Queensland Act took the further step of making disclosure of information about spent convictions a criminal offence.[43] This was tentatively suggested in the Commission's Discussion Paper[44] and has also been suggested in other proposals.[45] The prohibition suggested in the Commission's Discussion Paper would also have extended to disclosure of Commonwealth offences by any person.[46]

31. *Difficulties with prohibiting disclosure.* Proposals such as those in the Discussion Paper, that it should be a criminal offence to disclose a spent conviction for a Commonwealth offence, hold serious difficulties.[47] Compliance

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[40] para 43.

[41] See para 40 for an exemption for courts and tribunals generally.

[42] eg WALRC 80 draft Spent Convictions Bill cl 22–5; Rehabilitation of Offenders Act 1974 (UK) s 4.

[43] Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 6, 12.

[44] ALRC DP 25 Draft Criminal Information and Records Bill, cl 50(1); the Commission suggested that the proposed prohibition should apply to all persons in the non-self governing Territories and to Commonwealth agencies.

[45] NZDP para 5.9–5.16; SADP, 24, 29–30.

[46] ALRC DP 25 Bill cl 50.

[47] For a general discussion of these difficulties see WALRC 80 para 9.40–9.56.

would be extremely difficult. For example, it is often not clear to the ordinary person, to the journalist (a frequent user of information about old convictions), and most importantly, to former offenders themselves, whether the conviction to be disclosed is for a Commonwealth or a State offence. There are wider reasons, both practical and theoretical, which make a prohibition on disclosing any conviction, whether for a Commonwealth offence or not, undesirable. These include:

- *Difficult to observe.* National press and broadcasting bodies would need to distinguish between publications that would be permissible in one jurisdiction but not in another.
- *Difficult to know.* It would be difficult to know whether a particular conviction had become spent. The recommendation in this report is that convictions become spent ten years after the 'completion of sentence'. Persons making disclosures will have little idea when a sentence has been completed, particularly in relation to non-custodial sentences. They will have little means of finding out, other than directly from probation and parole authorities.[48] It will not necessarily be in an offender's interests for such information to be released on request.

The first of these difficulties would be reduced if a national scheme were implemented uniformly throughout Australia. But the second would remain even under national and uniform legislation. Finally, if, as under the Queensland Act, convictions were able to be revived,[49] the difficulties of knowing whether at a particular time a particular conviction was spent would be multiplied.

32. *Theoretical objections.* The theoretical objections to a prohibition on disclosure include:

- *Restriction on freedom of the press.* It would be inconsistent with the provisions of the International Covenant on Civil and Political Rights. The rights protected by that covenant include the freedom of the press and freedom of speech.[50]
- *Restriction on freedom of speech.* The proposal would provide protection for the person with a spent conviction, but only at the expense of the interest of the public in having full access to information about matters

[48] It it not common for police to keep a record of such information.

[49] See below para 66.

[50] International Covenant on Civil and Political Rights, Art 19; cf Law Reform Commission Act 1973 (Cth) s 7.

of public record. To restore the balance, a large number of exemptions would be necessary. These would further increase the complexity of enforcement. The Queensland provision already contains a large number of exemptions: reports of judicial proceedings in a recognised series of law reports educational purposes reports required by any provision of law disclosures subject to the Libraries Act, and disclosure by the Queensland Police Force.[51] In addition in Queensland the Governor in Council is empowered to grant permits to entitle persons to disclose spent convictions.[52] It would be unreasonable to expect the press and other persons to apply for permits every time they wish to make comments.

33. *Recommendation.* One possible solution is to adopt recommendations made by the Commission in its Discussion Paper on the law of contempt. There, as a statutory enactment of the 'sub judice' rule, it was suggested that present contempt law relating to publications should be developed into, among other things, a statutory offence of publishing, in certain circumstances, the fact of a past conviction. A defence of 'innocent publication' would be available.[53] Such an approach is inappropriate here. The circumstances in which the contempt proposals operate relate closely to prejudice to jury trials. It would be out of place in the wider context of any disclosure of an old conviction. For these reasons, there should be no general prohibition on disclosure along the lines of the Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 6. However, those laws which already prohibit or restrict the disclosure of criminal record information should continue to apply. They include

- in some States, the law of defamation
- the law of contempt
- the law restraining the disclosure of confidential information
- laws particularly applying to some statutory authorities, such as the Crimes Act 1914 (Cth) s 70 and other secrecy provisions in Commonwealth and Territory legislation, and
- existing restrictions on unauthorised police disclosure.

Nor should there be any weakening of the laws making it an offence to acquire criminal record information by unlawful means including by fraud or bribery.

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[51] Criminal Law Rehabilitation of Offenders) Act (Qld) s 6 and see further SADP, 29.
[52] Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld), s 10.
[53] ALRC DP 26, para 32, 34.

Further obligations on record keepers

34. *Obligations on record holders.* The policy behind the spent convictions scheme is that at some time, there should be an end to punishment for a past offence. The Commission has considered whether further controls are needed, supplementing those detailed above, to implement this policy. Those considered in the Discussion Paper include that prescribed agencies should

- keep a record of all persons allowed access to criminal records in the possession or under the control of the agency
- ensure, as far as practical, separate and secure storage for spent convictions, and
- on a conviction becoming spent, notify each person to whom such information had been released that the conviction had become spent.[54]

While these controls would hold advantages, a number of submissions argued that in this form they would be costly and difficult to implement.[55] For example:

- it would be administratively impossible to fulfil such obligations in relation to a multitude of records: in New South Wales alone, criminal records are accessible daily by 10 000 police and public servants, 1.6 million people are recorded on police files and in 1985 the NSW fingerprint bureau had over 200 000 enquiries
- the wide definition of criminal records proposed (which could include such documents as charge sheets and notebooks), accompanied by an obligation to maintain these records, would increase these administrative difficulties, and
- it would not be possible to record all instances of access by every person to a record and subsequently notify those who had gained it that the conviction had become spent.

35. *Recommendation against supplementary record keeping controls.* Any spent conviction scheme should be easy to understand and simple to administer. The complex set of requirements for secondary record holders suggested

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[54] ALRC DP 25, Draft Criminal Information and Records Bill, cl 51.

[55] Commonwealth Archives (J Stokes) *Submission 41* (7 April 1986); Correctional Services (MJ Dawes) *Submission 68* (8 October 1986) 2; Insp P Duffy, National Police Working Party, *Submission 69* (22 September 1986) 6; Asst Commr (Services) New South Wales Police (J Ryan) *Submission 69* (14 October 1986); Commr Police (NT) (R McAulay) *Submission 8* (7 January 1985); Director General, Office of Corrections (Vic) (WJ Kidston) *Submission 59* (15 September 1986) 2.

in the Commission's Discussion Paper would be inconsistent with such a requirement. It may be that record holders, including the police, should streamline their procedures further (including by separately storing spent conviction records). To some extent this is already occurring, without the impetus of legislation. There are many records held by public authorities, and contained in law reports, professional publications, newspaper files, registries and institutions both government and non-government. The proposal for supplementary controls would present very great practical problems, particularly in the absence of full computerisation.[56] The Commission does not recommend them.

Destruction of records

36. *Destruction of police criminal records.* The Law Reform Commission of Western Australia recommended that a former offender should be able to apply to the Commissioner of Police for destruction of police criminal records of a spent conviction after not less than ten years had elapsed since the date on which it became spent. Only minor convictions were covered by the proposal.[57] Neither the Rehabilitation of Offenders Act 1974 (UK) nor the Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) provides for the destruction of police records of spent convictions. There was strong resistance to the destruction of any criminal records in police and other submissions.[58]

37. *Arguments against destruction.* There is a strong case for retaining even very old records for criminal intelligence purposes, for criminological research and for sentencing purposes,[59] although the NSW Privacy Committee has argued that old records would be of little use for criminal intelligence purposes and would not be likely to be sufficiently relevant for sentencing purposes.[60]

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[56] Penal Policy Review Committee (NZ) *Report, Expunging Criminal Records* para 458, as set out in NZDP, para 8 App.

[57] WALRC 80, draft Spent Convictions Bill, cl 26. This Commission's Discussion Paper also tentatively proposed a system under which any record keeper to whom the proposed Bill applied could be ordered by a Privacy Commissioner to destroy records of spent convictions: ALRC 25, Draft Criminal Information and Records Bill, cl 54.

[58] J de Meyrick *Submission 58* (12 September 1986) 1; Commr Police (NT) (R McAulay) Submision 8 (7 January 1986) 2; Privacy Committee (NSW) (J Nolan) *Submission 35* (28 February 1986) 7; Victoria Police (Asst Commr N Newnham and Cmndr A Bolton) *Submission 36* (5 March 1986) 5; National Police Working Party, (Insp P Duffy) *Submission 62* (22 September 1986); Asst Commr (Services), NSW Police (J Ryan) *Submission 69* (14 October 1986). The keeper of public records in Victoria has ordered that there be no destruction of any public records: Director General, Office of Corrections (Vic) (WJ Kidston) *Submission 59* (15 September 1986) 4.

[59] See Living it Down para 26a.

[60] NSWPC Background Paper, para 9.7; see further WALRC 80 para 10.1–10.14.

The difficulty is that, once the record is destroyed, there is no longer the possibility of examining it to determine its relevance.[61] With effective controls in place on access to and disclosure of spent convictions, there would, in any event, be little to be gained in requiring destruction of the record.[62] Furthermore, destruction of police records serves little purpose if criminal records are still available from other bodies such as government archives, newspapers, professional publications, manual record systems, legal reports and registries. In the absence of full computerisation, it would be difficult fully to implement a process of total manual destruction.

38. *Recommendation against destruction.* For these reasons, there should be no requirement for destruction of records of spent convictions. The Commission is sympathetic to the many submissions received from those who have carried the burden of a criminal record for many years and who fear that what has been hidden to date might be uncovered accidentally, either during their lives or after death. But sympathy for those who fear exposure does not overcome the substantial arguments against destruction. Those fears, and the accompanying feelings of guilt, will in any event exist even if the physical record of the conviction were to be destroyed.

Exemptions

39. *Courts and tribunals – evidence of spent convictions.* Under previous recommendations the courts, when sentencing offenders, would be exempt from the obligation to disregard spent convictions.[63] But this is not the only context in which courts make use of information about convictions. The reasons for a general obligation to disregard spent convictions have less force when the decision maker is a court or tribunal. Courts and tribunals apply a well defined and highly structured set of rules in admitting evidence of convictions and determining the weight to be given to the evidence. The Commission has already considered these evidentiary rules in the context of its *Evidence* Report calling for comprehensive reform of the laws of evidence.[64] Evidence of prior convictions is admissible under the laws of evidence

- if the conviction itself is a fact in issue in the trial
- in certain cases, to support or attack the credibility of a witness or a party

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[61] The New Zealand Penal Policy Review Committee recommended that the destruction of police records, while desirable, was not essential and suggested that, should any destruction take place, it should be limited to records of offences carrying penalties of less than 10 years imprisonment; para 458, *Expunging Criminal Records* in NZDP, para 8 App.

[62] ibid.

[63] para 22.

[64] ALRC 26 para 784, 823. The Commission's final Evidence Report is forthcoming.

- to prove, because of the improbability of two events happening by coincidence, that a particular person must have done both of them, and
- generally, in civil proceedings, as proof of the facts on which the decision to convict was based.

In its review of the laws of evidence, the Commission has suggested that the second and third of these be subject to further safeguards.[65] It has not recommended substantial change for the others.

40. *Courts and tribunals - recommendation.* Given the safeguards already imposed by the laws of evidence, there is no need for courts or tribunals, when applying the laws of evidence, to be further restricted by the obligation to disregard spent convictions.[66] Further, in this context, there should be no relaxation of the obligation to answer questions fully and truthfully. Evidence of convictions should continue to be used in legal proceedings where admissible according to the laws of evidence.[67] As to the use of prior convictions in establishing a tendency to do a particular act or to have a particular state of mind, or in assessing the credibility of parties or witnesses, the recommendations made in the Commission's report on evidence should be adopted.[68] First, leave of the court or tribunal should be necessary for such evidence to be adduced. Secondly, the evidence must be substantially and relevantly similar to the act or state of mind sought to be proved, or must have substantial probative value as to credibility. Because of the possibility that this evidence will be admissible, the Director of Public Prosecutions should be able to take the fact of prior convictions, including spent convictions, into account in determining whether to prosecute.[69]

Further exemptions?

41. *Submissions.* The Commission received a large number of submissions from a wide range of groups and individuals seeking exemption from particular consequences of the scheme. For example, it was said that it should be possible to take spent convictions into account in making decisions on eligibility for, or amount of, defence pensions,[70] and for determining the length of service for

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[65] ALRC 26 para 809–11.

[66] This recommendation should not extend to cases where the court or tribunal is not applying the laws of evidence.

[67] See draft Bill cl 13.

[68] ALRC 26 para 801.

[69] Draft Bill cl 11(4)(c); DPP ACT (K Twigg) *Submission 99* (18 March 1986).

[70] id.

benefit purposes in the defence forces.[71] It was said that judges and magistrates need to have 'a totally clean record' so that their spent convictions should also be known.[72] It was said that social workers need to know about spent convictions in relation to 'welfare client profile files'.[73] The Commissioner for Public Employment in South Australia[74] was concerned about the liability of an organisation that employs a social worker with a spent conviction for child abuse who then molests a child. The New South Wales Privacy Committee argued for exemptions for 'designated sensitive positions', although it conceded that the Public Service Board of New South Wales considered this may be too administratively difficult to implement.[75] Perhaps the largest number of submissions came from employers (particularly those involved in education) who argued that, in areas of nursing, child care and teaching, it was necessary for employers to have all available information on offences involving physical or emotional violence against a child and drug related or sexual offences.[76]

42. *Recommendation - expert body.* The submissions discussed in the preceding paragraph sought relief from particular consequences of a conviction becoming spent, in particular, from the obligation to disregard a spent conviction in making decisions about the offender. The underlying rationale for the spent convictions scheme requires that, before there can be an exemption for a particular class of decision maker, the relevance of the spent conviction to the decision making process, and the public interest in allowing its consideration, must clearly be demonstrated.[77] Any claim for each further exemption should be scrutinised by an expert body to ensure that it is demonstrably justified on these grounds. The body originally recommended by the Commission in its report on *Criminal Investigation* to advise on a range of questions relating to

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[71] Defence Department (Brigadier RS Buchan) *Submission 40* (25 March 1986).
[72] Dept of Labour (Vic) (K Dight) *Submission 52* (28 August 1986).
[73] Territories Department (AR Hedley) *Submission 46* (20 June 1986).
[74] A Strickland *Submission 60* (16 September 1986).
[75] Privacy Committee (NSW) (J Nolan) *Submission 35* (28 February 1986).
[76] eg Ministry for Education (Vic) (MK Collins) *Submission 53* (29 August 1986); Teachers Board (SA); (HW Parsons) *Submission 61* (18 September 1986); Department of Education (NSW) (J Lambert) *Submission 62* (19 September 1986); Chamber of Commerce and Industry (SA) (LM Thompson) *Submission 67* (3 October 1986); Law Reform Commission (NSW) (P Byrne) *Submission 80* (4 March 1987); Council of Government School Organisations (J Pinney) *Submission 71* (21 October 1986).
[77] eg the specific exemptions recommended in para 22.

access, storage and use of criminal records information[78] would be an appropriate body to do this.[79] A further advantage of an expert body would be that it could encourage uniformity in relation to exemptions.

43. *Recommendation – regulations with safeguards.* The Commonwealth, the States and the Northern Territory in due course should establish an expert body with the functions detailed above. When established, one of its functions should be to advise on applications for exemptions from the requirements of the spent convictions scheme. The exemptions should be effected by regulation, rather than administrative action, to ensure proper Parliamentary scrutiny. But implementation of the scheme should not depend upon the existence of such a body. The protections the scheme affords for former offenders should not be delayed because of the lengthy negotiations which may prove necessary before such a body can function effectively. In the meantime the Governor-General should be able to exclude by regulation specified persons or classes of persons from certain consequences of the scheme; in particular the duty to disregard a spent conviction and relaxation of any obligation to disclose or acknowledge a spent conviction.[80] Strict safeguards, in addition to the normal safeguard for regulations of Parliamentary disallowance, should be included in the legislation empowering exemption by regulation, in particular

- convictions of the kind sought to be covered by an exemption should be substantially relevant to the exercise of power, or the performance of the duty or function for which they may be taken into account
- the harm that might be caused if the exempted convictions, or convictions of that kind, had to be disregarded should substantially outweigh the harm to convicted persons that would be caused by taking them into account, and
- for exemption from the obligation to acknowledge spent convictions, the persons to whom the exempted convictions are to be disclosed or acknowledged must be lawfully entitled to take them into account.

Further protection should be provided by including a 'sunset clause'. Exemption regulations should only have effect for five years after coming into operation. This will ensure continuing Parliamentary scrutiny of the justification for the exemption. While making this recommendation, the Commission nevertheless notes the criticisms of the large number of exemptions from the Re-

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[78] ALRC 2 para 245.

[79] It could also play a role in implementing the information privacy principles recommended in ALRC 22 para 1195.

[80] See draft Bill cl 15. One member of the Commission, Mr George Zdenkowski, dissents on this point. See App B.

habilitation of Offenders Act 1974 (UK), and the dangers, noted by the Justice Department of New Zealand, of prescribing a large number of exemptions.[81]

Convictions included in the scheme

Serious offences

44. *Approach in principle.* The principle underlying any spent conviction scheme is that, as time progresses, the relevance of past offences to making decisions about the offender decreases. For the offender whose life since the offence has been free of further conviction, this is particularly so. And it is so regardless of the offence for which the offender was convicted. Any discussion, therefore, of the range of convictions that should be covered by a spent conviction scheme should start from the premise that strong and persuasive reasons are required before particular classes of offences are excluded, whether because of their innate seriousness or for any other reason.

45. *Serious offences.* Problems arise in devising a spent convictions scheme which will cover all offences, even those which are, by whatever standard, regarded as 'serious'. As was pointed out earlier,[82] as a general rule, it is safe to regard a conviction as 'spent' if it is 'old'. For reasons explained later, the scheme sets the waiting period at 10 years. After 10 years it will generally be highly unlikely that the old conviction has any relevance to decision making about the offender. But there is no certainty about this: it is a matter of probability. The most that can be said is that the less serious the offence, the more likely it is that, after a period of time, it will cease to be relevant. The converse, however, is also true. The more serious the offence, the longer it is likely to remain relevant to decision making. Seriousness is relative. But the question of public acceptability of a spent convictions scheme must be squarely addressed.[83] One of the main objects of the spent convictions scheme is to make the offender's transition back into the community easier. A hostile public reaction to a scheme designed for this purpose will not make the transition any easier. For these reasons, special attention has to be given to serious offences in designing any spent convictions scheme. There are several approaches possible. Serious offences can be excluded from the scheme altogether. Alternatively they can be included, but dealt with in a particular way that meets community concerns about serious offences.

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[81] NZDP para 3.6.

[82] See above para 15.

[83] Public opinion polls conducted in Canada recently suggest that over 60% of people do not agree with expunging 'violent or dangerous offences': Clemency Review summary 14.

Excluding serious offences?

46. ***Australian proposals.*** The first alternative is simply to exclude serious offences from the scheme. The Queensland scheme does this. The benefits of the scheme are only available for convictions where a non-custodial sentence, or a custodial sentence not exceeding 30 months, was imposed.[84] Table 1 on page 30 sets out the convictions covered in each of the Australian proposals.

47. ***No exclusions.*** As Table 1 shows, the offences excluded are not uniform and appear, in some respects, arbitrary. There are significant difficulties with any distinction made on the basis of 'seriousness' of the offence or on the basis of maximum sentence. To exclude a conviction simply on the basis of the kind of offence would be unfair: there is a world of difference between some domestic murders and a murder committed in cold blood by a professional assassin for financial gain. Distinctions on the basis of the sentence actually imposed on the offender proceed on a more rational basis,[85] but difficulties still exist. Sentences for the same crime committed in apparently similar circumstances might vary markedly from judge to judge within the one court, to say nothing of from State to State. In the context of a scheme that applies to all offences, any particular sentence selected as a cut-off point could produce substantially different results. For example, sentencing policy under Commonwealth law stresses heavy fines rather than prison sentences for certain kinds of serious offences.[86] But this is by no means a national policy. The scheme should apply to all offences. A similar position is taken by the NZ Penal Policy Review Committee.[87] Where the offence is a serious one, a lengthy prison sentence will in most cases be imposed. Before the conviction can become spent, under later recommendations, at least ten years must elapse after completion of that sentence.

How convictions become spent

Flexibility required

48. The concerns expressed about serious offences could be accommodated by flexibility in the way in which convictions become spent. Again, there are several alternatives.

- ***A tribunal.*** Serious offences should only become spent if a specialist tribunal so approves.

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[84] Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 3(2); see also Law Reform Commission (NSW) (P Byrne) *Submission 80* (5 May 1986) (4 March 1987).

[85] See WALRC 80 para 6.2.

[86] Crimes Act 1914 (Cth) s 17A; see also Penalties and Sentencing Act 1985 (Vic) s 11.

[87] Para 442(a) as cited in NZDP App para 8.

Table 1

Australian spent conviction schemes: convictions covered

Queensland
non-custodial sentences custodial sentences not exceeding 30 months, whether or not any part is actually served in custody
South Australia
all convictions
Tasmania
convictions as a juvenile excluding convictions for 'serious offences' (murder, manslaughter, rape o other prescribed offences) or attempts to commit one of those crimes
Western Australia
all convictions
Northern Territory
all convictions as a juvenile excluding convictions for offences involving the use of violence, which, i committed by an adult, would be punishable by imprisonment of 12 months or more

Source: Qld: Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 3(2); SA: SADP, 26–7; Tas: Rehabilitation of Juvenile Offenders Bill 1981 (Tas) cl 4(2)–(3); WA: WALRC 80 para 6.6; NT: Juvenile Justice Act 1983 (NT) s 89(2).

- *Extended waiting periods.* Convictions for more serious offences would not become spent until a longer period of time has elapsed than for offences generally.

Alternatively, these concerns could be addressed by carefully tailored exclusions from particular consequences of the scheme.

A tribunal

49. *Tribunals.* The use of a specialist tribunal to approve convictions becoming spent would be one way of meeting community disquiet about a spent conviction scheme covering offences committed in serious circumstances or offences which are serious in themselves. It would also enable a whole range of matters, including the public interest, to be taken into account in making the decisions on a case by case basis. Examples of such schemes are in the Western Australian proposals and the scheme that has operated since 1970 in Canada.

50. *Western Australia.* The Law Reform Commission of Western Australia recommended that certain more serious convictions should only become spent on application to the Police Commissioner or to a District Court judge. All minor convictions would become spent automatically after ten years but application could be made to the Police Commissioner for earlier relief after five years if a non-custodial sentence was imposed. For more serious offences (those involving a custodial sentence of more than one year) application could be made to a District Court judge.[88] Matters to be taken into account by the judge would include

- the nature of and circumstances surrounding the offence
- the sentence imposed
- the time that has elapsed since the conviction
- the circumstances of the offender
- whether the conviction prevents the offender from engaging in a profession or employment, and
- the public interest.[89]

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[88] WALRC 80 para 8.11–8.22.

[89] id, para 8.18.

51. *Canadian scheme.* The Criminal Records Act 1970 established a review procedure under which applications for a pardon are heard by the National Parole Board[90] In the case of summary offences, two years must have elapsed since the conviction or completion of sentence before the Board can consider the matter. The waiting period for other offences is five years[91] If the Board is satisfied that the applicant has been of good behaviour and that the conviction should no longer reflect adversely on his or her character, it may recommend to the Solicitor-General that a pardon be granted.[92] The effect of a pardon is, first, to remove any disqualification imposed by Canadian law based on the fact of the conviction; secondly, records of spent convictions are to be stored separately and not to be disclosed without prior ministerial authority;[93] thirdly, Government application forms are not to ask questions related to pardons.[94] In the first 14 years of the Canadian scheme some 77 000 applications had been received. Of the 18 000 applications processed between 1976–80, some 17 700 were granted.[95] The applications rejected were those where it was thought necessary to protect the public from an offender with a history of violence. Only a fraction of offenders have applied. Many have been deterred by the fear that the process will inadvertently disclose their record. People who apply are generally males in their late twenties with one minor offence, often committed while a juvenile. The reasons for requiring a pardon are generally stated as 'employment', 'the need to obtain a licence', 'travel overseas' and 'death bed absolutions'.[96] The Canadian scheme is currently under review, with consideration being given to allowing 'minor' convictions to become spent automatically, and reducing the detailed scrutiny required for each application. The review has been considered necessary because of complaints about the cost and delays occasioned by the existing scheme.[97]

52. *Opposition to a tribunal.* The Commission's proposal in its Discussion Paper that there be a tribunal mechanism to deal with more serious offences was criticised in a number of submissions from organisations with significant

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[90] Criminal Records Act 1970 (Can) s 3, 4(1), (4), (5).
[91] id, s 4(2).
[92] id, s 4(4), (5)(a).
[93] id, s 6(2).
[94] id, s 8.
[95] Alford & Beattie 1982, 1.
[96] Clemency Review Summary; Alford & Beattie 1982, 28–35; Nadine–Davis 1980–81, 242.
[97] Clemency Review Summary, 4.

interests in criminal record-keeping.[98] Submissions opposed to the concept tended to concentrate on the cost and administrative difficulties associated with the proposal.[99] Few supported a tribunal mechanism. Those that did so gave, at most, tacit approval and did not elaborate on why a tribunal mechanism was preferable to an automatic scheme.[100] Only two submissions gave more than tacit approval. These pointed to the need for a body to balance the competing interests of the offender and society in general and the need for the offender to demonstrate that he or she now deserved to benefit.[101]

53. *Disadvantages of a tribunal.* A tribunal mechanism, assessing offenders on a case by case basis, is the surest way of balancing community interests with the offender's interests, and is particularly effective in dealing with questions about convictions for more serious offences. However, there are a number of disadvantages.

- *Delays.* Experience in Canada suggests that it could involve significant delays.[102]

- *Counter productive publicity.* Making an application would involve surrendering a certain amount of anonymity and could invite unfavourable publicity. The Canadian Solicitor General gave this as a reason for the lack of participation in the Canadian scheme.[103] Many people who ought, by any standard, to have the benefit of a spent conviction scheme might lack the determination, resolve and resources to pursue their claims through a tribunal.

- *Creates further records.* One aim of a spent conviction scheme is to reduce the amount of criminal record information passing back and forth between record-keepers. A tribunal will require more.

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[98] National Police Working Party (Insp P Duffy) *Submission 69* (22 September 1986) 4–7; Asst Cmmr (Services) NSW Police (J Ryan) *Submission 69* (14 October 1986) 4–8; Victoria Police (Assist Cmmr N Newnham & Cmdr A Bolton) *Submission 96* (5 March 1986) 4.

[99] Submissions from the police in Victoria and New South Wales, and from the National Police Working Party, drew attention to the difficulty for police in determining that there had been conviction free years.

[100] eg I Potas, *Submission 42* (17 April 1986); Deputy Chairman, Human Rights Commission (PH Bailey OBE) *Submission 93* (18 February 1986); Privacy Committee (NSW) (J Nolan) *Submission 95* (28 February 1986).

[101] Humanist Society (Vic) (C Duncan) *Submission 98* (10 March 1986); Victims of Crime Council (P Raymond) *Submission 50* (27 August 1986).

[102] For the delays incurred under the Canadian scheme see Nadine-Davis 1980–81, 231; see further Clemency Review Summary 12–3; Alford & Beattie 1982, 25.

[103] See Clemency Review Summary 13.

- *Uniformity.* More significantly, there is little value in one jurisdiction setting up a tribunal mechanism and the next only having an automatic scheme. In Canada, after 15 years of operation of a tribunal scheme at the Federal level, few of the provinces have chosen to participate. This Canadian experience suggests that participation at the federal and State level is more likely to be achieved uniformly in an automatic scheme than under a scheme that requires each jurisdiction to adopt a tribunal model.

The Commission's final view, particularly in light of the Canadian experience, is that the spent convictions scheme should be self-executing. No tribunal is needed.

54. *Bankruptcy analogy.* Further support for rejecting a tribunal mechanism can be found in an analogy with the bankruptcy experience. Under the Bankruptcy Act 1924 (Cth) a bankrupt could be discharged on an order made by the court. An order was originally obtainable only on application by the bankrupt. Many bankrupts did not apply, either through ignorance of their rights, the cost of proceedings or because they did not wish to raise before the public the spectre of their bankruptcy. The law has now been amended to provide that there be automatic discharge of a bankrupt after three years.[104] There are, however, dangers in comparisons with the bankruptcy experience. There is only one form of bankruptcy. There are many kinds of crime. Under the automatic spent conviction scheme proposed in this report these differences can be accommodated by providing for waiting periods of varying length or by an exemption mechanism.

Other ways of accommodating serious offences

55. *Longer qualifying period for serious offences.* Longer qualification periods are sometimes required before more serious offences become spent. This approach occurs more usually under automatic schemes.[105] In any event, this alternative suffers from the same defects as distinctions based on the seriousness of an offence or length of sentence mentioned in paragraph 47: the difficulty of rationally selecting which offences are to be subject to the longer qualification period is the same as those involved in selecting offences for exclusion from the scheme.

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[104] Bankruptcy Act 1966 (Cth) s 149–54; see further Bankruptcy Act 1980 (Cth) s 72–5. An objection can be lodged, but this will lapse on the expiry of five years or sometimes sooner. Should a bankrupt wish to be discharged earlier than the three years, he or she may apply for discharge at any time after expiry of twelve months from the commencement of a bankruptcy. Automatic discharge can be prevented by application to a court declaring that the automatic discharge provision shall not apply.

[105] However, varying qualification periods are rejected later in this report: para 59.

56. ***Exemption mechanism: the appropriate solution.*** A more flexible approach is needed, going to the heart of the disquiet about including serious offences in the scheme. As the submissions to the Commission show, that disquiet focuses on the consequences, in particular cases, of particular serious offences being regarded as spent. The problem of serious offences should be dealt with by concentrating on those consequences. The earlier proposals in this report, which would allow for regulations to be made to modify the consequences of particular convictions becoming spent, mean that the concern expressed in submissions to the Commission can adequately be met without having to exclude offences from the scheme.[106] Allowing particular decision makers to be exempted from elements of the scheme, in relation to specified classes of convictions, is preferable to providing a blanket exemption for 'serious' offences. Accordingly no convictions should be excluded from the scheme. All offences should be able to become spent automatically after the expiration of a prescribed number of years.

When convictions become spent

Drawing the line

57. The underlying rationale for a spent convictions scheme is that there is a particular time beyond which a conviction ceases to become relevant for any foreseeable future decision making about the offender. The following paragraphs identify ways of determining when that point has been reached. It should be frankly acknowledged that any drawing of this particular line will have elements of arbitrariness. But a line can and should be drawn at a point where it can be said with reasonable confidence that, in the vast majority of circumstances, the fact of a criminal conviction has simply become irrelevant and out of date in the context of any future judgment or decision which might reasonably be expected to be made about the former offender.[107]

Different waiting periods

58. ***Proposals for waiting periods.*** Different waiting periods for different classes of offence may be one way of accommodating concerns about including more serious offences within the spent conviction scheme.[108] Table 2 sets out the alternatives reflected in the Australian proposals. A number of sub-

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[106] Para 43; and see draft Bill cl 15.

[107] see ALRC DP 25 para 63.

[108] See Table 1, para 46; ALRC DP 25 para 79.

Table 2

Australian spent convictions schemes and proposals: waiting periods: adults

Waiting period (years)	Commencement	Kind of sentence or offence
	Queensland	
10	from date of conviction or date court order is satisfied	all offences covered by scheme
	South Australia (a)	
2	from conviction	for conviction but discharge without penalty
3	from conviction	for fines not exceeding $1000
3	from completion of recognizance	for conditional discharge (other than a suspension of term of imprisonment)
5	from conviction	for fines exceeding $1000
5	from completion of recognizance	for suspended sentence
5	for completion of judicial sentence	for imprisonment not exceeding 12 months
10		for imprisonment exceeding 12 months
40	from conviction	for imprisonment for life
	Western Australia	
10	from conviction or, if custodial penalty, from completion of sentence	for imprisonment less than 12 months or non-custodial penalty (reducible to 5 years on application to Magistrate where non-custodial sentence only)
10	from completion of sentence, on application to District Court	for imprisonment exceeding 12 months
10	from discharge from custody	for imprisonment for life

(a) No period is specified for detention at Governor's pleasure, sentencing court (or other court on application) to recommend waiting period. If motor vehicle or drivers licence disqualified and period of disqualification longer than waiting period, conviction not to become spent until disqualification lifted.

Source: Qld: Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 3(1); SA: SADP, 26–9; Tas: Rehabilitation of Juvenile Offenders Bill 1981 (Tas) cl 4(2)–(3); WA: WALRC 80, Draft Spent Convictions Bill cl 9. The Tasmanian Bill only applies to juvenile convictions: see Table 3.

missions suggested varying waiting periods. For example, many submissions considered that ten years for minor offences was unduly conservative.[109] In some submissions it was argued that the classification of offences, together with the waiting periods, should be determined by the judge at the time of sentencing, or, alternatively, that the court should be empowered to direct earlier relief where a case has been made out.[110]

59. ***Single period.*** An advantage of a single waiting period for all convictions is its simplicity and administrative practicality. Everyone knows precisely where they stand.[111] Moreover, to adopt a range of different waiting periods would involve some significant disadvantages. First, the varying sentencing policies and practices of the different Australian jurisdictions and the different categories of offences in each jurisdiction would mean that it would not be possible to have a single set of waiting periods. Each jurisdiction would need its own set, tailored to its own sentencing practices and policies, and to its own calendar of offences. Secondly, the same difficulties would arise in

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[109] eg I Potas *Submission 42* (17 April 1986); Humanist Society (Vic) (C Duncan) *Submission 38* (10 March 1986); Privacy Committee (NSW) (J Nolan) *Submission 35* (28 February 1986). Mr Potas suggested the following model: for minor offences, five years (with some qualifications); some convictions should become spent immediately on the end of probation (this would be consistent with some existing relief provisions eg in Crimes Act 1900 (NSW) s 556A); there should be four categories of major crimes: – imprisonment for under six months: five years from date of conviction; – imprisonment for over six months, but under ten years: five years from expiration of sentence; – imprisonment for over ten years: on application to the sentencing court after five years from the expiry of sentence; there should be no relief for persons sentenced to life imprisonment: *Submission 42* (17 April 1986). The Humanist Society (Vic) argued that the waiting period should be two years for 'minor offences', four years for 'major offences' and longer than ten years for sexual abuse of children (C Duncan) *Submission 38* (10 March 1986). The New South Wales Privacy Committee argued that the waiting period for all offences should be five years from the date of conviction: (J Nolan) *Submission 35* (28 February 1986) and see the practice of the Department of Education, Builders' Licensing Board, Plumbers, Gasfitters and Drainers Board, Department of Main Roads and Public Service Board (NSW) as detailed id 4–6.

[110] eg see Humanist Society (Vic) (C Duncan) *Submission 38* (10 March 1986); I Potas *Submission 42* (17 April 1986).

[111] See, eg Draft Rehabilitation of Offenders Ordinance 1984 (Hong Kong) cl 2(1)(c); see also NZDP para 5.2 and citing New Zealand Penal Policy Review Committee Report, para 442(b).

this context as have already been pointed out in the context of determining whether to exclude particular offences from a spent conviction scheme altogether: distinctions based on the nature of the offence or the severity of sentence are necessarily arbitrary.[112] A number of submissions to the Commission pointed to the inequities that could arise in making policy decisions based on classifying offences as major or minor.[113] In summary, and subject to the special provision which the Commission proposes for offences committed as a juvenile,[114] the spent convictions scheme should rest on a single waiting period.

60. *Ten year period.* There is no scientific basis for setting the length of the waiting period.[115] The line must be drawn at a time when the conviction can reasonably be regarded as, generally, no longer relevant to making decisions about the offender and the offender regarded as having 'paid his or her debt to society'. This period should be ten years.[116] Queensland has set a period of ten years. The period was also suggested by this Commission in its Discussion Paper,[117] and recommended by the Law Reform Commission of Western Australia in its report.[118] For whatever reason, and none can be found in the scientific research,[119] ten years is a generally acceptable starting point.[120] In the analogous area of bankruptcy, it has proved possible gradually to reduce the prescribed period which has to be served by the bankrupt before becoming entitled to discharge and to resume full legal status. There is no reason why the length of the prescribed period should not be reviewed and adjustments made after the scheme has been in operation for several years.

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[112] See para 47 above.

[113] See eg Victorian Magistrates (JM Dugan) *Submission 54* (29 August 1986); Department of Correctional Services (SA) (MJ Dawes) (SA) *Submission 68* (8 October 1986). Serious offenders frequently receive a non-custodial sentence, eg DPP ACT (K Twigg) *Submission 99* (18 March 1986); Victims of Crime Council (P Raymond) *Submission 50* (27 August 1986); Humanist Society (Vic) (C Duncan) *Submission 38* (10 March 1986); National Police Working Party (Insp P Duffy) *Submission 63* (22 September 1986). There would also be inequities in relation to those community based orders involving custodial aspects as provided under Penalties and Sentences Act 1985 (Vic) s 4(1): Director General Office of Corrections (Vic) (WJ Kidston) *Submission 59* (15 September 1986).

[114] See below para 61.

[115] ALRC DP 25 para 58–60; see also WALRC 80 para 6.28–30.

[116] One member of the Commission, Mr George Zdenkowski, dissents: see App B.

[117] ALRC DP 25 para 58–60.

[118] WALRC 80, para 6.20–1, 6.28–30. Relief may, in some cases, be granted earlier: para 6.31. See also Law Reform Commission (NSW) (P Byrne) *Submission 80* (4 March 1987).

[119] ALRC DP 25 App B.

[120] See draft Bill cl 8(2).

Juveniles

61. The Commission is satisfied that the special problems posed by juveniles within the criminal justice system demand, in certain circumstances, special rules for relief.[121] In the United Kingdom there are detailed provisions for juveniles over and above a general halving of all adult waiting periods in the case of juveniles.[122] There is no separate treatment of juveniles in Canada nor under the Hong Kong or New Zealand proposals.[123] However, in these countries the waiting period is already relatively short. As Table 3 on page 40 indicates, in all of the State models, special provision is made for children. Recidivism research shows that many young people go through periods of criminality which they abandon as they grow older.[124] This research, and the State experience, ought to be reflected in a two year waiting period for convictions by a Children's Court or a like court.[125] This accords with the Rehabilitation of Juvenile Offenders Bill 1981 (Tas) cl 6 and with the Child Welfare Act 1947 (WA) s 40[126] but is shorter than the waiting period that applies to juveniles in the Northern Territory[127] and Queensland.[128] Where, however, juveniles are convicted of serious offences, they should, for the purposes of the spent conviction scheme, be treated as adults. This may be achieved by requiring that convictions of children in courts other than the Children's Court or like court be treated in the normal way.[129] This also accords with the recommendation made by the Law Reform Commission of Western Australia[130] and would meet some of the concerns expressed to the Commission.[131]

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[121] See Law Reform Commission (NSW) (P Byrne) *Submission 80* (5 May 1986) (4 March 1986); Privacy Committee (J Nolan) *Submission 19* (1 February 1985); Humanist Society (Vic) (C Duncan) *Submission 38* (10 March 1986); Deputy Chairman, Human Rights Commission (PH Bailey OBE) *Submission 39* (18 February 1986) and Director General, Department of Community Services (WA) (D Semple) *Submission 77* (9 December 1986).

[122] Rehabilitation of Offenders Act 1974 (UK) s 5, Table B.

[123] eg NZ Penal Policy Review Committee para 442(c) cited in NZDP App.

[124] See D Biles, 'Recidivism research in Australia', para 22–4, published in ALRC DP 25 App B; see also Director General, Department of Community Services (WA) (D Semple) *Submission 77* (9 December 1986); Privacy Committee (NSW) (J Nolan) *Submission 19* (1 February 1985).

[125] See draft Bill cl 8(1).

[126] cf Community Welfare Act 1982 (NSW) s 198(1) not yet proclaimed.

[127] Juvenile Justice Act, s 89: (NT) 1983. But this Act requires the destruction of the juvenile's record when the conviction becomes spent.

[128] Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 3(1).

[129] See draft Bill cl 8(1).

[130] WALRC 80 para 11.10–11.14

[131] eg NT Police, (R McAuley) *Submission 8* (7 January 1985).

Table 3

Australian spent conviction schemes and proposals: waiting periods: juveniles

Waiting period (years)	Commencement	Kind of sentence or offence
	Queensland	
5	from conviction or satisfaction of court order	all offences where offender dealt with as child
	South Australia	
	no period specified, sentencing court to recommend waiting period	all child offenders
	Tasmania	
2	generally, from completion of sentence or order, or from time prescribed by regulation	convictions as a juvenile excluding convictions for 'serious offences' (murder, manslaughter, rape or other prescribed offences or attempts to commit one of these crimes)
	Western Australia	
2	from conviction or completion of sentence	all juvenile convictions (excluding murder, manslaughter and treason) in Childrens Court; otherwise as for adults: see Table 2
	Northern Territory	
3 5	from conviction or from completion of court order, whichever is later	all offences other than offences involving use of violence which, if offender had been adult, would be punishable by imprisonment for 12 months or more

Source: Qld: Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 3(1); SA: SADP, 30; Tas: Rehabilitation of Juvenile Offenders Bill 1981 (Tas) cl 6; WA: WALRC 80, para 11.5–11.14, Child Welfare Act 1947 (WA) s 40; NT: Juvenile Justice Act 1983 (NT) s 89.

Commencement of waiting period

62. ***Satisfaction of order.*** The waiting period should start on completion of any sentence imposed.[132] For those cases where no sentence is imposed or where the sentence is satisfied forthwith,[133] it should start on that day.[134] An advantage of this approach is its simplicity and clarity. Remissions and releases on parole or licence should not count for this purpose. In the case of very serious crimes, where heavy sentences will normally be imposed, the offender will have to wait a further ten conviction free years after the head sentence has expired before gaining the benefits of the scheme. Most people sentenced to a term of imprisonment will in fact be released from prison well before the term originally stipulated by the sentence. If the period were made to commence from the date of release from prison, in some cases the conviction would become spent only a short time after the expiry of the formal head sentence originally set by the court. Special provision will need to be made for indeterminate sentences (including sentences of death, life imprisonment and orders that the convicted person be detained at the pleasure of the Governor-General or a Governor). In these cases, the sentence should be taken to be completed

- when the convicted person is unconditionally released from imprisonment or detention, or
- where release from detention is subject to conditions, when they are fulfilled.[135]

This is consistent with the approach taken by the Law Reform Commission of Western Australia.[136]

63. ***Foreign and other convictions.*** Four other classes of conviction call for special mention. First, a conviction that occurred before the commencement of the scheme should become spent on the day the conviction would have become spent if the scheme had been in force at the time the conviction occurred and continued in force, or on the date of the commencement of the scheme, whichever is the later. Secondly, a conviction in respect of which a pardon has been given should become spent on the day the pardon takes effect. Thirdly, special rules need to be made for foreign convictions. It cannot be relevant to regard a person as convicted of an offence, for Australian purposes, if the offence could not have been committed in Australia. Examples of such offences include political offences arising under the laws of some foreign countries, where

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[132] One member of the Division, Mr G Zdenkowski, dissents: see App B.

[133] eg by immediate payment of the fine.

[134] See draft Bill cl 9.

[135] See draft Bill cl 9(1).

[136] WALRC 80 draft Bill cl 9(2)–(5).

there is no Australian equivalent. The general rule should be that a conviction for an offence against a law of a foreign country should become spent at once.[137] Finally, special rules should apply where the offence is found to be proved but the court does not proceed to record a conviction.[138] Where the court does not record a conviction and imposes no order the offence should become spent on the day of the proceeding. Where, however, the court, without recording a conviction, imposes an order, the offence should become spent on the day of completion of that order.[139] Sentencing judges should take this proposal into account in determing not to record a conviction or alternatively to record a conviction but impose virtually no sentence, for example, 'to the rising of the court'.

'Good behaviour'

64. *'Good behaviour' requirement.* Subject to what is said below about convictions for less serious offences, the waiting period of ten years should have to be free of further convictions. An offender who has spent ten conviction free years can legitimately say that the likelihood that a further offence will be repeated is substantially lessened. So also is the likelihood that information about it will remain relevant to decision making. Despite the earlier offence, it can reasonably be expected after ten conviction free years that he or she is unlikely to reoffend. Submissions to the Commission also expressed the apparently common view that people with convictions should have to earn a reprieve from the legal and economic effects of the conviction.[140] They reflected strong community pressure to take convictions into account. Spent convictions schemes, both in Australia and overseas[141] reflect this. However, minor lapses during the waiting period are sometimes disregarded. In Queensland, for example, later convictions for 'a simple offence or a regulatory offence' are disregarded.[142] Table 4 sets out the various approaches being pursued throughout Australia.

65. *Disregarding certain intervening convictions.* Not all convictions should prevent or delay the earlier conviction from becoming spent. The difficulty is in defining those convictions which should be disregarded. This was not a matter on which the Commission received guidance from submissions. Table 4 sets out the variety of views at State level. The United Kingdom legislation

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[137] See draft Bill cl 7.

[138] eg Crimes Act (NSW) 556 A.

[139] Draft Bill cl 3(3)(a), 7(4), (5); see Privacy Committee (NSW) (J Nolan) *Submission 19* (1 February 1985).

[140] eg, Victims of Crime Council (P Raymond) *Submission 50* (27 August 1986).

[141] ALRC DP 25 App D, para 17–21.

[142] Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 11: but see below para 66.

Table 4

Australian spent convictions schemes: effect of later conviction during waiting period

Later conviction	Effect
Queensland	
'simple offence' or 'regulatory offence' as defined	no effect
other offences	stops waiting period running
South Australia	
not specified	
Tasmania	
'minor offence'	no effect
other offences	stops waiting period running
Western Australia	
convictions quashed, set aside or pardoned	no effect
fines less than $100 or prescribed amount	no effect
other convictions	stops waiting period running

Source: Qld: Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 11; SA: SADP, 30; Tas: Rehabilitation of Juvenile Offenders Bill 1981 (Tas) cl 7; WA: WALRC 80, para 7.25–7.26

disregards only convictions tried in courts of summary jurisdiction.[143] But as the Law Reform Commission of Western Australia points out, this classification is too wide in the Australian context, where summary offences can include quite serious matters.[144] The Queensland scheme excludes 'simple or regulatory offences'. The Law Reform Commission of Western Australia recommends limiting the category of cases which will have no impact on the running of the waiting period to those cases where no penalty is imposed, or where the penalty imposed is a fine of less than a specified amount.[145] This approach is preferred by this Commission. Convictions that

- are quashed or set aside
- have been pardoned or
- incur only a fine of $500 (or some other amount prescribed)

should have no effect on the waiting period.[146] An alternative approach appears in the Queensland Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 11(2), which requires that the courts should at the time of sentencing declare whether a subsequent simple or regulatory offence should be disregarded. Such a proposal has many disadvantages. It will involve delays, certain inconsistencies, and make the scheme more complicated to administer. As the Law Reform Commission of Western Australia concludes

> it is not desirable to require courts to consider this issue in relation to every summary conviction, since it would increase the time taken to deal with cases and encourage discussion of the previous convictions in court.[147]

Revival of spent convictions

66. The Commission does not adopt the Queensland provision for revival of a spent conviction if the offender is again convicted after the end of the waiting period. In Queensland, the waiting period is made to recommence for the previously spent conviction from the date of its revival.[148] The Queensland revival mechanism is unduly punitive, and would pose great practical problems where a person had assumed a position or status after the conviction had become spent. This Commission supports the arguments of the Law Reform Commission of Western Australia against revival.[149] There is little point in complicating mat-

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[143] Rehabilitation of Offenders Act 1974 (UK) s 6(6).
[144] WALRC 80 para 7.24.
[145] id, para 7.25–6.
[146] See draft Bill cl 8(3).
[147] WALRC 80 para 7.24.
[148] Criminal Law (Rehabilitation of Offenders) Act (Qld) s 11.
[149] WALRC 80 para 7.50–7.54.

ters, particularly when available evidence suggests that it would be rare for a person with ten conviction free years to reoffend.[150]

Implementation

Alternatives open to the Commonwealth

67. The recommendations in this chapter should be implemented by Commonwealth legislation that controls decision making, and other actions, by Commonwealth agencies in relation to Commonwealth, State, Territory or foreign offences. The Commonwealth should also exercise its legislative power for the Territories by applying the recommendations to persons in the non-self-governing Territories. A further question now arises. Should the Commonwealth go further, in the interests of achieving uniformity, and exhaust the legislative power it has to bind persons in the States? It could do so in one of two ways.

- *Commonwealth heads of power.* The Commonwealth could legislate to cover decision making by, for example, trading or financial corporations, in the context of insurance or banking (other than State insurance or State banking not extending beyond the limits of the State concerned), broadcasting and television (but not non-corporate media) and in the context of interstate or overseas trade and commerce.[151] The constitutional scope of implementation in this way could extend to convictions for all offences, including State and overseas offences
- *Commonwealth offences.* The Commonwealth could legislate to bind all persons in the States, whether or not they fell within the class of persons just mentioned, but in doing so the Commonwealth would constitutionally be limited to dealing only with offences against Commonwealth laws.

Difficulties with general Commonwealth legislation

68. There are difficulties with extending Commonwealth legislation in either of these two ways. The latter proposal would require members of the public to distinguish between Commonwealth offences and State or Northern Territory or Norfolk Island offences. Such a distinction would be difficult enough for a person to attempt in relation to his or her own criminal record, let alone for someone else's criminal record. In relation to the first proposal, while this would achieve a significant degree of uniformity, in the Commission's view, given the

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[150] Less than 1% of pardoned convictions have been revived pursuant to Criminal Records Act 1970 (Can) s 8, see Alford & Beattie 1982, 57–75.

[151] Constitution s 51.

extent to which State administrations appear to be committed to enacting spent conviction schemes, and the acknowledged desirability of ensuring that those schemes can appropriately fit together, for the Commonwealth to legislate in that way might frustrate State attempts to achieve truly complementary and universal coverage for their own schemes. It might discourage States from taking any further step, which would leave important areas of the problem unaffected.

Conclusion

69. The best way, therefore, for achieving the desired goal of consistency between schemes is as follows:

- The Commonwealth should legislate so as to bind its own administration and persons in the non-self-governing Territories, including the Australian Capital Territory, in respect of convictions arising under Commonwealth, State or Territory law.[152]

- The Commonwealth should not seek to implement the recommendations in this chapter by means of any more exhaustive exercise of Commonwealth legislative power.

- To ensure that the schemes operate consistently, the Commonwealth legislation should recognise as spent any conviction that is recognised as spent under a State or Territory scheme.[153] State and Territory schemes should be encouraged to adopt similar provisions. To do so will help to overcome differences that may arise out of different sentencing practices and different criminal calendars in the various Australian jurisdictions.[154] An analogy can be made with the National Companies and Securities scheme.

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[152] The recommendations should not be applied in this way in the Northern Territory or in Norfolk Island. Since 1 July 1978, executive authority in respect of most matters (including civil liberties and the administration of justice) has been exercised in the Northern Territory by Northern Territory ministers. It would be inappropriate, in view of this, for the recommendations to be applied in the Northern Territory. The situation in respect of Norfolk Island is similar. A form of self-government (more limited than that accorded the Northern Territory) has been granted to the Island. The Commonwealth has undertaken not to extend law to the Island without adequate consultation with the Island Administration. That undertaking should be respected.

[153] See Director General, Department of Community Services (WA) (D Semple) *Submission 77* (9 December 1986).

[154] See 'spent conviction' as defined in draft Bill cl 3(1).

- **The Commonwealth should encourage, through the Standing Committee of Attorneys-General and in other ways, the implementation of these recommendations at State and Territory level in a broadly uniform and consistent way.**

3. Limiting discrimination

Need for reform

Protection from unjustified discrimination

70. The objective of a spent conviction scheme is to remove unnecessary barriers preventing former offenders from re-entering society. When an old conviction becomes irrelevant, it becomes unfair, and runs counter to this objective, to continue to rely on it in decision making. A ten year waiting period before a conviction can be regarded as spent is recommended. However, a former offender might well be able to demonstrate that, in the circumstances of a particular job or other decision, it would be unreasonable to take into account the conviction even though the ten years has not passed. Many convictions will have ceased to be relevant to particular decision making about the offender well before the ten year period ends. Former offenders who are discriminated against by being treated less favourably because of their criminal record should be able to have that decision tested irrespective of the age of the conviction or whether or not it has become spent. A mechanism is needed to enable a former offender to do this.

Limitations of the spent conviction scheme

71. There are a number of reasons why a spent conviction scheme cannot by itself sufficiently achieve the objective of removing all unnecessary barriers preventing a former offender from re-entering society.

- *Ten year delay.* It is immediately after conviction, as he or she is trying to re-establish a place in society, that the former offender will be most vulnerable to discriminatory practices. But he or she will have to complete a ten year conviction free period before any relief will be obtained from the spent conviction scheme.
- *Other damage.* The fact of the conviction may be a very minor part of the damage that disclosure of a criminal record can do to a former offender's capacity to gain for example, employment, credit, insurance or accommodation. The fact that the person has committed the offence, or has served a sentence, can be just as damaging as the fact of the conviction itself.

- *Exemptions.* The exemptions in spent convictions schemes may enable old convictions to be taken into account in a way that can be unfair and unreasonable.

The key element of the spent conviction scheme recommended by the Commission is the obligation on decision makers to disregard spent convictions on the basis that to do so after such a lapse of time would be unreasonable and unfair.[1] But because of the limitations of the spent convictions scheme noted above, record keepers and decision makers will continue to get hold of, and may discriminate on the basis of, criminal record information. Something more than the spent conviction scheme is therefore needed.

Other protections

72. *Discrimination in employment and occupation.* Until the end of 1986 it was possible to complain about discrimination on the ground of criminal record in the areas of employment and occupation to the National or State Committees on Discrimination in Employment and Occupation. These were established in conformity with the International Labour Organisation Convention concerning Discrimination in respect of Employment and Occupation. These Committees investigated and conciliated complaints of discrimination in employment, including discrimination on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin.[2] They also investigated

> such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.[3]

Since November 1986 these functions have largely been assumed by the new Human Rights and Equal Opportunity Commission.[4]

73. *The Human Rights and Equal Opportunity Commission.* The Human Rights and Equal Opportunity Commission has the power to inquire into practices that unfairly discriminate against former offenders. Its functions, broadly, are to inquire into practices that may be inconsistent with human rights.[5] 'Human rights' are defined in terms of the rights and freedoms recognised in the

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[1] See para 19–20.

[2] See ILO Convention (No 111) Concerning Discrimination in respect of Employment and Occupation, art 1.1(a).

[3] id, art 1.1(b).

[4] The former National Committee may however be represented on any advisory committee to be established under the Human Rights and Equal Opportunity Commission Act 1986 (Cth) s 15.

[5] id, s 11.

International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Declaration of the Rights of Mentally Retarded Persons, the Declaration of the Rights of Disabled Persons, and those rights and freedoms recognised or declared by 'any relevant international instrument'.[6] Discrimination on the ground of criminal conviction, while not expressly referred to in the Covenant or Declarations, would come under the International Covenant on Civil and Political Rights article 2(1), which provides that rights and freedoms provided in the Covenant are to be available 'without distinction of any kind, such as race, colour, sex . . ., religion, political and other opinion, national or social origin, property, birth or other status'.[7]

74. ***Equal opportunity functions.*** The Human Rights and Equal Opportunity Commission has specified additional functions in relation to equal opportunity in employment and occupation. These reflect the functions formerly carried out by the National and State Committees on Discrimination in Employment and Occupation described in paragraph 72. The Commission may enquire into an act or practice that may constitute discrimination, for the purposes of the Act, that is, that affects equal opportunity in employment or occupation.[8] With the limitation that discrimination does not include any distinction or preference in respect of a job based on the inherent requirements of the job, these provisions thus preserve Art 1.1(a)(b) of the Convention concerning discrimination in respect of employment and occupation. The regulations may also declare other grounds of discrimination to be covered by the equal opportunity provisions of the Act.[9] As yet no such regulations have been made.

75. ***Anti-discrimination legislation.*** The position under other anti-discrimination legislation should be mentioned. Former offenders who have been treated unreasonably on the basis of their criminal records receive little legal protection at present. None of the existing federal or State anti-discrimination legislation deals directly with discrimination on the ground of criminal record. At the federal level, the Racial Discrimination Act 1975 (Cth) s 9 makes it unlawful to discriminate on the grounds of race, colour, descent, national or ethnic origin.[10] The Sex Discrimination Act 1984 (Cth), prohibits

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[6] id, s 3(1).

[7] See also International Covenant on Civil and Political Rights, Art 17: 'No one shall be subjected to arbitrary or unlawful interference with his privacy . . .'.

[8] Human Rights and Equal Opportunity Commission Act 1986 (Cth) s 31.

[9] id, s 3(1), definition of 'discrimination'.

[10] It covers areas such as land, housing and other accommodation, provision of goods and services, the right to join trade unions, employment and access to places and facilities: s 11–6.

discrimination on the grounds of sex, marital status or pregnancy.[11] Neither of these Acts recognises discrimination on the ground of criminal record as a ground of complaint. Nor is there any State anti-discrimination legislation on the matter.[12]

Discussion Paper proposal

Support for proposal

76. Support for the proposal[13] that a former offender who is treated less favourably and unreasonably because of his or her criminal record should have redress according to the general principles upon which anti-discrimination laws are based ranged from unequivocal endorsement to tacit approval. Support came from, for example, the New South Wales Privacy Committee, the Melbourne Stock Exchange, the SA Department of Correctional Services and the Public Service Board.[14] Other bodies have also identified the need for this kind of protection. Concerns were expressed by the National Committee on Discrimination in Occupation and Employment[15] that there are no anti-discrimination provisions to protect former offenders from unreasonable discrimination. The New South Wales Anti-Discrimination Board[16] has called for State anti-discrimination legislation to be amended to include discrimination on the ground of criminal record. A similar suggestion was made in the Discussion Paper issued by the Attorney-General's Department in South Australia.[17] The Law Reform Commission of Western Australia has made detailed recommendations for the amendment of the Equal Opportunity Act 1984 (WA) to include discrimination on the ground of spent conviction.[18]

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[11] s 5–7, 14–27. In areas such as employment, partnerships, registered organisations, qualifying bodies, employment agencies, education, goods, services and facilities, accommodation, land and clubs.

[12] Unfair dismissal may give rise to an action at common law or under statute, eg Industrial Relations Act 1979 (Vic) s 34, see Department of Labour (Vic) (R Dight) *Submission 52* (28 August 1986).

[13] ALRC DP 25 para 32–4, see further draft Criminal Information and Records Bill Pt II.

[14] NSW Privacy Committee (J Nolan) *Submission 95* (28 February 1986) 2; Chairman, Melbourne Stock Exchange Ltd (I Roach) *Submission 65* (23 September 1986); Correctional Services (SA) (MJ Dawes) *Submission 68* (8 October 1986) 1; Public Service Board Canberra (M Bonsey) *Submission 57* (10 September 1986).

[15] NCDOE Annual Report, 46.

[16] NSWADB 1984, 111.

[17] SADP, Proposal 4.

[18] WALRC 80, para 9.2–9.11. There is some divergence between the WALRC proposals and those of this Commission. Where they occur they are noted.

77. *General effect of Discussion Paper proposal.* A number of submissions[19] questioned details of the Commission's proposals. The majority of these were concerned to preserve those discriminatory practices which might be described as 'reasonable'. The recommendations in this chapter would not prevent record keepers and decision makers from continuing to acquire and use criminal record information. It would prevent them, however, from using it in an unreasonable and discriminatory way. For example, it may be reasonable to take old convictions for sex offences against children into account when it comes to an application for employment as a youth care worker. However, it would be unreasonable, and therefore unfair, if a decision to deny insurance were made purely on the basis of these old offences.

Recommendations

Non-legislative action

78. Two reforms can be achieved at once. First, regulations should be made under the Human Rights and Equal Opportunity Commission Act 1986 (Cth) to provide that discrimination on the ground of criminal record, or of facts relating to a conviction,[20] is covered by the equal opportunity provisions of that Act.[21] Secondly, the Human Rights and Equal Opportunity Commission should acknowledge that discrimination on the ground of criminal record falls within the 'other status' provision of the International Covenant on Civil and Political Rights and that its powers extend to cover this form of discrimination. It should fully address, both in its administrative arrangements and the publicity it gives to its activities, problems arising from discrimination on the ground of criminal record.

Legislative action

79. *Federal legislation.* If discrimination on the ground of criminal record is to be taken seriously, effective remedies are needed. Complainants need enforceable rights and formal enforcement mechanisms. There are limitations on the Human Rights and Equal Opportunity Commission's capacity to deal effectively with the matter under the Human Rights and Equal Opportunity

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[19] See for example Ministry of Education (Vic) (MK Collins) *Submission 59* (29 August 1986) 2–3; Teachers' Registration Board (SA) (HW Parsons) *Submission 61* (18 September 1986) 2; Victorian Magistrates (JM Dugan) *Submission 54* (29 August 1986) 3; Commissioner for Public Employment (SA) (A Strickland) *Submission 60* (16 September 1986) 1; Defence Department (Brigadier RS Buchan) *Submission 40* (25 March 1986) 2; Victoria Police (Asst Cmdr N Newnham and Cmdr A Bolton) *Submission 36* (5 March 1986) 3; National Police Working Party (Insp P Duffy) *Submission 63* (22 September 1986) 3.

[20] See para 20.

[21] See para 74.

Commission Act 1986 (Cth). Under that Act its primary functions are conciliation, education and reporting matters to the Minister. It does not have power to make determinations on questions of discrimination. This contrasts with its power to make determinations, enforceable through the courts, under the Sex Discrimination Act 1984 (Cth). The most the Human Rights and Equal Opportunity Commission can do in the area of discrimination in employment and occupation is to recommend payment of compensation or some other action to reduce loss or damage. To provide real protection for former offenders, there should be Commonwealth legislation to cover discrimination on the ground of criminal record modelled on the Sex Discrimiation Act 1984 (Cth). This would enable the Human Rights and Equal Opportunity Commission to have the same power to make determinations in relation to discrimination on the ground of criminal record as it has in relation to discrimination on the ground of sex or race.

80. *Encouraging complementary State action.* At the same time, the Commonwealth should encourage complementary action by the States and the Northern Territory. Anti-discrimination and equal opportunity legislation currently exists in four States, New South Wales, Victoria, South Australia and Western Australia.[22] The Anti-Discrimination Act 1977 (NSW), for example covers discrimination on the basis of race, sex, marital status, physical or intellectual impairment and homosexuality in areas such as employment, partnerships, trade unions, qualifying bodies, employment agencies and education.[23] Each of the four States has a Commissioner for Equal Opportunity and Equal Opportunity Tribunal whose functions include determining questions of discrimination. There are no State or Territory laws providing for discrimination on the ground of criminal record. The New South Wales Anti-Discrimination Board[24] and the Western Australian Law Reform Commission have already suggested amendments to this effect.[25] This Commission endorses the detailed proposals of the Western Australian Law Reform Commission with two reservations: one relating to that Commission's view that the scheme should be limited to a 'record of offences' as narrowly defined;[26] and the other relating to the question of

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[22] NSW: Anti-Discrimination Act 1977 (NSW); Vic: Equal Opportunity Act 1984 (Vic); SA: Equal Opportunity Act 1984 (SA); WA: Equal Opportunity Act 1984 (WA).

[23] Similar provisions are found in the other States. In Western Australia (s 53–66) religious or political beliefs or convictions are made grounds for discrimination. In Victoria municipal councils are also included as an additional area (s 32).

[24] NSWADB 1984, 111.

[25] WALRC 80 para 9.2–9.11, App VII, draft Equal Opportunity Amendment Bill; see also SADP, Proposal 4.

[26] See below para 92–3.

reasonableness.[27] Similar anti-discrimination measures should be implemented by the States and the Northern Territory. One of the benefits of encouraging complementary action is that it enables use to be made of the expert administrative machinery already existing at State level.[28]

Sex Discrimination Act model

Sex Discrimination Act

81. The Sex Discrimination Act 1984 (Cth) makes it unlawful to discriminate on the ground of sex, marital status or pregnancy in a number of areas:

- discrimination against applicants for employment, employees, commission agents and contract workers
- discrimination by partnerships and registered organisations under the Conciliation and Arbitration Act 1904 (Cth) in relation to membership
- discrimination by employment agencies and qualifying bodies such as Law Societies, and
- in other areas, discrimination in relation to education, goods, services and facilities, accommodation, land, club membership and benefits, the administration of Commonwealth laws and programs and in material requested in application forms.[29]

Discrimination is defined in two ways. Direct discrimination is the treatment of a person on the ground of his or her sex, or a characteristic that appertains generally or is generally imputed to persons of that sex, that is less favourable than the treatment accorded to a member of the opposite sex in similar circumstances.[30] Indirect discrimination occurs when a person is required to comply with a requirement or condition

> (a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person[31] comply or are able to comply;
> (b) which is not reasonable having regard to the circumstances of the case; and
> (c) with which the aggrieved person does not or is not able to comply.[32]

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[27] Below, para 86.

[28] In New South Wales, the Anti-Discrimination Board and Equal Opportunity Tribunal are able to perform functions under any Commonwealth Act relating to human rights: Anti-Discrimination Act 1985 (NSW) Pt IXB.

[29] Sex Discrimination Act 1984 (Cth) s 15–27.

[30] id, s 5(1).

[31] The victim of the alleged discrimination.

[32] id, s 5(2).

The Act provides for exemptions, for example, for religious bodies, certain educational institutions and voluntary bodies.[33] Acts performed under specific statutory authority are also exempt.[34] In addition, the Human Rights and Equal Opportunity Commission can grant exemptions, although no grounds are specified for the exercise of this power.[35] The Acts exhaust the full extent of Commonwealth legislative power; for example, it extends to acts done in a Territory and to Commonwealth employees.[36] Detailed provision is made for administrative machinery to handle complaints and investigations, and the enforcement of determinations by the Commission.[37]

Modifications

82. While the Sex Discrimination Act can be used as the model, there will need to be a number of modifications to accommodate the particular ground of discrimination. Issues to be resolved include

- application of the legislation: to whom does it apply?
- the definition of discrimination on the ground of criminal record
- the record, covered
- the areas of decision making covered
- exemptions, and
- administrative implementation.

The remainder of this chapter addresses these modifications.

Application of the scheme

83. For constitutional reasons, the Sex Discrimination Act applies to

- acts done within a Territory
- discrimination against Commonwealth employees in connection with their employment or persons seeking to become Commonwealth employees
- discrimination by an authority or body exercising certain powers under a Commonwealth law
- acts done by or on behalf of the Commonwealth or a Territory
- the exercise of a power under a Commonwealth or Territory law
- acts done by a Commonwealth employee in connection with duties as a Commonwealth employee

[33] id, s 36–8.
[34] id, s 40.
[35] id, s 44.
[36] id, s 9.
[37] id, Pt III.

- acts done by a foreign corporation or by a financial or trading corporation formed within the limits of the Commonwealth
- acts done by officers of a financial, trading or foreign corporation in connection with their duties as an officer of that body
- acts done in relation to the carrying on of business of banking or insurance
- acts done in relation to foreign, interstate or Territory trade and commerce, and
- acts done in relation to matters arising outside of Australia.

No modification of this aspect of the Act is necessary.[38] However, the Act also applies to discrimination against women anywhere in Australia, implementing the Convention on Discrimination Against Women.[39] No equivalent provision is needed to implement the Commission's recommendations. The Act does not limit State laws that are capable of operating concurrently. Where a complaint can be made under State legislation, it is necessary to proceed under State legislation rather than resort to the Commonwealth Act. This arrangement should apply equally to discrimination on the ground of criminal record.[40]

Direct discrimination

84. *Direct discrimination.* Two forms of discrimination, direct and indirect, are distinguished in anti-discrimination and equal opportunity legislation at the federal and State levels. The Sex Discrimination Act and its State equivalents define direct discrimination simply in terms of less favourable treatment by reason of

> (a) the sex of the aggrieved person;
> (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
> (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person.[41]

There is no reason why direct discrimination on the ground of criminal record should not extend to characteristics that appertain generally or are generally imputed to the former offenders.[42]

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[38] See draft cl 6.
[39] Sex Discrimination Act 1984 (Cth) s 9(10).
[40] id, s 9(3)–(4); see draft cl 7.
[41] Sex Discrimination Act 1984 (Cth) s 5(1).
[42] See draft cl 4(2)(e), (f).

85. *Reasonableness.* Provisions defining direct discrimination require that the treatment be less favourable. They do not require that the less favourable treatment be unreasonable or unfair.[43] For indirect discrimination, on the other hand, a criterion of unreasonableness is included.[44] The National Committee on Discrimination in Employment and Occupation pointed out that, in considering complaints based on discrimination on the ground of criminal record, they

> seek to determine the relevance of the criminal record to the requirements of a particular job. While it is accepted that there may be many instances where criminal record may constitute a legitimate barrier to employment (eg, individuals with a criminal record of using drugs, seeking recruitment to a job where drugs are handled), criminal record should not be used on an indiscriminate basis to deny all employment.[45]

As the Committee pointed out, there are instances where discrimination on the ground of criminal record can be justified. A requirement that direct discrimination be unreasonable is needed to accommodate these instances. Many individuals and organisations who made submissions expressed concern whether the distinctions they currently make on the ground of criminal record and which they considered 'reasonable' would be considered discriminatory under such a proposal.[46] Some of the submissions which were critical of the Commission's discrimination proposals in its Discussion Paper may have reflected some confusion about the Commission's definition of discrimination. Only distinctions on the ground of criminal record that are not reasonable should be discriminatory.[47]

86. *Western Australia and 'reasonableness'.* The Commission's proposal in its Discussion Paper for an additional requirement of 'reasonableness' in the area of direct discrimination was criticised by the Law Reform Commission of Western Australia. That Commission did not consider that it was 'satisfactory' to restrict the provisions by the requirement of reasonableness, or by the requirement of 'direct relationship' as in New Zealand.[48] It considered that to do

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[43] eg Sex Discrimination Act 1984 (Cth) s 5(1); Anti-Discrimination Act 1977 (NSW) s 7(1); Equal Opportunity Act 1984 (Vic) s 17(1); Equal Opportunity Act 1984 (SA) s 29(2)(a); Equal Opportunity Act 1984 (WA) s 8(1).

[44] See Sex Discrimination Act 1984 (Cth) s 5(2); Anti-Discrimination Act 1977 (NSW) s 7(2); Equal Opportunity Act 1984 s 17(5); Equal Opportunity Act 1984 (SA) s 29(2)(b); Equal Opportunity Act 1984 (WA) s 8(2).

[45] NCDOE Annual Report, 11–2.

[46] NRMA (M O'Leary) *Submission 45* (30 May 1986) 3; Public Service Board, Canberra (M Bonsey) *Submission 57* (10 September 1986); Ministry of Education (Vic) (M Collins) *Submission 58* (29 August 1986) 2–3; Commissioner for Public Employment (SA) (A Strickland) *Submission 60* (16 September 1986) 1; Chamber of Commerce and Industry (SA) (LM Thompson) *Submission 67* (3 October 1986) 1.

[47] Draft cl 4(1)(b).

[48] See NZDP, para 5.3.

so would be to introduce 'an element of uncertainty'.[49] However, the weight of this criticism is reduced by the fact that the WALRC's own proposals in the area of indirect discrimination contained a reasonableness requirement.[50] This Commission sees no reason to depart from the requirement of reasonableness. Once a case of discrimination is made out, the requirement places the onus on the person who is alleged to have discriminated to demonstrate that the actions were reasonable. Rather than creating uncertainty, the requirement of reasonableness encourages flexibility. Should the requirement be dropped, it would be necessary to create a large number of exemptions to cover those circumstances in which it would be legitimate to make distinctions between people on the ground of criminal record. There be nothing to be gained from such a course.[51] The relationship between reasonableness and exemptions is considered further in paragraph 95.

Indirect discrimination

87. *Definition.* Indirect discrimination occurs when an apparently inoffensive requirement results in a particular individual or group of individuals being adversely affected. The Sex Discrimination Act and its State equivalents define indirect discrimination as follows:

> (2) For the purposes of this Act, a person (in this sub-section referred to as the "discriminator") discriminates against another person (in this sub-section referred to as the "aggrieved person") on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition –
>
> (a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply;
>
> (b) which is not reasonable having regard to the circumstances of the case; and
>
> (c) with which the aggrieved person does not or is not able to comply . . .

This concept of indirect discrimination was suggested in the Commission's Discussion Paper 25[52] but was subjected to severe criticism in at least one submission.

> This sub-clause seems to be a case of theoreticians gone berserk. It will not be enforceable, but will at least provide a lucrative source for argument among lawyers. Considering the many small business-people who are likely to be caught up in the intricacies of this new legislation, it is essential that it be kept simple and defensible at first glance; sub-clause 3 would make it just another piece of frustrating interference, comprehensible to few and without a clear operating guideline.[53]

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[49] WALRC 80 para 9.11.

[50] WALRC 80, Draft Equal Opportunity Amendment Bill cl 66A(2)(b).

[51] cf Cth Hansard (Sen) 26 November 1986, 2825; 2753–4.

[52] ALRC 25 Draft Spent Convictions Bill cl 14(3).

[53] Asst Commr N Newnham & Cmdr A Bolton *Submission 96* (5 March 1986) 3.

88. *Proof.* To constitute discrimination, the requirement must be one 'with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply'. This presents difficulties even if interpreted as merely meaning that 'non aggrieved persons are more likely to be able to comply with the requirement than aggrieved persons'. It is hard to see how any statistical analysis could be found to establish this criterion in the context of discrimination against former offenders.

> In employment complaints this [the necessary statistical analysis] can be done by analysing the employment profile of the workplace and establishing the number and proportion of workers of each sex in each job classification or on each pay scale. This may demonstrate primary evidence that discrimination has occurred. In complaints involving a refusal to grant credit, an analysis of the loans made by financial institution may demonstrate the lending patterns. In a major case involving indirect discrimination heard by the NSW Equal Opportunity Tribunal, statistical evidence on employment patterns and the impact of certain employment decisions was vital to a finding of unlawful discrimination (Najdovska v Australian Iron and Steel Pty Limited, 1985).[54]

The logic of this proposition is, at best, questionable – the difference shown up by such a statistical correlation may be due to any one of a number of factors not falling within the definition of discrimination. But in the case of discrimination on the ground of criminal record it will in many cases be impossible even to obtain the statistical data. In the absence of such statistical evidence, the best that can be done is to make an educated guess based on assumptions about what former offenders can or are likely to be able to do. These assumptions themselves will be discriminatory because they will involve decisions based on 'characteristics that are generally imputed to former offenders'.[55]

89. *Further difficulties.* The definition is even more complicated than appears at first glance. Considered carefully, it is not clear what is required. The definition is couched in the following terms: a requirement with which 'a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply'. This could mean that the imposition of a requirement is discriminatory if the proportion ascertained by dividing the number of persons who are not aggrieved and who comply, or are able to comply, with the requirement by the number of persons who are not aggrieved is

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[54] Ronalds 1987, 100–1. At 102 it is said that approximately '5% of all complaints investigated by the Sex Discrimination Commissioner at the Canberra Central Office involve indirect discrimination, while only 1% of complaints lodged under the Sex Discrimination Act at the State agencies involve indirect discrimination'.

[55] cf Sex Discrimination Act 1984 (Cth) s 5(1)(c).

substantially higher than the proportion ascertained by dividing the number of aggrieved persons who comply, or are able to comply, with the requirement by the number of aggrieved persons. Alternatively, the first proportion may have to be obtained by dividing by the total number of persons, whether aggrieved or not. In either case, the impossibility of applying such a provision is self-evident. It should not be adopted.

90. *No lack of protection.* The rejection of indirect discrimination as a ground of complaint does not leave the former offender vulnerable. Discrimination on the ground of criminal record is by its very nature more likely to be direct discrimination. Indirect discrimination on the ground of criminal record is difficult to envisage in the absence of discriminatory assumptions about former offenders. It is difficult to state the reasonable requirements with which former offenders will be less likely to be able to comply. Indirect discrimination on the ground of criminal record will be virtually impossible to establish. For these reasons, discrimination on the ground of criminal record should be limited to direct discrimination.

Records covered

91. *Records of charges, arrests.* There is no logical reason to limit discrimination to records of convictions. Discrimination on the basis that a person has been charged or arrested in relation to a particular offence may be just as damaging.[56] The National Committee on Discrimination in Employment and Occupation found that

> [s]ome cases have involved an assumption by employers that persons charged with criminal offences would be found guilty or that, even if acquitted, the reputation of such persons would be so compromised as to warrant their non-employment or dismissal.[57]

The scheme should therefore apply to records of arrests, charges made, cases dismissed and convictions against which appeals have been taken.[58]

92. *Not limited to spent convictions.* For many former offenders, particularly those who have served a prison sentence, the years immediately after release present the greatest difficulty in terms of finding employment, housing or obtaining credit. The question of discrimination arises immediately on completion of sentence. In its Discussion Paper the Commission proposed that

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[56] NSW Privacy Committee (J Nolan) *Submission 35* (28 February 1986) 2–3; Council of Civil Liberties (NSW) (T Robertson) *Submission 47* (20 August 1986).

[57] NCDOE Annual Report 11.

[58] See draft cl 4(2).

all convictions – not just those that have been considered spent – should be covered.[59] The New Zealand suggestion was to include all offences whether spent or not, though the ban on discrimination would only operate from the date of release from custody in the case of custodial sentences.[60]

93. *Western Australia.* The Law Reform Commission of Western Australia ultimately took the view that any recommendations for anti-discrimination legislation covering all convictions, regardless of whether or not they had be spent, would be outside its terms of reference.[61] However it was critical of this Commission's proposals.[62] It proposed that the Equal Opportunity Act 1984 (WA) should be amended to include 'record of offences' 'as a basis for an anti-discrimination claim'. 'Record of offences' was defined to cover

> (a) a conviction which has become spent under the provisions of the *Spent Convictions Act 198[ ]*;
> (b) a conviction for an offence committed by a child which is under section 40(2) of the *Child Welfare Act 1947* deemed not to be a conviction;
> (c) a conviction in respect of which a probation order is made which is under section 20 of *Offenders Probation and Parole Act 1963* deemed not to be a conviction;
> (d) a dismissal under section 669(1)(a) of *The Criminal Code*.[63]

If the Equal Opportunity Act 1984 (WA) were to be so amended it would only cover a limited range of problems faced by former offenders. In part, the divergence of views on this question between this Commission and the Law Reform Commission of Western Australia reflects a difference of opinion about defining discrimination in terms of reasonableness. To quote the Law Reform Commission of Western Australia:

> Though the Commission would not condone discrimination against persons whose convictions had not become spent, anti-discrimination provisions which were not limited to spent convictions would impose too great a restriction on employers and others. It would not be satisfactory to try to limit the ambit of such provisions by using criteria of direct relationship or reasonableness, because this would introduce an element of uncertainty.[64]

The reasons for including reasonableness in the definition of direct discrimination have already been mentioned. Clearly there will be circumstances where

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[59] This proposal is reflected in the draft cl 4(2)(b).
[60] NZDP para 5.3.
[61] WALRC 80 para 9.11.
[62] ibid. See also Director General, Department of Community Services (WA) *Submission 77* (9 December 1986).
[63] WALRC 80, Draft Equal Opportunity Amendment Bill, cl 5, amending Equal Opportunity Act 1984 (WA) s 4.
[64] id para 9.11.

it is reasonable to make distinctions on the ground of criminal record and these distinctions should not be discriminatory. On the other hand, to limit the proposal to spent convictions does not meet the objective of removing barriers against re-entering society to former offenders.

Areas of decision making covered

94. The Commission recommends that it should be unlawful to discriminate in those areas specified in the Sex Discrimination Act 1984 (Cth) s 15–27[65] with three exceptions.[66]

- *Partnerships.* Partnerships should not be covered. This is a departure from the Sex Discrimination Act s 17, but at the same time it accords with the aims of s 44 which exempts voluntary bodies from the provisions of the Act. The voluntary nature of a partnership, the depth of confidence and trust required by partners in each other, and the wide liability of partners for the debts of each other, make it inappropriate to interfere with the choice of partners on the ground of criminal record.[67]

- *Application forms.* Section 27 provides that, where it would be unlawful to discriminate contrary to the Act, it is also unlawful to require that the other person provide information that could be used as a basis for such discrimination. A number of submissions[68] pointed to the obscurity of s 27. The difficulties it creates are magnified when it is sought to establish indirect discrimination on the basis of this provision. Moreover, the provision has no value under the Commission's recommendation for direct discrimination on the ground of criminal record, given the proposed requirement that, to constitute direct discrimination the act must be 'unreasonable in the circumstances'. The circumstances would have to be known to the questioner, as would the details of the person's criminal record (to the extent that they affect the question of reasonableness) before the questioner could determine whether it would be discriminatory for the question to be asked. It would be impossible to comply with such a requirement. It should not be adopted.

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[65] As reflected in draft cl 10–21.

[66] In addition, for drafting reasons, provision should be included in the clause making discrimination in the supply of goods, services and facilities unlawful to ensure that it is a 'backstop' provision and to prevent overlaps: see draft cl 17(2).

[67] See further WALRC 80 para 9.7.

[68] Asst Cmmr (Services) Police (NSW) (J Ryan) *Submission 69* (14 October 1986) 4; National Police Working Party (Insp P Duffy) *Submission 63* (22 September 1986), 3; Asst Commr N Newnham & Cmdr A Bolton *Submission 36* (5 March 1986) 4.

- *Clubs.* Under s 25, it is unlawful for the management of a club to discriminate against members or non-members in terms of membership, access to benefits or by subjecting a member to any other detriment. A club is defined as an association of more than 30 members that uses its funds to maintain its facilities and that sells or supplies liquor for consumption on its premises.[69] The placing of such restrictions on the management committees of clubs should not be undertaken lightly. Clubs should not be entitled to discriminate unreasonably on the ground of criminal records. However, the Commission is mindful of claims of the many small clubs that operate for social and sporting purposes that they should be able to determine membership with the minimum of government interference. Any proposal that it be unlawful for a club to discriminate on the ground of criminal record should therefore be limited to those clubs that hold a licence to sell liquor for consumption on the premises.[70]

Exemptions

95. *Declarations.* Discrimination on the ground of criminal record should not be unlawful provided it is reasonable. For this reason, with the exception of those matters raised in the following paragraphs, there is no need to follow those provisions of the Sex Discrimination Act s 30–8, detailing a list of exceptions covering, for example, educational institutions, religious bodies and charities. A mechanism might, however, be provided to assist[71] those bodies and organisations that are uncertain as to the reasonableness of their actions. It should enable them to proceed without fear that they might be acting unlawfully. Accordingly, instead of a detailed list of exemptions for specified bodies, the Human Rights and Equal Opportunity Commission should be able to declare that a specified act does not constitute discrimination for the purposes of the scheme.[72] There should be provision for an appeal to the Administrative Appeals Tribunal for review of such a declaration.[73] The Commission should also be required to give notice by publication in the Gazette of any declarations.[74] A similar mechanism is found in the Sex Discrimination Act s 46.[75]

96. *Acts done under authority.* However, a small number of specific exemptions in the Sex Discrimination Act should be followed. These include

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[69] Sex Discrimination Act 1984 (Cth) s 4(1).
[70] Draft cl 2(1), 20.
[71] cf Sex Discrimination Act 1984 (Cth) s 44.
[72] See draft cl 25(1).
[73] Draft cl 25(2); cf Sex Discrimination Act 1984 (Cth) s 45.
[74] Draft cl 25(4).
[75] For the effect of exemptions see Sex Discrimination Act 1984 (Cth) s 47 and draft cl 26.

- acts done in pursuance of determinations or decisions of the Human Rights and Equal Opportunity Commission
- acts done in pursuance of the orders of a court or tribunal relating to terms and conditions of employment,[76] and
- acts done under statutory authority.[77] These statutory authorities would cease to exist after two years unless expressed to continue beyond that date.[78]

The proposals should not apply to anything done by a court or tribunal when applying the laws of evidence or when sentencing, nor to the public authorities (such as correctional authorities) in relation to matters related to imprisonment of offenders. Nor should they apply to the Director of Public Prosecutions when deciding whether to prosecute.

97. *Voluntary organisations.* Finally, the only other exception contained in the Sex Discrimination Act which should be expressly adopted is the exception for voluntary bodies.[79] Voluntary organisations should be expressly exempted, in relation to membership of the voluntary body, or in relation to benefits, services and facilities provided to members. Voluntary organisations should be defined as associations or bodies (incorporated or not) that do not engage in profit making activities. They would not include a club as defined in the Sex Discrimination Act, an organisation registered under the Conciliation and Arbitration Act 1904 (Cth), a body that provides finance to its members, or a body established by Commonwealth, State or Territory law.[80]

Administrative implementation

98. The Commission has recommended that it should be unlawful to discriminate on the ground of criminal record in the same way as discrimination on the ground of sex is unlawful. Legislation to achieve this should be modelled on the Sex Discrimination Act, with the modifications suggested above. Important aspects of this proposed legislation would include powers of the Human Rights and Equal Opportunity Commission to investigate discrimination, conciliate complaints and make determinations about discrimination.[81] These determinations would be enforceable through the Federal Court in the same

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[76] See Sex Discrimination Act 1984 (Cth) s 40.
[77] ibid.
[78] See draft cl 23; see further Human Rights and Equal Opportunity Commission Act 1986 (Cth) s 11(1)(e), 31(1)(a).
[79] Sex Discrimination Act 1984 (Cth) s 39.
[80] See draft clauses, cl 2(1), 20, 22.
[81] See draft cl 27, 28.

way as the Human Rights and Equal Opportunity Commission's determinations about sex discrimination are enforceable.[82] Again, the offence provisions of the Sex Discrimination Act, such as those prohibiting victimisation, should apply. Beyond this, the Commission makes no detailed recommendations about the administrative arrangements to be adopted by the Human Rights and Equal Opportunity Commission in performing these functions, for example, in the conduct of inquiries. These arrangements are best determined by that Commission in the light of other Government policies and its own resources.

[82] See Sex Discrimination Act 1984 (Cth) s 82.

Appendix A
Draft legislation

- Spent Convictions Bill 1987
- Explanatory Notes to Spent Convictions Bill 1987
- Clauses to be included in a Discrimination (Former Offenders) Bill 1987

SPENT CONVICTIONS BILL 1987

TABLE OF PROVISIONS

Clause

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Schedule
Spent convictions

A BILL

FOR

An Act to provide that certain convictions are to be regarded as spent, and for related purposes

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

Short title

1. This Act may be cited as the *Spent Convictions Act 1987*.

Commencement

2. This Act shall come into operation on a day to be fixed by Proclamation.

Interpretation

3. (1) In this Act, unless the contrary intention appears –

"Commonwealth agency" means –

(a) a Department or a person employed in a Department;

(b) a body corporate, a corporation sole or an unincorporated body established or appointed for a public purpose by, or in accordance with, a Commonwealth law, not being –

(i) an incorporated company, society or association;

(ii) an organisation registered under the *Conciliation and Arbitration Act 1904*;

(iii) the Legislative Assembly of the Northern Territory or the Executive Council of the Northern Territory; or

(iv) the Legislative Assembly of Norfolk Island or the Executive Council of Norfolk Island;

(c) a person holding, or performing the duties of, an office established by or under a Commonwealth law;

(d) an incorporated company or association over which the Commonwealth is in a position to exercise control; or

(e) a body, whether incorporated or unincorporated, established by the Governor-General or by a Minister;

"Commonwealth law" means –

(a) an Act;

(b) an Ordinance of, or an Imperial Act or an Act of a State in its application in, a Territory other than the Northern Territory or Norfolk Island; or

(c) an instrument (including a rule, a regulation and a by-law) in force under an Act or an Ordinance as mentioned in paragraph (a) or (b);

"convicted person" does not include a body corporate;

"Department" has the same meaning as it has in the *Public Service Act 1922;*

"legal or administrative proceeding" means a proceeding (however described) –

(a) in a federal court or a court of a Territory other than the Northern Territory or Norfolk Island; or

(b) before a person or body (other than a court) authorised by a Commonwealth law, or by consent of parties, to hear and receive evidence,

and includes such a proceeding in a coroner's court and a court-martial;

"offence" means an offence against or arising under –

(a) a Commonwealth law;

(b) a law of a State or Territory; or

(c) a law of a foreign country;

"sentence" includes an order of a court or of a tribunal imposed by way of penalty in respect of an offence;

"spent conviction" means a conviction that –

(a) has become spent by virtue of section 7; or

(b) is specified in the Schedule.

(2) Unless the contrary intention appears, a reference in this Act to the conviction of a person includes a reference to a conviction that occurred before the commencement of this Act.

(3) A reference in this Act to a conviction of a person also includes a reference to –

(a) where, in a prosecution of the person for an offence, the person admits the offence or the charge has been found proved – the court not proceeding to a finding of guilt or not proceeding to convict the person for the offence; and

(b) a finding, in a proceeding against the person in relation to the offence, that the person is not guilty because of the person's unsoundness of mind at the time of the commission of the offence.

(4) Unless the contrary intention appears, a reference in this Act to a fact about a conviction is a reference to the fact that a specified person –

(a) committed the offence for which the conviction was recorded; or

(b) was arrested for, or charged with, that offence.

Act to bind Crown

4. (1) This Act binds the Crown in right of the Commonwealth and of each of the Territories other than the Northern Territory or Norfolk Island.

(2) Nothing in this Act makes the Crown liable to be prosecuted for an offence.

External Territories

5. This Act extends to each external Territory.

Application

6. This Act applies to the following persons:

(a) Commonwealth agencies, wherever they are;

(b) persons in a Territory other than the Northern Territory or Norfolk island.

Convictions to become spent

7. (1) Subject to the succeeding provisions of this section, a conviction for an offence becomes spent at the end of the waiting period in relation to the offence.

(2) Subject to the succeeding provisions of this section, a conviction for an offence, being a conviction that occurred before the commencement of this Act, becomes spent on whichever is the later of the following:

(a) the day of commencement of this Act;

(b) the day on which the conviction would have become spent if this Act had been in force at the time when the conviction occurred and had continued in force.

(3) A conviction in respect of which a pardon is given becomes spent on the day on which the pardon takes effect.

(4) A conviction that is a conviction by virtue of paragraph 3(3)(a), being a conviction in respect of which no order is made by the court imposing a requirement on the convicted person, becomes spent on the day on which the proceeding concerned is determined.

(5) A conviction for an offence against or arising under the law of a foreign country become spent on the day of the conviction unless the circumstances constituting the offence, if they had occurred in a part of Australia, would constitute an offence against or arising under a Commonwealth law or a law of a State or a Territory.

Waiting period

8. (1) The waiting period in relation to a conviction by the Childrens Court of the Australian Capital Territory, or by a like court or tribunal of a State or of another Territory, is the first period of 2 consecutive years elapsing after –

(a) the day of the conviction; or

(b) if a sentence was imposed in relation to the conviction – the day on which the sentence was completed, whichever is the later, during which the convicted person is not convicted of a further offence.

(2) The waiting period in relation to any other conviction is the first period of 10 consecutive years elapsing after –

(a) the day of the conviction; or

(b) if a sentence was imposed in relation to the conviction – the day on which the sentence is completed, whichever is the later, during which the convicted person is not convicted of a further offence.

(3) In subsections (1) and (2), the conviction for the further offence does not include –

(a) a conviction that is quashed or set aside;

(b) a conviction in respect of which the convicted person is pardoned; or

(c) a conviction for which no penalty is imposed or for which the penalty imposed is only a fine not exceeding $500 or, if some other amount is prescribed, that other amount.

Completion of sentence

9. (1) Subject to subsection (3), the following sentences, namely:

(a) a sentence of death;

(b) a sentence of life imprisonment;

(c) an order that the convicted person be detained on the pleasure of the Governor-General, on the pleasure of the Governor of a State or on the pleasure of the Administrator of a Territory;

(d) a sentence of imprisonment or detention for an unspecified period,

shall, for the purposes of this Act, be completed –

(e) if the convicted person is unconditionally released from imprisonment or detention – on the day of release; or

(f) if the convicted person is released from imprisonment or detention subject to a condition – on the day on which the condition was, or, if there was more than one such condition, all of the conditions were, fulfilled.

(2) Subject to subsection (3), a sentence of imprisonment for a specified period shall, for the purposes of this Act, be completed at the end of that period, whether or not the convicted person was earlier released from imprisonment (whether conditionally or unconditionally).

(3) A sentence, not being a sentence of imprisonment or detention, that imposes a requirement on the convicted person shall, for the purposes of this Act, be taken to be completed when the requirement is satisfied.

(4) Where a person is convicted of 2 or more offences at the same time, then, for the purposes of this Act, the sentence imposed for each of the convictions shall be taken to be completed at the time when the last of the sentences is completed.

Interpretation of Commonwealth laws

10. **(1)** A reference in Commonwealth law (other than this Act) to a conviction does not, unless the law makes express provision to the contrary, include a reference to a spent conviction.

(2) Subsection (1) does not apply to a provision of a Commonwealth law so far as that provision imposes a restriction on, or prohibits, the disclosure, or the use in any way, of a conviction.

Spent convictions to be disregarded

11. (1) A person to whom this Act applies who is exercising a power or performing a duty or function in relation to a convicted person shall disregard –

(a) a spent conviction of the person; and

(b) a fact about a spent conviction of the person.

(2) Subsection (1) applies whether or not the power or function is conferred, or the duty imposed, by law, and whether or not it relates to a person's fitness to be admitted to a profession, occupation or calling.

(3) Where the power or function is conferred, or the duty imposed, by or under a Commonwealth law, subsection (1) applies subject to any express provision to the contrary in a Commonwealth law.

(4) Failure to comply with subsection (1) is not an offence, but this subsection does not limit any other remedy that may be invoked in respect of such a failure.

(5) Subsection (1) does not apply to –

(a) the Australian Federal Police;

(b) a Commonwealth agency when exercising a power, or performing a duty or function, in relation to the national security of Australia;

(c) the Director of Public Prosecutions when deciding whether to prosecute a convicted person and the charge to be preferred;

(d) in a proceeding in a court against the convicted person, so far as the proceeding concerns the penalty, if any, to be imposed on the convicted person in respect of an offence – the court;

(e) a person has been authorised or directed by a court to examine the convicted person and report to it concerning the penalty, if any, that should be imposed by the court on the convicted person in respect of an offence; or

(f) the Attorney-General, or the Parole Board of the Australian Capital Territory, in relation to the exercise of a power in relation to the imprisonment of the convicted person.

Acknowledgment of spent convictions

12. (1) An obligation imposed on a person by –

(a) a Commonwealth law;

(b) the principles and rules of common law and of equity as applied in a Territory other than the Northern Territory or Norfolk Island; or

(c) an agreement (by whatever name called) the proper law of which is the law of a Territory other than the Northern Territory or Norfolk Island,

to disclose a matter relating to a convicted person shall not be taken to require the disclosure or acknowledgement of –

(d) a spent conviction; and

(e) a fact about a spent conviction of the person.

(2) Without limiting subsection (1), a question put to a person in respect of which such an obligation is invoked shall not be taken to relate to –

(a) a spent conviction; or

(b) a fact about a spent conviction.

(3) If the obligation is imposed by a Commonwealth law, subsection (1) has effect subject to any express provision to the contrary in that law.

(4) Subsection (1) does not apply in a prosecution of a convicted person, so far as it concerns the penalty, if any, to be imposed on the convicted person.

Exceptions: evidence in legal or administrative proceedings

13. (1) This section applies in a legal or administrative proceeding before a court or a tribunal.

(2) Sections 11 and 12 do not apply in relation to –

(a) evidence of a spent conviction that is a fact in issue in the proceeding;

(b) in a proceeding under this Act in connection with a spent conviction – evidence of the spent conviction; or

(c) in any legal or administrative proceeding – evidence given or adduced by, or with the consent of, the convicted person.

(3) Where a court or tribunal is applying the laws of evidence in the proceeding, sections 11 and 12 do not apply in relation to evidence of a spent conviction of a person giving evidence before the court or tribunal that tends to prove that the evidence of that person should or should not be accepted if the evidence of the spent conviction –

(a) would, under the laws of evidence being so applied, be admissible for that purpose; and

(b) has substantial probative value as to the credibility of the person.

(4) Where a court or tribunal is applying the laws of evidence in the proceeding, sections 11 and 12 do not apply in relation to evidence of a spent conviction of a person that tends to prove that person has or had a tendency (whether because of his or her character or otherwise) to do a particular act or to have a particular state of mind if the evidence of the spent conviction –

(a) would, under the laws of evidence being so applied, be admissible for that purpose; and

(b) the act or state of mind that constituted the offence in respect of which the spent conviction was imposed is substantially and relevantly similar to the act or state of mind sought to be proved.

(5) Where a court or tribunal is applying the laws of evidence in the proceeding, sections 11 and 12 do not apply to prevent the admission or use of evidence of a spent conviction to prove the existence of a fact that was in issue in the proceeding in which the conviction occurred.

(6) Evidence as mentioned in subsection (3), (4) or (5) shall not be adduced or admitted without the leave of the court or tribunal.

Civil liability for failure to acknowlege spent convictions

14. (1) A person does not incur a civil liability, or make himself or herself liable, in a legal or administrative proceeding, to a civil remedy, under –

(a) a Commonwealth law; or

(b) the principles and rules of the common law and of equity as they apply in a Territory other than the Northern Territory or Norfolk Island,

only because the person failed or refused to disclose a spent conviction.

(2) If the liability arises under a Commonwealth law, subsection (1) has effect subject to any express provision to the contrary in that law.

(3) A person's failure to disclose or acknowledge a spent conviction, or a matter relating to a spent conviction, does not prevent the person from obtaining, in a legal or administrative proceeding, a remedy under –

(a) a Commonwealth law; or

(b) the principles and rules of the common law and of equity as they apply in a Territory other than the Northern Territory or Norfolk Island.

Regulations may make exceptions

15. (1) The regulations may provide that section 11 or 12 does not apply, or applies with such modifications as are prescribed in the regulations, in relation to –

(a) convictions included in a specified class of convictions; or

(b) a specified person to whom this Act applies, or persons included in a specified class of such persons.

(2) Such regulations may –

(a) impose obligations on a person to whom this Act applies with respect to further disclosure, or the use, of a spent conviction; and

(b) prescribe penalties, not exceeding a fine of $, for a breach of such an obligation.

(3) Regulations that relate to section 11 shall not be made unless the Governor-General is satisfied that –

(a) all the spent convictions concerned are likely to be substantially relevant to the exercise of the power, or the performance of the duty or function, for which they may be taken into account; and

(b) the harm that would be caused if those conviction, or convictions of the kind concerned, had to be disregarded substantially outweighs the harm to convicted persons that would be caused by taking them into account.

(4) Regulations that relate to section 12 shall not be made unless the Governor-General is satisfied that all the spent convictions concerned may lawfully be taken into account by the person to whom they are to be disclosed or acknowledged.

(5) Unless sooner repealed, regulations made by reference to this section cease to have effect at the end of 5 years after they come into operation.

Prerogative of mercy

16. This Act does not affect the exercise of the Royal prerogative of mercy, or anything done in connection with it.

Regulations

17. The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters –

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

SCHEDULE

Section 3

SPENT CONVICTIONS

1. Convictions to which the Criminal Law (Rehabilitation of Offenders) Act 1986, of the State of Queensland, applies and in respect of which the prescribed period under that Act has expired, not being convictions that, under section 11 of that Act, are to be taken to be revived.

Spent Convictions Bill 1987
Explanatory Memorandum

OUTLINE

1. This Bill provides for a scheme under which certain convictions are to be regarded as spent. It implements recommendations of the Law Reform Commission in its report Spent Convictions (ALRC 37).

NOTES ON CLAUSES

Clauses 1 and 2 – Short title and commencement

2. These clauses provide for the short title of the Bill (the Spent Convictions Bill 1987) and its commencement, which is to be on a day to be fixed by Proclamation.

Clause 3 – Interpretation

3. Subclause (1) sets out definitions used throughout the Act.

4. *Commonwealth agency* is defined to include –

- departments
- statutory authorities
- Commonwealth office holders
- incorporated companies over which the Commonwealth is in a position to exercise control.

5. *Commonwealth law* includes all Commonwealth laws and the laws of the non self-governing Territories.

6. *Convicted person* means a natural person only.

7. *Legal or administrative proceeding* means any kind of legal proceeding, whether in a court or a tribunal, under federal law or Territory law. It also includes arbitrations, coroner's court proceedings and courts-martial.

8. *Offence* means an offence against any law, including foreign law.

9. *Sentence* means any order of a court imposed by way of penalty for an offence.

10. *Spent conviction* means a conviction that has become spent under this Bill or a conviction that has become spent under a State or Territory law that provides for spent convictions. At present, only Queensland has such a law. As further States establish spent convictions schemes, the schedule to the Bill, which lists these, can be added to.

11. *Subclause (2)* ensures that the spent convictions scheme applies to convictions before the commencement of the Act.

12. *Subclause (3)* provides that a conviction also includes a court finding a person guilty without proceeding to a conviction (as, for example, in New South Wales under section 556A of the Crimes Act 1900 (NSW)) and a finding of not guilty due to insanity.

13. *Subclause (4)* defines 'fact about a conviction'. It means

- the fact that the convicted person committed the offence
- the fact that the convicted person was arrested for the offence
- the fact that the convicted person was charged with the offence.

Clause 4 - Act about Crown

14. This clause provides that the Act finds the Crown in right of the Commonwealth and of the non self-governing Territories.

Clause 5 - External Territories

15. This clause provides that the Act extends to each external Territory. As the Act will have operation in the Territories, it is necessary so to extend it.

Clause 6 - Application

16. This clause provides that the Act applies to Commonwealth agencies, not only in the Territories but also in the States and overseas, and to all persons in the non self-governing Territories.

Clause 7 - Convictions to become spent

17. This clause sets out the time at which convictions of various classes become spent.

18. *Subclause (1)* provides that the general rule is that the conviction become spent at the end of the waiting period (for the definition of waiting period see clause 8).

19. *Subclause (2)* provides that convictions that occurred before the commencement of the Bill become spent on the commencement of the Bill or on the day they will have become spent if the Bill had been in force when the conviction occurred, whichever is the later.

20. *Subclause (3)* provides that a conviction in respect of which a pardon has been given becomes spent on the day on which the pardon takes effect.

21. *Subclause (4)* provides that a conviction constituted by a court finding an offence proven but not proceeding to convict (see paragraph 3(3)(a)) becomes spent when the court makes that decision. If, however, the court imposes some order (for example, a good behaviour bond), the conviction becomes spent in the normal way (see subclause (1)).

22. *Subclause (5)* provides that foreign convictions become spent on the day of the convictions unless the offence would have been an offence under Australian law. In those circumstances, the rule set out in the other provisions of the section would apply.

Clause 8 – Waiting period

23. This clause defines waiting period, which determines when convictions become spent (see clause 7(1)).

24. *Subclause (1)* provides for that for offences dealt with by children's courts, the waiting period is two conviction free years after conviction or the day on which the sentence imposed was completed.

25. *Subclause (2)* provides that the waiting period for convictions for other offences is ten conviction free years after conviction or the day on which the sentence was completed.

26. *Subclause (3)* provides that quashed convictions, convictions that have been set aside, convictions in respect of which a pilot has been given and convictions in respect of which no penalty is imposed are not to be counted for the purposes of the waiting period. In addition, if a penalty imposed was only a fine not exceeding $500 or some other prescribed amount, that conviction is not to be counted either.

Clause 9 – Completion of sentence

27. This sentence defines when a sentence is completed, which is necessary to determine when the waiting period starts (see paragraph 8(1)(b), 8(2)(b)).

28. *Subclause (1)* provides that 'indeterminate' sentences, that is a sentence of death and life imprisonment and ordered to be detained on the pleasure of the Governor-General or the like, and sentences of imprisonment or detention for an unspecified period, are completed when the person is released from imprisonment or detention. If the release is subject to conditions, they are to taken to be completed when the conditions are fulfilled.

29. *Subclause (2)* provides that sentences of imprisonment for a specified period become completed at the end of that period. It is immaterial that the person is released from imprisonment earlier under an early release or parole scheme.

30. *Subclause (3)* provides for sentences but impose some requirement (for example to pay a fine) on the convicted person. Those sentences to be taken as completed when the requirement is fulfilled.

31. *Subclause (4)* covers the case of persons convicted of two or more offences at the same time. Both sentences are to be taken as completed when the later of the sentences is completed.

Clause 10 - Interpretation of Commonwealth laws

32. This clause provides for one of the effects of the spent convictions scheme.

33. *Subclause (1)* provides that references in Commonwealth laws (other than this Bill) to convictions are not to be read as including spent convictions.

34. *Subclause (2)* preserves laws that already impose restrictions on, or prohibit, the disclosure or use of a conviction.

Clause 11 - Spent convictions to be disregarded

35. This clause provides a further consequence of a conviction becoming spent. This conviction is not to be taken into account by people, for example, in making decisions about the former offender.

36. *Subclause (1)* provides that persons exercising powers or performing duties or functions must disregard spent convictions, and facts about spent convictions.

37. *Subclause (2)* makes it explicit that extra legal duties, powers or functions are included and that subclause (1) extends to questions such as a person's character or fitness to be admitted, for example, as a lawyer.

38. *Subclause (3)* provides for the case where the power, function or duty is imposed by a Commonwealth law. Subclause (1) does not apply if the Commonwealth law makes express provision to the contrary.

39. *Subclause (4)* makes it explicit that a person does not commit an offence by contravening subclause (1) but is nevertheless open to other legal remedies such as injunctions.

40. *Subclause (5)* sets out a list of exceptions to subclause (1). They include

- the Australian Federal Police
- powers, duties and functions for national security
- the Director of Public Prosecutions
- courts involved in sentencing offenders
- persons who are to provide pre-sentence reports
- Attorney-General or the Parole Board when making decisions about parole or early release of offenders.

Clause 12 - Acknowledgement of spent convictions

41. This clause provides for a further consequence of a conviction becoming spent: the convicted person need not be disclosed or acknowledged.

42. *Subclause (1)* relates to obligations imposed by Commonwealth law, the common law as in force in the non-self-governing Territories or under contracts governed by the law of the non-self-governing Territories to disclose matters relating to convicted persons. These obligations might apply to the convicted person or to someone else.

Under the subclause, the obligation is not to be read as extending to spent convictions or facts about spent convictions.

43. *Subclause (2)* makes it explicit that subclause (1) extends to questioning, for example, by police officers.

44. *Subclause (3)* provides that if the obligation is imposed by Commonwealth law, the Commonwealth law can modify the effect of subclause (1).

45. *Subclause (4)* excludes subclause (1) from court proceedings when sentencing a convicted person.

Clause 13 - Exceptions: evidence in legal and administrative proceedings

46. This clause provides for exceptions related to court or tribunal proceedings.

47. *Subclause (2)* provides that clauses 11 and 12 (the duty to disregard spent convictions have the relaxation of obligations to acknowledge spent convictions) do not apply in relation to the following evidence given in a legal or administrative proceeding:

- evidence of spent convictions that are facts in issue in the legal and administrative proceeding, for example, in a defamation proceeding where the defamation consists of an allegation that a person has been convicted of an offence
- proceedings under the Bill
- any evidence given by or with the consent of a convicted person.

48. *Subclause (3)* provides an exception for evidence of a spent conviction tendered to attack or support the credibility of a witness or a party. Clauses 11 and 12 do not apply if the evidence is admissible under the rules of evidence and if the evidence of the spent conviction has substantial probative value on credibility.

49. *Subclause (4)* provides an exception for evidence of a spent conviction tendered to prove character or tendencies of the former offender. Again, clauses 11 and 12 do not apply if the evidence is admissible under the rules of evidence and if the offence for which the spent conviction occurred is substantially and relevantly similar to the act that it is tendered to prove.

50. *Subclause (5)* provides for evidence of spent convictions that are admissible under exceptions to the rule in *Hollington v Hewthorne.*

51. *Subclauses (3), (4) and (5)* only apply where the laws of evidence are being applied. If the laws of evidence are not being applied (for example, because the tribunal is not bound by the laws of evidence), clauses 11 and 12 will apply.

Clause 14- Civil liability for failure to acknowledge spent convictions

52. In certain circumstances, failure to acknowledge or disclose a conviction may prevent the offender obtaining relief in legal proceedings (for example, because of the

equitable doctrine of 'clean hands') or may leave the former offender open to some civil liability. An example of the latter category is the former offender who does not disclose his or her conviction to an insurer. It may be that the former offender has breached the duty to act with the utmost good faith. This clause protects the former offender from these consequences if the conviction is a spent conviction. *Subclause (2)* preserves the operation of expressly inconsistent Commonwealth laws.

Clause 15 - Regulations may make exceptions

53. This clause provides a mechanism under which further exceptions to the consequences of a spent conviction can be provided by regulation.

54. *Subclause (1)* provides that the regulations may modify the application of the act in relation to specific classes of convictions, or specific persons to whom the Act applies (for a definition see clause 6).

56. *Subclause (2)* provides that such regulations may prescribe further obligations about use or disclosure of spent convictions and penalties for the breaches of the obligations.

57. *Subclause (3)* requires that, before regulations that affect clause 11 (the obligation to disregard spent convictions) are made, the Governor-General must be satisfied of two matters:

- that all the spent convictions to be covered by the regulations are likely to be substantially relevant to the purpose for which they can be taken into account
- the harm that would be cause if those convictions, or convictions of that kind, had to be disregarded substantially outweighs the harm to convicted persons that disclosure would cause.

58. *Subclause (4)* provides that, before regulations that modify clause 12 (the revocation of the obligations to acknowledge spent convictions) can be made, the Governor-General must be satisfied that, when the spent convictions are disclosed, they can lawfully be taken into account by the person to whom they are to be disclosed.

59. *Subclause (5)* is a sunset clause providing that the regulations will cease to have effect after five years.

Clause 16 - Prerogative of mercy

60. This clause provides that the Act does not affect the Royal prerogative of mercy.

Clause 17 - Regulations

61. This is the usual regulations making provisions.

Schedule

62. The schedule consists of a list of convictions spent under State laws.

Clauses to be included in a Discrimination (Former Offenders) Bill

Clause

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CLAUSES

Principal object

1. The principal object of this Act is to eliminate, to the extent practicable, unjustified discrimination against persons on the ground that they have committed an offence or have been arrested for, charged with or convicted of an offence.

Interpretation

2. (1) In this Act, unless the contrary intention appears –

"accommodation" includes residential accomodation and business accommodation;

"administrative office" means –

(a) an office established by, or an appointment made under, a law of the Commonwealth or a law of a Territory;

(b) an appointment made by the Governor-General or a Minister otherwise than under a law of the Commonwealth or of a Territory (including the Northern Territory); and

(c) an appointment as a director of an incorporated company that is a public authority of the Commonwealth,

but does not include –

(d) an office of member of –

(i) the Legislative Assembly, member of the Council or Minister of the Territory within the meaning of the *Northern Territory (Self-Government) Act 1978*;

(ii) the Legislative Assembly, or the Executive Council, within the meaning of the *Norfolk Island Act 1979*; or

(e) an office or appointment within the Australian Public Service;

"club" means an association (whether incorporated or not) of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that –

(a) provides and maintains its facilities, in whole or in part, from the funds of the association; and

(b) is, under a law of a State or Territory, licensed to sell or supply intoxicating liquor for consumption on its premises;

"Commission" means the Human Rights and Equal Opportunity Commission established by the *Human Rights and Equal Opportunities Commission Act 1986*;

"commission agent" means a person who does work for another person as the agent of that other person and is remunerated, whether in whole or in part, by commission;

"committee of management", in relation to a club or a registered organisation, means the group or body of persons (however described) that manages the affairs of the club or organisation;

"Commonwealth employee" means a person who –

(a) holds an office or appointment in the Australian Public serive or is employed in a temporary capacity in a Department;

(b) holds an administrative office;

(c) is employed by a public authority of the Commonwealth;

(d) holds an office or appointment in the Commonwealth Teaching Service or is employed as a temporary employee under the *Commonwealth Teaching Service Act 1972*;

(e) is employed under the *Australian Security Intelligence Organization Act 1979*, the *Commonwealth Electoral Act 1918*, the *Supply and Development Act 1939* or the *Naval Defence Act 1910*; or

(f) is a member of the Defence Force;

"Commonwealth law" means –

(a) an Act;

(b) an Ordinance of, or an Imperial Act or an Act of a State in its application in, a Territory other than the Northern Territory or Norfolk Island; or

(c) an instrument (including a rule, a regulation and a by-law) in force under an Act or an Ordinance as mentioned in paragraph (a) or (b);

"contract worker" means a person who does work for another person under a contract between the employer of the first-mentioned person and the other person;

"de facto spouse", in relation to a person, means a person of the opposite sex to the first-mentioned person who lives with the first-mentioned person as the husband or wife of the person on a *bona fide* domestic basis, although they are not legally married to each other;

"Department" has the same meaning as it has in the *Public Service Act 1922*;

"education authority" means a body or person administering an education institution;

"education institution" means a school, college, university or other institution at which education or training is provided;

"employment" includes –

(a) part-time employment;

(b) temporary employment;

(c) work under a contract for services; and

(d) work as a Commonwealth employee;

"employment agency" means a person who or a body that, whether for payment or not –

(a) assists persons to find employment or other work; or

(b) assists employers to find employees or workers,

and includes the Commonwealth Employment Service;

"enactment" has the same meaning as in the *Human Rights and Equal Opportunity Commission Act 1986*;

"institution of tertiary education" means a university, college of advanced education, technical and further education institution or other institution at which tertiary education or training is provided;

"instrumentality of a State" means a body or authority of a State established for a public purpose by a law of a State and includes a technical and further education institution conducted by or on behalf of the Government of a State but does not include any other institution of tertiary education;

"near relative", in relation to a person, means –

(a) a parent, child, grandparent, grandchild, brother or sister of the person; or

(b) the spouse of the person, a de facto spouse of the person or a person who is traditionally married to the person for the purposes of the *Aboriginal Customary Laws (Recognition) Act 19[ ]*;

"offence" means a Commonwealth offence, a State offence or a foreign offence;

"principal" means –

(a) in relation to a commission agent – a person for whom the commission agent does work as a commission agent; and

(b) in relation to a contract worker – a person for whom the contract worker does work pursuant to a contract between the employer of the contract worker and the person;

"proposed enactment" has the same meaning as in the *Human Rights and Equal Opportunity Commission Act 1986*;

"public authority of the Commonwealth" means –

(a) a body or authority, whether incorporated or not, incorporated or established before or after the commencement of this Act for a public purpose by, or in accordance with, a law of the Commonwealth or a law of a Territory, beng a body or authority that employs staff on its own behalf; or

(b) an incorporated company or association over which the Commonwealth, or a body or authority as mentioned in paragraph (a), is in a position to exercise control;

"registered organisation" means an organisation registered under the *Conciliation and Arbitration Act 1904*;

"services" includes –

(a) services relating to banking, insurance and the provision of grants, loans, credit or finance;

(b) services relating to entertainment, recreation or refreshment;

(c) services relating to transport or travel;

(d) services of a kind provided by members of a profession or trade; and

(e) services of the kind provided by government, a government authority or a local government body;

"State", except in subsections 6(9) and (10), includes the Northern Territory;

"technical and further education institution" has the same meaning as in the *Commonwealth Tertiary Education Commission Act 1977*;

"Territory", except in subsection 6(10), does not include the Northern Territory.

(2) A reference in this Act to doing an act includes a reference to failing or refusing to do an act.

Persons arrested or charged

3. (1) A reference in this Act to a person who has been arrested in relation to an offence includes a reference to a person who has been arrested in relation to the offence but has not been charged with the offence.

(2) A reference in this Act to a person who has been charged with an offence includes a reference to a person who has been charged with the offence but has not been convicted of the offence.

Discrimination contrary to this Act

4. (1) Where –

(a) for a prescribed reason, a person treats a person (in this Act called the former offender) less favourably than, in circumstances that are the same or are not materially different, he or she treats or would treat a person who is not a former offender; and

(b) the less favourable treatment is not reasonable, having regard to the circumstances of the case,

the first-mentioned person discriminates contrary to this Act against the former offender.

(2) "Prescribed reason", in relation to treatment of a former offender, means one or more of the following reasons:

(a) the commission by the former offender of an offence or of a particular offence;

(b) the conviction of the former offender for an offence or for a particular offence;

(c) the arrest of the former offender for an offence or a particular offence;

(d) the former offender being charged with an offence or with a particular offence;

(e) a characteristic that appertains generally to persons –

(i) who have committed an offence or an offence of the kind concerned;

(ii) who have been convicted of an offence or of an offence of the kind concerned; or

(iii) who have been arrested for, or charged with, an offence or an offence of the kind concerned;

(f) a characteristic that is generally imputed to persons referred to in paragraph (e).

Act done for 2 or more reason

5. A reference in section 4 to doing an act for a particular reason includes a reference to doing the act for 2 or more reasons that include the particular reason, whether or not the particular reason is the dominant, or a substantial, reason for doing the act.

Application of Act

6. (1) In this section, "Australia" includes the external Territories.

(2) Subject to the succeeding provisions of this section, this Act applies throughout Australia.

(3) This Act has effect in relation to acts done within a Territory.

(4) Sections 10, 11 and 12 have effect in relation to discrimination against –

(a) a Commonwealth employee, in connection with his or her employment as a Commonwealth employee; and

(b) a person seeking to become a Commonwealth employee, in connection with that employment.

(5) Section 13 has effect in relation to discrimination by an authority or body in relation to the exercise of a power under a Commonwealh law to confer, renew, extend, revoke or withdraw an authorisation or qualificaton.

(6) [The Part making discrimination unlawful] has effect in relation to acts done by or on behalf of –

(a) the Commonwealth, or the Administration of a Territory; or

(b) a body or authority established for a public purpose by, or in accordance with, a law of the Commonwealth or a law of a Territory,

in the exercise of a power conferred by a law of the Commonwealth or a law of a Territory.

(7) [The Part making discrimination unlawful] has effect in relation to discrimination by a foreign corporation, or a trading or financial corporation formed within the limits of the Commonwealth, or by a person in the course of the person's duties or purported duties as an officer or employee of such a corporation.

(8) Without limiting subsection (7), that Part has effect in relation to discrimination by a trading or financial corporation formed within the limits of the Commonwealth, or by a person in the course of the person's duties or purported duties as an officer or employee of such a corporation, to the extent that the discrimination takes place in the course of the trading activities of the trading corporation or the financial activities of the financial corporpation, as the case may be.

(9) [The Part making discrimination unlawful] has effect in relation to discrimination in the course of, or in relation to, the carrying on of the business of –

(a) banking, other than State banking not extending beyond the limits of the State concerned; or

(b) insurance, other than State insurance not extending beyond the limits of the State concerned.

(10) [The Part making discrimination unlawful] has effect in relation to discrimination in the course of, or in relation to, trade or commerce –

(a) between Australia and a place putside Australia;

(b) among the States;

(c) between a State and a Territory; or

(d) betwen 2 Territories.

(11) [The Part making discrimination unlawful] has effect in relation to discrimination within Australia involving persons, things or matters outside Australia.

Operation of State and Territory laws

7. (1) A reference in this section to this Act is a reference to this Act as it has effect by virtue of any of the provisions of section 6.

(2) It is the intention of the Parliament that this Act is not to limit or exclude the operation of a law of a State or Territory that is capable of operating concurrently with this Act.

(3) Where –

(a) a law of a State or Territory deals with a matter dealt with by this Act; and

(b) a person has made a complaint, instituted a proceeding or taken any other action unde that law in respect of an act or omission in respect of which the person would, but for this subsection, have been entitled to make a complaint under this Act,

the person is not entitled to make a complaint or institute a proceeding under this Act in respect of the act or omission.

(4) Where an act or omision by a person constitutes an ofence against or arising under a law of a State or Territory and an offence against this Act, the person may be prosecuted and convicted under that law or under this Act, but nothing in this Act makes the person liable to be punished more than once in respect of the same act or omission.

Extent to which Act binds Crown and State instrumentalities

8. (1) This Act binds the Crown in right of the Commonwealth and of Norfolk Island.

(2) Except as expressly provided by this Act, this Act does not bind the Crown in right of a State.

(3) Nothing in this Act makes the Crown liable to be prosecuted for an offence.

(4) Section 10 does not apply in relation to employment by an instrumentality of a State.

Convictions

9. This Act applies to and in relation to all convictions, including convictions that occurred before the commencement of this Act.

DISCRIMINATION

Applicants and employees

10. (1) It is unlawful for an employer to discriminate contrary to this Act against a person –

(a) in the arrangements made for the purpose of determining who should be offered employment;

(b) in determining who should be offered employment; or

(c) in the terms or conditions on which employment is offered.

(2) Paragraphs (1)(a) and (b) do not apply to discrimination in connection with employment to perform domestic duties on the premises on which the employer resides.

(3) It is unlawful for an employer to discriminate contrary to this Act against a person who is employed by the employer –

(a) in the terms or conditions of employment that the employer affords the person;

(b) by denying the person access, or by limiting the person's access, to an opportunity for promotion, transfer or training, or to any other benefit, associated with employment;

(c) by dismissing the person from employment; or

(d) by subjecting the person to any other detriment in relation to the employment.

Commission agents

11. (1) It is unlawful for a principal to discriminate contrary to this Act against a person –

(a) in the arrangements the principal makes for the purpose of determining who should be engaged as a commission agent;

(b) in determining who should be engaged as a commission agent; or

(c) in the terms or conditions on which the person is engaged as a commission agent.

(2) It is unlawful for a principal to discriminate contrary to this Act against a person who is a commission agent of the principal –

(a) in the terms or conditions that the principal affords the person as a commission agent;

(b) by denying the person access, or by limiting the person's access, to an opportunity for promotion, transfer or training, or to any other benefit associated with the position as a commission agent;

(c) by terminating the agency; or

(d) by subjecting the person to any other detriment in relation to the position as a commission agent.

Contract workers

12. It is unlawful for a principal to discriminate contrary to this Act against a person who is a contract worker –

(a) in the terms or conditions on which the principal allows the person to work;

(b) by not allowing the person to work or to continue to work;

(c) by denying the person access, or by limiting the person's access, to a benefit associated with the work in respect of which the contract with the employer is made; or

(d) by subjecting the person to any other detriment in relation to the work in respect of which the contract with the employer is made.

Qualifying bodies

13. It is unlawful for an person who, or an authority or body that, is empowered to confer, renew, extend, revoke or withdraw an authorisation or qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation to discriminate contrary to this Act against a person –

(a) by refusing or failing to confer, renew or extend the authorisation or qualification;

(b) in the terms or conditions on which it is prepared to confer the authorisation or qualifications or to renew or extend the authorisation or qualification; or

(c) by revoking or withdrawing the authorisation or qualification or by varying the terms or conditions upon which it is held.

Registered organisations

14. (1) It is unlawful for a registered organisation, the committee of management of a registered organisation or a member of the committee of management of a registered organisation to discriminate contrary to this Act against a person –

(a) by refusing or failing to accept the person's application for membership; or

(b) in the terms or conditions on which the organisation is prepared to admit the person to membership.

(2) It is unlawful for a registered organisation, the committee of management of a registered organisation or a member of the committee of management of a registered organisation to discriminate contrary to this Act against a person who is a member of the organisation –

(a) by denying the person access, or by limiting the person's acess, to a benefit provided by the organisation;

(b) by depriving the person of membership of the organization or by varying the terms of membership of the organization; or

(c) by subjecting the person to any other detriment in relation to membership of the organization.

Employment agencies

15. It is unlawful for an employment agency to discriminate contrary to this Act against a person –

(a) by refusing to provide the person with any of its services;

(b) in the terms or conditions on which it offers to provide the person with any of its services; or

(c) in the manner in which it provides the person with any of its services.

Education

16. (1) It is unlawful for an education authority to discriminate contrary to this Act against a person –

(a) by refusing or failing to accept the person's application for admission as a student in the education institution administered by the education authority; or

(b) in the terms or conditions on which it is prepared to admit the person as a student in the education institution administered by the education authority.

(2) It is unlawful for an education authority to discriminate contrary to this Act against a person who is a student enrolled at an education institution administered by the education authority –

(a) by denying the person access, or by limiting the person's access, to a benefit provided by the education authority at the education institution;

(b) by expelling the person from the education institution; or

(c) by subjecting the person to any other detriment in relation to the education provided at the education institution.

(3) This section binds the Crown in right of a State and of the Northern Territory.

Goods, services and facilitites

17. (1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate contrary to this Act against a person –

(a) by refusing to provide the person with any of those goods or services or by refusing to make any of those facilities available to the person;

(b) in the terms or conditions on which the first-mentioned person provides the second-mentioned person with those any of goods or services or makes any of those facilities available to that person; or

(c) in the manner in which the first-mentioned person provides the second-mentioned person with any of those goods or services or makes any of those facilities available to that person.

(2) Where, in relation to an act or omission, a provision of this Act applies or would, but for the operation of some other provision of this Act, apply, subsection (1) does not apply in relation to the act or omission.

(3) This section binds the Crown in right of a State and of the Northern Territory.

Accommodation

18. (1) It is unlawful for a person, whether as principal or agent, to discriminate contrary to this Act against a person –

(a) by refusing the person's application for accommodation;

(b) in the terms or conditions on which accommodation is offered to the person; or

(c) by deferring the person's application for accommodation or by according to the person a lower order of precedence in a list of applicants for that accommodation.

(2) It is unlawful for a person, whether as principal or agent, to discriminate contrary to this Act against a person –

(a) by denying the person access, or by limiting the other person's access, to a benefit associated with accommodation occupied by that person;

(b) by evicting the person from accommodation occupied by that person; or

(c) by subjecting the person to any other detriment in relation to accommodation occupied by that person.

(3) Subsections (1) and (2) do not apply to the provision of accomodation in premises if –

(a) the person who provides, or proposes to provide, the accomodation, or a near relative of that person, resides, and intends to continue to reside, on the premises; and

(b) the accomodation provided on those premises is for no more than 3 persons, other than a person referred to in paragraph (a), or a near relatives of such a person.

(4) This section binds the Crown in right of a State and of the Northern Territory.

Land

19. (1) It is unlawful for a person, whether as principal or agent, to discriminate contrary to this Act against a person –

(a) by refusing or failing to dispose of an estate or interest in land to the person; or

(b) in the terms or conditions on which an estate or interest in land is offered to the person.

(2) Subsection (1) does not apply in relation to a disposal by way of gift or by testamentary disposition.

(3) This section binds the Crown in right of a State and of the Northern Territory.

Clubs

20. (1) It is unlawful for a club, the committee of management of a club or a member of the committee of management of a club to discriminate contrary to this Act against a person who is not a member of the club –

(a) by refusing or failing to accept the person's application for membership of the club; or

(b) in the terms or conditions on which the club is prepared to admit the person to membership of the club.

(2) It is unlawful for a club, the committee of management of a club or a member of the committee of management of a club to discriminate contrary to this Act against a person who is a member of the club –

(a) in the terms or conditions of membership of the club;

(b) by refusing or failing to accept the person's application for a particular class or type of membership of the club;

(c) by denying the person access, or by limiting the person's access, to a benefit provided by the club;

(d) by depriving the person of membership of the club or by varying the terms of the person's membership of the club; or

(e) by subjecting the person to any other detriment in relation to membership of the club.

Administration of Commonwealth laws and programs

21. (1) It is unlawful for a person who performs a function or exercises a power under a Commonwealth law or for the purposes of a program conducted by or on behalf of the Commonwealth, or has any other responsibility for the administration of such a law or program, to discriminate contrary to this Act against a person in the performance of the function, the exercise of the power or the fulfilment of the responsibility.

(2) This section binds the Crown in right of a State and of the Northern Territory.

Voluntary bodies

22. (1) Sections 10 to 21 (inclusive) do not apply to discrimination by a voluntary body in connection with –

(a) membership of the body; or

(b) the provision of benefits, facilities or services to a member of the body.

(2) "Voluntary body" means an association or other body (whether incorporated or not) that does not engage in its activities for the purpose of making a profit, but does not include –

(a) a club;

(b) a registered organisation;

(c) a body established by a law of the Commonwealth, of a State or of a Territory; or

(d) an association that provides grants, loans, credit or finance to its members.

Acts done under statutory authority

23. (1) Sections 10 to 21 (inclusive) do not apply to discrimination required by –

(a) a provision of a Commonwealth law that is in force at the commencement of this Act;

(b) a provision of an Act of a State or of the Northern Territory or Norfolk Island, or of an instrument of a legislative character made, given or issued under such an Act, that is in force at the commencement of this Act;

(c) a determination or decision of the Commission; or

(d) an order of a court.

(2) Paragraphs (1)(a) and (b) shall, except to the extent that regulations made for the purposes of this subsection otherwise provide, cease to be in force at the expiration of 2 years after the commencement of this Act.

(3) Regulations made for the purposes of subsection (2) may provide generally in relation to the application of paragraphs (1)(a) and (b) or may make provision in relation to the application of paragraph (1)(a) or (b) in relation to specified legislation.

(4) Where paragraph (1)(a) or (b) ceases, by virtue of subsection (2) or of regulations made under that subsection, to be in force, whether generally or in relation to particular legislation, that paragraph shall, to the extent that it so ceases to be in force, be deemed for all purposes to have been repealed by an Act other than this Act.

Law enforcement, &c.

24. (1) Sections 10 to 21 (inclusive) do not apply to anything done by a court or a tribunal –

(a) when applying the laws of evidence; or

(b) when imposing a penalty on a person convicted of an offence.

(2) Sections 10 to 21 (inclusive) do not apply to anything done by a public authority of the Commonwealth or by an instrumentality of a State in exercising a power in relation to the imprisonment of, or other penalty imposed by or in accordance with law on, a convicted person.

(3) Sections 10 to 21 (inclusive) do not apply to anything done by the Director of Public Prosecutions when deciding whether to prosecute a convicted person and the charge to be preferred.

Declarations by Commission

25. (1) The Commission may, on application by a person, by instrument in writing, declare that a specified act does not constitute discrimination contrary to this Act.

(2) An application may be made to the Administrative Appeals Tribunal for review of a decision of the Commission under subsection (1).

(3) "Decision" has the meaning it has in the *Administrative Appeals Tribunal Act 1975*.

(4) The Commission shall, not later than one month after it makes the declaration, cause to be published in the *Gazette* a notice of the declaration –

(a) setting out its findings on material questions of fact and referring to the evidence on which the findings were based;

(b) setting out the reasons for the decision; and

(c) containing a statement to the effect that, subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the Administrative Appeals Tribunal for a review of the decision to which the notice relates by or on behalf of any person or persons whose interests are affected by the decision.

(5) Non-compliance with subsection (4) does not affect the validity of a decision.

Effect of exemptions

26. Sections 10 to 21 (inclusive) do not make it unlawful for a person to do an act that has been declared under section 25, not to constitute discrimination contrary to this Act.

OTHER PROVISIONS

Function of Human Rights and Equal Opportunity Commission

27. The Commission's functions include the following:

(a) to inquire into alleged infringements of [the Part making discrimination unlawful] and –

(i) to try, by conciliation, to settle the matters that gave rise to the inquiry; or

(ii) if the Commission considers that it is not possible so to settle those matters – to make determinations on those matters;

(b) to inquire into, and make determinations on, matters referred to it by the Minister;

(c) to exercise the power conferred on it by section 25;

(d) to promote an understanding and acceptance of, and compliance with, this Act;

(e) to undertake research and education programs, and other programs, on behalf of the Commonwealth, to promote the objects of this Act;

(f) to examine enactments, and (when requested to do so by the Minister) proposed enactments, to ascertain whether they are, or would be, inconsistent with or contrary to the object of this Act and to report to the Minister the results of any such examination;

(g) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, to further the object of this Act;

(h) to prepare, and to publish as the Commission considers appropriate, guidelines for the avoidance of discrimination contrary to this Act;

(i) where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that relate to discrimination contrary to this Act;

(j) to do anything incidental or conducive to the performance of any of the preceding functions.

Complaints

28. (1) A complaint in writing alleging that a person has done an act that constitutes discrimination contrary to this Act may be lodged with the Commission by –

(a) a person aggrieved by the act, on that person's own behalf or on behalf of the person and one or more other specified persons aggrieved by the act; or

(b) a registered organisation of which a person aggrieved by the act is a member, on behalf of the person, those persons or on behalf of the person and one or more other specified members of the organisation who are aggrieved by the act.

(2) "Registered organisation" includes a trade union within the meaning of any State Act or law of a Territory, an organisation of employers registered under such an Act or law and any other similar body, whether so registered or not.

Appendix B

Dissent – Mr George Zdenkowski

Length of prescribed period

1. *Five years.* The proposed prescribed period for adult offenders of 10 years is too conservative. Such scientific research as is available[1] indicates that the majority of ex-prisoners who are going to reoffend will do so within a period of three years after release. The key risk period is certainly in the period immediately following release.[2] It is acknowledged that the concept of recividism is very complex and no simple conclusions can be drawn from the scientific research in terms of the appropriate prescribed period. However, if a value judgment, as it decidedly is, is to be made about an appropriate waiting period and bearing in mind the desirability of a single waiting period as proposed in paragraph 59, the appropriate time for adult offenders is five years. This was the approach taken by the New Zealand Penal Policy Review Committee.[3] A number of submissions in response to the Commission's discussion paper regarded the proposed 10 year period as too long.[4] The only qualification proposed in relation to this waiting period is that, in the case of non-custodial sentences, the waiting period for adult offenders should be five years from the date of conviction or upon satisfaction of the non-custodial order, whichever is the later. This qualification should be carefully distinguished from the majority recommendation which refers to the satisfaction of order criterion as the appropriate *commencement time,* with quite different results. The issue of the appropriate commencement time is discussed below. The argument for a conservative waiting period may have more force if the effect of a spent conviction is absolute denial of the conviction for all purposes and a universal prohibition on access to this information. However the proposed scheme is far removed from such an absolutist approach. It must be borne in mind that the proposed spent conviction scheme will have very substantial exemption provisions so that most agencies which are

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[1] See ALRC DP 25 App B.

[2] See also transcript, Public Hearings, 1 September, 1986, Melbourne, 76–76a.

[3] NZDP App, para 442–5, see also NZDP para 5.25-5.31. However it should be noted that a distinction was drawn between protection from republication (five years) and protection against discrimination (ten years).

[4] The NSW Privacy Committee regarded five years as an appropriate period for certain purposes. Mr I Potas, Criminologist at the Australian Institute of Criminology, suggested that the waiting period for persons receiving a non-custodial sentence should be five years or the expiry date of the order, whichever is later: *Submission 42* (17 April 1986). The Humanist Society of Victoria argued that: 'The 10 year waiting period . . . is far too long and daunting a prospect for someone who hopes to reenter society and regain full citizenship . . . We suggest a 2 year period for minor convictions and a 4 year period to have a major conviction spent (or not) on application.' C Duncan *Submission 38* (10 March 1986).

either recognised in the statutory scheme itself (or subsequently recognised pursuant to applications made under the proposed exemption scheme) who have a legitimate interest according to public policy in having access to spent convictions will not be denied this information. This is a powerful argument against unnecessarily extending the prescribed period. A long waiting period in these circumstances entails the distinct danger of the proposed scheme becoming marginal or irrelevant to the interests of the person convicted, thus undermining the whole purpose of the exercise. It is important to spell out, yet again, the agencies who will have continued access to spent conviction information to underline the point:

- police
- prosecution authorities
- courts for sentencing purposes
- any person or organisation granted an exemption by the Attorney-General pursuant to the proposed exemption scheme (this is likely to include, for example, prison authorities, agencies and organisations employing persons who teach or supervise young children, private security organisations)
- any person or organisation who is authorised expressly by law to make disclosure as provided for in the Spent Convictions Ordinance.

In other words, a reduction of the waiting period could materially benefit the person with the record of conviction without damaging the public interest in the availability of such information to particular persons or organisations who have, or can subsequently establish, a legitimate claim to such information.

2. *Juveniles.* The prescribed period in respect of convictions relating to children (not dealt with as adults) should be two years. However, in the case of non-custodial sentences the period should be two years from the date of conviction or upon satisfaction of the relevant order whichever is the later.

Commencement of prescribed period

3. *The preferred option.* If a five year waiting period were to be adopted in respect of convicted adult offenders the commencement time for the prescribed period should be as follows:

- child offenders (not dealt with as adults): date of conviction (for non-custodial offenders), date of satisfaction of order[5] (for fixed term of imprisonment) and date of release (for indeterminate periods of imprisonment)
- for adult offenders[6] sentenced to penalties other than imprisonment: date of conviction
- for adult offenders[7] sentenced to a term of imprisonment (including periodic detention): date of satisfaction of the order

[5] Satisfaction of order is intended to refer to the date of completion of head sentence in respect of fixed terms of imprisonment.

[6] Including children dealt with as adult offenders.

[7] Including children dealt with as adult offenders.

- for adult offenders[8] sentenced to an indeterminate term of imprisonment (that is, life sentences and persons sentenced to the governor's pleasure): date of release

4. *Non-custodial sentences.* The date of conviction criterion in respect of non-custodial orders is readily ascertainable, easily intelligible and fairer than a satisfaction of order criterion. The date of conviction was the commencement time proposed in DP 25. Although different views were expressed in submissions to the Commission concerning the prescribed period, no adverse comment was received as to the date of conviction as the proposed commencement time in respect of convictions resulting in non-custodial orders. In relation to non-custodial sentences it could significantly delay the prescribed period if the commencement date were – as proposed in the majority view – the date of satisfaction of the relevant order. In practical terms, this will mean that there will be cases in which time will not commence to run in relation to the waiting period for some two or three or in some cases five years following the date of conviction. It is not uncommon for community-based orders of two or three years to be handed down by the courts. The first national census of community-based corrections in Australia indicated there are almost three times as many Australians serving non-custodial sentences as custodial sentences. Non-custodial sentences of one to three years for adults are most common. Two-thirds of the community-based orders were for probation.[9] The orders would not be satisfied until the relevant term expired. In rare cases, non-custodial orders can be as long as five years. In almost all cases the order would be satisfied within five years of conviction. However, in the rare cases where the period of the order equalled or exceeded 5 years, this would be accommodated by the qualification referred to above according to which the waiting period expired upon satisfaction of the relevant order. It is unlikely that the community would accept a conviction becoming spent prior to the satisfaction of the order. However, in the case where a long (by definition, in excess of five years) period is involved in discharging a non-custodial disposition, there would be no difficulty in the community accepting the contemporaneous consequence of that conviction becoming spent. It should be recalled that an adult offender will only obtain the benefit of the spent convictions regime if he or she has not re-offended (in the relevant sense) during the five year (or longer) waiting period. On the other hand, failure to adopt the suggested commencement criterion in relation to non-custodial orders and to adopt a satisfaction of order criterion as the *commencement* of the waiting period can lead to very harsh results. A recent decision in the Victorian Supreme Court imposed a five year community-based order.[10] In this case, the combined effect of the majority view in relation to the prescribed period and the proposed time of commencement would entail a period of fifteen years from the date of conviction before the conviction became spent in respect of an offence which the court deemed could be dealt with by way of a non-custodial order. In other words, to opt for a date of satisfaction of order criterion as the time of commencement is to build in a potentially substantial additional waiting period to the prescribed period which itself, as previously mentioned, is already a conservative term.

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[8] Including children dealt with as adult offenders.

[9] Walker and Biles 1987.

[10] *Yeo,* unreported decision of Nathan, J, Victorian Supreme Court, 2/6/86.

5. *Pecuniary penalty.* Obviously this additional period does not apply in some cases such as the imposition of a pecuniary penalty which is paid immediately upon conviction. However even where there is no guaranteed additional waiting time there may be a potential element. For example, in the case of a fine the date of satisfaction of order criterion would operate from the date of payment of the penalty. In cases where time was allowed to pay the penalty, the prescribed period would not commence until the period allowed (which may range from say one month to 12 months) had elapsed, unless earlier payment was made. Likewise, if there is default in payment the satisfaction of the original order could be substantially delayed until payment was received or the person was imprisoned for default. In the latter case it is not unusual for a period of one or two years to elapse before the warrant is issued and executed. The available research[11] demonstrates that a substantial number of people who default in payment of fines do so because of inability to pay. A prescribed period regime which adopts the satisfaction of order criterion will discriminate unfairly against people who require time to pay as well as those who default in payment through no fault of their own.[12]

6. *Fixed prison terms.* The proposal that the waiting period for persons sentenced to fixed prison terms commence on the date of satisfaction of the order,[13] is predicated on the assumption that a five year prescribed period is adopted for adult offenders and a two year period is adopted for child offenders. A cogent argument can be made out for the release date[14] as the appropriate commencement date as this is the time at which the offender resumes life in the community. Information as to release dates is also readily ascertainable from relevant authorities. However, the adoption of a release date criterion could, in extreme cases where the period between release and the expiry of the head sentence is very long, lead to a conviction becoming spent prior to or shortly after the head sentence was completed. It is unlikely that the community would tolerate a conviction becoming spent before the head sentence expired. For this reason a satisfaction of order criterion is recommended. However, the adoption of a conservative commencement date fortifies the argument in favour of a short waiting period. The selection of the date of satisfaction of order criterion in relation to fixed prison terms will entail, having regard to the practical realities of conditional release, that the time which a convicted person must wait *following release* before that conviction becomes spent will be well in excess of five years. Of course, the waiting period for persons sentenced to imprisonment from the actual date of conviction will be even longer. To take a concrete example, if the prescribed period is five years and a person is sentenced to a term of ten years imprisonment he or she would have to wait a period of 15 years from the date of conviction which itself may often be one or two years after the

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[11] Challinger 1983; Dixon Report; Houghton 1984; Warner 1984; Weber 1984.

[12] It is extremely unlikely that an order to pay a fine would not be satisfied (either by payment or the relevant default sanction) in less than five years. However, there is no reason why the waiting period should not be five years or upon satisfaction of the order, whichever is later, as suggested above for other non-custodial penalties.

[13] Defined as completion of the head sentence.

[14] In the case of fixed prison terms it is extremely rare for a person not to be released conditionally or unconditionally before the effluxion of the head sentence.

date of the actual offence. If the person is conditionally released after say four years imprisonment there will be a waiting period of 11 years (from the date of release) before the conviction becomes spent. (If a prescribed period of ten years is adopted the respective periods become 20 years and 16 years.)

7. *Indeterminate sentences.* The prescribed period for indeterminate sentences of imprisonment (such as life imprisonment, governor's pleasure) should commence on the date of release. This is broadly accepted by the majority members. However, the majority recommendation is qualified so that this commencement time only applies in the event of unconditional release. This is unsatisfactory both on the grounds of uncertainty and unfairness. It is well-known that release decisions in respect of persons sentenced to life imprisonment and the governor's pleasure are, quite properly, cautiously administered. Moreover, conditions that are attached to release may not lend themselves to performance within a specified time. For example, it is not uncommon to prohibit the consumption of alcohol. If there is no time limit and an offender has been conditionally released on licence from a life sentence, for example, the prescribed period will never, under the terms of the majority proposal, commence to run. This renders the comprehensiveness of the spent convictions scheme a sham. The scheme must not only apply in theory but also be capable of applying in practical terms, to all offenders. In cases where a time limit is imposed in relation to specified conditions of release, the majority proposal will lead to unnecessary uncertainty and complexity. Parole authorities will presumably be required to monitor the expiration of the time and satisfactory performance of the conditions as well as to record this information. On the other hand, little is lost and a great deal is gained in terms of simplicity and fairness if conditional release is placed on the same footing as unconditional release. Accordingly, it is suggested that the commencement date for the prescribed period be the date of release, whether conditional or unconditional. For reasons already referred to, the prescribed period in respect of indeterminate sentences for adult offenders should be five years rather than ten years.

8. *Summary of proposed scheme.*

	Prescribed Period	*Commencement date*
Offender dealt with as a child		
Conviction resulting in non-custodial penalty	2 years or satisfaction of order, whichever is later	Conviction
Conviction resulting in imprisonment for fixed term	2 years	Satisfaction of order
Conviction resulting in imprisonment for indeterminate term	2 years	Release

Adult offender (including child dealt with as an adult)

Conviction resulting in non-custodial penalty	5 years or satisfaction of order, whichever is later	Conviction
Conviction resulting in fixed term of imprisonment	5 years	Date of satisfaction of order
Conviction resulting in indeterminate sentence	5 years	Release

This scheme is preferable to that proposed by the majority because it will result in less hardship to convicted persons while preserving the interests of all those who require access to information relating to spent convictions.

9. *Dangers of proposed exemption mechanism.* The provision for exemptions to spent convictions schemes has been aptly described by the New Zealand Penal Policy Review Committee as 'a slippery slope'.[15] The same committee commented that 'The United Kingdom scheme has been rendered practically useless by the prescribing of a large number of exceptions, principally in the employment context, undoubtedly the area where the scheme would be most beneficial.[16] Given the exceptions to the scheme proposed in the draft legislation, and the conservative waiting periods prescribed, extreme caution should be exercised in the creation of a further exemption mechanism. The mechanism proposed – delegated legislation – is not a satisfactory mode of achieving this objective. It is an invitation to disembowel the scheme.

10. *Preferred alternative.* If exemptions are to be made, the responsible Minister (probably the Attorney-General) should have the benefit of expert advice in relation to any exemption application. It is proposed that applications should be made to a National Criminal Records Consultative Council (NCRCC) and that the Attorney-General shall not exempt any person or organisation from the proposed legislation except on the recommendation of this body. The proposed composition and functions of this Council are discussed at paragraphs 16ff. Its particular role in the operation of a proposed exemption scheme will first be considered.

11. *Operation of alternative exemption scheme.* It is suggested that the following scheme would be a more satisfactory basis for granting exemptions than that proposed by the majority. On application made to it in the prescribed form, the NCRCC, if it is satisfied that the applicant has a legitimate and sufficient purpose for being exempted, may recommend to the Attorney-General that the applicant be exempted from the relevant provision of the spent convictions legislation. In considering an application, the NCRCC ought to be able to make such enquiries and investigations, and take into account such considerations in determining the application as seem appropriate. In

[15] NZDP para 5.33.
[16] ibid.

considerating exemption applications the NCRCC shall be guided by the criteria set out in the draft Bill that

- all the spent convictions concerned are likely to be substantially relevant to the exercise of the power, or the performance of the duty or function, for which they may be taken into account
- the harm that would be caused if the spent convictions of that kind had to be disregarded substantially outweighs the harm to convicted persons that would be caused by taking them into account
- regulations should not be made requiring that a spent conviction be acknowledged unless the spent convictions concerned could be lawfully taken into account by the person to whom they are to be acknowledged.

The NCRCC should have the power to make such recommendations to the Attorney-General as to the terms and conditions under which an application for exemption should be granted, the circumstances in which the exemption should apply, the period for which it should be specified to apply, the activities to which it should apply, and the offences to which it should apply. These recommendations should be made public. The Attorney-General shall, under this scheme, after considering the recommendations of the NCRCC, determine whether or not an exemption should be granted and, if so, whether it should be subject to any conditions. The Attorney-General shall only grant an exemption if this has been recommended by the NCRCC but shall retain the right to veto NCRCC recommendations for exemption and impose conditions as to the grant of exemption additional to those recommended by the NCRCC.

12. *Publicity as to exemptions granted.* It is proposed that the Attorney-General shall issue an Annual Report which shall refer to, in relation to the year under report

- the number of exemptions issued
- the names of the applicants granted exemptions
- the purposes for which each exemption has been granted and issued to each applicant for exemption
- the conditions (if any) attached to each exemption and issued to an applicant for an exemption.

The Annual Report shall also refer to a list of current exemption holders, the categories of offences in relation to which the exemptions apply and the terms and conditions (if any) under which the exemptions are granted.

National Criminal Records Consultative Council

13. *Need for a national policy.* This Report has identified a number of areas where important work needs to be done in relation to criminal record information on a joint basis by the Commonwealth, States and Territories. The majority members have not, however, made any recommendations as to a means of coordinating national policy. Areas in which a national policy is required include:

1. To what persons and organisations ought criminal record information held by primary criminal record keepers, in particular the Police, be made available?

2. What classes of information should be made available to the particular persons or organisations entitled to receive criminal record information from primary criminal record keepers?
3. What standards should be applied to the processes of disclosure and use of criminal record information, particularly as between Police and other primary record keepers on the one hand, and persons and organisations seeking to use criminal record information in their decision making processes (secondary record keepers) on the other?
4. What particular persons and organisations ought to be exempted from the requirements of the spent convictions scheme, so that they might continue to demand disclosure of information about convictions which have become spent, and use such information in their decision making processes?
5. In relation to each class of person and organisation exempted from the requirements of the spent convictions scheme, precisely what classes of information ought to continue to be made available to, and used by them?
6. What conditions ought to be applied to exempt classes of record keepers and decision-makers under a spent conviction scheme in their handling of information about spent convictions, and in particular, what information privacy principles are appropriate in this context?

For reasons already explained, this Report is primarily concerned with issues 4, 5 and 6.

14. *National advisory body.* At present, policy on questions 1, 2 and 3, is left entirely to the discretion of the various Australian police forces. Such control as there is, is generally achieved through general orders and instructions emanating from the various Commissioners of Police. There has been no attempt to achieve a national policy. A national body should be established to address these issues. Calls for such a body have previously been made principally by the Committee on Computerisation of Criminal Data[17] and by this Commission in its report on Criminal Investigation.[18] Neither call was heeded. But the social climate and technological environment have changed enormously since these calls were first made.[19] The prediction that criminal record-keeping in Australia would be conducted on a coordinated, integrated, computerised and national basis has now almost come to pass. A National Exchange of Police Information Management Group (NEPIMG) has been established to coordinate and oversee arrangements for exchange of police information on a national basis and to facilitate lawful access to information currently held by each jurisdiction for law enforcement purposes in Australia.[20] These developments make the establishment of a

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[17] Ward Report.

[18] ALRC 2 para 235–40.

[19] The Ward Report was in 1973 and ALRC 2 in 1975.

[20] The NEPIMG comprises a representative from Australian Federal Police, all state and territory police forces, National Police Research Unit, Australian Bureau of Criminal Intelligence and Department of Special Minister of State, the latter representing all other Commonwealth agencies approved to under the system.

national consultative council concerned with issues such as those raised in the questions set out above, not only desirable, but necessary.

15. *Multi-disciplinary expertise for complex problem-solving.* The need for a national consultative body to address the criminal records problem is present and clear – even without the addition to that problem of the concept of a 'spent conviction'. But the enactment in each jurisdiction of spent convictions legislation (the major recommendation of this Report) will add a further level of complexity to the criminal records problem, in the resolution of which an expert, multi-disciplinary body is clearly desirable. In particular, there will need to be exemptions so that certain classes of record keepers and decision makers will be able to continue to obtain and use certain defined categories of criminal record information, notwithstanding the fact that for other purposes, the convictions which comprise that information have become spent. And the continued availability and use of such information by exempt classes of record keepers and decision makers will have to be according to appropriately formulated information privacy principles which meet the special privacy problems created by exemption from the general spent convictions scheme. In other words, while the police have a clear interest in being involved in the processes of answering questions 4, 5 and 6 above, they are not the only bodies with such an interest. And there are outside bodies with expertise directly relevant to appropriate resolution of those questions. Hence the need for a multi-disciplinary consultative body, to address all six questions.

Functions and composition of the NCRCC

16. *NCRCC's role in spent convictions.* The mechanism for exemption from the operation of the spent convictions scheme ought to be by instrument in writing, under the hand of the Attorney-General after he or she has received advice on the application from the proposed NCRCC. Such a mechanism is necessary because of the need for a speedy national response to an application for exemption by any particular person or organisation in a State or Territory. The delegated law making process would be too slow and cumbersome in the context of exemption from a spent convictions scheme. It is also desirable for the Attorney to have independent expert advice in this highly sensitive area, for the reasons referred to earlier. In summary, the role of the NCRCC, in the spent convictions context, would be to receive applications for exemption, to consider them, and to recommend to the Attorney-General whether they should be granted or refused. Recommendations that applications for exemptions be granted would be accompanied by recommendations as to appropriate conditions and standards to be observed by the successful applicants in receiving, using and storing public spent convictions information thereby made available to them. An appropriate level of public accountability would be achieved if the spent convictions legislation imposed upon the Attorney-General a statutory obligation to table in each House of Parliament in each year a report setting out the number of exemptions issued, the names of the applicants granted exemptions, the purposes for which exemptions were granted, and the conditions, if any, attached to each exemption; and an obligation to publish each year a list of current exemption holders, the categories of offences in relation to which their exemptions apply and the terms and conditions (if any) under which their exemptions were granted.

17. *NCRCC's role in criminal record-checking generally.* The NCRCC would perform a similar advisory role in the general context of criminal record information processing, use and disclosure. The NCRCC would develop standards and make recommendations about the regulation of storage and dissemination of criminal record information. Another function of the NCRCC would be to educate the public, record keepers, decision makers, and people with criminal records, about their rights and obligations under the spent convictions scheme.

18. *NCRCC's role in anti-discrimination proposals.* The Commission has already recommended that the Human Rights and Equal Opportunity Commission should have primary responsibility for issue of discrimination on the ground of criminal record. These responsibilities are detailed in the Report. There is however likely to be some overlap between the work of the NCRCC and the Human Rights and Equal Opportunity Commission (HREOC). For example questions of exemptions for certain employers from provisions of the spent conviction scheme will have a very close bearing on the reasonableness of discrimination by an employer on the basis of a spent conviction. Furthermore, neither the discrimination provisions, nor the spent conviction provisions apply where there is legislation authorising the discrimination, or in the case of spent convictions, authorising for example their disclosure. In each case of legislation authorising discrimination on the ground of criminal record, the Commission has recommended that the Human Rights and Equal Opportunity Commission have power to review legislation authorising the disclosure of spent convictions. The NCRCC would make a valuable contribution in this area by liaising with HREOC. Similarly there will need to be close involvement between the NCRCC and State Equal Opportunity Commissions.

19. *Composition of NCRCC.* There are a number of existing bodies with a strong interest in the matters assigned to the National Criminal Records Consultative Council, but not necessarily with full expertise in all areas relevant to resolution of the questions which that Council must address. These include

- the Conference of Australian Commissioners of Police
- the Australian Bureau of Criminal Intelligence
- the National Exchange of Police Information Management Group
- the Privacy Committee (New South Wales)
- the Privacy Committee (Queensland)
- the Australian Institute of Criminology
- the Australian Law Reform Commission
- the Human Rights and Equal Opportunity Commission (Cth)
- the Advisory Committee established under the Human Rights and Equal Opportunity Act 1986 (Cth) s 15 (similarly the National Committee on Discrimination in Employment)
- the Anti-Discrimination Board (NSW)
- the Equal Opportunity Commission (Vic)
- the Equal Opportunity Commission (WA)
- the Equal Opportunity Commission (SA).

The NCRCC should be established by administrative action on the part of the various Australian Police Ministers and Attorneys-General, rather than by legislation. Appropriate funding arrangements would have to be made. A permanent Secretariat would be necessary. The obvious place for its location would be in Sydney, which is the centre for development of the National Exchange of Police Information. The Human Rights and Equal Opportunity Commission is now based in Sydney. In order to provide continuity, it is desirable that there should be a part-time Chairperson appointed for a term of five to seven years. There should be a permanent, full-time Secretary and Director of Research. Other members of the Council should be part-time, and should be appointed for terms of one to three years. It is desirable that relevant interests be represented but that the body be of a manageable size. As a result all of the bodies with an interest in the area referred to above could not, in practical terms, be separately represented. It would be important for the NCRCC to liaise with such bodies as are not directly represented. A possible membership might comprise:

- an Attorney-General's nominee, from the Department, to be made in turn on a rotation basis by the State and Commonwealth Attorneys-General
- a nominee, from the Department, by the Police Minister to be made on a rotation basis by the Australian Police Minister's Council
- a nominee from the National Exchange of Police Information Management Group
- a nominee from the Conference of Australian Commissioners of Police
- a nominee of the Australian Bureau of Criminal Intelligence
- a nominee representing the Privacy Committee (NSW) and the Privacy Committee (Queensland)
- a nominee of the Human Rights and Equal Opportunity Commission (Cth) or alternatively a member of the Advisory Council to be established under the Human Rights and Equal Opportunity Act 1986 s 15
- a nominee representing the Anti-Discrimination Board (NSW), the Equal Opportunity Commission (WA), the Equal Opportunity Commission (SA) and the Equal Opportunity Commission (Vic).

The Chairperson (part-time) should be a Supreme Court judge, sitting or retired, with considerable sentencing experience. The Secretary and Director of Research should have legal qualifications. Research officers could be seconded from appropriate State and Commonwealth departments as the need arose. The National Criminal Records Consultative Council could be established immediately by administrative action on the part of the Australian Attorneys-General and Police Ministers. Other successful exercises in Commonwealth/State co-operation, resulting in the establishment of bodies performing useful work in diverse areas in the national interest have been established in this manner.[21]

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[21] For example the former National Committee on Discrimination in Employment and Occupation, the National Companies and Securities Commission, the Family Law Council of Australia and the State and Territory Consultative Committees in Social Welfare.

List of submissions

1	JG Funnessy, Australian High Commission (NZ)	29 May 1984
2	Professor A E-S Tay, Faculty of Law, Sydney University	4 June 1984
3	S Paul & S Wilson, Faculty of Law, NSW University	27 June 1984
4	B Tennant, Council for Civil Liberties (WA)	15 August 1984
5	EA Mudge, Deputy Commissioner Police (Vic)	14 August 1984
6	R Eady, Scottish Law Commission	28 August 1984
7	F Marles, Commissioner for Equal Opportunity (Vic)	21 August 1984
8	Commissioner R McAulay, Commissioner of Police (NT)	7 January 1985 25 August 1985
9	Uno Hagelberg, Raksaklagaren Stockholm	27 September 1984
10	DER Faulkner, Home Office, London	28 September 1984
11	John K Van de Kamp, Attorney-General, California (USA)	20 August 1984
12	N Perkins, Aboriginal Hostels	24 December 1984
13	J Nolan, NSW Privacy Committee	1 February 1985
14	G Kriz, Attorney-General's Department, Canberra	1 February 1985
15	B Bailey, Aboriginal Development Commission	4 February 1985
16	B Clark, Office of the Public Service Board, Canberra	14 February 1985
17	Brigadier RS Buchan, Department of Defence, Canberra	18 February 1985
18	A Levy, Commonwealth Ombudsman	21 February 1985
19	K Markham, Solicitor-General's, Ottawa, Ontario	February 1985
20	R Toohey, Department of Aboriginal Affairs, Canberra	5 March 1985
21	Sergeant K Murdoch, Police Department (NSW)	14 April 1985
22	Asst Commissioner N Newnham, Police Department (Vic)	15 April 1985
23	L Malezer, National Aboriginal Conference	16 April 1985
24	Justice D Hunt, Supreme Court (NSW)	17 April 1985

25	Inspector P Duffy, Australian Federal Police	31 April 1985
26	C Niland, Anti-Discrimination Board (NSW)	21 May 1985
27	RJ Cahill SM (ACT)	31 May 1985
28	Commissioner D Hunt, Commissioner for Police (SA)	May 1985
29	Supt RA Smith, Superintendent of Police (Qld)	11 July 1985
30	C Sheilds, Director of Casino Security, Department of the Treasury (NSW)	18 July 1985
31	LP Greene, Ngwala Willumbong Cooperative Ltd (Vic)	July 1985
32	M Mulgrew, Attorney-General's Department, Canberra	16 December 1985
33	PH Bailey, OBE, Deputy Chairman, Human Rights Commission	18 February 1986
34	AJ Salt, New Zealand Information Agency	28 February 1986
35	J Nolan, Privacy Committee (NSW)	28 February 1986
36	Asst Commissioner N Newnham, Cmdr A Bolton, Police Department (Vic)	5 March 1986
37	IC Hill, Director, Prisons Department (WA)	6 March 1986
38	C Duncan, Humanists Society (Vic)	10 March 1986
39	K Twigg, Director of Public Prosecutions (ACT)	18 March 1986
40	Brigadier RS Buchan, Department of Defence, Canberra	25 March 1986
41	J Stokes, Commonwealth Archives	7 April 1986
42	I Potas, Criminologist, Australian Institute of Criminology (personal views)	17 April 1986
43	B Cox, Australian Archives	6 May 1985
44	EJL Tucker, Administrative Review Council	12 May 1986
45	M O'Leary, NRMA Insurance Ltd	30 May 1986
46	AR Hedley, Department of Territories, Canberra	20 June 1986
47	T Robertson, Council of Civil Liberties (NSW)	20 August 1986
48	P Bradhurst	27 August 1986
49	M de Meyrick, Secondary Schools Board (NSW)	26 August 1986
50	P Raymond, Victims of Crime Council	27 August 1986
51	P Daly, Board of Senior School Studies (NSW)	27 August 1986
52	R Dight, Department of Labour (Vic)	28 August 1986
53	MK Collins, Ministry of Education (Vic)	29 August 1986
54	JM Dugan, Chief Magistrate, on behalf of the Magistrates (Vic)	29 August 1986
55	L Robertson, Department of Justice (NT)	1 September 1986
56	CT Hunt, Deputy Commonweath Ombudsman	3 September 1986

57	M Bonsey, Office of the Public Service Board, Canberra	10 September 1986
58	J de Meyrick, Barrister, Sydney	12 September 1986
59	WJ Kidston, Director General, Office of Corrections (Vic)	15 September 1986
60	A Strickland, Commissioner for Public Employment, Department of Personnel & Industrial Relations (SA)	16 September 1986
61	HW Parsons, Teachers' Registration Board (SA)	18 September 1986
62	J Lambert, Department of Education (NSW)	19 September 1986
63	Inspector P Duffy, National Police Working Party	22 September 1986
64	AM Cornish, Department of Public Administration (Tas)	22 September 1986
65	I Roach, Chairman, Melbourne Stock Exchange Ltd	23 September 1986
66	E Hunt, Women Justices' Association (NSW)	2 October 1986
67	LM Thompson, Chamber of Commerce & Industry (SA)	3 October 1986
68	MJ Dawes, Department of Correctional Services (SA)	8 October 1986
69	J Ryan, Asst Commissioner (Services), Police Department (NSW)	14 October 1986
70	DJ Hayne, Australian Institute of Management	15 October 1986
71	J Pinney, Council of Government School Organisations (NT)	21 October 1986
72	IO Spicer, Employers Federation (Vic)	24 October 1986
73	Chief Insp D Cluff, Police Department (NSW)	24 October 1986
74	T Rippon, Police Association (Vic)	27 October 1986
75	K Sharpe, Department of Youth and Community Services (NSW)	12 November 1986
76	TM Barr, Director General, Education Department (SA)	4 December 1986
77	D Semple, Director General, Department of Community Services (WA)	9 December 1986
78	BJ French, Commissioner, Corporate Affairs Commission (NSW)	14 January 1986
79	RD Butel, Probation & Parole Service (Qld)	26 February 1987
80	P Byrne, Commissioner, Law Reform Commission (NSW)	4 March 1987 5 May 1986

In addition the Commission received a large number of written and oral submissions from individuals with criminal records. For reasons of confidentiality they are not listed here.

Bibliography

ALFORD DG & BEATTIE R, Draft research paper prepared for the Canadian Clemency Review Project Team, A Statistical Overview of Pardon under the Criminal Records Act, (mimeo), 1982.

ALRC, see Australia, Law Reform Commision.

AUSTRALIA, COMMITTEE ON COMPUTERISATION OF CRIMINAL DATA, *Report*, 1973 (Chairman, PG Ward) Attorney-General's Department, Canberra (Ward report).

AUSTRALIA, COMMONWEALTH PARLIAMENT, Parliamentary Debates (House of Representatives) (Cth Hansard (H of R)).

_____ Parliamentary Debates (Senate) (Cth Hansard (Sen)).

AUSTRALIA, CONSTITUTIONAL COMMISSION, Background Paper No 7, *Qualification of Members of Parliament*, Sydney, July 1986.

AUSTRALIA, LAW REFORM COMMISSION, Report No 2, *Criminal Investigation*, Australian Government Publishing Service, Canberra, 1981 (ALRC 2).

_____ Report No 11, *Unfair Publication: Defamation and Privacy*, Australian Government Publishing Service, Canberra, 1979 (ALRC 11).

_____ Report No 15, *Sentencing of Federal Offenders (Interim)*, Australian Government Publishing Service, Canberra, 1980 (ALRC 15).

_____ Report No 18, *Child Welfare*, Australian Government Publishing Service, Canberra, 1981 (ALRC 18).

_____ Report No 20, *Insurance Contracts*, Australian Government Publishing Service, Canberra, 1981 (ALRC 20).

_____ Report No 22, *Privacy*, Australian Government Publishing Service, Canberra, 1983 (ALRC 22).

_____ Report No 26, *Evidence*, Australian Government Publishing Service, Canberra, 1985 (ALRC 26).

_____ Discussion Paper No 25, *Criminal Records*, Australian Law Reform Commission, Sydney, 1985 (ALRC DP 25).

_____ Discussion Paper No 26, *Contempt and the Media*, Australian Law Reform Commission, Sydney, 1985 (ALRC DP 26).

AUSTRALIA, NATIONAL COMMITTEE ON DISCRIMINATION ON OCCUPATION AND EMPLOYMENT, *12th Annual Report 1984–5*, Australian Government Publishing Service, Canberra, 1986 (NCDOE Annual Report).

AUSTRALIA, NATIONAL EXCHANGE OF POLICE INFORMATION MANAGEMENT GROUP, *Charter, Composition, Rules and Agreed Operational Procedures*, Status Report and Recommendations, (mimeo), 1985.

AUSTRALIA, NEW SOUTH WALES, ANTI-DISCRIMINATION BOARD, *Annual Report 1984*, New South Wales Government Printer, Sydney, 1985 (NSWABD 1984).

AUSTRALIA, NEW SOUTH WALES, PRIVACY COMMITTEE, Publication No 41A, *The use of Criminal Records in the Public Sector*, Sydney, 1977 (NSWPC 41A).

_____ Publication No 45, *The Special Branch – Criminal Records in New South Wales*, Sydney 1978 (NSWPC 45).

_____ Publication No 48A, *The Collection, Storage and Dissemination of Criminal Records by the Police*, Sydney, 1978, (NSWPC 48A).

_____ Background Paper, Criminal Information Systems of the Australian Police, 1975 (NSWPC Background Paper).

AUSTRALIA, SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS, *The Constitutional Qualifications of Members of Parliament*, Australian Government Publishing Service, Canberra, 1981 (Senate Standing Committee report).

AUSTRALIA, SOUTH AUSTRALIA, ATTORNEY-GENERAL'S DEPARTMENT, Discussion Paper, *Rehabilitation of Offenders: Old Criminal Convictions*, Attorney-General's Department, Adelaide, 1984 (SADP).

AUSTRALIA, TASMANIA, LAW REFORM COMMISSION, Report No 9, *Report and Recommendations on the Provisions of the English Rehabilitation of Offenders Act 1974, and the Extent, if any, To Which Such provisions or Similar Provisions Ought to be Adopted in Tasmania*, Government Printer, Hobart, 1977 (TasLRC 9).

AUSTRALIA, WESTERN AUSTRALIA, COMMITTEE OF INQUIRY INTO THE RATE OF IMRISONMENT, (Chairman, O Dixon QC) *Report*, Western Australian Government Printer, Perth, 1981 (Dixon Report).

AUSTRALIA, WESTERN AUSTRALIA, LAW REFORM COMMISSION OF WESTERN AUSTRALIA, Project No 80, *Report on the Problem of Old Convictions*, Government Printer, Perth, 1986 (WALRC 80).

CANADA, SOLICITOR GENERAL OF CANADA, CLEMENCY REVIEW, *Summary of Discussion Paper*, (mimeo) (undated) (Clemency Review summary).

CHALLINGER D, Report to the Criminology Research Council, *Assessing the Utility of Fines*, Criminology Department, University of Melbourne, Melbourne, 1983.

Clemency Review, see Canada.

Constitutional Commission, see Australia, Constitutional Commission.

Hansard, see Australia, Commonwealth Parliament.

HONG KONG, ATTORNEY-GENERAL'S CHAMBERS, *A Spent Conviction Scheme for Hong Kong - A Proposal, Government Printer*, Hong Kong, 1984 (Hong Kong AG).

HOUGHTON J, *Fine Default: A Preliminary Report of a Study of Persons Imprisoned for Non-Payment of Fines*, New South Wales Bureau of Crime Statistics and research, 1984.

Living it Down, see United Kingdom.

NADINE-DAVIS RP 'Canada's Criminal Records Act: Notes on How Not To Expunge Criminal Convictions', (1980-81) 45 *Saskatchewan Law Review* 221.

NCDOE, see Australia, National Committee on Discrimination in Occupation and Employment.

NEW ZEALAND, DEPARTMENT OF JUSTICE LAW REFORM DIVISION, Discussion Paper, *Living Down a Criminal Record: Problems and Proposals*, Government Printer, Wellington, New Zealand, 1985 (NZDP).

NSWADB, see Australia, New South Wales, Anti-Discrimination Board.

NSWPC, see Australia, New South Wales, Privacy Committee.

RONALDS C, *Affirmative Action and Sex Discrimination: A Handbook on Legal Rights for Women*, Pluto Press, Sydney, 1987.

SADP, see Australia, South Australia.

Senate Standing Committee report, see Australia, Senate Standing Committee on Constitutional and Legal Affairs.

TasLRC, see Australia, Tasmania.

UNITED KINGDOM, COMMITTEE OF THE HOWARD LEAGUE FOR PENAL REFORM AND THE NATIONAL ASSOCIATION FOR THE CARE AND SETTLEMENT OF OFFENDERS, (Chairman: The Rt Hon Lord Gardiner), Report, *Living it Down - the Problems of Old Convictions*, Stephens and Sons, London, 1972 (Living it Down).

WALKER J & BILES D, *Australian Community Based Corrections 1985–86*, Australian Institute of Criminology, Canberra, 1987.

WALRC, see Australia, Western Australia.

Ward report, see Australia, Committee on Computerisation of Criminal Data.

WARNER CA, Research Paper, *Research Paper on Fines*, Law Reform Commission of Tasmania, Hobart, 1984.

WEBER L, *Fine Default in South Australia*, South Australian Department of Corrective Services, 1984.

For articles and reports considered by the Commission, but not referred to in this Report, see ALRC DP 25, Bibliography.