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Living Down a Criminal Record: Problems and Proposals

A Discussion Paper

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Living Down a Criminal Record: Problems and Proposals

A Discussion Paper

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Living Down a Criminal Record : Problems and Proposals

A discussion paper on proposals to assist the rehabilitation of persons with a criminal record.

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INTRODUCTION

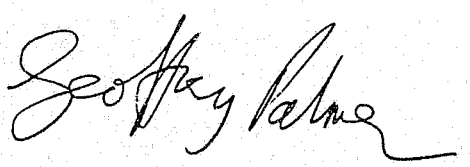
1. As Minister of Justice, I frequently receive correspondence from people from all walks of life, asking that something be done to help them overcome the problems which they have encountered because they have a criminal record. Almost without exception, they are not hardened criminals or people who live at the edge of the law. Most are simply people who have offended at some time in the past and have subsequently established themselves as law-abiding citizens. Often the offence which led to their conviction was only minor in nature, and frequently the result of youthful indiscretion, but the hardships caused by it have been quite out of proportion, or indeed unrelated, to the original offence. A criminal conviction may mean the inability to follow or continue in a chosen career, or make it difficult to obtain a visa to travel or settle overseas. Some people who have overcome the immediate problems of a criminal record and who have rehabilitated themselves in the community live in fear that an old conviction will be revealed to unsuspecting family, friends or business associates. Others simply feel that they have earned the right to have their offences officially forgotten. Under existing law, there are no procedures for dealing with the effects of a criminal record, apart from the exercise of the royal prerogative of mercy, which is normally reserved for cases where there has been a miscarriage of justice.

2. A variety of measures have been adopted overseas to alleviate the problems faced by those with a criminal record. In New Zealand, the Penal Policy Review Committee considered the topic in its report in 1981, and made a number of recommendations. These form the basis of this discussion paper.

3. It is far from easy to find a solution to the problem of a criminal record. Several separate and competing interests must be balanced. While society has an interest in protecting its citizens from those who break the law, there is a need at the same time to provide a real incentive for offenders to rehabilitate themselves and become law-abiding citizens. Those who have rehabilitated themselves should be allowed to live down their past. This discussion paper attempts to give due weight to the various interests.

4. The proposals, if adopted, would not in any way weaken the criminal justice system. They are part and parcel of any enlightened and fair criminal justice system which seeks to encourage all offenders to become responsible members of society.

5. The Government is releasing these proposals in this form so as to give all those interested an opportunity to make submissions on them. Legislation will then be prepared in the light of the comments received. The details of the proposals do not represent Government policy at this stage. They merely indicate how the matter might be approached. My wish is that they receive careful scrutiny by concerned members of the community.



Geoffrey Palmer
Minister of Justice

1. The Problem

1.1 People who are convicted of a criminal offence may have any of a number of penalties imposed upon them by the court. However, there is one penalty which is not provided for in any law, but which may well be the severest of all—the fact that an offender has a criminal record. With the exception of the penalties of life imprisonment and preventive detention, all penalties officially imposed by a court last for a finite period. These penalties are available only for a small number of offences, but no matter what the offence, whether trivial or very serious, the penalty of having a criminal record at present lasts for the whole of a person's life.

1.2 Having a criminal record may give rise to a number of consequences. It may mean the loss of a job, and create severe difficulties in finding employment in the future. There is also the negative effect that having a criminal record may have on the attitudes of family and friends. These consequences may severely impair the effort of offenders to rehabilitate themselves.

1.3 In addition, people with a criminal record at present have the prospect that no matter how many years have passed since conviction for an offence, the criminal record may be raked up again many years later. Many people live in fear that this will happen, and as well as the psychological effect that that may have on them, it may also dissuade them from pursuing an active role in public life. Others simply feel that after many years of living as a responsible citizen, they have the right to have their slate wiped clean.

1.4 At present, there is no legal process in New Zealand to mitigate the hardships, both short and long term, which are faced by those with a criminal record.

2. The Case for Reform

2.1 Overseas jurisdictions have adopted a variety of measures to alleviate the problems faced by those with a criminal record. These will be outlined shortly. All of these jurisdictions have recognised that the hardships faced by those with a criminal record are serious social problem which merits reform.

2.2 Several broad justifications are advanced for reform. First, it furthers one of the goals of penal policy, "rehabilitation", which aims to change an offender's character or attitudes so that he or she no longer sees the need to offend. The removal of those barriers which a criminal record imposes on an offender (such as difficulties in obtaining employment) will, it is argued, aid in and promote rehabilitation.

2.3 It is also argued that the law should recognise that offenders can and often do live down their earlier misconduct and become responsible members of society. Once they have done so, their past mistakes, particularly where they were the result of youthful indiscretions, should be allowed to be forgotten and not raked up years later. The recognition of this may act not only as an incentive to those recently convicted to rehabilitate themselves, but also serve to recognise and reinforce the fact that a person has indeed become rehabilitated.

2.4 It is also argued that it is unfair to require an offender who has paid the penalty imposed by the court for an offence to keep on paying the penalty which results from having a criminal record, even many years after the offence was committed. All of the penalties which may be imposed on persons convicted of offences should have a limited duration.

3. Overseas Solutions to the Problem

3.1 A number of different approaches have been adopted overseas to deal with the problems faced by those with a criminal record.

Record concealment

3.2 This approach focuses on the fact of conviction and attempts to mitigate its consequences by either concealing the fact or treating it as if it had never happened. Thus the record of conviction may simply be sealed, or it might be actually destroyed or "expunged". The rationale behind this approach is that if the formal evidence of a conviction can be hidden away from the public, then the conviction itself can no longer influence people in their relationship with the offender.

3.3 The United Kingdom Rehabilitation of Offenders Act 1974 is an example of this approach. Very simply, that legislation provides that anyone convicted of one or more offences and who has not been sentenced to more than two and a half years' imprisonment can become a "rehabilitated person" if he or she does not commit further offences for a certain period. At the end of the period, which varies according to the sentence imposed, the conviction becomes "spent". Once this happens, for most purposes (but not all) the law treats the spent conviction as if it had never happened. Thus, in general, there is no need to disclose a spent conviction, for example, when applying for a job or taking out insurance, even if one is asked. It is also a criminal offence for anyone who has official access to criminal records to disclose spent convictions otherwise than in the course of their official duties.

3.4 Rehabilitation periods are usually halved for people who were under 17 when they were convicted.

3.5 Any person whose spent conviction is disclosed may sue the person who disclosed it but only if the publication was made maliciously. There are a large number of exceptions to the Act which have been created by regulation. A number of classes of employment, offices and occupations, and classes of licence, certificate and registration and certain proceedings are exempt from the provisions of the Act. In these situations, spent convictions must be disclosed and may be taken into consideration.

3.6 Record concealment statutes such as the United Kingdom Act have been criticised on a number of grounds. By deeming a conviction never to have occurred, and allowing the offender to deny that it ever existed, the approach is open to the objection that it sanctions deceit; it "legislates a lie". Further, the approach is often hedged around with so many qualifications and exceptions that its effectiveness in providing real relief to rehabilitated offenders is seriously in doubt. The long list of exceptions to the principles in the United Kingdom Act bears this criticism out.

3.7 Nor does the record concealment approach do anything to assist offenders in the period immediately after they have completed their sentence. This period is often the most critical in terms of an offender's prospects for rehabilitation, particularly in the field of employment. The likelihood that a person will reoffend is influenced to a very large extent by whether or not he or she is able to get a job.

Removal of disabilities

3.8 An example of this approach is found in the Canadian Criminal Records Act 1970. This legislation attempts to assist persons with a criminal record, not by concealing the fact of conviction, but by giving notice to society that an offender who has stayed out of trouble for a certain period should no longer have his or her conviction taken into account.

3.9 The Act provides that after a certain period has elapsed since conviction, the offender may apply to the Solicitor-General for a pardon. The National Parole Board investigates the merits of the application to ensure that the offender is in fact rehabilitated. On the basis of the Board's recommendation, the Solicitor-General may then grant a pardon.

3.10 The effect of a pardon is that the conviction in respect of which it is granted is vacated, and any disqualification to which the person was previously subject is removed. However, unlike the United Kingdom Rehabilitation of Offenders Act, the Canadian legislation does not permit the pardoned person to deny the fact of conviction. A pardon is considered to be evidence to others, such as employers, that the individual has become rehabilitated and should therefore no longer be penalised on account of an earlier conviction.

3.11 This approach has also been criticised on a number of grounds. First, the legislation places the onus on the offender to apply for a pardon. This may result in a number of eligible persons failing to apply, either because they lack initiative or intelligence, or simply because they do not know that the scheme exists.

3.12 Second, the requirement that all applications must be investigated to ensure that pardons are not granted to undeserving persons may result in the publication of the applicant's criminal record to those who previously were unaware of it, or who had forgotten about it.

3.13 In addition, the whole procedure is rather cumbersome, and requires the development of administrative machinery to implement it. And like the United Kingdom legislation, it does not deal with the problems faced by offenders immediately after completion of the sentence imposed on them. Nor, by itself, does a simple pardon offer the rehabilitated person any real protection against adverse public attitudes. The success of the legislation is dependent upon the degree to which people are prepared to accept and recognise the fact of the offender's pardon. These problems are alleviated to some extent by the Canadian Human Rights Act 1977. That Act outlaws discrimination in employment on certain grounds, including a criminal conviction for which a pardon has been obtained. Discrimination is permitted, however, if it is based on a "bona fide" occupational requirement.

Anti-discrimination legislation

3.14 This approach is widely adopted in the United States. It focuses on adverse public attitudes towards convicted persons, and attempts to effect a change in those attitudes. The approach is modelled on human and civil rights legislation which outlaws discrimination on the grounds of race, sex, and religious belief. Thus discrimination on the grounds of a criminal record is made unlawful. However, it is also recognised that a criminal record may legitimately be taken into account in

certain circumstances, for example in denying a person employment in a certain occupation, and thus discrimination is permitted when a criminal record is relevant to the particular activity in question.

3.15 The legislation provides that persons who believe that they have been unlawfully discriminated against on the grounds of a criminal record may complain to an enforcement authority, which will attempt to settle the dispute, and if this fails, damages may be awarded to a successful complainant.

3.16 In certain jurisdictions, the bar on discrimination on the grounds of an irrelevant criminal record commences as soon as the offender has completed his or her sentence. This recognises the fact, mentioned earlier, that this period is often the most critical in terms of an offender's prospects for rehabilitation.

3.17 It might be argued that it is wrong to draw an analogy between discrimination on the grounds of a criminal record with that on the grounds of race or sex. Race and sex are determined by means beyond human control, while a criminal record is an indication of blameworthiness. However, such a distinction emphasises the notion of retribution in the criminal process, and ignores the concept of rehabilitation which most would agree is in the interests of both society and the offender. Some also argue that the anti-discrimination approach is difficult to police and virtually impossible to prove. This has not proved to be the case in New Zealand in the enforcement of the anti-discrimination provisions of the Human Rights Commission Act 1977.

4. The Report of the New Zealand Penal Policy Review Committee 1981

4.1 The report of the Penal Policy Review Committee, set up by the then Minister of Justice in 1981, included recommendations on the topic of expunging of criminal records. In summary, the Committee recommended as follows:

(a) New Zealand should adopt the method of sealing the record of conviction. After an appropriate rehabilitation period without further convictions, it should be unlawful to publish details of a person's criminal record without the convicted person's consent, or to ask questions the answer to which might tend to disclose the existence of the criminal record;

(b) It should be unlawful from the date of a person's release from custody, or, where no custodial sentence was imposed, from the date of conviction, to discriminate on the basis of a conviction in the areas at present covered by the Human Rights Commission Act 1977 (notably in employment). However, a conviction would be able to be taken into account where there was a direct relationship between the criminal record and the area of concern;

(c) A rehabilitation period (i.e., a period during which a person was not convicted of an offence) should be fixed that would run from the date of actual release from a custodial sentence, and from the date of conviction if no custodial sentence was imposed;

(d) Protection from republication of a criminal record would be acquired after a rehabilitation period of five years. A rehabilitation period of ten years would apply in relation to protection against discrimination, after which a criminal conviction could in no circumstances be used as a basis for discrimination;

(e) There should be a right in exceptional cases to apply to a High Court Judge for dispensation from the prohibitions on disclosure or discrimination after the relevant rehabilitation period has expired;

(f) The Human Rights Commission Act 1977 should be extended to provide a remedy in cases of unlawful publication of a previous conviction or unlawful discrimination on the ground of a criminal record.

5. The Penal Policy Review Committee's Recommendations: A New Zealand Solution to the Problem of Living Down a Criminal Record

5.1 The Penal Policy Review Committee has recommended a multi-faceted approach to the problems faced by those with a criminal record in New Zealand. It combines the suppression of criminal records approach with the anti-discrimination approach outlined above.

5.2 The criteria adopted by the Penal Policy Review Committee as the objectives of its proposed scheme can be summarised as follows: comprehensiveness, avoidance of fictions, administrative viability, automatic relief, simplicity, and ease of understanding. Most of these principles are fundamental to the Committee's scheme, and they raise a number of issues. They are outlined in the following discussion of the scheme's details.

Extension of the Human Rights Commission Act 1977 to prohibit discrimination on the grounds of a criminal record

5.3 The Committee proposed that it be made unlawful to discriminate in any of the areas at present covered by the Human Rights Commission Act 1977 (i.e., employment, access to land, housing, accommodation, education; access and use of public facilities and services; the provision of goods and services; and advertising relating to any of these areas) against anyone with a criminal record unless it can be shown that there is a direct relationship between the criminal record and that particular area. The bar on discrimination would operate from the date of release from custody, or the date of conviction for non-custodial penalties.

5.4 The direct relationship test would cease to apply after ten years if during that period the person had no further convictions. Convictions for minor offences, e.g., those punishable only by a fine, would not count as convictions for that purpose.

5.5 The proposed protections would be enforced via the existing procedures of the Human Rights Commission Act 1977. Thus a person complaining of discrimination on the ground of a criminal record would approach the Human Rights Commission which would attempt to conciliate between the parties and try to reach a settlement. If that approach was unsuccessful, then a case could be taken to the Equal Opportunities Tribunal, which has power to award damages to a successful complainant.

Comment

5.6 This proposal aims to alleviate the problems caused by a criminal record in both the short and the long term. The newly convicted or released offender is assisted in that initial critical period to the extent that discrimination is based purely on prejudicial attitudes towards offenders. However, the public interest is also protected by permitting an offender's criminal record to be taken into account where it is a demonstrably relevant consideration in the particular circumstances.

5.7 The Committee's scheme has the advantage that offenders have an incentive to rehabilitate themselves through the prospect that their offence will become totally

irrelevant in the course of time, whilst rehabilitated offenders will have the assurance that their past is truly put behind them once the rehabilitation period has expired.

5.8 The direct relationship test might be criticised on the ground that it is too indefinite on which to base the distinction between a relevant and an irrelevant conviction. However, this criticism might be overcome by specifying the factors which must be taken into account in the assessment, i.e., the nature of the offence and its relationship to the matter in question, the time elapsed since the conviction or release from custody, and whether there have been any subsequent offences and their nature.

Bar on publication of a criminal record

5.9 The Penal Policy Review Committee recommended that after a rehabilitation period of five years, which would run from release from custody, or the date of conviction for non-custodial sentences, it should be unlawful to publish, ask questions, or require information about a person's convictions. However, because relevant offences could be taken into account within the ten year rehabilitation period prescribed for the anti-discrimination provisions, people would be permitted to make enquiries about relevant offences within that period.

5.10 The scheme would permit persons to refuse to answer any unlawful questions about a previous conviction. Because it is directed at a person's rehabilitation, the restriction on publication would lapse on that person's death. The Committee also recommended that enforcement of the restrictions would be via the procedures in the Human Rights Commission Act 1977.

Comment

5.11 The approach recommended by the Penal Policy Review Committee avoids the "legislating a lie" criticism of the record concealment approach discussed above. The fact of conviction is in effect suppressed, rather than becoming spent.

5.12 The imposition of restrictions on the availability of information about a person's criminal record would complement the protection accorded by anti-discrimination legislation, by removing the source from which adverse treatment of an offender must proceed. It makes the prospect of unlawful discrimination against a rehabilitated person less likely, provides security to the person who at present fears that an old conviction will be raked up again, and guards against those consequences of disclosure for which it would be difficult to provide a remedy, for example public humiliation.

5.13 However, one aspect of the Penal Policy Review Committee's recommendations in relation to the restrictions on publication of a criminal record may require further consideration. The Committee recommended that the procedures of the Human Rights Commission Act 1977 should be used to provide a remedy for a breach of the restrictions on the publication of a criminal record. It rejected the creation of a criminal offence in this context because of the publicity involved for the complainant, and the fact that the amount of compensation which the court could award to the victim would depend upon the extent to which the publisher was at fault, rather than upon the amount of harm suffered by the victim.

5.14 It might be questioned, however, whether the procedures and sanctions of the Human Rights Commission Act are appropriate in this context. The thrust of the Penal Policy Review Committee's recommendation is to see that a victim of unlawful publication of a criminal record is compensated for any harm suffered as a result. However, the emphasis of the Human Rights Commission Act procedures is on conciliation and settlement of disputes. Proceedings before the Equal Opportunities Tribunal, which may result in an award of damages, are very much a last resort.

5.15 Further, the awarding of compensation for harm suffered as a result of the publication of a stale conviction is open to the same fundamental objection which has been raised against the United Kingdom Rehabilitation of Offenders Act, which allows a defamation action to be brought where a spent conviction is unlawfully disclosed. In both cases, damages are awarded for the disclosure of what is unquestionably true.

5.16 The publication of a stale conviction can be seen as similar to a breach of a court order suppressing the name of a person involved in a court proceeding. In those circumstances, the offender is prosecuted not for publishing something which is true, but for doing something which is forbidden by law. In this context, the function of the law is to act as a deterrent, not to compensate a victim. While the conciliation and settlement procedures of the Human Rights Commission Act 1977 would seem to be entirely appropriate to deal with complaints of discrimination on the basis of a criminal record, they would seem to be inappropriate where what is really in issue is the simple fact of whether someone has published details of the conviction of a rehabilitated person. Here the criminal law seems entirely appropriate. Concerns about the publicity inherent in criminal proceedings would seem to be adequately met by the existing power of the courts to order the suppression of the names of complainants. Alternatively, consideration might be given to enacting a presumption in favour of name suppression in this context. Difficulties involved in the burden of proof might be overcome by providing that on proof of publication of a stale conviction, fault might be presumed unless the defendant proves that the publication was not due to negligence on his or her part.

The principle of a rehabilitation period

5.17 The Penal Policy Review Committee's proposals would not entitle a person with a criminal record to automatic relief from its consequences regardless of the circumstances. Relief is available only to those who have demonstrated that they have become rehabilitated persons. Evidence of rehabilitation would be demonstrated by the absence of any convictions during a certain period after conviction or completion of sentence, as the case may be. This raises several issues: is a rehabilitation period necessary, and if so, should the same period be required for all offenders, or should periods vary according to the nature of the offence, or the type of sentence imposed?

5.18 Under the Penal Policy Review Committee's proposed scheme, the principle of rehabilitation has two aspects. The scheme is seen as both an incentive to offenders to rehabilitate themselves, and as a reward for achieving that end. However, a person who reoffends obtains little benefit from the scheme.

5.19 It might be argued, however, that a conviction is capable of losing its relevance with the passage of time, regardless of subsequent offending. A person who has paid the legal penalty for an offence should not be penalised again and again for it.

5.20 The anti-discrimination component of the Penal Policy Review Committee's scheme does provide some protection for all offenders regardless of further convictions. Those who do not reoffend may not have their conviction taken into account at all after the rehabilitation period of ten years. Those who do reoffend may have all convictions considered, but only to the extent that they are relevant. The relevance of a particular conviction will to a certain extent be determined by whether or not there are any other convictions. Conviction for a further offence may preserve or increase the relevance of those earlier in time, even more so if the offences involved were similar. An isolated offence may quickly lose any relevance at all.

5.21 A rehabilitation period is therefore not a necessary element of the anti-discrimination scheme proposed, but it does provide additional protection to the rehabilitated offender. After a finite and certain period, he or she can be sure that his or her conviction will no longer be taken into account.

5.22 An alternative would be to specify a period after which some (or all) convictions become irrelevant regardless of whether there are any subsequent convictions. The period could be made to run in respect of each conviction, rather than the most recent.

5.23 There would be considerable practical difficulties with this proposal, however. For example, should there be different periods depending upon the nature of the offence or the length of the sentence imposed? There is also the problem that an offender with a number of convictions imposed on separate occasions would have a number of periods running at the same time and expiring at different dates. The more complex the scheme becomes, then the more difficult it will be for offenders to understand it. The Penal Policy Review Committee's proposal to have one rehabilitation period which runs in respect of the most recent conviction permits maximum simplicity. The offender need know only one date.

5.24 There may be a stronger argument for a period running in respect of each conviction in the context of the publication of conviction details. The newsworthiness of a conviction undoubtedly ceases at an earlier point than its relevance for other purposes, for example in employment. And any subsequent newsworthiness which results from a later conviction will decrease with the passage of time, even in the case of a frequent offender. A dual approach might therefore be adopted in this context. There would thus be one rehabilitation period which would run in respect of the most recent conviction and after which all convictions would be suppressed if the offender does not reoffend. In addition a longer period would run in respect of each conviction and after which a conviction would become spent regardless of further offending. Whilst more complex than a single rehabilitation period, simplicity would appear to be less important in this context where publishers bear the onus of avoiding a breach of the law, compared with the anti-discrimination context where offenders must stand on their rights.

Calculating the rehabilitation period

5.25 The Penal Policy Review Committee recommended that the rehabilitation period should commence from the date of release in the case of custodial sentences and from the date of conviction in all other cases. The Committee based its recommendation on the ground that an offender should not receive the benefits of rehabilitation unless he or she has first established credibility through good behaviour. This can only be done while the offender is living in the community. Given that, the issues which arise in this context are:

(i) Whether the scheme is to cover all offenders;

(ii) Whether there is to be only one rehabilitation period, regardless of the offence involved; and

(iii) The length of the rehabilitation period(s).

(i) Comprehensiveness of the scheme

5.26 The Penal Policy Review Committee recommended that its scheme should offer assistance to all offenders. By contrast, the United Kingdom Rehabilitation of Offenders Act 1974 excludes all those sentenced to more than two and a half years' imprisonment. Is it justifiable to deny the benefits of any scheme to those convicted of the more serious types of offence, or who receive more substantial penalties?

5.27 One difficulty with using the seriousness of the offence as a basis for excluding certain offenders is the degree of culpability involved. For example, a person convicted of manslaughter might, because of mitigating circumstances, receive a sentence of probation whilst in fact liable to up to life imprisonment. So too the offence of theft can cover a wide range of degrees of seriousness. Further, in the case of murder, the most serious offence of all, it has been established that of all serious offenders the murderer is the least likely to reoffend. In these circumstances, there would appear to be no good reason, nor any satisfactory basis, for excluding certain types of offence from the scheme.

5.28 An alternative basis for exclusion would be according to the severity of the sentence imposed. Again, however, this would lead to anomalies. For example, the manslaughter case in which probation is imposed would undoubtedly be included, whereas a serious theft could be excluded. The Penal Policy Review Committee's recommendation that the rehabilitation period should commence from completion of sentence in the case of custodial sentences means that the variations in the seriousness of offences are recognised and accommodated within the scheme. The longer the custodial sentence imposed, the longer the offender must wait for the rehabilitation period to begin to run.

(ii) Should rehabilitation periods differ according to the seriousness of the offence

5.29 The Penal Policy Review Committee recommended that the rehabilitation period be the same for all convictions (although the rehabilitation period for protection from republication would be different from that for protection from discrimination). One period was adopted on account of its simplicity, and also because of the difficulty of avoiding arbitrary distinctions. This seems the most desirable option. However,

an alternative might be to adopt a two-tier system, with the dividing line drawn at the necessarily arbitrary level of, say, a sentence of two years' imprisonment.

(iii) The length of the rehabilitation period(s)

5.30 The Penal Policy Review Committee recommended that the rehabilitation period be five years for protection from republication and ten years for protection from discrimination. The Committee referred to research which shows that reoffending after five years is very limited. After ten years, the prospects of reoffending would appear to be negligible. If there is to be only one rehabilitation period to run in respect of each form of relief granted (and it is accepted that relief from republication should be available within a shorter period than complete protection from discrimination) the periods recommended by the Penal Policy Review Committee appear to incorporate a reasonable balancing of the interests of the offender and the public interest.

5.31 While a five year rehabilitation period for protection from republication appears reasonable for all offenders, it might be considered that a single ten year rehabilitation period for protection from discrimination is rather long for those whose offences were relatively trivial. An alternative would be to adopt a variable rehabilitation period for the latter, perhaps with a dividing line at a sentence of two years' imprisonment, and with the rehabilitation periods set at seven years and ten years respectively. Clearly, it is difficult to avoid the drawing of arbitrary distinctions here.

Exceptions to the scheme

5.32 The Penal Policy Review Committee recommended that there should be a right in exceptional circumstances to apply to a High Court Judge for dispensation from the restrictions relating to publication or discrimination. The need to protect national security and effective sentencing for a major crime might, in the Committee's view, justify information being disclosed about a conviction for an earlier serious crime outside the rehabilitation period.

5.33 The provision of exceptions in this context is inevitably a slippery slope. 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. If a relatively long rehabilitation period of ten years is adopted, the balance would seem to lie in favour of protecting those who have established through their good conduct that they are indeed rehabilitated. Provision for judicial dispensation from the scheme would therefore seem to be preferable to incorporating express exceptions. The criteria which a judge would have to consider in granting a dispensation might be spelt out in the legislation.

Retention of records

5.34 At present, information on criminal convictions is stored in a vast range of different places and forms. The Penal Policy Review Committee was of the view that the deletion of criminal history information from record systems such as the Wanganui Computer was not essential to its proposed scheme, although it saw it as desirable.

From an administrative point of view, the only context in which deletion of such information is feasible is in respect of data held on the Wanganui Computer. The removal of conviction data in other situations, such as in newspapers and professional publications and manual record systems, would be quite impractical.

5.35 Conviction data held on the Wanganui Computer is available to the individual subject of that data on request. Public credibility in any scheme would appear to require that convictions which no longer attract any adverse consequences should be removed from the system. However, the question of providing exceptions to the scheme is a complicating factor. In the vast majority of cases, a conviction will become totally irrelevant after the rehabilitation period prescribed for complete protection from discrimination. In these circumstances, that period might be adopted as the maximum for record retention purposes. However, exceptions for the more serious offences, such as murder, rape, and armed robbery, and which might be expected to be the subject of an application for dispensation, might be retained. This exception might be formulated by providing that records relating to offences carrying a maximum penalty of ten years' imprisonment or more might be retained.

5.36 It should be noted that the deletion of conviction data from the Wanganui Computer would affect the ability of prosecuting authorities to produce an offender's complete criminal history for sentencing purposes in subsequent criminal proceedings.

Ensuring that offenders know their rights

5.37 One important justification for the scheme proposed is that it operates as an incentive to offenders to rehabilitate themselves. This therefore assumes that offenders know how the scheme operates. One of the advantages of the scheme proposed by the Penal Policy Review Committee is its simplicity, which should assist offenders in their understanding of what their rights are. Adequate publicity for the scheme will therefore be a major factor in determining its success.

5.38 Offenders' awareness of the scheme would be further enhanced by providing them with individualised information on what they must do to receive the benefits of the scheme. This could be done at the time the offender's rehabilitation period begins to run—i.e., either on conviction or on release from custody as the case requires. The information provided could be a basic outline of the scheme, and how it applies in the particular offender's case, i.e., when that particular offender's rehabilitation period expires. This information could be supplied either through the courts, or by the prison authorities.

6. Conclusion

6.1 This paper is about the problems faced by those who at some point in their lives, either recently or many years ago, have been convicted of a criminal offence. It sets out proposals designed to help those persons overcome those problems. The proposals are relevant to a much wider range of persons than those with a criminal record. A conviction is relevant not only to an offender, but also his or her family and friends, and to employers, landlords, insurers, the media, and many others with whom the person comes into contact. The proposals therefore merit careful attention and consideration by the community at large.

6.2 The Government intends to introduce legislation on this topic in 1986, and the proposals contained in this paper set out how the matter might be approached. All interested persons are invited to make submissions on these proposals. Legislation will then be prepared in the light of the submissions received.

Submissions should be sent to:

Law Reform Division
Department of Justice
Private Bag
Postal Centre
WELLINGTON

by 10 March 1986.

7. Summary of Proposals

— Legislation should be enacted to deal with the problems faced by persons with a criminal record.

— The legislation should endeavour to provide a system for all; it should not distort the truth by creating legal fictions (for example, by denying the commission of an offence); it should be administratively viable; relief should be automatic and not on the application of the offender; and the scheme should be simple and easy to understand.

— The legislation should provide an incentive to offenders to rehabilitate themselves and provide tangible recognition to offenders who have managed to live down their past.

— The Human Rights Commission Act 1977 should be amended to make it unlawful to discriminate, in any of the areas at present covered by that Act, against anyone with a criminal record *unless* there is a direct relationship between the criminal record and that particular area.

— The bar on discrimination would operate from the date of the offender's release from custody where a custodial sentence was imposed, or from the date of the conviction where a non-custodial sentence was imposed.

— The direct relationship test would cease to apply after an appropriate rehabilitation period (that is a period during which an offender was not convicted of any further offences).

— The bar on discrimination would be enforced via the existing conciliation and settlement procedures of the Human Rights Commission Act 1977.

— After an appropriate rehabilitation period, it should be unlawful to publish details of, or to ask questions or require information about, a person's criminal convictions. However, enquiries could be made about relevant offences where this was within the rehabilitation period prescribed for the bar on discrimination.

— A breach of the bar on publishing details of, or asking questions or requiring information about, a person's criminal record would be a criminal offence.

— Convictions for minor offences would not count as convictions for the purposes of any rehabilitation periods.

— The rehabilitation period for protection from republication would begin to run from the date of the offender's release from custody, or from the date of the conviction in the case of a non-custodial sentence.
Alternatively, there might be one rehabilitation period which runs in respect of the most recent conviction, after which all convictions would be suppressed if the offender does not reoffend, and also a longer rehabilitation period which would run in respect of each conviction, after which each conviction would become spent regardless of further offending.

— The rehabilitation periods for the bars on discrimination and publication should be the same for all offenders, regardless of the offence for which they were convicted or the length of the sentence imposed. Alternatively, a two-tier system might be adopted with a longer rehabilitation period for offenders sentenced to more than two years' imprisonment.

— The rehabilitation period should be five years for protection from republication

and ten years for complete protection from discrimination. Alternatively, the rehabilitation period for the latter might be varied according to the length of the sentence imposed, with a rehabilitation period of seven years for those sentenced to less than two years' imprisonment, and ten years for those sentenced to more than two years' imprisonment.

— There should be a right in exceptional circumstances to apply to a High Court Judge for dispensation from the restrictions on publication or discrimination.

— Maximum periods should be set for the retention of conviction data on the Wanganui Computer. The period should be the same as the rehabilitation period prescribed for complete protection from discrimination. An exception might be made for records of offences carrying a maximum penalty of ten years' imprisonment or more.

— Sufficient publicity should be given to the scheme to ensure that offenders affected by it are aware of their rights.

8. Appendix

Report of the Penal Policy Review Committee 1981, Chapter 25—Expunging Criminal Records

PART VI

CHAPTER 25—EXPUNGING CRIMINAL RECORDS

Background

432. Term of reference (1) requires the committee to consider the principle of expunging criminal records after an appropriate period of time in respect of persons who have appeared before a court. Fifty-three separate submissions were received and all but two of them favoured this in principle, suggesting strong support in the community for the concept. There are numerous reports of the traumatic effect disclosure of an offence—sometimes years afterwards—may have on the life of an offender who has successfully rehabilitated himself, and on his family. We mention three out of those referred to us:

(i) When C. was a young man he was convicted of a sex offence. Later he married, settled down, did well in business and became a respected member of his community. Twenty years after his conviction he was found guilty of a minor motoring offence, and his old conviction was read out in court and reported in the local press. (This does not normally happen now in New Zealand.)

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

(iii) Some years ago R. was convicted of robbery and imprisoned. When he completed his sentence he re-established himself. His employers (but not other staff) were told of his background. He now enjoys the respect of a large number of junior staff working under him, but is concerned that it might be lost overnight by re-publication of his conviction.

433. There are other situations which can be affected by a conviction. Many professional groups require candidates for admission to be of "good repute" and "proper" persons, and similar requirements exist for some trade groups such as second-hand dealers and motor vehicle dealers. A conviction may debar an offender from community office or service; for example, he cannot become a Justice of the Peace if by reason thereof he is thought not to be a "fit and proper" person. There are other statutory restrictions as well.

434. A recognised goal of penal policy is rehabilitation, and the expunging of criminal records is seen as part of that process. When the penalty has been paid, offenders should not be penalised again and again. The community must accept that they can become respectable citizens, and no longer hold their past against them. In the long term it is to everyone's interest to utilise fully the skills of all its citizens, as well as to create a climate which will minimise the prospect of reoffending. For an offender to know that

he can live down his earlier misconduct is an important factor in his rehabilitation. The objectives of any policy of expungement or concealment are therefore to protect a reputation which has been regained; to encourage and assist an offender to build up his self-respect; and to remove barriers to, and promote his rehabilitation. The justification for concealing a criminal record is that if it can be hidden from public view, then it can no longer influence people in their attitudes towards an offender.

Definitions

435. We adopt the following brief definitions used by Working Party 5:

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

"Expungement"—this means that the record of proceedings is erased and it is treated in law as if it had never happened in the first place.

"Removal of Disabilities"—the elimination or limitation of the legal and social effects of conviction, e.g., job discrimination.

"Rehabilitation Period"—the period free of reoffending required for removal of disabilities. It may run from completion of sentence or from conviction or from some other event.

436. This topic has been approached in different ways in many overseas jurisdictions and their solutions vary considerably. Some rely on expunging others on sealing the record and in some cases there is only the removal of disabilities arising from conviction. The rehabilitation period may depend on the nature or seriousness of the offence or it may depend on the severity of the penalty. It can have different commencing dates.

SEALING THE RECORD

437. We have come to the conclusion that the proper approach for New Zealand rests in sealing the record rather than its expungement or destruction. Some overseas legislation—particularly that adopted in the United Kingdom—is extemely complicated and difficult to understand. The following criteria adopted by Working Party 5 appeal to us. They recommend that any legislation should:

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

—Not distort the truth by creating legal fictions, for example, denying the commission of the offence, or the fact of the conviction and sentence, or creating any civil remedies based on denial of these, such as the right to bring defamation proceedings.

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

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

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

438. We therefore recommend that after an appropriate rehabilitation period it shall be unlawful to publish without the convicted person's consent any record of his conviction or any reference to it or information which might reasonably lead others to believe that he has been so convicted; or to ask any question the answer to which may tend to disclose such conviction or reasonably lead others to believe that he has been so convicted; or to require any answer or information calculated to produce those consequences. This is subject to the right of a person in a "direct relationship" with the convicted person to make inquiries within the 10-year limits we recommend in the section "Removal of Disabilities" (paragraph 452) and to the power of a judge of the High Court to make an exception in special circumstances (paragraph 453).

Rehabilitation Period

439. There are implications for publishers in prohibiting the circulation of information relating to convictions, and for employers in compelling them either to disregard convictions or preventing them from gaining access to information about them. The public interest in rehabilitation must be balanced against the public interest in ensuring that the community is informed of the propensity of any individual towards criminal acts, so that the risk or danger to persons and property can be assessed. In many overseas jurisdictions—mainly European—the name of the offender is never published, although a description of his activity is. There was a short-lived attempt to achieve this in New Zealand some years ago, but except for the Children and Young Persons Act 1968, there are now no restrictions, save those the court may order. It is not within our terms of reference to determine whether automatic suppression of names or identifying particulars should be adopted. We recognise the strength of the community's claim to know about offences and who has committed them.

Commencing Date

440. We believe an offender cannot expect to receive the benefits of rehabilitation immediately; he must first establish credibility. Accordingly, it is important that he does not receive protection while he is still offending. It is also important to ensure that he serves the sentence imposed. There is no problem in applying this to sentences involving a defined period of custody, but there are practical difficulties with non-custodial sanctions, and especially with fines, in determining precisely when the sentence has been satisfied. A fine may be payable by instalments. We agree with the view of the working party that it would be fairer in these cases for the period to run from the date of conviction. The offender's credibility can only be established when he is at risk in the community. If he is serving his sentence in that environment, we think he is entitled to have his good conduct taken into account while in that situation, as distinct from a person in custody, who can only establish his ability to live without trouble in the community after he is released. We therefore recommend that for custodial sentences the rehabilitation period should date from actual release from custody but that for all community-based sentences it should date from conviction.

441. Where a person goes overseas after having been convicted of an offence in New Zealand, offences committed by him abroad should be relevant in determining the commencement of the rehabilitation period: similarly, a person who has come to New Zealand after being sentenced overseas should be entitled to have his rehabilitation period start from the date he was released, or from the date of conviction abroad if a non-custodial sentence was imposed.

Length of Period

442. The following matters have been adopted in other jurisdictions as material to the length of the rehabilitation period:

(a) Nature or Seriousness of Offence—overseas legislation generally takes into account the nature or seriousness of offences, either dealing differently with them on the basis of differing periods of rehabilitation; or, in some instances, excluding them altogether. We agree with the conclusion of the working party that there is no satisfactory basis for identifying offences by either category or seriousness. Maximum penalties depend partly on when the legislation was last reviewed, and in many cases it is difficult to rely on them as an indication of the relative seriousness of offences. There is also the problem of the degree of culpability, making the maximum penalty unrealistic in deciding whether or not a given offender has earned his rehabilitation. Furthermore, many offences are beyond classification in this manner. There could be a case for excluding some serious offences, e.g., murder, from the scheme altogether, but against this is the experience that, of all serious offenders, it is the murderer who is least likely to reoffend. We have already referred to the difficulties in trying to predict the likelihood of reoffending in our comments on individual deterrence. We do not think that the nature or seriousness of the offence can be used in any rational way as a basis for rehabilitation.

(b) Length or Nature of Sentence—the approach adopted in the United Kingdom legislation depends on the principle that it is reasonable to expect a person who has received a long term of imprisonment to wait for a longer period before being deemed rehabilitated. However, this leads to the line being somewhat arbitrarily drawn, and to a multiplicity of rehabilitation periods which has caused considerable confusion. It is almost impossible to determine the effect of that legislation in some circumstances. The problem presented by the offender to the community commences from the commission of the offence, and we believe the risk he presents could be largely dealt with by starting the rehabilitation period from the completion of his sentence. This approach recognises that the seriousness of the offence and the offender's culpability has already been taken into account by the sentence; and that the offender does not begin to establish his credibility in the community until he is released. (On the other hand the person who receives a non-custodial sentence starts his rehabilitation in the community from the date of his conviction.) We are not persuaded that length or nature of sentence should be used to assess the rehabilitation period.

(c) Age of an Offender—in some jurisdictions there are special provisions for reducing the period of rehabilitation for the younger offender, and seven submissions were in favour of special consideration. However, for reasons of uniformity and simplicity the working party recommended there be no variation because of age—although with some reluctance, because of his diminished responsibility and the lack of awareness of the effect of a conviction on later life. However, they belong to an age group which is more likely to reoffend, borne out by the statistics we have cited in other parts of this review. With the exception of those charged with murder or manslaughter, the names of young persons are invariably suppressed and this affords a degree of protection.

Recommendations for Rehabilitation Period

443. We believe the period of rehabilitation should be arrived at by reference to the objectives we have identified in paragraph 420, and not on the basis of the nature or severity of the sentence or offence, nor the age of the offender. The aim is to protect a reputation regained and remove disabilities arising from conviction. There are two areas of interest involved—the right of the public to be informed; and private rights arising from a special relationship which the offender might have, e.g., with a prospective employer, an insurance company, or a professional group. There could be no great objection to denying the news media the right to republish particulars of the offender after the expiry of a relatively short period from conviction, and even less after release from a term of imprisonment. On the other hand, it seems a far more serious matter to prevent an employer from ascertaining a prospective employee's criminal history.

444. The submissions demonstrate a preference for a term of 5 years and research indicates that reoffending after such a period is very limited. We believe that after 10 years free of conviction the prospects of reoffending are negligible. Further research may demonstrate these times are conservative, but they seem appropriate for adoption at this stage. We accordingly recommend that there be a rehabilitation period of 5 years for protection from republication, and 10 years for the removal of disabilities arising from conviction. This latter period for removal is common in overseas legislation.

445. We believe that any protection should enure only for the lifetime of the convicted person, as it is directed to his rehabilitation and there seems to be no point in continuing restrictions on publication after his death. To do so would cause obvious complications; historical works are a ready example.

446. We do not think this restriction on publication seriously conflicts with the established practice of most publishers. It is rare for them to report offences beyond the immediate event, or indeed, for the public to have more than a passing interest in old convictions. In 1975 the New Zealand Press Council in adjudicating on a complaint said:

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

Proposed Sanctions

447. If this restraint on publication is to be given statutory force it must be supported by effective sanctions. We are quite opposed to the concept in the United Kingdom legislation that convictions could be deemed never to have occurred. Nor do we propose to follow their amendment to the present defamation laws effected by their Rehabilitation of Offenders Act 1974, whereby if a statement is made of a rehabilitated person that he has committed an offence, that person may sue for defamation on the grounds that he is accused of an offence that he did not commit and the publisher cannot plead justification. We agree with the view that it is in the public's interest that truth should at all times remain a defence in actions for defamation. Similar legislation in Bermuda in 1977 explicitly excluded from its application any civil proceedings for defamation. The South Australian Law Reform Committee rejected this approach and indicated the proper

sanction would be by the provision of a summary offence procedure. The working party supported that view, with provision for substantial maximum penalties in the case of a blatant breach, and with power to the court to award a large proportion of the fine to the complainant, analogous to the provisions of section 45A of the Criminal Justice Act 1954 for compensation for physical injury. As we indicate later, we think a more appropriate remedy would be to allow him to complain to the Human Rights Commission and take advantage of its remedies.

REMOVAL OF DISABILITIES

448. The most critical area of rehabilitation is that of employment, and the time of greatest need is immediately after conviction or completion of sentence. The effect that sudden disclosure of past offences might have on employment haunts many for years afterwards. Even when there is no specific qualifying bar arising from past convictions, a criminal record operates as a potential disability or handicap in most fields of employment or professional involvement.

Discrimination and Direct Relationship

449. In no aspect of rehabilitation is the need to weigh the interest of the individual against the reasonable requirements of society more finely balanced than in the employment arena. Most of the legislation abroad recognises that job discrimination is not unlawful if it can be shown there is a direct relationship between the ex-offender's criminal history, and the job, service, or benefit for which he has applied. We believe that such provisions are necessary, but they should be narrowly defined and sparingly applied so they will not be misued to deny the rehabilitated person the opportunity to live down his past. Observation of the way the United Kingdom Act works in providing for expungement demonstrates that it has not achieved nearly as much as has been hoped for. This is attributed partly to the very wide range of exemptions and exceptions made by subsequent regulations, and a tendency for its purposes to be circumvented by potential employers.

450. It is self-evident that employers should not be obliged to engage recently convicted persons whose offence relates directly to the field in which employment is sought. For example, a bank might not be required to engage a person recently convicted for an offence of dishonesty. Similar provisions apply in the case of those convicted of sexual offences against children who later seek employment in this area. There are difficulties in defining a direct relationship, but we believe acceptable criteria could be spelt out in the legislation without undue complexity. Subject to this qualification, we believe there should be no discrimination against offenders from the time of completion of a custodial sentence, or from conviction in other cases.

451. Our recommendation is that from the date of release from custody (or date of conviction for non-custodial penalties) it should be unlawful to discriminate in any of the areas covered by existing Human Rights legislation against anyone with a criminal record unless it can be shown that there is a direct relationship between the criminal record and the area of concern. The criteria for this direct relationship must be defined in any legislation with sufficient clarity to protect both employers and offenders. There should be provision for any person who considers he has been discriminated against unfairly because of a criminal record to complain to the Human Rights Commission.

Length of Time for Direct Relationship

452. The next question is for how long a direct relationship should be able to operate as a barrier to a person with a criminal record? We do not believe it should be for the rest of his life. This may be an area of some controversy, but there must come a time when an offender who has continued to live a blameless life has earned the right to a complete absence of discrimination. Due weight must be given to the public interest. While 5 years of good conduct may be accepted as an adequate qualifying period for protection from undue publicity, in the sensitive area of employment and related matters a longer period is desirable. We recommend that a period of 10 years should elapse before the direct relationship criteria would cease to apply. After this date an offender could regard his past conviction as having become irrelevant in every respect. Accordingly, any statute should provide that the direct relationship test cease to apply if the offender has not been convicted of any new offence for 10 years after conviction, or completion of sentence, as appropriate. In this context (as in the area of publication) minor offences should not count. Possibly the same test might be applied as those adopted in response to our recommendations about the conditions for calling up for sentence in an order under section 41 of the Criminal Justice Act 1954, or recall from parole. We have recommended it should be unlawful to ask questions designed to show that a person has convictions outside the rehabilitation period, with the exceptions mentioned in paragraph 438. We further recommend it be made lawful to refuse to answer any such questions.

Exceptions to Non-Disclosure or Discrimination

453. There may be some very exceptional cases when even the 10-year limit may not be sufficient to warrant eliminating the direct relationship test. There may be others in which it is very strongly in the public interest that disclosure or reference to a conviction should be allowed outside the rehabilitation period. We think there should be a right in exceptional cases for application to be made to a High Court judge for dispensation from the restrictions relating to non-disclosure or discrimination. One obvious example may be national security; another would be the right to refute a positive assertion by a person in legal proceedings that he has not been convicted of a crime. Effective sentencing for a major crime may justify information being disclosed about an earlier serious crime outside the rehabilitation period. Such an order could be made subject to appropriate safeguards for protection beyond the degree necessary to achieve the purpose justifying the application. We prefer this specific approach to the views of the majority of the working party, suggesting a review of proposed legislation and policies which would allow some categories of employer or professional groups to object to a 10-year limitation if they thought it inappropriate. If an offender's crime has been serious enough to make him an undesirable person after that length of time, it should be of such notoriety that someone concerned can be expected to recall it, prompting an application to the court for specific exemption if this were thought desirable. On the other hand we can see a great number of objections being made simply as precautionary measures to protect employers and professional bodies from an exceptional case which may never materialise. We favour the views of the member of that working party who was opposed to creating a large number of exceptions—one of the major difficulties in the United Kingdom legislation.

454. The impact of these recommendations will have to be carefully considered in cases of release on parole and statutory probation following life imprisonment and long prison sentences and of recall to prison in those circumstances.

Insurers

455. We agree with the working party that no exception should be made in favour of the insurance industry. They gave as their reasons the need for simplicity in the scheme and the desirability to avoid exceptions; the negligible prospect of any reoffending more than 10 years after the person has paid the penalty for his last offence, and the limited effect that it would have on the industry as a whole. It is not suggested there be any change to the existing obligation to disclose whether a risk has been declined elsewhere, or any cover refused or policy cancelled. This could be expected to cover most of those who have previously defrauded insurance companies.

RETENTION OF RECORD

456. The primary concern is to find a solution which gives maximum rehabilitation to a convicted person, and the basic approach is that of limiting publication and removing the disabilities that flow from conviction. In some cases deletion of criminal records would be quite impracticable. Sentencing records, criminal record books, court files, and other records are distributed throughout the country in many departmental offices and are voluminous. The same applies to police records, many of which are held for their own operational and administrative requirements and contain information about convictions. There is no suggestion that attempts be made to remove these manual records. The situation may be different in respect of finger prints and photographs.

457. Under the Wanganui Computer Centre Act 1976, there is provision for the deletion of criminal history records, the final responsibility for setting limits resting on the Computer Policy Committee. It tentatively suggested to the Minister of State Services in 1980 that criminal histories records should be purged after 20 years if the subject has 5 convictions or less, was sentenced to not more than 6 months' imprisonment on any conviction and has not reoffended during the last 20 years. There is a strong argument for making our rehabilitation period and the maximum length of time that records should be retained on the computer the same. Individuals have the right to request from the Privacy Commissioner information held about them on the system, and there may be some loss of credibility if a person applies after the end of the 10-year period we recommend, and finds details of his previous offences still recorded. However, there may be occasions when such a record will be relevant, e.g., in the event of a judge making a dispensation order (paragraph 439).

458. Bearing in mind that the thrust of our approach is against the publication and use of recorded information, the actual deletion of records is not essential for the protection we seek, although it may be very desirable. It must be accepted that there will be permanent records in law reports, other professional publications, newspaper files, court registries, and other institutions. There is no feasible way these can be destroyed or put out of circulation and we are far from making any such recommendation. We can only suggest that those responsible for the administration of recording procedures in offices and institutions, and the Computer Centre Policy Committee might bear in mind the aim of our recommendations and of any resulting legislation. We also believe that the success of our proposals will depend very much on the public's attitude to

rehabilitation. If they are put into operation, a programme giving publicity to their desirable objectives is recommended.

ENFORCEMENT

459. We have already referred to the working party's suggestion that any infringement of the ban against publication should be enforced by summary prosecution and fine, from which compensation would be awarded. This raises the question of enforcement. Either the complainant, or the police on his behalf, would have to take action in the court, a step which is likely to involve him in a great deal more publicity. The amount of compensation would depend on the amount of the fine imposed and the proportion ordered to be paid to him. The courts must take into account the culpability of the publisher, and only a small penalty may be imposed in some cases where he had not acted wilfully or maliciously. On the other hand, the harm done to the complainant might be very great indeed. There have been cases in recent years where newspapers have inadvertently published the name of an offender in respect of whom a suppression order was made by the court. The damage has been done, and any apology offered goes nowhere towards rectifying it. We think the situation in this area is much closer to that prevailing in defamation cases, where damages are awarded in proportion to the harm done to the plaintiff, regardless of the publisher's belief if the legality of his statement. There already exists a straightforward procedure under Part III of the Human Rights Commission Act 1977 for persons unlawfully discriminated against to complain to the commission, which may seek damages on his behalf from the offender before the Equal Opportunities Tribunal if previous conciliation has failed. We think those provisions could be appropriately extended to those who have been the subject of unlawful publication of previous conviction, or have been discriminated against on that account outside the rehabilitation periods provided. However, we think the existing limit of $1,000 for damages could be increased in these cases. Such proceedings have the advantage that they are normally taken on behalf of the complainant by an experienced agency, and he is not faced with having to initiate action himself. There is also the opportunity for conciliation and settlement beforehand, which is not available in the summary offence procedure contemplated by the working party. The prospect of having to pay a substantial penalty regardless of fault will also ensure that publishers and others concerned will be very careful to observe the provisions of any legislation. We consider that consent to publication should be a defence to any proceedings taken in respect thereof, or for any re-publication made in good faith and in reliance on the original publication to which consent was given.

460. The report from Working Party 5 is very full and thoroughly researched. It covers many matters of detail which are not appropriate for a policy review of this nature, but will be invaluable to those concerned with drafting or considering legislation.

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