

C136 CAIRNS, J.

Overcoming  
criminal  
record.

JOANNE CAIRNS

*OVERCOMING A CRIMINAL RECORD – TOWARDS AN  
EFFECTIVE SPENT CONVICTIONS SCHEME*

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**ABSTRACT**

Spent convictions schemes are a feature of many criminal justice systems overseas. They aim to aid and recognise the rehabilitation of offenders by concealing criminal records after certain period of time. This limits the ability for social and legal discrimination that undermines the rehabilitation of ex-offenders to occur.

Despite several proposals in the 1980s, the criminal justice system in New Zealand does not presently incorporate a spent convictions law. This paper will examine the need for reform and the justifications for enacting a spent convictions scheme in the interests of ex-offenders and society and general. Concluding that reform is necessary, it will critique the various forms of protection enacted overseas from an "offender-oriented" perspective, which emphasises that a spent convictions scheme should offer assistance to ex-offenders that is comprehensive and accessible.

Finally, by examining the efficacy of overseas models and indigenous proposals, this paper will identify the core elements of an effective spent convictions scheme that enables ex-offenders overcome the burden of a criminal record. It also considers the various methods that implementing protection can be achieved and submits that the most appropriate method is the issue of a code of practice issued under the Privacy Act 1993.

*The Text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 12,500 words.*

A	Aggressiveness	37
B	Simplicity	39
C	Cost and Practicality	40
VII	OPERATIONALISING THE CORE ELEMENTS	42
A	Alternative approaches towards enacting protection	42
B	A Code of Practice under the Privacy Act 1993	44

## CONTENTS

I	INTRODUCTION .....	1
II	THE NEED TO CONCEAL CONVICTIONS .....	3
III	THE CASE FOR REFORM .....	4
IV	GENERAL APPROACHES TO SPENT CONVICTIONS SCHEMES....	10
	A Record Concealment .....	11
	B Length of Rehabilitation Period .....	13
	C Excluded Offences .....	13
	D Enforcement of Rights .....	14
	E Exemptions .....	15
V	OVERSEAS SCHEMES AND NEW ZEALAND MODELS .....	16
	<i>A Automatic Schemes</i> .....	16
	1 United Kingdom - Rehabilitation of Offenders Act 1974 .....	17
	2 Queensland (Rehabilitation of Offenders) Act 1986 .....	20
	3 New South Wales Criminal Records Act 1991 .....	21
	4 New Zealand - Rehabilitation of Offenders Bill 1983 .....	22
	<i>B Non-automatic schemes</i> .....	23
	1 Canada - Criminal Records Act 1970 .....	24
	2 Western Australia Spent Convictions Act 1988 .....	26
	<i>C Hybrid Schemes</i> .....	27
	1 Australia - Commonwealth Crimes Legislation Amendment Act 1989 .....	27
	2 New Zealand - Recommendations of the Penal Policy Review Committee 1981 .....	29
	3 New Zealand - The Criminal Records Bill 1988 .....	32
VI	LESSONS LEARNED FROM OVERSEAS – THE CORE ELEMENTS OF AN EFFECTIVE SPENT CONVICTIONS SCHEME .....	36
	A Comprehensiveness .....	37
	B Simplicity .....	39
	C Cost and Practicality .....	40
VII	OPERATIONALISING THE CORE ELEMENTS .....	42
	A Alternative approaches towards enacting protection .....	42
	B A Code of Practice under the Privacy Act 1993 .....	44

VIII CONCLUSION ..... 52

XI BIBLIOGRAPHY

X APPENDICES

A Table of Spent Convictions Schemes in relation to adult offenders

B Information Privacy Principles - Privacy Act 1993

Record Keeping

Extent of Retail Licence Period

Excluded Offences

Enforcement of Rights

Exemptions

OVERSEAS SCHEMES AND NEW ZEALAND MODELS

United Kingdom - Rehabilitation of Offenders Act 1974

Queensland (Rehabilitation of Offenders) Act 1986

New South Wales Criminal Records Act 1991

New Zealand - Rehabilitation of Offenders Bill 1983

Non-conviction systems

Canada - Criminal Records Act 1970

Western Australia Spent Convictions Act 1983

Fijian System

Australia - Commonwealth Criminal Legislation Amendment Act 1988

New Zealand - Recommendations of the Panel Policy Review Committee 1981

New Zealand - The Criminal Records Bill 1983

LESSONS LEARNED FROM OVERSEAS - THE CORE ELEMENTS OF AN EFFECTIVE SPENT CONVICTIONS SCHEME

A Confidentiality

B Simplicity

C Loss and Penalties

OPERATION ALONG THE CORE ELEMENTS

A Alternative approaches towards existing protection

B A Code of Practice under the Privacy Act 1993

## I INTRODUCTION

Acquiring a criminal record exposes offenders to many social and legal disabilities in subsequent life. These include difficulties obtaining employment, housing, insurance, credit and documents required to travel or settle overseas. Reformed offenders also live with the fear that old convictions may be raked up and revealed years later to family or friends. The adverse impact of convictions, even in context of minor offending,<sup>1</sup> places ex-offenders in a dilemma about disclosing the past. However, concealing a criminal record is difficult, due to the fact that convictions are virtually a public record, entered in open court, often published in the media and have the potential to be disseminated indefinitely.

Many jurisdictions overseas have addressed the problems ex-offenders face without a legal mechanism to conceal convictions. Laws that restrict the ability of third parties to collect, use and disclose information about "spent" convictions and prohibit discrimination on the grounds of a criminal record have existed for over twenty years throughout the Commonwealth, the United States, continental Europe and Japan. However, despite several proposals during the 1980s to enact a "spent convictions scheme" in New Zealand, legislation to enable ex-offenders overcome the burden of a criminal record does not exist.

This paper will examine the need for reform of the criminal justice system in New Zealand to mitigate the long-term effects of conviction and provide offenders with an incentive to rehabilitate. It contends there are strong reasons to follow international trends and introduce legislation that enables offenders to conceal convictions after a certain period of time, both in the interests of ex-offenders and society in general.

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<sup>1</sup> For example, the prejudicial effect of minor convictions on insurance cover.

Concluding that reform is necessary, this paper will examine the effectiveness of spent convictions schemes enacted in other Commonwealth jurisdictions from an "offender-oriented" perspective that prioritises the interests of offenders and emphasises the need to provide assistance that is comprehensive and accessible. A comparative analysis of overseas schemes reveals that attempts to balance the needs of ex-offenders to conceal convictions with the wider public interest in continuing access to criminal records, has led to a weakening of the protection provided to ex-offenders in most jurisdictions. Examining different approaches to reconcile these competing interests provides a method to develop an effective approach to the issue in New Zealand.

Secondly, this paper will discuss past initiatives in New Zealand to enact legislation that enables ex-offenders overcome the burden of a criminal record. These include the recommendations of the Penal Policy Review Committee 1981,<sup>2</sup> the Rehabilitation of Offenders Bill 1983 and the Criminal Records Bill 1988. It will critique the effectiveness of these initiatives from an offender-oriented perspective and discuss the reasons for their failure to be implemented. In particular, it will focus on the problems encountered over the last two decades in proposing legislation that has the appearance of "forgiving offenders", especially in the context of sexual offences and other serious crime.

Finally, by evaluating the strength of international models and indigenous proposals this paper will develop an original proposal to regulate the collection, use and disclosure of criminal records through a Code of Practice under the Privacy Act 1993.

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<sup>2</sup> Penal Policy Review Committee Working Party No 5, *Expungement of Criminal Records (Appendix III)*, (Government Printing Service, Wellington, 1981).

## II THE NEED TO CONCEAL CONVICTIONS

Obtaining a conviction exposes offenders to adverse character assessments in later life that affect their family, social and employment status. Particularly, in relation to minor convictions incurred as the result of a "youthful indiscretion", the long-term effects of a criminal record on the reputation of an ex-offender can go beyond the demands of justice and undermine the interest of society in general to rehabilitate criminals. Although most offenders go on to live blameless lives once they have paid their debt to society, living down the past especially for those convicted of serious crime is fraught with difficulty due to the stigma of conviction and requirements to disclose the past in various contexts.

The immediate consequences of conviction, in particular, impact on crucial aspects of a successful transition to community life and can undermine efforts to rehabilitate. The ability to gain and retain employment, find housing, obtain credit, insurance and belong to a voluntary association or club are significant forces in the rehabilitation of ex-offenders that can be compromised by disclosure of previous offending.

The stigma that attaches to convictions in areas of private life is compounded by the exclusion from certain legal entitlements available to other citizens without a criminal record. In New Zealand, the legal disabilities that flow from conviction include difficulties obtaining discretionary licences,<sup>3</sup> being appointed to statutory authorities, to serve on a jury and run for public office.

However, possibly the most serious consequence of conviction in the long-term that impacts on offenders and the wider public interest, is the loss of potential contribution reformed offenders might otherwise make to society. Ex-offenders

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<sup>3</sup> For example a taxi licence or fire arms licence.



may be reluctant to pursue their chosen career or an active role in community affairs due to the adverse personal, social and economic hardships encountered in daily life and fear that a foray into public life may lead to wider disclosure of past offending. As a result, the community as a whole is deprived of the work talents, initiative and creativity of individuals who wish to contribute to society.<sup>4</sup>

Without a legal mechanism to conceal criminal records, convictions have the potential to affect the future prospects and relationships of offenders indefinitely and may be a factor encouraging a re-lapse into criminal behaviour.<sup>5</sup> Whereas, legislation that "wipes the slate clean" after a period of time without further conviction, serves to recognise that a person has become rehabilitated and sets an example for those recently convicted to follow.<sup>6</sup>

### III THE CASE FOR REFORM

Apart from life imprisonment and preventive detention, all penalties officially imposed by a court have limited duration.<sup>7</sup> A criminal record does not. Currently, there is no legislation in New Zealand that provides for information held on the Wanganui Computer, the central law enforcement database storing criminal records, to be expunged after a certain period of time. While the Privacy Act 1993 regulates information-sharing practices between law enforcement authorities,<sup>8</sup> it does not specifically control the collection, use and disclosure of criminal records in other contexts. In fact, where information about convictions is collected directly from the individual, for example on request of a potential employer, is published in

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<sup>4</sup> Australian Law Reform Commission *Criminal Records – Discussion Paper No 25*, (Australian Government Publishing Service, Canberra, 1985), 9.

<sup>5</sup> Above n 4, 1.

<sup>6</sup> Law Reform Division, Department of Justice, *Living Down a Criminal Record: A Discussion Paper* (Government Printing Service, Wellington, 1985), 9.

<sup>7</sup> Above n 6, 8.

<sup>8</sup> Privacy Act 1993, Fifth Schedule.

the media or disclosed under statute the information privacy principles in the Privacy Act do not apply at all.<sup>9</sup>

Without legal intervention to control the availability of information about criminal records in these situations, the lingering presence of old convictions can be the most onerous penalty ex-offenders suffer for offending. This is because legitimately or otherwise, many sectors in society assert that they have a right to know an individual's criminal past and a legitimate right to discriminate against offenders because of conviction.

In the New Zealand context, employers<sup>10</sup> and insurance companies<sup>11</sup> in particular, have voiced strong opposition towards the enactment of legislation that prohibits collection of information about convictions from prospective employees and clients to determine the "moral hazard" ex-offenders present to their interests. Their concerns focus on the alleged relevancy of past convictions to predict the future conduct of ex-offenders on the basis of their track record.<sup>12</sup> The refusal of a benefit such as employment or insurance is not viewed as discrimination, which involves taking into account irrelevant considerations, rather it is perceived as the legitimate exercise of judgement taking into account concerns about the genuineness of rehabilitation.

Acknowledging that information about convictions should be available in some circumstances, the demands expressed by employers and insurance companies for continuing access to criminal records generally, are based on an assumption that offenders lack the capacity to reform that is statistically unjustified. Recidivism

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<sup>9</sup> Above n 8, see exceptions to 2(a) and 2(b) to information privacy principle 2 and s 7 of the Act.

<sup>10</sup> New Zealand Employers Federation Inc, *Submission to the Justice and Law Reform Select Committee on the Criminal Records Bill 1988*, (Wellington, 9 June 1988).

<sup>11</sup> Insurance Council of New Zealand, *Submission on The Criminal Records Bill 1988* (Wellington, 13 March 1990).

<sup>12</sup> Insurance Council of New Zealand, *Submission to the Department of Justice on "Living Down a Criminal Record"* (Wellington, 26 February 1986), 10.

rates suggest that the longer an ex-offender remains crime-free the more the likelihood of re-offending decreases.<sup>13</sup> After 10 years, the prospect of re-offending is minimal.<sup>14</sup> Accordingly, it seems that the concerns expressed by these groups stem from prejudice against certain categories of offenders, rather than an individual assessment of the actual risks.

Legislation that conceals convictions is also alleged to undermine the proper administration of justice by obstructing Police investigation of crime and the ability of the courts to take previous convictions into account during sentencing. While the actual relevance of old convictions for these purposes is highly questionable, given that the older a conviction is the less likely it will assist in apprehending offenders or carry weight during sentencing, these arguments suggest that spent convictions schemes should be rejected in wider public interest.

Spent convictions schemes are also opposed on retributive grounds. It is contended that offenders do not deserve automatic relief from the consequences of conviction because a criminal record is a self-inflicted hardship and it is the role of individuals, not the law, to decide when and whether to forgive past criminal behaviour.<sup>15</sup> It is also asserted that the public has a right to know with whom it is dealing and to have access to the facts that would influence the ordinary and prudent members of the community in making their day to day decisions.<sup>16</sup> Legislation that seeks to conceal convictions is seen as unduly offender-oriented and dismissive of the wider community interest in knowing about offending.

While these criticisms are based on the erroneous belief that most offenders will continue to commit offences throughout their lives, the arguments opposing the

<sup>13</sup> Report to the Minister of Justice by the Secretary for Justice on the *Expungement of Criminal Records: A Summary of Submissions and Legislative Proposals*, Wellington, 1 July 1986, 6.

<sup>14</sup> However, it is important to distinguish certain offences, for example sexual offences where a lack of convictions may not indicate a lack of offending.

<sup>15</sup> Above n 12, 3.

<sup>16</sup> Above n 12, 2.

introduction of a spent convictions scheme on retributive grounds also reflect trends in public opinion about offenders. In recent times, the strength of community antipathy towards ex-offenders has been shown by the endorsement of Police proposals to issue "crime bulletins" in community newspapers, including photographs of ex-offenders suspected of re-offending<sup>17</sup> and support for a public index naming convicted paedophiles and sex offenders.<sup>18</sup> Such measures not only undermine individual attempts to rehabilitate, they convey a false impression to the community that it is constantly at threat from ex-offenders because they are unable to reform.

In addition to the arguments opposing the enactment of a spent convictions scheme being unpersuasive, there are several positive reasons why some form of statutory protection can be justified in the interests of the offender and society as a whole.<sup>19</sup>

First, enacting a spent convictions scheme can be justified on symbolic grounds. Such laws are perceived as an essential part of an enlightened criminal justice system and a method of ensuring that the system does not operate in a way that is harsh and oppressive.<sup>20</sup> Anecdotal evidence strongly suggests that ex-offenders perceive the inequality of treatment that flows from conviction as a continual punishment, out of proportion to the legal sanction for the offence. Regardless of whether the taint of conviction is viewed as a justified aspect of punishment on retributive grounds, it is clear that the consequences of conviction in later life are not the principal method by which the criminal justice system aims to punish offenders for committing offences.<sup>21</sup> A criminal record is not intended to be a life

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<sup>17</sup> See "Caution Urged over Crime Pamphlet Photographs", *Nelson Evening Mail*, Nelson, New Zealand, 26 May 1993; "Challenge to Crime Bulletins" *Sunday Times*, Wellington, New Zealand, 10 March 1993.

<sup>18</sup> "A New Chapter on Child Abusers", *The Dominion*, Wellington, New Zealand, 19 August 1997. The author states that 9000 copies have been sold of the *1996 New Zealand Paedophile and Sex Offender Index* which names over 500 convicted offenders.

<sup>19</sup> Above n 2, 9.

<sup>20</sup> Above n 4, 45.

<sup>21</sup> Above n 6, 5.

sentence.<sup>22</sup> By controlling the access, use and disclosure of criminal records, a spent convictions scheme not only enhance the lives of offenders, it promotes the interests of society in general by limiting punishment to the legal sanction imposed for the offence.

Secondly, spent convictions schemes can be justified on rehabilitation grounds. While the long-term consequences of a criminal record may fulfil other objectives of punishment such as retribution and denunciation of offending by ensuring that the offender is never forgiven and the crime is never forgotten,<sup>23</sup> they undermine rehabilitation of offenders by closing off opportunities at every turn. This process is also disempowering for victims of crime by failing to achieve closure on the psychological effects of harm caused by offending. Accordingly, there is a need to examine the objectives of punishment and determine whether the disadvantages of continuing access to criminal records on retributive grounds are outweighed by other justifications for punishment.

Thirdly, spent convictions schemes can be justified on the basis of protecting human rights, including the specific right of individuals to privacy. Discrimination against ex-offenders, particularly in the employment context is usually justified in terms of the risks that offenders present to specific interests and the public in general. However, evidence suggests most offenders do reform despite the problems they encounter restoring their credibility within society. As a result, reliance on an outdated criminal history to form character judgements about an ex-offender becomes unreasonable discrimination on the fact of conviction alone.

Following a period of crime-free behaviour, it is contended that the harm caused to

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<sup>22</sup> 1st Reading of the Rehabilitation of Offenders Bill 1983, NZPD, vol 445, 2 December 1983, 4539, per Mr R Prebble, MP.

<sup>23</sup> Report of Justice and Law Reform Committee on The Criminal Records Bill 1988, NZPD, vol 499, 11 July 1989, 11142, per Rt. Hon G Palmer.

ex-offenders by continuing access to information about past convictions outweighs the public right to know in most contexts. The injustice of continuing disclosure of past convictions when their relevancy to most decision-making has diminished is even more apparent in relation to decriminalised offences.<sup>24</sup>

A criminal record is also sensitive personal information. While, the Privacy Act 1993 protects a general right to privacy in accordance with international privacy obligations,<sup>25</sup> several exceptions to the information privacy principles limit the application of the Privacy Act in relation to the particular problems faced by ex-offenders. However, at the same time the privacy interests of ex-offenders are increasingly under threat. Privatization of the Wanganui Computer<sup>26</sup> and the ability of employers to delegate criminal record checks to private companies<sup>27</sup> increase the number of people dealing with criminal records and the possibility of mishandling information about past convictions. The potential erosion of privacy rights in relation to certain category of citizens weakens the commitment to these fundamental human rights in relation to all members of society and is something that should be guarded against.

The final justification for the need to enact legislation to alleviate the consequences of conviction is the belief that without some initiative from the Government, the community's perception of ex-offenders is unlikely to change.<sup>28</sup> Legislation that enhances the prospect of ex-offenders to live without stigma, not only ameliorates the legal and social disabilities faced by ex-offenders it can assist in changing public attitudes towards reformed offenders over time. The

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<sup>24</sup> For example offences decriminalised by the Homosexual Law Reform Act 1986.

<sup>25</sup> In particular, Art 17 of the International Covenant on Civil and Political Rights 1966 under which New Zealand has assumed international obligations to protect rights to privacy.

<sup>26</sup> In 1994 the Government sold administration of the Wanganui Computer to the government computing service GCS Ltd. In 1997, GCS Ltd was sold to a private company, EDS Ltd. The Privacy Commissioner has recently issued the EDS Code of Practice which seeks to prevent mishandling of information held on the Wanganui Computer.

<sup>27</sup> "Employment Agency offers Wanganui Computer Bait", *National Business Review*, Auckland, New Zealand, 19 August 1997.

<sup>28</sup> Above n 6, 11.

Homosexual Law Reform Act 1986, which decriminalised homosexuality and the Human Rights Act 1993 that prohibits discrimination on the grounds of sexual orientation are useful examples of the ability of legislation to force change in public attitudes.

However, in order to gather public support for a proposal to enact legislation that aims to assist ex-offenders re-establish their credibility within society, a spent convictions proposal must balance the needs of ex-offenders to conceal convictions with the wider public interest in the general availability of criminal records. If such legislation is perceived as unduly "offender-oriented" there is a risk that it will be rejected by the public and reinforce erroneous views about ex-offenders. It is important that any proposal to balance these competing interests does not undermine the purpose of enacting legislation in the first place. Attempts in other jurisdictions to balance these competing interests have limited the scope of protection under the law, permitted wide exemptions to the law and prescribed long waiting periods before offenders are eligible for relief.

#### IV GENERAL APPROACHES TO SPENT CONVICTIONS SCHEMES

The diverse approaches adopted overseas to resolve identical problems faced by ex-offenders, indicate that enacting protection under a spent convictions scheme can be achieved in a number of ways. However, while differences exist in the scope and effect of protection offered by spent convictions schemes overseas, it is evident that most schemes have common objectives. They are:<sup>29</sup>

- (i) To protect the information privacy interests of ex-offenders by guarding against the consequences of mishandling of criminal records by record keepers;

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<sup>29</sup> Above n 4, 13.

- (ii) To eliminate, as so far is practicable, the social and economic disabilities ex-offenders encounter in their attempt to re-enter society and resume full citizenship; and
- (iii) To bring to an end the legal disabilities that attach to conviction, so far as this is practicable and consistent with competing interests such as the detection of crime, administration of justice, the rights of victims and the ability to make fair decisions about the genuineness of an ex-offenders rehabilitation.

In order to attain these goals, most spent convictions schemes overseas share the following characteristics:

#### *A Record Concealment*

Concealing the record from the public eye is the primary method by which spent convictions laws aim to alleviate the problems caused by on-going disclosure of old convictions. In some systems this is achieved by expunging the record, which involves destroying the physical record of conviction entirely. The advantages of this approach are that it removes the source of the discrimination and sends a message to society that the conviction is forgotten.

However, expunging criminal records is an approach that has been criticised on a number of grounds. While it may be desirable from an ex-offender's point of view to eliminate the record, information about past convictions is scattered in amongst various sources including courts, prisons, parole boards, corrective services, employment records, law offices, police stations, archives, magazines, newspapers, journals and books. The impossibility of extinguishing all the various sources of information about past convictions renders complete expungement of criminal records impracticable.



Expungement is also opposed on the grounds that criminal records should to be retained for certain purposes, including criminal investigation, criminological research and sentencing of subsequent offences. Destruction of the record in these circumstances is perceived to undermine the administration of justice and is against the wider public interest.

For these reasons, sealing criminal records after a certain period of time, is an approach to record concealment that is generally preferred. This involves legally controlling the dissemination of criminal records by limiting the circumstances under which convictions can be lawfully disclosed and creating sanctions for failure to comply with the law. Preserving the physical record of conviction enables continued use of the information in restricted circumstances such as sentencing subsequent offences, but provides a general rule against collecting, using and disclosing convictions in other situations.

Another approach to record concealment adopted in the United Kingdom goes beyond prohibiting disclosure of past convictions by enabling offenders to lawfully deny the fact of conviction itself. This creates a legal fiction that the conviction never occurred, and therefore no information exists to be disclosed. However, this approach is seen as providing a dishonest form of assistance to offenders that fails to encourage rehabilitation by making them acknowledge and change their attitude towards offending. Permitting offenders to lie about conviction is also perceived as offensive to victims of crime. Due to these problems, "legislating a lie" has been rejected in the enactment of most recent spent convictions schemes.

Whichever approach is adopted towards record concealment, it should be noted that such provisions do not prevent questions about convictions from being asked. To address this problem, many spent convictions schemes also extend rights to ex-offenders to treat questions about past convictions to exclude those that are spent.

In some systems this is enforced by making it an offence to ask questions that would reveal spent convictions. This overcomes the difficulty that ex-offenders often face completing applications for employment, housing, credit, insurance and obtaining a visa to travel overseas.

### ***B Length of Rehabilitation***

Typically, ex-offenders do not receive immediate protection under a spent convictions scheme on release from custody or completion of sentence. Almost all spent convictions schemes enacted in other jurisdictions provide that an offender must earn the protection offered by the scheme by not incurring any further convictions for the same or similar offence during a legally imposed waiting period. The "rehabilitation period", as the time that must elapse before an offender becomes eligible for protection is known, varies in overseas schemes according to the age of the offender, the nature of the offence and length of sentence imposed by the court. However, 10 years without further conviction is the duration of the rehabilitation period in most systems, as this is viewed as compelling evidence that the risks to society of re-offending are negligible.

### ***C Excluded Offences***

In order to gain public acceptance, a common feature of spent convictions schemes is the exclusion of serious offences<sup>30</sup> from the ambit of protection. Targeting assistance to offenders who have been convicted of minor offences, is a major weakness of such legislation from the perspective of offenders and leads to anomalies, given that many minor offences have a higher re-conviction rate than

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<sup>30</sup> In most schemes this is defined as the imposition of custodial sentence exceeding 30 months.

some serious offences, for example homicide. If convictions for serious offences are dealt with in a way that takes into account public concerns to denounce the offending, for example extending the rehabilitation period in certain circumstances, it seems unnecessary to exclude serious convictions from the regime of protection altogether.

Ultimately, determining the class of offenders that should receive protection under the law should be linked to the relevance of past convictions to forming decisions about an ex-offender. After 10 years without further conviction, the unlikelihood of re-offending in most cases suggests that it is anomalous to exclude serious offenders from protection. To overcome this problem, spent convictions schemes adopted in a number of jurisdictions require serious offenders to apply to the court or a specialised tribunal for an order declaring the conviction spent.

#### *D Enforcement of Rights*

There are several approaches to enforcing the rights provided to ex-offenders by spent convictions scheme. The most common method adopted is to create an offence to collect, use and disclose of information about spent convictions. This sanction usually covers both the public and private sector, and is punishable by imprisonment or a substantial fine.

Another approach is to enable an ex-offender to commence proceedings for defamation where a spent conviction is disclosed. However, this is an expensive method of enforcing compliance with the law that can involve protracted legal proceedings and subject the ex-offender to further adverse publicity that undermines the purpose of concealing the record. Because of the disadvantages of the process many offenders may consider defamation proceedings an impracticable remedy.

A final method is the use of a complaints procedure established under existing legislation. This approach has been adopted in relation to federal offences in Australia where compliance with the law is enforced through a complaints procedure under the Privacy Act 1988. The advantages of this approach from the offender's perspective are that investigations are conducted in private, inquisitorial in nature and emphasise the informal resolution of complaints.

### *F Exemptions*

An important feature of international spent convictions schemes is ability to obtain an exemption from the law in relation to certain activities or occupations. Exemptions are provided for either by way of a definitive schedule or by the ability to enact regulations on a category basis. In the United Kingdom, a large number of exemptions to the law created by regulations, principally in the employment context where protection is most beneficial. As a result the Act has been criticised as being practically useless from the point of view of the offender.<sup>31</sup>

An alternative method of dealing with exemptions, adopted in relation to federal offences in Australia is to provide jurisdiction to a specialist body, such as the Privacy Commissioner, to approve applications by individuals and groups<sup>32</sup> for an exemption from the law. The advantage of this approach is that it allows for a careful consideration of the individual merits of a particular application, weighing up the needs of the applicant and the impact on the offender on a case by case basis.

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<sup>31</sup> Above n 6, 19.

<sup>32</sup> However, the most common applicants for an exemption have been Government Departments and Industry Groups. See Federal Privacy Commissioner for Australia *Spent Convictions Scheme: Exclusions, Advice to the Attorney General* (Human Rights & Equal Opportunities Commission, Sydney, 1990).

## V OVERSEAS SCHEMES AND NEW ZEALAND MODELS

Spent convictions laws are widespread throughout the world. Despite considerable variation in the detail of particular schemes, three general categories of protection exist. These are automatic schemes, non-automatic schemes, and hybrid schemes. In the Commonwealth, the contrasting approaches to spent convictions laws in the United Kingdom, Australia, and Canada provide useful examples of the different types of schemes. The limitations placed on the protections offered in these jurisdictions also highlights difficulties in obtaining public support for legislation that has the appearance of "forgiving" offenders and being "soft" on crime. As a result, spent convictions schemes enacted in these jurisdictions only target minor offences, tend to provide for a lengthy rehabilitation period and do not focus directly on the discrimination problems faced by ex-offenders. In the New Zealand context, evaluating the strength of these schemes from an "offender-oriented" perspective indicates that unless a spent convictions proposal adequately resolves the problems ex-offenders face, there may be little merit in enacting a scheme in first place.

### A *Automatic Schemes*

Automatic schemes are the most common type of spent convictions laws. They exist throughout Europe, the United States, in Fiji and Japan. Because ex-offenders receive protection from on-going disclosure of past convictions automatically following the successful completion of an appropriate rehabilitation period, there is no onus on a person with a criminal record to apply for his or her criminal record to become spent. The United Kingdom Rehabilitation of Offenders Act 1974 is an automatic scheme that has been influential on subsequent legislation in the Commonwealth, most notably in Australia.

## 1 *United Kingdom - The Rehabilitation of Offenders Act 1974*

Now widely criticised because of its limited scope, the Rehabilitation of Offenders Act 1974 is a leading example of a scheme that automatically deems past convictions spent. The purpose of the Act is:<sup>33</sup>

*to rehabilitate offenders who have not been reconvicted of any serious offence for periods of years, to penalise the unauthorised disclosure of their previous convictions and to amend the law of defamation for purposes connected therewith.*

The primary method by which the Act promotes the rehabilitation of offenders is by deeming a "spent" conviction to have never occurred.<sup>34</sup> This enables ex-offenders to lawfully declare under oath that they were never prosecuted, charged, convicted or sentenced in relation to a conviction that is "spent".<sup>35</sup> Thus, in general there is no obligation on "rehabilitated offenders" to disclose spent convictions<sup>36</sup> when applying for a job, insurance or credit. Further, they are entitled to treat any questions relating to past convictions as not referring to those that are spent, and will not face any prejudice in law for a failure to acknowledge such convictions.<sup>37</sup>

Offenders become eligible for protection under the scheme by completing a rehabilitation period without incurring any further convictions for the same offence. The duration of the rehabilitation period varies from 10 years to 6 months according to the length of the sentence imposed by the Court<sup>38</sup> and is halved in relation to juvenile offenders.<sup>39</sup> The period commences from the date of conviction

<sup>33</sup> Rehabilitation of Offenders Act 1974 (UK), Long Title.

<sup>34</sup> Above n 33, s 1(1).

<sup>35</sup> Above n 33, s 4.

<sup>36</sup> Except in the case of criminal proceedings, see above n 33, ss 4(1)(a) and 7(2). However, it should be noted that this does not affect other statutory obligations imposed on ex-offenders, such as the need for convicted sex offenders to notify local police of their address sometimes for the rest their life under the Sex Offenders Act 1997 (UK).

<sup>37</sup> Above n 33, s 4(5).

<sup>38</sup> Above n 33, s 5(2)(a). The maximum rehabilitation period applies to a sentence of imprisonment or corrective training exceeding six months but not exceeding 30 months.

<sup>39</sup> Above n 33, s 5(2)(a) Table A.

or release from custody, rather than upon completion of sentence.

Specifically targeting offenders with minor convictions, the Act excludes offenders sentenced to more than 30 months imprisonment.<sup>40</sup> Incurring a subsequent conviction for a serious offence can have the effect of extending the length of a rehabilitation period already running in relation to a conviction eligible to become spent.<sup>41</sup> However, obtaining a subsequent conviction for a minor offence does not affect the earlier conviction and the rehabilitation periods for the convictions run separately.<sup>42</sup>

A significant feature of the scheme is the punitive approach towards enforcing the provisions regarding collection and disclosure of information about spent convictions. In relation to the public sector, the Act creates an offence for disclosing information about spent convictions from official records<sup>43</sup> and for obtaining information about spent convictions by means of dishonesty, bribery or fraud.<sup>44</sup> In the private sector, the Act enables rehabilitated offenders to commence defamation proceedings against any person publishing information about a spent conviction where the publication is malicious.<sup>45</sup>

Another important feature of the scheme is the wide provision for exemption from the law under subordinate legislation. This provision allows industry groups, employers, licensing and registration bodies to continue to collect information about spent convictions. In practice, a large number of exemptions have been created by regulations that restrict the scope of protection offered by the law, particularly in the context of employment and family law matters.

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<sup>40</sup> The Act also excludes offenders sentenced to life imprisonment, preventive detention and corrective training exceeding 30 months, see above n 33, s 5(1).

<sup>41</sup> Above n 33, s 1(1)(b) and section 6(4)(b).

<sup>42</sup> Above n 33, s 6(6)(a).

<sup>43</sup> Above n 33, s 9(2).

<sup>44</sup> Above n 33, s 9(4).

<sup>45</sup> Above n 33, s 8.

The approach of the Rehabilitation of Offenders Act to the problems faced by ex-offenders has influenced spent convictions schemes subsequently enacted in the Queensland and New South Wales. However, since the mid-1980s, New Zealand proposals to enact a spent convictions scheme have rejected legislation based on the English approach because of the limitations perceived with the scope of protection and length of rehabilitation under the Act.

The most significant criticism of the Act is that it targets only offenders with a minor criminal record, who are arguably those that face less difficulty in re-establishing their credibility within society in any event. Whereas offenders sentenced to life imprisonment, preventive detention or a sentence of imprisonment or corrective training exceeding 30 months, who arguably have greater needs to live down the past are excluded from protection entirely.<sup>46</sup>

Secondly, the Act is criticised for providing an unduly complex regime of assistance by enacting multiple rehabilitation periods to cover what is all essentially minor offending. The imposition of a 10 year rehabilitation period in relation to any sentence greater than 6 months is perceived as failing to provide offenders with an adequate incentive to rehabilitate, given that they must wait a very long time before society considers they have reformed.<sup>47</sup>

A final criticism of the Act is that it "legislates a lie". By deeming a spent conviction to never have occurred, the Act provides a dishonest form of assistance to offenders and is a practice that is offensive to victims of crime. However, this criticism seems overstated. Legal fictions are not unusual in law, and exist in a variety of contexts involving social policy, most notably in the area of adoption. Rather, it seems that creating a legal fiction is perceived as inappropriate in

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<sup>46</sup> Above n 40.

<sup>47</sup> Penal Affairs Consortium, *"On the Record": Comments on the White Paper of June 1996* (Penal Affairs Consortium, London, 1996) 6.



relation to convictions because of the moral culpability involved in offending.

## 2 *Queensland Criminal Law (Rehabilitation of Offenders) Act 1986*

Substantially adopting the approach in the United Kingdom, Queensland was the first State in Australia to enact a spent convictions scheme. Unlike its predecessor, the Criminal Law (Rehabilitation of Offenders) Act provides a single rehabilitation period of 10 years in relation to adult offenders<sup>48</sup> and 5 years for juvenile offenders.<sup>49</sup> The Act excludes serious offences<sup>50</sup> from rehabilitation and more restrictively than in the United Kingdom, does not apply where an offender has been ordered to serve any period in custody.<sup>51</sup> To discourage recidivism, subsequent convictions incurred during the rehabilitation period have the effect of reviving any convictions previously spent.<sup>52</sup>

The main benefit of rehabilitation for ex-offenders under the scheme, is the right to lawfully deny the existence of a spent conviction, unless expressly required to disclose it by law.<sup>53</sup> Protection is also achieved by the creation of an offence for unauthorised disclosure of spent convictions by third parties.<sup>54</sup>

Acknowledging the difficulties that ex-offenders face in the area of obtaining and retaining employment, the Act imposes a legal duty upon employers and professional bodies to disregard spent convictions in assessing character, unless the conviction is expressly required to be considered by law.<sup>55</sup> Non-compliance

<sup>48</sup> Queensland Criminal Law (Rehabilitation of Offenders Act) 1986 (Qld), s 3(1)(a).

<sup>49</sup> Above n 48, s 3(1)(b).

<sup>50</sup> Where the offender is ordered to serve a period in custody exceeding 30 months. See above n 48, s 3(2)(b).

<sup>51</sup> Above n 48, s 3(2)(a).

<sup>52</sup> Above n 48, s 11.

<sup>53</sup> Above n 48, s 8.

<sup>54</sup> Punishable on conviction to a fine not exceeding \$5,000 see above n 48, s12. However disclosure is permissible with the consent of the offender or where expressly required by law, see s 9 of the Act.

<sup>55</sup> Above n 48, s 9.

with this provision is an offence punishable by a fine of \$5,000.<sup>56</sup> Recognising the disadvantage that ex-offenders suffer in the context of court proceedings, the Act amends the Evidence Act 1977-1984 to prevent ex-offenders from being questioned about spent convictions in civil or criminal proceedings without the leave of the Court.<sup>57</sup>

### 3 *The New South Wales Criminal Records Act 1991*

The Criminal Records Act incorporates the major features of the Rehabilitation of Offenders Act 1974 including record concealment, a lengthy rehabilitation period for adult offenders and provision for specific exemptions from the law. However, targeting protection more restrictively than its English counterpart, the approach to spent convictions in New South Wales only provides relief to offenders where a maximum sentence of less than six months imprisonment is imposed of the offence.<sup>58</sup> Uniquely, the Act isolates a large number of sexual offences and expressly provides that they cannot be spent.<sup>59</sup> Other specific exemptions from the scheme include appointment to legal office, employment as a police officer, teacher and child-care provider.<sup>60</sup>

The rehabilitation period that must expire before an adult offender is eligible for protection under the scheme is 10 years.<sup>61</sup> However, in relation to juvenile offenders, the waiting period is reduced to 3 years.<sup>62</sup> This enables offences committed by young offenders to become spent when they reach early adulthood,

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<sup>56</sup> Above n 48, s 12.

<sup>57</sup> Above n 48, s 15A.

<sup>58</sup> New South Wales Criminal Records Act 1991 (NSW), s 7; Also applies to discharges without conviction under s 556A of the Crimes Act (NSW) which are defined as a conviction for the purposes of the Act.

<sup>59</sup> Above n 58, s 15.

<sup>60</sup> Above n 58, s 8.

<sup>61</sup> Above n 58, s 9.

<sup>62</sup> Above n 58, s 8.

and provides an incentive to turn away from crime.

The object of the scheme is to limit the collection, use and disclosure of criminal records. The Act provides that ex-offenders are not required to disclose spent conviction for any purpose<sup>63</sup> for example, when applying for employment, insurance, credit, or applying for a statutory licence. Where questions about ex-offender's criminal record arise in a legal context, excluding court proceedings,<sup>64</sup> spent convictions are deemed irrelevant. However, unlike spent convictions schemes in Queensland and the United Kingdom, this protection does not apply in relation to being charged with an offence, even where charges are dismissed or withdrawn.<sup>65</sup> To enforce the protection provided by the scheme, the Act provides that disclosure of a conviction outside the rehabilitation period is an offence.<sup>66</sup>

#### 4 *New Zealand - The Rehabilitation of Offenders Bill 1983*

Influenced by corresponding legislation in the United Kingdom, Richard Prebble MP, introduced the Rehabilitation of Offenders Bill as a private members bill in 1983. While conceded that the Bill was not revolutionary,<sup>67</sup> it was the first legislative measure to recognise that the consequences of conviction prevent ex-offenders from pursuing occupations of choice, participating in social life and exercising the rights of citizenship available to others.

Incorporating the major features of its English counterpart, the Bill limited protection to offenders with minor convictions. Convictions where the offender was sentenced to more than 2 years imprisonment were deemed ineligible for

<sup>63</sup> Above n 58, s 12.

<sup>64</sup> Above n 58, s 16.

<sup>65</sup> New South Wales Privacy Committee Information Bulletin No. 20, Sydney, 1995, 1.

<sup>66</sup> Above n 58, s 13.

<sup>67</sup> Above n 22, 4546, per Mrs M Shields, MP.

relief.<sup>68</sup> In relation to convictions eligible for rehabilitation, the Bill proposed a modified scale of protection with custodial sentences becoming spent after 8 years, semi-custodial sentences after 6 years and non-custodial sentences after 4 years.<sup>69</sup> The Bill proposed that for these rehabilitation periods for juvenile offenders be halved. Acknowledging the unfairness of excluding serious offences from protection under the scheme, it was conceded that the desire to gain widespread acceptance of the principles of the Bill caused it to be confined to a first cautious step.<sup>70</sup>

The main benefit of rehabilitation provided to ex-offenders proposed by the Bill was the ability to treat questions about past convictions as excluding any that are spent.<sup>71</sup> The Bill adopted the English approach of enforcing protection under the scheme by enabling defamation proceedings to be brought against anyone that reveals the existence of spent conviction.<sup>72</sup> Also drawing on a major recommendation of the Penal Policy Review Committee 1981, the Bill proposed extending the grounds of unlawful discrimination under the Human Rights Commission Act 1977 to include discrimination on the grounds of a spent conviction.

### **B Non-automatic Schemes**

Non-automatic schemes require an ex-offender to apply to a court or specialised tribunal in order to take advantage of the benefits available under a spent convictions scheme. Leading examples of non-automatic schemes exist in Canada and Western Australia and are common in many United States jurisdictions.

<sup>68</sup> Rehabilitation of Offenders Bill 1983, cl 6.

<sup>69</sup> Above n 68, cls 6-8.

<sup>70</sup> Above n 22, 4539.

<sup>71</sup> Above n 22, 4540, per Mr R Prebble, MP.

<sup>72</sup> Above n 22, 4542, per Hon P East, MP.

### 1 Canada – The Criminal Records Act 1970

The Canadian Criminal Records Act provides the oldest model in the Commonwealth dealing with hardships caused by a criminal record. The Act enables ex-offenders to apply to the Solicitor-General for a pardon in relation to a federal offence. In order to ensure that the candidate for pardon is rehabilitated and worthy of protection by the law, the application is then referred to the National Parole Board for investigation and recommendation who are empowered to make “proper enquiries” to ascertain the behaviour of the applicant since the date of conviction.<sup>73</sup> In relation to indictable offences, the Board is empowered to delegate investigation of an applicant’s worthiness for pardon to the Royal Canadian Mounted Police. While, the scope of investigation varies according to the nature of the offence, the sentence imposed and the time that has elapsed since the completion of sentence. However, the most extensive form of scrutiny can involve interviews with the applicant, their present employer and up to two previous employers as well as the supply of at least two character references and a criminal activity check by local police.<sup>74</sup>

Unlike subsequent approaches, the Act does not allow ex-offenders to lie about the fact of conviction as a method of concealing the past. Rather, the scheme empowers the National Parole Board to issue a pardon<sup>75</sup> that removes the legal disabilities imposed on ex-offenders by law on the grounds of conviction.<sup>76</sup> With reference to the particular hardships faced by ex-offenders in the employment context, the Act provides that applicants for federal public sector employment

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<sup>73</sup> Criminal Records Act 1970 (Can), s 4(2).

<sup>74</sup> R Nadin-Davis “Canada’s Criminal Record Act – Notes on How Not to Expunge Records” (1981) 45 Saskatchewan LR 221, 230.

<sup>75</sup> Above n 73, s 4.

<sup>76</sup> Above n 73, s 5. As well as the protection provided against unwarranted disclosure of a criminal record by the Act, the Canadian Human Rights Act 1977 makes it unlawful to discriminate against an ex-offender on the grounds of conviction where a pardon has been granted.

cannot be asked questions that would reveal a pardoned conviction.<sup>77</sup>

Also information relating to pardoned convictions is not available to law enforcement or the Courts except with the permission of the Solicitor-General. Accordingly, it is unable to be used in criminal investigations or referred to in prosecutions. To prevent mishandling of records by government officials the Act provides that information in relating to pardoned convictions must be stored separately and is unable to disclosed without the consent of the Solicitor-General.<sup>78</sup>

The rehabilitation period imposed by the Criminal Records Act is considerably shorter than corresponding waiting periods in other jurisdictions. Ex-offenders must wait 5 years before they are able to make an application for pardon in relation to an indictable offence<sup>79</sup> and only 3 years in relation to a summary offence.<sup>80</sup>

However, the Criminal Records Act does not guarantee the protection provided to ex-offenders. Pardons issued under the scheme are revocable by the National Parole Board where the offender is subsequently convicted of a summary offence, the Board is satisfied that the offender is no longer of good conduct and where the offender makes a false or deceptive statement on their application for pardon.<sup>81</sup>

The most distinguishing feature of spent convictions scheme implemented in Canada is the creation of an administrative process to screen applications for pardon. A thorough investigation into the applicant's worthiness for pardon by the National Parole Board and the Royal Canadian Mounted Police, means that there is no need to draw an arbitrary distinction between minor and serious convictions as schemes in other jurisdictions do.

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<sup>77</sup> Above n 73, s 8.

<sup>78</sup> Above n 73, s 6.

<sup>79</sup> Above n 73, s 4(a)(i).

<sup>80</sup> Above n 73, s 4(b)(i).

<sup>81</sup> Above n 73, s 7 (a)-(c).

## 2 *The Western Australia Spent Convictions Act 1988*

Incorporating the recommendations of the Western Australian Law Reform Commission,<sup>82</sup> the Spent Convictions Act 1988 departs from earlier approaches in Queensland and the United Kingdom by including convictions for serious offences within the ambit of protection and requiring offenders to make an application for past convictions to become spent.

While the Act gives all ex-offenders who have not incurred any subsequent convictions within a prescribed period<sup>83</sup> the right to apply for a past conviction to become spent, it adopts a two-tier approach towards applying for protection under the scheme.<sup>84</sup> First, in relation to "lesser" convictions,<sup>85</sup> ex-offenders can apply to the Commissioner of Police for a certificate acknowledging that a conviction is spent.<sup>86</sup> Secondly, in relation to serious convictions,<sup>87</sup> ex-offenders can apply to the District Court for an order declaring that the conviction is spent.<sup>88</sup> In determining the application the Judge will usually take into account the particular nature and circumstances of the offender and their offending, the time that has elapsed since conviction, whether the conviction prevents the ex-offender from engaging in a profession or employment and the wider public interest.

Finally, the Act provides that exclusions from the scheme are to be prescribed by regulation.

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<sup>82</sup> Western Australian Law Reform Commission, *Report on the Problem of Old Convictions* (WALRC, Perth, 1985).

<sup>83</sup> The general rehabilitation period is 10 years, but can be reduced to 5 years in the case of lesser convictions, see The Spent Convictions Act 1988 (WA), ss 6 and 9.

<sup>84</sup> Above n 83, s 6.

<sup>85</sup> Above n 83, s 8(3), defined as a conviction that is not "serious" under section 8(4).

<sup>86</sup> Above n 83, s 7(1). Where an application is not made, lesser convictions become spent automatically upon the expiration of 10 years.

<sup>87</sup> Defined as the imposition of a custodial sentence of one year or more or a fine of \$15,000 or more. See above n 83, s 8(4).

<sup>88</sup> Above n 83, s 4(1).

## *C Hybrid Schemes*

Rather than enacting separate legislation, hybrid schemes involve the amending existing legislation to incorporate an automatic spent convictions scheme that places the onus on offenders to seek civil remedies for failure to comply with the law. They exist in relation to federal offences in Australia and have been the dominant form of protection proposed in New Zealand.

### *1 Australia - The Commonwealth Crimes Legislation Amendment Act 1989*

The Commonwealth Crimes Legislation Amendment Act 1989 inserted Part VIIC into the Commonwealth Crimes Act 1914 to provide a spent convictions scheme in relation to federal offences. Like most other schemes, the Act sets the rehabilitation period in relation to adult offenders at 10 years and 5 years for juvenile offenders.<sup>89</sup> Following the law in Queensland and the United Kingdom, the scheme applies only in relation to offences where the penalty imposed is a sentence of 30 months imprisonment or less and has no impact on serious offences at all.<sup>90</sup> The main benefit provided to offenders by the scheme is the right to lawfully claim under oath that they have never been charged or convicted in relation to a spent federal offence.<sup>91</sup> Like the models upon which the scheme is based, the protection provided by the Commonwealth legislation is not unlimited and can be revoked where an offender incurs a subsequent conviction during the rehabilitation period.<sup>92</sup>

A distinctive characteristic of the Commonwealth spent convictions scheme is that

<sup>89</sup> Definition of 'waiting period' in s 85ZL of the Commonwealth Crimes Amendment Act 1989 (Cth).

<sup>90</sup> Above n 89, s 85ZM(2)(b).

<sup>91</sup> Above n 89, s 85ZW.

<sup>92</sup> Above n 89, ss 85ZX and 85ZY.



uses an existing institution to enforce the rights given to ex-offenders. The Act empowers the Federal Privacy Commissioner to investigate complaints involving the unauthorised collection, use and disclosure of information about spent convictions.<sup>93</sup> Where a complaint has substance, the Act enables the Privacy Commissioner to make a number of declarations in order to redress the interference with privacy. These include the power declare that the respondent has engaged in unlawful conduct, should take reasonable steps to redress the loss suffered by the complainant, should employ or re-employ the complainant,<sup>94</sup> should promote the complainant and that the complainant is entitled to compensation.<sup>95</sup>

Another, major innovation of the Act is the extension of jurisdiction to the Privacy Commissioner to determine applications by an agency for a complete or partial exclusion from the scheme.<sup>96</sup> Where an application for exclusion is approved it has the effect of removing or restricting the rights of individuals with minor convictions.

The Act also provides for a number of statutory exclusions. Specifically, it exempts provisions relating to the disclosure of criminal records information to law enforcement agencies for assessing the suitability of prospective employees, the Intelligence Service, courts and tribunals and for the purposes of immigration.<sup>97</sup> The advantage of using the Privacy Commissioner to determine applications allowing further exclusion from the Act, is that it empowers a specialist body with knowledge and expertise in the area of information privacy to determine after careful consideration the worthiness of specific applications. This avoids the danger of political bias to affect exemptions made under subordinate legislation.

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<sup>93</sup> Above n 89, s 85ZZ.

<sup>94</sup> Above n 89, s 85ZZD(1)(b)(iii).

<sup>95</sup> Above n 89, ss 85ZZD(1)(b)(i)-(v).

<sup>96</sup> Above n 89, s 85ZZ(1)(b).

<sup>97</sup> Above n 89, s 85ZZH.

By introducing a privacy model, the legislation recognises that issues relating to the collection, use and disclosure of criminal records specifically impact on the privacy rights of ex-offenders. The main benefit of using an existing structure that emphasises conciliation and settlement by agreement as the primary method of resolving complaints is that the legislation provides a private, low cost and user-friendly mechanism by which ex-offenders enforce their rights.

## 2 *New Zealand - Recommendations of the Penal Policy Review Committee*

In its 1981 Report,<sup>98</sup> the Penal Policy Review Committee ("the Committee") recommended the enactment of legislation which combined concealment of past convictions after an appropriate rehabilitation period with extension of the Human Rights Commission Act 1977 to include criminal conviction as an unlawful ground of discrimination. As a proposal that modifies existing human rights legislation, the recommendations of the committee focus on the social and legal and disabilities encountered by ex-offenders.

Compared to subsequent legislation enacted in other Commonwealth jurisdictions, the proposals of the Committee are "offender-oriented" and provide strong protection to enable all ex-offenders to live stigma free lives. In formulating its recommendations, the Committee was guided by the principles that legislation to assist ex-offenders should be accessible, easy to understand, administratively viable and endeavour to provide a system for all.<sup>99</sup> It was the Committee's view that focusing on the severity of the sentence to determine eligibility for protection, does not account for variation in the culpability of offending and can lead to anomalies between those protected and excluded by the law. The Committee also rejected focusing on the length of sentence imposed by the Court as a method for

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<sup>98</sup> Above n 1.

<sup>99</sup> Above n 2, para 437.

determining eligibility for protection because this does not account for the range of penalties available for sentencing of the same offence.<sup>100</sup> Hence protection was to be extended to all offenders regardless of the seriousness of the offence or penalty imposed.

The Committee recommended that offenders should receive automatic protection following the completion of a rehabilitation period without subsequent conviction. In relation to custodial sentences, the rehabilitation period would commence from the release from custody, and in relation to non-custodial sentences from the date of conviction. Acknowledging that expungement of criminal records completely is impracticable, it was the Committee's view that the proper approach is to seal rather than destroy criminal records. In this regard, the Committee proposed that a maximum period of 10 years be set for the access to criminal records on the Wanganui Computer.<sup>101</sup>

Focusing on the problems of disclosure and discrimination ex-offenders encounter, the Committee proposed the enactment of a spent convictions scheme as an amendment to the Human Rights Commission Act 1977. The first method by which protection was proposed involved the enactment of a prohibition on seeking information or publishing details about spent convictions after 5 years.<sup>102</sup> Breach of this provision would be a criminal offence. Acknowledging the strength the community's claim to know about offenders, the Committee recommended that in exceptional cases there would be a right to apply to the High Court for a dispensation from the prohibitions on disclosure and discrimination.<sup>103</sup> In the Committee's view, circumstances where a dispensation would be appropriate

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<sup>100</sup> For example, the arbitrariness of focusing on the penalty imposed by the Court is shown in the context of manslaughter where the sentence imposed could range from probation to life imprisonment.

<sup>101</sup> Above n 2, para 442.

<sup>102</sup> Above n 2, para 445.

<sup>103</sup> Above n 2, para 453.

include matters involving national security and sentencing of major crime.<sup>104</sup>

The second method of protection proposed by the Committee included extending the existing grounds of unlawful discrimination under the Human Rights Commission Act to include discrimination on the basis of conviction, unless a direct relationship exists between the conviction and the particular area of activity in question.<sup>105</sup> This would enable past convictions to be taken into account, where for example an ex-offender convicted of dishonesty offences wished to apply for a job in a bank or an offender convicted of child sex offences applied for employment in a crèche. The prohibition on discrimination would commence on release from custody and date of conviction in relation to non-custodial sentences. The direct relationship test would cease to apply after 10 years, at which point it would be unlawful to take past convictions into account in any of the areas covered by the Act.<sup>106</sup> The Committee proposed that the rights extended to offenders would be enforced through the existing complaints procedure of the Human Rights Commission that promotes the resolution of complaints by agreement.

The form of protection recommended by the Committee has a number of advantages. First, it offers automatic protection to all offenders by adopting a "direct relationship" test that only enables criminal records to be taken into account in the short-term where the public interest outweighs the needs of the offender. Secondly, it also addresses community concern about serious offenders by enabling the Court to extend the basic rehabilitation period in certain circumstances where there is a perceived risk to public safety. The proposals of the Committee were subsequently endorsed by the Department of Justice in its 1985 discussion paper *"Living Down a Criminal Record - The Problem of Old*

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<sup>104</sup> Above n 103.

<sup>105</sup> Above n 2, para 449.

<sup>106</sup> These include the provision of goods and services, housing, employment and education.

*Convictions*"<sup>107</sup> and formed the basis for the Criminal Records Bill 1988.

### 3 *New Zealand - The Criminal Records Bill 1988*

Introduced to Parliament in April 1988, the Criminal Records Bill was drafted as an amendment to the Human Rights Commission Act 1977. Substantially adopting the recommendations of the Penal Policy Review Committee the Bill represents the most significant proposal to mitigate the hardships of conviction and provide ex-offenders with an incentive to rehabilitate in the New Zealand context.

The Bill offered ex-offenders protection from discrimination in the areas covered by the Human Rights Commission Act and from further publication of their criminal record, except in limited circumstances.<sup>108</sup> It proposed that protection be extended to all offenders regardless of the nature of offending or sentence imposed. However, the duration of the rehabilitation period was set at 10 years irrespective of age, the type of offending or length of sentence imposed. Also to specifically address community concern and violent and sexual offending, the Bill empowered the sentencing judge to extend the rehabilitation period in relation to sexual offenders and those convicted of homicide where a sexual element is present.<sup>109</sup> In all cases, the rehabilitation period would commence on the date of release from custody in relation to custodial sentences and from the date of conviction where a non-custodial is imposed. Minor convictions incurred during the rehabilitation period, would not effect the period already running or incur a separate period.<sup>110</sup>

<sup>107</sup> Above n 6.

<sup>108</sup> The Criminal Records Bill 1988, cl 17, Part IIA, proposed s 33B.

<sup>109</sup> A major amendment to the Bill following report back by the Law and Justice Select Committee, see above n 23, 11138.

<sup>110</sup> Defined as an offence where the penalty is a maximum fine of \$500, see above n 108, proposed s 76R.

In relation to protection against publication of convictions, the Bill created an offence for the media to disclose any information about a criminal record after 5 years.<sup>111</sup> It is also created an offence for government officials, including a police officer to disclose the existence of a spent conviction. However, the Bill provided that in certain circumstances disclosure is still permissible. These situations were defined as disclosure to law enforcement authorities, the Intelligence Service, during sentencing, at parole hearings, extradition proceedings and for the treatment of individuals with a mental illness.<sup>112</sup>

Secondly, the Bill created an offence of asking an ex-offender questions that would require disclosure of a spent conviction.<sup>113</sup> However, this provision was applicable only where the requester of information acts knowingly, recklessly or negligently regarding collection of information. Adopting the approach in the United Kingdom and Australia, the Bill proposed that ex-offenders would not face any prejudice in law for refusing to answer questions that would reveal a spent conviction.<sup>114</sup>

The third major feature of the Bill was the protection proposed against unwarranted discrimination on the grounds of conviction. Adopting the recommendations of the Penal Policy Review Committee, the Bill proposed extending the existing grounds of unlawful discrimination under the Human Rights Commission Act to include discrimination on the grounds of conviction.

Addressing the unfairness of excluding offenders convicted of serious crime from the ambit of the law, the Bill proposed that it would be unlawful to discriminate on the basis of a criminal record unless there a direct relationship between the

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<sup>111</sup> Punishable on conviction by a maximum penalty of 3 months imprisonment or a fine of \$2000 for an individual and \$10,000 in relation to a body corporate, see above n 108, proposed s 33B.

<sup>112</sup> Above n 108, proposed ss 33F – 33L.

<sup>113</sup> Above n 108, proposed s 33M.

<sup>114</sup> Above n 108, proposed s 33Q.

conviction and the particular area of activity could be shown. This would cease to operate after 10 years if the offender had not re-offended during that period.

As an amendment to existing human rights legislation, the most significant feature of the Criminal Records Bill 1988, is that it elevates discrimination on the basis of conviction to the status of other areas of unlawful discrimination generally based on immutable characteristics such as gender and race. Encompassing the needs of ex-offenders in legislation that is perceived to "enshrine the values of a nation" by declaring that certain characteristics are irrelevant to decision-making about individuals,<sup>115</sup> the Bill symbolically recognises that rehabilitated offenders have resumed full citizenship and deserve equal rights of participation in society.

Also the approach adopted by the Bill satisfies several other needs of the ex-offenders, particularly regarding the enforcement of rights extended by the law. The advantage of grafting a spent convictions scheme onto existing legislation that enacts a complaints procedure which is free, private and promotes conciliation between the parties is that it meets the need of ex-offenders to conceal the past, in order to live it down. Seeking redress through the complaints procedure overcomes the cost and potential publicity associated with an application to the Court for an order declaring the conviction spent or by initiating civil proceedings as required in other jurisdictions.

Another advantage of the approach adopted by the Criminal Record Bill, is that the Human Rights Commission Act covers discrimination in both the public and private sector, and therefore provides comprehensive protection to offenders. However, it should be noted that the protection under the Human Rights

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<sup>115</sup> P Rishworth "Affirming the Fundamental Values of a Nation: How the Bill of Rights Act and the Human Rights Act affect New Zealand Law" in G Huscroft and P Rishworth (eds) *Rights & Freedoms - The New Zealand Bill of Rights Act 1990 and the Human Right Act 1993* (Brookers, Wellington, 1995) 71, 72.

Commission Act only prohibits discrimination in contexts prescribed by the Act.<sup>116</sup> While these are wide enough to cover many of the every day problems that ex-offenders face such as obtaining employment, housing, access to education and goods and services, no remedy lies for discrimination encountered by ex-offenders outside the jurisdiction of the Act. Therefore the scheme provides no remedy in relation to other major problems ex-offenders face due to convictions such as disadvantage in legal proceedings<sup>117</sup> and immigration matters.

The Justice and Law Reform Select Committee received 98 submissions on the Criminal Records Bill. A majority supported its enactment, however a considerable number of those making submissions expressed concern about their particular need for an exemption from the anti-discrimination provisions of the Bill.<sup>118</sup>

However, despite considerable support for the Bill, it failed to be enacted prior to a change of Government in the 1990 election. When the Bill was revisited prior to its second reading in 1991, the Minister of Justice proposed three options for its future progress. These included continuing with the Bill in its present form, preserving the provisions on protection from discrimination but dropping the offences for publicising or questioning about old convictions, or not continuing with the Bill in any form.<sup>119</sup> The Minister stated that continuing with the Bill in its present form was an option unacceptable to the Government, although making it purely an anti-discrimination measure and not continuing with at all were options that the Government wished the Select Committee to examine in more detail.<sup>120</sup> Little progress was made on the Bill prior to the 1993 election, following its

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<sup>116</sup> Part II of the Human Rights Commission Act 1977; Part II of the Human Rights Act 1993.

<sup>117</sup> For example giving character evidence.

<sup>118</sup> Department of Justice, *Report of the Department of Justice on the Criminal Records Bill 1988*, (Wellington, 16 March 1989), 1.

<sup>119</sup> Minister of Justice, *Report to Caucus on the Criminal Records Bill: Revision*, (Office of the Minister of Justice, Wellington, 26 June 1991), 1.

<sup>120</sup> Above n 119, 3.



referral back to Select Committee. After the election, it dropped off the order paper entirely. There is no indication that it will re-emerge in the short-term.

Due to failure of the Criminal Records Bill to be enacted calls for a spent convictions scheme in New Zealand continue to be made. Recently, the issue has been raised by the Privacy Commissioner,<sup>121</sup> and by the Public Issues Committee of the Auckland District Law Society.<sup>122</sup> In response, however, the Minister of Justice has indicated that the issue is not a high priority for the present Government.<sup>123</sup>

## VI LESSONS LEARNED FROM OVERSEAS – THE CORE ELEMENTS OF A SPENT CONVICTIONS SCHEME

In 1981, the Penal Policy Review Committee recommended that the criteria to determine the effectiveness of a spent convictions scheme from an offender-oriented perspective should include comprehensiveness, simplicity, cost, and practicality.<sup>124</sup> However, overseas experience shows that it is difficult for a spent convictions scheme based on one approach to meet all of these objectives effectively. For example, while automatic schemes meet concerns about cost and practicality they are not comprehensive. Whereas, non-automatic scheme are comprehensive but fail to provide protection that is cost-effective or practical. Examining the pros and cons of the various schemes in other jurisdictions and the initiative proposed in New Zealand provides a method of identifying the core elements of a spent convictions scheme that aims to fulfil these objectives.

<sup>121</sup> B Slane, Privacy Commissioner, "Spent Convictions", *Private Word Newsletter Issue 9*, (Office of the Privacy Commissioner, Auckland, 1996) 2; "Bid to Wipe Minor Convictions" *The Dominion*, Wellington, New Zealand, 25 January 1997.

<sup>122</sup> Auckland District Law Society, "Precis of a Paper by the Public Issues Committee on the Deletion of Criminal Convictions from a Person's Record", (ADLS, Auckland, 1996).

<sup>123</sup> Above n 121.

<sup>124</sup> Above n 2, para 437.

### *A Comprehensiveness*

In order to gain public support, automatic spent convictions schemes in the United Kingdom, Queensland and New South Wales exclude serious offenders from protection completely. However, targeting assistance to offenders who commit minor offences and raising the threshold of "seriousness" to exclude offenders sentenced to more than 2 years imprisonment are major shortcomings of automatic schemes. Recidivism rates suggest that there is no rational basis for excluding serious offenders from relief in the public interest, given that crimes of serious personal violence such as homicide or rape are less likely to be repeated than many minor offences.

Also excluding serious offences undermines the very purpose of a spent convictions scheme, which is to enable offenders to live down the past. Compared to the problems minor offenders face, offenders convicted of serious crimes appear to have stronger needs to live down the past because the nature of offending involves conduct that society finds harder to forgive. The difficulties serious offenders encounter re-establishing their credibility within society are also likely to last longer than problems faced by those convicted of minor offences because the type of offending is more likely to be seen as relevant in decision-making about the individual.

Provided that serious offences are dealt with in a way that overcomes community concern about re-offending, it seems unnecessary to exclude them from protection under a spent convictions scheme altogether. In the Commonwealth, non-automatic schemes in Canada and Western Australia offer protection to all offenders by requiring those convicted of serious crimes to apply to the Court or a specialised tribunal in order to receive protection. An investigation or court hearing is then held to examine the individual merits of the application, which include an inquiry into the conduct of the applicant since conviction.

Also adopting an individualised approach to the removal of disabilities in the case of serious offenders satisfies the wider public interest to ensure that ex-offenders who receive protection from the law are no longer a risk to society. However, the cost of making an application to a court or tribunal may prevent serious offenders taking advantage of this form of protection. A further method of reconciling the needs of serious offenders and the wider public interest is to enable the sentencing judge to extend the rehabilitation period in cases of serious offences or permit a dispensation from the general application of the law in relation to certain offenders. This approach, which is adopted in the Criminal Records Bill 1988, takes account of the risk that a minority of serious offenders may represent to public safety.

VI LESSONS LEARNED FROM OVERSEAS - THE CORE

Another major shortcoming in the comprehensiveness of overseas spent convictions schemes and proposals in New Zealand is that they fail to provide immediate protection to offenders upon release from custody or completion of sentence. Primarily, this is because the benefits under a spent convictions scheme are conceived as a right that is to be earned. The imposition of a rehabilitation period before an offender is eligible to receive protection is the legislative expression of this view. It is designed to protect the public interest by ensuring that ex-offenders eligible for protection have reformed.

Calculating the length of the rehabilitation period is a difficult matter due to variations in the seriousness and culpability of offending. However, the duration of period impacts on the ability of ex-offenders to rehabilitate because the effects of a criminal record are likely to be most severely felt immediately following conviction. While the enactment of immediate protection to ex-offenders would ameliorate difficulties obtaining employment, housing, credit and from being subjected to official harassment in the short-term, offering this form of protection runs the risk that the scheme will be rejected by the public and fail to be enacted at all. Accordingly, the enactment of a rehabilitation period is seen as a necessary

trade-off to ensure public support of a spent convictions scheme and is promoted as a measure that provides both an incentive and reward to ex-offenders in their efforts to rehabilitate.

### *B      Simplicity*

Overseas experience and indigenous proposals suggest that 10 years without further conviction is a sufficient period to assure the public that an ex-offender is rehabilitated. While it is obvious that a line must be drawn at some point when a conviction can be reasonably regarded as no longer relevant to a decision-making about an ex-offender, a fixed period of 10 years is too long in the context of most offences. Although a single period for all offences provides simplicity and enables offenders to know where they stand in terms of the law, the enactment of a lengthy rehabilitation period for all offences can be counter-productive.

Given that risk of re-offending is greatest within the first three years following conviction, a strong case exists for the duration of the rehabilitation period to be shortened in context of all offences. There are several ways in which this can be achieved. The first alternative to enacting a fixed period for all offences is to provide a range of periods that vary according to the seriousness of offence. This approach has been adopted in the United Kingdom where the duration of rehabilitation varies from 10 years to 6 months according to the length of sentence imposed. While this has the advantage of linking the length of rehabilitation required to the seriousness of the offence, enacting multiple periods to cover various types of offending can make the scheme cumbersome and difficult for offenders to determine their position under the law.

A workable solution to reconciling the need of the scheme to be simple yet appropriately linked to the seriousness of offending is to enact two basic periods

that distinguish between minor and serious offences. This approach has been adopted in Canada where the Criminal Records Act provides that indictable offences can become spent after 5 years and summary offences after 3 years. In the New Zealand context, a similar distinction can be drawn between offences under the Crimes Act 1961 and offences under the Summary Offences Act 1981, without undermining the overall simplicity of the scheme.

### *C Cost and Practicality*

Automatic spent convictions schemes are the most advantageous form of protection from an offender-oriented perspective in terms of cost and practicality. Because benefits of protection under the scheme accrue automatically on completion of the rehabilitation period, no effort or expense is required for offenders to receive protection. However, overseas experience shows that a trade-off involved in providing automatic protection is to restrict the comprehensiveness of the scheme to minor offenders which undermines the efficacy of protection overall. To overcome this problem, spent convictions schemes in Western Australia and Canada provide protection to the majority of offenders under the law by requiring all offenders to apply to have their convictions spent.

While non-automatic schemes may enable the legislature to increase the scope of protection provided by the law, the expense involved in making an application may result in few offenders taking advantage of relief.<sup>125</sup> Offenders may lack the initiative to seek protection or the resources to make an application and engage legal representation. Also offenders may be reluctant to apply for relief out of fear that the application may attract further adverse publicity or lead to wider disclosure of convictions to parties previously unaware. In the New Zealand context, schemes requiring offenders to make an application may be inappropriate from a Maori

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<sup>125</sup> This has been the experience in Canada, see above n 74, 225.

perspective which emphasises resolving conflict within iwi structures and perceives the experience of Pakeha legal processes as alienating and individualistic.

From an offender-oriented perspective, hybrid schemes are a workable solution to the problem of providing protection that is both comprehensive and accessible to all offenders. Enacting a scheme that automatically deems convictions to be spent overcomes disadvantages that exist with requiring offers to apply for protection while providing remedies through a complaints procedure provides assistance that is low-cost and user-friendly.

On the basis of overseas experience regarding the effectiveness of spent convictions it is submitted that the core elements of a spent convictions proposal in New Zealand should include:

- (i) Relief that is extended to all offenders, including those convicted of serious offences;
- (ii) A scheme that provides automatic protection to offenders at the completion of an appropriate rehabilitation period and does not place an onus on the offender to make an application to the Court or to the Police for protection;
- (iii) A scheme that enables ex-offenders to make a complain about the unlawful collection, use and disclosure of a spent convictions;
- (iv) A scheme that seals rather than destroys the record.

## VII OPERATIONALISING THE CORE ELEMENTS

### *A Alternative Approaches Towards Protection*

A review of indigenous proposals and spent convictions schemes overseas demonstrates that two main approaches exist towards enacting a spent convictions law in New Zealand. The first and most obvious method is to enact new legislation that focuses on the need to conceal the past by limiting further dissemination of criminal records. This is the method adopted unanimously in the overseas schemes discussed in the paper. An alternative approach involves incorporating a spent convictions regime into existing legislation that focuses on the long-term consequences faced by ex-offenders because of a criminal record, particularly discrimination. This is the method endorsed by the Penal Policy Review Committee and the Criminal Records Bill 1988.

Given the advantages of grafting a spent convictions scheme onto an existing legislative structure that offers the benefits of a complaints procedure, proposing protection under the Human Rights Act 1993, may appear an obvious solution to the problems faced by ex-offenders in New Zealand. An advantage of this approach is that draft legislation already exists to facilitate the speedy enactment of relief that has been proposed for more than 20 years. However, a closer analysis of this approach reveals limitations with grafting a scheme on the Human Rights Act from the perspective of ex-offenders.

The main difficulty with this proposal is the fact that to date, protection for ex-offenders under human rights legislation has failed to succeed. Despite the progress made in New Zealand over the last decade in recognising the needs of ex-offenders, it is conspicuous that the Human Rights Act 1993 continues to exclude conviction from the significantly expanded grounds of unlawful discrimination provided by section 21 of the Act. The omission demonstrates the lack of a

political constituency for "offender-oriented" law reform. It is notable that while the 1993 Act extended the grounds of unlawful discrimination to cover other controversial matters involving "choice" such as political conviction, employment and family status, it abandoned the opportunity to address the needs of ex-offenders to live down their past actions. In particular, this highlights the difficulty perceived in gaining public support for a measure that views discrimination based on immutable characteristics, such as gender and ethnicity analogous to discrimination on basis of moral culpability.

However, it should be noted that even if a spent convictions scheme had been enacted under the Human Rights Act 1993, several limitations with the overall protection offered by the Act suggest that an alternative form of legislative support for the scheme may be preferred. The first limitation is that the protection provided to individuals is subject to section 97 of the Act. This empowers the Complaints Review Tribunal ("the CRT") to declare an otherwise discriminatory action lawful because of a "genuine justification". A lack of jurisprudence regarding the circumstances that will constitute a "genuine justification" and the fact that the CRT is not required to give reasons in writing when making a section 97 declaration make it difficult to determine the impact this section may have on the general parameters of protection under the Act. However, at least theoretically, it seems that section 97 provides an avenue for groups philosophically opposed to a spent convictions scheme to try to obtain a "back-door" exemption from the requirements of the law.

Secondly, section 151 of the Human Rights Act provides that until the year 2000, inconsistent legislation overrides the protection from discrimination offered by the legislation. Although section 152 has the effect of repealing this provision on 31 December 1999, it does not go as far as enacting a primacy clause that guarantees protection from discrimination. Rather from that date the Act remains silent on the effect of inconsistent legislation and the strength of the protection provided by the



Act will fall to be determined by the Courts. Also, because the Human Rights Act does not deal with equality in a general sense, it would need to be shown that inconsistent legislation affects one the prescribed contexts of unlawful discrimination such as the provision of goods and services, employment, housing or education. A failure of the Human Rights Act to enact comprehensive protection and to guarantee the rights extended to individuals generally, undermines the efficacy of legislation from an offender-oriented perspective and indicates that an alternative vehicle for the legislative support of a spent convictions scheme is preferred.

### ***B Code of Practice under the Privacy Act 1993***

In a contemporary context, it is submitted that the Privacy Act 1993 offers an alternative mechanism to support a spent convictions scheme in New Zealand. From an offender-oriented perspective, it provides an effective method of achieving protection because it deals with the cause of the problems faced by ex-offenders, namely collection, use and disclosure of information about past convictions rather than their effects, which include discrimination. Also by approaching the issue in terms of information privacy, rather than discrimination, the Privacy Act provides an expedient and less controversial method of instituting a spent convictions scheme by narrowing the focus of protection.

Proposing the introduction of a spent convictions scheme under the Privacy Act has several advantages for ex-offenders. First, is the broad definition of "Agency" in section 2<sup>126</sup> that provides seamless application of the Act to both the public and private sector. While it is significant that the Act exempts courts and tribunals in

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<sup>126</sup> Above n 8, this provides that an "Agency" includes any person or body of persons, whether corporate or unincorporate, and whether in the public or private sector and for the avoidance of doubt includes a Department.

relation to their judicial functions<sup>127</sup> and the media in relation to its news activities,<sup>128</sup> its provisions impact on most parties regularly seeking access to criminal records such as employers, insurers, and Government Departments.

Secondly, the Privacy Act meets the needs of ex-offenders for the provision of low-cost, user-friendly and relatively timely assistance. Rather than making it an offence to breach the information privacy principles ("the IPPs), the Act establishes a complaints jurisdiction that empowers the Privacy Commissioner to investigate whether an action has caused an "interference with privacy".<sup>129</sup> A complaint has substance where the Commissioner is satisfied that the respondent's actions have breached an IPP and caused the complainant to suffer loss. Section 66 of the Act broadly defines the circumstances that constitute loss. These include causing the complainant to suffer actual or potential loss, detriment or damage to, adversely affecting their rights, benefits, privileges, obligations or interests or causing significant humiliation, loss of dignity or injury to feelings. It is submitted that the broad provisions regarding loss effectively encompass most of the difficulties that ex-offenders face because of on-going dissemination of past convictions.

Using the Privacy Act also achieves comprehensive and accessible protection for ex-offenders. Section 67 provides that any person may make a complaint. Unless the complainant chooses to engage legal representation, there is usually no cost involved in making a complaint. Also the Act provides that proceedings are conducted in private<sup>130</sup> and obliged to be completed by the Privacy Commissioner as speedily and efficiently as possible.<sup>131</sup> This avoids the cost and delays associated

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<sup>127</sup> Above n 8, ss 2(b)(vii) and 2(b)(viii). Although the law of evidence generally regulates the admissibility of past convictions in legal proceedings and provides some protection to ex-offenders.

<sup>128</sup> Above n 8, s 2(b)(xiii). However complaints can be made to the Press Council and Broadcasting Standards Authority.

<sup>129</sup> Above n 8, s 66.

<sup>130</sup> Above n 8, s 90(1).

<sup>131</sup> Above n 8, s 75.

with traditional civil proceedings to enforce legal rights.

Thirdly, because the Act places considerable emphasis on the conciliation of complaints<sup>132</sup> the complaints procedure promotes a form of restorative justice between the parties to the complaint. By placing the complainant at the centre of the process of redressing the interference with privacy, the process enables them to convey how the respondent's actions have affected them and what the type of remedy that is required to resolve the matter. Typically, resolution of a complaint may involve the complainant receiving an apology for the distress the respondent's actions have caused and an assurance against repetition or by the payment of compensation.<sup>133</sup> The process is also beneficial from the respondent's perspective by identifying issues in relation to information handling practices that can avoid future complaints.

However, where a complaint is unable to be settled informally, the Act provides that the Commissioner may form an opinion on whether there has been an interference with the complainant's privacy. If the Commissioner is satisfied that the complaint has substance and a settlement cannot be secured, section 77 empowers the Commissioner to refer the matter to the Proceedings Commissioner who is required to determine whether proceedings should be initiated in the CRT.<sup>134</sup> The complainant may also commence proceedings in the Tribunal if the Privacy Commissioner's form the opinion that their complaint lacks substance. However, in all cases, before a matter can be taken to the CRT, the Privacy Commissioner must complete first complete an investigation in to the complaint. This demonstrates that the formal legal processes available under the Act are

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<sup>132</sup> Above n 8, s 74. This empowers the Privacy Commissioner to use his or her best endeavours to settle complaints informally wherever possible.

<sup>133</sup> Office of the Privacy Commissioner, *Review of the Privacy Act 1993, Structure and Scope, Discussion Paper No 1* (Auckland, 1997).

<sup>134</sup> Above n 8, s 77(2).

intended only as a matter of last resort.<sup>135</sup>

Finally, it should be noted that the twelve IPPs that comprise the core feature of the Privacy Act are directly applicable to a spent convictions proposal, which aims to restrict further dissemination of past convictions.<sup>136</sup> A number of the principles already provide general protection to ex-offenders in relation to problems caused by collection and use of information about past convictions.

Specifically, IPP 1 provides that personal information<sup>137</sup> shall not be collected by an agency unless it is collected for a lawful purpose connected with the function or activity of the agency and collection of information is *necessary* for that purpose. This obliges agencies to consider the reasons for collecting information about past convictions and limit the kind of information to only that which is relevant to the purpose. For example, IPP 1 provides that it may be unlawful for employers to seek information about traffic convictions for the purpose of employing an individual as a bank officer. However, under IPP1 it would probably be permissible to collect information about past sexual offending for the purpose of assessing the suitability for employment as a child-care provider.

IPP 2 regulates the manner in which agencies collect personal information. It provides a general rule that wherever possible personal information must be collected directly from the individual concerned. IPP 3 provides corresponding obligations on agencies to advise individuals of certain matter when information is being collected from them. These include the fact that information is being collected, the purpose of collection, the recipient of the information, whether it is voluntary or mandatory to supply the information and the consequences (if any) of failure to comply with the request. However, due to the power imbalance present

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<sup>135</sup> E Longworth and T McBride *The Privacy Act - A Guide* (GP Publications, Wellington, 1994), 146.

<sup>136</sup> Above n 8, s 6.

<sup>137</sup> Which clearly includes information about past convictions.

in many situations where ex-offenders are asked to disclose past convictions, for example in the context of applying for a job application or a visa to travel overseas, they may perceive they lack a real alternative but to comply with the request.

IPP 4 impacts on the manner that agencies seek to collect information from ex-offenders about past convictions. It provides that personal information shall not be collected in a manner that is unfair or unreasonably intrudes on the personal affairs of the individual. Circumstances where the collection of information about past convictions would be unfair include information obtained by misrepresenting the consent of the ex-offender or under false pretences such as using a fake authorisation.

Finally, IPP 8 impacts on the use of past convictions in forming decisions about ex-offenders generally. It provides that agencies must take reasonable steps to check the accuracy, completeness, and relevancy of personal information before it is used. Where an agency relies on information about past convictions that is incorrect, or uses takes irrelevant convictions into account to the detriment of an ex-offender a complaint can be made to the Privacy Commissioner.

However, while it is evident that a number of the IPPs in the Act already impact on the difficulties faced by ex-offenders, several exceptions to the general principles concerning collection, use and disclosure of personal information limit the overall protection that Act provides to ex-offenders. This is because in many cases, information about past convictions is collected by third parties with the (coerced) authority of the ex-offender,<sup>138</sup> is required under statute<sup>139</sup> or where the offending is reported in the media, is publicly available information.<sup>140</sup>

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<sup>138</sup> Above n 8, exceptions 2(1) (b), 10(b) and 11(d).

<sup>139</sup> Above n 8, s 7.

<sup>140</sup> Above n 8, exceptions 2(1)(a), 10(a) and 11(b).

To overcome these problems, section 46 of the Privacy Act empowers the Privacy Commissioner to issue a code of practice that modifies the application of the IPPs in relation to a particular agency, area of activity or class of information.<sup>141</sup> A code of practice is a form of delegated legislation that has the effect of prescribing standards that are more or less stringent than those enacted by the principles under the Act and modifying how compliance with any one or more of the privacy principles can be enforced.<sup>142</sup> Accordingly, a code of practice issued specifically in relation to criminal records could alter or remove the exceptions currently in place that permit the general availability of information about past convictions.

From an offender-oriented perspective, there are several benefits of using a code of practice under the Privacy Act to ameliorate the difficulties caused by past convictions. First, a code of practice provides a self-contained guide to the rights and responsibilities of individuals dealing with conviction information that is tailored to the particular needs of ex-offenders. A similar code already exists that addresses the needs of individuals in relation to health information.<sup>143</sup>

Secondly, as a measure that specifically focuses on the information privacy in all contexts, a code of practice can also deal other types of information that may be a source of on-going problems for ex-offenders such as information about arrest, charge and prosecution of offences. By focusing only on the problems caused by disclosure of past convictions, most spent convictions schemes do not address the adverse consequences that flow from the availability of this kind of information that may also be considered when forming decisions about an ex-offender.

Under a code of practice, it is submitted that modifications to the IPPs should include prohibiting the collection, and use of information following the completion

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<sup>141</sup> Above n 9, s 46(3).

<sup>142</sup> Above n 8, ss 46(2)(a)(i) and 46(2)(b).

<sup>143</sup> Health Information Privacy Code 1994.

of an appropriate rehabilitation period<sup>144</sup> even where the source of information is publicly available. Such convictions should be deemed "spent" and only able to be collected, used or disclosed pursuant to exemption obtained by an agency under section 54 of the Privacy Act. This provision enables the Privacy Commissioner to permit actions that would otherwise cause an interference with privacy because of a countervailing public interest substantially outweighs the privacy interest of the individual.<sup>145</sup> Modifying the IPPs in this way, places an onus on agencies to show that information about past convictions is required in the public interest<sup>146</sup> and reinforces the concept that information collected from individuals must be relevant to the area of activity concerned.

Secondly, the exceptions to the IPPs that permit the availability of criminal records with the authorisation of the individual concerned should be modified to provide that following completion of the rehabilitation period an ex-offender will not face any prejudice in law for failing to authorise the disclosure of spent convictions. It should be expressly provided that ex-offenders are not obliged to spent convictions for any purpose, unless the disclosure is required under statute.<sup>147</sup> This recognises that other rights compete with privacy but leaves it to Parliament to determine when those rights prevail.

Finally, it is submitted that IPP 9 which provides that agencies holding personal information shall not keep that information longer than is required for the purposes for which it may lawfully be should be modified to impose a time-limit on storing of criminal records on the Wanganui Computer. While the arguments against

<sup>144</sup> It is submitted that the length of rehabilitation should be set at 5 years in relation to indictable offences and 2 years in relation to summary offences to reflect the actual risk of re-offending in most cases.

<sup>145</sup> Above n 8, s 54. This provides a discretion to the Privacy Commissioner to authorise an agency to collect, use or disclose personal information where it would otherwise constitute a breach of IPPs 2, 10 and 11. It should be noted that s 57 of the Act also provides an exemption to the Security Intelligence Service in relation to IPPs 1-5 and 8-11.

<sup>146</sup> Rather than because of their specific interest or just because they do not like ex-offenders.

<sup>147</sup> In which case there is a statutory override of the IPPs. Above n 8, s 7.

expungement of criminal records correctly identifies problems in eliminating all the various sources of information about past convictions, it is clear that in New Zealand the Wanganui Computer is the major source of convictions information in most cases. Eliminating this source of information is far easier to achieve than for example, ordering the widespread destruction of criminal records because the information is stored centrally. It is submitted that retention of information on the Wanganui Computer should be limited to the rehabilitation period applicable to the conviction.

However, while a code of practice under the Privacy Act appears to provide an mechanism to strengthen the ability of ex-offenders to conceal past convictions, it should be noted that certain provisions of the Privacy Act still present threats to the protection of their interests overall. Most significantly section 7 of the Act provides that other enactments,<sup>148</sup> authorising or requiring personal information to be made available can override the IPPs.

Also, while the Privacy Commissioner can issue a code of practice,<sup>149</sup> since they are deemed to be regulations under the Regulations (Disallowance) Act 1989,<sup>150</sup> there is still the potential for an unsympathetic Parliament to disallow all or part of a code drafted in relation to criminal records. However, the open law-making process provided by the Privacy Act<sup>151</sup> the flexibility codes of practice provide and the ability for them to be amended, revoked and reviewed<sup>152</sup> suggest that a code of practice is a pragmatic option for the legislative support for a spent convictions scheme in New Zealand.

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<sup>148</sup> Including regulations, see above n 8, s 7(1).

<sup>149</sup> Above n 8, s 47-52.

<sup>150</sup> Above n 8, s 50.

<sup>151</sup> Above n 8, s 49. The Privacy Commissioner is required to give public notice of his or her intention to issue a code and consult with persons affected by a proposed code.

<sup>152</sup> Above n 8, s 51 and 46(3)(d).



## VIII CONCLUSION

By limiting the dissemination of past convictions, spent convictions complement existing measures that promote the rehabilitation of offenders. As well as enhancing the interests of ex-offenders, they also be justified in the interests of society in general because they aim to limit punishment for offending to the legal sanction imposed for the offence.

Although spent convictions schemes are widespread overseas, law reform in New Zealand it is overdue to occur. This paper has examined the positive justifications for enacting a spent convictions scheme and critiqued the variety of measures adopted overseas and proposed in New Zealand to enable ex-offenders to overcome the burden of a criminal record.

Examining the efficacy of overseas models and indigenous proposals from an "offender-oriented" perspective, this paper submits that an effective spent convictions scheme should provide automatic relief to all offenders following the completion of an appropriate rehabilitation period. In the New Zealand context, this paper contends that a code of practice issued under the Privacy Act 1993 is an appropriate and expedient method for this to occur.

Enacting protection under the Privacy Act offers ex-offenders comprehensive protection and low-cost remedies if the law is breached. By removing the source of problems faced by ex-offenders, namely on-going disclosure of irrelevant convictions, rather than the effects of the problem, which include discrimination, the Privacy Act is a logical approach. Also by empowering the Privacy Commissioner to approve exemptions to the law where a countervailing public interest substantially outweighs the needs of ex-offenders to conceal convictions, enacting a code of practice strengthens the effectiveness of the scheme overall by striking a balance between the needs of ex-offenders and the wider public interest.

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APPENDIX I

SUMMARY OF SPENT CONVICTIONS SCHEMES  
IN RELATION TO ADULT OFFENDERS

Country/State	Applicable convictions and/or sentences	Rehabilitation Period	Enforcement of scheme
United Kingdom	Non-custodial sentences and custodial sentences not exceeding 30 months	6 months - 10 years according to length of sentence imposed	Offence to collect or disclose spent convictions; Defamation Proceedings
Canada	All convictions	5 year - indictable offences 2 years - summary offences	Offence to collect or disclose spent convictions
Western Australia	All convictions	10 years	Offence to collect or disclose spent convictions
New South Wales	Sentences less than 6 months	10 years	Offence to collect or disclose spent convictions
Queensland	Sentences less than 30 months	10 years	Offence to collect or disclose spent convictions
Commonwealth of Australia	Sentences less than 30 months	10 years	Complain to Federal Privacy Commissioner
NZ - Penal Policy Review Committee 1981	All convictions	10 years where a direct relationship exists between conviction and particular area of activity	Complain to Human Rights Commission; Offence for media to publish past convictions after 5 years
NZ - Rehabilitation of Offenders Bill 1983	Sentences less than 2 years	8 years - custodial sentences 6 years - semi-custodial sentences 2 years - non-custodial sentences	Offence to collect or disclose spent convictions; Defamation Proceedings
NZ - Criminal Records Bill 1988 -	All convictions	10 years where a direct relationship exists between conviction and particular area of activity	Complain to Human Rights Commission; Offence for media to publish past convictions after 5 years




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 FACT SHEET NO. 3  
 Information Privacy Principles
 

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**PRINCIPLE 1***Purpose of collection of personal information*

Personal information shall not be collected by any agency unless -

- (a) The information is collected for a lawful purpose connected with a function or activity of the agency; and
- (b) The collection of the information is necessary for that purpose.

**PRINCIPLE 2***Source of personal information*

(1) Where an agency collects personal information, the agency shall collect the information directly from the individual concerned.

(2) It is not necessary for an agency to comply with subclause (1) of this principle if the agency believes, on reasonable grounds -

- (a) That the information is publicly available information; or
- (b) That the individual concerned authorises collection of the information from someone else; or
- (c) That non-compliance would not prejudice the interests of the individual concerned; or
- (d) That non-compliance is necessary -
  - (i) To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
  - (ii) For the enforcement of a law imposing a pecuniary penalty; or
  - (iii) For the protection of the public revenue; or
  - (iv) For the conduct of proceedings before any court or Tribunal (being proceedings that have been

commenced or are reasonably in contemplation); or

- (e) That compliance would prejudice the purposes of the collection; or
- (f) That compliance is not reasonably practicable in the circumstances of the particular case; or
- (g) That the information -
  - (i) Will not be used in a form in which the individual concerned is identified; or
  - (ii) Will be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
- (h) That the collection of the information is in accordance with an authority granted under section 54 of this Act.

**PRINCIPLE 3***Collection of information from subject*

(1) Where an agency collects personal information directly from the individual concerned, the agency shall take such steps (if any) as are, in the circumstances, reasonable to ensure that the individual concerned is aware of -

- (a) The fact that the information is being collected; and
- (b) The purpose for which the information is being collected; and
- (c) The intended recipients of the information; and
- (d) The name and address of -
  - (i) The agency that is collecting the information; and
  - (ii) The agency that will hold the information; and
- (e) If the collection of the information is authorised or required by or under law -



- (i) The particular law by or under which the collection of the information is so authorised or required; and
  - (ii) Whether or not the supply of the information by that individual is voluntary or mandatory; and
  - (f) The consequences (if any) for that individual if all or any part of the requested information is not provided; and
  - (g) The rights of access to, and correction of, personal information provided by these principles.
- (2) The steps referred to in subclause (1) of this principle shall be taken before the information is collected or, if that is not practicable, as soon as practicable after the information is collected.
- (3) An agency is not required to take the steps referred to in subclause (1) of this principle in relation to the collection of information from an individual if that agency has taken those steps in relation to the collection, from the individual, of the same information or information of the same kind, on a recent previous occasion.
- (4) It is not necessary for an agency to comply with subclause (1) of this principle if the agency believes, on reasonable grounds -
- (a) That non-compliance is authorised by the individual concerned; or
  - (b) That non-compliance would not prejudice the interests of the individual concerned; or
  - (c) The non-compliance is necessary -
    - (i) To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
    - (ii) For the enforcement of a law imposing a pecuniary penalty; or
    - (iii) For the protection of the public revenue; or
    - (iv) For the conduct of proceedings before any court or Tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
  - (d) That compliance would prejudice the purposes of the collection; or

- (e) That compliance is not reasonably practicable in the circumstances of the particular case; or
- (f) That the information -
  - (i) Will not be used in a form in which the individual concerned is identified; or
  - (ii) Will be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned.

#### PRINCIPLE 4

##### *Manner of collection of personal information*

Personal information shall not be collected by an agency -

- (a) By unlawful means; or
- (b) By means that, in the circumstances of the case -
  - (i) Are unfair; or
  - (ii) Intrude to an unreasonable extent upon the personal affairs of the individual concerned.

#### PRINCIPLE 5

##### *Storage and security of personal information*

An agency that holds personal information shall ensure -

- (a) That the information is protected, by such security safeguards as it is reasonable in the circumstances to take, against -
  - (i) Loss; and
  - (ii) Access, use, modification, or disclosure, except with the authority of the agency that holds the information; and
  - (iii) Other misuse; and
- (b) That if it is necessary for the information to be given to a person in connection with the provision of a service to the agency, everything reasonably within the power of the agency is done to prevent unauthorised use or unauthorised disclosure of the information.

#### PRINCIPLE 6

##### *Access to personal information*

- (1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled -

- (a) To obtain from the agency confirmation of whether or not the agency holds such personal information; and
  - (b) To have access to that information.
- (2) Where, in accordance with subclause (1)(b) of this principle, an individual is given access to personal information, the individual shall be advised that, under principle 7, the individual may request the correction of that information.
- (3) The application of this principle is subject to the provisions of Parts IV and V of this Act.

#### PRINCIPLE 7

##### *Correction of personal information*

- (1) Where an agency holds personal information, the individual concerned shall be entitled -
- (a) To request correction of the information; and
  - (b) To request that there be attached to the information a statement of the correction sought but not made.
- (2) An agency that holds personal information shall, if so requested by the individual concerned or on its own initiative, take such steps (if any) to correct that information as are, in the circumstances, reasonable to ensure that, having regard to the purposes for which the information may lawfully be used, the information is accurate, up to date, complete, and not misleading.
- (3) Where an agency that holds personal information is not willing to correct that information in accordance with a request by the individual concerned, the agency shall, if so requested by the individual concerned, take such steps (if any) as are reasonable in the circumstances to attach to the information, in such a manner that it will always be read with the information, any statement provided by that individual of the correction sought.
- (4) Where the agency has taken steps under subclause (2) or subclause (3) of this principle, the agency shall, if reasonably practicable, inform each person or body or agency to whom the personal information has been disclosed of those steps.
- (5) Where an agency receives a request made pursuant to subclause (1) of this principle, the

agency shall inform the individual concerned of the action taken as a result of the request.

#### PRINCIPLE 8

##### *Accuracy, etc, of personal information to be checked before use*

An agency that holds personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant, and not misleading.

#### PRINCIPLE 9

##### *Agency not to keep personal information for longer than necessary*

An agency that holds personal information shall not keep that information for longer than is required for the purposes for which the information may lawfully be used.

#### PRINCIPLE 10

##### *Limits on use of personal information*

An agency that holds personal information that was obtained in connection with one purpose shall not use the information for any other purpose unless that agency believes, on reasonable grounds -

- (a) That the source of the information is a publicly available publication; or
- (b) That the use of the information for that other purpose is authorised by the individual concerned; or
- (c) That non-compliance is necessary -
  - (i) To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
  - (ii) For the enforcement of a law imposing a pecuniary penalty; or
  - (iii) For the protection of the public revenue; or
  - (iv) For the conduct of proceedings before any court or Tribunal (being proceedings that have been commenced or are reasonably in contemplation); or

- (d) That the use of the information for that other purpose is necessary to prevent or lessen a serious and imminent threat to -
  - (i) Public health or public safety; or
  - (ii) The life or health of the individual concerned or another individual; or
- (e) That the purpose for which the information is used is directly related to the purpose in connection with which the information was obtained; or
- (f) That the information -
  - (i) Is used in a form in which the individual concerned is not identified; or
  - (ii) Is used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
- (g) That the use of the information is in accordance with an authority granted under section 54 of this Act.

#### PRINCIPLE 11

##### *Limits on disclosure of personal information*

An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds -

- (a) That the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained; or
- (b) That the source of the information is a publicly available publication; or
- (c) That the disclosure is to the individual concerned; or
- (d) That the disclosure is authorised by the individual concerned; or
- (e) That non-compliance is necessary -
  - (i) To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
  - (ii) For the enforcement of a law imposing a pecuniary penalty; or
  - (iii) For the protection of the public revenue; or
  - (iv) For the conduct of proceedings before any court or Tribunal (being

- proceedings that have been commenced or are reasonably in contemplation); or
- (f) That the disclosure of the information is necessary to prevent or lessen a serious and imminent threat to:
  - (i) Public health or public safety; or
  - (ii) The life or health of the individual concerned or another individual; or
- (g) That the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern; or
- (h) That the information -
  - (i) Is to be used in a form in which the individual concerned is not identified; or
  - (ii) Is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
- (i) That the disclosure of the information is in accordance with an authority granted under section 54 of this Act.

#### PRINCIPLE 12

##### *Unique identifiers*

- (1) An agency shall not assign a unique identifier to an individual unless the assignment of that identifier is necessary to enable the agency to carry out any one or more of its functions efficiently.
- (2) An agency shall not assign to an individual a unique identifier that, to that agency's knowledge, has been assigned to that individual by another agency, unless those 2 agencies are associated persons within the meaning of section 8 of the Income Tax Act 1976.
- (3) An agency that assigns unique identifiers to individuals shall take all reasonable steps to ensure that unique identifiers are assigned only to individuals whose identity is clearly established.
- (4) An agency shall not require an individual to disclose any unique identifier assigned to that individual unless the disclosure is for one of the purposes in connection with which that unique identifier was assigned for a purpose that is directly related to one of those purposes.



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