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PRIVACY OF PAST CONVICTIONS: WHY THE CRIMINAL RECORDS (CLEAN SLATE) ACT 2004 DOES NOT PROVIDE ADEQUATE PRIVACY PROTECTION FOR THOSE WITH HISTORIC CRIMINAL CONVICTIONS.

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ABSTRACT

In May 2004 the Criminal Records (Clean Slate) Act 2004 became part of New Zealand law. For the first time ever New Zealand offenders convicted of relatively minor crimes can look forward to the concealment of their criminal records after the expiry of a seven year rehabilitation period. The Clean Slate Act does not prohibit the publication of a clean-slated criminal record nor does it make discrimination on the basis of such a record an offence. The Clean Slate Act may, however, provide guidance to other courts and tribunals (such as the Broadcasting Standards Authority or a court considering a claim in the tort of privacy) when they are deciding whether or not a historic criminal conviction is a private fact. Clean Slate schemes in other countries are more inclusive than the Criminal Records (Clean Slate) Act 2004. A number of European and Australian schemes include offenders who have been sentenced to imprisonment or convicted of a sexual offence – the Clean Slate Act does not. This research paper examines alternatives to the provisions of the Clean Slate Act (including the Criminal Records Bill 1988) and proposes amendments to the Act that would improve the delivery of rehabilitation and privacy protection to those with historic criminal convictions.

This research paper contains 15,200 words excluding footnotes, bibliography and contents.

I INTRODUCTION

On 31 July 2004 The Dominion Post published a front-page article about John Mark Tanner, a post-graduate classics student at Victoria University of Wellington.[1] The article, which was accompanied by a photograph of the subject, revealed that Mr Tanner had been convicted of murdering his girlfriend some 13 years previously and had served 11 years of a life sentence of imprisonment.

The publication of the article does not appear to have been prompted by any recent misbehaviour by Mr Tanner (and certainly none is reported in the article), but simply by a desire to expose the fact that a convicted murderer attends a local university.

The publication of this article raises the question as to whether a person's criminal history makes him or her more susceptible to an invasion of privacy (perhaps long after the last conviction) because of a greater public interest in his of her activities.

The Criminal Records (Clean Slate) Bill 2001 received its third reading in Parliament on 11 May 2004 and the Royal Assent on 16 May 2004.[2] The resulting Act (the Clean Slate Act) is not yet in force, but is scheduled to be by the end of 2004.[3] It is timely for this paper to examine the Act to determine the extent to which it will protect against the disclosure of historic criminal records by the media.

The purpose of the Clean Slate Act is to conceal the criminal record of those who have completed a period of rehabilitation since their last sentence in cases where the offending was of a reasonably minor nature.[4]

New Zealand courts have already had to consider the position of a person thrust into the public eye who seeks to prevent the disclosure of historic criminal convictions. In *Tucker v News Media Ownership Ltd*[5] Justice McGechan considered the plight of David Tucker, who, suffering from heart disease, made a public appeal for funds to allow him to travel to Australia for a heart transplant operation. Unfortunately for Mr Tucker, some news media became aware that he had criminal convictions for indecency, the most recent being some 4 years earlier.[6] Whilst McGechan J had some sympathy for Mr Tucker, subsequent reporting of the details of the convictions meant the continuation of the existing injunctions was futile.[7] Details of the convictions were published despite judicial concern that this might have amounted to a breach of Mr Tucker's privacy.

Even if the Clean Slate Act been in force in 1986 when Mr Tucker sought to gather public support for his life saving trip to Australia the media could not have been prevented from disclosing the details of his indecency convictions. This research paper examines why.

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[1] Oskar Alley "Deported killer on uni course" (31 July 2004) *The Dominion Post* Wellington, 1.
[2] Ministry of Justice *Criminal Records (Clean Slate) Act 2004* (May 2004) http://www.justice.govt.nz.
[3] The Ministry of Justice website indicates that the Act is likely to come into force by the end of 2004, above n 2.
[4] Criminal Records (Clean Slate) Bill 2001, no 183-2 (Explanatory Note).
[5] *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, (HC).
[6] *Tucker v News Media Ownership Ltd*, above n 5, 722.
[7] *Tucker v News Media Ownership Ltd*, above n 5, 736.

II BACKGROUND TO THE CRIMINAL RECORDS (CLEAN SLATE) ACT 2004

A The Introduction of the Act

Legislation that allows for the removal or concealment of old criminal convictions is not a new concept in many parts of the world.[8] In the United Kingdom the Rehabilitation of Offenders Act 1974 (which has been in force for almost thirty years) addresses the following objectives:[9]

> The objectives of the Rehabilitation of Offenders Act 1974 are to rehabilitate offenders who have not been reconvicted of any serious offence for periods of years and to penalise the unauthorised disclosure of their previous convictions.

Individual Australian states have their own "spent convictions" legislation[10] and Canada operates a system under which ex-offenders can apply to the National Parole Board for a pardon that effectively prevents disclosure of the criminal record.[11]

The idea of a spent convictions scheme is not new to New Zealand law-makers either. As long ago as 1981 the Penal Policy Review Committee[12] recommended that legislation be enacted to conceal past convictions after the expiry of an appropriate rehabilitation period. In 1983 Hon Richard Prebble MP introduced the Rehabilitation of Offenders Bill 1983 as a private members bill.[13] In 1988 the Criminal Records Bill[14] was introduced into Parliament. The Bill largely adopted the recommendations of the Penal Policy Review Committee. It also made it an offence for the media to publish any information about a person's criminal record after a period of 10 years from the date of the last conviction.[15]

However the Criminal Records Bill 1988 was not enacted and it has taken a 16 year wait to see clean slate legislation become part of New Zealand law. To quote Justice Minister Phil Goff:[16]

> When enacted, the only challenge that people in the future will raise about the legislation is why we took so long in this country to join other countries in introducing it.

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[8] Conviction expungement or concealment schemes in 18 countries (not including New Zealand and Great Britain) are summarised in a UK Home Office Report on a review of the Rehabilitation of Offenders Act 1974 "Braking the Circle" (July 2002) Annex D "Arrangements in other countries".

[9] *Halsbury's Laws of England* (4 ed, Butterworths, London,1980) vol 11(2), Criminal Law, Evidence and Procedure, para 1566.

[10] Criminal Law (Rehabilitation of Offenders) Act 1986 (Queensland); Spent Convictions Act 1988 (Western Australia); Criminal Records Act 1991 (New South Wales); Criminal Records (Spent Convictions) Act 1992 (Northern Territory); Spent Convictions Act 2000 (Australian Capital Territory).

[11] Criminal Records Act 1970 (Canada).

[12] Penal Policy Review Committee Working Party No 5 *Expungement of Criminal Records (Appendix 111)* (Government Printing Service, Wellington, 1981); discussed by Joanne Cairns *Overcoming a Criminal Record: Toward an Effective Spent Convictions Scheme* (LLM Research Paper, Victoria University of Wellington 1997), 29.

[13] Discussed by Joanne Cairns, above n 12, 22.

[14] The Criminal Records Bill 1988, no 42-2.

[15] The Criminal Records Bill 1988, cl 17.

[16] Hon Phil Goff, Justice Minister "Half a million to benefit from Clean Slate legislation" (11 May 2004) Press Release http://www.beehive.govt.nz.

B Purposes of the Clean Slate Act

In the Explanatory Note attached to the Criminal Records (Clean Slate) Bill 2001[17] three distinct purposes are alluded to:

1. Rehabilitation:[18]

> [P]ersons with old criminal records often face a number of difficulties, including finding or keeping employment, becoming admitted to a profession, obtaining credit or insurance, and obtaining entry visas for overseas travel.

If the aim of the Clean Slate Act is to reduce the difficulties ex-offenders face when attempting to reintegrate with society this can be seen as a rehabilitative purpose. To achieve rehabilitation it is arguably not necessary to conceal the conviction but simply to prohibit discrimination on the basis of that conviction. A rehabilitation focused clean slate scheme would either ensure that employers, insurers and bankers never find out about an ex-offender's convictions, or it would make discrimination on the basis of a conviction an offence. The Criminal Records (Clean Slate) Act does neither.

2. Privacy:[19]

> [S]pent or concealed conviction schemes recognise that there is a point at which a convicted person's interest in privacy outweighs the public interest in disclosure of the past record.

A clean slate scheme that recognises privacy protection as an important purpose implicitly acknowledges that after a period of time details of past offending cease to be public facts and become private facts. If historic criminal convictions are considered to be private facts the person to whom the facts relate is entitled to control dissemination of those facts. A clean slate scheme that aims to protect an ex-offender's privacy would prohibit the unauthorised disclosure or publication of details of a clean-slated criminal record. It would vest complete control over any decision to disclose details of a historic criminal conviction in the hands of the convicted person.

As we shall see below, the Criminal Records (Clean Slate) Act goes only a small way towards protecting an ex-offender's privacy. Given that the Clean Slate Act only restricts access to "official criminal records"[20] as opposed to reports of criminal convictions found in newspapers, law reports and on the internet, it could be argued that the Act's focus is rehabilitation rather than privacy. Information about a person's historic criminal record is still readily available but does not need to be disclosed should a clean-slated individual apply for a new job.

Prior to the introduction of the Act official criminal records could generally only be disclosed to third parties with the consent of the individual concerned (as allowed by principle 11(d) of the Privacy Act 1993). Therefore a prospective employer or

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[17] Criminal Records (Clean Slate) Bill 2001, no 183-2, (Explanatory Note) "Regulatory impact and compliance cost statement".
[18] Criminal Records (Clean Slate) Bill 2001, above n 17, "Statement of problem and need for action".
[19] Criminal Records (Clean Slate) Bill 2001, above n 17, "Social benefit".
[20] Criminal Records (Clean Slate) Act 2004, s4; Criminal Records (Clean Slate) Bill 2001, above n 17, Commentary "Introduction".

insurance company may ask that an applicant consent to the disclosure of their criminal record. In practical terms a refusal to give consent would likely lead to a failure to secure the job or the insurance. Privacy could be protected but at the expense of rehabilitation.

By comparison the Rehabilitation of Offenders Act 1974 (UK) allows ex-offenders to sue in defamation those who maliciously publish or disclose details of spent convictions[21] while allowing full conviction information to be disclosed in a large number of employment situations.[22] The focus of this Act seems to lean more towards privacy protection than rehabilitation through employment.

3.Symbolic:[23]

> Spent or concealed conviction laws may be perceived as a method of ensuring that the criminal justice system does not operate in a way that is unduly harsh.

It is submitted that the 'symbolic' purpose of the Clean Slate Act is largely achieved if there is a public perception that the legislation allows offenders to put historic criminal convictions behind them and continue life as productive law abiding members of society. Because the Clean Slate Act is not yet in force, and there has been little publicity about the legislation to date, the Act's success in meeting its symbolic purpose cannot yet be assessed.

C Key Features of the Clean Slate Act

1 Concealment not Expungement

Ex-offenders who satisfy all the requirements outlined in section 7 of the Clean Slate Act are entitled to have their criminal records concealed.[24] The criminal record is not destroyed or wiped but will not be revealed to a third party. If a person is later convicted of a further offence he or she will no longer meet the criteria set out in section 7 and his or her criminal record will no longer be concealed.[25]

In other countries spent convictions are actually deleted (or expunged) from a person's record.[26] The effect of expungement (as opposed to concealment) is that subsequent offences do not resurrect the spent convictions.

Expungement schemes also have the advantage of not 'legislating a lie'. Where criminal convictions have been deleted from official records a person can honestly say they do not have a criminal record. When the convictions remain on the record (as they do under the Clean Slate Act) the ex-offender is instructed to treat any question about convictions as relating to non-concealed convictions. Therefore although people

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[21] Rehabilitation of Offenders Act 1974 (UK), s8.
[22] Rehabilitation of Offenders Act 1974.
[23] Criminal Records (Clean Slate) Bill 2001, above n 17, "Social benefit".
[24] Criminal Records (Clean Slate) Act 2004, s7(1).
[25] Criminal Records (Clean Slate) Bill 2001 no 183-2, (Commentary) "Introduction".
[26] For example Sweden see UK Home Office Report, above n 8, 72.

can say they have no convictions, the assertion stems from a legal fiction. Effectively it is like telling the owner of a labrador to treat all questions about dogs as referring only to poodles. When the labrador owner is asked if he has a dog, he is entitled to answer no, because he hasn't got a poodle.

2 Automatic – Application not Required.

Everyone who meets the criteria outlined in section 7 of the Clean Slate Act automatically receives the benefit of the legislation without having to make a specific application to the Ministry of Justice. It is anticipated (because the Act has not yet come into force) that when a third party makes an enquiry to the Ministry of Justice as to a person's criminal record, in cases where the Clean Slate Act applies the enquirer will be advised that the individual in question has no criminal convictions.

Automatic schemes are not without problems. Because offenders do not receive any specific notification that their records have been 'clean slated' they may either continue disclosing convictions needlessly or alternatively, may fail to disclose convictions on a mistaken belief that their criminal records have been wiped.

On a purely practical level, ex-offenders may have some anxiety that past criminal records really will be concealed from prospective employers. If the individual concerned makes an application to the Ministry of Justice for his or her own criminal record he or she will receive the full, unconcealed criminal history.[27] If the same individual asks for the version of the criminal record that a prospective employer would receive, the Ministry is alerted to the possibility of a clean slate candidate. If however, the Ministry of Justice is given no subtle message that what is required is the 'clean slated' criminal history there seems to be a real risk that the full record could be disclosed in error. This potential problem arises from the fact that offenders are not individually ticked off as having applied for and received a clean slate (it also arises from the fact that convictions are concealed rather than expunged).

In Canada the Criminal Records Act 1970 allows offenders to apply to the National Parole Board for a pardon after the expiry of a rehabilitation period.[28] The advantage of this non-automatic scheme is that people have a level of certainty as to the status of their criminal record, the obvious disadvantage is the comparatively high compliance costs, given that each offender's application is considered individually.

In the Commentary attached to the Criminal Records (Clean Slate) Bill 2001[29] there is an indication that offenders may be able to apply to the Department for Courts for a document certifying that they have no convictions. If this document were to be accepted by employers as evidence of a clean criminal record, offenders' anxiety as to

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[27] Criminal Records (Clean Slate) Act 2004, s16(1) states that criminal records must not be disclosed to people *other than the eligible individual.*

[28] Ministry of Justice "Criminal Records (Clean Slate) Bill – Advice on exemptions from the 'clean slate' schemes in overseas jurisdictions" (submission to the Justice and Electoral Committee, 24 February 2003), 2.

[29] Criminal Records (Clean Slate) Bill 2001, above n 25, (Commentary) "Clean slate scheme is implemented automatically".

the status of their records and the possibility of inadvertent disclosure could be allayed.

3 No Clean Slate for those Sentenced to Imprisonment or Convicted of a Sexual Offence.

Offenders are not eligible to have their criminal record concealed if they have ever had a custodial sentence imposed on them[30] or have been convicted of a "specified offence" (an offence of a sexual nature).[31]

The only exception to this blanket provision is if the offence for which the person was sentenced to imprisonment is no longer an offence, "for example convictions for homosexual activity prior to 1986 and prostitution-related convictions before 2003".[32]

Because section 7 of the Clean Slate Act requires that an offender meet all of the eligibility criteria in order for all of his or her criminal record to be concealed, having one conviction resulting in imprisonment or one conviction for a 'specified offence' means that none of the criminal record will be concealed – ever.

Clean slate legislation in other countries is more permissive in terms of the types of offences and sentences that can be clean-slated.[33] A number of schemes allow for all offences to be concealed or expunged eventually but require a longer rehabilitation period in cases where the offender received a lengthy prison sentence or committed a sexual offence.[34]

Ironically, from a rehabilitation perspective, it is those who have served time in prison or have an historic conviction for a sexual offence that would likely benefit most from the provisions of a clean slate scheme given that these are the people who will have the most difficulty obtaining employment following the expiry of their sentence.

4 Seven Year Rehabilitation Period for All

Everyone who meets the other criteria for eligibility set out in section 7 of the Clean Slate Act must have had seven consecutive years without conviction in order to have their criminal record concealed.[35] If a person's record has previously been concealed and that person is later convicted of another offence, eligibility under the Clean Slate Act is lost and none of the criminal record will be concealed.

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[30] Criminal Records (Clean Slate) Act 2004, s7(1)(b).
[31] Criminal Records (Clean Slate) Act 2004, s7(1)(d) and s4 "specified offence".
[32] Criminal Records (Clean Slate) Bill 2001 above n 25, (Commentary) "Exemptions from the rehabilitation period for decriminalised offences".
[33] UK Home Office "Braking the Circle" (July 2002) Annex D, "Arrangements in other countries".
[34] Countries operating these type of schemes include Belgium, Germany, Hungary, Japan and Portugal, see UK Home Office Report, above n 33.
[35] Criminal Records (Clean Slate) Act 2004, s7(1)(a) and s4 "rehabilitation period".

Similarly if an ex-offender is part way through the seven year rehabilitation period when they are convicted of a further offence the rehabilitation period will start running again from the date of the last sentence.[36]

The seven year rehabilitation period applies irrespective of the seriousness (or otherwise) of the offence, or whether the charges were heard in the Youth Court.

In other jurisdictions, such as the United Kingdom, the length of the rehabilitation period varies depending on the sentence imposed and whether or not the individual was a juvenile at the time the offence occurred.[37] Rehabilitation periods under the Rehabilitation of Offenders Act 1974 (UK) can be as short as six months, as long as ten years, and are halved in the case of juvenile offenders.[38]

The advantage of having one rehabilitation period for all is simplicity. Where the length of the rehabilitation period varies depending on the sentence received there is bound to be a level of uncertainty as to whether a criminal record has been clean slated.

However one size does not necessarily fit all when it comes to rehabilitation periods. For a young person convicted of a single shoplifting offence, a seven year wait to have the conviction concealed is arguably excessive. In Germany even the convictions of sex offenders can be erased after 20 years.[39] Clearly it would be inequitable to require shoplifters to wait 20 years just because sex offenders were to be included in the clean slate scheme as well. Having a sliding scale of rehabilitation periods would allow even those sentenced to imprisonment or convicted of sexual offences to have their convictions concealed eventually while not unnecessarily penalising those convicted of more minor offences.

5 Clean Slate Act Creates an Offence to Disclose Official Criminal Record

Section 17 of the Clean Slate Act states:

> (1) A person commits an offence if the person has access to criminal records, and knowing that he or she does not have lawful authority under this Act, or being reckless as to whether or not he or she has lawful authority under this Act, discloses to any person, body, or agency the criminal record, or information about the criminal record, of an eligible individual that is required to be concealed.
>
> (2) A person who commits an offence against subsection (1) is liable on summary conviction to a fine not exceeding $20,000.

For the purpose of section 17 "criminal record" is defined in section 4 as being:

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[36] Criminal Records (Clean Slate) Act 2004, s4.
[37] Ministry of Justice, above n 28, 3.
[38] Rehabilitation of Offenders Act 1974 (UK), s5(2)(a); see also discussion by Joanne Cairns, above n 12, 17.
[39] Records are kept on the Central Federal Register (*Bundeszentralregister*) for between 5 and 20 years depending on the sentence received. For sex offenders it is always 20 years. UK Home Office Report, above n 33, 68.

> (i) any official record (including, without limitation, an electronic record) that is kept by, or on behalf of, the Crown…

A person can therefore only commit the offence created by section 17 if he or she has access to official criminal records. Disclosing information about a person's criminal record on the basis of information obtained from newspaper reports, law reports or other non-official sources is not an offence under the Clean Slate Act.

Other countries take a different approach when it comes to enforcement of rights under spent convictions legislation. The Rehabilitation of Offenders Act 1974 (UK) allows eligible persons to recover damages for defamation when details of their spent convictions are maliciously published.[40]

The Clean Slate Act also makes it an offence to require a person to disclose clean-slated convictions.[41] This approach to enforcement is sometimes described as being 'question based' in that it is an offence for certain questions to be asked. Section 18 states:

> (1) A person commits an offence if, without lawful authority under this Act, the person requires or requests that an individual –
>
> (a) disregard the effect of the clean slate scheme when answering a question about his or her criminal record; or
>
> (b) disregard the effect of the clean slate scheme and disclose, or give consent to the disclosure of, his or her criminal record.

Clearly, there are freedom of expression implications in respect of a law which makes it an offence to ask a question. However without section 18, clean-slated offenders would be back in exactly the same position they were in prior to the introduction of the Clean Slate Act. An employer could request that clean-slated convictions be revealed, failure to reveal such convictions would be viewed negatively and the job would likely be offered to another candidate.[42]

Ex-offenders would receive greater privacy protection if the Clean Slate Act made it an offence to publish details of concealed criminal records (as was suggested in the Criminal Records Bill 1988[43]). This issue is discussed in greater detail later in this paper.

6 Clean Slated Convictions Are Not Hidden From Everyone

Section 19 of the Clean Slate Act sets out the exceptions under which a clean-slated criminal record can be (or must be) disclosed.

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[40] *Halsbury's Laws of England* (4ed Butterworths, London, 1980) vol 11(2) Criminal Law, Evidence and Procedure, para 1566.
[41] Criminal Records (Clean Slate) Act 2004, s 18.
[42] S Albright and F Denq "Employer attitudes towards hiring ex-offenders" (1996) 76 The Prison Journal 118-137, (USA). 42% of respondents would be unwilling to hire an ex-offender, 12% would be willing and 42% were neutral.
[43] Criminal Records Bill 1988, cl 17.

Official criminal record information may be disclosed if the information is needed to assist in the prevention, detection, investigation or prosecution of offences by a law enforcement agency.[44]

Details of an eligible person's criminal record can also be disclosed if relevant to any criminal or civil court proceedings.[45] This exception may allow an eligible person to be questioned about previous convictions in the event that he or she has to give evidence against another person (as a witness to or victim of offending).

If a clean-slated person applies for one of the jobs specified in paragraphs (d) and (e) of subsection (3) his or her full criminal record may be disclosed to the potential employer.[46]

In addition, section 14(3)(b) states that eligibility under the Clean Slate Act does not authorise someone to conceal his or her full criminal record when asked a question by a foreign jurisdiction. Commentary attached to the Criminal Records (Clean Slate) Bill explains section 14(3)(b) in this way:[47]

> Further, as the bill does not propose to affect the law of foreign states, it will not remove any existing barriers to overseas travel.

This explanation of section 14(3)(b)(ii) seems somewhat disingenuous. New Zealanders have criminal convictions because of the operation of New Zealand law. If New Zealand law later considers it fit to conceal or even erase these same convictions then surely the convictions cease to exist. It is not an interference with the law of another country to tell that other country that an eligible individual has no convictions. The same authority that applied the conviction in the first place has now seen fit to remove it.

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[44] Criminal Records (Clean Slate) Act 2004, s19(3)(a)(i).
[45] Criminal Records (Clean Slate) Act 2004, s19(3)(b).
[46] Jobs include the care and protection of children, police, prison officer, probation officer, security officer, Judge, JP or any position concerning the security of New Zealand.
[47] Criminal Records (Clean Slate) Bill 2001, above n 25, (Commentary) "Introduction".

II DOES THE CLEAN SLATE ACT SERVE ITS PURPOSES?

This part of the research paper will look at how well the Clean Slate Act serves its purposes of rehabilitation and privacy protection.[48]

In the Explanatory Note, which forms part of the Criminal Records (Clean Slate) Bill 2001, a general policy statement says that the clean slate scheme "is intended to enable law-abiding citizens to live free from the adverse effects of historical criminal records, in particular circumstances".[49] If these adverse effects include an inability to get a job, obtain insurance, or travel overseas, or include living one's life with a continuing fear that a past indiscretion will be uncovered, how well does the Clean Slate Act protect people from these effects?

In this part the Clean Slate Act will be applied to 3 real fact situations in order to determine how well it is serving its purposes.

A Scenario 1: Tucker

Mr Tucker was convicted of a number of criminal offences in the 10 years between 1976 and 1986.[50] In 1977 he was convicted of committing indecencies with boys, in 1978 he was sent to prison for "frequenting with felonious intent".[51] His last conviction (for argument's sake, as the Court did not have details of the convictions or the penalties imposed) was in 1982 when he was convicted of indecency.[52] It is now 1986 and Mr Tucker wants to prevent the publication of a newspaper article discussing his past convictions. Imagine that the Clean Slate Act is in force.

Putting aside the sentence of imprisonment, the indecency convictions, and the lack of evidence of any disclosure of official records for a moment, Mr Tucker would still not be eligible to have his criminal record concealed because 7 years had not passed since the date of his last conviction.[53]

Moving forward 8 years to 2004, and the rehabilitation period has well and truly passed, but Mr Tucker is still no closer to being able to rely on the Clean Slate Act to prevent publication, or indeed disclosure, of his criminal history. Despite the fact that 22 years has elapsed since Mr Tucker last offended he will never be eligible to have his criminal record concealed because of his indecency convictions[54] and because he was sentenced to imprisonment.[55]

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[48] Because the Clean Slate Act is not yet in force the Act's success in meeting its symbolic purpose cannot be assessed.
[49] Criminal Records (Clean Slate) Bill 2001 no183-2, (Explanatory Note) "General policy statement".
[50] *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, 723.
[51] *Tucker v News Media Ownership Ltd,* above n 50, 728.
[52] *Tucker v News Media Ownership Ltd,* above n 50, 722; actually it was just Mr Tucker's last conviction for indecency, not his last conviction per se.
[53] Criminal Records (Clean Slate) Act 2004, s7 and s4.
[54] Criminal Records (Clean Slate) Act 2004, s7(1)(d).
[55] Criminal Records (Clean Slate) Act 2004, s7(1)(b).

Even if the New Zealand scheme was a little more like that of Germany[56] and allowed for the concealment of most offences after a 20 year rehabilitation period, Mr Tucker would still be unable to prevent a newspaper from publishing details of his concealed record. This is because the Clean Slate Act does not make it an offence to publish details of a clean-slated criminal history, just to disclose information from the official record.[57] In Mr Tucker's case, information about his indecency convictions probably came to the attention of the media from sources other than the official record. It may have come from newspaper reports at the time of his conviction, family or friends of his victims may have notified the press, or indeed from anyone who was in court when Mr Tucker was convicted or sentenced.

It is clear that the Clean Slate Act does not attempt to suppress criminal record information when it comes from sources other than the official record. Commentary from the Bill states:[58]

> It is important to note that the bill is not an attempt to rewrite history. Some conviction information will remain in the public domain – for example, in books, in newspaper articles and on the Internet – and the bill creates no obligations for this to be concealed.

The question is whether news media would be in breach of section 17 if, having access to an official criminal record (from a clerk at the Ministry of Justice for example), they publish the information knowing that they have no lawful authority to do so. Clearly the clerk who disclosed the information would be liable under section 17.[59] But would the newspaper editor who received the information second-hand also be liable? The answer to this question may depend on how the courts interpret the phrase:[60]

> any official record (including, without limitation, an electronic record) that is kept by, or on behalf of, the Crown…

Is a printout from the Crown's electronic record also an official record? Could it therefore be said that anyone who possesses that printout has access to official criminal records? If this is not the correct interpretation of section 17, the Clean Slate Act is only enforceable against the person, in the employ of the Crown, who directly discloses the official record. The eligible individual whose clean–slated criminal record is about to be published in the morning newspaper will have no legal redress against the newspaper.

Returning to Mr Tucker, we can see that the Clean Slate Act will be of no assistance to those people who have convictions for sexual offending or have been sentenced to imprisonment - irrespective of how long they have been 'rehabilitated'. The Clean Slate Act will not prevent disclosure or publication of a person's criminal record where information about that record is found in places other than 'official' sources.

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[56] UK Home Office Report, above n 33.
[57] Criminal Records (Clean Slate) Act 2004, s17(1).
[58] Criminal Records (Clean Slate) Bill 2001 no 183-2 (Commentary) "Introduction".
[59] Provided he or she had knowledge that (or was reckless as to whether) he or she had no lawful authority to disclose the information. Criminal Records (Clean Slate) Act 2004, s17(1).
[60] Criminal Records (Clean Slate) Act 2004, s4 "criminal record".

Mr Tucker's criminal record can be disclosed (with his consent[61]) to prospective employers and insurance companies. Mr Tucker will have to disclose his criminal record if he wishes to travel to the United States of America. The Clean Slate Act does not prevent the news media from running stories detailing my Tucker's criminal convictions. And in its present form it never will.

B Scenario 2: "Sophia"

"Sophia" (not her real name) is a 36 year old mother of two living in Wellington. After leaving school at 16 Sophia fell in with a rough crowd and in 1986, aged 18 years, she was convicted of 5 offences arising out of 4 separate incidents. The convictions were for cultivating cannabis, taking and using a credit card for pecuniary advantage, theft, and theft from a dwelling.[62]

Sophia went on to complete a bachelor of laws degree and in 1994 was admitted as a barrister and solicitor of the High Court of New Zealand. In 1997 she applied for a job with the (then) Department for Courts. The position involved providing research assistance to the judiciary. The salary was $50,000. After 10 hours of interviews (including psychological assessment and performance evaluation) Sophia was offered the job. The following day Sophia signed an employment contract with the Department for Courts that authorised the employer to access her criminal record.

Sophia believed she did not have to worry about the criminal record check. The last offence was committed 11 years earlier. She had subsequently obtained a law degree and admission to the bar. The interview had been thorough and she was held by the employer to be the best of the many applicants for the position. However a few days after signing the employment contract Sophia received a telephone call from the Department for Courts advising her that as a result of the criminal record check, the job offer was no longer open. Although Sophia did take the matter to the Employment Court for mediation, her lack of resources led her to accept a small financial settlement. Sophia has been unable to obtain full-time employment to this date.

The Clean Slate Act may be of some assistance to Sophia. She meets all the criteria for eligibility under section 7 of the Clean Slate Act. She has never been convicted of a sexual offence, she has not been sentenced to imprisonment, and it is more than 7 years since her last conviction.

If any prospective employer were to undertake a criminal record check they would be told that Sophia had no criminal convictions. If she wished to travel overseas, however, Sophia would have to disclose her criminal record on the immigration or customs forms.[63]

As with Mr Tucker, there is nothing in the Clean Slate Act that would prevent the media from publishing an article about Sophia's clean-slated criminal record, or indeed prevent an employer from rejecting Sophia's job application on the basis of her criminal convictions (should they somehow find out about them).

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[61] Privacy Act 1993, Principle 11(d).
[62] Criminal Information Report annexed hereto.
[63] Criminal Records (Clean Slate) Act 2004 s 14(3)(b)(ii).

The 1988 Criminal Records Bill "proposed extending the existing grounds of unlawful discrimination under the Human Rights Commission Act[64] to include discrimination on the grounds of conviction".[65] Had the Clean Slate Act adopted this proposal, those people who were eligible to have their criminal records concealed would have an avenue for complaint should they be unsuccessful in obtaining housing, employment or insurance on the basis of historic convictions. Without such a provision someone like Sophia would have no redress if she were again refused a job on the basis of her (concealed) criminal record.

C. Scenario 3: Deported killer on university course

As mentioned in the introduction, the media discover that John Tanner, a postgraduate student at Victoria University of Wellington, has a 13 year old conviction for murder.[66] The conviction was entered in Britain.

Even if Mr Tanner did not receive a sentence of imprisonment, the Clean Slate Act could not be relied upon to conceal the conviction. Section 4 of the Act states that 'conviction':

> means a conviction entered by a court in New Zealand for an offence, including a conviction for a traffic offence;

Therefore when the Clean Slate Act refers to convictions that can be concealed, a New Zealand court must have entered the conviction. This interpretation is confirmed in the commentary to the Criminal Records (Clean Slate) Bill 2001:[67]

> Therefore, the legislation is limited to enabling concealment of official conviction information held on justice sector electronic databases and paper-based records of convictions held by an agency or deposited by Crown agencies with National Archives.

So in the same way that New Zealand convictions cannot be concealed overseas,[68] overseas convictions will not be concealed in New Zealand.

Therefore there are three reasons why media disclosure of Mr Tanner's criminal record could not be prevented under the Clean Slate Act. The first is that the conviction arose overseas. Secondly Mr Tanner was sentenced to imprisonment. Finally the Clean Slate Act does not prohibit publication of details of a clean-slated criminal record.

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[64] The Human Rights Commission Act 1977 was the predecessor to the Human Rights Act 1993. Section 21 of the Human Rights Act 1993 does not include 'conviction' in the list of attributes for which it is unlawful to discriminate.

[65] Joanne Cairns *Overcoming a Criminal Record – Towards an Effective Spent Convictions Scheme* (LLM Research Paper, Victoria University of Wellington, 1997), 33.

[66] Oskar Alley "Deported killer on uni course" (31 July 2004) *The Dominion Post* Wellington, 1.

[67] Criminal Records (Clean Slate) Bill 2001, no 183-2 (Commentary) "Criminal history information".

[68] Criminal Records (Clean Slate) Act 2004, s14(3)(b)(i).

III HOW THE CLEAN SLATE ACT RELATES TO OTHER LAW

Although the level of privacy protection offered by the Clean Slate Act is rather underwhelming on its own, the effect of the legislation may be to enhance an individual's prospect of redress in other areas of law. An eligible individual's chances of obtaining an injunction restraining the publication of details of his or her concealed criminal record could be enhanced by virtue of the existence the Clean Slate Act. The Broadcasting Standards Authority's privacy principle ii) (which deals with facts that were once public but through the passage of time have become private again) can now be interpreted in a manner consistent with the provisions of the Clean Slate Act. The Act may even impact on the tort of privacy in so far as it indicates that concealed criminal records contain private facts, publication of which should be considered highly offensive.

A Injunction Restraining Publication

Although an injunction is not a remedy specifically mentioned in the Clean Slate Act it is clear from case law in New Zealand[69] and overseas[70] that the courts will grant an injunction to protect against the publication of confidential information. In order to establish a breach of confidence a plaintiff must show that confidential information, imparted in circumstances creating an obligation of confidence, has been misused.[71] The Clean Slate Act may assist a plaintiff trying to establish a breach of confidence in so far as it provides statutory authority for the claim that a clean-slated criminal record is confidential information. The Clean Slate Act also imposes an obligation of confidence upon anyone with access to an official criminal record and makes disclosure of such information an offence.[72]

In *Francome v Mirror Newspapers Ltd*[73] the English Court of Appeal granted an injunction preventing the publication of details of phone conversations to and from the plaintiff's home. The plaintiff, John Francome, was a champion national hunt jockey. The facts of the case were that an unknown person illegally tapped the plaintiff's home phone, recording conversations that allegedly exposed some illegal behaviour by Mr Francome. The defendant sought to publish a newspaper article revealing the contents of the telephone conversations. Under section 5 of the Wireless Telegraphy Act 1949 (UK) it is a criminal offence to tap a person's telephone. Whilst it was not the defendant who committed the illegal act, the Court of Appeal held that:[74]

> Parliament by section 5(b) of the Wireless Telegraphy Act 1949 created a criminal offence. The proposition that citizens are free to commit a criminal offence if they have formed the view that it will further what they believe to be the public interest is quite baseless in our law and inimical to parliamentary authority.

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[69] *European Pacific Banking Corporation v Television New Zealand Ltd* [1993] 1 NZLR 559
[70] *Francome v Mirror Newspapers Ltd* [1984] 1 WLR 892.
[71] *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47 Megarry J.
[72] See a discussion of a breach of a statutory duty in John Burrows and Ursula Cheer *Media Law in New Zealand* (4ed, Oxford University Press, Auckland, 1999) 155.
[73] *Francome v Mirror Newspapers Ltd*, above, n70.
[74] *Francome v Mirror Newspapers Ltd*, above n 70, 901.

Allowing the defendants to benefit from another person's illegal act would defeat the purpose of the Wireless Telegraphy Act 1949.

The same reasoning could be applied in an application for an injunction preventing publication of details of a clean-slated criminal record. Allowing the publication of information disclosed in breach of section 17 of the Clean Slate Act would surely be "inimical to parliamentary authority".

A further question concerns whether this principle could be extended to cover information about a concealed criminal record that was not unlawfully disclosed but obtained from some legitimate source (such as an old newspaper report). Although an action in breach of confidence generally cannot succeed if the information has already been published (and is therefore no longer confidential) there is a qualification to this principle that would assist a clean-slated plaintiff. In *X v Attorney General*[75] X succeeded in an action for breach of confidence notwithstanding the fact that the information he sought to conceal could have been discovered elsewhere by someone searching. Information about a seven year old conviction is not readily available to the general public without a search even if a newspaper report was published at the time. The subsequent clean slating of the conviction would effectively restore confidentiality.

If it is an offence to disclose details of a clean-slated record surely Parliament's intent is to restrict the dissemination of this information. A newspaper publishing details of a clean-slated record clearly goes against Parliamentary intent. Would the courts grant an injunction preventing the publication notwithstanding the fact that no offence has been committed in the disclosure of the information?

The decision of the High Court in *European Pacific Banking Corporation v Television New Zealand Ltd*[76] gives some indication that an injunction could be granted to protect confidential information in circumstances where no offence has been committed. In this case the plaintiffs sought an injunction prohibiting the publication, copying, or use of their confidential information. The information in question consisted of a number of business documents that had been leaked to the media. Justice Henry granted the injunction stating:[77]

> Where the information is confidential there is prima facie an entitlement to protection, the public interest or "iniquity rule" being a defence to a claim for protection. Accordingly it is in my view incumbent on a party resisting protection to identify and establish the public interest if that is to be relied on.

He goes on to say:[78]

> In my judgment the short answer to that contention is that prima facie documents taken from the plaintiff's records are their confidential property.

Here we see a balancing between the plaintiff's right to confidentiality and the right of the public to be informed of a possible wrongdoing. In cases such as these the

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[75] *X v Attorney General* [1997] 2 NZLR 673.
[76] *European Pacific Banking Corporation v Television New Zealand Ltd* [1993] 1 NZLR 559, (HC).
[77] *European Pacific Banking Corporation,* above n 76, 564.
[78] *European Pacific Banking Corporation,* above n 76, 565.

'iniquity rule' states that a person cannot hide behind a right of confidentiality to prevent examination of his or her wrongdoing.

Justice Henry states that it is for the party who wants to publish the information to prove that there is a public interest in publication otherwise the presumption of confidentiality will stand.

This test translates well to the Clean Slate Act scenario where a newspaper editor wishes to publish details of a person's concealed criminal record. The clean-slated criminal record is clearly confidential and an injunction will be granted prohibiting publication unless the newspaper editor can establish some clear public interest in disclosure.

For example, a situation justifying publication could arise where an elected representative speaks out against cannabis law reform stating that those who have smoked cannabis will never be capable of leading productive lives. The media may be able to show a legitimate public interest in the publication of information concerning the Member of Parliament's own historic conviction for possession of marijuana.

B Complaint to the Broadcasting Standards Authority

A complaint can be made to the Broadcasting Standards Authority under section 8(1)(c of the Broadcasting Act 1989 if an item broadcast on television or radio breaches a person's right to privacy. The Broadcasting Standards Authority considers complaints under the guidance of seven privacy principles. Privacy principle (ii) states:

> The protection of privacy also protects against the public disclosure of some kinds of public facts. The "public" facts contemplated concern events (such as criminal behaviour) which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to a reasonable person.

Privacy principle (ii) illustrates that criminal behaviour (and criminal convictions) are not private facts capable of privacy protection unless sufficient time has passed to effectively extinguish any public interest. The question for the Broadcasting Standards Authority has been, up until the introduction of the Clean Slate Act, how much time must pass until criminal conviction information becomes private again.

The Clean Slate Act will arguably settle this issue, although perhaps not to the advantage of the ex-offender. Because the Clean Slate Act states that minor criminal convictions can be concealed after a seven year rehabilitation period, the Broadcasting Standards Authority may well adopt the same criteria when determining whether or not a person's privacy has been breached. Such an adoption will not be welcomed by anyone who has been sentenced to imprisonment or convicted of a sexual offence. These people will never be protected by privacy principle (ii) if a Clean Slate Act approach is taken but may well have been considered eligible for privacy protection by the Broadcasting Standards Authority prior to the introduction of the Act.

Two decisions of the Broadcasting Standards Authority illustrate how privacy principle (ii) has been applied to date.

In *T v Television New Zealand Ltd*[79] a photograph of T was screened during a "Crimescene" television documentary about people accused of defrauding the student loans scheme. T had been convicted, sentenced and had served his sentence prior to the screening of the documentary. In declining to uphold T's complaint that TVNZ had breached his privacy the Authority said:[80]

> The question for the Authority was whether sufficient time had elapsed to render the facts private again. As the trial occurred only last year, the Authority concludes that it had not. However even if it had, it does not find the public disclosure of the facts would have been offensive to a reasonable person and thus a breach of principle (ii).

Clearly, in the Authority's view, a year is not long enough to render criminal convictions private information. The introduction of the Clean Slate Act would not alter this Broadcasting Standards Authority decision.

Ms M made a complaint to the Broadcasting Standards Authority after film footage of her arrest was screened six years after the incident occurred. In *MM v TV3 Network Services Ltd*[81] the Authority considered the complaint about an item that screened on the television programme "Nightline". The item purported to deal with the issue of repeat drink driving offenders. Film footage was screened which showed a struggling Ms M being put into a police car. In fact Ms M had not been driving and had only been charged with assault. The film footage was shot six years prior to the screening of the programme.

In upholding Ms M's complaint the Authority said:[82]

> The Authority next considers whether the facts have become private again. It notes that the offence and conviction related to relatively minor matters. It also notes that some six years have now passed since the conviction was entered. It concludes that this public fact has, in effect become private in these circumstances.

Not only did the Broadcasting Standards Authority consider that six years was a sufficient period of time to render the conviction private again (as opposed to seven under the Clean Slate Act), they were able to look at the seriousness of the offence and adjust the rehabilitation period accordingly (something that the Clean Slate Act does not allow). If the Broadcasting Standards Authority had used the Clean Slate Act as a guide in Ms M's case it is likely that the TV3 would have been within their rights to broadcast the six year old footage (although the fact that Ms M was not arrested for drink driving would still pose some fairness issues!).

Another interesting aspect of the *MM v TV3 Network Services* complaint is that it reveals the broadcaster's attitude towards the privacy of historic criminal convictions:

> Because details of convictions are not expunged from the public record in New Zealand regardless of the passage of time, TV3 considered that the events had not become private again.

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[79] *T v Television New Zealand Ltd* (1 October 1998) Broadcasting Standards Authority BSA 1998-119.
[80] *T v Television New Zealand Ltd*, above n 79, 3.
[81] *MM v TV3 Network Services Ltd* (15 July 1999) Broadcasting Standards Authority BSA 1999-103 and 1999-104.
[82] *MM v TV3 Network Services Ltd*, above n 81, 3.

So following TV3's reasoning, historic criminal convictions would never have become private again prior to the introduction of the Clean Slate Act, but after the introduction of the Clean Slate Act criminal records of eligible persons are private again after seven years.

We shall have to wait and see whether broadcasters do in fact respect the privacy of those with concealed criminal records given that the Clean Slate Act does not make publication of such records an offence.

C Privacy Tort

The introduction of the Clean Slate Act gives authority to the proposition that the facts contained in a concealed criminal record are private facts. This support from the Clean Slate Act may assist an ex-offender obtain redress under the privacy tort.

Elements that need to be proved to establish a breach of privacy are:[83]

> 1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
>
> 2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

Where an Act of Parliament has established a scheme, which allows a person to deny that he or she has a criminal record and makes it an offence to disclose the existence of such a record, there is arguably a reasonable expectation of privacy in respect of that record. Where Parliament has created a scheme that will keep this information private surely it must be highly offensive to publicise the information.

The Court of Appeal in *Hosking v Runting & Ors*[84] recognises that statutory and common law remedies may work together to provide comprehensive privacy protection. The Court cites this passage from the Law Commission's preliminary paper:[85]

> There is no reason why the development of a judge-made tort and the creation of statutory protections by the legislature for particular types of personal information or for particular methods of publication could not develop side-by side.

Perhaps then the Clean Slate Act will be used as a tool by the courts to determine (in the area of past convictions) whether of not a person has a reasonable expectation of privacy so as to allow recovery in tort.

Alternatively, because Parliament has not prohibited the publication of a concealed criminal record it could be argued that a person could not have a reasonable expectation of privacy in respect of publication, only in respect of disclosure from an official source.

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[83] *Hosking v Runting & Ors* (25 March 2004) Court of Appeal CA 101/03, [117].
[84] *Hosking v Runting & Ors*, above n 83.
[85] *Hosking v Runting & Ors*, above n 83, [108].

D Summary

The Clean Slate Act may well have the indirect effect of providing guidance to other courts and tribunals in cases where an ex-offender seeks to prevent publication of a concealed criminal record. In a breach of confidence action the Clean Slate Act will provide statutory guidance as to which historic convictions can be considered confidential and the situations in which an obligation of confidence may exist. In a claim in tort for breach of privacy a plaintiff may be able to point to the Clean Slate Act as providing authority for the proposition that a concealed criminal conviction is a private fact. Similarly, a complaint to the Broadcasting Standards Authority on the basis of an alleged breach of privacy is likely to be considered in light of the clean slate eligibility criteria set out in section 7 of the Act.

Although clarification as to the circumstances in which historic convictions can be considered private facts may be helpful to the courts, there may be little benefit to a person wishing to prevent the publication of information about an old conviction. In the case of a complaint to the Broadcasting Standards Authority an ex-offender may be worse off under the Clean Slate Act criteria than he or she would have been had the Authority simply applied its own judgment. Although someone with a clean-slated criminal record may succeed in a breach of confidence or privacy claim, the financial cost of pursuing such a claim is likely to be prohibitive. Surely a better solution would be to make publication of details of a clean-slated criminal record an offence?

IV OTHER CLEAN SLATE SOLUTIONS

As already discussed, the extent to which the Clean Slate Act can provide for the rehabilitation and privacy protection of ex-offenders is significantly limited by the failure of the legislature to make publication of a clean-slated criminal history an offence. This omission, together with the lack of a non-discrimination offence, the exclusion from the clean slate scheme of sexual offenders and those sentenced to imprisonment, and the failure to extend the effects of the scheme to New Zealanders overseas (and vice versa), has left the clean slate scheme with more holes than fabric.

In this part alternative clean slate options will be examined and compared to the Clean Slate Act with a view to determining whether there could be a better way to protect the privacy and rehabilitation interests of those seeking to put historic convictions behind them.

A Criminal Records Bill 1988

The Criminal Records Bill 1988[86] progressed as far as a second reading and was reported from the Justice and Law Reform Committee on 11 July 1989. However a lack of political will and a change of Government in 1990 meant that the Bill was never enacted.

The Criminal Records Bill 1988 (the Bill) went a lot further in its efforts to protect the privacy of ex-offenders than the Clean Slate Act does. The Bill, which was to have amended and extended the provisions of the Human Rights Commission Act 1977, also proposed to make it unlawful to discriminate against a person on the basis of a historic criminal conviction thereby achieving its rehabilitative purposes.

The long title of the Bill states:

> An Act to assist persons who have been convicted of a criminal offence to live down the effect of their criminal record, and, for that purpose,-
>
> (a) To extend the provisions of the Human Rights Commission Act 1977 to make it unlawful to discriminate against persons on the ground of an irrelevant conviction; and
>
> (b) To prohibit, after a certain period without reconviction, the disclosure of the existence of, and the asking of questions about, a conviction.

The key features of the Bill (and the key differences from the Clean Slate Act) are discussed below.

1 The Criminal Records Bill was more inclusive.

Unlike the Clean Slate Act, the Bill allowed the criminal records of those convicted of sexual offences or sentenced to imprisonment to be deemed irrelevant (and therefore unable to be disclosed or published), after the expiry of a rehabilitation

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[86] Criminal Records Bill 1988, no 42-2.

period.[87]Convictions entered by a Children and Young Persons Court or by a Youth Court were automatically irrelevant without the need for a rehabilitation period, as were convictions for minor offences.[88]

Convictions entered overseas were deemed to be irrelevant on the same basis as those entered in New Zealand.[89]

By comparison the Clean Slate Act will not conceal the criminal record of those convicted of sexual offending or sentenced to imprisonment, overseas convictions will never be concealed, and young offenders and those convicted of minor offences will need to wait seven years before being clean-slated.

A report from the Department of Justice to the Justice and Law Reform Select Committee sheds some light on the inclusive approach taken in the Criminal Records Bill 1988. Referring to the 1981 report of the Penal Policy Review Committee the Department states:[90]

> The protection afforded by the bill should apply to all offenders. No-one should be denied the removal of disabilities and the opportunity to build a new life.
>
> The nature or seriousness of the offence should not be used as a basis for dealing differently with various offenders. The nature or seriousness of an offence does not necessarily reflect graver culpability or mean the offender is more likely to re-offend.

This statement raises the issues of culpability of an offender, risk of re-offending and the opportunity to rehabilitate. How these issues relate to the specific criteria of a clean slate scheme will be discussed below. Suffice to say it appears that those who drafted the Criminal Records Bill 1988 were more mindful of research into criminal behaviour than those who drafted the Clean Slate Act.

Submissions on the Bill indicate that there was some opposition to the proposal that convictions for sexual offences could become irrelevant after the expiry of a rehabilitation period. The Women's Division of Federated Farmers of New Zealand Inc "submitted that convictions for sexual violation should be relevant to an employment decision where the employment involves association with women or children".[91] Goodman Fielder Wattie (NZ) Limited submitted that a 10 year rehabilitation period should not apply in respect of convictions for sexual offences or theft.[92]

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[87] Criminal Records Bill 1988, cl 24, proposed sections 76D and 76DA. The rehabilitation period was 10 years from the date of conviction or, if a custodial sentence was imposed, 10 years from the date of release. In the case of sexual offences the Bill allowed the sentencing court to set the rehabilitation period at the time of sentence for a period of not less than 10 years.

[88] Criminal Records Bill 1988, cl 24, proposed section 76B. Minor offences were defined in proposed section 76A as being: "any summary offence for which the defendant is not liable on conviction to a sentence of imprisonment or a fine exceeding $500" and included overseas convictions.

[89] Criminal Records Bill 1988, cl 24, proposed section 76S.

[90] Department of Justice "Criminal Records Bill: Major Issues" (report to the Justice and Law Reform Select Committee, 7 December 1988), 7.

[91] Department of Justice, above n 90, 7.

[92] Department of Justice, above n 90, 7.

Although, understandably, submissions from the Editors Committee of the Commonwealth Press Union focused largely on the prohibition on publication of details of irrelevant convictions, an objection was also made to the extension of the provisions of the Bill to cover overseas convictions. The CPU submitted that:[93]

> We foresee real and unnecessary difficulties in publishing news from overseas because of the definition of "conviction" in the proposed Sections 76A and 76S which purport to include convictions entered abroad. (We offer, for example, the prohibition on reporting the conviction of a person in another country unless we obtained the specific consent of that person. We assume it was never the intention of the Bill to prohibit such reporting; yet that is one effect of legislating against the truth.)

Had the Criminal Records Bill 1988 been enacted rather than the Clean Slate Act, not only would John Mark Tanner[94] be able to prevent publication of details of his 13 year old British murder conviction, but Mr Tucker would also be entitled to put his indecency convictions behind him.[95] Even Olympic boxer Soulan Pownceby[96] (who has received so much publicity recently due to his 9 year old conviction for the manslaughter of his baby daughter), would be protected from further public scrutiny from 2005 onwards. This is not only because the Criminal Records Bill made publication of irrelevant convictions an offence, but, because it allowed convictions resulting in prison sentences, convictions for sexual offences, and overseas convictions to become irrelevant over time.

2 The Criminal Records Bill made it an offence to discriminate.

The Criminal Records Bill 1988 was drafted to amend and extend the Human Rights Commission Act 1977. The Human Rights Commission Act 1977 made it unlawful to discriminate against a person on the basis of "colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief".[97] The Bill proposed extending the prohibition on discrimination to cover discrimination on the grounds of irrelevant conviction.[98] For example, proposed section 22A states:

> Where any provision of any enactment requires, as a qualification for holding office, that the appointee be a fit and proper person, or a person of good character and reputation, or a fit person to be appointed, or imposes any other qualification that relates to the character or conduct of the appointee, that provision shall not disqualify any person from holding that office merely because that person, or any relative or associate of that person, has a conviction (being a conviction that is an irrelevant conviction) and every such provision shall be read subject to this section.

As discussed above in the 'Sophia' example it is not enough to make disclosure of a clean-slated conviction an offence if an ex-offender has no redress should he or she be discriminated against on the basis of leaked information about such a clean-slated conviction.

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[93] Editors' Committee of the New Zealand Section of the Commonwealth Press Union "Submission to the Justice and Law Reform Committee on the Criminal Records Bill", 5.
[94] Oskar Alley "Deported killer on uni course" (31 July 2004) *The Dominion Post* Wellington, 1.
[95] *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, discussed above.
[96] Ann- Marie Johnson "Outcry over Games boxer" (22 June 2004) *The Dominion Post* Wellington.
[97] Human Rights Commission Act 1977 for example s 26.
[98] Criminal Records Bill 1988, clauses 7 to 15.

The current Human Rights Commission expressed the problem clearly in their submission on the Criminal Records (Clean Slate) Bill 2001:[99]

> 4. The Need To Prohibit Discrimination
> The Bill contains no provision preventing discrimination on the basis of previous criminal convictions. In our view, there are several reasons to prohibit discrimination on the basis of spent convictions, as well as concealing them. The first is that concealing convictions provides only limited assistance to those who have put their offending behind them. In a small country like New Zealand there are numerous ways that people can find out that someone has a conviction – in particular by word of mouth. The fact that a conviction is legally "concealed" is of little use if people hear about the conviction through informal avenues. It would be more useful for people with concealed convictions to rely on a law preventing discrimination on that ground, than to rely on a prospective (or current) employer not finding out about their conviction.

Submissions on the Criminal Records Bill 1988 by and large supported the prohibition of discrimination on the basis or irrelevant conviction. The Commonwealth Press Union state:[100]

> We do not take issue with the stated motive behind the Bill, being that there should be no discrimination on the grounds of irrelevant convictions.

The Department of Justice[101] did refer to three submissions that "questioned the inclusion of irrelevant convictions under the protective umbrella of the Human Rights commission Act 1977". The basis of the objections was that unlike race or sex, a conviction is not inherent to an individual. The counter-argument would surely be that neither marital status nor religious belief are inherent to an individual, nevertheless it is still unlawful to discriminate against someone on these grounds.

3 The Criminal Records Bill 1988 made it an offence to publish details of "irrelevant convictions".

Perhaps the most important difference between the Clean Slate Act and the Criminal Records Bill 1988 is that the Bill made publication of details of an "irrelevant conviction"[102] unlawful.

Proposed new section 33B states:

> (1) Subject to sections 33C and 33BA to 33D of this Act, no person shall-
> (a) Publish, in any newspaper or other document intended to be made available to the public; or
> (b) Broadcast, by radio or television or otherwise, - any information where –
> (c That information discloses, or is reasonably likely to disclose, the fact that any person has a conviction; and

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[99] Human Rights Commission "Submission on the Criminal Records (Clean Slate) Bill [to the] Justice and Electoral Select Committee", 5-6.
[100] Editors' Committee of the New Zealand Section of the Commonwealth Press Union, above n 93, 2.
[101] Department of Justice, above n 90, 5.
[102] An "irrelevant conviction" was a conviction in relation to which the rehabilitation period had expired. In most cases the rehabilitation period expired 10 years following the entering of the conviction provided the offender had not been reconvicted of a further offence, see proposed sections 76A, 76B and 76D.

> (d) That conviction is an irrelevant conviction; and
> (e) The person who publishes or broadcasts that information knows, or has good reason to know, that the conviction is an irrelevant conviction.
>
> (2) Every person who contravenes subsection (1) of this section commits an offence and is liable on summary conviction, -
> (a) In the case of an individual, to imprisonment for a term not exceeding 3 months or to a fine not exceeding $2000:
> (b) In the case of a body corporate, to a fine not exceeding $10,000.

Sections 33BA, 33C and 33D deal with reporting proceedings of Parliament, publishing after the death of the offender, and publishing with the offender's consent respectively.

The Editors' Committee of the Commonwealth Press Union opposed the inclusion of the publication offence in the Criminal Records Bill. In essence, the CPU argued that whilst it was acceptable for the Bill to prohibit discriminatory action, it was not acceptable to suppress the knowledge that could bring about the action:[103]

> (4) Further, by virtue of the arbitrary and unqualified manner in which information would be suppressed, the Bill fails to take account of the public interest considerations which both Parliament and the courts have recognised and enshrined in other areas of law which govern social behaviour.
>
> (5) More particularly, we contend that the Bill legislates against knowledge of the truth and transmission of this knowledge, and against the entitlement of citizens to think or act according to a fair and reasonable interpretation of the truth. If it is Parliament's resolve to prohibit certain actions based on knowledge of past convictions, we submit that the knowledge itself should not be banned.
>
> (6) The restraints on information set out in the Bill are not matched by the restraints in its principal Act, the Human Rights Commission Act 1977. The existing restraints in the Act do not set out to deny the facts of racial or ethnic origins, colour, sex, marital status, or religious or ethical beliefs. The restraints go only as far as to forbid certain discriminatory acts based on these.

In respect of paragraph (4) of the CPU submission the writer submits that any prohibition on publishing a 'clean-slated' criminal history should be accompanied by a 'public interest' defence. The type of situation in which a public interest defence could succeed is discussed above under the heading '*Injunction Restraining Publication*'.[104]

Although the Department of Justice[105] considered the possibility of amending proposed section 33B to allow publication in order to protect public welfare or safety, this option was rejected.

The difficulties with the arguments raised by the CPU in paragraphs (5) and (6) of its submissions are twofold. The first problem concerns the practicality of an ex-offender establishing that he or she did not get a job, house, or insurance because of discrimination on the basis of a historic conviction. Although an employer may decide

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[103] The Editors' Committee of the New Zealand Section of the Commonwealth Press Union, above n 93, 2.
[104] *Injunction Restraining Publication*, above page 16.
[105] Department of Justice in its report to the Justice and Law Reform Select Committee, above n 90, 9.

not to hire someone on the basis of his or her criminal history, it is likely that the decision will be justified on other grounds. In this situation surely it is better not to allow the employer's judgment to be swayed by an irrelevant conviction in the first place, particularly as research has shown that willingness to hire ex-offenders is low.[106]

The second problem arises from the fact that whilst anti-discrimination provisions may conceivably go some way towards meeting the rehabilitation functions of any clean slate legislation they do not address the privacy concerns of ex-offenders. If Parliament has determined that a criminal conviction should be irrelevant after 10 years surely it is necessary, in order to protect the privacy of the ex-offender, to prevent the publication of details of such a conviction. In the same way that the Broadcasting Standards Authority's privacy principle (ii) recognises that public facts become private again through the passage of time, clean slate legislation needs to recognise and protect the privacy interests of rehabilitated offenders.

One requirement that could have significantly limited the scope of proposed section 33B is the need for the person who publishes the information to know or have good reason to know that the conviction is an irrelevant conviction.[107] The Department of Justice, in a report dated 16 March 1989, discussed what was meant by the phrase "know or have good reason to know".[108]

> "Know or have good reason to know" is a standard phrase to cover both actual knowledge and knowledge which the person could and should have had.

Although this definition is not tremendously helpful on its own, some examples provided by the Department indicate the level of knowledge required in order for a person to be in breach of section 33B.

> The submissions considered that an offence would be committed in the following circumstances:
> (i) A reporter publishing an account of the Mr Asia drug ring in the 1970's who mentioned the roles of a number of important characters who had not offended for 10 years.
>
> ...the reporter would commit an offence only if the conditions in section 33B(1)(c - (e) were satisfied. Section 33B(1)(e) could be met only if the reporter knew the subsequent offending history of the important characters concerned.

So if a reporter has no knowledge of any subsequent offending does it follow that he or she should have good reason to know that a conviction is now likely to be irrelevant? The example given seems to indicate yes, the reporter who knows of an offence 10 years ago but who is unaware of any subsequent offending would have good reason to know that a conviction is likely to be irrelevant.

One submission received by the Justice and Law Reform Select Committee suggested that "an offence should have been committed only if there was an intent to damage a reputation by the dissemination of the information".[109] This looks a lot like the malice

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[106] Albright and Denq, above n 42.
[107] Criminal Records Bill 1988, cl 17 proposed section 33B(1)(e).
[108] Department of Justice "Criminal Records Bill: Report of the Department of Justice" (16 March 1989) 9.
[109] Department of Justice, above n 90, 9.

element required by English courts.[110] This suggestion was rejected by the Department of Justice on the basis that it "departs from the central purpose of the disclosure provisions, which is to underline that after a certain passage of time the fact of a conviction is not important and should be ignored."[111]

Although it is not entirely clear how the courts would have interpreted section 33B(1)(e) it may be that mere knowledge of the fact that a conviction is more than 10 years old is enough to indicate that a publisher should know that a conviction is irrelevant.

Another criticism that would undoubtedly be levelled at a provision that made the publication of a clean-slated criminal history unlawful is that such a provision would be an unjustified incursion into the right of freedom of expression as expressed in section 14 of the New Zealand Bill of Rights Act 1990.

In their submission on the Criminal Records Bill 1988 (and prior to the enactment of the New Zealand Bill of Rights Act) the CPU argued that the "prized and traditional principle that access to the truth, knowledge of the facts and communication of the facts is in the best interests of all society".[112] This sounds a lot like a freedom of expression argument. In their submission on the Criminal Records (Clean Slate) Bill 2001 the CPU made the same argument (albeit more explicitly) notwithstanding the fact that the Bill does not make publication of a clean-slated criminal history an offence. The CPU states that:[113]

> It is the view of the CPU that this Bill is inconsistent with Section 14 of the New Zealand Bill of Rights Act and should not be enacted.

The problem with the freedom of expression argument is that there are already incursions into an individual's right to say whatever he or she wishes. Defamation laws prevent people from saying untrue derogatory things about others. If one of the purposes of clean slate legislation is to put an offender in the position that they would have occupied had they not been convicted of an offence, namely a person with no criminal convictions, surely it is akin to defamation to publish details of a clean-slated conviction. This point is made in *Halsbury's Laws of England* in a discussion of the features of the Rehabilitation of Offenders Act 1974 (UK):[114]

> A person who has become a rehabilitated person for the purposes of the Act in respect of a conviction is to be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction.
>
> A rehabilitated person may recover damages for libel provided he can show that publication of convictions which can be treated as spent by virtue of section (1)(1) was malicious;

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[110] *Halsbury's Laws of England*, above n 40, 1291.
[111] Department of Justice, above n 90, 9.
[112] Editors' Committee of the New Zealand Section of the Commonwealth Press Union, above n 93, 3.
[113] Commonwealth Press Union (New Zealand Section) "Submission to the Justice and Electoral Committee on Criminal Records (Clean Slate) Bill and Clean Slate Bill", 2.
[114] *Halsbury's Laws of England* (4ed, Butterworths, London, 1980) vol 11(2) Criminal Law Evidence and Procedure, para 1566.

So by prohibiting the publication of a clean-slated criminal record, Parliament is simply preventing the publication of information about a person that is no longer true, just as the law of defamation does. In the writer's opinion this does not seem to be too great an incursion into the right of freedom of expression, and would go a long way towards preventing the sort of invasion of privacy that we have seen in the Pownceby, Tanner and Tucker examples discussed above.

B German Clean Slate Scheme

In Germany details of a person's criminal convictions are "kept on the Central Federal Register (Bundeszentralregister) for between 5 and 20 years depending on the severity of the sentence. For sex offenders it is always 20 years, and for those sentenced to life imprisonment the details are never deleted".[115]

Paragraph 51 of the Bundeszentralregistergesetz states that if a conviction has been wiped, it must not be referred to in legal proceedings, and should not be used to the detriment of the person.[116]

The question of whether details of a deleted conviction can be published has been left to German constitutional law (common law). The leading case is the *Lebach Case.*[117] The facts of the *Lebach Case* are that the plaintiff (who had been convicted of a criminal offence) sought an injunction preventing the screening of a documentary about his life. Whilst the Court held that there may be occasions where the privacy rights of the offender will need to be balanced against the public interest in receiving information it held that:[118]

> Repetitive television reports about a serious criminal offence which are not covered by a current interest in receiving information, are at least impermissible if they endanger the rehabilitation of the offender...The rehabilitation will generally be endangered if a report identifying the offender will be transmitted after his release or very soon before his release.

And later:[119]

> To summarise, a television report about a criminal offence which presents the name, picture or image of the offender, particularly in the form of a documentary play, will generally constitute a serious violation of his personal sphere.

The approach of the Court in *Lebach* seems to be that whilst there may be some public interest in details of offending at the time of the offence, by the time of the

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[115] UK Home Office Report "Braking the Circle" (July 2002) Report on a review of the Rehabilitation of Offenders Act 1974 Annex D "Arrangements in other countries", 68.

[116] (1) Ist die Eintragung ueber die Verurteilung im Register getilgt worden oder ist sie zu tilgen, so duerfen die Tat und die Verurteilung dem Betroffenen im Rechtsverkehr nicht mehr vorgehalten warden und nicht zu seinem Nachteil verwertet warden.

[117] Bverf Ge 35, 202 (1973), discussed in S Michalowski and L Woods *German Constitutional Law* (Aldershot Hants, England, 1999) 123.

[118] S Michalowski and L Woods, above n 117, 132.

[119] S Michalowski and L Woods, above n 117, 124.

conclusion of the sentence public interest is overridden by the rehabilitative interests of the offender:[120]

> If, however, several years later, the offender wants to start a new life, his/her personality right becomes more important, as he/she must have the possibility to atone and to then make a new start, while the public interest in information about the offender at the same time decreases. A careful analysis of the facts of any given case is therefore necessary to determine which of the competing rights should prevail.

We see in the *Lebach Case* the idea that in order to achieve rehabilitation it is necessary to prevent publication of details of historic offending. This approach is similar to that taken in the Criminal Records Bill 1988 where publication of irrelevant convictions is unlawful.

German press rules also protect the privacy of accused persons prior to conviction. Guideline 8.1 states:[121]

> The publication of names and photographs of accused persons and victims in reports on accidents, crimes, investigations and court cases is in general not justifiable.

Guideline 13.2 deals with the publication of the names or photographs of criminals:[122]

> When publishing names and photographs of criminals, victims and accused persons, great care must be taken in weighing up the public's interest in information and the personal rights of those involved. Sensationalism is in no way justified by the public's right to information....
> In the interests of the reintegration of convicted persons into society, publication of names and photographs following a court case should be avoided.

It is interesting that German press rules suggest that once the court case has concluded the name and photograph of the convicted person should no longer be published. This stance gives quite considerable privacy protection to convicted persons and recognises the benefits of allowing offenders to put past mistakes behind them and permitting them to go on to make a contribution to society.

In summary, there are three major differences between the German spent convictions regime and the New Zealand Clean Slate Act. The first is that in Germany all convictions (except those where the penalty is life imprisonment) will be deleted over time.[123] In New Zealand convictions for sexual offending and convictions resulting in a sentence of imprisonment will forever prevent an offender from having any of his or her criminal record concealed.[124]

Secondly, in Germany the length of the rehabilitation period is linked to the severity of the offence. While those convicted of minor offences need only wait 5 years before their conviction is deleted, those convicted of sexual offending will have to wait 20 years.[125] In New Zealand all offenders who are eligible under the Clean Slate Act

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[120] S Michalowski and L Woods, above n 117, 133.
[121] *Press Laws* (Bonn Inter Nationes, 1980), 31.
[122] *Press Laws*, above n 121, 35.
[123] UK Home Office Report, above n 115.
[124] Criminal Records (Clean Slate) Act 2004, s7.
[125] UK Home Office Report, above n 115.

must wait seven years before their criminal record can be concealed.[126] In practice this means that both the teenager convicted of underage drinking and the adult convicted of burglary will have to wait seven years before being able to claim an unblemished criminal record.

Finally, and perhaps most importantly, German constitutional law does not allow the publication of details of a person's criminal record unless there is clear public interest in publication. The more time that has elapsed since the date of conviction the less likely the courts will be to allow publication.[127] In New Zealand even after 20 years as a law-abiding citizen details of a person's youthful indiscretion could appear in the pages of the local newspaper.

[126] Criminal Records (Clean Slate) Act 2004, s4.
[127] *Lebach Case* BverfGE 35, 202 (1973).

V PROPOSED CHANGES TO THE CLEAN SLATE ACT

The features of the Clean Slate Act and the extent to which they serve the purposes of enabling the rehabilitation of, and protecting the privacy of, those with historic criminal convictions have already been discussed in this paper. In this part some changes to the Clean Slate Act are proposed. The aims of the proposed changes are to make the Clean Slate Act more inclusive and to make the protection offered by the Act more comprehensive.

A Include those Sentenced to Imprisonment

If section 7(1)(b) of the Clean Slate Act were repealed those sentenced to a custodial sentence would be entitled to have their criminal record concealed after seven years. This amendment would bring the Clean Slate Act into line with spent convictions schemes in other countries, including Canada, the United Kingdom, Germany, and individual Australian states, all of which allow for the concealment of convictions where a custodial sentence was imposed.[128]

The social stigma surrounding prisons and prisoners is such that, without concealment of their criminal records, those that have served time in jail may never be able to re-integrate into society. Therefore the very people who are likely to derive the most benefit from a clean slate scheme are currently excluded from the scheme.

The arguments against including those sentenced to imprisonment in a clean slate scheme are that these offenders have committed more serious crimes, crimes that should therefore never be concealed; and that in order to have received a custodial sentence a person must be a repeat offender; and that because of the more serious nature of their crimes these offenders need to continue repaying their debt to society and should not be allowed to put their pasts behind them. These arguments will be discussed below.

1 People are only imprisoned for serious offences.

In a report to the Justice and Electoral Committee on the Criminal Records (Clean Slate) Bill the Ministry of Justice provided a number of examples of custodial sentences being imposed for relatively minor offending.[129] Between 1960 and 1990 sentences of imprisonment were imposed on offenders for crimes such as theft of a bag of potatoes, idle and disorderly, assault, and failing to account. The effect of the sentence of imprisonment in all these cases is to disqualify the offender from ever having their criminal record concealed. The person convicted of the theft of $1.75 bag of potatoes in the 1960s will have a criminal record for the rest of his or her life.

The Clean Slate Act does not even provide for the concealment of a conviction where the equivalent offence no longer carries a penalty of imprisonment. An example of this situation is where a person was convicted of fighting in a public place. Prior to

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[128] Ministry of Justice "Criminal Records (Clean Slate) Bill – Advice on exemptions from the 'clean slate' schemes in overseas jurisdictions" (24 February 2003, submission to the Justice and Electoral Committee).

[129] Ministry of Justice "Criminal Records (Clean Slate) Bill – sentencing trends" (16 June 2003, report to the Justice and Electoral Committee).

the introduction of the Summary Offences Act 1981 this offence carried a maximum penalty of 3 months imprisonment. In theory a person may have been sentenced to imprisonment for fighting in a public place and be ineligible for consideration under the Clean Slate Act notwithstanding the fact that the same offence now carries a maximum penalty of a $500 fine.

Section 9 of the Clean Slate Act provides for the situation where someone is convicted of an offence which is subsequently abolished. If the act which constituted the offence is no longer illegal (prostitution for example) the offender can apply to the District Court for an order that the rehabilitation period be waived. In effect this means that a conviction for an offence, which no longer exists, can be clean-slated immediately, without the need to wait for the expiry of a rehabilitation period. Surely, if a person is imprisoned for an offence, for which imprisonment is no longer a penalty, access to the clean slate scheme should be available also.

Similarly section 10 of the Clean Slate Act allows a custodial sentence to be disregarded in cases where the offence for which the sentence was imposed has been abolished. If, for example, a person was sentenced to imprisonment for engaging in consensual homosexual sex, that person could apply to the District Court for an order that the conviction (and sentence of imprisonment) be disregarded for the purposes of section 7(1)(b).[130] Whilst it seems fair that a conviction for something that is no longer an offence should not prevent a person from benefiting from the effects of the Clean Slate Act, it would seem a logical to extend this benefit to those sentenced to imprisonment where a custodial penalty is no longer available.

In the writer's opinion the best solution would be to allow all those sentenced to imprisonment access to the clean slate scheme. A sentence of imprisonment does not necessarily mean that a serious offence has been committed.

2 People sentenced to imprisonment are repeat offenders.

Another justification for denying those sentenced to imprisonment access to the clean slate scheme is the perception that those given custodial sentences must be repeat offenders and must therefore pose a greater threat to the community. Putting aside for the moment the requirement for a seven year rehabilitation period and the effect this has on minimising any risk of re-offending, a sentence of imprisonment does not necessarily indicate that the offender is a recidivist.

The Research and Evaluation Unit of the Ministry of Justice has produced a table showing how many people (released over a three year period) had been sentenced to imprisonment for less than a year for a first offence.[131] Of those released from prison between 1995 and 1998, 634 were sent to prison on their first conviction.[132]

By denying first offenders access to the clean slate scheme we are ignoring a fundamental purpose of the scheme – to give offenders a second chance.

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[130] Namely the requirement that no custodial sentence have been imposed on the person.
[131] Ministry of Justice, above n 129.
[132] The total number of people sent to prison for a first offence will be higher when sentences of over 12 months imprisonment are included.

> The concept of spent conviction laws is linked to a value which has considerable influence in our society that people who do wrong should be given a second chance because they have the capacity to reform their ways.[133]

B Include those Convicted of Sexual Offences

Provided that the legislation requires an appropriate rehabilitation period be served there is no good reason for excluding those convicted of sexual offending from a clean slate scheme.[134]

Submissions on the Criminal Records Bill tend to indicate that there is likely to be a low level of public support for allowing sex offenders access to the clean slate scheme.[135] One view frequently expressed is that those convicted of sexual crimes continue to pose a risk to society indefinitely.

In relation to those given non-custodial sentences research shows that if people do not re-offend after five years the chance that they will re-offend at all is minimal.[136] After five years 57.3% of offenders had not re-offended. After 15 years 49.1% had still not re-offended. Therefore of those who had not been reconvicted after five years the vast majority were still 'clean' a further 10 years on.

Although the figures may not be identical where the sentence is imprisonment, it would not be unreasonable to assume that recidivism levels would be higher up to the five year mark (with many offenders being reconvicted soon after their release from prison) but that for those who make it to five years without re-offending the risk of recidivism would then be low.

As an added safeguard in relation to sex offenders the rehabilitation period could be set as high as 20 years and the legislation could contain an exception which would require the disclosure of the criminal record should the offender apply for a job caring for children or other vulnerable persons.[137]

It is also worth remembering that any subsequent conviction will prevent concealment of any of the offender's criminal record until such time as the rehabilitation period has run again (in this case a further 20 years!).

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[133] Jeanette Knowler "Living down the past – Spent convictions schemes in Australia" (1994) PLPR 80.

[134] In Germany those convicted of sexual offences are entitled to have their convictions deleted after 20 years. The Criminal Records Bill 1988 allowed for the concealment of convictions for sexual offences after a minimum 10 year rehabilitation period.

[135] Department of Justice, above n 90, 7.

[136] Ministry of Justice "Criminal Records (Clean Slate) Bill – information regarding 'rehabilitation period' (clause 4)" (16 June 2003, submission to the Justice and Electoral Committee), Table 1.

[137] Section 19(3)(e) of the Criminal Records (Clean Slate) Act 2004 already requires that an eligible individual must disclose his or her criminal record when applying for a job involving the care and protection of children.

C Make Publication of a Clean Slated Criminal Record an Offence.

So long as details of a person's clean-slated criminal record can be published anywhere, at anytime, and without any requirement that there be a legitimate public interest in publication, the provisions of the Clean Slate Act are rendered almost completely ineffective.

How does it assist an offender to prevent the disclosure of his or her official criminal record while allowing open slather in regard to publication of the very same information? As we have seen when looking at the examples of Tucker, Tanner, Pownceby and Sophia[138] the benefit of having one's criminal record clean-slated is all but lost if television and newspapers can publish the information. The situation could arise where the official who discloses the clean-slated record is penalised[139] while the reporter who publishes the story is held to have done nothing wrong.

Justification for not including a publication offence in the Clean Slate Act is found in the commentary to the Criminal Records (Clean Slate) Bill 2001:[140]

> It is not possible to remove all references to convictions from information within the public domain. Even if it were, the intention of the bill is not to rewrite history but rather to limit the potential for relatively minor convictions to have a disproportionate effect on the lives of citizens who are otherwise law-abiding. Therefore, the legislation is limited to enabling concealment of official conviction information held on justice sector electronic databases and paper-based records of convictions held by an agency or deposited by Crown agencies with the National Archives.

This explanation for not prohibiting publication is totally disingenuous. To say that we cannot remove all references to convictions from the public domain so therefore we will not prohibit any further publication is a complete non sequitur. The fact that a member of the public could go to the library and look through archived newspapers to find a report of an offence that was committed 10 years ago should not provide justification for allowing the publication of details of that offence to hundreds of thousands of people a decade after the offending where there is no legitimate public interest.

There is an enormous difference between trying to erase all references to a conviction from the public domain and simply prohibiting the publication of any new references to that conviction.

Not surprisingly, the New Zealand Television Broadcasters' Council oppose any move to restrict the freedom of the press. Even without a prohibition on publication the NZTBC objected to the Clean Slate Bill:[141]

> A dilemma that would confront editors and programme producers following the enactment of the proposed clean slate legislation would be reconciling the provision of the Act with the public interest and the public's right to know.

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[138] Part II of this research paper, above page 12.
[139] Section 17 Criminal Records (Clean Slate) Act 2004.
[140] Criminal Records (Clean Slate) Bill 2001 no 183-2 (the commentary) "Criminal history information".
[141] New Zealand Television Broadcasters' Council "Submission to the Justice and Electoral Committee from the New Zealand Television Broadcasters' Council on the Criminal Records (Clean Slate) Bill"

It is possible to make publication of information about a concealed criminal record unlawful whilst providing for a defence of 'legitimate public concern'. Guidance as to the operation and scope of this defence can be found in *Hosking v Runting*[142] but suffice to say general interest or curiosity on the part of the public would not constitute 'legitimate public concern'. The onus would be on the defendant to establish the defence.

In their submission on the Criminal Records Bill 1988, the Commonwealth Press Union argue that a publication prohibition is an unnecessary interference with freedom of information given that the New Zealand news media are largely self-regulating:[143]

> (13) We are not aware of recent complaints against the news media for references to convictions that would be prohibited by the Bill. The record of the New Zealand Press in this regard is, we submit, one of responsibility.
> (14) In summary, although we see no virtue in the gratuitous of vindictive recounting of a person's offending long past, we see within this Bill a grave interference with the dissemination of knowledge in a blanket fashion that denies the truth and has no allowance for public interest.

Recent media coverage of the Pownceby and Tanner cases does not tend to support the assertion of media responsibility. Although the public may well have had a legitimate interest in knowing about an Olympic boxer's manslaughter conviction, it is difficult to see what the public interest is in knowing about a university student's 13 year old murder conviction. Creating a publication offence would at least give a rehabilitated offender an avenue upon which to pursue redress should his or her concealed record be published in circumstances where there is no legitimate public concern.

It is worth remembering that the laws of both the United Kingdom[144] and Germany[145] prohibit the publication of concealed criminal records. In *Herbage v Pressdram Ltd*[146] Griffiths LJ states:

> If a man has rehabilitated himself and his conviction is to be regarded as spent and that conviction is published of him he can recover damages if he is able to show that it was maliciously published. I take 'malice' in this subsection to mean published with some irrelevant, spiteful or improper motive. If it is so published, even though it is true that he has a 'spent' conviction, that conviction is to be disregarded. He is to be treated as though no such conviction has taken place and accordingly the publication is libellous.

Whilst not supporting the requirement that the publisher be acting with malice, the writer agrees with the codification of the publication offence.

Finally, it would be a defence for a publisher to show that he or she had reasonable grounds to believe that a conviction had not, in fact, been clean-slated.

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[142] *Hosking v Runting & Ors* (25 March 2004) CA 101/03, [129] to [135].
[143] The Editors' Committee of the New Zealand section of the Commonwealth Press Union "Submission to the Justice and Law Reform Committee Re: Criminal Records Bill" (8 June 1988), 3.
[144] Rehabilitation of Offenders Act 1974 (UK)
[145] *Lebach Case* BVerfGE 35, 202 (1973).
[146] *Herbage v Pressdram Ltd* [1984] 2 All ER 769, 772. (Court of Appeal).

D Clarify what is Covered by Disclosure of an Official Criminal Record

As discussed above,[147] it is difficult to determine the scope of the offence created by section 17 of the Clean Slate Act. Section 17 makes it an offence for a person with access to official criminal records to disclose any information about an eligible person's convictions. The issue is whether a printout, photocopy or email of an official criminal record is also an official criminal record. If this is the case then a reporter (for example) who has been given a photocopy of a person's clean-slated criminal history is prohibited from disclosing the information. The Commonwealth Press Union in their submission on the Clean Slate Bill described the problem in this way:[148]

> The explanatory note to the bill attempts to reassure that the provisions are aimed at constraining official channels and will not impinge on the private sector. There is at best very thin protection for the public, including the news media, under the offence provisions of the bill. Section 14(1) says a person commits an offence if the person *has access to criminal records* and knowing she or he does not have lawful authority, discloses to any other person any information that is required to be concealed under the clean slate scheme.
>
> How is "access to the criminal record" to be interpreted? Is it direct access to the official document or could it be once removed, ie a news media report based on previous access to a record at the time of conviction?

Whilst the writer's view is that the media should be prohibited from disclosing any details of a clean-slated criminal record irrespective of how the information was obtained, the better option would be to make publication an offence and to tighten the definition in respect of the disclosure offence.

E Make Discrimination on the Basis of a Clean-Slated Criminal Record an Offence

A clean-slated criminal record provides little benefit to an ex-offender if it remains lawful to discriminate against him or her on the basis of the concealed conviction. This issue has already been discussed above.[149] A recent decision of the Employment Court, *Tai v Ian Robinson & Catherine Robinson*[150] indicates the difficulties that a job applicant has in obtaining employment when he or she has previous convictions. The facts of the case were that the plaintiff applied for a job at the defendant's rest home. She failed to disclose on the application form that she had two convictions for assault. On learning of the convictions the defendants dismissed the plaintiff. Shaw J held that:

> [81]...It is reasonable to expect that a revelation of a prior conviction for dishonesty or violence would be very influential in the decision of whether to employ or not.
> [82] I conclude that the question about court convictions was entirely appropriate. I note also that it only required declaration of convictions in the last 10 years.
> [83] Ms Tai's denial of any convictions had two consequences. First it deprived the defendants of an opportunity to make inquiries into the nature and circumstances of her

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[147] Above, page 13.
[148] Commonwealth Press Union (New Zealand Section), above n 113, 4.
[149] Above, pages 24 and 25.
[150] *Tai v Ian Robinson & Catherine Robinson (T/A Coronation Lodge Rest Home)* (17 March 2004) EC WN WC4/04; WRC 16/03. Shaw J.

> convictions. It also deprived Ms Tai of the opportunity of explaining the background to the convictions with a view to persuading the defendants to employ her in spite of them.
> [84] Without such an explanation the defendants were entitled to be worried about a propensity for violence.
> [85] Secondly, it was a lie. Ms Tai was not honest in her response and the discovery of that by the defendants at such a late stage inevitably undermined their trust and confidence in her.
> [86] I reach the inescapable conclusion that the defendants were substantively justified in dismissing Ms Tai by reason of her false declaration.

On one hand the Court says that a revelation of a conviction would be "very influential" on an employer's decision to hire a person. On the other hand making a false declaration about a conviction gives an employer grounds to dismiss. The Clean Slate Act will assist a job applicant in Ms Tai's position – but only so long as the employer does not find out about the clean-slated conviction(s). If the employer knows that the job applicant has a conviction (through media reports, word of mouth, or some other source) he or she may legitimately refuse to give the applicant the job solely on the basis of that conviction.

In their submission on the Clean Slate Bill, the Human Rights Commission[151] proposed amendments to the Bill to protect against discrimination on the basis of a clean-slated conviction:

> ...we would suggest that:
> (a) the Bill include provisions prohibiting discrimination on the basis of a conviction falling within the scope of the Bill along with appropriate exemptions; and
>
> (b) the schedule to the Bill amend the Human Rights Act 1993, inserting a new subsection 21(1)(n), specifying the status of having a conviction which is a concealed conviction in accordance with the Criminal Records (Clean Slate)Bill becomes a new prohibited ground of discrimination; and
>
> (c the Bill amend the Employment Relations Act 2000 to ensure the grounds under s21(1) of HRA and S105(1) of the ERA remain congruent.

For the reason's given above, the writer supports the enactment of these amendments.

F Extend the Scope of the Clean Slate Act to Allow Concealment of Offences When Travelling Overseas

Finally, I propose the repeal of section 14(3)(b) of the Clean Slate Act, which disallows the application of the clean slate scheme in situations where an ex-offender is dealing with a foreign jurisdiction (such as travelling to the United States). If New Zealand law sees fit to conceal a person's criminal record, this action does not interfere with the jurisdiction of another country in any way (given that it was New Zealand law which attached the conviction in the first place). If a person's criminal record has been concealed it should be concealed from everyone.

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[151] Human Rights Commission "Submission on the Criminal Records (Clean Slate) Bill" to the Justice and Electoral Select Committee (September 2002).

CONCLUSION

The introduction of a clean slate scheme to New Zealand has been a long time coming. Whilst spent conviction schemes have formed part of the criminal justice systems of a number of overseas jurisdictions for many years now, it was not until May 2004 that New Zealand could boast its own Criminal Records (Clean Slate) Act.

In essence, the Clean Slate Act will prevent the disclosure of the official criminal record of those whose convictions were for relatively minor offences and where no further offence has been committed for 7 years.

The Clean Slate Act does not prevent the media publishing details of concealed criminal records. Those with convictions for sexual offending or sentences of imprisonment are not entitled to protection under the scheme. The Act does not prohibit discrimination on the basis of a clean-slated conviction.

The Clean Slate Act has taken a very conservative approach to the protection of privacy and the promotion of rehabilitation of those with historic criminal convictions, especially when compared to spent conviction schemes overseas. Failure to prohibit discrimination or publication has, in the writer's view, left the Clean Slate Act virtually toothless.

The existence of the Clean Slate Act may however assist other courts and tribunals when determining privacy issues, for example, in relation to the privacy tort a clean-slated conviction may now automatically be held to be a private fact.

It is likely that lawmakers perceived that a more inclusive clean slate scheme would have met with public opposition. Perhaps the enactment of a bare-bones scheme was simply a way of easing the public into acceptance of a spent convictions regime and over time amendments will be made to make the legislation more inclusive. Of this the writer is hopeful.

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Legislation

Criminal Law (Rehabilitation of Offenders) Act 1986 (Queensland)
Criminal Records Act 1970 (Canada).
Criminal Records Act 1991 (New South Wales)
The Criminal Records Bill 1988, no 42-2.
Criminal Records (Clean Slate) Act 2004
Criminal Records (Clean Slate) Bill 2001, no 183-2.
Criminal Records (Spent Convictions) Act 1992 (Northern Territory)
The Human Rights Act 1993
The Human Rights Commission Act 1977
Privacy Act 1993
Rehabilitation of Offenders Act 1974 (UK)
Spent Convictions Act 2000 (Australian Capital Territory)
Spent Convictions Act 1988 (Western Australia)

Cases

Coco v AN Clark (Engineers) Ltd [1969] RPC 41.
European Pacific Banking Corporation v Television New Zealand Ltd [1993] 1 NZLR 559
Francome v Mirror Newspapers Ltd [1984] 1 WLR 892.
Herbage v Pressdram Ltd [1984] 2 All ER 769, 772 (Court of Appeal).
Hosking v Runting & Ors (25 March 2004) Court of Appeal CA 101/03
Lebach Case BverfGE 35, 202 (1973).
MM v TV3 Network Services Ltd (15 July 1999) Broadcasting Standards Authority BSA 1999-103 and 1999-104.
T v Television New Zealand Ltd (1 October 1998) Broadcasting Standards Authority BSA 1998-119.
Tai v Ian Robinson & Catherine Robinson (T/A Coronation Lodge Rest Home) (17 March 2004) EC WN WC4/04; WRC 16/03, Shaw J.
Tucker v News Media Ownership Ltd [1986] 2 NZLR 716, (HC).
X v Attorney General [1997] 2 NZLR 673.

Texts

Burrows, John and Ursula Cheer *Media Law in New Zealand* (4ed, Oxford University Press, Auckland, 1999).

Halsbury's Laws of England (4 ed, Butterworths, London,1980) vol 11(2), Criminal Law, Evidence and Procedure, para 1566.

Michalowski, S and L Woods *German Constitutional Law* (Aldershot Hants, England, 1999) 123.

Press Laws (Bonn Inter Nationes, 1980), 31er Nationes, 1980), 31.

ANNEXURE 1

Criminal Information Report

PCNO: 4053392 ***Date Submitted:*** 02/06/2004

[redacted]

PRN: 6649813

History Detail

PRN=6649813, TRACK NUMBER=C860854097,
STATUS=HISTORY, NUMBER CHARGES=1, FINE=$250,
CHARGE=3271-CULTIVATE CANNABIS,
TYPE OF CASE=ARREST,
HEARING=12/05/86, COURT=085-DC WELLINGTON,
PROSECUTING AGENCY=POLICE DEPARTMENT,
DISPOSITION=CONV-CONVICTED
CHARGE DATE=3/02/86,
OFFENCE DATE=3/02/86,
ENTERED=3/02/86, UPDATED=12/05/86,

PRN=6649813, TRACK NUMBER=C8608521259,
STATUS=HISTORY, NUMBER CHARGES=1,
CHARGE=4584-TAKE/OBTN/USE CRED/BNK CARD PECUN ADV-USING A DOCUMENT,
TYPE OF CASE=ARREST,
HEARING=25/08/86, COURT=085-DC WELLINGTON,
PROSECUTING AGENCY=POLICE DEPARTMENT,
DISPOSITION=CONV-CONVICTED
CHARGE DATE=5/07/86,
OFFENCE DATE=5/07/86,
ENTERED=10/07/86, UPDATED=26/08/86,
SENTENCE 1=7 SUPERVISION
BEGINNING=25/08/86, 9 MONTHS

PRN=6649813, TRACK NUMBER=C8608521258,
STATUS=HISTORY, NUMBER CHARGES=1,
CHARGE=4584-TAKE/OBTN/USE CRED/BNK CARD PECUN ADV-USING A DOCUMENT,
TYPE OF CASE=ARREST,
HEARING=25/08/86, COURT=085-DC WELLINGTON,
PROSECUTING AGENCY=POLICE DEPARTMENT,
DISPOSITION=CONV-CONVICTED
CHARGE DATE=5/07/86,
OFFENCE DATE=5/07/86,
ENTERED=10/07/86, UPDATED=26/08/86,
SENTENCE 1=7 SUPERVISION
BEGINNING=25/08/86, 9 MONTHS

PRN=6649813, TRACK NUMBER=(
STATUS=HISTORY, NUMBER CHA
CHARGE=4373-THEFT (UNDER $5(
TYPE OF CASE=ARREST,
HEARING=25/08/86, COURT=085-D(
PROSECUTING AGENCY=POLICE
DISPOSITION=CONV-CONVICTED
CHARGE DATE=9/07/86,
ENTERED=6/08/86, UPDATED=26/0
SENTENCE 1=7 SUPERVISION
BEGINNING=25/08/86, 9 MONTHS

PRN=6649813, TRACK NUMBER=(
STATUS=HISTORY, NUMBER CHA
CHARGE=4362-THEFT EX DWELLI
TYPE OF CASE=ARREST,
HEARING=30/04/87, COURT=085-DC WELLINGTON,
PROSECUTING AGENCY=POLICE DEPARTMENT,
DISPOSITION=CONV-CONVICTED
COURT ORDER 1=IM-ORDERED TO PAY IMMEDIATELY ,
CHARGE DATE=9/11/86,
OFFENCE DATE=8/11/86,
ENTERED=10/11/86, UPDATED=1/05/87,

PRN=6649813, TRACK NUMBER=C8608524062,
STATUS=HISTORY, NUMBER CHARGES=1,
CHARGE=4373-THEFT (UNDER $500),
TYPE OF CASE=ARREST,
HEARING=25/08/86, COURT=085-DC WELLINGTON,
PROSECUTING AGENCY=POLICE DEPARTMENT,
DISPOSITION=CONV-CONVICTED
CHARGE DATE=9/07/86,
ENTERED=6/08/86, UPDATED=26/08/86,
SENTENCE 1=7 SUPERVISION
BEGINNING=25/08/86, 9 MONTHS

PRN=6649813, TRACK NUMBER=C
STATUS=HISTORY, NUMBER CHA
CHARGE=4362-THEFT EX DWELLI
TYPE OF CASE=ARREST,
HEARING=30/04/87, COURT=085-D
PROSECUTING AGENCY=POLICE
DISPOSITION=CONV-CONVICTED
COURT ORDER 1=IM-ORDERED T
CHARGE DATE=9/11/86,
OFFENCE DATE=8/11/86,
ENTERED=10/11/86, UPDATED=1/0