

# Wiping the Slate Clean: Rehabilitating Offenders and Protecting the Public

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The National Economic and Social Forum (NESF) recommended in January 2002 that legislative changes should be introduced to allow the criminal records of certain adults to be expunged. This would happen after a period of time to be determined by the seriousness of the offence, the length of time since it occurred, and the absence of subsequent convictions. In particular, the NESF observed that:

In relation to employment, Ireland is the only country in the EU that does not allow for some form of rehabilitation whereby mainly short-term prison sentences are considered spent after a period of time ... Many of those the team consulted mentioned this is a substantial barrier to gaining employment on release, especially in periods of high unemployment. There are two practical reasons why change in this area is now required: the Government has made available significant resources under the Connect Project to prepare prisoners for employment on their release. The effectiveness of this spending will be improved by reducing barriers to acquiring gainful employment, such as long-term prison records; and there is also a human rights issue here -

once a person has completed a sentence of imprisonment s/he should not continue to experience discrimination for that crime.<sup>1</sup>

At a conference held in Dublin and Belfast in 1999, entitled *Accessing Employment: 2000 and Beyond*, the director of social policy at the Irish Business Employers' Confederation suggested that a significant number of employers would not recruit ex-offenders. He also pointed out that job applicants are routinely asked to declare the existence of any criminal record. This was confirmed by a recent survey of 200 employers in Dublin which indicated that only 52 per cent would consider employing ex-offenders.<sup>2</sup> A review of the grounds of discrimination under the Employment Equality Act, 1998 is currently underway.<sup>3</sup> This will examine, *inter alia*, the implications of extending the Act to prohibit discrimination on the ground of criminal convictions.

In the context of this review, it is useful to consider the arguments for and against giving offenders another chance. In essence, this involves finding an acceptable balance between public protection and individual rehabilitation. Considered individually, neither of these principles is controversial. In practice, of course, they must always be considered together and this often creates tension. The central issue is where to set the eligibility threshold; in other words what kind of conviction or sentence is to be excluded from any proposed scheme.

#### FINDING A BALANCE

There are several justifications for wiping the slate clean. First, it is argued that by focusing on previous criminal conduct, society deprives itself of the opportunity to enlist the talents, skills and energies of individuals in whose development it has a vested interest. At the very least it is wasteful and inefficient for employers to discount such a pool of potential employees. Secondly, it prevents the emergence of a continuum of exclusion and perhaps even a criminal underclass.<sup>4</sup> Thirdly, a failure to reintegrate ex-offenders can have the unintended consequence of preventing them from becoming law-abiding citizens, thereby adding to the crime problem. Ex-offenders who find employment are less likely to offend.

Fourthly, if there is no possibility of a fresh start, a criminal record itself can become the most enduring of all sanctions,

creating a life sentence of sorts. Fifthly, certain socio-economic groupings are already grossly over-represented in the criminal justice system and the lack of expungement provisions compounds their disadvantage.<sup>5</sup> Finally, the incidence of crime reduces steeply with age, and there is little to be gained by maintaining a bar to employment long after any appreciable risk has evaporated.

Such justifications have to be balanced against public interest considerations including the necessity for informed decision making, the proper administration of justice, and the needs of victims. It could be said that expungement and discriminatory provisions vis-a-vis criminal records restrict freedom of expression and lead to the suppression of the truth. Indeed it has been argued that a society which legitimates institutionalised lying 'is a society of questionable moral substance.'<sup>6</sup> From an employment perspective, restricting the right to knowledge of employers, thereby creating an 'information asymmetry', can affect the abilities of parties to an employment contract to reach *consensus ad idem*. Such provisions also have the potential to undermine the relationship of employment given its foundation on principles of trust and good faith.<sup>7</sup>

From a criminal justice perspective, it is argued that more emphasis needs to be placed on offenders taking responsibility for their actions. This is particularly so given that 'those with criminal records are more likely to commit crime than the general populace.'<sup>8</sup> It can be argued that if an ex-offender makes the rational choice to commit crime, he or she is not entitled to expect a presumption of trust from society. Allowing offenders to conceal rather than reveal their pasts is inconsistent with the view that they must take personal responsibility for the harms they have caused.

Finally, the fact that employers may be directly prohibited from utilising information on the criminal records of individuals does not necessarily imply that discrimination will not occur. Embargoes on information could, for example, be surmounted by the substitution of informal 'estimation techniques' (having regard to issues such as socio-economic class) for formal 'particularised information.' Funk and Polsby put it well when they wrote that:<sup>9</sup>

There is no reason to think, in other words, that by destroying real information, expungement statutes make the world any

less dependent on information than it was before. If employers ... cannot get good information, they will do their best with bad information. To the extent that the rate of serious criminal offending among poor ... adolescents is believed to be higher than that of their ... wealthier counterparts, one should not be surprised if it turned out to be the case that ... poor first-time offenders are treated somewhat more harshly in expungement jurisdictions than wealthier first-time offenders are.

Balancing these competing priorities of protection for society (exclusion) and increased resettlement of offenders (inclusion) is a complex process, particularly given the fear of crime that exists today and the increasingly politicised approach taken to law and order issues.<sup>10</sup> It is a mistake however to present these concerns in mutually exclusive terms. Re-integrative initiatives can also contribute to public safety by breaking the continuum of exclusion and reducing the likelihood of further crime. In many instances, the adverse and unfair consequences of a criminal record outweigh the public's right to know. Enabling such records to be concealed will not affect the public's right to safety while at the same time promoting the offender's ability to re-enter mainstream society. Some examples of the endeavours being made in other jurisdictions to strike an equitable balance between re-integrative and public safety concerns are outlined next.<sup>11</sup> These provide a background against which to consider any proposals that may emerge from the review of the Employment Equality Act.

## COMPARATIVE OVERVIEW

There is considerable variation in approaches to dealing with criminal records. Different jurisdictions, and indeed different states within jurisdictions, adopt dissimilar procedures to the issue, particularly having regard to offences covered, qualifying periods, exceptions and enforcement mechanisms. Nonetheless, three broad frameworks can be identified:

1. *Discriminatory model*: prohibits discrimination on the grounds of a criminal record in relation to a variety of activities including employment. Discrimination on the grounds of a criminal record is not unlawful, however, if it

can be justified by the inherent requirements of the employment position.

2. *Spent convictions model*: offences are expunged after prescribed qualifying periods. Following the prescribed period, an offender need not disclose the record of the conviction or ancillary circumstances relating to the conviction.
3. *Hybrid model*: provision is made for the elimination of discrimination on the grounds of an irrelevant criminal record. What constitutes an irrelevant criminal record, however, is provided for under spent convictions legislation.

These models guide practice in Australia, New Zealand, the UK and the US and some of their key features are highlighted in the following sections.

### *Australia*

A mix of spent conviction and discriminatory legal provisions exists to regulate access to the criminal records of ex-offenders in Australia. This is so given that each state, as well as the commonwealth, administers its own criminal justice system.<sup>12</sup> In respect of discrimination at a commonwealth level, regulations were introduced in 1989 which declared an additional twelve grounds of discrimination for the purpose of the Human Rights and Equal Opportunity Act, 1986 (Cth). They included discrimination on the ground of a criminal record and came into effect on 1 January 1990.<sup>13</sup> For an act or practice to be discriminatory, a complainant must demonstrate that it impaired or nullified his or her equality of opportunity in employment and that the distinction was not premised on the inherent requirements of the employment or occupation.

A number of states have also enacted discriminatory provisions as regards irrelevant criminal records. In the Northern Territories, for example, the Anti-Discrimination Act, 1992 makes provision for the elimination of discrimination on the grounds of an irrelevant criminal record in the area of work, accommodation, or education, in the provision of goods, services and facilities, in the activities of clubs, and in insurance and superannuation. Under the Criminal Records (Spent Convictions) Act, 1992 a criminal record does not include a sexual offence, an offence by

a body corporate, a prescribed offence, or a record of a conviction in respect of which a sentence of imprisonment for more than six months was imposed. A conviction becomes spent on completion of a crime-free period - ten years in the case of adults, or five years for juveniles.<sup>14</sup>

The commonwealth also provides protection to ex-offenders through direct spent conviction provisions.<sup>15</sup> An individual is not required to disclose a conviction, or a related charge, if the conviction is spent. A conviction is spent if the following requirements are met: (i) it is five years or more since the date of conviction in respect of minors, or ten years or more since the date of conviction for adults; (ii) the sentence imposed was a fine, bond, community service or imprisonment for a period of less than thirty months; (iii) no further offences have been committed in the qualifying period; and (iv) an exclusion does not apply. Various states also make provision for expungement laws.<sup>16</sup> In Queensland, for example, spent convictions are regulated through the Criminal Law (Rehabilitation of Offenders) Act, 1986. The scheme is limited, however, to circumstances where the offender was not ordered to serve a custodial sentence or a custodial sentence of less than thirty months was imposed. Again, the crime free periods are ten years in respect of adults and five years for juveniles.<sup>17</sup>

### *New Zealand*

In New Zealand in 2000,<sup>18</sup> a private member's Clean Slate Bill was proposed by the Green Party. This stipulates that all convictions - except convictions for which a prison sentence of more than six months or a fine exceeding \$2,000 had been imposed, convictions for sexual offences, and convictions imposed against corporate bodies - can become spent after a qualifying period. This qualifying period is seven years for an adult, to run from the date of conviction provided that the individual was not convicted of a further offence in the interim. In the case of a child or young person, the qualifying period is three years provided the individual was tried in the youth court and a sentence not greater than three months imprisonment was imposed.

Once a conviction is spent under the terms of the bill, no person or organisation can require disclosure of the criminal record. Exclusions provided for include appointments as judges, magistrates, justices of the peace, police and prison officers,

teachers, teachers' aides, or providers of child care services. The bill provides that it is unlawful to discriminate against individuals in respect of spent convictions and imposes a maximum penalty of \$7,000 for such unlawful discrimination. Also, the bill does not authorise a public authority to destroy records relating to spent convictions. The Clean Slate Bill is currently with a select committee. The government has also introduced its own Criminal Records (Clean Slate) Bill.<sup>19</sup>

### *England and Wales*

Spent conviction provisions in England and Wales have their origins in the 1972 Report of the Gardiner Committee, *Living it Down - The Problem of Old Convictions*. The focus of the report was people who offended once, or a few times, who had paid the penalty which the court imposed on them, and then 'settle down to become hard working and responsible citizens'.<sup>20</sup> Its recommendations found statutory recognition in the Rehabilitation of Offenders Act, 1974. Under s. 5 of this Act, sentences excluded from rehabilitation include life imprisonment (or detention at Her Majesty's pleasure), a sentence of imprisonment for a term exceeding thirty months, and a sentence of preventive detention. Any other sentence is subject to rehabilitation under the Act.

The rehabilitation periods are reckoned from the date of the conviction in respect of which the sentence was imposed. For an adult a sentence of imprisonment between six and thirty months becomes spent after ten years; a sentence of imprisonment for a term not exceeding six months is spent after seven years; any other sentence subject to rehabilitation under the Act is spent after five years. For a person who was under eighteen years of age at the date of conviction, the rehabilitation periods are halved.<sup>21</sup>

Access to criminal records has now been formalised under a statutory framework established by Part V of the Police Act, 1997. This sets out a centralised procedure for criminal record checks for the purpose of employment. The system will be operated by the Criminal Records Bureau. A record can only be applied for with the consent of the person who is the subject of a check. Three types of checks can be carried out. Selecting the appropriate one depends on the job applied for and the nature of the work involved:

*Basic level check and criminal conviction certificate:* This check relates to any type of employment. The certificate will only reveal details of unspent convictions under the 1974 Act. The certificate will only be issued to the individual who is the subject of the check.

*Intermediate level check and criminal record certificate:* This type of check is available to anyone seeking a position involving regular contact with persons under eighteen years of age or for occupations excepted under the 1974 Act. It is a joint application made by the relevant individual and employer. Such a check will provide details of both spent and unspent convictions and also police cautions, reprimands and warnings. If the position involves children, details will also be furnished with regard to whether or not the individual is named on lists held by the Department of Education and Skills under the Protection of Children Act 1999 or the Education Reform Act 1988. This certificate is issued to both the individual and the registered organisation (employer).

*High level check and enhanced criminal record certificate:* This check relates to work involving persons under eighteen or vulnerable adults, and those seeking judicial appointments, lottery or gaming licences. It involves a joint application. Details furnished will include: all spent and unspent convictions; cautions, reprimands and warnings; appearances on the lists cited above; criminal intelligence information, records of acquittals, inconclusive police investigations, and uncorroborated allegations.

A review of the Rehabilitation of Offenders Act, 1974 is underway.<sup>22</sup> It is argued that the Act is unnecessarily restrictive in its contribution to public safety. On 31 March 1999, for example, 63 per cent of the 51,409 sentenced prisoners were serving sentences over thirty months and were, accordingly, excluded from the benefits of the Act.<sup>23</sup> It was also estimated that 70,000 people aged forty and under had served custodial sentences of more than thirty months which excluded them from the spent conviction scheme.<sup>24</sup> It is also suggested that sentencing practice has changed considerably since 1974. The Prison Reform Trust has estimated that the length of the average prison sentence has increased by 30 per cent since the introduction of the Act.<sup>25</sup>

Whereas 3,537 offenders were sentenced to custody for over thirty months in 1974, the number had risen to over 11,000 by 2000.<sup>26</sup> Some commentators have also pointed out that the rehabilitation periods are over-long and do not serve the needs of society. More emphasis is needed on encouraging offenders to lead law-abiding lives, particularly given the clearly established links between crime and unemployment.<sup>27</sup> The Rehabilitation Review Team noted that:

Research suggests that employers who routinely ask for information on previous convictions as part of the recruitment process tend to use it in a blanket discriminatory way rather than to inform their assessment of the general suitability of candidates, and any risk they may present in the workplace. This may stem partly from a lack of understanding. There is evidence that some employers are under the impression that they may not employ anyone with an unspent conviction. However, more often than not it is likely to be symptomatic of the increasingly risk-averse culture of our communities. It also reflects a common view that society is divided into offenders, unworthy of our help and support, and on the other side of the divide the law-abiding population. It is common to feel that the divide may never be crossed. However, the huge number of people with previous convictions - as well as those who may have evaded conviction - is proof enough that no such clear-cut divide exists.<sup>28</sup>

In a survey undertaken by the UK Home Office in 2001, 57 per cent of those looking for work said they had experienced difficulty in finding employment post-release due to their previous convictions.<sup>29</sup> Another study found that half of employers in England and Wales would routinely ask about criminal convictions. Three quarters of those surveyed would treat a candidate less favourably on the basis of a criminal conviction; one in seven would reject an applicant with a criminal record irrespective of the relevance and nature of the offence.<sup>30</sup>

### *United States*

In the US, the need for expungement provisions was first recognised at the 1956 National Conference on Parole. It was actively embraced by most states in the ensuing two decades. Indeed, as Kogon *et al* noted: 'Record sealing and expungement

have been accepted casually and extended uncritically over the years, prospering in the rosy glow of good intentions and expediency, with little attention to the evaluation of results.'<sup>31</sup> For example in 1980, Utah introduced a significant package of expungement provisions. It provided that 'any person who has been convicted of any crime within this state may petition the convicting court for a judicial pardon and for sealing of his record in that court ... [if] the rehabilitation of the petitioner has been attained to the satisfaction of the court, [the court] shall enter an order that all records in the petitioner's case ... be sealed.'<sup>32</sup>

The offender seeking expungement had to demonstrate that he or she had not been charged with or convicted of a felony or misdemeanour involving moral turpitude subsequent to the crime in question. The prescribed qualifying period also had to have passed (five years in respect of felony or Class A misdemeanours, three years for any other misdemeanour or infraction; expungement of arrest records required a waiting period of one year which was later shortened to thirty days). The provisions applied to all offenders and offences. This meant that in answering questions at an employment interview about arrests which had been expunged or convictions which had been sealed, the ex-offender could answer as though they had not occurred.

Since the 1980 statute, however, there has been a gradual whittling away of ex-offenders' rights not to reveal information about previous criminality. In 1987, new laws were introduced which prevented certain offences, such as capital felony, first degree felony, or second degree forcible felony, from being eligible for expungement. A higher threshold for rehabilitation was also set in particular circumstances by increasing the qualifying periods (seven years in the case of a felony and six years in the case of an alcohol-related traffic offence).

In 1994, provision was made for victims to be included in the expungement process. A duty was imposed on the Department of Corrections to notify victims when offenders who perpetrated crimes against them petitioned for expungement of the conviction. Victims had the right to oppose the petition at a hearing. In the same year, offenders who committed sexual acts against minors were denied the right to have such records expunged. Certain employers were given the right to examine the criminal records, including sealed or expunged records, of

potential employees. These included the Board of Education, the Board of Pardons and Parole, and the Division of Occupational and Professional Licensing.

The 1994 statute also gave power to the judiciary to deny expungement, even where a certificate of eligibility was granted. Such a denial had to be justified on the ground that there was clear evidence that expungement would be contrary to public policy. Provision was made in the same statute for *redaction*, the blotting out of names from police records, as an alternative to the sealing of records. Moreover, the qualifying period for alcohol related offences has recently been extended to ten years.<sup>33</sup> As Mayfield noted: 'from 1978 to the present, the requirements for expungement have grown more arduous, making expungement available to fewer types of crimes, and criminals. The trend in Utah is to limit expungement, both in terms of its availability to offenders and its effectiveness on concealing the record from the public.'<sup>34</sup>

## CONCLUSION

In examining the current society-offender relationship, a leading commentator recently noted that: 'Today, the interests of convicted offenders, insofar as they are considered at all, are viewed as fundamentally opposed to those of the public. If the choice is between subjecting offenders to greater restrictions or else exposing the public to increased risk, today's common sense recommends the safe choice every time. In consequence, and without much discussion, the interests of the offender and even his or her legal rights are routinely disregarded.'

He went on to observe that:

In today's information society, criminal justice agencies come under increasing pressure to share their information with members of the public, particularly where this concerns security risks and potential dangers ... This new practice is in sharp contrast to the thinking embodied in the Rehabilitation of Offenders Acts and 'expungement laws' that were passed in the 1960s and 1970s, which made it illegal to disclose information about an ex-offender's criminal record after a certain time had elapsed. The assumption today is that there

is no such thing as an ex-offender - only offenders who have been caught before and will strike again. 'Criminal' individuals have few privacy rights that could ever trump the public's uninterrupted right to know.<sup>35</sup>

This increased emphasis on safety concerns is, to some extent, evident in our review of the various jurisdictions. For example, both the Australian Law Reform Commission and the New Zealand Penal Review Group recommended in the 1980s that expungement laws should apply to all offenders. When Part VIIC of the Crimes Act, 1914 (Cth) became law in 1989 in Australia, however, it was limited to offenders who were sentenced to prison sentences of less than thirty months. Similarly, both bills currently under consideration in New Zealand are limited to offenders who were not sentenced to prison, or, in the case of the private member's bill, received custodial sentences of less than six months.

Moreover, a review of the jurisdictions indicates that whilst the qualifying periods before a conviction could become spent have remained static (usually ten years for adults),<sup>36</sup> there has been a stark reduction in the length of prison sentences which fall within the ambit of spent conviction or discriminatory schemes. For example, Queensland, in 1986, was the first state in Australia to introduce a spent convictions law. Custodial sentences of less than thirty months were included in the scheme. In contrast, New South Wales (in 1991), the Northern Territories (in 1992), and the Australian Capital Territory (in 2001), all limited their schemes to custodial sentences of less than six months.

Indeed, it could be argued that if anything the trend should have moved in the opposite direction to reflect the increases which have taken place in imprisonment rates and average sentence lengths. For example, between 1987 and 1998, the imprisonment rate in Australia increased by 37 per cent.<sup>37</sup> In England and Wales, it has been estimated that the length of the average prison sentence has increased by 30 per cent since 1974 when provision was first made for a spent conviction scheme. Similarly, in the US, it has been suggested that the 'legislative trend is to make expungement laws less effective in concealing criminal histories and expungement more difficult for offenders to obtain.'<sup>38</sup>

Coupled with this reduction in the length of prison sentences for which a spent conviction or anti-discrimination law applies,

there has been an expansion in the range of exemptions to such schemes. This increased emphasis on public safety has led to accusations of a 'checking culture' being created in England and Wales, particularly since the introduction of the Police Act, 1997.

On the other hand, it would be going too far to suggest that jurisdictions systematically disregard offenders' interests and deny them rights to citizenry. It would be simplistic to argue that absolute priority is given to public safety concerns. The facts that jurisdictions are still willing to introduce spent conviction laws and discriminatory provisions which offer some degree of protection to ex-offenders (as in New Zealand and the Australian Capital Territory); that some do not set extremely restrictive limitations on the application of their schemes (as in Tasmania); and that others remain disposed to critically reviewing the relative merits and demerits of their particular schemes (as in England and Wales), all signpost a continued inclination to restore the *status quo ante* by reintegrating and resettling ex-offenders.

Ireland, however, continues to remain an anomaly in that it has not yet attempted to grapple with the issue of previous adult criminal records. In the past, particularly in the 1960s and 1970s when expungement laws were in vogue in the US and UK, this oversight could perhaps be explained in terms of a *politics of neglect*. This was understandable given the low crime and incarceration rates at this time, the lack of a developed criminological discourse, and the disinterest shown by political parties in law and order issues.<sup>39</sup>

The context has changed dramatically in recent decades: crime and punishment are now hotly contested political issues, the Department of Justice has published a number of important policy documents,<sup>40</sup> a major expansion of the prison system is underway,<sup>41</sup> and a more nuanced understanding has emerged of the structural causes of crime. The fact that the issue of expungement continues to be overlooked could be said to indicate a more disturbing *politics of intention*. A continued failure to legislate so as to rebalance re-integrative and public safety concerns could amount to tacit support for the *de facto* ancillary punishments that follow *de jure* criminal punishments. Curtailment of adult ex-offenders' rights of citizenry, of course, is not new.<sup>43</sup> That it should continue in a blanket and indiscriminate manner for all ex-offenders in Ireland at the beginning of the 21<sup>st</sup> century appears, at best, anachronistic; at worst, calculated and wilful.

## NOTES

- 1 National Economic and Social Forum *Re-integration of Prisoners* (Report No. 22) 2002, p. 91. See also O'Donnell, I. 'The re-integration of prisoners,' *Administration*, 2002, Vol. 50, No. 2, pp. 80-96.
- 2 Lawlor, R and McDonald, E. *Story of Success: Irish Prisons Connect Project, 1998-2000*, 2001, pp. 40-41.
- 3 Section 6(4) Employment Equality Act, 1998.
- 4 This argument has been made in the National Development Plan, 2000-2006 (PN 7780) 1999, p. 194.
- 5 For such an analysis in Ireland, see Bacik, I. and O'Connell, M. *Crime and Poverty in Ireland* 1998. In New Zealand, see Wells, P. and MacKinnon, J. 'Criminal records and employment: a case for legislative change' *New Zealand Universities Law Review* 2001, Vol. 19, pp. 287-308
- 6 Mayfield, M. 'Revisiting expungement: concealing information in the information age,' *Utah Law Review* 1997 No. 4, p. 1067
- 7 See Greenslade, B. 'Eyes open policy: employment of a person with a criminal record,' *New Zealand Law Journal* November 1986, pp. 386-388
- 8 Mayfield pp. 1057-1085 at p. 1065.
- 9 Funk, T M. and Polsby, D.D. 'The problem of lemons and why we must maintain criminal records', *The Cato Journal*, 1998 Vol. 18, No. 1, pp. 75-83 at p. 81
- 10 For Ireland, see O'Donnell, I. and O'Sullivan, E. *Crime Control in Ireland: The Politics of Intolerance* 2001. More generally, see Tonry, M. and Frase, R.S. (eds) *Sentencing and Sanctions in Western Countries* 2001.
- 11 For an example of the lack of balance in Ireland, see Kilcommins, S. 'The duty to disclose previous criminal information in Irish insurance law,' *Irish Jurist* 2002, Vol. 37, pp. 167-186.
- 12 See Law Reform Commission, *Criminal Records* (Discussion Paper No. 25) 1985; Law Reform Commission *Spent Convictions* (Report No. 37) 1987.
- 13 Discrimination on the ground of a criminal record was not however made unlawful so that the Human Rights Commission only has the power to conciliate a claim of discrimination in this regard. See Human Rights and Equal Opportunity Commission *Regulations* 1989, No. 407, Reg 4(a).
- 14 For discriminatory provisions as regards criminal records in other states, see the Anti-Discrimination Act, 1998 in Tasmania, the Discrimination Act, 1991 and the Spent Convictions Act, 2000 in the Australian Capital Territory, and the Spent Convictions Act, 1988 in Western Australia.
- 15 Part VIIC of the Crimes Act, 1914 (Cth), became law on 30 June 1989.

- 16 This is in addition to expungement laws provided for in the Northern Territories, Australian Capital Territory and Western Australia which operate in conjunction with discriminatory provisions.
- 17 In New South Wales, expungement laws are governed by the Criminal Records Act, 1991, which provides that all convictions are capable of becoming spent, except those for which a prison sentence of more than six months was imposed, convictions for sexual offences, convictions against bodies corporate, and convictions prescribed by regulations.
- 18 For earlier discussions, see Law Reform Division, *Living Down a Criminal Record: Problems and Proposals*, 1985
- 19 The main differences between the two bills are as follows: custodial sentences are excluded from the government scheme; the qualifying period in the private member's bill is seven years, but ten years in the government bill; both bills exclude sexual offences but the government bill specifies the sexual offences and excludes less serious ones; the private member's bill distinguishes between adults and children, the government bill does not; the private member's bill excludes convictions for arson or attempted arson, the government bill does not; the government bill provides a more blanket approach to exceptions in respect of police investigations and court proceedings, the private member's bill only excludes similar fact evidence.
- 20 Gardiner Committee, *Living it Down - the problem of old convictions*, 1972, p. 5
- 21 For the rehabilitation periods of certain young offenders, see Table B of section 5(2) of the 1974 Act. For the periods that apply in respect of discharge, hospital orders under the Mental Health Act, 1983, disqualifications, prohibitions or penalties, see sections 5(3) to 5(10).
- 22 The Rehabilitation of Offenders (NI) Order, 1978 makes it possible for convictions to become spent in Northern Ireland. The Order was drafted directly from the 1974 Rehabilitation of Offenders Act in England and Wales. It therefore does not take into account the very different prison population in Northern Ireland where three quarters of the prisoners are serving long-term sentences. It is estimated that one in every three males under the age of thirty-five in Northern Ireland has a criminal record. This excludes traffic offences. Department Of Economic Development, *Criminal Records and Employment* (Employment Rights 22) (nd), p. 1. As MACRO has noted: 'Dealing with people with criminal convictions is therefore a regular occurrence for personnel managers. Since we all have stereotypical images of crime and criminality, often based on fear and misunderstanding, it is an area of personnel practice which can be easily mishandled.' MACRO *Coping with Convictions: An*

- Employer's Guide to Good Practice in the Employment of People with Criminal Records in Northern Ireland* (nd), p. 4.
- 23 Prison Reform Trust, *A Review of the Rehabilitation of Offenders Act, 1974*, 2001.
- 24 Ibid. It is estimated that the total number of people with previous convictions who will never be rehabilitated is 100,000. Rehabilitation of Offenders Act Review, *Breaking the Cycle: A Report of the Review of the Rehabilitation of Offenders Act*, 2002, p. 37. The review team also noted, in examining the criminal careers of those born in England and Wales between 1958 and 1978, that it was estimated that 22 per cent of men and 5 per cent of women aged between 10 and 45 have a criminal record.
- 25 Op. cit.
- 26 Op. cit, p. 6
- 27 On the link between crime and unemployment, see Webster, R. et al *Building Bridges to Employment for Prisoners*, 2001 (Research Study 226).
- 28 Op. cit, p. 22
- 29 Home Office, *Criminality Survey: Drugs Follow-up*, 2001; see also Fletcher, D. et al *Recruiting and employing Offenders*, 2001.
- 30 Metcalf, H. et al., *Barriers to Employment for Offenders and Ex-offenders*, 2001 (Report No. 155). See also, Social Exclusion Unit, *Reducing Re-Offending by Ex-Prisoners*, 2002. The central importance of employment in reducing the likelihood of reoffending is reviewed by Bridges, A. *Increasing the Employability of Offenders: An Inquiry into Probation Service Effectiveness*, Probation Studies Unit Report No. 5, University of Oxford Centre for Criminological Research (Oxford, 1998).
- 31 Kogon, B et al., 'Sealing and expungement of criminal records: the big lie' *Journal of Criminal Law, Criminology and Police Science* (1970), p. 378.
- 32 Mayfield, op cit. p. 1073.
- 33 See [http:// www.bci.utah.gov/Records/Expunge.html](http://www.bci.utah.gov/Records/Expunge.html)
- 34 Mayfield, op. cit. p. 1076.
- 35 Garland, D. *The Culture of Control: Crime and Social Order in Contemporary Society*, 2001, pp. 180-181.
- 36 Most jurisdictions set qualifying periods which apply equally to all sentences imposed by the courts. The only distinction made is on the basis of whether the offender was sentenced as a minor or an adult. So, for example, in Queensland, the qualifying periods are ten years for adults and five for juveniles. In England and Wales, however, the qualifying period varies according to the sentence imposed, though a distinction is also made between adults and juveniles.
- 37 Freiberg, A. "Three strikes and you're out - it's not cricket' in Tonry, M. and Frase, R.S. (eds) op. cit. pp. 29-61 at p. 48.

- 38 Mayfield, op cit. p. 1085
- 39 For an overview see O'Sullivan, E. and O'Donnell, I. 'Imprisonment and the crime rate in Ireland,' *Economic and Social Review*, 2003, Vol. 34, pp. 33-64.
- 40 O'Donnell, I. 'Criminal justice review 1998,' *Administration*, 1999, Vol. 47, No. 2, pp. 175-211.
- 41 O'Donnell, I. 'Prison matters,' *Irish Jurist*, 2001, Vol. 36, pp. 153-73.
- 42 See Bacik, I. and O'Connell, M. *Crime and Poverty in Ireland* 1998; O'Donnell, I. 'Crime, Punishment and Poverty' *Irish Criminal Law Journal* 1997, Vol. 7, pp. 134-151; O'Mahony, P. *Mount joy Prisoners: A Sociological and Criminological profile*, 1997.
- 43 Indeed the phenomenon of curtailment of rights has been succinctly captured in Victor Hugo's novel, *Les Miserables*, which tells the story of life in early nineteenth-century France for Jean Valjean, an ex-convict who has been released after nineteen years in prison: 'When at the time of leaving prison Jean Valjean heard the words, 'You are free', the moment had seemed blinding and unbelievable, as though he was suddenly pierced by a shaft of light, the true light of living men. But this gleam swiftly faded. He had believed for an instant in a new life. He soon discovered the meaning of liberty when it was accompanied by a yellow ticket.' In England, see T Taylor *The Ticket-of-Leave Man*, 1863 London: Thomas Hailes Lacy. More recently, see Cox v. Ireland [1992] IR 503 for a discussion of the *de jure*, ancillary formal measures that may follow a criminal