



SOUTH AFRICAN LAW REFORM COMMISSION

DISCUSSION PAPER 135

PROJECT 137
THE REVIEW OF THE EXPUNGEMENT OF CERTAIN CRIMINAL RECORDS

Closing date for comments

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INTRODUCTION

The South African Law Reform Commission was established by the South African Law Reform Commission Act 19 of 1973.

The members of the Commission are -

Honourable Judge Mandisa Muriel Lindelwa Maya (Chairperson)

Honourable Judge Narandran Kollapen (Vice-Chairperson)

Professor Vinodh Jaichand (Member)

Mr Irvin Lawrence (Member)

Advocate Mahlape Sello (Member)

Ms Thina Siwendu (Member)

The Acting Secretary is Mr JB Skosana. The Commission's offices are located at Spooral Park, 2007 Lenchen Avenue South, Centurion, Pretoria. Correspondence should be addressed to:

The Secretary
South African Law Reform Commission
Private Bag X 668
PRETORIA
0001
Telephone : (012) 622-6313
E-mail : advanvuuren@justice.gov.za
Website: <http://www.doj.gov.za/salrc>

The project leader for this project is the Honourable Judge Jody Kollapen. There is no Advisory Committee.

Preliminary recommendations and issues raised for comments

1. The request for an investigation on the expungement of previous convictions follows from the enactment of the Criminal Procedure Amendment Bill, which was approved by Parliament in 2008 and was assented to by the President in February 2009. That Bill became the current Act 65 of 2009, and it deals with *inter alia* the expungement of certain minor criminal records. The Minister of Justice and Constitutional and Constitutional Development (Mr JT Radebe) explained that during the deliberations about the Bill, a number of stakeholders submitted inputs to the Portfolio Committee on a wide range of matters related to the expungement of criminal records. The Portfolio Committee concluded that the expungement of criminal records is a complex matter that requires a balance between the rights of citizens to be protected against criminals and the recognition that having a criminal record can cause undue hardship for an individual.

2. The Minister requested the Commission to conduct research on the different systems followed in the keeping of criminal records and the expungement of such records. The research must, among other things, draw on international best practices, and the relevant stakeholders and public must be widely consulted on the matter. Thereafter, a report was to be submitted to the Minister on the outcome of the research as soon as possible to enable him to comply with the time-frame set by the Committee within which he needs to report back to Parliament. The publication of this discussion paper represents the first stage of the response to the Minister's request. The discussion paper contains the Commission's comparative research to determine and draw on international best practices; outlines the problem areas relevant to the current South African legislation; and presents the Commission's provisional conclusions and recommendations.

3. The Commission's analysis of the relevant legislative provisions includes the legislative provisions that deal specifically with expungement, namely expungement in terms of the Child Justice Act 32 of 2008 and the Criminal Procedure Act 51 of 1977. It also includes an analysis of specific legislation that directly impacts on expungement, in that the provisions of these Acts are included in the expungement legislative scheme. For example, the conditional requirement for an application for and approval of an expungement order are subject to the removal of the names of the applicants from the registers established in terms the Children's Act (National Child Protection Register) and the register established in terms the Criminal Law (Sexual Offences and Related Matters) Amendment Act (National Sex Offender Register). Thus the research also examines how the provisions and procedures prescribed in terms of the latter legislative provisions impact on the provisions of the

expungement legislation. It also includes an evaluation of other relevant national legislation which contains provisions creating certain disqualifications for employment opportunities following a conviction and sentence, and how these disqualifications affect the expungement provisions. In the final analysis, this discussion paper includes a consideration of the rationale for legislation providing for expungement, which stems from the rights contained in the Constitution. These include two competing rights: firstly, the right of the community to protection, and second, the rights of an applicant to equality and dignity. The paper therefore includes an evaluation of the constitutional implications of all relevant legislative provisions, and how the principle of the expungement of criminal records should be interpreted, having due regard to South Africa's constitutional dispensation. In particular, one must have regard to the contents of the competing rights and the principle of limitation of rights as provided for in the Constitution and expanded by the Courts.

4. Having due regard to the relevant provisions of the national legislation that enables the expungement of criminal records, and the constitutional dispensation within which these provisions operate, the SALRC concluded as follows:

- (i) The provisions in the Criminal Procedure Act 51 of 1977 (CPA) and the Child Justice Act 75 of 2008 (CJA) which deal with expungement are not aligned, and use different qualifying criteria to approve the expungement of records. The CPA criteria for expungement of convictions are based on the sentence imposed and a time lapse of 10 years; whereas the CJA criteria are based on the conviction of an offence and a time lapse of 5 or 10 years, depending the nature of the offence for which convicted.
- (ii) Because of the different criteria, in practice, expungements made in terms of the CJA are more limited than expungements made in terms of the CPA.
- (iii) The justification for legislation that enables the expungement of previous convictions is the same for juvenile and adult offenders; hence, the application of the differing qualifying criteria is inappropriate.
- (iv) Both the CPA and the CJA provide for compulsory expungement of a conviction, provided the criteria set in the Acts are met and do not provide a discretion to the approving authority.
- (v) Both the CPA and the CJA provide for an administrative application process to obtain approval for an expungement based on criteria limited to those listed in the legislation.
- (vi) Applying the constitutional principles applicable to the enabling legislation for expungements as applied by the courts, the Commission concluded that the

provisions in the existing legislation in the CPA and the CJA are overbroad. This is with regard both to the prescribed process and to the qualifying criteria. This problem of overbroad provisions must be addressed.

5. The Commission concluded that the justification for the legislation that enables expungement of criminal records centres on two issues: **on the one hand, government's duty to promote safety in society and protect citizens from dangerous and dishonest individuals; and on the other hand, the individual's right to equality and the constitutional duty on the state "to free the potential of each person"**. The question that needs to be considered is the state's duties and responsibilities in respect of both rights, and the extent to which these rights impact on the state's duties and responsibilities. In other words, the constitutional validity of the legislation dealing with expungements and the extent to which it could be justified should be considered and weighed with regard to both these rights, and having due regard to the relevant legislation as well as the Constitution and jurisprudence.

6. Important objections to expungement statutes are:

- **they prevent employers from taking appropriate steps to meet the security and supervision needs of their employees. In essence, there is a fundamental conflict between an offender's right to obtain employment for which he or she is qualified and the employer's interest in hiring trustworthy employees;**
- **it is argued that expungement laws interfere with effective law enforcement. Police officers are impeded in their efforts to uncover criminal conduct because of the expungement of arrest and conviction records and identification information of offenders.** An offender's previous contact with the police and his or her previous arrests are factors to be considered by a police officer in deciding whether an arrest should be made or not. Criminal records not only assist prosecutors in handling specific cases and assist correctional services in developing appropriate diagnostic programmes, they also assist police officers directly in their most important function of investigating cases.

7. The reference to government's legal responsibilities in exercising its duties is particularly relevant when considering the expungement legislation. Both the CPA and the CJA provide for an administrative process where a government official takes a final decision

on whether or not to approve an application for expungement. In this regard, the enabling legislation becomes vital because it regulates the qualifications and conditions of such approval, and the prescribed process to obtain such approval. The Commission concluded that to determine the validity of the enabling legislation, the legislation must be sure to give effect to the government's responsibilities in terms of the Constitution and other relevant laws. With reference to the qualifying criteria for expungement, both the CPA and the CJA provide for an administrative process to authorize a non-discretionary (that is, compulsory) approval of an expungement on application by the approving authority, namely the Director-General of the DOJCD, if he or she is satisfied that the application concerns a sentence (in terms of the CPA) or the commission of a prescribed offence (in terms of the CJA), as well as the lapsing of the prescribed period (10 years in terms of the CPA, and 5 or 10 years in terms of the CJA); coupled with the consideration that the applicant has not been reconvicted of a prescribed offence during the relevant prescribed period (5 or 10 years).

8. In so far as the enquiry concerns government's duty to promote safety in society and protect citizens from dangerous and dishonest individuals, it should be noted that the Constitution and relevant national legislation have been considered by the courts to determine government's constitutional responsibilities; and the state's liability in case of failure has been considered by the Constitutional Court. This has been done with particular reference to the question of government's responsibilities to maintain an effective criminal justice system, and its liability to pay compensation to victims of crime in cases where the government has failed to meet the required standards. In so far as this is relevant to the issue of expungement of a criminal conviction, the Commission considered the relevant constitutional principles, legislation and case law.

9. The Commission concluded that:

- The Constitution places an obligation on the organs of state, through legislative and other measures, to ensure the impartiality, independence, dignity, accessibility and effectiveness of the courts. The fact that reference is made to the *effectiveness* of the courts means that provision must be made to ensure this functioning, which further means that structures must be created to bring about this effectiveness, if they do not exist.
- In meeting the above obligations, national legislation (for example the Criminal Law (Sexual Offences and Related Matters) Amendment Act, the Child Justice Act, the Witness Protection Act, the Domestic Violence Act, and the Criminal Procedure Act) not only give effect to the constitutional rights applicable to all

citizens, but also includes specific provisions relevant to the treatment of victims of crime. This includes provisions that give effect to relevant principles contained in International Protocols applicable to victims of crime, which have been endorsed by the South Africa government; for example, the right to be treated with dignity and respect, the right to security of the person, and the right to protection.

- As another example, the CAA has provisions in terms of which certain services must be provided to certain victims of sexual offences, *inter alia* to minimise or as far as possible eliminate secondary traumatisation. These services include affording the victims of certain sexual offences the right to require that the alleged perpetrator be tested for HIV status, and the victim's right to receive post-exposure prophylaxis (PEP) in certain circumstances. The CAA also makes provision for the adoption of a national policy framework regulating all matters in this Act, including the manner in which sexual offences and related matters must be dealt with uniformly, in a co-ordinated and sensitive manner, by all government departments and institutions; and the issuing of national instructions and directives to be followed by law enforcement agencies, the National Prosecuting Authority, and health care practitioners, to guide the Act's implementation.
- In addition, constitutional and legislative provisions dealing with the establishment of the Police Services and the Courts are relevant for the purpose of determining the effectiveness of the criminal justice system. These provisions are therefore also relevant to the treatment of victims of crime and the protection of society. For example, the SA Police Services is the foremost agency established to detect and investigate crime, and bears the primary responsibility to protect women and children against the prevalent scourge of violent crimes. National legislation and relevant provisions in the Constitution adopted in the establishment of the Police Services give effect to these principles.
- Similarly, the courts are bound by the Constitution and the Bill of Rights. When the courts perform their functions they are obliged, through additional legislative and other measures, to ensure their impartiality, independence, dignity, accessibility and effective functioning. This includes, for example and with reference to crimes that violate the fundamental rights of women and girl-children, the responsibility to ensure that the rights of women and children are not made hollow by actual or threatened sexual violence. This also applies to

relevant legislation (national or otherwise) that gives effect to government's duty to protect society.

- The CPA contains specific provisions aimed at protecting society: it makes provision for sentencing options, and has provisions dealing with the criminal record of an accused and the proof of previous convictions. In this regard the courts have a particular responsibility with reference to the criminal record of an offender. This scenario influences government's responsibility in dealing with the criminal record of an offender in its duty to protect society.
- Section 271 of the CPA provides for a particular responsibility of the state with regard to the sentencing of offenders. It provides that previous convictions may be proved, in that the prosecution may, after an accused has been convicted but before sentence has been imposed on him or her, produce before the court, for admission or denial by the accused, a record of previous convictions alleged against the accused. If the accused admits such previous conviction or such previous conviction is proved against him or her, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has currently been convicted.
- The courts have interpreted the proof of previous convictions by the state not to be a discretionary power, but that the "permissive nature" of section 271 must yield to the "peremptory provisions" of section 51 of Act 105 of 1997 (the so-called "minimum sentence" legislation), which is the more recent legislation and requires a prosecutor to present facts that a court can consider when imposing sentence. A presiding judicial officer should, indeed, insist upon proof of form SAP 69 in order to properly discharge his or her sentencing functions, "unless good reason exists to avoid a further remand where the offender is to remain in custody." The courts indicated clearly why this approach is incompatible with the duty of the prosecutor and the adjudicative function of the courts. Only in exceptional cases will the list not be produced, however, since previous convictions are usually highly relevant during sentencing.
- It is also for the court, and not for the prosecutor, to decide what weight is to be attached to previous convictions. Once a prior conviction has been proved, the court must take it into account, but the weight to be attached thereto is to be decided by the court.
- Section 286 of the CPA provides for the declaration of a person as a habitual criminal. A superior court or a regional court which convicts a person of one or more offences may, if it is satisfied that the person habitually commits offences

and that the community should be protected against him or her, declare the person to be a habitual criminal, in lieu of imposing any other punishment for the offence or offences of which the person is convicted. Again, with reference to an accused's criminal record, the courts have a duty to protect society.

- Section 286A of the CPA provides for the declaration of a person as a dangerous criminal. A superior court or a regional court which convicts a person of one or more offences may, if it is satisfied that the person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him or her, declare that person to be a dangerous criminal. A convicted person's criminal record is of particular importance when a court is considering imposing a sentence in terms of section 286 and 286A of the CPA. These sentencing options in particular are aimed at the protection of society.
- The CJA is primarily aimed at dealing with children (under the age of 18 years) who come into conflict with the law. However, the Director of Public Prosecutions may, in accordance with directives issued by the National Director of Public Prosecutions, direct that a matter be dealt with in accordance with the CJA if the person was a child at the time of the alleged commission of the offence, or was older than 18 but younger than 21 years when ordered or summoned to appear at a preliminary enquiry or was arrested.

10. The Commission has given due consideration to government's constitutional obligations, the relevant constitutional rights applicable to the expungement of criminal records, and the provisions contained in relevant national legislation regarding the state's duty to ensure an effective criminal justice system (as summarised above). Having considered these matters, the Commission recommends that:

- (i) The enabling legislation for expungement of criminal records in both the CPA and the CJA are overbroad where the prescribed administrative application process allowing mandatory expungement is concerned, and should be replaced by a motion application fully motivated to a court that gives the court a discretionary power to approve an expungement of a criminal record. This recommendation arises because the current legislation (CPA and CJA) provides no role for the prosecution in the process, and ignores the prosecution's responsibility to ensure the imposition of appropriate sentences giving effect to the constitutional duty to protect society. The prosecutor is not required to give an input notwithstanding the obligation on the prosecution to prove previous convictions, to address the court on sentencing, and to

ensure that an appropriate sentence is imposed to give effect to government's obligation to protect society.

(ii) The qualifying criteria in the existing legislation (CPA and CJA) are overbroad, and should be aligned so that both Acts use the same criteria, which should be broadened to include:

- Consideration of the relevant constitutional rights, namely the right to protection and the right to equality and the application of the limitation clause in the Constitution;
- Consideration of any disqualifications imposed in terms of national legislation following a conviction and sentence, which have or may have an impact on future employment of a convicted offender, in respect of both adult and juvenile offenders;
- The inclusion of a limitation to the number of times an expungement should be available. (Currently there are no limitations to the number of times an offender, either adult or juvenile, may apply for an expungement);
- The inclusion of a consideration of whether or not the sentence relating to the criminal record to be expunged has been complied with or has been served. Rehabilitation is still regarded by our courts as a purpose of sentencing, and it is an important factor to be considered to justify the approval of expunging a criminal record. The absence of such a requirement raises questions about the constitutional compliance of the legislation, in view of the fact that for purposes of protecting society it is vital to consider the possibilities of the person re-offending. For this reason, consideration of any evidence showing successful rehabilitation or completion of a rehabilitation programme is of critical importance in an application for expungement;
- The removal of the name of the applicant from the National Sex Offender Register or the National Child Protection Register where applicable, before granting an order for expungement; and
- The differing qualification periods in the CPA (10 years) and the CJA (either 5 or 10 years) should be aligned to provide for expungements after either 5 or 10 years in respect of both adult and juvenile offenders, depending on the seriousness of the offences; the seriousness is to be determined by the sentence imposed, not by the offence committed (as currently stated in the CJA).

- (iii) The Commission also considered the impact of the introduction of the National Sex Offender Register and the National Child Protection Register on applications for expungement. The Commission concluded that although the two Acts (CAA and CA) which introduced the registers contain different procedures for names to be included in or removed from the registers, compared with the procedures that apply to expungement in terms of the CPA and the CJA, those differences are not necessarily unconstitutional. This is because the registers are aimed at protecting two categories of victims, namely victims of sexual offences and children. Thus, the conditions for inclusion in and removal from the registers do not need to be the same as those applicable to expungement, and were determined to give effect to government's constitutional obligations and obligations following its ratification of International Instruments. The link of the above provisions to the expungement legislation is the fact that, in respect of a conviction resulting in the inclusion of the offender's name in either of these registers, an expungement is not allowed unless the name has been removed from the relevant register. The Commission is of the view that such a limitation represents a legitimate government interest and is justified.
- (iv) The Commission also recommends that the expungement legislation should include a provision dealing with the effects of a successful expungement for purposes of re-integration into society, similar to the provision in the Constitution or in the Promotion of National Unity and Reconciliation Act.
- (v) The Commission recommends an amendment to section 271A of the CPA to provide that a criminal conviction followed by a prescribed sentence falls away as a previous conviction, if a period of 10 years has elapsed after the date on which the sentence imposed has been served; or where a sentence has been suspended or passing of the sentence postponed, 10 years has elapsed after the period of suspension or the period of postponement of the sentence. These provisions should apply unless the person has again been convicted of or sentenced for any offence committed during the 10-year period. The fall-away provision is not applicable to a conviction in respect of any offence in respect of which any of the following sentences is imposed:
- (a) a sentence of imprisonment for a period of more than 10 years, with or without the option of a fine;
 - (b) declaration as a habitual criminal in terms of section 286;
 - (c) declaration as a dangerous criminal in terms of section 286A;
 - (d) imprisonment for an indefinite period in terms of section 286B;
 - (e) a minimum sentence imposed in terms of section 50 of the Criminal Law Amendment Act 105 of 1997.

- (vi) The Commission recommends the retention of section 271C of the CPA dealing with the expungement of criminal records in respect of the so-called apartheid offences, including the prescribed administrative application process.

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ABBREVIATIONS

CA	Children's Act 38 of 2005;
CAA	Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007;
CJA	Child Justice Act 75 of 2008;
CPA	Criminal Procedure Act 51 of 1977;
CP Amendment Act	Criminal Procedure Amendment Act 65 of 2008.

PREFACE

This discussion paper reflects information that was gathered up to the end of September 2014. This paper was prepared by Mr Willie van Vuuren to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views.

The discussion paper is published in full so as to provide persons and bodies who wish to comment or make suggestions for the reform of this branch of the law with sufficient background information to enable them to place focused submissions before the Commission.

Respondents are asked to submit **written** comments, representations or requests to the Commission at the address appearing on the previous page. **The closing date for comment is 31 August 2015.** The researcher will endeavour to assist you with any difficulties you may encounter. Comment already forwarded to the Commission should not be repeated. In such event, you should merely indicate that you abide by your previous comment, if that is the case. The researcher allocated to this project is Mr Willie van Vuuren and he may be contacted for further information.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked "Confidential". Respondents should be aware that the Commission may in any event be required under the Constitution of the Republic of South Africa Act 108 of 1996 to release information contained in representations.

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CHAPTER 1

ORIGIN OF THE INVESTIGATION AND SOME INTRODUCTORY REMARKS

1.1 On 2 October 2009, the Commission received a letter from the Minister of Justice and Constitutional Development addressed to the Chairperson, requesting the Commission to include a new investigation in its programme. The requested investigation was to deal with the expungement of certain criminal records.

1.2 The request follows from the enactment of the Criminal Procedure Amendment Bill, which was approved by Parliament in 2008 and assented to by the President during February 2009. The Bill (now Act 65 of 2009), *inter alia*, deals with the expungement of certain minor criminal records. The Minister explained that during the deliberations on the Bill a number of stakeholders submitted inputs to the Portfolio Committee on a wide range of matters related to the expungement of criminal records. The Portfolio Committee concluded that the expungement of criminal records is a complex matter that requires a balance between the rights of citizens to be protected against criminals and the recognition that having a criminal record can cause undue hardship for an individual. A Resolution in respect of which certain actions are required was adopted by the Portfolio Committee.

1.3 The Minister requested the Commission to –

1.3.1 conduct research on the different systems followed in the keeping of criminal records and the expungement of such records. The research must draw, among others, on international best practices;

1.3.2 consult widely with the relevant stakeholders and the public on the matter; and

1.3.3 report to him on the outcome of the research as soon as possible, to enable him to comply with the time-frame set by the Committee within which he needs to report back to Parliament.

1.4 The Resolution was adopted by the Portfolio Committee on 21 October 2008, and the Committee requested the Minister to report back to it within 24 months. (The 24 months will expire on 21 October 2010). The Commission received the Minister's request to conduct the

investigation on 3 November 2009.

1.5 The Chairperson responded to the Minister's letter by indicating that the Minister's request will be considered by the Commission at its first available meeting in 2010. The Commission referred the request to the Commission's secretariat for consideration, with the recommendation to use the Commission's approved selection criteria to evaluate the inclusion of new investigations.

1.6 Two completed SALRC investigations have dealt with the issue of expungement of criminal records. However, these investigations considered the issue of expungement in a limited way, in the context of the review of the law of sentencing and the need to introduce a criminal justice system for juveniles. Both investigations considered expungement of criminal records with reference to its impact on criminal law, and did not consider the impact of expungement of criminal records in general.

1.7 At its meeting on 13 March 2010, the Commission considered the inclusion of the expungement of criminal records in its programme. In accordance with the SALRC's mandate to renew and improve the law of South Africa on a continual basis, the Commission considered its approved selection criteria to determine whether it ought to recommend to the Minister that an investigation on the expungement of criminal records be included in the SALRC programme.

1.8 The Commission applied its approved selection criteria, which include:

1. Criteria used in the initial sifting process to determine whether a proposal should be subjected to a preliminary investigation or whether it should be dealt with summarily:

- a) Whether the issues concerned are predominantly legal.
- b) Whether the legal problem can be addressed in a way that does not require a change of the law, for example through a mere change in policy or improved implementation of existing legislation.
- c) Whether there is another institution or government department better placed to deal with the topic in question.
- d) Pending legal developments (for example court cases or other draft legislation) that could influence the relevance of the investigation.
- e) The availability of current resources in terms of capacity, funding and the effective management of the research programme.

2. Second-phase criteria used in conjunction with those set out in 1 above during a preliminary investigation:

- a) Extent to which the law is unsatisfactory (for example unconstitutional, unduly complex, inaccessible or outdated).
- b) Scale of the problem in terms of the proportion of the community affected.
- c) Potential benefits likely to accrue from undertaking reform or repeal of the law.
- d) The extent to which the investigation contributes to the implementation of a broader government policy.
- e) Enhanced constitutionality.
- f) Development and enhancement of the constitutional democracy.
- g) Whether the issues span the interests of a number of government departments or professional groups.
- h) Whether the investigation would require substantial long-term commitment and fundamental review.
- i) Whether extensive public or professional consultation would be necessary.
- j) Whether the investigation needs to be done independently of central government departments or other stakeholders because of –
 - the existence of vested interests; or
 - significant difference of views or objectives in the different entities.
- k) Whether the investigation would promote informed public debate on future policy direction.
- l) The extent to which the investigation will benefit poor and previously disadvantaged communities.

1.9 When applying the first set of criteria, it was submitted as follows:

- (i) That the issues concerned are predominantly legal; the difficulty with the law cannot be overcome other than by a change of the law (e.g. not through a mere change in policy or improved implementation of existing legislation).
- (ii) The Department of Justice and Constitutional Development is the only other institution with an interest in the matter and is not necessarily better placed than the Commission to examine the topic in question, since the proposed investigation touches on issues already dealt with in other investigations of the Commission.
- (iii) As far as could be established, there are no pending legal developments (e.g. court cases or other draft legislation) that could influence the relevance of the investigation.

1.10 The question of capacity was specifically considered when applying the Commission's first set of selection criteria. The Minister was requested to report back to the

Portfolio Committee within 24 months after the Resolution was adopted on 21 October 2008. By the time the Commission considered the Minister's request, only eight months would have been left to complete the investigation. Having regard to the Commission's working methods and the Minister's request to consult widely on proposals for reform and to conduct comparative research on international best practices, the Commission concluded that it would not be practicable to complete the investigation by 21 October 2010.

1.11 The Commission subsequently approved that the Minister be approached to formally approve the inclusion of an investigation into the expungement of criminal records with an "A" priority rating in the Commission's programme in terms of section 5(1) of the South African Law Reform Commission Act 19 of 1973. Further, that the Minister should be informed that the Commission would not be able to complete the investigation within the time-frame set by the Portfolio Committee. The Commission designated Mr Tembeka Ngcukaitobi, a Commissioner, to be the project leader for the investigation in anticipation of it gaining ministerial approval. However, Mr Ngcukaitobi's term of appointment expired on 31 December 2011, resulting in the project not having a project leader. A new Commission was appointed in August 2013, and at its meeting on 6 to 7 December 2013 the Commission appointed Commissioner Judge J Kollapen as project leader.

CHAPTER 2

IDENTIFYING THE ISSUES

INTRODUCTION

2.1 For the purpose of this discussion paper, it is necessary to have a clear understanding of the meaning of the term “expungement of a criminal record”. There is no universally accepted definition for this term, but the phrase generally refers to the destruction or obliteration of an individual's criminal file by the relevant authorities in order to prevent employers, judges, police officers, and others from learning of a person's prior criminal activities. It is important to note that there is a difference between expungement which involves the complete destruction of one's record and expungement which merely “seals” the previous convictions. The latter option means that the record is not destroyed completely and it leaves open the possibility of future access to the records. In the first part of this chapter, reference is made to investigations conducted by the SA Law Reform Commission relevant to expungement of criminal records; this is followed by an exposition of the legislative provisions relevant to expungement.

PREVIOUS CONVICTIONS (CRIMINAL RECORD OF AN ACCUSED PERSON) AND THE EFFECT IN SOUTH AFRICAN CRIMINAL LAW

2.2 Section 271 of the Criminal Procedure Act 51 of 1977 (“the CPA”) permits the prosecution to prove previous convictions against an accused person upon conviction. Such previous convictions may be taken into account by the court when imposing sentence in respect of the offence of which the accused has been convicted. Previous convictions may be highly relevant during the sentencing phase, and it is for the court and not the prosecutor to decide what weight is to be attached to previous convictions. Section 303 ter, read with Schedule 5 of the repealed Criminal Procedure Act 56 of 1955, acknowledged the principle that a previous conviction lapses after a period of 10 years has expired without a further conviction during that period.¹ Initially the new CPA did not contain a similar provision, and in terms of the new Act the courts had a discretion whether or not to take previous convictions

¹ Compare *S v Van der Poel* 1962 (2) SA 19 (CPD) and *S v Makhae en 'n Ander* 1974 (1) SA 578 (OPD).

older than 10 years into account; and if so, what weight was to be given to such previous convictions. However, in their discretion, the courts did not ignore the principle contained in the repealed section 303 ter and it continued to influence the decisions taken by the courts.²

2.3 Following the remarks in *S v Mqwathi*,³ the Criminal Procedure Act was amended during 1991. In terms of the new provision it is now specified that, under certain circumstances, previous convictions will fall away as previous convictions, provided that 10 years have elapsed since the date of conviction of the relevant offence. Section 271A reads as follows:

271A Certain convictions fall away as previous convictions after expiration of 10 years

Where a court has convicted a person of-

- (a) any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed but-
 - (i) has postponed the passing of sentence in terms of section 297 (1) (a) and has discharged that person in terms of section 297 (2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297 (3); or
 - (ii) has discharged that person with a caution or reprimand in terms of section 297 (1) (c); or
- (b) offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine, may be imposed,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed.

2.4 The CPA does not provide for a definition of a previous conviction, but our courts have defined the concept to mean a conviction by a court of law of a crime or offence.⁴ A

2 See *S v Mqwathi* 1985 (4) SA 22 (TPD).

3 1985 (4) SA 22 (TPD).

4 *S v Greveling* 1976 (2) SA 103 (OPD).

conviction is not considered a previous conviction for the purposes of section 271 unless the accused has been brought before court, and convicted and sentenced by that court. The concept is furthermore interpreted restrictively, and convictions for crimes committed after the crime for which the accused stands to be sentenced can also be taken into account, in the sense that it is indicative of the character of the accused. It is not a misdirection to take into account, in aggravation of sentence, the fact that the accused had a few weeks prior to the commission of the crime for which the judge sentenced him, committed rape, although at the time of committing the second rape he had not yet been convicted for the first rape.⁵ It is indicative of his character and therefore relevant. The State may prove all previous convictions, including those for crimes committed after the one for which the accused person stands to be sentenced.

CRIMINAL RECORD OF JUVENILES AND THE IMPOSITION OF SENTENCE IN SOUTH AFRICAN CRIMINAL LAW

THE COMMISSION'S INVESTIGATION INTO SENTENCING

2.5 The Commission's investigation into sentencing was included in the Commission's programme during 1991. The purpose of the investigation was to review, on a continual basis, all aspects related to sentencing. During 1996 the Minister of Justice appointed a new project committee for the investigation. At its meeting during October 1996, the project committee identified a number of projects for investigation, one of which was the expungement of the criminal records of juveniles. The motivation for including the investigation included the following: a criminal record has serious implications; a convicted person is branded forever as an untrustworthy member of society; a conviction compromises job opportunities permanently; and convicts are often the subject of suspicion and mistrust. It was argued that in order to protect the interests of juveniles in this regard, legislation should be enacted to allow them to resume their lives without the stigma of a conviction. The aim of the investigation was therefore to determine whether such protection should be given to juveniles and if so, to investigate the circumstances under which such protection should be given; to determine whether such expungement should be automatic or should be allowed only on application to an institution or judicial officer appointed to consider such

5 S v S 1988 (1) SA 120 (A).

applications; and to determine whether or not expungement should be allowed in respect of any offence, or in respect of specified offences only.

2.6 At the time when the investigation was approved for inclusion on the SALRC programme, the context was one of major political and constitutional changes in South Africa. The country underwent changes and major reforms were being considered. The future development of the country was re-evaluated not only on the political, social and cultural fronts but also in respect of the judicial process in general. Researchers and other functionaries were constantly struggling to keep the judicial system in touch with developments and constitutional changes in the country. The project committee (as it was called at the time) was, however, fully aware that the high crime rate, the unprecedented prevalence of violence, and overcrowded prisons in South Africa might pose problems for a meaningful and empirical evaluation of the question of expungement.

2.7 It was argued that a re-evaluation of the past also presented the opportunity to consider afresh the development of those aspects that were kept in abeyance within the boundaries of our country. The expungement of criminal records of juveniles represented one of these aspects.

THE COMMISSION'S INVESTIGATION INTO A JUVENILE JUSTICE SYSTEM

2.8 However, following the ratification of the United Nations Convention on the Rights of the Child in 1995, the SALRC was requested to undertake an investigation into the establishment of a separate juvenile justice, and to make recommendations to the Minister of Justice for the reform of this particular area of the law. Following this development, the Commission abandoned its investigation into the expungement of criminal records of juveniles as part of its investigation into sentencing. In the new investigation on a separate juvenile justice system, an issue paper was published for comment during 1997. The paper proposed that a separate Bill should be drafted to provide for a cohesive set of procedures for the management of cases in which children are accused of crimes. The issue paper was the subject of consultation with both government and civil society role-players. Towards the end of 1998, the Commission published a comprehensive discussion paper, accompanied by a draft Bill (referred to in the Commission's report as "Bill A"). Wide consultation was held regarding this document, with all relevant government departments and non-governmental

organisations that provided services in the field of juvenile justice being specifically targeted for inclusion in the consultation process. The draft Bill encapsulated a new system for children accused of crimes, to provide substantive law and procedures to cover all actions concerning the child from the moment of the offence being committed through to sentencing. This would include record-keeping and special procedures to monitor the administration of the proposed new system. The workshops and seminars held regarding the discussion paper, and the written responses received, all revealed substantial support for the basic objectives of the Bill and for the proposed structures and procedures. Many of the submissions and discussions included constructive criticisms and helpful suggestions as to how the Bill could be improved. The Commission's final recommendations were included in its report, which followed the publication of the discussion paper. The report contained a final proposed draft Bill (referred to in the report as "Bill B" to differentiate it from the draft Bill which had accompanied the discussion paper) titled the "Child Justice Bill". This Bill embodied the recommendations of the SALRC that the law relating to children accused of crimes in South Africa should be reformed, and it dealt with the expungement of criminal records of juveniles in some detail.

EXPUNGEMENT OF CRIMINAL RECORDS OF JUVENILES IN TERMS OF THE COMMISSION'S INVESTIGATION

2.9 The Commission's report on a juvenile justice system dealt with the expungement of criminal records of juveniles in the following terms:⁶

CHAPTER 13: CONFIDENTIALITY AND EXPUNGEMENT OF RECORDS

13.1 The Issue Paper did not address the issues of confidentiality and expungement of records. However, since the inclusion of provisions on confidentiality and expungement were contemplated after they were raised during the consultation process that followed the release of the Issue Paper, a detailed discussion of the current position in terms of the Criminal Procedure Act was included in the Discussion Paper. The project committee on the Commission's investigation into sentencing identified the expungement of the criminal records of child offenders as an issue that the project committee on juvenile justice should deal with in this investigation.

6 South African Law Commission, Project 106, Report on *Juvenile Justice* July 2000 on p 204.

13.2 In the Discussion Paper (Discussion paper 79), the Commission reviewed two draft provisions that were proposed by the Juvenile Justice Drafting Consultancy concerning the confidentiality of proceedings involving accused persons under the age of 18 years, and prohibiting the publication of information which could reveal the identity of any accused child. The proposed provisions were similar to the applicable sections of the Criminal Procedure Act, which regulates confidentiality and privacy at present. An additional provision stipulated that the prohibition on the publication of information should not be used to prevent people or agencies from seeking access to children in order to offer assistance, or to prevent access to information for the purpose of study or analysis. The additional provision was included because it was contended that the provision in the Criminal Procedure Act had in the past been used to prevent individuals and organisations from obtaining access to information in order to provide para-legal and other assistance to children in detention, and to analyse or conduct research about the situation of children in the criminal justice system.

13.3 Recent amendments to regulations under the Child Care Act 74 of 1983 provide for the introduction of a Child Protection Register in which details must be entered of any child exposed to ill treatment or deliberate injury of which the Director-General of Welfare and Population Development has been notified. The regulations permit the Director-General to approve the examination or inspection of the register for official and *bona fide* research purposes, and also to disclose information contained in the register to such persons as he or she may determine with the sole purpose of serving the interests, safety and welfare of any child. This has provided the Commission with a useful precedent concerning access to otherwise confidential information without prejudicing the best interests of the child.

13.4 The Commission proposed in Discussion Paper 79 that the present provisions in the Criminal Procedure Act relating to the protection of the identity of accused persons under the age of 18 years, as well as those pertaining to the privacy of criminal proceedings involving such children, should be incorporated in similar form in the Child Justice Bill. In addition, the Discussion Paper suggested the inclusion of a provision permitting relaxation of the above rules in clearly defined and limited circumstances. This was to ensure that the provisions on confidentiality and privacy were not used in such as to prevent people or organisations from gaining access to information pertaining to children accused of offences, if such access would be in the interests of the children concerned or in the interests of the administration of the proposed child justice system.

Expungement of criminal records

13.5 Although it is clear that the privacy of the child's identity and the confidentiality of the criminal proceedings should be protected by law, any record of the conviction of a child for an offence committed whilst below the age of 18 years does not enjoy any special status in our present system. In Discussion Paper 79, the Commission presented a synopsis of the provisions of the Criminal Procedure Act and the relevant case law regarding when, after the expiry of a certain period of time, an accused person's previous convictions fall away. The present position is that under certain circumstances, previous convictions will fall away provided that a period of ten years has elapsed after the date of conviction of the relevant offence. In addition, the relevance of the Promotion of National Unity and Reconciliation Act 34 of 1995 to this area of debate was discussed in Discussion Paper 79.

13.6 A criminal record has serious implications. A convicted person is branded for ever as an untrustworthy member of society; a conviction compromises job opportunities permanently, and convicts are often the subject of suspicion and mistrust. These consequences can be especially serious for young persons who have to attempt to enter the job market with the liability of a criminal record for an offence committed whilst still a child. In the Discussion Paper it was argued that in order to mitigate these negative effects, and to give children a second chance, legislation should be enacted to allow them to resume their lives without the stigma of a conviction.

13.7 In Discussion Paper 79 the Commission proposed that in respect of certain specified convictions, the criminal record of child would never be able to be expunged. These were convictions for serious offences, which were specified as murder, rape, indecent assault involving the infliction of grievous bodily harm, robbery with aggravating circumstances, any offence referred to in section 13(f) of the Drugs and Drugs Trafficking Act, 1992 (Act No. 140 of 1992), if it is alleged that the value of the dependence producing substance in question is more than R50000, and any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armaments.

13.8 As far as the possible expungement of criminal records for all other offences was concerned, Discussion Paper 79 put forward two possible options for debate and comment. As the first option, the Commission proposed a simple model for the automatic expungement of the records of a child. All that would be required was the lapse of a period of five years following the expiry of the sentence, provided that during this time the person was not again convicted of any offence during the five-year period.

13.9 The second option sought to distinguish further between convictions for more serious offences and less serious offences. The basis for this distinction was whether a sentence involving a residential requirement had been imposed (ie a reform school or prison sentence). In those cases in which the sentence imposed

included a residential requirement, indicating a more serious offence, the record could be expunged ten years after the completion of the sentence, but only upon application to the proposed National Committee for Child Justice. A “clean” record was once again required in the stipulated period following expiry of the sentence. If the National Committee for Child Justice decided to grant the application, it would cause a notice of this decision to be transmitted to the South African Criminal Bureau, together with a direction that the said record be expunged. In cases where the child’s record reflected the imposition of a sentence which did not involve a residential element, expungement could occur five years after completion of the sentence, and it was proposed that this expungement would occur automatically.

13.10 In the Discussion Paper, the Commission set out the advantages of an automatic expungement procedure as opposed to expungement upon application by the person seeking to have the criminal record expunged. Not only is an automatic procedure more expeditious as compared to expungement by application, which would necessarily involve more administrative functions, but automatic expungement could prove to be more equitable. An application procedure leaves scope for widely varying decisions from case to case, and there is also the real possibility that many convicted persons will be unaware of the possibility of expungement, and will therefore not benefit by these provisions. There may also be cost implications for an applicant. By contrast, an application procedure does allow for screening of individual cases, rather than the blanket deletion of records by operation of a computer programme.

13.11 The Commission did not favour the option of “sealing” records of convictions obtained by children. In this instance, the record is not completely destroyed, but an application in specific instances may be made for access to the record. The Discussion Paper also raised the issue of the confidentiality of the record of the child during the period of its retention. The Commission argued that if the purpose of the retention of the record is to assist the court in the imposition of any subsequent sentence by providing a complete profile of the child, then all officials of the court, including presiding officers, prosecutors, probation officers, the police and the staff of residential care facilities, should have access to the record. No provision concerning access to records during the period of retention was proposed, however, as the provisions in the Criminal Procedure Act concerning proof of previous convictions are adequate.

Evaluation of comment and recommendations

Confidentiality

13.12 The Commission did not receive any comment on its proposals in respect of confidentiality, and retains its recommendations in this regard.

Expungement of criminal records where serious offences committed

13.13 There was no opposition to the Commission's recommendation that in certain circumstances the expungement of a child's record should not be possible. As argued in Discussion Paper 79, it is in the interests of both the child and society as a whole that criminal records be maintained reflecting a profile of the child who has been convicted of a serious or violent offence. Therefore, the Commission has retained the recommendation that expungement should not be possible in respect of certain serious offences.

Convictions which should be considered for expungement

13.14 The responses to the two options proposed in the Discussion Paper were varied. It appeared from the workshops that there was considerable support for the policy position of introducing legislation to provide for the expungement of the records of child offenders. The children consulted in the NICRO report, too, agreed that expungement should be possible, arguing that a criminal record can prevent travel and inhibit employment prospects. The Commission has therefore included provisions on expungement in Bill B.

13.15 Some of the respondents expressed their support for one of the options proposed in Discussion Paper 79. The Gauteng Provincial Government and Ms Cassim, of UNISA, expressed a preference for option two, which sought to provide different procedures for the expungement of a criminal record, depending upon whether a residential or non-residential sentence had been imposed. The consultation with children revealed that 53% of the respondents preferred option two. The responses of the children included comments that "they felt people had to prove themselves to the community first", and that "offences differ as to their seriousness". The written submission of Mr LM Muntingh, Director of Research, NICRO, was critical of the fact that option two gave substantial weight to the sentence that was imposed upon conviction for the offence, that is, whether it involved a sentence with a residential requirement or not. He stated that "it is not clear why the sentence bears on the expungement of the record" and argued that "the offence has substantially more bearing, and is a more consistent variable to apply when decisions are to be made". The Commission agrees that the nature of the *offence* for which the conviction was obtained must be an important factor in deciding on expungement, and that the nature of the *sentence* is not the ideal way in which to distinguish "expungeable" offences from those that do not merit expungement.

13.16 The Association of Law Societies of South Africa and the Inkatha Freedom Party supported option one, which provided for automatic expungement of all records, save convictions for serious specified offences, after a period of five years. The IFP argued that

this model for expungement will allow a child to re-enter society after completion of the sentence and will also enable the child to play a valuable role as a normal member of society without fear of prejudice resulting from a permanent criminal record.

13.17 Mr Muntingh was of the opinion that if the intention is to provide for the expungement of criminal records, then this should be effected in such a way as to maximise the benefits thereof to the young person, and to enable such person to enter adult life without the burden of youthful misdemeanours hanging over him or her. He also submitted that the more limitations and obstacles that are placed by legislation upon the process required for expungement of records, the more ineffectual and complicated the application of this apparent benefit will become in practice. The Department of Social Services, Provincial Administration, Western Cape, held the view that each case should be reviewed after five or seven years to consider the question of the expungement of the record. The submission proposed that the following factors should be taken into account in deciding whether expungement ought to be allowed: the commission of any further offence; the life-style of the child or adult concerned; co-operation during diversion or any community programme which formed part of the sentence; and the seriousness of the crime(s).

13.18 The Commission agrees that the process involved in obtaining an expungement should not be complicated or costly, and has for this reason chosen not to pursue the idea of an application to the National Committee for Child Justice, which was the model presented in option two of the Discussion Paper. Clearly, the envisaged system must be administratively possible, and an individual review of each case five to seven years after conviction would entail extensive additional hearings into the sorts of factors proposed by the Department of Social Services, Western Cape. The revised model proposed by the Commission, and elaborated in para 13.23 below, envisages that an order regarding expungement would be made at the time of the initial sentence being passed. This proposal overcomes the necessity of additional hearings on the matter some years after the event, and, in addition, allows for a simple administrative procedure after the conclusion of the "crime-free period". The conditions of expungement will be endorsed on the SAP 69 form that is sent to the South African Criminal Bureau, and the Bureau will attend administratively to the expungement as it would to the expungement of records of adults in terms of section 271A of the Criminal Procedure Act.

Period after which expungement can occur

13.19 Mr Muntingh did not approve of the proposal that a minimum period of five years must expire before expungement of criminal records can occur. He argued that the setting of **such a period negates** any positive effect that the expungement is intended to have, as those five years will frequently span the very period during

which the young adult is attempting to find gainful employment. He gave an example of a 16-year-old child who receives a two-year residential sentence and who, upon expiry of that sentence, may only apply for the expungement of the record ten years later. In effect, this would be at the age of 28 years. Mr Muntingh proposed that the legislative provision be amended to read as follows:

Save for the record of those offences mentioned in subsection (1), the record of a conviction and sentence imposed upon a child must be automatically expunged and the record sealed when the child turns 18 years of age unless a sentence is still in force, in which case the record will be expunged following the completion of the sentence.

13.20 The Department of Social Services, Western Cape, also recommended that the records of children should be preserved, but should not be allowed to be used or adduced in such a way as to influence any punishment received upon conviction as an adult. The Commission has considered the merits inherent in both this submission and that of Mr Muntingh, but is of the view that automatic expungement of criminal records upon attainment of the age of 18 years is not a proposition that can be supported. First, such an approach does not allow for the consideration of the nature of the harm caused by the commission of the offence. Second, it cannot be realistically suggested that a child who commits an offence a matter of weeks before his or her 18th birthday should enjoy the benefit of expungement without having passed the acid test of a “crime-free period” after conviction. Third, this proposal would be inequitable as regards the child who is convicted of an offence close to his or her 18th birthday, by comparison to the child who committed a similar offence whilst still very young, but who will then bear the stigma of a criminal record until reaching the age of 18 years. Further, it would be unjustifiable for a child who has offended repeatedly in his or her 17th year, and then offended again upon turning 18, to enjoy the benefit of being treated as a first offender. Finally, if, as argued in the submission from the Department of Social Services, Western Cape, the records of convictions of children are not intended to be used to influence punishment should the child be again convicted on becoming an adult, then there would appear to be little justification in retaining the record at all. The proposals that records be automatically expunged upon attainment of the age of 18 are therefore not accepted by the Commission. The Commission’s approach has also been influenced by the fact that the proposed model will give children many opportunities to be diverted. The structure of the system places emphasis on giving children “a chance” in the early phases, thus avoiding both trial and criminal records in a large number of first offences, and even subsequent offences if these are not of a serious nature.

13.21 Mr Muntingh further proposed that a clause be inserted to

the effect that where a child is convicted of an offence whilst still under the age of 18 years, he or she must be under no obligation to divulge this information to any person(s) unless ordered to do so by a court. The Commission does not support this proposal, however. There may be legitimate reasons for requiring disclosure of a criminal conviction in the broader interests of society, such as upon application for travel documents, a license to own a gun or to drive a vehicle. It is arguable that employers, too, have a right to know whether a prospective employee has a criminal record. The Commission is thus of the view that the expungement provisions as drafted in the proposed legislation grant sufficient protection to those seeking to escape the permanent taint of a criminal conviction recorded against them for offences committed during their youth.

13.22 In the light of all the submissions received, the difficulties related to the process for expungement referred to in para 13.18 above, and the rejection of the view that convictions and criminal records should be automatically expunged upon attainment of a certain age, the Commission proposes that the decision whether expungement of a conviction can take place needs to be made on the individual merits of each case, save where the child has been convicted of a serious offence referred to in Schedule 3 to Bill B. The Commission has identified the sentencing magistrate as the person best placed to make the determination in respect of the expungement, and consequently, the proposed legislation envisages a model in which the judicial officer sentencing the child will simultaneously make an order on expungement. The sentencing officer would have full knowledge of the offence, the child, the victim and the sentence, and in this way the complications and administrative burden that would be inherent in any later application procedure or individualised hearing on expungement (at the expiry of the proposed period after conviction for the original offence) can be avoided. Whilst this model could be regarded as placing too much discretion with the presiding officer, it must be remembered that in the new system the child justice magistrate would be a specially qualified and trained individual, sensitive to the rights of children. In addition, clause 115(3) of Bill B spells out that a decision by a sentencing officer not to allow expungement may be taken on appeal or review.

13.23 In the light of submissions received, the Commission has revised its opinion on prescribing a fixed period of time after which expungement may occur. It is conceded that the five-year period proposed in the Discussion Paper may occur during the very time at which a young person is seeking employment, and that the apparent benefit of expungement could then be lost. The Commission therefore favours an individualised response in respect of the setting of a period of time after which expungement can occur, and it has been provided that a determination most appropriate to the circumstances of that particular child and the offence would have to be made by the sentencing officer. The date may not be less than three months, and may not exceed five years, after imposition of sentence.

13.24 The advantage of the above approach is that, once the period of time has been fixed after which expungement may ensue, and if no further convictions are recorded during that period, the actual procedure for expungement can occur automatically at the South African Criminal Bureau. This, the Commission has established, should be able to occur with relative ease in practice.

13.25 The Commission is of the view that the approach to expungement adopted in this Report, as detailed above, gives effect to the best interests of the children who are convicted of offences committed during their youth, as well as the interests of society in ensuring that where recidivists are concerned, such records do not qualify for expungement. In addition, the proposed procedure achieves both the goal of ensuring an individualised approach to each case, as well as the goal of providing a simple administrative process for expungement.

2.10 The Commission's draft Bill provided for the following:

Expungement of records

115. (1) The record of any conviction and sentence imposed upon a child convicted of any offence included in Schedule 3 may not be expunged.

(2) In respect of offences other than those referred to in Schedule 3, the presiding officer in a court must, at the time of sentencing a child in respect of such offence and after consideration of -

- (a) the nature and circumstances of the offence; and
- (b) the child's personal circumstances or any other relevant factor,

make an order regarding the expungement of the record of the child's conviction and sentence and must note the reasons for the decision as to whether such record may be expunged or not.

(3) Where a presiding officer decides that a record referred to in subsection (2) may not be expunged, such decision is subject to review or appeal upon application by or on behalf of the child.

(4) If an order has been made in terms of subsection (2) that the record of the conviction and sentence of a child may be expunged, the officer presiding in the court must set a date upon which the record of conviction and sentence must be expunged, which date may not be less than three months and may not exceed five years from the date of the imposition of the sentence.

(5) Where a date for expungement of the record of the conviction and sentence has been set in terms of subsection (4), the presiding officer must impose, as a condition of expungement, a requirement that the child concerned must not be convicted of a similar or more serious offence between the date of imposition of the sentence and the date of expungement.

(6) The order contemplated in subsection (2) and the condition referred to in subsection (5) must be noted on the record of the conviction and sentence of the child and must be submitted to the South African Criminal Bureau as soon as is reasonably practicable, and that Bureau must, upon the date set for expungement, cause such record of conviction and sentence to be expunged: Provided that no other conviction of a similar or more serious offence has been recorded during the period of time referred to in subsection (5).

(7) Whenever a court makes a decision regarding the expungement of the record of a conviction and sentence of a child as contemplated in this section, the court must explain such decision and its reasons, as well as any conditions relating to expungement of such record, to the child.

2.11 Clause 115 of the Child Justice Bill therefore provided that any conviction and sentence imposed upon a child convicted of any offence listed in Schedule 3 may not be expunged. In respect of other offences, the clause provided that the presiding officer, at the time of sentencing the child, must also make an order regarding the expungement of the record of the child's conviction and sentence. The presiding officer must note reasons for the decision as to whether such record may be expunged, and if it is decided that the record should not be expunged, such decision was subject to review or appeal. In making a decision regarding expungement, the presiding officer must consider the nature and circumstances of the offence as well as the child's personal circumstances or any other relevant factor. Where the presiding officer makes a decision that the record should be expunged, he or she must set a date upon which the expungement must take place, which date may not be less than 3 months and not exceed 5 years from the date of sentence. The presiding officer must also impose, as a condition of expungement, a requirement that the child must not be convicted of a similar or more serious offence between the date of imposition of the sentence and the date of expungement. The order regarding expungement must be recorded on the record of conviction and sentence, and must be submitted to the South African Criminal Bureau. The Bureau must, upon the date set for expungement, cause

the record of conviction and sentence to be expunged, provided that no other conviction of a similar or more serious offence has been recorded since the date of sentence.

2.12 Before the adoption of the Child Justice Act 75 of 2008, the South African law did not provide for a separate criminal justice system for juveniles, and no provision was made for the expungement or sealing of juvenile criminal records. The applicable principles when sentencing juvenile offenders, were derived from case law and the Criminal Procedure Act. The younger the accused, the more important it was for the court to consider information about his or her background, education, level of intelligence, and mental capacity. The Criminal Procedure Act contained a number of provisions which clearly indicate that young age (“youth”) was to be regarded as a factor in mitigation of sentence. Youth usually was a factor against imprisonment.⁷ An 18-year-old Standard Ten pupil with no previous convictions was, without proper factual basis, not regarded as a “hooligan” with no respect for the law, and was where possible to be kept out of goal.⁸ Immaturity and vulnerability to bad influence by older persons would always constitute a strong mitigating factor, especially in the absence of cruel and unnecessary violence (where the charge was, for example, rape). There was no rule of practice requiring that a part or all of a custodial sentence should routinely be suspended, but direct imprisonment was only justified under highly unusual circumstances.⁹ In *S v Madingoane*¹⁰ it was held that the public interest was not served by requiring a young man still at school to undergo compulsory imprisonment. However, youth was not an absolute bar to the imposition of imprisonment.¹¹

2.13 The CPA contained a number of provisions dealing with alternative sentencing options which were appropriate for juveniles. Section 290 (1) (a), for example, provided that where the accused was under the age of 18 and had been convicted of any offence, the court may, instead of imposing punishment upon him or her, order that he or she be placed under supervision of a probation officer; or may order that he or she be placed in the custody

7 *S v Sakabula* 1975 (3) SA 784 (C); *S v Abrahams* 1980 (1) PH H 82 (C).

8 *S v Mbuyisa* 1988 (1) SA 89 (N).

9 *S v Ven 'n Ander* 1989 (1) SA 532 (A).

10 1992 (2) SACR 87 (W).

11 *S v Victor* 1970 (2) SA 427 (A).

of a suitable person designated by the court (section 290 (1) (b)); or may order that he or she be sent to a reform school (section 290(1)(d)); or where he or she was over 18 but under 21, instead of imposing punishment, ay order that he or she be placed under supervision of a probation officer or a correctional official or be sent to a reform school.

2.14 In terms of section 297(1)(a) (i), the imposition of sentence in respect of any offence other than one for which a minimum sentence is prescribed, could be postponed for a period of 5 years under any of one or more specified conditions. The conditions were related to compensation; the rendering of some specific benefit to the aggrieved person; the performance without remuneration of some service for the benefit of the community; or submission to instruction or treatment, or submission to supervision or control of a probation officer. Provision was also made for the unconditional release of a person in terms of section 297(1)(ii) coupled with an order to appear before the court if called upon before the expiration of the relevant period of suspension.

2.15 If a sentence had been imposed in terms of section 297 (1)(a)(i) and the court was satisfied that the person concerned had observed the conditions imposed under that paragraph, the court should discharge him or her without passing sentence. Such a discharge had the effect of an acquittal, provided that the conviction was to be recorded as a previous conviction (section 297(2)). Postponement of sentence was highly desirable where the accused was a juvenile and could thereby be kept out of prison.¹² The Child Justice Act 75 of 2008 (“the CJA”) was passed following the Commission’s investigation; the content of the relevant provisions will be discussed in the next section of this paper.

EXPUNGEMENT OF CRIMINAL RECORDS IN SOUTH AFRICAN CRIMINAL LAW

(a) The Promotion of National Unity and Reconciliation Act 34 of 1995

2.16 The issue of expunging criminal records is part of recent developments and changes to the law in South African. The topic was dealt with extensively in our law for the first time in the Promotion of National Unity and Reconciliation Act 34 of 1995. The Act, however, applied to offences committed with a political objective only, and it did not deal specifically

12 *S v Peters* 1974 (1) SA 368 (N).

with juveniles but included expungement for offences committed by adults; furthermore, its operation was not limited to convictions for criminal offences.

2.17 The Promotion of National Unity and Reconciliation Act 34 of 1995 was passed following the coming into operation of the new Constitution. The epilogue to the new Constitution provided as follows:

National Unity and Reconciliation

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

2.18 Pursuant to the provisions of the epilogue, Parliament enacted during 1995 what is referred to as the Truth and Reconciliation Act. Its proper name is the Promotion of National Unity and Reconciliation Act 34 of 1995.

2.19 The Act established a Truth and Reconciliation Commission (TRC). The objectives of that Commission are set out in section 3. Its main objective is to “promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past”. It is enjoined to pursue that objective by “establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights” committed during the period between 1 March 1960 and the “cut-off date”. For this reason, the TRC was obliged to have regard to “the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations”. The TRC was also required to facilitate the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective.

2.20 The TRC was further entrusted with the duty to establish and to make known “the fate or whereabouts of victims”; it was also tasked with “restoring the human and civil dignity of such victims” by affording them an opportunity to relate their own accounts of the violations, and by recommending “reparation measures” in respect of such violations. Finally, the TRC was also required to compile a comprehensive report in respect of its functions, including the recommendation of measures to prevent the violation of human rights.

2.21 Three committees were established for the purpose of achieving the objectives of the TRC. The first was the Committee on Human Rights Violations, which conducted enquiries pertaining to gross violations of human rights during the prescribed period; it had extensive powers to gather and receive evidence and information. The second committee was the Committee on Reparation and Rehabilitation, which was given similar powers to gather information and receive evidence for the ultimate purpose of recommending to the President suitable reparations for victims of gross violations of human rights. The third committee, which is of the most direct relevance to the present investigation, was the Committee on Amnesty. This committee was required to consist of five persons, among which the chairperson had to be a judge. The Committee on Amnesty was given elaborate powers to consider applications for amnesty. The Committee had the power to grant amnesty in respect of any act, omission or offence to which the particular application for amnesty related, as long as the applicant concerned had made a full disclosure of all relevant facts; and as long as the relevant act, omission or offence was associated with a political objective committed in the course of the conflicts of the past, in accordance with the provisions of

sections 20(2) and 20(3) of the Act. These sub-sections contained very detailed provisions pertaining to what may properly be considered to be acts “associated with a political objective”. Sub-section (3) of section 20 provides as follows:

Whether a particular act, omission or offence contemplated in subsection (2) is an act associated with a political objective, shall be decided with reference to the following criteria:

- (a) The motive of the person who committed the act, omission or offence;
- (b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;
- (c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;
- (d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;
- (e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and
- (f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted-
 - (i) for personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or
 - (ii) out of personal malice, ill-will or spite, directed against the victim of the acts committed.

2.22 After making provision for certain ancillary matters, section 20(7) provides as

follows:

- (7) (a) No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.
- a. (b) Where amnesty is granted to any person in respect of any act, omission or offence, such amnesty shall have no influence upon the criminal liability of any other person contingent upon the liability of the first-mentioned person.
- (c) No person, organisation or state shall be civilly or vicariously liable for an act, omission or offence committed between 1 March 1960 and the cut-off date by a person who is deceased, unless amnesty could not have been granted in terms of this Act in respect of such an act, omission or offence.

2.23 Section 20(7) is followed by sections 20(8), 20(9) and 20(10), which deal expressly with both the formal and procedural consequences of an amnesty in the following terms:

- (8) If any person-
 - (a) has been charged with and is standing trial in respect of an offence constituted by the act or omission in respect of which amnesty is granted in terms of this section; or
 - (b) has been convicted of, and is awaiting the passing of sentence in respect of, or is in custody for the purpose of serving a sentence imposed in respect of, an offence constituted by the act or omission in respect of which amnesty is so granted,

the criminal proceedings shall forthwith upon publication of the proclamation referred to in subsection (6) become void or the sentence so imposed shall upon such publication lapse and the person so in custody shall forthwith be released.

- (9) If any person has been granted amnesty in respect of any act or omission which formed the ground of a civil judgment which was delivered at any time before the granting of the amnesty, the

publication of the proclamation in terms of subsection (6) shall not affect the operation of the judgment in so far as it applies to that person.

(10) Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public.

2.24 What is clear from section 20(7), read with sections 20(8), (9) and (10), is that once a person has been granted amnesty in respect of an act, omission or offence,

- (a) the offender can no longer be held “criminally liable” for such offence and no prosecution in respect thereof can be maintained against him or her;
- (b) such an offender can also no longer be held civilly liable personally for any damages sustained by the victim and no such civil proceedings can successfully be pursued against him or her;
- (c) if the wrongdoer is an employee of the State, the State is equally discharged from any civil liability in respect of any act or omission of such an employee, even if the relevant act or omission was effected during the course and within the scope of his or her employment; and
- (d) other bodies, organisations or persons are also exempt from any liability for any of the acts or omissions of a wrongdoer which would ordinarily have arisen in consequence of their vicarious liability for such acts or omissions.

2.25 In *Azapo and Others v the President of the Republic of South Africa and Others*,¹³ the applicants sought to attack the constitutionality of section 20(7) on the grounds that its consequences are not authorised by the Constitution. They alleged that various agents of

13 1996 (8) BCLR 1015 (CC).

the State, acting within the scope and in the course of their employment, unlawfully murdered and maimed leading activists during the conflict against the racial policies of the previous administration; and that the applicants had a clear right to insist that such wrongdoers should properly be prosecuted and punished, that they should be ordered by the ordinary courts of the land to pay adequate civil compensation to the victims or dependants of the victims, and further that the State should make good to such victims or dependants the serious losses which they suffered as a consequence of the criminal and delictual acts of the employees of the State. In support of that attack, it was contended that section 20(7) was inconsistent with section 22 of the Constitution, which provides that every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum. The Constitutional Court, however, rejected this contention.

2.26 The Court upheld the constitutionality of the section. It acknowledged that the section limited the applicants' right in terms of section 22 of the interim Constitution to "have justiciable disputes settled by a court of law, or ... other independent or impartial forum". However, in terms of s 33(2) of the Constitution, violations of rights are permissible either if sanctioned by the Constitution or if justified in terms of s 33(1) of the Constitution ("the limitation section"). The Court held that the epilogue to the Constitution (titled "National Unity and Reconciliation") sanctioned the limitation on the right of access to court.

2.27 The Court held that amnesty for criminal liability was permitted by the epilogue, because without such amnesty there would be no incentive for offenders to disclose the truth about past atrocities. The truth might unfold with such amnesty, assisting in the process of reconciliation and reconstruction. Further, the Court noted that such amnesty was a crucial component of the negotiated settlement itself, without which the Constitution would not have come into being. It found that the amnesty provisions were not inconsistent with international norms, and did not breach any of the country's obligations in terms of public international law instruments.

2.28 The Court held that amnesty for civil liability was also permitted by the epilogue, again because the absence of such amnesty would constitute a disincentive for the disclosure of the truth. The Court held that the epilogue permitted the granting of amnesty to the State for any civil liability. The Court said that Parliament was entitled to adopt a wide

concept of reparations. This would allow the State to decide on proper reparations for victims of past abuses, having regard to the resources of the State and competing demands thereon. Further, Parliament was authorised to provide for individualised and nuanced reparations that would take into account the claims of all the victims, rather than preserving state liability for provable and unprescribed delictual claims only.

2.29 The Court held that the epilogue authorised the granting of amnesty to bodies, organisations or other persons that would otherwise have been vicariously liable for acts committed in the past. The truth might not be told if these organisations or individuals were not given amnesty. Indeed, according to the Court, the Constitution itself might not have been negotiated had this amnesty not been provided for.

(b) The new Child Justice Act 75 of 2008

2.30 Prior to 1 April 2010, children who committed crime were dealt with in terms of the CPA – which also deals with adults who commit crime. The aim of the CJA is to set up a child justice system for children who come into conflict with the law. This means that children under the age of 18, who are suspected to have committed crime, will not be dealt with in terms of the normal criminal procedure which is used for adults but rather the child justice process will be followed. The CJA seeks to ensure that child justice matters are managed in a rights-based manner, so that children suspected of committing crime are helped to turn their lives around and become productive members of society; this can be achieved by engaging with the child in restorative justice measures, diversions and other alternative sentencing options.

2.31 Section 87 of the CJA provides for the expungement of records of certain convictions and diversion orders in the following terms:

87 Expungement of records of certain convictions and diversion orders

- (1) (a) Where a court has convicted a child of an offence referred to in Schedule 1 or 2, the conviction and sentence in question fall away as a previous conviction and the criminal record of that child must, subject to subsections (2), (3) and (5), on the written application of the child, his or her parent, appropriate adult or

guardian (hereafter referred to as the applicant), in the prescribed form, be expunged after a period of-

- (i) five years has elapsed after the date of conviction in the case of an offence referred to in Schedule 1; or
- (ii) 10 years has elapsed after the date of conviction in the case of an offence referred to in Schedule 2,

unless during that period the child is convicted of a similar or more serious offence.

(b) In the case of a dispute or uncertainty as to whether another offence of which a child is convicted during the period is similar to or more serious than the offence in respect of which a record exists, the opinion of the Cabinet member responsible for the administration of justice prevails.

- (2) The Director-General: Justice and Constitutional Development must, on receipt of the written application of an applicant referred to in subsection (1), issue a prescribed certificate of expungement, directing that the conviction and sentence of the child be expunged, if the Director-General is satisfied that the child complies with the criteria set out in subsection (1).
- (3) Notwithstanding the provisions of subsection (1), the Cabinet member responsible for the administration of justice may, on receipt of an applicant's written application in the prescribed form, issue a prescribed certificate of expungement, directing that the conviction and sentence of the child be expunged, if he or she is satisfied that exceptional circumstances exist which justify expungement, where, in the case of the child-
 - (a) the period of five years, referred to in subsection (1) (a) (i); or
 - (b) the period of 10 years, referred to in subsection (1) (a) (ii), has not yet elapsed, if the Cabinet member responsible for the administration of justice is satisfied that the child otherwise complies with the criteria set out in subsection (1).
- (4) An applicant to whom a certificate of expungement has been issued as provided for in subsection (2) or (3) must, in the prescribed manner, submit the certificate to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with subsection (5).
- (5) (a) The head of the Criminal Record Centre of the South African Police Service or a senior person or persons at the rank of Director or above, employed at the Centre, who has or have been authorised, in writing, by the head of the Centre to do so, must expunge the criminal record of a child if he or she is furnished by the applicant with a certificate of expungement as provided for in subsection (2) or (3).

(b) The head of the Criminal Record Centre of the South African Police Service must, on the written request of an applicant, in writing, confirm that the criminal record of the child has been expunged.

- (c) Any person who-
- (i) without the authority of a certificate of expungement as provided for in this section; or
 - (ii) intentionally or in a grossly negligent manner,

expunges the criminal record of any child, is guilty of an offence and is, if convicted, liable to a fine or to a sentence of imprisonment for a period not exceeding 10 years or to both a fine and the imprisonment.

- (6) The Director-General: Social Development must, in the prescribed manner, expunge the record of any diversion order made in respect of a child in terms of this Act on the date on which that child turns 21 years of age, unless the child has been convicted of any other offence before that date or has failed to comply with the diversion order in question.

2.32 Section 87 of the Act must be read with Schedules 1, 2 and 3 of the Act. These Schedules read as follows:

Schedule 1

...

- 1 Theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen or theft by false pretences, where the amount involved does not exceed R2 500.
- 2 Fraud, extortion, forgery and uttering or an offence referred to in the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004), where the amount involved does not exceed R1 500.
- 3 Malicious injury to property, where the amount involved does not exceed R1 500.
- 4 Common assault where grievous bodily harm has not been inflicted.
- 5 Perjury.
- 6 Contempt of court.
- 7 Blasphemy.
- 8 Compounding.
- 9 *Crimen iniuria*.

- 10 Defamation.
- 11 Trespass.
- 12 Public Indecency.

- 13 Engaging sexual services of persons 18 years or older, referred to in section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 2007.
- 14 Bestiality, referred to in section 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.
- 15 Acts of consensual sexual penetration with certain children (statutory rape) and acts of consensual sexual violation with certain children (statutory sexual assault), referred to in and subject to sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.
- 16 Any offence under any law relating to the illicit possession of dependence producing drugs, other than any offence referred to in Item 17 of this Schedule, where the quantity involved does not exceed R500 in value.
- 17 Any other statutory offence where the maximum penalty determined by that statute is imprisonment for a period of no longer than three months or a fine for that period, calculated in accordance with the Adjustment of Fines Act, 1991 (Act 101 of 1991).
- 18 Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

Schedule 2

...

- 1 Theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen, or theft by false pretences, where the amount involved exceeds R2 500.
- 2 Fraud, extortion, forgery and uttering or an offence referred to in the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004), where the amount involved exceeds R1 500.
- 3 Robbery, other than robbery with aggravating circumstances.
- 4 Malicious injury to property, where the amount involved exceeds R1 500.
- 5 Assault, involving the infliction of grievous bodily harm.
- 6 Public violence.

- 7 Culpable homicide.
- 8 Arson.
- 9 Housebreaking, whether under the common law or a statutory provision, with the intent to commit an offence.
- 10 Administering poisonous or noxious substance.
- 11 Crimen expositionis infantis.
- 12 Abduction.
- 13 Sexual assault, compelled sexual assault or compelled self-sexual assault referred to in sections 5, 6 and 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007), respectively, where grievous bodily harm has not been inflicted.
- 14 Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, referred to in section 8 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.
- 15 Exposure or display of or causing exposure or display of child pornography or pornography as referred to in sections 10 or 19 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.
- 16 Incest and sexual acts with a corpse, referred to in sections 12 and 14 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.
- 17 Exposure or display of or causing exposure or display of genital organs, anus or female breasts to any person ('flashing'), referred to in sections 9 or 22 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.
- 18 Violating a dead body or grave.
- 19 Defeating or obstructing the course of justice.
- 20 Any offence referred to in section 1 or 1A of the Intimidation Act, 1982 (Act 72 of 1982).
- 21 Any offence relating to criminal gang activities referred to in Chapter 4 of the Prevention of Organised Crime Act, 1998 (Act 121 of 1998).
- 22 Any contravention of section 2 of the Animals Protection Act, 1962 (Act 71 of 1962).
- 23 Any offence under any law relating to the illicit possession of dependence producing drugs, other than any offence referred to in Item 24 of this Schedule, where the quantity involved exceeds R500 but does not exceed R5 000 in value.
- 24 Any other statutory offence where the maximum penalty determined by that statute is imprisonment for a period

exceeding three months but less than five years or a fine for that period, calculated in accordance with the Adjustment of Fines Act, 1991 (Act 101 of 1991).

- 25 Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule

Schedule 3

...

- 1 Treason.
- 2 Sedition.
- 3 Murder.
- 4 Extortion, where there are aggravating circumstances present.
- 5 Kidnapping.
- 6 Robbery-
 - (a) where there are aggravating circumstances; or
 - (b) involving the taking of a motor vehicle.
- 7 Rape or compelled rape referred to in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007), respectively.
- 8 Sexual assault, compelled sexual assault or compelled self-sexual assault referred to in sections 5, 6 and 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, involving the infliction of grievous bodily harm.
- 9 Sexual exploitation of children, sexual grooming of children and using children for or benefiting from child pornography, referred to in sections 17, 18 and 20 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.
- 10 Exposure or display of or causing exposure or display of child pornography or pornography to children referred to in section 19 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, if that exposure or display is intended to facilitate or promote-
 - (a) the sexual exploitation or sexual grooming of a child referred to in section 17 or 18 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or
 - (b) the use of a child for purposes of child pornography or in order to benefit in any manner from child pornography, as provided for in section 20 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

- 11 Compelling or causing children to witness sexual offences, sexual acts or self-masturbation referred to in section 21 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.
- 12 Sexual exploitation of persons who are mentally disabled, sexual grooming of persons who are mentally disabled, exposure or display of or causing exposure or display of child pornography or pornography to persons who are mentally disabled or using persons who are mentally disabled for pornographic purposes or benefiting therefrom, referred to in sections 23, 24, 25, and 26 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively
- 13 Trafficking in persons for sexual purposes referred to in section 71(1) and involvement in trafficking in persons for sexual purposes referred to in section 71 (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.
- 14 Any offence referred to in Parts 1, 2 and 3 of Chapter 2 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act 33 of 2004).
- 15 Any offence relating to-
 - (a) racketeering activities referred to in Chapter 2; or
 - (b) the proceeds of unlawful activities referred to in Chapter 3,
 of the Prevention of Organised Crime Act, 1998 (Act 121 of 1998).
- 16 The crimes of genocide, crimes against humanity and war crimes referred to in the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act 27 of 2002).
- 17 Any offence under any law relating to-
 - (a) the dealing in or smuggling of ammunition, firearms, explosives or armament;
 - (b) the possession of firearms, explosives or armament.
- 18 Any offence referred to in section 13 (f) of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992).
- 19 Any offence of a serious nature if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise, acting in the execution or furtherance of a common purpose or conspiracy.
- 20 Any offence under any law relating to the illicit possession of dependence producing drugs, other than an offence referred to in Item 21 of this Schedule, where the quantity involved exceeds R5 000 in value.

- 21 Any other statutory offence where the maximum penalty determined by that statute is imprisonment for a period exceeding five years or a fine for that period, calculated in accordance with the Adjustment of Fines Act, 1991 (Act 101 of 1991).
- 22 Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

2.33 The Regulations made under the Act further regulate the expungement procedure.

The relevant regulations read as follows:

49 Application for expungement of conviction and sentence

- (1) An application in terms of-
 - (a) section 87(1)(a) of the Act to the Director-General: Justice and Constitutional Development; or
 - (b) section 87(3) of the Act to the Cabinet member responsible for the administration of justice, for the expungement of a conviction and sentence must correspond substantially with Form 13 of the Annexure.
- (2)
 - (a) Form 13 must be available at every magistrate's office and on the website of the Department of Justice and Constitutional Development.
 - (b) Copies of section 87 and Schedules 1, 2 and 3 of the Act must be made available to every applicant who requests an application form.
- (3) The applicant must attach to Form 13 a certified copy of his or her criminal record obtained from the Criminal Record Centre of the South African Police Service, indicating the date of the conviction and the sentence, and the type of offence convicted of.
- (4) The applicant must submit a completed Form 13 to the Department of Justice and Constitutional Development-
 - (a) by post to Private Bag X 81, Pretoria, 0001; or
 - (b) by handing it in at the National Office of the Department of Justice and Constitutional Development.

50 Consideration of application for expungement by Director-General

- (1) An official of the Department of Justice and Constitutional Development who has been designated to deal with applications relating to the expungement of convictions and sentences in terms of the Act may, if the information in Form 13

is inadequate or not clear, request further information from the applicant or any organ of state.

- (2) The Cabinet member responsible for the administration of justice must express his or her opinion in terms of section 87(1)(b) of the Act in writing and record his or her reasons for the opinion.
- (3) The Director-General: Justice and Constitutional Development must, if he or she intends to refuse the application on the basis that the application does not meet the requirements of section 87(2) of the Act, notify the applicant in writing of-
 - (a) his or her intention; and
 - (b) the requirements which have not been met and why not, and specify a date on or before which the applicant may respond to the Director-General on the information submitted.
- (4) The Director-General must, after expiry of the date specified in the notice, consider the response by the applicant, if any, and make a decision regarding the application for expungement.
- (5) The Director-General must, if an application has been refused, within 15 working days thereafter inform the applicant in writing-
 - (a) of the decision;
 - (b) of the reasons for the refusal of the application;
 - (c) of the remedies available to the applicant in terms of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000).
- (6) The Director-General must, if he or she is satisfied that the child complies with the criteria set out in section 87(1) of the Act, issue a certificate of expungement which corresponds substantially with Form 14 of the Annexure.
- (7) An applicant to whom a certificate of expungement has been issued in terms of section 87(2) of the Act must hand, or submit by registered post, the certificate to the Head of the Criminal Record Centre of the South African Police Service.

51 Consideration of application for expungement by Cabinet member

- (1) Regulation 50(1), (4), (5) and (7) applies in respect of the consideration of an application by the Cabinet member responsible for the administration of justice in terms of this regulation, with the necessary changes required by the context.
- (2) The Cabinet member responsible for the administration of justice must, if he or she intends to refuse the application on the basis that there are no exceptional circumstances justifying the expungement of the conviction and sentence as referred to in section 87(3) of the Act or that the child

does not otherwise comply with the criteria in section 87(1) of the Act, notify the applicant in writing of-

- (a) his or her intention; and
 - (b) the requirements which have not been met and why not, and specify a date on or before which the applicant may respond to the Cabinet member on the information submitted.
- (3) The Cabinet member responsible for the administration of justice must, if he or she is satisfied that the child complies with the criteria set out in section 87(1) and (3) of the Act, issue a certificate of expungement which corresponds substantially with Form 15 of the Annexure.

(c) The Criminal Procedure Amendment Act 65 of 2008

2.34 The Criminal Procedure Amendment Act 65 of 2008 (“the CP Amendment Act”) amended the CPA, and provides for the expungement of certain criminal records. For purposes of the discussion, the new provisions are quoted here in full. Section 271A was substituted by section 2 of the CP Amendment Act and provides as follows:

271A Certain convictions fall away as previous convictions after expiration of 10 years

Where a court has convicted a person of-

- (a) any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed but-
 - (i) has postponed the passing of sentence in terms of section 297 (1) (a) and has discharged that person in terms of section 297 (2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297 (3); or
 - (ii) has discharged that person with a caution or reprimand in terms of section 297 (1) (c); or
- (b) any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine, may be imposed,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed.

271B Expungement of certain criminal records

- (1) (a) Where a court has imposed any of the following sentences on a person convicted of an offence, the criminal record of that person, containing the conviction and sentence in question, must, subject to

paragraph (b) and subsection (2) and section 271D, on the person's written application, be expunged after a period of 10 years has elapsed after the date of conviction for that offence, unless during that period the person in question has been convicted of an offence and has been sentenced to a period of imprisonment without the option of a fine:

- (i) A sentence postponing the passing of sentence in terms of section 297 (1) (a) where that person was discharged in terms of section 297 (2), without the passing of sentence, or where that person was not called upon to appear before the court in terms of section 297 (3);
 - (ii) a sentence discharging that person with a caution or reprimand in terms of section 297 (1) (c);
 - (iii) a sentence in the form of a fine only, not exceeding R20 000;
 - (iv) a sentence of corporal punishment before corporal punishment was declared to be unconstitutional as a sentencing option;
 - (v) any sentence of imprisonment with the option of a fine, not exceeding R20 000;
 - (vi) any sentence of imprisonment which was suspended wholly;
 - (vii) a sentence of correctional supervision, referred to in section 276 (1) (h) or (i); or
 - (viii) a sentence of periodical imprisonment, referred to in section 276 (1) (c).
- (b) A person-
- (i) who has been convicted of a sexual offence against a child or a person who is mentally disabled and whose name has been included in the National Register for Sex Offenders, as provided for in section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007); or
 - (ii) whose name has been included in the National Child Protection Register as a result of a conviction for an offence, as provided for in section 120 (1) (b) of the Children's Act, 2005 (Act 38 of 2005),

does not qualify to have the criminal record in question expunged in terms of this section, unless his or her name has been removed from the National Register of Sex Offenders, as provided for in section 51 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, or section 128 of the Children's Act, 2005, as the case may be.

(2) The Director-General: Justice and Constitutional Development must, on receipt of the written application of a person referred to in subsection (1), issue a certificate of expungement, directing that the criminal record of that person be expunged, if the Director-General is satisfied that the person applying for expungement complies with the criteria set out in subsection (1).

(3) The Director-General: Justice and Constitutional Development must submit every certificate of expungement that has been issued as provided for in subsection (2) to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with section 271D.

271C Expungement of certain criminal records under legislation enacted before the Constitution of the Republic of South Africa, 1993, took effect

(1) Where a court has convicted a person of any of the following offences, the criminal record, containing the conviction and sentence in question, of that person in respect of that offence must be expunged automatically by the Criminal Record Centre of the South African Police Service, as provided for in section 271D:

- (a) A contravention of section 1 of the Black Land Act, 1913 (Act 27 of 1913);
- (b) a contravention of section 12 of the Development Trust and Land Act, 1936 (Act 18 of 1936);
- (c) a contravention of section 5 (1), read with section 5 (2), or section 6, read with section 6 (2), of the Blacks (Urban Areas) Consolidation Act, 1945 (Act 25 of 1945);
- (d) a contravention of section 8 (1), read with section 8 (3), of the Coloured Persons Settlement Act, 1946 (Act 7 of 1946);
- (e) a contravention of section 2 or 4 of the Prohibition of Mixed Marriages Act, 1949 (Act 55 of 1949);
- (f) a contravention of section 11 of the Internal Security Act, 1950 (Act 44 of 1950);
- (g) a contravention of section 10 (6) and (7), 11 (4), 14, 15, 16, 20 (1), 28 (7), 29 (1) or 30 of the Black Building Workers Act, 1951 (Act 27 of 1951);
- (h) a contravention of section 15 of the Blacks (Abolition of Passes and Co-ordination of Documents) Act, 1952 (Act 67 of 1952);
- (i) a contravention of section 2 of the Criminal Law Amendment Act, 1953 (Act 8 of 1953);
- (j) a contravention of section 2 (2) of the Reservation of Separate Amenities Act, 1953 (Act 49 of 1953);
- (k) a contravention of section 16 of the Sexual Offences Act, 1957 (Act 23 of 1957);
- (l) a contravention of section 46 of the Group Areas Act, 1966 (Act 36 of 1966);
- (m) a contravention of section 2 or 3 of the Terrorism Act, 1967 (Act 83 of 1967); or
- (n) a contravention of section 2 read with section 4 (1), of the Prohibition of Foreign Financing of Political Parties Act, 1968 (Act 51 of 1968).

(2) (a) Where a court has convicted a person of contravening any provision of-

- (i) an Act of Parliament or subordinate legislation made thereunder;
- (ii) an ordinance of a provincial council;
- (iii) municipal by-law;
- (iv) a proclamation;
- (v) a decree; or
- (vi) any other enactment having the force of law, other than those provisions referred to in subsection (1), which were enacted in

the former Republic of South Africa, the former Republic of Transkei, Bophuthatswana, Ciskei or Venda, or in any former self-governing territory, as provided for in the Self-governing Territories Constitution Act, 1971 (Act 21 of 1971), before the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), took effect, which created offences that were based on race or which created offences, which would not have been considered to be offences in an open and democratic society, based on human dignity, equality and freedom, under the constitutional dispensation after 27 April 1994, the criminal record, containing the conviction and sentence in question, of that person must, on the person's written application, subject to subsection (3) and section 271D, be expunged.

- (b) Where the criminal record of a person referred to in subsection (1) has not been expunged automatically as provided for in that subsection, the criminal record of that person must, on his or her written application, subject to subsection (3) and section 271D, be expunged.

(3) The Director-General: Justice and Constitutional Development must, on receipt of the written application of a person referred to in subsection (2) (a) or (b), issue a certificate of expungement, directing that the criminal record of the person be expunged, if the Director-General is satisfied that the person applying for expungement complies with the criteria set out in subsection (1) or subsection (2) (a), as the case may be.

(4) The Director-General: Justice and Constitutional Development must submit every certificate of expungement that has been issued as provided for in subsection (3) or (5) (b) to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with section 271D.

- (5) (a) In the case of a dispute or any uncertainty as to whether an offence is an offence as referred to in subsection (1) or (2) (a) or not, the matter must be referred to the Minister for a decision.
- (b) If the Minister decides that the offence is an offence as referred to in subsection (1) or (2) (a), he or she must issue a certificate of expungement, directing that the criminal record of the person be expunged

271D Expungement of certain criminal records by Criminal Record Centre

(1) The head of the Criminal Record Centre of the South African Police Service or a senior person or persons at the rank of Director or above, employed at the Centre, who has or have been authorised, in writing, by the head of the Centre to do so, must expunge the criminal record of a person if-

- (i) he or she is furnished with a certificate of expungement by the Director-General: Justice and Constitutional Development as provided for in section 271B (2) or section 271C (3) or by the Minister as provided for in section 271C (5); or

- (ii) that person qualifies for the automatic expungement of his or her criminal record as provided for in section 271C (1).
- (2) The head of the Criminal Record Centre of the South African Police Service must, on the written request of a person who-
- (a) has applied to have his or her criminal record expunged in terms of section 271B or section 271C (2); or
 - (b) qualifies to have his or her criminal record expunged automatically in terms of section 271C (1),

in writing, confirm that the criminal record in question has been expunged.

- (3) Any person who-
- (a) without the authority of a certificate of expungement as provided for in section 271B, 271C or this section; and
 - (b) intentionally or in a grossly negligent manner, expunges the criminal record of any person or confirms that a criminal record has been expunged as provided for in subsection (2), is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and that imprisonment.

IDENTIFYING THE PROBLEMS

2.35 It is clear from the outline given above that the principle of expungement of criminal records has been sanctioned South Africa in various pieces of legislation. In the first instance, it was sanctioned in the Promotion of National Unity and Reconciliation Act, which introduced the principle of amnesty in South African law – at least with regard to offences associated with a political objective that were committed during the historical political conflicts. The Act included amnesty in respect of offences as well as other acts or omissions that had been committed with a political objective. Such amnesty was granted in order to advance the process of national reconciliation and reconstruction. The Act provided that for any person who has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, **any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place.** To this end and under the Interim Constitution, Parliament adopted a law and determined firm cut-off dates to be applied to the process, with the period in question

commencing on 8 October 1990 and ending on 6 December 1993. The Act provided for the mechanisms, criteria and procedures, including tribunals if any, through which such amnesty shall be dealt with at any time after the law had been passed.

2.36 Since then the CJA has been passed, which introduced the principle of expungement of records in respect of juvenile offenders. The CP Amendment Act was also passed, which introduced the principle of expungement of criminal records in respect of crimes committed in terms of legislation that applied under the old apartheid system, as well as in respect of certain minor crimes. It is this latter amendment to the CPA which resulted in the referral of the investigation into the expungement of certain criminal records to the Commission.

2.37 In addition to amnesty in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995, another option for the clearance of criminal records was available in terms of the 1983 and 1996 Constitutions through a presidential pardon.

2.38 The Criminal Procedure Amendment Bill as introduced into Parliament dealt with the expungement of certain criminal records. It proposed the creation of two categories of sentences which would qualify for expungement under certain circumstances: the first category required a period of 5 years to have lapsed since the conviction, and the second required a period of 10 years to have lapsed after the conviction. The provisions in the Bill dealing with expungement led to extensive debates in the Committee. Upon finalisation of the Bill, the Committee reported that in the course of its deliberations it had become clear that the matter was complex. The achievement of a careful balance that safeguards the public against criminals, while recognising that the consequences of possessing a criminal record can cause undue hardship for an individual, is difficult.

2.39 The Committee, therefore, was of the view that further consideration was needed of the system of keeping criminal records and the procedures to be followed for their expungement. The Committee also felt that given the complexity of the matter, further consultation with stakeholders and the public was required. The Committee recognised, however, that in the meanwhile there was an urgent need for a system of expungement of criminal records for minor crimes after some years have elapsed. They felt that, in view of the above concerns, this system should be of a limited nature until further research could be conducted and consideration given to all the relevant issues. The Committee therefore

requested that the Minister should conduct further research on the different systems followed in the keeping of criminal records and their expungement. This research should draw, among others, on international best practice; in addition, it would require wider consultation with relevant stakeholders and the public; and the Minister should report the findings of such research to Parliament. The Minister responded to these issues by requesting the Commission to include a new investigation in its programme and to report back to him.

2.40 The Committee, in finalising the Bill, retained the provisions dealing with categories of sentences which would qualify for expungement after a period of 10 years. However, the Committee rejected the category relating to expungement after 5 years. The Committee's request to the Minister was, as a result, referred to the SALRC. Any investigation of this magnitude (as required by the Committee) would ordinarily be undertaken by the SALRC.

2.41 Prior to the enactment of the CP Amendment Act of 2008, amnesty was available in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995. This provided for the negation of the commission of criminal acts that were committed with political motives. In summary, the criteria used in the CP Amendment Act to qualify for an application for expungement is in the first instance the commission of apartheid-era offences, which introduced an automatic expungement; and secondly the listing of minor offences which qualify for expungement in terms of the sentence imposed and a lapse of 10 years since the last conviction, through an application process. This option introduces expungement in respect of an open list of offences which is qualified only by the sentence imposed and the time lapse from the date of conviction. In terms of the CJA, the criteria to qualify for an expungement includes a list of offences (where some of the offences are qualified by the monetary value involved in the offence where such value can be determined). Examples are theft, whether under the common law or a statutory provision; receiving stolen property, knowing it to have been stolen; or theft by false pretences, where the amount involved does not exceed R2 500; fraud, extortion, forgery and uttering or an offence referred to in the Prevention and Combating of Corrupt Activities Act 12 of 2004, where the amount involved does not exceed R1 500; and a drug-related offence, where the value involved is not more than R500. Further qualifying criteria are the **age of the offender and a prescribed time lapse of 5 or 10 years.**

2.42 The question which arises in the present investigation is whether legislation which

makes provision for the concept of expungement of criminal records should be available to particular offenders only. Examples would be juvenile offenders who have been convicted of the offences listed in the CJA; adult offenders who have committed offences which were crimes in the apartheid era; and adult offenders who have committed less serious crimes and who have, upon conviction, been sentenced to the penalties listed in the Act. The question therefore, in the first place, is whether or not expungement should be broadened to include offences other than those dealt with in the CP Amendment Act, those listed in the CJA, and those recognised for amnesty in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995. Secondly, the referral to the Commission for investigation includes an evaluation and consideration of the procedures that should be in place in the legislation dealing with expungement.

2.43 The Commission was made aware of problems experienced with the current legislative framework dealing with the expungement of criminal records. The Chief Directorate: Legal Administration advised the Commission that during the process of drafting the Regulations and implementing the expungement procedure, certain shortcomings in the CPA were identified. Some of the shortcomings were intended to be addressed in a Judicial Matters Amendment Bill, 2013. This Bill was subsequently passed by Parliament and reference will be made to its content in the course of the investigation. Further comments regarding the shortcomings in respect of sections 271B to D of the CPA were referred to the SALRC by the Department of Justice and Constitutional Development in the following terms:

3.1 The ... shortcomings which have been identified are as follows:

3.1.1 The opinion is held that the sentence "refer to a reform school" in terms of section 290 of the CPA should be included as a sentence that can be expunged in terms of section 271B of the CPA. During July 2009 this opinion was communicated to you by way of an electronic mail of which a copy is attached for easy reference. The content of the above-mentioned mail sets out the reasons why the opinion is held that this sentence should be included in section 271B as a sentence that can be expunged. It is not clear why this amendment was not included in the Judicial Matters Amendment Bill, 2010.

3.1.2 In terms of sections 271B(2) and 271C(3) of the CPA, the Director-General is responsible to issue an expungement certificate directing that the criminal record of the applicant be expunged. Since sections 271B to D came into operation during 2009, a huge amount of applications for criminal records to be expunged in terms of section 271B of the CPA was received. This created a mammoth administrative task for the Director-General. She has indicated that she wishes the relevant sections in

the CPA to be amended to make provision for a delegation of the power of the Director-General to issue certificates of expungement.

3.1.3 During discussions with the Director-General she indicated that she is of the opinion that the 10 year period that has to lapse before a criminal record can be expunged should be reconsidered and that the possibility that certain records can be expunged after a period of 5 years has lapsed, should be investigated. In this regard, your attention is directed to the fact that the Minister has tasked the South African Law Reform Commission (SALRC) to further investigate the expungement of criminal records. Kindly look into this matter also.

2.44 The matters identified by the Department of Justice and Constitutional Development regarding the expungement of criminal records, which were forwarded to the SALRC and included in the Judicial Matters Amendment Bill of 2013, were as follows:¹⁴

Amendments to section 271B of the Criminal Procedure Act, 1977, which deals with the expungement of certain criminal records. This section provides that a person may apply for the expungement of his or her criminal record if a sentence provided for in section 271B was imposed on him or her and if certain other criteria have been complied with, which are among others, that a period of 10 years has lapsed since he or she was convicted. **The section, however, does not make provision for the expungement of a criminal record if the person convicted of an offence was a child at the time of the commission of the offence and the court made an order in terms of section 290(1)(a) or (b) of the Criminal Procedure Act, 1977.** Although section 87 of the Child Justice Act, 2008, regulates the expungement of certain criminal records of persons who were convicted of offences when they were children, one of the qualifying criteria for expungement under this regime is based on the offence committed and not the sentence imposed. Section 290 of the Criminal Procedure Act, 1977, dealing with orders that could be made in the place of penalties in the case of children who had been convicted of offences, was repealed by section 99 of the Child Justice Act, 2008. In terms of section 290(1)(a) a court could make an order that the child be placed under the supervision of a probation officer. In terms of section 290(1)(b) a court could make an order that the child be kept in the custody of a suitable person designated by the court in the order. In terms of section 290(1)(d) the court could make an order that the child be referred to a reform school. In order to come to the relief of persons who were convicted as children and who otherwise qualify to have their records expunged under section 271B of the Criminal Procedure Act, 1977, the amendment seeks to add court orders made under section 290(1)(a) and (b) as sentences that qualify for expungement. It should be noted, however, that an order under section 290(1)(d) is not listed. An order under this provision is a custodial sentence and, as such, does not fall within the scope of the other sentences which qualify for expungement under section 271B.

14 Act No. 42 of 2013: Judicial Matters Amendment Act, 2013 assented to by the President published in GG 37254 dated 22 January 2014 .

Amendments to section 271C of the Criminal Procedure Act, 1977, in order to include offences which may automatically be expunged by the Criminal Record Centre of the South African Police Service. These offences are also "apartheid offences" which were put on the Statute Book before the new constitutional dispensation took effect and relate to racial segregation and job reservation.

Insertion of insert sections 271DA and 271DB in the Criminal Procedure Act, 1977.

The insertion of section 271DA allows the Minister or the Director-General: Justice and Constitutional Development to revoke a certificate of expungement which was erroneously issued. The Director-General is empowered to request the head of the Criminal Record Centre to rectify the information on the person's criminal record. The amendment is required for the following reasons:

(a) The National Register for Sex Offenders in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), and the National Child Protection Register in terms of the Children's Act, 2005 (Act No. 38 of 2005), have not been implemented yet. In terms of section 271B a person's criminal record may not be expunged if his or her name appears on either of the Registers. It might happen that a certificate of expungement is issued in respect of a person whose name is entered in one of those Registers at a later stage.

(b) At the time an applicant applies for a certificate of expungement of a criminal record, his or her criminal record might not have been updated by the Criminal Record Centre, or the applicant may have withheld information on a pending criminal case against him or her.

(c) A certificate of expungement might have been issued due to incorrect information or advice or the offence was not an offence referred to in section 271C(1) or (2) of the Criminal Procedure Act, 1977.

In terms of the proposed section 271DB the Director-General may delegate any power or assign any duty conferred on or assigned to him or her in terms of section 271B(2) or (3) or 271C(3) or (4) to an appropriately qualified employee of the Department of Justice and Constitutional Development holding the rank of Deputy Director-General. This amendment is necessary in light of the many expungement applications that have been received by the Department.

2.45 In addition to the above, the Commission was provided with a copy of *The Law and the Business of Criminal Record Expungement in South Africa*,¹⁵ in which Mr Muntingh identifies the problems with regard to expungement in the following terms:

Having a criminal record can have serious implications for an individual's prospects of finding employment and much research has been done especially in the United

15. Lukas Muntingh Civil Society Prison Reform: Research report no. 18.

States with its draconian laws excluding felons from a variety of resources, rights and types of employment. In South Africa the issue of criminal records was recently brought to the fore by an amendment to the Criminal Procedure Act (51 of 1977) through the Criminal Procedure Amendment Act (65 of 2008) which came into force on 6 May 2009. The amendment to section 271 created for the first time a statutory mechanism and clear procedure for the expungement of certain criminal convictions, including crimes created by apartheid era legislation. Prior to this no mechanism existed to expunge criminal convictions, save through a presidential pardon as provided for in the 1983 and 1996 Constitutions. While the Criminal Procedure Amendment Act (65 of 2008) created the mechanism for the expungement of certain criminal convictions, this has not been the only development on this front in recent years. What has emerged from various legislative interventions is a complex and often confusing set of yardsticks dealing with criminal records and their expungement. One is offence and age specific (i.e. the Child Justice Act 75 of 2008), whereas the second gives no recognition to the offence but only the sentence imposed and the time lapse from the date of conviction (i.e. Criminal Procedure Act 51 of 1977), and the third yardstick uses the sentence and the time lapse following the completion of the sentence (the Final Constitution, 1996 with reference to Members of Parliament). In addition to criminal convictions, there has been the establishment of three registers which are also relevant to the debate. The Sex Offenders Register established under the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007) and Part B of the National Child Protection Register in the Children's Act (38 of 2005) are both linked to criminal convictions and such convictions cannot be expunged unless the name of the offender has not first been removed from the relevant register. Lastly, the Child Justice Act (75 of 2008) created, oxymoronically, a register of children who have been diverted from the criminal justice system. While the diversion register is not specifically mentioned in relation to sentencing, it may be consulted in relation to a range of functions set out in several chapters of the Child Justice Act.

On a broader level, the question must be asked what purpose(s) the retention of criminal records aims to serve. Fundamental to the debate is the acknowledgment that having a criminal record can be severely detrimental to a person's access to employment and social status in general. Moreover, the effect of a criminal record is that the punishment for the crime committed lasts much longer than the sentence imposed by the court. It is this lasting effect that ex-offenders and ex-prisoners often experience as being exclusionary and marginalising. The effect of a criminal record is that it becomes a debt to society that cannot be re-paid. It is this debt that Van Zyl Smit calls a 'civil disability' – individuals are excluded from certain civil functions and types of employment because at some time in the past they had committed and were convicted of a crime. In the American literature this is also referred to as 'collateral disabilities'. As Van Zyl Smit observed in respect of prisoners in 2003: *'There has been no systematic effort to think through what the fundamental change to the constitutional order should mean for the legal disabilities imposed on former prisoners. Current disabilities are something of a neglected ragbag, typically relegated to a passing paragraph in the major legal textbooks dealing with their legal status generally.'* Admittedly, criminal records also serve a protective function; they signify to society that a specific person is dishonest or poses a danger to children, or is violent. The protective value of criminal records in such instances have now also found expression in recently passed legislation providing for a sex offenders' register and a register of persons convicted for crimes against children. Criminal records are

also used by courts when imposing sentences to assess the criminal history of the offender and previous convictions would normally count against the offender and result in a more severe penalty. There are, however, also different schools of thought on this issue. The retention or expungement of criminal records then centres on two issues: on the one hand, the duty to promote safety in society and protect citizens from dangerous and dishonest individuals and, on the other hand, the right to equality and the constitutional duty on the state 'to free the potential of each person'. Van Zyl Smit argues that discriminating against former prisoners based on their criminal pasts is not only counter-productive by undermining social reintegration, but that the state has a positive duty to fulfill in respect of social reintegration and to render support to former prisoners. Making information available to third parties about individuals' criminal histories would thus be to undermine this positive obligation.

CHAPTER 3

EXPUNGEMENT OF CRIMINAL RECORDS: A COMPARATIVE PERSPECTIVE

INTRODUCTION

3.1 To provide a clear understanding of the matters which are relevant in considering the process of expungement, it is necessary to identify, from a comparative perspective, the topics that are considered essential to make recommendations for reform of the law. As in South Africa, many countries worldwide provide for differing legislative interventions to achieve the objective of clearing the criminal records of offenders. These include amnesty, pardons or applications for executive clemency, and expungement of criminal records. This investigation focuses on the legislative interventions which provide for the expungement of criminal records. However, reference will also be made to other processes available to achieve similar goals, and how these processes and consequences differ. These other related processes will be discussed separately after dealing with the issue of expungement. In addition, it is clear that the current legislative measures in respect of juvenile offenders are distinct and different from those applicable to adult offenders. Clearly, there are different articulated prerequisites which have to be complied with before the process can be invoked. In addition, it is necessary to articulate the subject matter of expungement (i.e. whether it should be limited to criminal records, or should include other relevant information on arrests, ongoing criminal investigations, court appearances and diversion proceedings – whether or not this resulted in a criminal conviction). For purposes of understanding the process of expungement, this chapter includes reference to other related processes.

PROCESSES RELATED TO EXPUNGEMENT

3.2 There are a number of processes that are related to expungement but do not involve actual expungement; these processes may differ subtly from country to country. They are included in the scope of this investigation so that we can determine the relationship between such processes and the principles governing expungement. Such processes are briefly listed, and the similarities and differences between such a process and the expungement process are identified. The various “non-expungement” processes are briefly explained to

show that they can achieve similar results to those of actual expungement. The following processes are relevant:

- **Amnesty:** Forgetting the crime. For example, if a car thief witnesses a murder, he will often be granted amnesty for his crime in order to allow him to testify against the murderer. Similarly, after a civil war a mass amnesty may be granted to absolve all participants of guilt and “move on”. Weapon amnesties are often granted so that people can hand in weapons to the police without any legal questions being asked as to where they obtained them and why they had them.
- **Commutation:** Substituting the penalty for a crime with the penalty for another, while retaining guilt for the original crime. For example, in the United States of America, someone who is guilty of murder may have their sentence commuted to life imprisonment rather than death.
- **Remission:** Complete or partial cancellation of the penalty, while retaining guilt for the crime as charged (i.e. reduced penalty).
- **Reprieve:** Temporary postponement of a punishment, usually so that the accused can mount an appeal. (This is often granted if the accused has been sentenced to death.)
- **Clemency:** This may either be a catch-all term for all the above, or may refer only to amnesty and pardons.
- **Immunity from prosecution:** A prosecutor may grant immunity, usually to a witness, in exchange for testimony or production of other evidence. The prosecutor conditionally agrees not to prosecute a crime that the witness might have committed in exchange for said evidence.
- **Other immunity:** Several other types of immunity are available, depending on the status of a person as a member of a country’s government.

A COMPARATIVE OVERVIEW OF PROCESSES RELATED TO EXPUNGEMENT

3.3 Reference has been made above to legal processes related to expungement, in terms of which the objects similar to those pursued by expungement could be achieved. In order to understand these legal processes and determine how they impact on expungement, a brief comparative overview of these processes is included here. However, it should be noted that, from their application in different countries, these processes appear to differ from expungement and different rules and preconditions apply. It would also appear that unless

the rules are applied consistently and objectively, some of the processes may be open to abuse and many of them provide solutions to problems that differ from those which are pursued by the process of expungement. However, in other instances the objectives achieved by some of the processes are similar to those pursued by expungement. In general, having considered the application of these processes in various countries, it seems fair to conclude that in many instances the rules governing these processes are controversial. Although these processes may be viewed as representing a legitimate use of the power to pardon in some cases, some experts believe they are susceptible to abuse where they are applied inconsistently, selectively, arbitrarily, or without strict and publicly accessible guidelines. These processes are called by different names but in essence they relate to reprieve granted to convicted persons by way of the exercising of executive power. In order to provide an understanding of these processes a brief outline of what they entail is given with reference to a few jurisdictions.¹⁶

Pardons

3.4 The online free legal dictionary defines “pardon” in the following terms:¹⁷

Pardon

The action of an executive official of the government that mitigates or sets aside the punishment for a crime.

The granting of a pardon to a person who has committed a crime or who has been convicted of a crime is an act of clemency, which forgives the wrongdoer and restores the person's Civil Rights. At the federal level, the president has the power to grant a pardon, and at the state level the governor or a pardon board made up of high-ranking state officials may grant it.

The power to grant a pardon derives from the English system in which the king had, as one of his royal prerogatives, the right to forgive virtually all forms of crimes against the crown. The Framers of the U.S. Constitution, in Article II, Section 2, Clause 1, provided that the president "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." Throughout U.S. history the courts have interpreted this clause to give the president virtually unlimited power to issue pardons to individuals or groups and to impose conditions on the forgiveness.

The first major court case involving the pardon power, *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 18 L. Ed. 366 (1866), established both the scope of the pardon power and

16 For information see the discussion by Wikipedia at <http://en.wikipedia.org/wiki/Pardon> accessed 10/12/13.

17 <http://legal-dictionary.thefreedictionary.com/Pardon> accessed 23 September 2014.

the legal effect on a person who was pardoned. President Andrew Johnson pardoned Arkansas attorney and Confederate sympathizer Alexander Hamilton Garland, who had not been tried, for any offenses he might have committed during the Civil War. Garland sought to practice in federal court, but federal law required that he swear an oath that he never aided the Confederacy. Garland argued that the pardon absolved him of the need to take the oath. The Supreme Court agreed with Garland. It held that the scope of the pardon power "is unlimited, with the exception stated [impeachment]. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."

The power to pardon applies only to offenses against the laws of the jurisdiction of which the pardoning official is the chief executive. Thus the president may only pardon for violations of federal law, and governors may only pardon for violations of the laws of their states.

A president or governor may grant a full (unconditional) pardon or a conditional pardon. The granting of an unconditional pardon fully restores an individual's civil rights forfeited upon conviction of a crime and restores the person's innocence as though he or she had never committed a crime. This means that a recipient of a pardon may regain the right to vote and to hold various positions of public trust.

A conditional pardon imposes a condition on the offender before it becomes effective. Typically this means the commutation of a sentence. For example, the president has the power under the Pardon Clause to commute a death sentence on the condition that the accused serve the rest of his or her life in prison without eligibility for Parole, even though a life sentence imposed directly by a court would otherwise be subject to parole. In upholding this type of conditional pardon, the Supreme Court in *Schick v. Reed*, 419 U.S. 256, 95 S. Ct. 379, 42 L. Ed. 2d 430 (1974), reasoned that "considerations of public policy and humanitarian impulses support an interpretation of that [pardon] power so as to permit the attachment of any condition which does not otherwise offend the Constitution."

Unless the pardon expressly states that it is issued because of a determination that the recipient was innocent, a pardon does not imply innocence. It is merely a forgiveness of the offense. It is generally assumed that acceptance of a pardon is an implicit Acknowledgment of guilt, for one cannot be pardoned unless one has committed an offense. The Constitution allows two other pardon powers besides the power of commutation. It expressly speaks about the president's power to grant "reprieves." A reprieve differs from a pardon in that it establishes a temporary delay in the enforcement of the sentence imposed by the court, without changing the sentence or forgiving the crime. A reprieve might be issued for the execution of a prisoner to give the prisoner time to prove his or her innocence. A related power is the power to grant "amnesty," which is also implicit in the pardon power. Amnesty is applied to whole classes or communities, instead of individuals. The power to issue an amnesty and the effect of an amnesty are the same as those for a pardon.

(a) Canada

3.5 According to the website of the Parole Board of Canada (PBC):¹⁸

The Royal Prerogative of Mercy (RPM) is a monarch's prerogative exercised in Canada by the Governor General or the Governor in Council. Clemency is granted in exceptional circumstances in deserving cases involving federal offences, where no other remedy exists in law to reduce severe negative effects of criminal sanctions. Clemency can be requested for numerous reasons, including employment, perceived inequity, medical conditions, immigration to Canada, compassion and financial hardship. The Governor General or the Governor in Council grants clemency upon the recommendation of a Minister of the Crown. In most cases it is the Minister of Public Safety who makes the recommendation.

3.6 Importantly, the granting of clemency does not remove a criminal record.¹⁹

3.7 According to Ashby of the National Pardon Centre, "Pardons in Canada are no longer officially called pardons."²⁰ This change was brought about by the amendment of the Criminal Records Act (CRA) in 2012.²¹ The PBC website states that – ²²

A record suspension (formerly a pardon) allows people who were convicted of a criminal offence, but have completed their sentence and demonstrated they are law-abiding citizens for a prescribed number of years, to have their criminal record kept separate and apart from other criminal records.

And

The term pardon in Canada was changed because the Tories felt that it implied the government was forgiving criminals and because a tough on crime stance rings very well with the electorate. This plus a few high profile cases of the wrong people receiving pardons allowed the Tories to capitalize on the public's outrage and the general misunderstanding of what a pardon is supposed to do.

The truth is that a pardon in Canada is not about forgiveness. Instead it is about completing the rehabilitation process and allowing previous offenders to return to the workforce unimpeded.

18 Parole Board of Canada <http://www.pbc-clcc.gc.ca/prdons/clem-eng.shtml> accessed 23 September 2014.

19 Parole Board of Canada <http://www.pbc-clcc.gc.ca/prdons/clem-eng.shtml> accessed 23 September 2014.

20 *Pardons in Canada* by Michael Ashby January 10 2013 <http://www.nationalpardon.org/pardons-in-canada-2/> accessed 23 September 2014.

²¹ <http://laws-lois.justice.gc.ca/eng/acts/C-47/page-1.html> accessed 23 September 2014.

²² <http://www.pbc-clcc.gc.ca/prdons/servic-eng.shtml>

3.6 The new pardons program in Canada has been very successful.²³ In Canada pardons or record suspensions as it is now called, are part of the social re-integration programme. The legislation on record suspensions is uncomplicated. The website briefly outlines the eligibility requirements for a record suspension.²⁴ A person is eligible for a pardon after completing the sentence imposed and the person has also refrained from further conflict with the law for a period of 5 or 10 years. For a conviction of a summary offence a person qualifies for a pardon 5 years after serving the sentence. A person convicted of an indictable offence must wait 10 years after serving the sentence before being eligible for a pardon. A person convicted of certain offences, eg a sexual offence committed against a child, is not eligible for a pardon. Similarly, a conviction of more than 3 indictable offences in respect of which a sentence of more than 2 years imprisonment have been imposed, is also excluded from being eligible for a pardon.

3.7 In terms of the Criminal Records Act (CRA),²⁵ the Parole Board of Canada (PBC) may order, refuse to order, or revoke record suspensions for convictions under federal acts or regulations of Canada.²⁶ In practice pardons in Canada no longer exist because a record suspension fulfills the same role as a pardon.²⁷ It is still possible to get a pardon in Canada. However, the application of the new record suspension programme (also called pardons) is very different from the pardon process in the United States of America which is an executive pardon programme as is evident from the brief outline below. In terms of Canadian law, a pardon is much broader than the narrow application in Australia and the USA.

3.8 Pardon eligibility is met after all sentences have been served and a prescribed waiting period of 5 or 10 years good conduct has been met. A sentence can vary from a fine or probation to imprisonment. Community service and house arrest are also common

23 See statistics on website <http://www.nationalpardon.org/pardons-in-canada-2/> accessed 23 September 2014.

24 <http://www.nationalpardon.org/pardons-in-canada-2/> accessed 23 September 2014.

25 <http://laws-lois.justice.gc.ca/eng/acts/C-47/page-1.html> accessed 23 September 2014. See also <http://www.pbc-clcc.gc.ca/prdons/servic-eng.shtml>

26 <http://www.pbc-clcc.gc.ca/prdons/servic-eng.shtml> accessed 23 September 2014 accessed 23 September 2014.

27 <http://www.nationalpardon.org/pardons-in-canada-2/> accessed 23 September 2014.

sentences for which pardons are granted. The requirement of good conduct means that a person must not have been in conflict with the law for the prescribed period.²⁸

3.9 For court appearances which did not result in a conviction there are certain waiting periods that must be met before the files can be destroyed. For an absolute discharge it is 1 year and for a conditional discharge it is 3 years. For not guilty outcomes varying time frames exist before the records can be destroyed, but it is normally within 1 year.²⁹

3.10 Two important features of the legislation are the fact the approval of a record suspension is given by the Canadian Parole Board, and secondly much emphasis is placed on the completion of serving the sentence concerned and the rehabilitation of offenders. A pardon does not, however, erase the fact that an individual was convicted of a crime. The criminal record is not erased, but it is kept separate and apart from other (non-pardoned) criminal records. A pardon removes disqualifications caused by a criminal conviction, such as the ability to contract with the federal government, or eligibility for Canadian citizenship. If an individual in receipt of a pardon is convicted of a new offence, the information may lead to a reactivation of the criminal record for which the pardon was received.³⁰

3.11 Because of the importance of the change to suspension of criminal records in Canada, the relevant provisions of the Act are quoted below in full:³¹

2.1 The Board has exclusive jurisdiction and absolute discretion to order, refuse to order or revoke a record suspension.

2.2 (1) An application for a record suspension shall be determined, and a decision whether to revoke a record suspension under section 7 shall be made, by a panel that consists of one member of the Board.

(2) The Chairperson of the Board may direct that the number of members of the Board required to constitute a panel to determine an application for a record suspension, to decide whether to revoke a record suspension under section 7 or to determine any class of those applications or make any class of those decisions shall be greater than one.

28 <http://www.nationalpardon.org/pardon-eligibility/> accessed 23 September 2014.

29 <http://www.nationalpardon.org/pardon-eligibility/> accessed 23 September 2014.

30 <http://www.nationalpardon.org/pardon-eligibility/> accessed 23 September 2014.

31 Criminal Records Act <http://laws-lois.justice.gc.ca/eng/acts/C-47/page-1.html> accessed 23 September 2014.

EFFECT OF RECORD SUSPENSION

2.3 A record suspension

(a) is evidence of the fact that

(i) the Board, after making inquiries, was satisfied that the applicant was of good conduct, and

(ii) the conviction in respect of which the record suspension is ordered should no longer reflect adversely on the applicant's character; and

(b) unless the record suspension is subsequently revoked or ceases to have effect, requires that the judicial record of the conviction be kept separate and apart from other criminal records and removes any disqualification or obligation to which the applicant is, by reason of the conviction, subject under any Act of Parliament — other than section 109, 110, 161, 259, 490.012, 490.019 or 490.02901 of the *Criminal Code*, subsection 147.1(1) or section 227.01 or 227.06 of the *National Defence Act* or section 36.1 of the *International Transfer of Offenders Act*.

Application for record suspension

3. (1) Subject to section 4, a person who has been convicted of an offence under an Act of Parliament may apply to the Board for a record suspension in respect of that offence, and a Canadian offender, within the meaning of the *International Transfer of Offenders Act*, who has been transferred to Canada under that Act may apply to the Board for a record suspension in respect of the offence of which he or she has been found guilty.

Transfer of offenders

(2) For the purposes of this Act, the offence of which a Canadian offender within the meaning of the *International Transfer of Offenders Act* who has been transferred to Canada under that Act has been found guilty is deemed to be an offence that was prosecuted by indictment.

PROCEDURE

Restrictions on application for record suspension

4. (1) A person is ineligible to apply for a record suspension until the following period has elapsed after the expiration according to law of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, imposed for an offence:

(a) 10 years, in the case of an offence that is prosecuted by indictment or is a service offence for which the offender was punished by a fine of more than five thousand dollars, detention for more than six months, dismissal from Her Majesty's service, imprisonment for more than six months or a punishment that is greater than

imprisonment for less than two years in the scale of punishments set out in subsection 139(1) of the *National Defence Act*; or

(b) five years, in the case of an offence that is punishable on summary conviction or is a service offence other than a service offence referred to in paragraph (a).

Ineligible persons

(2) Subject to subsection (3), a person is ineligible to apply for a record suspension if he or she has been convicted of

(a) an offence referred to in Schedule 1; or

(b) more than three offences each of which either was prosecuted by indictment or is a service offence that is subject to a maximum punishment of imprisonment for life, and for each of which the person was sentenced to imprisonment for two years or more.

Exception

(3) A person who has been convicted of an offence referred to in Schedule 1 may apply for a record suspension if the Board is satisfied that

(a) the person was not in a position of trust or authority towards the victim of the offence and the victim was not in a relationship of dependency with him or her;

(b) the person did not use, threaten to use or attempt to use violence, intimidation or coercion in relation to the victim; and

(c) the person was less than five years older than the victim.

Onus — exception

(4) The person has the onus of satisfying the Board that the conditions referred to in subsection (3) are met.

Amendment of Schedule 1

(5) The Governor in Council may, by order, amend Schedule 1 by adding or deleting a reference to an offence.

Exception — long-term supervision

4.01 The period during which a person is supervised under an order for long-term supervision, within the meaning of subsection 2(1) of the *Corrections and Conditional Release Act*, is not included in the calculation of the period referred to in subsection 4(1).

Record suspension

4.1 (1) The Board may order that an applicant's record in respect of an offence be

suspended if the Board is satisfied that

(a) the applicant, during the applicable period referred to in subsection 4(1), has been of good conduct and has not been convicted of an offence under an Act of Parliament; and

(b) in the case of an offence referred to in paragraph 4(1)(a), ordering the record suspension at that time would provide a measurable benefit to the applicant, would sustain his or her rehabilitation in society as a law-abiding citizen and would not bring the administration of justice into disrepute.

Onus on applicant

(2) In the case of an offence referred to in paragraph 4(1)(a), the applicant has the onus of satisfying the Board that the record suspension would provide a measurable benefit to the applicant and would sustain his or her rehabilitation in society as a law-abiding citizen.

Factors

(3) In determining whether ordering the record suspension would bring the administration of justice into disrepute, the Board may consider

(a) the nature, gravity and duration of the offence;

(b) the circumstances surrounding the commission of the offence;

(c) information relating to the applicant's criminal history and, in the case of a service offence, to any service offence history of the applicant that is relevant to the application; and

(d) any factor that is prescribed by regulation.

Inquiries

4.2 (1) On receipt of an application for a record suspension, the Board

(a) shall cause inquiries to be made to ascertain whether the applicant is eligible to make the application;

(b) if the applicant is eligible, shall cause inquiries to be made to ascertain the applicant's conduct since the date of the conviction; and

(c) may, in the case of an offence referred to in paragraph 4(1)(a), cause inquiries to be made with respect to any factors that it may consider in determining whether ordering the record suspension would bring the administration of justice into disrepute.

Entitlement to make representations

(2) If the Board proposes to refuse to order a record suspension, it shall notify in writing the applicant of its proposal and advise the applicant that he or she is entitled to make, or have made on his or her behalf, any representations to the Board that he or she believes relevant either in writing or, with the Board's authorization, orally at a hearing held for that purpose.

Board to consider representations

(3) The Board shall, before making its decision, consider any representations made to it within a reasonable time after the notification is given to the applicant pursuant to subsection (2).

Waiting period

(4) An applicant may not re-apply for a record suspension until the expiration of one year after the day on which the Board refuses to order a record suspension.

Expiration of sentence

4.3 For the purposes of section 4, a reference to the expiration according to law of a sentence of imprisonment imposed for an offence shall be read as a reference to the day on which the sentence expires, without taking into account

(a) any period during which the offender could be entitled to statutory release or any period following a statutory release date; or

(b) any remission that stands to the credit of the offender in respect of the offence.

Functions of Executive Committee

4.4 The Executive Committee shall, after the consultation with Board members that it considers appropriate, adopt policies relating to applications for record suspensions, including related inquiries and proceedings.

5. [Repealed, 2012, c. 1, s. 119] CUSTODY OF RECORDS

Records to be delivered to Commissioner

6. (1) The Minister may, by order in writing addressed to a person having the custody or control of a judicial record of a conviction in respect of which a record suspension has been ordered, require that person to deliver that record into the Commissioner's custody.

Records to be kept separate and not to be disclosed

(2) A record of a conviction in respect of which a record suspension has been ordered that is in the custody of the Commissioner or of any department or agency of the Government of Canada shall be kept separate and apart from other criminal records. No such record shall be disclosed to any person, nor shall the existence of the record or the fact of the conviction be disclosed to any person, without the prior approval of the Minister.

Approval for disclosure

(3) The Minister shall, before granting the approval for disclosure referred to in subsection (2), satisfy himself that the disclosure is desirable in the interests of the administration of justice or for any purpose related to the safety or security of Canada or any state allied or associated with Canada.

Information in national DNA data bank

(4) For greater certainty, a judicial record of a conviction includes any information in relation to the conviction that is contained in the convicted offenders index of the national DNA data bank established under the *DNA Identification Act*.

Discharges

6.1 (1) No record of a discharge under section 730 of the *Criminal Code* that is in the custody of the Commissioner or of any department or agency of the Government of Canada shall be disclosed to any person, nor shall the existence of the record or the fact of the discharge be disclosed to any person, without the prior approval of the Minister, if

(a) more than one year has elapsed since the offender was discharged absolutely; or

(b) more than three years have elapsed since the offender was discharged on the conditions prescribed in a probation order.

Purging C.P.I.C.

(2) The Commissioner shall remove all references to a discharge under section 730 of the *Criminal Code* from the automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police on the expiration of the relevant period referred to in subsection (1).

Disclosure to police forces

6.2 Despite sections 6 and 6.1, the name, date of birth and last known address of a person whose record is suspended under section 4.1 or who has received a discharge referred to in section 6.1 may be disclosed to a police force if a fingerprint, identified as that of the person, is found.

(a) at the scene of a crime during an investigation of the crime; or

(b) during an attempt to identify a deceased person or a person suffering from amnesia.

Definition of “vulnerable person”

6.3 (1) In this section, “vulnerable person” means a person who, because of his or her age, a disability or other circumstances, whether temporary or permanent,

(a) is in a position of dependency on others; or

(b) is otherwise at a greater risk than the general population of being harmed by a person in a position of trust or authority towards them.

Notation of records

(2) The Commissioner shall make, in the automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police, a notation enabling a member of a police force or other authorized body to determine whether there is a record of an individual’s conviction for an offence listed in Schedule 2 in respect of which a record suspension has been ordered.

Verification

(3) At the request of any person or organization responsible for the well-being of a child or vulnerable person and to whom or to which an application is made for a paid or volunteer position, a member of a police force or other authorized body shall verify whether the applicant is the subject of a notation made in accordance with subsection (2) if

- (a) the position is one of trust or authority towards that child or vulnerable person; and
- (b) the applicant has consented in writing to the verification.

Unauthorized use

(4) Except as authorized by subsection (3), no person shall verify whether a person is the subject of a notation made in accordance with subsection (2).

Request to forward record to Minister

(5) A police force or other authorized body that identifies an applicant for a position referred to in paragraph (3)(a) as being a person who is the subject of a notation made in accordance with subsection (2) shall request the Commissioner to provide the Minister with any record of a conviction of that applicant, and the Commissioner shall transmit any such record to the Minister.

Disclosure by Minister

(6) The Minister may disclose to the police force or other authorized body all or part of the information contained in a record transmitted by the Commissioner pursuant to subsection (5).

Disclosure to person or organization

(7) A police force or other authorized body shall disclose the information referred to in subsection (6) to the person or organization that requested a verification if the applicant for a position has consented in writing to the disclosure.

Use of information

(8) A person or organization that acquires information under this section in relation to an application for a position shall not use it or communicate it except in relation to the assessment of the application.

Amendment of Schedule 2

(9) The Governor in Council may, by order, amend Schedule 2 by adding or deleting a reference to an offence.

(b) United States

3.12 Article II, Section 2, Clause 1 of the United States Constitution provides that:³²

The President... shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

3.13 The Heritage Guide explains the power in the following terms:³³

The power to pardon is one of the least limited powers granted to the President in the Constitution. The only limits mentioned in the Constitution are that pardons are limited to offenses against the United States (i.e., not civil or state cases), and that they cannot affect an impeachment process. A reprieve is the commutation or lessening of a sentence already imposed; it does not affect the legal guilt of a person. A pardon, however, completely wipes out the legal effects of a conviction. A pardon can be issued from the time an offense is committed, and can even be issued after the full sentence has been served. It cannot, however, be granted before an offense has been committed, which would give the President the power to waive the laws.

And:

The development of the use of the pardon power reflects its several purposes. One purpose is to temper justice with mercy in appropriate cases, and to do justice if new or mitigating evidence comes to bear on a person who may have been wrongfully convicted. Alexander Hamilton reflects this in *The Federalist* No. 74, in which he argues that "humanity and good policy" require that "the benign prerogative of pardoning" was necessary to mitigate the harsh justice of the criminal code. The pardon power would provide for "exceptions in favor of unfortunate guilt."

Chief Justice John Marshall in *United States v. Wilson* (1833) also commented on the benign aspects of the pardon power: "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate...."

3.14 As is evident from the above outline, real distinctions exist between the process of expungement and other forms of clearing criminal records – for example through pardons. The process that is most similar to expungement is amnesty. For the purpose of comparison, consideration of the impact of related processes (as discussed above) is relevant to expungement. Where an expungement is granted, the person whose record is expunged

32 The Heritage guide to The Constitution- Pardon Power
<http://www.heritage.org/constitution#!/articles/2/essays/89/pardon-power>.

33 The Heritage guide to The Constitution- Pardon Power
<http://www.heritage.org/constitution#!/articles/2/essays/89/pardon-power>.

may, for most purposes, treat the event as if it never occurred. The record may be erased permanently, or it could be sealed, thereby preventing access to the record. On the other hand, an amnesty or pardon (also called “executive clemency”) does not necessarily “erase” the event; rather, it constitutes forgiveness and it may or may not be accompanied by a clearing of the criminal record. There are also differences as to the person or institution which may grant an amnesty or pardon and expungement. In the United States, for example, an expungement can be granted only by a judge. By contrast, a pardon can be granted only by the President of the United States for federal offences, and – with variation from state to state – by the state governor, certain other state executive officers, or the State Board of Pardons and Paroles. With reference to pardons as outlined above, the following should be noted: pardons do not necessarily require a conviction; the power is in many instances exercised by political office bearers; it need not comply with strict legislative requirements; and more often than not it is reserved for exceptional cases.

CHAPTER 4

EXPUNGMENT OF CRIMINAL RECORDS: A COMPARATIVE OVERVIEW

INTRODUCTION

4.1 Before giving a comparative overview of expungement, it is necessary to identify and outline the main steps in the process of expungement. These steps are relevant when considering reform of the law relating to expungement. They include the prerequisites for expungement, the subject matter of expungement, and the prescribed process for expungement. In addition it should be noted that different rules apply to expungement in respect of adult offenders and juvenile offenders. These matters are briefly highlighted before a comparative overview is given of expungement.

(a) Prerequisites for expungement

4.2 In many jurisdictions, the records may not completely “disappear” and may still be available to law enforcement agencies, court officials and officials in charge of correctional facilities. It is also clear that important prerequisites for the process of expungement can be identified.

4.3 Prerequisites include eligibility requirements for expungement, and the identification of the subject matter (record) for expungement. The latter prerequisite refers to whether or not the process is limited to clearing a criminal record based on the conviction record in terms of the law of the jurisdiction in which the record was recorded, or whether the process should include other information relating to an offence (e.g. information relating to an arrest, criminal investigation or detention). Ordinarily, only the subject of the record may ask that the record be expunged. Often, the subject must meet a number of conditions before the request will be considered. Some jurisdictions allow expungement of the record in respect of a deceased person.

4.4 In the United States, most states include certain requirements for expungement. The example of the expungement process in Arizona (in the United States) is as follows, quoted

from the website of the Arizona legislature:³⁴

13-910. Applications by persons discharged from federal prison

A. On proper application, a person who has been convicted of two or more felonies and who has received an absolute discharge from imprisonment in a federal prison may have any civil rights which were lost or suspended by the conviction restored by the presiding judge of the superior court in the county in which the person now resides.

B. A person who is subject to subsection A of this section may file, no sooner than two years from the date of his absolute discharge, an application for restoration of civil rights that shall be accompanied by a certificate of absolute discharge from the director of the federal bureau of prisons, unless it is shown to be impossible to obtain such certificate. Such application shall be filed with the clerk of the superior court in the county in which the person now resides, and such clerk shall be responsible for processing applications for restoration of civil rights upon request of the person involved or the person's attorney.

C. If the person was convicted of an offense which would be a dangerous offense under section 13-704, the person may not file for the restoration of the right to possess or carry a gun or firearm. If the person was convicted of an offense which would be a serious offense as defined in section 13-706, the person may not file for the restoration of the right to possess or carry a gun or firearm for ten years from the date of the person's absolute discharge from imprisonment. If the person was convicted of any other felony offense, the person may not file for the restoration of the right to possess or carry a gun or firearm for two years from the date of the person's absolute discharge from imprisonment.

13-911. Restoration of civil rights in the discretion of the presiding judge of the superior court

The restoration of civil rights under provisions of sections 13-909 or 13-910 is within the discretion of the presiding judge of the superior court in the county in which the person resides.

13-912. Restoration of civil rights for first offenders; exceptionA. Any person who has not previously been convicted of any other felony shall automatically be restored any civil rights that were lost or suspended by the conviction if the person both:

1. Completes a term of probation or receives an absolute discharge from imprisonment.
2. Pays any fine or restitution imposed.

B. This section does not apply to a person's right to possess weapons as defined in section 13-3101 unless the person applies to a court pursuant to section 13-905 or 13-906.

34 Arizona ARS (Title 13 Criminal Code) <http://www.azleg.state.az.us/ArizonaRevisedStatutes.asp?Title=13> accessed 15 January 2014.

It is evident from a comparative overview that various countries have different rules applicable to expungement. However, a number of common features can be identified. Common features include the following:³⁵

- Compliance with a time period before an expungement is viable (waiting period);
- A requirement that a person must be free from a conviction during the waiting period the;
- A limit to the number of convictions in respect of which an expungement is allowed;;
- Allowing an expungement only in respect of less serious crimes;;
- Compliance with the sentences imposed in respect the convictions eligible for expungement; prescribed process in obtaining an expungement;

4.5 In general most expungement legislation provides for the exclusion of certain offences from expungement. This can be illustrated with reference to the example of Arizona.³⁶ Sections 13-907, 1309 C and 1310 deal with the following: setting aside of judgment of convicted person on discharge; application; release from disabilities; and exceptions. The Act provides that:

- D. This section does not apply to a person who was convicted of a criminal offense:
1. Involving a dangerous offense.
 2. For which the person is required or ordered by the court to register pursuant to section 13-3821.
 3. For which there has been a finding of sexual motivation pursuant to section 13-118.
 4. In which the victim is a minor under fifteen years of age.
 5. In violation of section 28-3473, any local ordinance relating to stopping, standing or operation of a vehicle or title 28, chapter 3, except a violation of section 28-693 or any local ordinance relating to the same subject matter as section 28-693.

13-909. Restoration of civil rights; persons completing probation for federal offense

A...

B ...

C. If the person was convicted of an offense which would be a dangerous offense under section 13-704, the person may not file for the restoration of the right to possess or carry a gun or firearm. If the person was convicted of an offense which

³⁵ http://www.sentencingproject.org/detail/publication.cfm?publication_id=115 *Relief from the collateral consequences of a criminal conviction: A State by State Resource Guide*, by Margaret Colgate Love June 2008 accessed 14 December 2012.

³⁶ Arizona ARS (Title 13 Criminal Code) <http://www.azleg.state.az.us/ArizonaRevisedStatutes.asp?Title=13> accessed 15 January 2014.

would be a serious offense as defined in section 13-706 the person may not file for the restoration of the right to possess or carry a gun or firearm for ten years from the date of the person's discharge from probation. If the person was convicted of any other felony offense, the person may not file for the restoration of his right to possess or carry a gun or firearm for two years from the date of his discharge from probation. 13-910. Applications by persons discharged from federal prison

A. ...

B. ...

C. If the person was convicted of an offense which would be a dangerous offense under section 13-704, the person may not file for the restoration of the right to possess or carry a gun or firearm. If the person was convicted of an offense which would be a serious offense as defined in section 13-706, the person may not file for the restoration of the right to possess or carry a gun or firearm for ten years from the date of the person's absolute discharge from imprisonment. If the person was convicted of any other felony offense, the person may not file for the restoration of the right to possess or carry a gun or firearm for two years from the date of the person's absolute discharge from imprisonment.

Research by Margaret Love³⁷ reveals that general exclusions from expungement include the following offences, for example:

- Felonies and first degree misdemeanors in which the victim is under 18 years of age;
- Rape;
- Sexual battery;
- Corruption of a minor;
- Sexual imposition;
- Obscenity or pornography involving a minor.

4.6 As is evident from the resource guide prepared by Margeret Colgate Love³⁸ in some jurisdictions in the USA, all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system can be expunged. Each state sets its own guidelines for which records can be expunged, or for which expungement is available. The petitioner requesting an expungement of all or part of his or her record will have to complete forms and instructions to submit to the appropriate

³⁷ <http://blogs.law.columbia.edu/4cs/files/2008/11/statebystaterelieffromcccc.pdf>
"Relief from the collateral consequences of a criminal conviction: A State by State Resource Guide", by Margaret Colgate Love July 2005 accessed 14 December 2012. (See <http://blogs.law.columbia.edu/4cs/files/2008/11/statebystaterelieffromcccc.pdf>).

³⁸ <http://blogs.law.columbia.edu/4cs/files/2008/11/statebystaterelieffromcccc.pdf>
"Relief from the collateral consequences of a criminal conviction: A State by State Resource Guide", by Margaret Colgate Love July 2005 accessed 14 December 2012.

authority. The petitioner may hire an attorney to guide him or her through the process, or the petitioner can decide to represent him or herself.

(b) The subject matter of expungement: the term “criminal record”

4.7 To understand the process of expungement, it is necessary first to understand the subject matter that is expunged, and also to know what is meant by the term “criminal record”. In other words, we must examine what the term “criminal record” entails for purposes of expungement. In addition, it is necessary to know how such records are kept and how access can be obtained to the records. For this paper, it is sufficient to indicate that every country or state has its own legislation dealing with keeping criminal records and making them available. In addition, countries differ with regard to the subject matter for expungement. Some limit the expungement to criminal records, whereas others allow expungement of records that detail arrests, postponements and the end results of the court process.

(c) The process to complete expungement

4.8 In the normal course of events, there are three processes through which an expungement can be finalised. Firstly, the process can be invoked automatically, in other words upon fulfillment of certain prerequisites the expungement is automatically recorded and executed. Second, the process can be initiated by an application from a person who requests an expungement. This application process has two types: 1) an administrative request or petition to an official who has the authority to consider the request; and 2) the requester can approach a court to approve the expungement.

4.9 A brief discussion of the definitions of relevant terms and concepts gives a useful overview for a comparative study.³⁹ These terms include “criminal record”, storage of other relevant information short of convictions, access to criminal records, the process to obtain an expungement, and the qualifying criteria for expungement. The legislative provisions, where relevant to this discussion, will be outlined when examining the examples from foreign jurisdictions. Where relevant, the difficulties regarding expungement will be highlighted,

39 For a general discussion see http://en.wikipedia.org/wiki/Criminal_record accessed 6 January 2014.

especially the following issues:

- a proliferation of agencies (state and otherwise) authorized to keep databases reflecting convictions, arrests court appearances and discharges – all of which may affect the decisions taken by potential employers;
- the difficulty in controlling access to such information – which is relevant to the effectiveness of the process of expungement once enacted;
- the need to identify certain occupations in respect of which an expungement process should be stricter (e.g. convictions relating to firearm licenses or driving licenses);
- offences of dishonesty affecting employment in public office; and
- convictions relating to the need to protect women and children (e.g. sexual offences).

The above issues will be considered in the comparative part of the paper.

EXPUNGEMENT OF JUVENILE CRIMINAL RECORDS

(a) Introduction

4.10 The legislation in many countries differentiates in the processes and consequences of expungement in so far as it applies to adult versus juvenile offenders. In South Africa, as the law stands, legislation applicable to adults and juveniles provides different rules for the expungement of criminal records, as was discussed in Chapter 2. In common law legal systems, an expungement proceeding is described as a process during which a convicted offender seeks that the records of that earlier process be sealed or cleared, thereby making the records unavailable through the State or Federal repositories.⁴⁰ If successful, the records are said to be "expunged". While expungements deal with underlying criminal records, in most instances it is a civil action or administrative process in which the subject is the petitioner or plaintiff, who asks a court or delegated authority to declare that the criminal record be expunged.⁴¹

40 *Black's Law Dictionary* defines "expungement of record" as the "Process by which record of criminal conviction is destroyed or sealed from the state or Federal repository." Cited in http://en.wikipedia.org/wiki/Expungement#cite_note-1.

41 The free legal dictionary <http://legal-dictionary.thefreedictionary.com/Expungement> defines

4.11 With reference to the USA, as an example, each jurisdiction which has laws to allow for expungement will have its own definition of expungement proceedings. However, generally speaking, expungement is the process of removing from general review the records pertaining to a case.

4.12 Most jurisdictions in the USA have laws which allow or mandate the expungement of juvenile records once the person reaches a certain age. In some cases, the records are expunged and in others they are simply sealed. The purpose of these laws is to allow a minor accused of criminal acts – or in the language of juvenile courts "delinquent acts" – to erase the record. The idea is to allow juvenile offenders to enter adulthood with a "clean slate," protecting them from the negative effects of having a criminal record.⁴²

(b) Developments in the USA

4.13 An important initiative in the USA is the Sentencing Project, which was established in 1986.⁴³

The Sentencing Project aims to achieve a fair and effective criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration. The Sentencing Project was founded in 1986 to provide defense lawyers with sentencing advocacy training and to reduce the reliance on incarceration. Since that time, the Sentencing Project has become a leader in the efforts to draw national attention to disturbing trends and inequities in the criminal justice system with a successful formula that includes the publication of ground breaking research, aggressive media campaigns and strategic advocacy for policy reform. As a result of the Sentencing Project's research, publications and advocacy, it is well known that the USA is the world's leader in incarceration, that one in three young black men is under control of the criminal justice system. Five million Americans can't vote because of felony convictions and

expunge in the following terms:

Expunge

To destroy; blot out; obliterate; erase; efface designedly; strike out wholly. The act of physically destroying information—including criminal records—in files, computers, or other depositories.

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expunge

verb abrade, annul, black out, blot out, cancel, cause to disappear, censor, cross off, cross out, delere, delete, destroy, dispose of, do away with, edit out, efface, eradicate, erase, excise, extinguish, extirpate, inducere, leave no trace, nullify, obliterate, oblitterare, put an end to, quash, quell, raze, remove, remove all sign of, remove all trace of, render illegible, rub out, scratch out, strike out, take out, wipe away, wipe off, wipe out

42 <http://blogs.law.columbia.edu/4cs/files/2008/11/statebystaterelieffromcccc.pdf>

"Relief from the collateral consequences of a criminal conviction: A State by State Resource Guide", by Margaret Colgate Love July 2005 accessed 14 December 2012.

43 <http://www.sentencingproject.org> accessed 10 Dec ember 2013.

thousands of women and children have lost welfare, education and housing benefits as a result of convictions for minor drug offenses. The Sentencing Project is dedicated to changing the way Americans think about crime and punishment.⁴⁴

4.14 For purposes of discussion, the USA resource guide of the Sentencing Project is used for comparative purposes to outline the principles of expungement in the USA. In July 2005 Margaret Colgate Love, with the support from an Open Society Institute fellowship, completed a study titled “Relief from the Collateral Consequences of a Criminal Conviction”.⁴⁵ In her summary of findings⁴⁶ she concluded that in the USA, the difficulty to welcome convicted persons back into the community is reflected in the numerous existing legal mechanisms for obtaining relief from collateral consequences. Offenders generally don’t understand the multiplicity of changes brought about in their legal status by virtue of a conviction and do not know how to remedy the situation.

4.15 Her conclusions from the study are important from a comparative perspective and are quoted in full:

- ***In every U.S. jurisdiction, the legal system erects formidable barriers to the reintegration of criminal offenders into free society.*** When a person is convicted of a crime, that person becomes subject to a host of legal disabilities and penalties under state and federal law. These so-called “collateral consequences of conviction” may continue long after the court-imposed sentence has been fully served. Their scope and duration are often unclear not only to those who experience them, but also to those who administer and enforce them. While most states now routinely restore the right to vote upon completion of the court-imposed sentence, a criminal record can be grounds for exclusion from many benefits and opportunities, including employment in education, health care, and transportation. The collateral consequences of conviction have grown more numerous and more disabling since the terrorist attacks of 9/11, and criminal background checks have become a routine and pervasive way of identifying who should be subject to them. This web of “invisible punishment” can frustrate the chances of successful offender reentry, and thereby actually increase risk to public safety.

44 Original: “About Us” page of the Sentencing project website:

<http://www.sentencingproject.org/template/page.cfm?id=2> accessed 10 December 2013.

45. <http://blogs.law.columbia.edu/4cs/files/2008/11/statebystaterelieffromcccc.pdf>
“Relief from the collateral consequences of a criminal conviction: A State by State Resource Guide”, by Margaret Colgate Love July 2005 accessed 14 December 2012.

46 <http://blogs.law.columbia.edu/4cs/files/2008/11/statebystaterelieffromcccc.pdf>
Relief from the collateral consequences of a criminal conviction: A State by State Resource Guide, by Margaret Colgate Love July 2005 accessed 14 December 2012.

- ***These legal barriers are always difficult and often impossible to overcome, so that persons convicted of a crime can expect to carry the collateral disabilities and stigma of conviction to their grave, no matter how successful their efforts to rehabilitate themselves.*** Most states have not yet developed a comprehensive and effective way of “neutralizing” the effect of a prior criminal record in cases where it is no longer necessary or appropriate to take it into account. In almost every U.S. jurisdiction, offenders seeking to put their criminal past behind them are frustrated by a legal system that is complex and unclear and entirely inadequate to the task. As a practical matter, in most jurisdictions people convicted of a crime have no hope of ever being able to fully discharge their debt to society.
- ***While every jurisdiction provides at least one way that convicted persons can avoid or mitigate the collateral consequences of conviction, the actual mechanisms for relief are generally inaccessible and unreliable, and are frequently not well understood even by those responsible for administering them.*** Relief mechanisms of the same nominal type (e.g., pardon, expungement, sealing, set-aside) vary widely in effect and availability from state to state, and there is no national model to which state or federal authorities seeking guidance may refer. There is also no central clearinghouse of information about state and federal restoration of rights mechanisms, so that authorities in one state have little or no information about law and practice even in their neighboring states. Often officials responsible for administering one type of relief are unaware of alternatives available in their own state for mitigating or avoiding collateral consequences. Federal regulatory schemes sometimes give effect to state pardon and expungement remedies, apparently without considering their wide variation. Few jurisdictions provide information about avenues of relief from collateral disabilities to offenders leaving prison or completing probation, even where the law requires that this be done. It is often unclear what if any relief may be available for persons with convictions from other jurisdictions. The scope or effect of relief is also not well-understood, either by those seeking it or by those responsible for administering it.
- ***Pardon remains the most common relief mechanism, but it has been allowed to atrophy in recent years.*** In most U.S. jurisdictions, executive pardon is the only way to mitigate the impact of collateral legal penalties and disabilities, and the governor has exclusive and unreviewable authority to exercise the pardon power. At the same time, most governors no longer regard pardoning as a routine function of their office. In at least a dozen states where a governor’s pardon is the exclusive means of avoiding or mitigating collateral disabilities, the governor has not exercised the power with any regularity for many years. The federal pardoning process has also withered in the past 20 years, producing only a handful of grants despite a steady stream of applications from people who may long since have completed their court-imposed sentences.
- ***The states that have issued the greatest number of pardons are generally ones in which the pardon power has some degree of protection from the political process, through exercise or administration by an independent appointed board.*** There are only 13 states in which there have been more than a handful of pardons granted each year since 1995, and in only nine of

these states is pardon regularly available to ordinary people whose circumstances are not in some way exceptional. In most of the states where pardons are still routinely available, the pardon power is either exercised or controlled by an appointed board.

- ***Judicial restoration remedies like expungement and sealing are generally available to adult felony offenders in only a few states, but where they exist they appear to be widely utilized.*** In some states expungement and/or sealing are available only to first offenders, or to misdemeanants, and serious or violent offenses are almost always ineligible for this relief. Persons whose convictions are expunged or sealed are frequently authorized by law to deny their conviction, including for purposes of employment, though the conviction ordinarily remains available for law enforcement purposes.
- ***A number of jurisdictions provide for some form of deferred adjudication or deferred sentencing, whereby minor offenders or persons without a prior criminal record can avoid a criminal record entirely if they successfully complete a term of community supervision.*** The growing popularity of deferred adjudication and deferred sentencing schemes appears to reflect a recognition that public safety is better served by keeping certain kinds of offenders out of the justice system entirely. Many such schemes offer not only the possibility that the conviction will be set aside or “erased” after successful completion of a period of probation, but also that the record itself will be expunged or sealed.
- ***Two-thirds of the states have laws that forbid denial or termination of employment and/or licensure “solely” because of a conviction, and/or require that a conviction be “substantially related” to the license or employment at issue; but it is unclear how effective these laws are.*** Thirty-three states have laws on their books that purport to limit consideration of conviction in connection with employment and/or licensing decisions, requiring that the offense of conviction be “substantially” or “directly” related to the license and/or employment sought. A few states allow consideration of an offender’s rehabilitation, establishing a standard that, if met, precludes denial of licensure or employment. In a few states rehabilitation is presumed after the passage of a certain period of time. Some states apply a general limitation on consideration of conviction only if the conviction has been pardoned or expunged or sealed. However, these general nondiscrimination laws are subject to significant exceptions in the form of specific prohibitions under state or federal law that apply to particular jobs or licenses. Also, many states have no mechanism for enforcement, so that it is not clear how effective these laws are in discouraging employers from firing or refusing to hire people on grounds related to conviction.
- ***In all but a handful of states, most offenders regain the vote upon completion of sentence.*** A total of 39 States, the District of Columbia and the territories, either do not suspend the right to vote at all upon conviction, or restore it automatically to all felony offenders upon the satisfaction of some objective criterion (e.g., release from prison, discharge from sentence, or expiration of sentence plus an additional specified term of years). Eleven states make restoration of the right to vote discretionary for at least some offenders who have completed their court-imposed sentences, but only three states (Florida, Kentucky and Virginia) currently disenfranchise all felony offenders for life, unless and until they can successfully

navigate an executive pardon or restoration process, or obtain a judicial restoration order.

- ***The ability to overcome the disabling effect of a criminal record is becoming an important issue in the national conversation about offender re-entry.*** Of the hundreds of thousands of people coming home from prison each year, many will make a reasonable effort to stay out of further trouble with the law, but will be frustrated by unreasonable legal barriers to their rehabilitative efforts. Particularly since 9/11, people with a felony conviction in their past are disqualified from a wide variety of jobs and licenses. The widespread availability of criminal record information has made it easier for employers and licensing boards to identify and reject people with a criminal record. Existing relief mechanisms in many jurisdictions have been flooded with applications from people seeking relief from employment barriers. In order to encourage rehabilitation of offenders and reduce recidivism, it has become essential to develop an accessible and reliable way to neutralize the effect of a criminal conviction in appropriate cases.

4.16 The study resulted in the publication of a resource guide. One of the goals of the resource guide is to raise public awareness on the inefficiency and unfairness of keeping criminal offenders branded forever as criminals and to encourage policymakers to provide opportunities to convicted offenders to discharge their debt to society at some point. In addition, the resource guide will assist in educating the public on the content of the law and how to enforce their rights.

4.17 The first three sections of the resource guide analyze the principal avenues to restoration available in U.S. jurisdictions, namely 1) the executive pardon power; 2) judicial expungement and sealing of adult felony convictions; and 3) laws that limit consideration of conviction in employment and licensing. A fourth section describes how voting rights are regained after a felony conviction, focusing on those jurisdictions where restoration depends upon a **subjective test of suitability**, as opposed to an **objective test like release from prison or satisfaction of sentence**. The guide consists of charts that give an overview of each type of restoration mechanism, and allow state-to-state comparisons. Because of its useful comparison of the legal position in the 54 U.S. states, the information in the source is, for purposes of this discussion paper, quoted extensively.⁴⁷

^{47.} The second appendix consists of individual profiles of law and practice in 54 U.S. jurisdictions, organized into three categories, namely, 1) automatic restoration of rights; 2) discretionary restoration mechanisms, including pardon and judicial expungement; and 3) non-discrimination provisions.

EXPUNGEMENT AND SEALING OF JUVENILE RECORDS IN THE USA

4.18 The information presented in this section was obtained from the following sources: Funk's "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records";⁴⁸ The US Department of Justice: Bureau of Justice Statistics "Privacy and Juvenile Justice Records: A Mid-Decade Status Report";⁴⁹ and the Bureau of Justice Statistics "National Conference on Juvenile Justice Records: Appropriate Criminal and Noncriminal Justice Uses."⁵⁰

(a) Introduction

4.19 In the USA, numerous statutes at federal and state levels allow for and occasionally even mandate the expungement of juvenile convictions, when the juvenile reaches a certain age. One federal law allows, upon application of the offender, expungement for first-time drug possession by a person under the age of 21 who receives not more than one year of probation. Another only seals the criminal records of those who have been convicted of a federal juvenile offence. However, many states permit requests to expunge or destroy juvenile records, under varying conditions, and instances of expungement occur under these state statutes.⁵¹

4.20 According to Markus Funk there are differences in the USA between the various state and federal statutes, but they all share a common feature "they all prevent the courts, law enforcement agencies and employers from gaining access to information concerning an individual's prior juvenile arrest record and juvenile adjudications."⁵² Supporters of the principle of expungement argue that expungement protects a juvenile's chances for rehabilitation and increases the likelihood of being reintegrated into society. The question arises whether or not expungement is the appropriate way of dealing with juvenile recidivism in respect of violent crimes and whether the benefits expungement brings to society by rehabilitating juvenile offenders, outweigh the harms it inflicts by preventing courts, the law

48 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" *University of Michigan Journal of Law Reform* 1996 at 885

49 Published May 1997

50 May 1997

51 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" *University of Michigan Journal of Law Reform* 1996 885.

52 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" *University of Michigan Journal of Law Reform* 1996 at 888.

enforcement community, and employers from accessing their criminal records reflecting the complete picture of the person concerned.⁵³ He critically examines the above question and concludes that legislators should abandon the approach of granting courts an unlimited power to expunge juvenile records.⁵⁴

4.21 From an evaluation of expungement legislation dealing with juvenile offenders in the USA it seems that the initial underlying policy view of the juvenile justice system was that it was orientated towards rehabilitative efforts, and that punishment had no role and should not be considered in the context of juvenile justice activity. Together with this main principle, assumptions were built into the system through legislation and policy dealing with the availability of and access to criminal records of juveniles. This resulted in the conclusion that, if it is accepted that the system is a rehabilitative-orientated system, the idea of privacy and access to information about juveniles are at a premium. As a result it was concluded that the keeping of that information as confidential was a prerequisite to maximise the achievement of the the rehabilitative ideal. Therefore, branding a child as a criminal, was something to be avoided because it interfered with the rehabilitative mission. The two principles on which juvenile record confidentiality rested were, juveniles do not have the criminal mind-set to be held responsible for what they do and secondly, if they have been convicted they should be rehabilitated.⁵⁵

(b) The historical and philosophical origins of the rehabilitative ideal and justification for expungement laws in the USA

4.22 For purposes of this investigation, reference is made to the historical and philosophical origins of the rehabilitative model. As stated above, in the USA this model provided the justification for sealing or expungement of criminal records of juveniles. The rehabilitative ideal, which was based on the view that an offender can be cured of criminal tendencies, dominated in the 1960s and 1970s. During this period many scholars and social

53 Clay Calvert & Jerry Bruno "When Cleansing Criminal History Clashes With the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?" *Common Law Conspectus* Vol 19 123.

54 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" *University of Michigan Journal of Law Reform* 1996 at 889.

55 Ashley Nellis *Addressing the Collateral consequences of Convictions for Young Offenders* July/ August 2011 <http://www.NACDL.org> accessed January 2012.

science professionals sought to reform the juvenile court system in the USA.⁵⁶ This vision of the juvenile court was based on the premise that young people do not deserve punishment for their violations of the law. This view was articulated in 1998 by Danielle R Oddo as follows:⁵⁷

The juvenile system was born at the turn of the century, driven in part by the developing social sciences and an increased awareness of the special problems of juveniles.^[9] "Because children are not fully developed, physically or mentally, it was argued that they could not be held accountable for their wrongdoing" in the same manner, and to the same degree, that adults are."^[McNulty, *supra* note 2, at 86.] Criminality was not seen as the result of a decision by a morally responsible individual; rather, it was a type of youthful illness which could be treated and the child rehabilitated^[*Id.*; see AYERS, *supra* note 2, at 25; Guttman, *supra* note 6, at 512.]. Thus, rehabilitation became the mainstay of the juvenile justice system.^[12] As the Supreme Court stated, the underlying objective of the juvenile system was "not to ascertain whether the child was 'guilty' or 'innocent,' but 'what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career'"^[13] *In re Gault*, 387 U.S. 1, 15 (1967) (quoting Julian Mack, *The Juvenile Court*, 23 HARV.L.REV.104, 119-20 (1909).]

The procedures used to rehabilitate the juveniles were to be clinical rather than punitive.^[14] The reasoning was twofold: children are amenable and responsive to treatment, and this treatment was necessary to make up for the care which they were denied for most of their young lives.^[15] Thus, cases were handed over to probation officers, reform school administrators, and other experts who were to develop and implement a rehabilitation program specifically tailored for each juvenile.^[16] Juveniles were adjudicated "delinquent," rather than found "guilty," and a conviction did not send them to jail.^[17] *See id.* Overall, the goal was to provide juveniles with services to encourage rehabilitation and supervision to help them stay on the right path.^[18]

Following these principles, juvenile court proceedings have traditionally been distinguished from criminal trials by their general informality and by the exclusion of the public.^[19] Protection of the juvenile's confidentiality was essential to the attainment of rehabilitation.^[20] The principle of confidentiality served "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past"^[21]. *In re Gault*, 387 U.S. 1,24 (1967).]

56 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" University of Michigan Journal of Law Reform 1996 885 at 893 http://www.ejprob.ro/uploads_ro/725/Conclusion_Courts_of_Redemption.pdf; Clay Calvert & Jerry Bruno "When Cleansing Criminal History Clashes With the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?" Common Law Conspectus Vol 19 123 at 130. See also Ashley Nellis "Addressing the Collateral consequences of Convictions for Young Offenders" July August 2011 <http://www.NACDL.org> accessed January 2012.

57 Danielle R Oddo "Removing confidentiality protections and the "get tough" rhetoric: What has gone wrong with the juvenile justice system?" 18 B.C. *Third World L.J.* 105 (1998) at 106. <http://lawdigitalcommons.bc.edu/twlj/vol18/iss1/5> accessed 13 January 2014.

4.23 The notion that a criminal is driven by his or her upbringing and experiential background rather than by free will was far removed from the classical school of criminological theory, which viewed the individual as acting in a voluntary and calculated manner and saw free will as underlying all human acts. In the classical view, the doctrinal requirements of voluntary action and *mens rea* are based on the underlying morality that views individuals as endowed with reason, and therefore as being able to choose one of various possible courses of conduct. Therefore, in the classical school's criminological theory, punishment was regarded as justified only when the individual chose to engage in the proscribed conduct.⁵⁸

4.24 The views of the classical school was first challenged by the positivist school, headed by Cesare Lombroso, an Italian doctor who is regarded by some as the father of modern criminology. The positivist school of criminology articulated a deterministic view of behaviour which provided the general premise supporting rehabilitation. The positivist approach to rehabilitation was that, despite the classical school's deterministic view of human nature, professionals engaged in the healing process have acquired the skills necessary to reform others by education, counselling, psychotherapy, and vocational training.⁵⁹ However, in the second half of the twentieth century correctional philosophy increasingly moved away from its claimed faith in positivistic penology and its confidence in the rehabilitative potential of juvenile delinquents. One of the main factors influencing this shift away from positivism was the failure of instituted programs to show any effect upon recidivism rates.⁶⁰

4.25 While many of the earlier theories searched for the source of criminal behaviour in the soul, the body or the mind of the individual, the individual's social background and environment were not considered as causes of crime until the twentieth century. The Chicago school of criminology, started at the University of Chicago, led the way with the introduction of an environmental explanation of criminality. In the 1920s and 1930s, the

58 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" University of Michigan Journal of Law Reform 1996 885 at 894.
http://www.ejprob.ro/uploads_ro/725/Conclusion_Courts_of_Redemption.pdf.

59 Privacy and Juvenile Justice Records: A Mid-Decade Status Report A Criminal Justice Information Policy Report May 1997, NCJ – 161255 on p 6.

60 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" University of Michigan Journal of Law Reform 1996 885a t895
http://www.ejprob.ro/uploads_ro/725/Conclusion_Courts_of_Redemption.pdf.; T.Markus Funk and Daniel D. Polsby "The problem of lemons and why we must retain juvenile crime records" Cato Journal, Vol. 18, No. 1 (Spring/Summer 1998). Copyright© Cato Institute 75.

Chicago school focussed on the psychological and social disorientation caused by urban life. The theory suggested that urban life led to a disintegration of the moral order, higher rates of criminality, and loss of social cohesion. The Chicago school emphasised the transmission of a criminal culture, giving rise to the cultural deviance theory, which implied that the environment of the ghettos and slums taught the people who lived there how to become criminals by providing them with deviant cultural values.⁶¹

4.26 Movements of this type replaced the classical view of the individual as the source of crime with the theory that society itself is criminogenic. Such movements developed the "strain" theory. The strain theory considered criminal conduct an innovative means of achieving the promised ends of the American dream.⁶²

4.27 Markus Funk notes that the historical evolution of attitudes toward criminals and criminality described above set the ideological stage for "labeling theory." He explains:⁶³

Labeling theorists assert that the delinquent child is not responsible for his actions; instead, the blame is more appropriately shouldered by society. Labeling theorists view the destruction of harmful police records as removing a major obstacle impeding the rehabilitation of the juvenile because the very act of labeling a child or young adult as a "deviant" directly increases the likelihood that this individual indeed ultimately will live a criminal life.

4.28 Supporters of legislation which allows for the clearing or destruction of criminal records emphasise its effectiveness in rehabilitating juvenile delinquents. They argued that expungement allows a youth offender to enter into adulthood without the stigma of a criminal conviction. If the record is expunged it means that access to the record is prevented because the person committed an immature and impulsive act. The philosophy driving this theory emphasises the perpetrator's youthfulness as justification for expungement rather than the crime committed and the justification is based on the fact that a juvenile may encounter

61 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" University of Michigan Journal of Law Reform 1996 at 896. http://www.ejprob.ro/uploads_ro/725/Conclusion_Courts_of_Redemption.pdf.

62 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" University of Michigan Journal of Law Reform 1996 at 896. http://www.ejprob.ro/uploads_ro/725/Conclusion_Courts_of_Redemption.pdf.

63 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" University of Michigan Journal of Law Reform 1996 at 897. http://www.ejprob.ro/uploads_ro/725/Conclusion_Courts_of_Redemption.pdf.
T.Markus Funk and Daniel D. Polsby "The problem of lemons and why we must retain juvenile crime records" Cato Journal, Vol. 18, No. 1 (Spring/Summer 1998). Copyright© Cato Institute 75.

difficulties when trying to overcome the effects of his or her record of past criminality. In view thereof the benefits of expungement are clear. Recognizing the near impossibility of changing societal views towards juvenile offenders, many legislators have, in attempts to combat the harmful effects of a delinquency adjudication, employed the principle of concealment of juvenile records on the basis that such concealment will aid the child's reintegration into society.⁶⁴

4.29 The labeling perspective was based on the premise that the very process of labeling children who have been apprehended as different, in itself created "deviants" – who were different only because they have been tagged with the label "delinquent".⁶⁵ Labelling theorists suggested that some of the alleged characteristics of delinquents may be exaggerated and even generated by the processes of trial and punishment itself, and by the consequential social stigma and loss of reputation to which those who are caught are inevitably exposed. The labelling theory implied that the delinquency labels with which society identifies certain members are the root causes of criminality, and delinquents are therefore victims of labelling practices.⁶⁶

4.30 Explaining this principle, labelling theorists argued that deviance is not a quality of the act which a person commits, but is rather a consequence of the application by others of rules and sanctions with regard to an offender. The deviant is one to whom that label has successfully been applied. Thus deviant behaviour is behaviour that people label as such.⁶⁷ The process of making the criminal is therefore the process of tagging, defining, describing and emphasising the behaviour complained of. Shadd Maruna describes the idea of

64 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" University of Michigan Journal of Law Reform 1996 885 at 897. http://www.ejprob.ro/uploads_ro/725/Conclusion_Courts_of_Redemption.pdf.

65 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" University of Michigan Journal of Law Reform 1996 885 at 897. http://www.ejprob.ro/uploads_ro/725/Conclusion_Courts_of_Redemption.pdf.

66 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" University of Michigan Journal of Law Reform 1996 885 at 897. http://www.ejprob.ro/uploads_ro/725/Conclusion_Courts_of_Redemption.pdf.

67 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" University of Michigan Journal of Law Reform 1996 885 at 898. http://www.ejprob.ro/uploads_ro/725/Conclusion_Courts_of_Redemption.pdf

rehabilitation in the following terms:⁶⁸

The word 'rehabilitation,' in English, has in recent years become synonymous with cognitive therapy, changing offenders' thinking, something bizarre called 'treatment' with set levels of 'dosage' tested in random control trials, something that comes in a 'programme.' This is an unfortunate misuse of the term and is not consistent with the original meaning of the word in English. Writing 25 years ago, for instance, Forsyth (1987) was careful to distinguish 'rehabilitation' from 'reform'. He argued that the latter concept involves efforts to change an individual's character or values, whereas the former refers to the restoration of the person's reputation and full citizenship.

The two need not be in competition. Indeed, one might think that reform and rehabilitation should logically go hand-in-hand. Yet, as Boone (2011) insightfully points out in her discussion of the rehabilitation movement in the Netherlands, this hardly seems to be the case. Consider the following examples: Thirty five years ago, Aryeh Neier argued that computer systems were becoming 'record prisons' and acting as 'leper's bells' on people with criminal convictions:

'Arrest and conviction records often create social lepers who must exist as best they can on the fringes of society. The dissemination of records places a series of obstacles in the path of persons who wish to enter society's mainstream and end the half-life of the world of crimes. Is it any wonder, then, that recidivism rates should be so high? How can we seriously hope to reduce crime if we disseminate records which have the unintended effect of making it impossible for people to stop being criminals?' (cited in Harnsberger, 1979: 397)

The following year, Neier published *Crime and Punishment: A Radical Solution* (1976), in which he argued for the abandonment of rehabilitation as a penal goal and the end of parole! Indeed, it is a distinct irony that some of the loudest opponents of the 'rehabilitative ideal' (e.g., reform efforts) characterised by a commitment to offender treatment in prison and probation (e.g., von Hirsch, 1993; Irwin, 1974) are at the same time some among the most vocal supporters of strategies for ending the collateral consequences of criminal records (see von Hirsch & Wasik, 1997; Irwin, 2009).

Yet, if that combination of positions is slightly inconsistent, then the position of contemporary rehabilitation proponents is utterly incoherent. What is the point of 'challenging criminal thinking' or providing prisoners with suitable job training if upon their release they will be prohibited from finding legitimate employment because of their criminal records? Yet, the contemporary rehabilitation movement appears primarily concerned with reform and is almost silent on this issue of 'restoration of reputation' (i.e. the proper definition of rehabilitation). Each author in this Special

68 Shadd Maruna "Judicial Rehabilitation and the 'Clean Bill of Health' in Criminal Justice" *European Journal of Probation* University of Bucharest Vol. 3, No.1, 2011, pp 97 – 117 http://www.ejprob.ro/uploads_ro/725/Conclusion_Courts_of_Redemption.pdf at 103-106 accessed 9 September 2014.

Issue points out that there has been remarkably little empirical literature, internationally, about the effects (either in terms of recidivism or else softer identity measures such as self-esteem or self-efficacy) of sealing or expunging criminal convictions (but see Ruddell & Winfree, 2006) on recidivism. Admittedly, estimating the effects of such policies is fraught with methodological difficulties. It is far easier to measure and compare the effects of a 12-week, modular programme to a control group. Yet, deciding to evaluate the latter rather than the former on grounds of ease is a bit like the drunk looking for his car keys under the lamppost not because he thought they were there, but because that was the spot with the best light. This imbalance in research focus appears to be a considerable blind spot for a movement that claims to be motivated purely by research evidence ('what works') and utilitarian goals.

This has not always been the case. For most of the 20th Century, the movement for 'rehabilitation' centred around stigma-removal processes that could facilitate the reintegration promised by reform efforts. In 1919, Morgenstern (2011) tells us, the reform-oriented government of the Weimar Republic adopted something called 'Straftilgungsgesetz' or the Conviction Redemption Act. She translates the legislation as follows:

'Who, after completion of a sentence, precisely *because* of this completion only finds closed doors; who, despite honest efforts, is over and again punished with public disregard and is hampered in his struggle for life because he once failed and has been punished, finally must lose hope and motivation to find his way into reputable civil life and will be recoiled to the path to crime' (Morgenstern, 2011).

In 1950, the United States Congress likewise passed the Federal Youth Corrections Act, a law that would be almost unthinkable today. Under the Act, overturned in the 1980s, if a young adult (18-26 years old) was released from a federal prison or probation sentence prior to the expiration of the maximum sentence (i.e. is deemed 'rehabilitated' by the authorities), his or her conviction was 'automatically set aside' and the young person was provided 'a certificate to that effect' to allow the person to move on with the rest of his or her life. The UK's Rehabilitation of Offenders Act clearly understood this definition of 'rehabilitation' when it was drafted in 1974, too (see Padfield, 2011). The Act provided that after specified periods of time, criminal records would become 'spent,' and the individual shall 'be treated as a *rehabilitated* person'.

The need for this sort of redemption in society is obvious from a utilitarian standpoint: 'There has to be a way to restore people to good standing so that they'll be motivated to return to cooperation with all of the other cooperators in the population' (McCullough, 2008: 109). Without the chance of redemption, 'every failure results in guilt from which there is no exit.' (Smith, 1971: 206). Hannah Arendt (1958: 213) talks about this as the burden of irreversibility" in *The Human Condition*:

'Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover; we would remain the victim of its consequences

forever, not unlike the sorcerer's apprentice who lacked the magic formula to break the spell.'

The impact of this sorcerer's spell on recidivism has a substantial and long-standing research basis in criminology, of course, in labelling theory. In a study of 95,919 men and women who were either adjudicated or had adjudication withheld, Chiricos and colleagues (2007) found that those who were formally labeled were significantly more likely to recidivate within two years than those who were not. Similar findings have emerged in longitudinal cohort studies (see e.g., Bernburg, Krohn & Rivera 2006; Farrington 1977; McAra & McVie, 2011).

Drawing on Randall Collins (1979) classic, *The Credential Society*, Pager (2007: 4) argues that the 'criminal credential' of a conviction record 'constitutes a formal and enduring classification of social status, which can be used to regulate access and opportunity across numerous social, economic and political domains' and is therefore 'an official and legitimate means of evaluating and classifying individuals(5).' The econometric modelling research suggests that imprisonment is associated with a 10 percent drop in wages and a flatter earnings trajectory than those of individuals with similar skills and backgrounds (Western, 2002). In the first few years after prison, released prisoners in the United States tend to earn around \$6,000 to \$10,000 US in legitimate income (see Bushway, Stoll & Weiman, 2007) -- far from a living wage. Indeed, two-thirds of ex-prisoners will likely remain unemployed for up to three years after their release from prison (Saxonhouse, 2004). As criminological research has long established the common-sense link between successful employment and desistance from crime (e.g., Sampson & Laub, 1993; Uggen, 2000) – and between higher wages and the reduced likelihood of criminality (Western & Petit, 2000) – such findings suggest that high rates of criminal recidivism are something of a self-fulfilling prophecy. Jacobs (2006) captures this nicely, when he writes 'The criminal justice system feeds on itself. The more people who are arrested, prosecuted, convicted, and especially incarcerated, the larger is the criminally stigmatized underclass screened out of legitimate opportunities' (387).

In addition to these practical/instrumental concerns, there are also clear normative justifications for ending punishment. Von Hirsch & Wasik (1997: 605) argue that 'A fair system of punishment is one in which the offender is subjected to specified penal restrictions, which bear a reasonable relation to the gravity of the crime, and which are operative only for a specified time.' Dostoevsky famously remarked that the 'degree of civilization in a society can be judged by entering its prisons.' Devah Pager (2007: 144) builds on this insight arguing that 'In an era of mass incarceration, an equally relevant measure may be the success rate of those returning home'. Likewise, Fletcher (1999: 1907) writes:

'There is no point to the metaphor of paying one's debt to society unless the serving of punishment actually cancels out the fact of having committed the crime. The idea that you pay the debt and be treated as a debtor (felon) forever verges on the macabre' (Fletcher, 1999: 1907).

4.31 Radical criminologists took the labeling theory's core notion of blaming society rather than the individual for the individual's criminal acts one step further by noting the law itself as

an oppressive force used by the dominant classes to promote and to stabilize existing socio-economic relations. As a result the rich were viewed as protecting their interests and safety from those who lacked power and privilege, and used the legal order to promote their own interests. For radical criminologists the rehabilitative system was designed to foster middle class values and a belief in the law's neutrality.⁶⁹

4.32 The development of a new juvenile court system in the USA coincided with and formed part of a general movement directed towards developing and creating new programs of adjudication and control for the delinquent and neglected youth. The work of the labelling theorists reformed the juvenile justice system in the USA in the 1960's and 1970's and led to the institution of contemporary expungement schemes. Their early work shaped the present-day ideal of rehabilitation, which provided the foundation for expungement.⁷⁰ The labeling theory therefore lies at the heart of the present day juvenile expungement statutes in the US. According to the *Mid-Decade Status Report* (1997) of the Bureau of Justice Statistics in the USA:

Then, in the early 1970s, rehabilitation suffered a precipitous reversal of fortune. The larger disruptions in American society in this era prompted a general critique of the 'state run' criminal justice system. Rehabilitation was blamed by liberals for allowing the state to act coercively against offenders, and was blamed by conservatives for allowing the state to act leniently toward offenders. In this context, the death knell of rehabilitation was seemingly sounded by Robert Martinson's (1974b) influential 'nothing works' essay, which reported that few treatment programs reduced recidivism. This review of evaluation studies gave legitimacy to the anti-treatment sentiments of the day; it ostensibly 'proved' what everyone 'already knew': Rehabilitation did not work.' Deterrence (legal) and incapacitation ruled over the criminal justice system until the 90's where an unmanageable increase of the prisoner population created gaps where the benefits of rehabilitative policy could be discussed. 'The increase of the prisoner population in the United States has resulted in shifting opinions on punishment vs. rehabilitation policies.'⁷¹

4.33 The following paragraphs give a brief outline of the expungement of juvenile records in the USA. In 1983 to 1992 there appears to have been a trend towards increasingly

69 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" University of Michigan Journal of Law Reform 1996 885 at 899.

70 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" University of Michigan Journal of Law Reform 1996 at 900.

71. Privacy and Juvenile Records: A Mid-Decade Status Report," May 1997; Bureau of Justice Statistics National Conference on Juvenile Justice Records: Appropriate Criminal and Noncriminal Justice Uses, May 1997 <https://www.ncjrs.gov/app/publications/abstract.aspx?ID=164269> accessed 13 January 2014 p 28.

making available the criminal records of juveniles.⁷² This trend may be ascribed to changes in juvenile criminal behaviour. A number of surveys and studies have shown that delinquents were increasingly committing very "adult" crimes which involved serious violence and considerable harm to both persons and property.

4.34 For example, during the ten-year period from 1983 to 1992, juvenile arrest rates for violent crimes (offences such as murder, non-negligent manslaughter, forcible rape, and robbery) increased by an overall 57%. Some disaggregated figures were as follows:

- The arrest rate for aggravated assault, rape and other forms of assault by juveniles increased by 95% up to 125% between 1983 and 1992.
- For murder, the adult arrest rate rose by just 9% whereas the juvenile arrest rate increased by 128% (between 1983 and 1992).
- Juvenile arrests for weapons law violations more than doubled between 1983 and 1992.
- In 1991, juveniles between the ages of 12 and 18 were responsible for approximately 28% of all personal crimes such as rape, personal robbery, aggravated and simple assault, and theft from a person.⁷³

4.35 The *Mid-Decade Status Report* (1997) also discusses surveys which estimated that by the year 2010, juvenile arrests for violent crime would have more than doubled (presumably since 1997), and juvenile arrests for murder would have increased by 45%. These statistics and estimates strongly contradicted the notion that juvenile criminals commit childish crimes.⁷⁴

4.36 As stated above, the present system in the USA is grounded in the belief in rehabilitation. It was designed to deal with delinquents who committed less serious crime like theft and not crimes involving serious violence against vulnerable members of society. However, in light of the statistics showing an increase in violent crime (see paragraph 4.36

66 Privacy and Juvenile Records: A Mid-Decade Status Report, May 1997; Bureau of Justice Statistics National Conference on Juvenile Justice Records: Appropriate Criminal and Noncriminal Justice Uses, May 1997 <https://www.ncjrs.gov/app/publications/abstract.aspx?ID=164269> accessed 13 January 2014 p 28.

73 USA Department of Justice report <https://www.ncjrs.gov/txtfiles/fs-9416.txt> accessed 13 January 2014.

74. "Records: A Mid-Decade Status Report," May 1997; Bureau of Justice Statistics *National Conference on Juvenile Justice Records: Appropriate Criminal and Noncriminal Justice Uses*, May 1997 <https://www.ncjrs.gov/app/publications/abstract.aspx?ID=164269> accessed 13 January 2014 p 28. National Conference on Juvenile Justice Records: *Appropriate Criminal and Noncriminal Justice Uses*, BJS, May 1997, NCJ 164269.)

above), Funk argues that limitations on access to juvenile records should be considered carefully. The sealing and expungement of juvenile records might make the courts a sanctuary for the most vicious among the criminal youth. Expungement by the courts could also be interpreted that the courts failed to effectively deal with those who might be deterred from a life of crime.⁷⁵

4.37 Despite these developments, the sealing or purging of juvenile records retained substantial support in the USA. In most states, sealing and purging laws remained on the statute books.⁷⁶ The reason for this is that in most states, sealing and purging were available only for those juvenile offenders who have demonstrated some measure of rehabilitation by establishing a clean record. Those juveniles who, after committing one or two offences, establish a clean record period represent a great majority of the juvenile offender population and the policy of purging and sealing therefore continues to be supported. Studies in the States of Philadelphia, Utah and Arizona have shown that well under 50% of youths who have had contact with the police prior to their 18th birthday have had contact more than once.

4.38 All but two states govern by statute the sealing and expungement of juvenile records. Such laws are more likely to apply to juvenile court records than to law enforcement records. Over the past few years legislation was amended in a number of States and in most instances the law was changed to make expungement or sealing of records more difficult.⁷⁷

Further facts about the USA laws are as follows:

- In 21 states, the law calls for the sealing of juvenile court records;
- In 24 states the law calls for the expungement of criminal records;
- In 40 states, sealing and expungement is discretionary;
- In 8 states sealing and expungement is mandatory.

4.39 Where records may be sealed certain conditions must be met, for example there

75 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" University of Michigan Journal of Law Reform 1996 885. at 902; http://www.ojjdp.gov/PUBS/reform/ch2_i.html#205 .

76 Juvenile Justice Reform Initiatives in the States 1994-1996 http://www.ojjdp.gov/PUBS/reform/ch2_i.html accessed 9 September 2014 .

77 Juvenile Justice Reform Initiatives in the States 1994-1996 http://www.ojjdp.gov/PUBS/reform/ch2_i.html accessed 9 September 2014.

must be a clean record period or no subsequent convictions or adjudications or no pending proceedings or attainment of a defined age or expiration of juvenile court jurisdiction or satisfactory outcome to the proceeding for which the record was created. Expungement guidelines are similar to sealing guidelines, but because expungement involves a certain degree of finality, court orders are almost always required. In most States access to sealed records are strictly regulated and the courts have made clear that there is no constitutional right to demand the sealing or expungement of criminal records.

4.40 Under New York's Family Court Act a termination of a delinquency proceeding results in the automatic sealing of the record unless the agency can show that the interests of justice require otherwise, for example in a case where a juvenile violated his parole by not residing with his father as instructed and by being arrested twice in another country while waiting for a dispositional hearing for unlawful possession of weapons, the presentation agency waived the hearing and dismissed the delinquency proceeding. However, the family court declined to seal his record because sealing these records would reward and encourage disrespect for the court and it was held that the interests of justice would be served by allowing the records to remain unsealed.⁷⁸

4.41 State laws regarding disclosure and confidentiality of juvenile criminal records address a number of issues, including regulating access to the records and prescribing exceptions and limitations to disclosure. Most of the laws also spell out timetables for sealing and expungement of juvenile records if a juvenile offender reaches adulthood without further or subsequent brushes with the law. In what follows a few examples of State laws are referred to.

4.42 Until recently, State laws and judicial norms were established with the understanding that the preservation of the privacy of juveniles adjudicated in the juvenile court is a critical component of the youth's rehabilitation.⁷⁹ However, in the face of increasing public concerns over juvenile crime and violence, government agencies, school officials, the public, and victims were seeking more information about juvenile offenders. An increasing number of States responded to this need by allowing public access to and victim participation in

78 See Juvenile Justice Reform Initiatives in the States 1994-1996 <http://www.ojjdp.gov/> accessed 13 January 2014.

79 See Juvenile Justice Reform Initiatives in the States 1994-1996 <http://www.ojjdp.gov/> accessed 13 January 2014.

juvenile proceedings, broadening access to juvenile records, fingerprinting and photographing delinquent youth, and altering expungement laws for juvenile records.⁸⁰

4.43 The establishment of protective measures for guarding the privacy of youth offenders can be traced back to the separation of juvenile courts from criminal court systems. When the first juvenile court was created in Chicago (Illinois) in 1899, it was designed to spare juveniles from the harsh proceedings of adult courts, punitive and unseemly conditions of adult jails, and the stigma of being branded as criminal. The new system of juvenile justice administration was accordingly designed to be less punitive and more therapeutic than the adult system and included the idea of keeping juvenile proceedings and records private. As States began to establish separate juvenile court systems, much of the original enabling legislation did not include specific provisions for protecting the confidentiality of juvenile court proceedings or records. However, confidentiality was practiced by most early juvenile courts, where it was deemed unfair to label a juvenile as a criminal because such a characterization would inhibit a youth's rehabilitation.⁸¹

4.44 As a result of juvenile crime becoming more prevalent and increasingly violent, State policymakers felt pressure to enact laws that emphasize juvenile accountability for the commission of violent offenses. The juvenile court's focus on the rehabilitation and protection of minors from public exposure was not problematic when the indiscretions committed by these youth were of a less serious nature. However, as juvenile crime has become more violent, community protection and the public's right to know has begun to displace confidentiality and privacy issues as building blocks in the juvenile court system.⁸²

(c) Alabama

4.45 Inspection of law enforcement juvenile records is permitted by juvenile courts, officers of the State human resources and youth services departments, and any other person, agency or institution that the juvenile court determines after a hearing, to have a

80 http://www.ojjdp.gov/PUBS/reform/ch2_i.html#205 accessed 13 January 2014.

81 See Juvenile Justice Reform Initiatives in the States 1994-1996 <http://www.ojjdp.gov/> accessed 13 January 2014. Privacy and Juvenile Justice Records: A Mid-Decade Status Report A Criminal Justice Information Policy Report May 1997, NCJ – 161255 12.

82 Washington State Partnership Council on Juvenile Justice Bulletin *The Public Access of Juvenile Criminal History Records in Washington State and Collateral Consequences* January 2013. See also Sarah Alice Brown "Trends in Juvenile Justice State Legislation: 2001-2011" National Conference of State Legislatures William T. Pound, Executive Director June 2012.

legitimate interest in the case or in the work of the law enforcement agency. Juveniles themselves must move to seal records. Courts will seal records if 2 years have passed without any criminal conviction or other adjudication of delinquency. (The sealing order is nullified if there is a subsequent conviction or delinquency adjudication). A juvenile meeting the prescribed conditions may apply to expunge records at age 23.

4.46 In Alabama, a juvenile court record may be either sealed or expunged. If a record is sealed, it is hidden from public view. However, if a juvenile is later convicted or adjudicated a delinquent or youthful offender for a serious crime, the records will be treated as though they were never sealed.⁸³ If a court issues an order that a record is to be expunged, all agencies and offices with such records will be ordered to destroy them.⁸⁴ The destruction should be complete and permanent. Legally it is as though the related offenses never occurred.

4.47 Section 12-15-136 provides:

Proceedings for sealing legal and social files and records of courts, pertaining to certain persons and effect thereof.

(a) On motion of a person who has been the subject of a delinquency or child in need of supervision petition, the juvenile court may order the sealing of the legal and social files and records of the juvenile court pertaining to the person if it finds that:

(1) Two years have elapsed since the final discharge of the person from legal custody or supervision or two years after the entry of any other order of the juvenile court not involving custody or supervision; and

(2) The person has not been convicted or adjudicated delinquent or a youthful offender of any felony or a misdemeanor involving sexual offenses, drugs, weapons, or violence, or threats of violence, prior to the filing of the motion and no proceeding is pending seeking the conviction or adjudication.

(b) The motion and the order may include the records, reports, or information specified in Section 12-15-133.

(c) Notice of the motion shall be given by the clerk of the juvenile court to all of the following:

(1) The prosecutor.

83 Code of Alabama - Title 12: Courts - Section 12-15-136 (§ 12-15-136) statutes.laws.com/alabama/Title12/Chapter15/12-15-137 accessed 12 September 2013.

84 Code of Alabama - Title 12: Courts - Section 12-15-137 accessed 12 September 2013. statutes.laws.com/alabama/Title12/Chapter15/12-15-137.

(2) The authority granting the discharge if the final discharge was from an institution, parole, or probation.

(3) The law enforcement officers, department, agency, and central depository having custody of the files and records specified in Section 12-15-133 and included in the motion.

(d) Upon the entry of the order, the proceedings in the case shall be sealed. The juvenile court, by order in an individual case, may permit inspection by or release of information in the records to any clinic, hospital, or agency which has the person under care.

(e) Any adjudication of delinquency or youthful offender or conviction of a felony or misdemeanor involving sexual offenses, drugs, weapons, or violence, or threats of violence, subsequent to sealing shall have the effect of nullifying the sealing order.

4.48 To seal a juvenile record, the offender must wait two years from the end date of legal custody or supervision or, if there was no custody or supervision, two years from the date of any other court order. To qualify, an offender may not have been convicted or adjudicated a delinquent or youthful offender for sexual offenses or offenses involving drugs, weapons, violence, or threats of violence.⁸⁵ An offender may ask to have his or her juvenile court records destroyed if, as a juvenile, he or she was the subject of a delinquency petition and:

- Has not been convicted or adjudicated a delinquent or a youthful offender for sexual offenses or offenses involving drugs, weapons, violence, or threats of violence,
- there are no juvenile or criminal proceedings pending against him or her, and
- he or she is at least twenty-three years old.⁸⁶

4.49 If an offender's juvenile record is inaccurate or incomplete, he or she may contact the Alabama Criminal Justice Information Center (ACJIC) and ask that they correct it. To seal or expunge a juvenile record, the offender must file a motion in the juvenile court that handled the case.

85 Code of Alabama - Title 12: Courts - Section 12-15-136 (§ 12-15-136).
(statutes.laws.com/alabama/Title12/Chapter15/12-15-137).

86 Alabama Code § 12-15-137.

(d) Nevada⁸⁷

4.50 The expungement of juvenile records are dealt with in the Nevada Revised Statutes. The relevant records are defined and the process outlined in the legislation. Records are available only through court order to persons having a legitimate interest in a particular juvenile case. Nevada courts have interpreted this provision liberally by stating that it is up to the judge to balance the needs of the juvenile and the requesting party. Release without a court order is limited to records of traffic violations and records required by probation officers for the preparation of pre-sentence reports. Juveniles may petition the court for the sealing of all records except those which are traffic related, 3 years after the last juvenile court referral or expiration of the court's jurisdiction. Prosecutors and probation officers have an opportunity to contest the sealing. All records are sealed automatically when the juvenile reaches the age of 24. All sealed records are to be treated as though they never existed, but courts may still review them under certain circumstances.

4.51 In Nevada, most juvenile court records are hidden from public view. To ensure maximum confidentiality, however, a person can ask to have his or her juvenile record officially sealed. If the record is sealed, it may be viewed only with the court's permission in very limited circumstances. Generally, the sealed record will be treated as though it never existed, and a person is not required to disclose information about it to anyone.

4.52 Nevada juvenile court records, except those for the crimes listed below, are automatically sealed when a person turns twenty-one. If an offender has not yet turned twenty-one, he or she can ask the court to seal his or her record if at least three years have passed since last referred to a juvenile court or adjudicated. If the court finds that he or she has not been convicted of a misdemeanor involving moral turpitude or a felony, and that the offender has been rehabilitated, the criminal record may be sealed. If one of the crimes listed below has been committed, and a juvenile court judge has not ordered the record to be sealed, the record will not be automatically sealed when the offender turns twenty-one. Instead, the offender must wait until he or she turns thirty and petition the court to seal the record. At that time, the juvenile record will be eligible for sealing if the person has not been convicted of an offence, other than minor traffic offences, since his or her twenty-first

87 Nevada Revised Codes <http://www.leg.state.nv.us/NRS/NRS-062H.html#NRS062HSec130> accessed 13 September 2014 NRS 62H.100-170.

birthday.

4.53 The offences that do not qualify for automatic sealing are as follows:⁸⁸

- sexual assault as defined by Nevada Statutes;⁸⁹
- battery with intent to commit sexual assault as defined by Nevada Statutes;⁹⁰
- lewdness with a child as defined by Nevada Statutes;⁹¹ and
- any unlawful act that would have been a felony if committed by an adult and that involved the use or threat of force or violence.

To seal a record, the person must file a petition in the juvenile court that handled the case. Clearing a juvenile record can be complicated and assistance is normally required to have the paperwork prepared and the case presented to the juvenile court judge.⁹²

4.54 Nevada Revised Statutes NRS 62H.100 deals with records in the following terms:⁹³

1. As used in NRS 62H.100 to 62H.170, inclusive, unless the context otherwise requires, “records” means any records relating to a child who is within the purview of this title and who:

(a) Is taken into custody by a peace officer or a probation officer or is otherwise taken before a probation officer; or

(b) Appears before the juvenile court or any other court pursuant to the provisions of this title.

2. The term includes records of arrest. (Added to NRS by 2003, 1091)
NRS 62H.110 Applicability of provisions.

The provisions of NRS 62H.100 to 62H.170, inclusive, do not apply to:

1. Information maintained in the standardized system established pursuant to NRS 62H.200;

2. Information that must be collected by the Division of Child and Family Services pursuant to NRS 62H.220;

3. Records that are subject to the provisions of NRS 62F.260; or

4. Records relating to a traffic offense that would have been a misdemeanor if committed by an adult.

88 NRS 62H 62.150 Nevada Revised Codes <http://www.leg.state.nv.us/NRS/NRS-062H.html#NRS062HSec130> accessed 13 September 2014.

89 Nevada Statutes § 200.366.

90 Nevada Statutes § 200.400

91 Nevada Statutes § 201.230.

92 Nevada Statutes §§ 62H.100.

93 <http://www.recordclearing.org/states/nevada/nevada-juvenile-expungement/>

(Added to NRS by 2003, 1091)

NRS 62H.120 Explanation of certain information concerning sealing of records to be included in court order.

Any decree or order entered concerning a child within the purview of this title must contain, for the benefit of the child, an explanation of the contents of NRS 62H.100 to 62H.170, inclusive, and, if applicable, NRS 62F.260.

(Added to NRS by 2003, 1091)

4.55 The prescribed process is outlined in the following terms:

NRS 62H.130 Procedure for sealing records of child who is less than 21 years of age.

1. If a child is less than 21 years of age, the child or a probation officer on behalf of the child may petition the juvenile court for an order sealing all records relating to the child. The petition may be filed not earlier than 3 years after the child:

- (a) Was last adjudicated in need of supervision or adjudicated delinquent; or
- (b) Was last referred to the juvenile court, whichever is later.

2. If a petition is filed pursuant to this section, the juvenile court shall notify the district attorney and, if a probation officer is not the petitioner, the chief probation officer.

3. The district attorney and the chief probation officer, or any of their deputies, or any other person who has evidence that is relevant to consideration of the petition may testify at the hearing on the petition.

4. After the hearing on the petition, the juvenile court shall enter an order sealing all records relating to the child if the juvenile court finds that:

(a) During the applicable 3-year period, the child has not been convicted of a felony or of any misdemeanor involving moral turpitude; and

(b) The child has been rehabilitated to the satisfaction of the juvenile court.

(Added to NRS by 2003, 1091)

NRS 62H.140 Automatic sealing of records when child reaches 21 years of age; exception.

Except as otherwise provided in NRS 62H.150, when a child reaches 21 years of age, all records relating to the child must be sealed automatically.

(Added to NRS by 2003, 1091)

NRS 62H.150 Limitations on sealing records related to certain delinquent acts.

1. If a child is adjudicated delinquent for an unlawful act listed in subsection 6 and the records relating to that unlawful act have not been sealed by the juvenile

court pursuant to NRS 62H.130 before the child reaches 21 years of age, those records must not be sealed before the child reaches 30 years of age.

2. After the child reaches 30 years of age, the child may petition the juvenile court for an order sealing those records.

3. If a petition is filed pursuant to this section, the juvenile court shall notify the district attorney and the chief probation officer.

4. The district attorney and the chief probation officer, or any of their deputies, or any other person who has evidence that is relevant to consideration of the petition may testify at the hearing on the petition.

5. After the hearing on the petition, the juvenile court may enter an order sealing the records relating to the child if the juvenile court finds that, during the period since the child reached 21 years of age, the child has not been convicted of any offense, except for minor moving or standing traffic offenses.

6. The provisions of this section apply to any of the following unlawful acts:

(a) An unlawful act which, if committed by an adult, would have constituted:

- (1) Sexual assault pursuant to NRS 200.366;
- (2) Battery with intent to commit sexual assault pursuant to NRS 200.400; or
- (3) Lewdness with a child pursuant to NRS 201.230.

(b) An unlawful act which would have been a felony if committed by an adult and which involved the use or threatened use of force or violence.

(Added to NRS by 2003, 1092)

NRS 62H.160 Procedure for sealing records of child: Duties of juvenile court and other public officers and agencies.

1. If the juvenile court enters an order sealing the records relating to a child or the records are sealed automatically, all records relating to the child must be sealed that are in the custody of:

- (a) The juvenile court or any other court;
- (b) A probation officer, probation department or law enforcement agency; or
- (c) Any other public officer or agency.

2. If the juvenile court enters an order sealing the records relating to a child, the juvenile court shall send a copy of the order to each public officer or agency named in the order. Not later than 5 days after receipt of the order, each public officer or agency shall:

(a) Seal the records in the custody of the public officer or agency, as directed by the order;

(b) Advise the juvenile court of compliance with the order; and

- (c) Seal the copy of the order received by the public officer or agency.
(Added to NRS by 2003, 1092)

NRS 62H.170 Effect of sealing records; inspection of sealed records in certain circumstances.

1. Except as otherwise provided in this section, if the records of a person are sealed:

(a) All proceedings recounted in the records are deemed never to have occurred; and

(b) The person may reply accordingly to any inquiry concerning the proceedings and the acts which brought about the proceedings.

2. The juvenile court may order the inspection of records that are sealed if:

(a) The person who is the subject of the records petitions the juvenile court to permit the inspection of the records by the persons named in the petition;

(b) An agency charged with the medical or psychiatric care of the person who is the subject of the records petitions the juvenile court to permit the inspection of the records by the agency; or

(c) A district attorney or an attorney representing a defendant in a criminal action petitions the juvenile court to permit the inspection of the records to obtain information relating to the persons who were involved in the acts detailed in the records.

3. Upon its own order, any court of this State may inspect records that are sealed if the records relate to a person who is less than 21 years of age and who is to be sentenced by the court in a criminal proceeding.

(Added to NRS by 2003, 1092)

(e) California⁹⁴

4.56 In California, it is possible to seal juvenile court records for all but very serious offenses. Under California Penal Code Section 1203.4, a juvenile is entitled to an expungement order if placed on probation after conviction and after successfully completing the terms of probation, including paying all fines, fees and restitution ordered by the court. Even if not placed on probation, one is still entitled to an expungement order under section 1203.4a if the conviction was for a misdemeanor, the sentence have been completed and more than one year has elapsed since the date of conviction. In either of these situations, an expungement order will allow one to withdraw a guilty plea and the case will be dismissed.

94 http://www.ehow.com/about_6374729_california-expungement-law.html. Accessed 9/09/2014.

4.57 As a condition for granting expungement, one cannot be currently serving a sentence, be on probation or charged with a crime. In the event one has not completed the terms of probation, or committed probation violations, the expungement of the record is no longer mandatory, but is subject to the discretion of the judge. Some convictions cannot be expunged under any circumstances, such as certain sex-related offenses and any infractions.

4.58 If a juvenile court record is sealed, it may still be accessed in a few situations, for example, when applying for a job in the field of law enforcement or health care or, if a person committed a driving offense, or when a person's background is checked for the purpose of setting car insurance rates. Under most circumstances, however, the events in a juvenile's record are treated as though they never occurred and a juvenile may legally state that he or she has never been arrested or convicted of a juvenile offense. Records of any conviction for possession of marijuana for personal use have been in a special category since 1976. California law provides that these records will be automatically erased two years from the date of conviction. Therefore, one does not have to petition the court for an expungement order for dismissal of these records.⁹⁵

4.59 When a court orders that a juvenile record be sealed, it will also set a later date upon which the record will be expunged, that is, physically destroyed, unless the court finds that there is good cause to keep the record intact.⁹⁶ To ask a court to seal a juvenile record, a person must be at least 18 years old or at least five years must have passed since his or her juvenile court supervision ended. The record may be sealed if a court finds that:

- The person has no subsequent criminal convictions for a felony or misdemeanor involving moral turpitude, and
- The person has been rehabilitated.

A record does not qualify for sealing if a person has committed one of the serious offences listed in the relevant legislation⁹⁷ when the person was at least 14 years old. To seal a

95 http://www.ehow.com/about_6374729_california-expungement-law.htm l. accessed 9/09/2014.

96 California Welfare & Institutions Code § 781.

97 California Welfare & Institutions Code § 707(b).

juvenile record, a person must file a petition with the juvenile court in the county where the case was dealt with.

4.60 Some criminal courts offer diversion programs as an alternative to conviction and sentencing to jail or probation. Records in diversion cases are automatically changed to dismissals after completion of the diversion program requirements and an expungement order is not needed. However, if the requirements have not been completed, then a conviction will be placed on record. As in the case of not completing the probation noted above, it will be at the discretion of the judge whether this type of record can be expunged.⁹⁸

4.61 The Code provides:⁹⁹

Code § 781. Sealing of records

(a) In any case in which a petition has been filed with a juvenile court to commence proceedings to adjudge a person a ward of the court, in any case in which a person is cited to appear before a probation officer or is taken before a probation officer pursuant to Section 626, or in any case in which a minor is taken before any officer of a law enforcement agency, the person or the county probation officer may, five years or more after the jurisdiction of the juvenile court has terminated as to the person, or, in a case in which no petition is filed, five years or more after the person was cited to appear before a probation officer or was taken before a probation officer pursuant to Section 626 or was taken before any officer of a law enforcement agency, or, in any case, at any time after the person has reached the age of 18 years, petition the court for sealing of the records, including records of arrest, relating to the person's case, in the custody of the juvenile court and probation officer and any other agencies, including law enforcement agencies, and public officials as the petitioner alleges, in his or her petition, to have custody of the records. The court shall notify the district attorney of the county and the county probation officer, if he or she is not the petitioner, and the district attorney or probation officer or any of their deputies or any other person having relevant evidence may testify at the hearing on the petition. If, after hearing, the court finds that since the termination of jurisdiction or action pursuant to Section 626, as the case may be, he or she has not been convicted of a felony or of any misdemeanor involving moral turpitude and that rehabilitation has been attained to the satisfaction of the court, it shall order all records, papers, and exhibits in the person's case in the custody of the juvenile court sealed, including the juvenile court record, minute book entries, and entries on dockets, and any other records relating to the case in the custody of the other agencies and officials as are named in the order. In any case in which a ward of the juvenile court is subject to the registration requirements set forth in Section 290 of the Penal Code, a court, in ordering the sealing of the juvenile records of the person, also shall provide in the

98 http://www.ehow.com/about_6374729_california-expungement-law.html.

99 <http://www.recordclearing.org/states/california/california-juvenile-record-sealing/> accessed 9 September 2014.

order that the person is relieved from the registration requirement and for the destruction of all registration information in the custody of the Department of Justice and other agencies and officials. Notwithstanding any other provision of law, the court shall not order the person's records sealed in any case in which the person has been found by the juvenile court to have committed an offense listed in subdivision (b) of Section 707 when he or she had attained 14 years of age or older. Once the court has ordered the person's records sealed, the proceedings in the case shall be deemed never to have occurred, and the person may properly reply accordingly to any inquiry about the events, the records of which are ordered sealed. The court shall send a copy of the order to each agency and official named therein, directing the agency to seal its records and stating the date thereafter to destroy the sealed records. Each such agency and official shall seal the records in its custody as directed by the order, shall advise the court of its compliance, and thereupon shall seal the copy of the court's order for sealing of records that it, he, or she received. The person who is the subject of records sealed pursuant to this section may petition the superior court to permit inspection of the records by persons named in the petition, and the superior court may so order. Otherwise, except as provided in subdivision (b), the records shall not be open to inspection.

(b) In any action or proceeding based upon defamation, a court, upon a showing of good cause, may order any records sealed under this section to be opened and admitted into evidence. The records shall be confidential and shall be available for inspection only by the court, jury, parties, counsel for the parties, and any other person who is authorized by the court to inspect them. Upon the judgment in the action or proceeding becoming final, the court shall order the records sealed.

(c) (1) Subdivision (a) does not apply to Department of Motor Vehicle records of any convictions for offenses under the Vehicle Code or any local ordinance relating to the operation, stopping and standing, or parking of a vehicle where the record of any such conviction would be a public record under Section 1808 of the Vehicle Code. However, if a court orders a case record containing any such conviction to be sealed under this section, and if the Department of Motor Vehicles maintains a public record of such a conviction, the court shall notify the Department of Motor Vehicles of the sealing and the department shall advise the court of its receipt of the notice.

Notwithstanding any other provision of law, subsequent to the notification, the Department of Motor Vehicles shall allow access to its record of convictions only to the subject of the record and to insurers which have been granted requestor code numbers by the department. Any insurer to which such a record of conviction is disclosed, when such a conviction record has otherwise been sealed under this section, shall be given notice of the sealing when the record is disclosed to the insurer. The insurer may use the information contained in the record for purposes of determining eligibility for insurance and insurance rates for the subject of the record, and the information shall not be used for any other purpose nor shall it be disclosed by an insurer to any person or party not having access to the record.

(2) This subdivision shall not be construed as preventing the sealing of any record which is maintained by any agency or party other than the Department of Motor Vehicles.

(3) This subdivision shall not be construed as affecting the procedures or authority of the Department of Motor Vehicles for purging department records.

(d) Unless for good cause the court determines that the juvenile court record shall be retained, the court shall order the destruction of a person's juvenile court records that are sealed pursuant to this section as follows: five years after the record was ordered sealed, if the person who is the subject of the record was alleged or adjudged to be a person described by Section 601; or when the person who is the subject of the record reaches the age of 38 if the person was alleged or adjudged to be a person described by Section 602, except that if the subject of the record was found to be a person described in Section 602 because of the commission of an offense listed in subdivision (b), of Section 707, when he or she was 14 years of age or older, the record shall not be destroyed. Any other agency in possession of sealed records may destroy its records five years after the record was ordered sealed.

(e) This section shall not permit the sealing of a person's juvenile court records for an offense where the person is convicted of that offense in a criminal court pursuant to the provisions of Section 707.1. This subdivision is declaratory of existing law.

§ 1772 Setting Aside the Verdict

(a) Subject to subdivision (b), every person honorably discharged from control by the Youth Authority Board who has not, during the period of control by the authority, been placed by the authority in a state prison shall thereafter be released from all penalties and disabilities resulting from the offense or crime for which he or she was committed, and every person discharged may petition the court which committed him or her, and the court may upon that petition set aside the verdict of guilty and dismiss the accusation or information against the petitioner who shall thereafter be released from all penalties and disabilities resulting from the offense or crime for which he or she was committed, including, but not limited to, any disqualification for any employment or occupational license, or both, created by any other provision of law.

(b) Notwithstanding subdivision (a):

(1) A person described by subdivision (a) shall not be eligible for appointment as a peace officer employed by any public agency if his or her appointment would otherwise be prohibited by Section 1029 of the Government Code. However, that person may be appointed and employed as a peace officer by the Department of the Youth Authority if (A) at least five years have passed since his or her honorable discharge, and the person has had no misdemeanor or felony convictions except for traffic misdemeanors since he or she was honorably discharged by the Youth Authority Board, or (B) the person was employed as a peace officer by the Department of the Youth Authority on or before January 1, 1983. No person who is under the jurisdiction of the Department of the Youth Authority shall be admitted to an

examination for a peace officer position with the department unless and until the person has been honorably discharged from the jurisdiction of the Youth Authority Board.

(2) A person described by subdivision (a) is subject to Sections 12021 and 12021.1 of the Penal Code.

(3) The conviction of a person described by subdivision (a) for an offense listed in subdivision (b) of Section 707 is admissible in a subsequent criminal, juvenile, or civil proceeding if otherwise admissible, if all the following are true:

(A) The person was 16 years of age or older at the time he or she committed the offense.

(B) The person was found unfit to be dealt with under the juvenile court law pursuant to Section 707 because he or she was alleged to have committed an offense listed in subdivision (b) of Section 707.

(C) The person was tried as an adult and convicted of an offense listed in subdivision (b) of Section 707.

(D) The person was committed to the Department of the Youth Authority for the offense referred to in subparagraph (C).

(4) The conviction of a person described by subdivision (a) may be used to enhance the punishment for a subsequent offense.

(5) The conviction of a person who is 18 years of age or older at the time he or she committed the offense is admissible in a subsequent civil, criminal, or juvenile proceeding, if otherwise admissible pursuant to law.

(c) Every person discharged from control by the Youth Authority Board shall be informed of the provisions of this section in writing at the time of discharge.

(d) "Honorably discharged" as used in this section means and includes every person whose discharge is based upon a good record on parole.

§ 626. Alternative procedures as to disposition of minor; Governing consideration in selecting alternative

An officer who takes a minor into temporary custody under the provisions of Section 625 may do any of the following:

(a) Release the minor.

(b) Deliver or refer the minor to a public or private agency with which the city or county has an agreement or plan to provide shelter care, counseling, or diversion services to minors so delivered.

(c) Prepare in duplicate a written notice to appear before the probation officer of the county in which the minor was taken into custody at a time and place specified in the notice. The notice shall also contain a concise statement of the reasons the minor was taken into custody. The officer shall deliver one copy of the notice to the minor or to a parent, guardian, or responsible relative of the minor and may require the minor or the minor's parent, guardian, or relative, or both, to sign a written promise to appear at the time and place designated in the notice. Upon the execution of the promise to appear, the officer shall immediately release the minor. The officer shall, as soon as practicable, file one copy of the notice with the probation officer. The written notice to appear may require that the minor be fingerprinted, photographed, or both, upon the minor's appearance before the probation officer, if the minor is a person described in Section 602 and he or she was taken into custody upon reasonable cause for the commission of a felony.

(d) Take the minor without unnecessary delay before the probation officer of the county in which the minor was taken into custody, or in which the minor resides, or in which the acts take place or the circumstances exist which are alleged to bring the minor within the provisions of Section 601 or 602, and deliver the custody of the minor to the probation officer. The peace officer shall prepare a concise written statement of the probable cause for taking the minor into temporary custody and the reasons the minor was taken into custody and shall provide the statement to the probation officer at the time the minor is delivered to the probation officer. In no case shall the officer delay the delivery of the minor to the probation officer for more than 24 hours if the minor has been taken into custody without a warrant on the belief that the minor has committed a misdemeanor.

In determining which disposition of the minor to make, the officer shall prefer the alternative which least restricts the minor's freedom of movement, provided that alternative is compatible with the best interests of the minor and the community.

(f) Utah¹⁰⁰

4.62 Court records may be inspected by social service agencies having custody, parents, guardians, lawyers or officials doing background checks for concealed weapons permits. Juveniles themselves, persons having a legitimate interest in the proceedings and researchers may be granted access by court order. In cases of juveniles over the age of 16 who are charged with crimes that would be felonies if committed by adults, the court will release petitions, adjudications or disposition orders and summaries of delinquency records. Juveniles may petition the court for expungement one year after release from detention or one year after termination of juvenile court jurisdiction. Records are to be expunged if the juvenile has not been convicted of a crime in the meantime and no felony or misdemeanor charge is pending. If a judge grants the petition photographs and other records are to be

100. <http://www.recordclearing.org/states/utah/sealing-of-utah-juvenile-records/> accessed 9 September 2014.

destroyed but fingerprints must be preserved.

4.63 In Utah, the public has limited access to juvenile records, though certain individuals and agencies are permitted to view them. To ensure maximum confidentiality, a person may be able to have his or her juvenile record expunged, following the guidelines below. An expunged record may be viewed only by court order. Generally, expunged juvenile records are treated as though they never existed. A person is not required to disclose information about an expunged juvenile record to anyone, for instance, to colleges or potential employers.

4.64 Juvenile records may qualify for expungement if all of the following are verified:

- The person is at least eighteen years old;
- it has been one year since the end of the person's case and he or she has paid any fines, fees, or restitution, and
- since the end of the case, the person has not been convicted of a felony or misdemeanor involving moral turpitude, and no criminal proceedings are pending against the person.

Importantly, adjudications for murder or aggravated murder cannot be expunged.¹⁰¹

4.65 Utah Code 78A-6-1105 provides as follows:

Expungement of juvenile court record — Petition — Procedure.

- (1) (a) A person who has been adjudicated under this chapter may petition the court for the expungement of the person's record in the juvenile court if:
- (i) the person has reached 18 years of age; and
 - (ii) one year has elapsed from the date of termination of the continuing jurisdiction of the juvenile court or, if the person was committed to a secure youth corrections facility, one year from the date of the person's unconditional release from the custody of the Division of Juvenile Justice Services.

101 Utah Code § 78A-6-1105. (<http://www.recordclearing.org/states/utah/sealing-of-utah-juvenile-records/> accessed 9 September 2014).

(b) The court may waive the requirements in Subsection (1)(a), if the court finds, and states on the record, the reason why the waiver is appropriate.

(c) The petitioner shall include with the petition the original criminal history report obtained from the Bureau of Criminal Identification in accordance with the provisions of Subsection 53-10-108(8).

(d) The petitioner shall send a copy of the petition to the county attorney or, if within a prosecution district, the district attorney.

(e) (i) Upon the filing of a petition, the court shall set a date for a hearing and shall notify the county attorney or district attorney, and the agency with custody of the records of the pendency of the petition and of the date of the hearing. Notice shall be given at least 30 days prior to the hearing.

(ii) The court shall provide a victim with the opportunity to request notice of a petition for expungement. A victim shall receive notice of a petition for expungement at least 30 days prior to the hearing if, prior to the entry of an expungement order, the victim or, in the case of a child or a person who is incapacitated or deceased, the victim's next of kin or authorized representative, submits a written and signed request for notice to the court in the judicial district in which the crime occurred or judgment was entered. The notice shall include a copy of the petition and statutes and rules applicable to the petition.

(2) (a) At the hearing, the county attorney or district attorney, a victim, and any other person who may have relevant information about the petitioner may testify.

(b) In deciding whether to grant a petition for expungement, the court shall consider whether the rehabilitation of the petitioner has been attained to the satisfaction of the court, taking into consideration the petitioner's response to programs and treatment, the petitioner's behavior subsequent to adjudication, and the nature and seriousness of the conduct.

(c) The court may order sealed all petitioner's records under the control of the juvenile court and any of petitioner's records under the control of any other agency or official pertaining to the petitioner's adjudicated juvenile court cases if the court finds that:

(i) the petitioner has not, since the termination of the court's jurisdiction or his unconditional release from the Division of Juvenile Justice Services, been convicted of a:

(A) felony; or

(B) misdemeanor involving moral turpitude;

(ii) no proceeding involving a felony or misdemeanor is pending or being instituted against the petitioner; and

(iii) a judgment for restitution entered by the court on the conviction for which the expungement is sought has been satisfied.

(3) The petitioner shall be responsible for service of the order of expungement to all affected state, county, and local entities, agencies, and officials. To avoid destruction or sealing of the records in whole or in part, the agency or entity receiving the

expungement order shall only expunge all references to the petitioner's name in the records pertaining to the petitioner's adjudicated juvenile court cases.

(4) Upon the entry of the order, the proceedings in the petitioner's case shall be considered never to have occurred and the petitioner may properly reply accordingly upon any inquiry in the matter. Inspection of the records may thereafter only be permitted by the court upon petition by the person who is the subject of the records, and only to persons named in the petition.

(5) The court may not expunge a juvenile court record if the record contains an adjudication of:

- (a) Section 76-5-202, aggravated murder; or
- (b) Section 76-5-203, murder.

(6) (a) A person whose juvenile court record consists solely of nonjudicial adjustments as provided in Section 78A-6-602 may petition the court for expungement of the person's record if the person:

- (i) has reached 18 years of age; and
- (ii) has completed the conditions of the nonjudicial adjustments.

(b) The court shall, without a hearing, order sealed all petitioner's records under the control of the juvenile court and any of petitioner's records under the control of any other agency or official pertaining to the petitioner's nonjudicial adjustments.

(g) Conclusion on expungement of juvenile records in the USA

4.66 TM Funk makes certain conclusions which he regards as essential conditions to be considered for inclusion in any legislation dealing with expungement of juvenile records. He reached his conclusions after studying the jurisdictions in the USA which retain statutory provisions that allow for, or mandate, the expungement of juvenile crime records once the juvenile reaches a certain age and the stated policy goal justifying such legislation (to allow the juvenile offender to enter adulthood with a "clean slate," thereby shielding him from the negative effects of having a criminal record), and an exhaustive analysis and critique of the policy, examining its philosophical origins, the "rehabilitative ideal" on which it is premised, and its theoretical and practical impact. TM Funk concludes:¹⁰²

I will emphasize certain universal elements that every statute should incorporate if it is to effectively deal with the problems created by contemporary juvenile delinquency. **Most importantly, "expunge" should never be defined as destroying or erasing the record entirely, but instead should be limited to "sealing" the record from employers and other members of the public in appropriate situations.** One of

102 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" *University of Michigan Journal of Law Reform* 1996 936.

the primary reasons for this is that courts should always have access to an individual's entire unaltered record so as to be able to tailor a sentence based on the former juvenile's full criminal history and demonstrated rehabilitative potential. **Law enforcement officials, academic researchers, and employers seeking employees for positions of national security should in most circumstances likewise have access to the entire juvenile record...**

and

Turning to those events in an individual's past that may appropriately be sealed from members of the public such as employers, **the research discussed above demonstrates that the seriousness of the juvenile offense is predictive of continuing criminal involvement and that recidivism as a juvenile is strongly correlated to adult chronic criminality. In short, criminal propensities rarely emerge de novo in adulthood. For this reason, expungement statutes should require records to be maintained where the juvenile has committed three or more unrelated delinquent acts...**

and

In any event, no juvenile conviction should be expunged if the individual has not remained crime free for at least five years, thereby ensuring that the individual who has been found guilty of one or two nonviolent delinquent acts has demonstrated his rehabilitative potential.

and

Furthermore, given the high stability of aggression over time, expungement statutes should not expunge delinquent acts of violence unless special circumstances indicate to the court that expungement is appropriate.

and

Finally, expungement of the remaining juvenile records, including all arrests that did not result in formal actions, should occur automatically and without the need to petition the court' once the juvenile reaches his eighteenth birthday or has remained crime free for five years, whichever is later.

(h) Expungement of juvenile records in Australia

4.67 In 1997 the Australian Law Reform Commission completed and tabled its report conducted into the treatment of children in their contact with the law over a broad spectrum of areas.¹⁰³ In particular the report contains recommendations for law reform to Australia's child protection, education and legal systems to ensure children's appropriate participation in decision making concerning them. The report provided extensive evidence of the problems and neglect of children who come into contact with federal and state legal processes. It

103 Australian Law Reform Commission Report 84 "*Seen and heard: priority for children in the legal process*" published on 19 November 1997 and last modified on 19 July 2012.

addresses issues including legal representation and advocacy for children and their access to legal processes and the appropriateness of procedures by which children give evidence. It also addressed the treatment of children in conflict with the law and in particular how they should be treated in the criminal justice system. The Commission's investigation contains particular recommendations on reform of the criminal justice process where children are involved and also deals with sentencing and how criminal records of children should be dealt with.

4.68 With reference to how the criminal records of children should be dealt with, the Commission made important recommendations relevant to our current enquiry into the expungement of criminal records in South Africa. These discussions and recommendations are contained in Chapter 19 of the report and for purposes of this investigation the relevant parts are quoted in full.¹⁰⁴

Criminal records

Introduction

19.117 Criminal records and associated police records detail a young person's contact with the criminal justice system. They can have significant effects in a child's later life. Criminal records can be retained and follow the child into adulthood or they can lapse upon the child's majority or after a certain time.

Convictions

19.118 The view that a child's criminal record should lapse recognises that most children 'grow out' of crime and should not be branded in adulthood by youthful mistakes. A submission made to the Inquiry summarised this view.

This provision appropriately reflects the reality of youth offending — that most youth do not continue criminal behaviour into their adult lives, that the maintenance of a criminal record incurred as a youth stigmatises the young offender, and this stigmatisation could drive them further into criminality.

19.119 The prejudice which a criminal record carries has an enormous impact on a young person, particularly in relation to employment prospects.

Once you have a criminal record and the police know they treat you like shit. The[y] never believe [what] you say and always go against you.

104 Australian Law Reform Commission Report 84 "*Seen and heard: priority for children in the legal process*" published on 19 November 1997 and last modified on 19 July 2012.

I was given a second chance, and yes, I believe I deserve it! I deserved to be punished — which I was — but I don't think it should hamper my future job.

A criminal record at a young age could ruin their life.

19.120 Submissions generally agreed that young people convicted of criminal offences should only carry a criminal record for the most serious types of offences. Submissions also emphasised the importance of limiting the period of time for which criminal records of juvenile offenders can be retained. Some favoured expunging the record when the child reaches the age of 18; others preferred deletion after a specified period such as two or three years where no further offences have been committed in that time. One submission argued that young people should be made aware that any conviction for a criminal offence may be expunged after a period of time. 'Youths need to know that offences committed whilst a youth have a use by date...!'

19.121 Recent amendments to Queensland's juvenile justice legislation are likely to cause more children to make the transition to adulthood with an established criminal record. A new section provides that particular cautions and community conference agreements are retained and admissible as part of a person's criminal history. In both written submissions and public hearings great concern was expressed at the amendments.

19.122 Some State and Territory laws limit the imposition or retention of criminal records in relation to children. Some protection is provided by the spent convictions provisions in Part VIIC of the Crimes Act. This law does not affect the recording of criminal convictions. It protects people by giving them the right not to disclose spent convictions under certain circumstances. It also prohibits individuals and organisations from taking into account certain spent convictions or disclosing them to other people. A spent conviction is a conviction for a federal, Territory, State or foreign offence which meets all of the following conditions.

• Ten or more years must have passed in the case of adults and five or more years in the case of juvenile offenders.

• The sentence imposed (not the sentence served) must have been a prison sentence of 30 months or less, a fine, bond or community service order.

• The person has not committed another offence in the last ten year period for adult offenders or five year period for juvenile offenders, subject to some exceptions.

• None of the specified exclusions applies. Where an exclusion is specified, information about the spent conviction can be requested and taken into account. The exclusions include courts when making decisions on matters such as sentencing offenders and law enforcement agencies when making decisions about whether to prosecute.

19.123 DRP 3 proposed that criminal convictions of young offenders should be expunged after a period of two years, or when the young person attains the age of eighteen years, whichever is the earlier, except where further convictions have been

recorded. It also proposed that police records of young offenders should be retained for five years then automatically destroyed where no further offence has occurred. The AFP's submission was generally supportive of the draft recommendations regarding retention of criminal records and favoured a system along the lines of the federal spent convictions provisions. The Northern Territory Government in its submission noted that the *Criminal Records (Spent Convictions) Act 1992* (NT) provides that convictions for some less serious offenders expire after five years in the case of persons convicted in the Juvenile Courts, and after ten years for a conviction recorded as an adult. The Education Centre Against Violence supported the recommendation but suggested that convictions and records of juveniles who have committed sexual offences should be retained because of the 'highly repetitive nature of this class of offences and the general resistance to treatment'. The Inquiry agrees with this and recognises that there are some classes of exceptions to the principle that juvenile criminal records should lapse.

19.124 Any **expungement of criminal records** for young offenders should be subject to appropriate exclusions. The exclusions which apply in the federal spent convictions legislation provide some useful guidance on this issue, although they should not necessarily be the same. Sexual offending is one area where it may be appropriate to impose more rigorous requirements, given the serious consequences and the likelihood of re-offending.

19.125 The federal spent convictions legislation plays an important role in protecting the rights of people who have offended against the law. However, its main focus is on non-disclosure of information about convictions rather than expungement as such from the records of the relevant authorities. Expungement is necessary to ensure that young people are not stigmatised by aberrant youthful offending.

Police records

19.126 Retention of police records is also a concern for young offenders. Police generally retain a record of a young offender's contact with the police and courts even when no conviction is recorded or no formal record is kept. This internal police record assists police to determine appropriate action to be taken in relation to the child in any future dealings with him or her. The record cannot be used in sentencing for further offences or in any other way adverse to the child. However, submissions expressed concern about the adverse effect on children's future prospects of retaining police records indefinitely. Most agreed that police records should be retained only for a limited period. There is already some provision for this in State and Territory legislation. In New South Wales, for example, the Children's Court may order destruction of a range of records including photographs, fingerprints and any other prescribed records other than records of the Children's Court. Presumably, 'other prescribed records' would include such things as records of official cautions. Submissions expressed concern that the requirements concerning destruction of police records of juvenile offenders, where they exist, should be properly enforced.

19.127 A submission from the AFP opposed the proposal in DRP 3 for the automatic destruction of police records after five years. The AFP preferred a system for police records based on similar principles to those which apply to convictions under the Commonwealth spent convictions legislation. This would include appropriate

requirements regarding non-disclosure of this type of information. However, the stigmatisation of a criminal record is not restricted to the public arena. If police records are retained, they will undoubtedly affect police decision making in later contacts with the young person. The Inquiry recognises that police need access to information about potential offenders in their investigations. However, the patterns of youth offending mean that most young offenders do not re-offend. Young people who have not re-offended within five years are unlikely to offend again. Subject to the same exceptions noted at paras 19.122-124, the utility of retaining police records is outweighed, after five years, by the need to allow a young person who has not re-offended, to outgrow his or her record.

Recommendation 253. Criminal convictions of young offenders should be expunged after a period of two years or when the young person attains the age of eighteen years, whichever is earlier, except where further convictions have been recorded. Exceptions to this requirement may be appropriate in relation to particularly serious offences, some sexual offences and certain other categories.

Implementation. The Attorney-General through SCAG should encourage the implementation of this recommendation, including development of appropriate exceptions, in all Australian jurisdictions.

Recommendation 254. Police records of young offenders should be retained for five years and then destroyed where no further offence has occurred and subject to the same exceptions noted at recommendation 253.

Implementation. The Attorney-General through SCAG should encourage the implementation of this recommendation in all Australian jurisdictions

4.69 With reference to sentencing the Commission included the following recommendations:¹⁰⁵

19. Sentencing

238 The Crimes Act should be amended to make it clear that s 20C allows the enforcement provisions of State and Territory legislation to apply to young federal offenders.

Implementation. The Attorney-General should initiate this amendment.

239 The national standards for juvenile justice should include principles for sentencing of juvenile offenders. These principles should also be reflected in relevant Commonwealth, State and Territory legislation. They should include the following.

- the need for proportionality, such that the sentence reflects the seriousness of the offence
- the importance of rehabilitating juvenile offenders

105 Appendix D of the Report.

- the need to maintain and strengthen family relationships wherever possible
- the importance of the welfare, development and family relationships of the child
- the desirability of imposing the least restrictive sanctions consistent with the legitimate aim of protecting victims and the community
- the importance of young offenders accepting responsibility for their actions and being able to develop in responsible, beneficial and socially acceptable ways
- the impact of deficiencies in the provision of support services in contributing to offending behaviour
- the need to take into account the special circumstances of particular groups of juvenile offenders, especially Indigenous children.

240 A wide range of sentencing options, with clearer and more appropriate hierarchies based on minimum appropriate intervention by the formal justice system, should be provided in the national standards for juvenile justice. Sentencing options should embody the principles in recommendation 239 dealing with national standards for sentencing. In addition, matters to be taken into account in the development of sentencing options should include

- Rehabilitation and reintegration into the community should be the primary objective in the development of sentencing options.
- Programs should be tailored as far as possible to the individual needs and circumstances of young offenders, including the difficulties they may have in complying with certain orders.
- Sentencing options should take into account the special health and other requirements of children and young people. This should include the provision of appropriate drug treatment facilities incorporating both detoxification programs and treatment or referral services. It should also include counselling and other practical programs to assist these young people and their families. These could be run by voluntary, community or church based agencies, by non-profit concerns or by government agencies.
- Sentencing options for young sex offenders should include specific treatment programs appropriate to this category of offenders. the need to maintain and strengthen family relationships wherever possible
- the importance of the welfare, development and family relationships of the child
- the desirability of imposing the least restrictive sanctions consistent with the legitimate aim of protecting victims and the community
- the importance of young offenders accepting responsibility for their actions and being able to develop in responsible, beneficial and socially acceptable ways
- the impact of deficiencies in the provision of support services in contributing to offending behaviour
- the need to take into account the special circumstances of particular groups of juvenile offenders, especially Indigenous children.

4.70 Of particular importance are the recommendations regarding sentencing principles which should guide the treatment of juvenile offenders and which are relevant to decisions on expungement of criminal records of juveniles. The following principles are emphasised - the need for proportionality, such that the sentence reflects the seriousness of the offence; the importance of rehabilitating juvenile offenders; the need to maintain and strengthen family relationships wherever possible; the importance of the welfare, development and family relationships of the child; the desirability of imposing the least restrictive sanctions consistent with the legitimate aim of protecting victims and the community; the importance of young offenders accepting responsibility for their actions and being able to develop in responsible, beneficial and socially acceptable ways. All these principles would appear to support the recognition of the principle of expungement of criminal records of juveniles.

EXPUNGMENT OF CRIMINAL RECORDS IN RESPECT OF ADULT OFFENDERS – A COMPARATIVE OVERVIEW

(a) United States

(i) Federal

4.71 Federal offences are currently not expungeable from records. Legislation was placed before congress in 2011¹⁰⁶ which would allow certain non-violent offenders to get their felonies expunged to rid themselves of the lifelong felony. The Fresh Start Act of 2011 (which was introduced in 2010 and reintroduced in 2013 but has not been passed yet)¹⁰⁷ amends the federal criminal code to allow an individual convicted of a nonviolent criminal offense to file a petition for expungement of the record of such conviction. It allows expungement if such individual:

- (1) has never been convicted of any criminal offense other than the nonviolent offenses committed in a single criminal episode that includes the offense for which expungement is sought;
- (2) has fulfilled all requirements of the sentence of the court, including payment of all fines, restitution, or assessments and completion of terms of imprisonment and probation; and

106 H.R. 2449 or The Fresh Start Act of 2011.

107 <https://www.govtrack.us/congress/bills/112/hr2449#summary/libraryofcongress> accessed 5 March 2014.

- (3) has remained free (if required by the court's sentence) from dependency on or abuse of alcohol or a controlled substance for at least one year.
- (4) Requires the Attorney General to maintain an unaltered nonpublic copy of expunged criminal records, to be disclosed for limited purposes to federal, state, or local law enforcement agencies.
- (5) Amends the Omnibus Crime Control and Safe Streets Act of 1968 to increase by 5% grant funding under the Edward Byrne Memorial Justice Assistance Grant Program to states that implement expungement procedures substantially similar to the procedures enacted by this Act. Decreases such grant funding by 5% for states that fail to adopt expungement procedures.

(ii) Arizona¹⁰⁸

4.72 Arizona's expungement equivalent is "setting aside" a conviction. Arizona's setting aside statute allows a defendant to petition the court to have a conviction set aside after the terms of the sentence are met. If the court grants the petition, the defendant is "released from all penalties and disabilities resulting from the conviction other than those imposed by the Department of Transportation." The conviction can be used in any subsequent criminal prosecution. Section 13.907 provides:

13-907. Setting aside judgment of convicted person on discharge; application; release from disabilities; exceptions

A. Except as provided in subsection D of this section, every person convicted of a criminal offense, on fulfillment of the conditions of probation or sentence and discharge by the court, may apply to the judge, justice of the peace or magistrate who pronounced sentence or imposed probation or such judge, justice of the peace or magistrate's successor in office to have the judgment of guilt set aside. The convicted person shall be informed of this right at the time of discharge.

B. The convicted person or, if authorized in writing, the convicted person's attorney or probation officer may apply to set aside the judgment.

C. If the judge, justice of the peace or magistrate grants the application, the judge, justice of the peace or magistrate shall set aside the judgment of guilt, dismiss the accusations or information and order that the person be released from all penalties and disabilities resulting from the conviction except those imposed by:

108 Arizona Revised Statutes (ARS) Section 13-907 <http://www.keytlaw.com/arizona-revised-statutes-title-13/> accessed 9 September 2014.

1. The department of transportation pursuant to section 28-3304, 28-3306, 28-3307, 28-3308 or 28-3319, except that the conviction may be used as a conviction if the conviction would be admissible had it not been set aside and may be pleaded and proved in any subsequent prosecution of such person by the state or any of its subdivisions for any offense or used by the department of transportation in enforcing section 28-3304, 28-3306, 28-3307, 28-3308 or 28-3319 as if the judgment of guilt had not been set aside.

2. The game and fish commission pursuant to section 17-314 or 17-340.

D. This section does not apply to a person who was convicted of a criminal offense:

1. Involving a dangerous offense.

2. For which the person is required or ordered by the court to register pursuant to section 13-3821.

3. For which there has been a finding of sexual motivation pursuant to section 13-118.

4. In which the victim is a minor under fifteen years of age.

5. In violation of section 28-3473, any local ordinance relating to stopping, standing or operation of a vehicle or title 28, chapter 3, except a violation of section 28-693 or any local ordinance relating to the same subject matter as section 28-693.

(iii) California¹⁰⁹

4.73 California has several post-conviction remedies that are sometimes called expungement. For misdemeanor and felony crimes (not involving a sentence in state prison), a petition for expungement is filed in the court of conviction, seeking to have the conviction dismissed.¹¹⁰ For crimes involving a prison sentence, a petition for a Certificate of Rehabilitation (CR) issued by the courts and filed with the California Department of Corrections and Rehabilitation (CDCR).

4.74 California's expungement law permits someone convicted of a crime to file a petition for dismissal with the court to re-open the case, set aside the plea, and dismiss the case. In order for one to qualify for expungement, the petitioner must have completed probation, paid all fines and restitution, and not currently be charged with a crime. If the requirements are met for eligibility, a court may grant the petition if it finds that it would be in the interest of

109 http://www.leginfo.ca.gov/html/pen_table_of_contents.html accessed 9 September 2014.

110 California Penal Code section 1203.4. See note above.

justice to do so. A successful expungement will not erase the criminal record, but rather the finding of guilt will be changed to a dismissal. The petitioner can then honestly and legally answer to a question about their criminal history, with some exceptions, that they have not been convicted of that crime. What is actually stated on the record of the case is that the case was dismissed after conviction. If the petitioner is later convicted of the same crime again, then the expungement may be reversed.

4.75 Persons who serve sentences in the state prison system (felons), must apply to the Superior Court for a Certificate of Rehabilitation (CR). The CR does not remove or expunge anything negative from the individual's record; however, it places something positive on it. Among other requirements, the applicant must live in California and must have done so for at least 5 consecutive years prior to applying, and must have been law-abiding for 7 years starting from the sooner of his or her release from prison or court supervision. After he or she has met all the requirements and received a CR, certain of his or her rights are restored and a request for a pardon is automatically sent to the governor.

(iv) Colorado¹¹¹

4.76 Colorado law has recently been changed¹¹²and allows drug conviction to be sealed¹¹³ This requires strict conditions to be met concerning the original violation and the time and behavior since the conviction. This is part of a greater movement by the Colorado Criminal Justice Reform Coalition¹¹⁴ to create a way for forgiveness and redemption for people who have been convicted based on past drug convictions.

(v) Florida¹¹⁵

4.77 Florida law allows for expungement of criminal records that do not include a

111 <http://www.sentencingproject.org/detail/publication.cfm?publication id=115> "Relief from the collateral consequences of a criminal conviction: A State by State Resource Guide", by Margaret Colgate Love July 2005 accessed 14 December 2012. See also <http://www.lexisnexis.com/hottopics/colorado/> accessed 9 September 2014.

112 Colorado HB 11-1167.

113 Colorado HB 11-1167.

114 ccjrc.org.

115 Florida Statutes Expunction Procedures 943.0585 and Florida Statutes section.943.059. See also <http://www.sentencingproject.org/detail/publication.cfm?publication id=115> "Relief from the collateral consequences of a criminal conviction: A State by State Resource Guide", by Margaret Colgate Love July 2005 accessed 14 December 2012. See <http://www.leg.state.fl.us/STATUTES/> accessed 9 September 2014.

conviction, and permits the sealing or expungement of records where adjudication was withheld. To be eligible for sealing or expungement, the defendant must not have been convicted of or have pled guilty to any criminal offense, and must not have previously received an expungement or sealing. Some criminal records are ineligible for expungement or sealing if they resulted in a final disposition of Adjudication Withheld.¹¹⁶ A Certificate of Eligibility from the Florida Department of Law Enforcement is required prior to petitioning the court for an order to seal or expunge a record. There is a \$75.00 charge for the Certificate of Eligibility. A successful sealing will limit disclosure of the record to only the Florida Bar, the Florida Department of Children and Families, the Florida Board of Education, law enforcement and in a few other circumstances. An expunged record will be unavailable for dissemination to any private or public entity, though the four agencies that can see a sealed record will be informed only that a record has been expunged. Section 943.0585 provides:

... Any court of competent jurisdiction may order a criminal justice agency to expunge the criminal history record of a minor or an adult who complies with the requirements of this section. The court shall not order a criminal justice agency to expunge a criminal history record until the person seeking to expunge a criminal history record has applied for and received a certificate of eligibility for expunction pursuant to subsection (2) or subsection (5). A criminal history record that relates to a violation of s. 393.135, s. 394.4593, s. 787.025, chapter 794, former s. 796.03, s. 800.04, s. 810.14, s. 817.034, s. 825.1025, s. 827.071, chapter 839, s. 847.0133, s. 847.0135, s. 847.0145, s. 893.135, s. 916.1075, a violation enumerated in s. 907.041, or any violation specified as a predicate offense for registration as a sexual predator pursuant to s. 775.21, without regard to whether that offense alone is sufficient to require such registration, or for registration as a sexual offender pursuant to s. 943.0435, may not be expunged, without regard to whether adjudication was withheld, if the defendant was found guilty of or pled guilty or nolo contendere to the offense, or if the defendant, as a minor, was found to have committed, or pled guilty or nolo contendere to committing, the offense as a delinquent act. The court may only order expunction of a criminal history record pertaining to one arrest or one incident of alleged criminal activity, except as provided in this section. The court may, at its sole discretion, order the expunction of a criminal history record pertaining to more than one arrest if the additional arrests directly relate to the original arrest. If the court intends to order the expunction of records pertaining to such additional arrests, such intent must be specified in the order. A criminal justice agency may not expunge any record pertaining to such additional arrests if the order to expunge does not articulate the intention of the court to expunge a record pertaining to more than one arrest. This section does not prevent the court from ordering the expunction of only a portion of a criminal history record pertaining to one arrest or one incident of alleged criminal activity.

116 Florida Statutes section 943.0585, Florida Statutes section 943.059

(vi) Illinois ¹¹⁷

4.78 Illinois law allows the sealing or expungement of parts of the records of a conviction. Sealing a conviction prevents the public, including employers, from gaining access to that record. To be eligible for sealing of a conviction record in Illinois one must have been sentenced to supervision. A waiting period of four years also is required, beginning at the time of discharge from supervision, where no convictions were entered. Some misdemeanors are ineligible for sealing. All felony convictions are ineligible for sealing except for class 4 felony drug possession and prostitution offenses.¹¹⁸

(vii) Missouri ¹¹⁹

4.79 Missouri has two forms of expungement, one generally applicable to criminal cases and a unique one for the crime of being a minor in possession of alcohol.

Ordinary expungement

4.80 If certain requirements are met, Missouri law allows a person to have an arrest record expunged, which the law of Missouri defines as the process of legally destroying, obliterating or striking out records or information in files, computers and other depositories relating to criminal charges. A person is eligible for expungement in Missouri if the arrest was based on false information *and* the following conditions exist:

- There is no probable cause to believe the person committed the offence;
- No charges will be pursued as a result of the arrest;
- The person has no prior or subsequent misdemeanor or felony convictions;
- The person did not receive a suspended imposition of sentence for the offence; and
- No civil action is pending relating to the arrest or records sought to be expunged.

4.81 If a person qualifies, in order to have the records expunged, they must file a verified

117 20 Illinois Compiled Statutes 2630 § 5. See <http://www.ilga.gov/legislation/ilcs/ilcs.asp> accessed 9 September 2014.

118 20 Illinois Compiled Statutes 2630 § 5.20. See Illinois Compiled Statutes 2630 § 5.20 <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=350&ChapterID=5> accessed 9 September 2014.

119 Missouri Revised Statutes Chapter 610 Governmental Bodies and Records <http://www.moga.mo.gov/mostatutes/stathtml/61000001051.html> accessed 9 September 2014.

petition for expungement in the civil division of the Circuit Court in the county of the arrest. The court sets a hearing on the matter no sooner than thirty days after the petition was filed. If the court finds that the petitioner is entitled to expungement of any record, it will enter an order directing expungement. Records expunged under this provision still may be opened to law enforcement if the person is charged with a subsequent offense or if any of the requirements of expungement no longer are met.

Minor in possession of alcohol

4. 82 In 2005, the Missouri General Assembly enacted a special new section in the state's Liquor Control Law allowing for the complete and total expungement for the offense of being a minor in possession of alcohol. Unlike ordinary expungement, the MIP (Minor in possession of alcohol) expungement exists with the explicit legislative mandate that the effect of an order of expungement under it shall be to restore such person to the status occupied prior to such arrest, plea or conviction, as if such event had never happened"

4.83 After not less than one year since the offense was disposed of, or upon reaching the age of twenty-one, whichever occurs first, a person who pleaded guilty to or was found guilty of the crime of minor in possession of alcohol for the first time, and who, since such conviction has not been convicted of any other alcohol-related offense, may apply to the civil division of the circuit court of the county in which the person was sentenced for an order to expunge all official records of the arrest, plea, trial and conviction.

4.84 The person also must meet the following requirements:

- The person has not been convicted of any other alcohol-related offence at the time of the application for expungement; and
- The person has had no other contacts with law enforcement (i.e. arrest, charge) which were alcohol-related (such as for drunk driving or violation of the terms of a liquor license).

4.85 If a person has had an MIP record expunged this way, the law states they cannot be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, plea, trial, conviction or expungement in response to any inquiry made for any purpose whatsoever. A

person is only entitled to one MIP expungement under this special provision.

(viii) New Hampshire¹²⁰

4.86 New Hampshire statutes allow any person whose arrest has resulted in a finding of not guilty, or whose case was dismissed or not prosecuted, to petition for annulment of the arrest record at any time, free of charge. Any person who has been convicted may petition for annulment after he/she has completed all requirements of his/her sentence, including probation, paid a \$100 fee to the department of corrections to cover the cost of an investigation into the criminal history of the petitioner and has thereafter not been convicted of any offence except a motor vehicle related offence after the periods listed below:

- For a violation, one year, unless the underlying conviction was for an offence specified under habitual offender law.
- For a class A or B misdemeanor excluding sexual assault, 3 years.
- For a class B felony other than incest or endangering the welfare of a child by solicitation, 5 years.
- For a class A felony, 10 years.
- For sexual assault, 10 years.
- For felony indecent exposure or lewdness, 10 years.

4.87 The person whose record is annulled shall be treated in all respects as if he or she had never been arrested, convicted or sentenced, **except that, upon a conviction of any crime committed after the order of annulment has been entered, the prior conviction may be considered by the court in determining the sentence** to be imposed, and may be counted toward habitual offender status.

4.88 In any application for employment, license or other civil right or privilege, or in any appearance as a witness in any proceeding or hearing, a person may be questioned about a previous criminal record whether or not he or she has ever been arrested for or convicted of a crime that has not been annulled by a court.

120 NH Criminal Code Section 651:5 Annulment of criminal records. <http://law.justia.com/codes/new-hampshire/2010/titlelxii/chapter651/section651-5/> accessed 23 September 2014.

(ix) New Jersey¹²¹

4.89 New Jersey statutes allow expungement of convictions of many indictable offences, disorderly persons offences, municipal ordinances, and juvenile adjudications. The statutes disallow expungement for convictions if the applicant has been convicted of two or more indictable offences, or four or more disorderly person offences. If the applicant has a combination of one criminal conviction and up to two disorderly persons convictions, the criminal conviction can be expunged when the waiting period has elapsed, but the disorderly person conviction can never be expunged. A person who has had an indictable charge dismissed on account of a diversion cannot, thereafter, have a criminal or disorderly person conviction expunged.¹²²

4.90 The waiting period was ten years for indictable convictions, and remains five years for disorderly offences, and two years for municipal ordinances. In 2010, the waiting period on indictable convictions was lowered to five years. However, applicants who have not waited the full ten years must satisfy the judge that granting the expungement is in the public interest. No such requirement is needed once the full ten years has elapsed. Waiting periods begin to run on the date of sentencing, the date all fines are paid, or the completion date of probation or parole, whichever occurs last. Not all offences are eligible and several new ineligible offences were added by the 2010 changes, including convictions that took place before the changes.

4.91 There is no waiting period for most dismissals and acquittals. However, if the dismissal arose on account of a diversion, there is a six month waiting period. If the acquittal resulted from a finding of insanity or lack of mental capacity, records of the arrest cannot be expunged. Traffic offences cannot be expunged. However, records of arrests and convictions for disorderly persons' offences that are defined in Title 39 (traffic statutes) may be eligible to be expunged.

4.92 Expungements give the person the legal right to state, under oath, that the event never occurred. All civil disabilities associated with the conviction are eliminated. However,

121 N.J.S. 2C:52-2, N.J.S. 2C:52-3 , N.J.S. 2C:52-14(f), N.J.S. 2C:52-6(a), N.J.S. 2C:52-6b N.J.S. 2C:52-6(c) and N.J.S. 2C:52-28. See <http://law.onecle.com/new-jersey/2c-the-new-jersey-code-of-criminal-justice/index.html> accessed 9 September 2014.

122 N.J.S. 2C:52-2, N.J.S. 2C:52-3 , N.J.S. 2C:52-14(f), N.J.S. 2C:52-6(a), N.J.S. 2C:52-6b N.J.S. 2C:52-6(c) and N.J.S. 2C:52-28

expunged records must still be recited in certain situations. These include applications for employment with a law enforcement agency, applications for employment in the judicial system, and applications for a subsequent expungement.

4.93 Not all states honor New Jersey expungements. *White v. Thomas*,¹²³ held that each state may interpret its own law to determine what recognition it may give to the expungement order of a sister state.

(x) New York

4.94 New York Criminal Procedure Law¹²⁴ permits the "sealing" of cases where charges were dismissed, vacated, set-aside, not filed, or otherwise terminated. Otherwise, New York does not allow expungements, or "sealings," of cases where a conviction was entered, except for some older controlled substance, marijuana, and loitering offences. Sealing a record under 160.50 will prevent the public from having access or seeing the records, including fingerprint cards, photographs, court entries, and other information related to the case. The record may still be made available to some entities, such as courts and law enforcement.

4.95 New York also permits the expungements of non-criminal dispositions (violations and traffic infractions, such as disorderly conduct) through New York Criminal Procedure Law 160.55. Misdemeanor and felony adjudications are not eligible. Effective 2009, in terms of the New York Criminal Procedure,¹²⁵ a petitioner convicted of felony drug, marijuana, or Willard non-drug eligible crimes, may request to have their records for those crimes sealed if they successfully complete diversion or a substance abuse treatment program recognized by the court. The sealing will also extend to up to three of the petitioners misdemeanor drug convictions. The 2010 amendment to Criminal Procedure Law, Article 440, creates a specific mechanism for survivors of trafficking to vacate prior prostitution convictions if the acts were committed as a result of having been trafficked. The law now provides, in relevant part, that a motion to vacate a judgment of conviction may be granted where: "...the arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offence,

123 660 F.2d 680, 685 (5th Cir, 1981), cert. den., 455 U.S. 1027 (1982).

124 New York Criminal Procedure Law 160.50. See <http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO>: accessed 9 September 2014.

125 New York Criminal Procedure § 160.58. See <http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO>: accessed 9 September 2014.

provided that the defendant was not alleged to be loitering for the purpose of patronizing a prostitute or promoting prostitution) or section 230.00 (prostitution) of the penal law, and the defendant's participation in the offense was a result of having been a victim of sex trafficking in terms of the Penal Law or under section § 230.34 of the Penal Law or trafficking in persons under the Trafficking Victims Protection Act." C.P.L. § 440.10(i) (2009) (effective Aug. 13, 2010).¹²⁶

(xi) Ohio

4.96 Ohio is a state which allows **first-time offenders** to petition the court for the sealing of a conviction record. Margaret Love explains the position in Ohio in the following terms:¹²⁷

B. Judicial sealing or expungement of adult felony convictions:

1. First Offender Sealing

- *Authority:* Ohio Rev. Code Ann. §§ 2953.31-2953.36. Upon application, court may order all records relating to certain minor non-violent convictions sealed if it determines that: (1) the applicant has no other criminal record; (2) the applicant has no charges pending against him or her; (3) "the interest of the applicant in having the records pertaining to his conviction ... sealed are not outweighed by any legitimate governmental needs to maintain those records"; and (4) "the rehabilitation of an applicant ... has been attained to the satisfaction of the court." § 2353.32(C)(2).

- *Eligibility I:* The "first offender" requirement is a jurisdictional requirement for eligibility. *State v. Coleman*, 691 N.E.2d 369 (Ohio Ct. App. 1997) (Judge Bettman's concurring opinion points out the concerns associated with such a limiting definition). The original definition of "first offender" was enlarged by several amendments to address problems apparently perceived by the General Assembly. See *State v. Patterson*, 714 N.E. 2d 409 (Ohio Ct. App. 1998); *Anderson's Ohio Criminal Practice and Procedure* ch. 43 (9th ed, 2003). Section 2953.31(A) now provides that "two or more" convictions may be counted as one if they are "connected with the same act, or result from offenses committed at the same time;" or, if occurring within three months, "two or three" offenses are contained in the same indictment. See *State v. Broadnax*, ___ N.E. ___, 2005 WL 1413235 (Ohio App. 1 Dist., 2005) (physician ineligible for sealing).

- *Eligibility II:* Persons convicted of a felony must wait three years after final

126 Section § 230.34 of the Penal Law or trafficking in persons under the Trafficking Victims Protection Act." C.P.L. § 440.10(i) (2009) (effective Aug. 13, 2010).
See also <http://www.sexworkersproject.org/downloads/2012/20120422-memo-vacating-convictions.pdf> accessed 15 January 2014.

127 http://www.sentencingproject.org/detail/publication.cfm?publication_id=115 "Relief from the collateral consequences of a criminal conviction: A State by State Resource Guide", by Margaret Colgate Love July 2005 accessed 14 December 2012.

discharge, misdemeanants one year. The sealing statute, by its terms, applies to federal and out-of-state convictions as well as Ohio convictions. Ohio Rev. Code Ann. § 2953.32(A)(1). Misdemeanor arrest records may also be sealed. §§ 2953.32(A)(2).

- *Eligibility III:* Any crime carrying a mandatory prison term is ineligible; also, more specifically, first and second degree felonies, crimes of violence (including robbery and domestic violence), sex offenses, offenses against minors, certain traffic offenses. Ohio Rev. Code Ann. § 2953.36. OH4

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- *Procedure and Standards:* Spelled out in § 2953.32(B). Court must notify prosecutor, who is permitted to object. Information gathers information relevant to rehabilitation through probation office. In performing the balancing test set out in § 2353.32(C), courts must liberally construe the statute in favor of the individual's right to privacy, and should deny only when that right is outweighed by a legitimate government interest. See Pierre H. Bergeron and Kimberley A. Eberwine, *One Step in the Right Direction: Ohio's Framework for Sealing Criminal Records*, 36 U. Tol. L. Rev. 595, 600 (2005)(citing cases).

- *Effect:* Sealing "restores the person . . . to all rights and privileges not otherwise restored by termination of the sentence or community control sanction or by final release on parole or post-release control." Ohio Rev. Code Ann. § 2953.33(A). Private and public employers, including occupational licensing authorities, may not question a person about a sealed adult conviction, unless the question "bears a direct and substantial relationship to the position for which the person is being considered." § 2953.33(B). In addition, any public employee who discloses sealed conviction in connection with application for employment or license is guilty of a misdemeanor. §§ 2953.35; 2953.54. Sealing does not restore the right to hold public office to a public servant convicted of bribery in office.

(xii) Oregon

4.97 The state allows an order setting aside a conviction or record of arrest.¹²⁸

137.225 Order setting aside conviction or record of arrest; fees; prerequisites; limitations. (1)(a) At any time after the lapse of **three years** from the date of pronouncement of judgment, any defendant who **has fully complied with and performed the sentence of the court** and whose conviction is described in subsection (5) of this section by motion may apply to the court where the conviction was entered for entry of an order setting aside **the** conviction; or (emphasis added) (b) At any time after the lapse of one year from the date of any arrest, if no accusatory instrument was filed, or at any time after an acquittal or a dismissal of the charge, the arrested person may apply to the court that would have jurisdiction over the crime for which the person was arrested, for entry of an order setting aside the record of the arrest. For the purpose of computing the one-year period, time during

128 ORS 137. 225 (Volume 4 Chapter 137) https://www.oregonlegislature.gov/bills_laws/Pages/ORS.aspx accessed 5 March 2014.

which the arrested person has secreted himself or herself within or without this state is not included.

(2)(a) A copy of the motion and a full set of the defendant's fingerprints shall be served upon the office of the prosecuting attorney who prosecuted the crime or violation, or who had authority to prosecute the charge if there was no accusatory instrument filed, and opportunity shall be given to contest the motion. The fingerprint card with the notation "motion for setting aside conviction," or "motion for setting aside arrest record" as the case may be, shall be forwarded to the Department of State Police. Information resulting from the fingerprint search along with the fingerprint card shall be returned to the prosecuting attorney.

(b) When a prosecuting attorney is served with a copy of a motion to set aside a conviction under this section, the prosecuting attorney shall provide a copy of the motion and notice of the hearing date to the victim, if any, of the crime by mailing a copy of the motion and notice to the victim's last-known address.

(c) When a person makes a motion under subsection (1)(a) of this section, the person must pay a fee of \$80 to the Department of State Police. The person shall attach a certified check payable to the Department of State Police in the amount of \$80 to the fingerprint card that is served upon the prosecuting attorney. The office of the prosecuting attorney shall forward the check with the fingerprint card to the Department of State Police.

(d) In addition to the fee established under paragraph (c) of this subsection, when a person makes a motion under subsection (1)(a) of this section the person must pay the filing fee established under ORS 21.135.

(3) Upon hearing the motion, **the court may require the filing of such affidavits and may require the taking of such proofs as the court deems proper.** (emphasis added) The court shall **allow the victim to make a statement** at the hearing. Except as otherwise provided in subsection (13) of this section, if the court determines that the circumstances and behavior of the applicant from the date of conviction, or from the date of arrest as the case may be, to the date of the hearing on the motion warrant setting aside the conviction, or the arrest record as the case may be, the court shall enter an appropriate order that shall state the original arrest charge and the conviction charge, if any and if different from the original, date of charge, submitting agency and disposition. The order shall further state that positive identification has been established by the Department of State Police and further identified as to Department of State Police number or submitting agency number. Upon the entry of the order, the applicant for purposes of the law shall be deemed not to have been previously convicted, or arrested as the case may be, and the court shall issue an order sealing the record of conviction and other official records in the case, including the records of arrest whether or not the arrest resulted in a further criminal proceeding.

(4) The clerk of the court shall forward a certified copy of the order to such agencies as directed by the court. A certified copy must be sent to the Department of Corrections when the person has been in the custody of the Department of Corrections. Upon entry of the order, the conviction, arrest or other proceeding shall be deemed not to have occurred, and the applicant may answer accordingly any questions relating to its occurrence.

- (5) The provisions of subsection (1)(a) of this section apply to a conviction of:
- (a) A Class B felony, except for a violation of ORS 166.429 or any crime classified as a person felony as that term is defined in the rules of the Oregon Criminal Justice Commission.
 - (b) A Class C felony, except for criminal mistreatment in the first degree under ORS 163.205 when it would constitute child abuse as defined in ORS 419B.005 or any sex crime.
 - (c) The crime of possession of the narcotic drug marijuana when that crime was punishable as a felony only.
 - (d) A crime punishable as either a felony or a misdemeanor, in the discretion of the court, **except for:**
 - (A) Any sex crime; or**
 - (B) The following crimes when they would constitute child abuse as defined in ORS 419B.005:** (emphasis added)
 - (i) Criminal mistreatment in the first degree under ORS 163.205; and
 - (ii) Endangering the welfare of a minor under ORS 163.575 (1)(a).
 - (e) A misdemeanor, including a violation of a municipal ordinance, for which a jail sentence may be imposed, except for endangering the welfare of a minor under ORS 163.575 (1)(a) when it would constitute child abuse as defined in ORS 419B.005 or any sex crime.
 - (f) A violation, whether under state law or local ordinance.
 - (g) An offense committed before January 1, 1972, that if committed after that date would be:
 - (A) A Class C felony, except for any sex crime or for the following crimes when they would constitute child abuse as defined in ORS 419B.005:
 - (i) Criminal mistreatment in the first degree under ORS 163.205; and
 - (ii) Endangering the welfare of a minor under ORS 163.575 (1)(a).
 - (B) A crime punishable as either a felony or a misdemeanor, in the discretion of the court, except for any sex crime or for the following crimes when they would constitute child abuse as defined in ORS 419B.005:
 - (i) Criminal mistreatment in the first degree under ORS 163.205; and
 - (ii) Endangering the welfare of a minor under ORS 163.575 (1)(a).
 - (C) A misdemeanor, except for endangering the welfare of a minor under ORS 163.575 (1)(a) when it would constitute child abuse as defined in ORS 419B.005 or any sex crime.
 - (D) A violation.
- (6) Notwithstanding subsection (5) of this section, the provisions of subsection (1) of this section do not apply to:
- (a) A conviction for a state or municipal traffic offense.
 - (b) A person convicted, within the 10-year period immediately preceding the filing of the motion pursuant to subsection (1) of this section, of any other offense, excluding motor vehicle violations, whether or not the other conviction is for conduct associated with the same criminal episode that caused the arrest or conviction that is sought to be set aside. Notwithstanding subsection (1) of this section, a conviction that has been set aside under this section shall be considered for the purpose of determining whether this paragraph is applicable.
 - (c) A person who at the time the motion authorized by subsection (1) of this section is pending before the court is under charge of commission of any crime.

(7) Notwithstanding subsection (5) of this section, the provisions of subsection (1)(a) of this section do not apply to:

- (a) Criminal mistreatment in the second degree under ORS 163.200 if the victim at the time of the crime was 65 years of age or older.
- (b) Criminal mistreatment in the first degree under ORS 163.205 if the victim at the time of the crime was 65 years of age or older.
- (c) Criminally negligent homicide under ORS 163.145, when that offense was punishable as a Class C felony.

(8) Notwithstanding subsection (5) of this section, the provisions of subsection (1)(a) of this section apply to a conviction for:

(a) A Class B felony described in subsection (5)(a) of this section only if:

(A) Twenty years or more have elapsed from the date of the conviction sought to be set aside or of the release of the person from imprisonment for the conviction sought to be set aside, whichever is later; and

(B) The person has not been convicted of or arrested for any other offense, excluding motor vehicle violations, after the date the person was convicted of the offense sought to be set aside. Notwithstanding subsection (1) of this section, a conviction or arrest that has been set aside under this section shall be considered for the purpose of determining whether this subparagraph is applicable.

(b) A sex crime listed in ORS 181.830 (1)(a) if:

(A) The person has been relieved of the obligation to report as a sex offender pursuant to a court order entered under ORS 181.832 or 181.833; and

(B) The person has not been convicted of, found guilty except for insanity of or found to be within the jurisdiction of the juvenile court based on, a crime that a court is prohibited from setting aside under this section.

(c) A sex crime constituting a Class C felony, if:

(A) The person was under 16 years of age at the time of the offense;

(B) The person is less than three years older than the victim;

(C) The victim's lack of consent was due solely to incapacity to consent by reason of being less than a specified age;

(D) The victim was at least 12 years of age at the time of the offense;

(E) The person has not been convicted of, found guilty except for insanity of or found to be within the jurisdiction of the juvenile court based on a crime that a court is prohibited from setting aside under this section; and

(F) Each conviction or finding described in this paragraph involved the same victim.

(9) The provisions of subsection (1)(b) of this section do not apply to:

(a) A person arrested within the three-year period immediately preceding the filing of the motion for any offense, excluding motor vehicle violations, and excluding arrests for conduct associated with the same criminal episode that caused the arrest that is sought to be set aside. An arrest that has been set aside under this section may not be considered for the purpose of determining whether this paragraph is applicable.

(b) An arrest for driving while under the influence of intoxicants if the charge is dismissed as a result of the person's successful completion of a diversion agreement described in ORS 813.200.

(10) The provisions of subsection (1) of this section apply to convictions and arrests that occurred before, as well as those that occurred after, September 9, 1971. There

is no time limit for making an application.

(11) For purposes of any civil action in which truth is an element of a claim for relief or affirmative defense, the provisions of subsection (3) of this section providing that the conviction, arrest or other proceeding be deemed not to have occurred do not apply and a party may apply to the court for an order requiring disclosure of the official records in the case as may be necessary in the interest of justice.

(12) Upon motion of any prosecutor or defendant in a case involving records sealed under this section, supported by affidavit showing good cause, the court with jurisdiction may order the reopening and disclosure of any records sealed under this section for the limited purpose of assisting the investigation of the movant. However, such an order has no other effect on the orders setting aside the conviction or the arrest record.

(13) Unless the court makes written findings by clear and convincing evidence that granting the motion would not be in the best interests of justice, the court shall grant the motion and enter an order as provided in subsection (3) of this section if the defendant has been convicted of one of the following crimes and is otherwise eligible for relief under this section:

- (a) Abandonment of a child, ORS 163.535.
- (b) Attempted assault in the second degree, ORS 163.175.
- (c) Assault in the third degree, ORS 163.165.
- (d) Coercion, ORS 163.275.
- (e) Criminal mistreatment in the first degree, ORS 163.205.
- (f) Attempted escape in the first degree, ORS 162.165.
- (g) Incest, ORS 163.525, if the victim was at least 18 years of age.
- (h) Intimidation in the first degree, ORS 166.165.
- (i) Attempted kidnapping in the second degree, ORS 163.225.
- (j) Attempted robbery in the second degree, ORS 164.405.
- (k) Robbery in the third degree, ORS 164.395.
- (L) Supplying contraband, ORS 162.185.
- (m) Unlawful use of a weapon, ORS 166.220.

(14) As used in this section, "sex crime" has the meaning given that term in ORS 181.805. [1971 c.434 §2; 1973 c.680 §3; 1973 c.689 §1a; 1973 c.836 §265; 1975 c.548 §10; 1975 c.714 §2; 1977 c.286 §1; 1983 c.556 §1; 1983 c.740 §17; 1987 c.320 §31; 1987 c.408 §1; 1987 c.864 §6; 1989 c.774 §1; 1991 c.830 §6; 1993 c.546 §98; 1993 c.664 §2; 1995 c.429 §9; 1995 c.743 §1; 1999 c.79 §1; 2007 c.71 §35; 2009 c.360 §1; 2009 c.560 §1; 2011 c.196 §1; 2011 c.533 §1; 2011 c.547 §29; 2011 c.595 §87; 2012 c.70 §4; 2013 c.390 §1]

4.98 Section 27, chapter 659, Oregon Laws 2009, deals with fees payable in respect of setting aside convictions and provides¹²⁹:

129 https://www.oregonlegislature.gov/bills_laws/Pages/ORS.aspx accessed 5 March 2014.

Sec. 27. (1) In addition to the fee provided in ORS 137.225 (Order setting aside conviction or record of arrest), upon the filing of an application under ORS 137.225 (Order setting aside conviction or record of arrest) (1), the court shall order the defendant to pay a fee of \$250 to the court.

(2) This section applies only to applications filed under ORS 137.225 (Order setting aside conviction or record of arrest) (1) on or after October 1, 2009, and before July 1, 2011.

(3) Fees imposed under this section in the circuit court shall be deposited by the clerk of the court in the Judicial System Surcharge Account. Fees imposed in a justice court under this section shall be paid to the county treasurer. Fees imposed in a municipal court under this section shall be paid to the city treasurer.

(4) The collections and revenue management program established under ORS 1.204 (Judicial Department collections and revenue management program) may not be reimbursed under ORS 1.204 (Judicial Department collections and revenue management program) from amounts imposed under this section. [2009 c.659 §27]

(xiii) Tennessee

4.99 TCA 40-32-101 is the statute and provides some expungements at no cost.¹³⁰ All public records of a person who has been charged with a misdemeanor or a felony shall, upon petition by that person to the court having jurisdiction in the previous action, be removed and destroyed without cost to the person, if: the charge has been dismissed, a no true bill was returned by a grand jury, a verdict of not guilty was returned, whether by the judge following a bench trial or by a jury, the person was arrested and released without being charged.¹³¹ A person applying for the expunction of records because the charge or warrant was dismissed in any court as a result of the successful completion of a pretrial diversion program pursuant to §§ 40-15-102 — 40-15-107, shall be charged the appropriate court clerk's fee pursuant to § 8-21-401 for destroying such records.¹³² Upon petition by a defendant in the court that entered a *nolle prosequi* in the defendant's case, the court shall order all public records expunged.¹³³ All public records concerning an order of protection authorized by title 36, chapter 3, part 6, which was successfully defended and denied by the court following a hearing¹³⁴ shall, upon petition by that person to the court denying the order,

130 TCA 40-32-101(a)(1)(A). See <https://www.recordclearing.org/states/tennessee/tennessee-expungement/law/> accessed 9 September 2014.

131 TCA 40-32-101(a)(1)(B).

132 TCA 40-32-101(a)(3).

133 TCA 40-32-101(a)(5).

134 Conducted pursuant to § 36-3-605.

be removed and destroyed without cost to the person.

(xiv) Texas¹³⁵

4.100 Texas expungement law allows expungement of arrests which did not lead to a finding of guilt, and class C misdemeanors if the defendant received deferred adjudication, and completed community supervision. The release, dissemination or use of expunged records by any agency is prohibited. Unless being questioned under oath, the defendant may deny the occurrence of the arrest and expungement order. If the defendant was found guilty, pled guilty, or pled no contest to any offence other than a class "C" misdemeanor, it is not eligible for expungement; however, it may be eligible for non-disclosure if deferred adjudication was granted. However, if the person who has had a record expunged is applying for enlistment into the Armed Services, the charge must be revealed or the person shall be disqualified from enlistment and may be liable for criminal action for fraudulent enlistment if the charge is not revealed.

(xv) Utah¹³⁶

4.101 The Utah Bureau of Criminal Identification has published a pamphlet that provides an overview of Utah's expungement law.¹³⁷ In essence, first degree crimes cannot be expunged. Second degree forceable crimes cannot be expunged. Crimes other than those can be expunged. Section 103 provides an overview of the prescribed procedure. The process for the expungement of records is as follows:

4.102 The petitioner shall apply to the bureau for a certificate of eligibility for expungement and pay the application fee established by the department. Once the eligibility process is complete, the bureau shall notify the petitioner. If the petitioner is qualified to receive a certificate of eligibility for expungement, the petitioner shall pay the issuance fee established by the department. The petitioner shall file the certificate of eligibility with a petition for expungement in the court in which the proceedings occurred. If there were no court proceedings, or the court no longer exists, the petition may be filed in the district court where

135 Code of Criminal Procedure Title 1 Chapter 55 Expunction of criminal records <http://www.statutes.legis.state.tx.us/Docs/CR/htm/CR.55.htm> accessed 11 September 2014.

136 <http://www.le.utah.gov/UtahCode/section.jsp?code=77-40> accessed 11 September 2014.

137 The law itself is set forth in Utah Statute Title 77 Chapter 40 -18-2. See <http://www.le.utah.gov/UtahCode/section.jsp?code=77-40> accessed 11 September 2014.

the arrest occurred. If a certificate is filed electronically, the petitioner or the petitioner's attorney shall keep the original certificate until the proceedings are concluded. If the original certificate is filed with the petition, the clerk or the court shall scan it and return it to the petitioner or the petitioner's attorney, who shall keep it until the proceedings are concluded.

4.103 The petitioner shall deliver a copy of the petition and certificate to the prosecutorial office that handled the court proceedings. If there were no court proceedings, a copy of the petition and certificate shall be delivered to the county attorney's office in the jurisdiction where the arrest occurred. If an objection to the petition is filed by the prosecutor or victim, a hearing shall be set by the court and the prosecutor and victim notified of the date. If the court requests a response from Adult Probation and Parole and a response is received, the petitioner may file a written reply to the response within 15 days of receipt of the response. An expungement may be granted without a hearing if no objection is received. Upon receipt of an order of expungement, the petitioner shall deliver copies to all government agencies in possession of records relating to the expunged matter.

4.104 Section 104 deals with eligibility for expungement of records of arrest, investigation, and detention. A person who has been arrested or formally charged with an offence may apply to the bureau for a certificate of eligibility to expunge all records of arrest, investigation, and detention which may have been made in the case, subject to the following conditions, namely at least 30 days have passed since the arrest for which a certificate of eligibility is sought; there are no criminal proceedings pending against the petitioner; and one of the following occurred: charges were screened by the investigating law enforcement agency and the prosecutor has made a final determination that no charges will be filed in the case; the entire case was dismissed with prejudice; the person was acquitted at trial on all of the charges contained in the case; or the statute of limitations has expired on all of the charges contained in the case.

4.105 Section 105 deals with eligibility requirements for expungement of a conviction. It provides that a person convicted of an offence may apply to the bureau for a certificate of eligibility to expunge the record of conviction. A petitioner is not eligible to receive a certificate of eligibility from the bureau if the conviction for which expungement is sought is a capital felony; a first degree felony; a violent felony as defined in subsection 76-3-203.5(1)(c)(i); a felony automobile homicide; a felony violation of subsection 41-6a-501(2); or

a registerable sex offence as defined in subsection 77-41-102(16); a criminal proceeding is pending against the petitioner; or the petitioner intentionally or knowingly provides false or misleading information on the application for a certificate of eligibility.

4.106 A petitioner seeking to obtain expungement for a record of conviction is not eligible to receive a certificate of eligibility from the bureau until all of the following have occurred, all fines and interest ordered by the court have been paid in full; all restitution ordered by the court pursuant to section 77-38a-302, or by the Board of Pardons and Parole pursuant to section 77-27-6, has been paid in full; and the following time periods have elapsed from the date the petitioner was convicted or released from incarceration, parole, or probation, whichever occurred last, for each conviction the petitioner seeks to expunge, namely:

- 10 years in the case of a misdemeanor conviction or a felony conviction; seven years in the case of a felony;
- five years in the case of any class A misdemeanor or a felony drug possession offence; four years in the case of a class B misdemeanor; or
- three years in the case of any other misdemeanor or infraction.

4.107 The bureau may not issue a certificate of eligibility if, at the time the petitioner seeks a certificate of eligibility, the bureau determines that the petitioner's criminal history, including previously expunged convictions, contains any of the following:

- (i) two or more felony convictions other than for drug possession offences, each of which is contained in a separate criminal episode;
- (ii) any combination of three or more convictions other than for drug possession offenses that include two class A misdemeanor convictions, each of which is contained in a separate criminal episode;
- (iii) any combination of four or more convictions other than for drug possession offences that include three class B misdemeanor convictions, each of which is contained in a separate criminal episode; or
- (iv) five or more convictions other than for drug possession offences of any degree whether misdemeanor or felony, excluding infractions and any traffic offenses, each of which is contained in a separate criminal episode.

4.108 The bureau may also not issue a certificate of eligibility if, at the time the petitioner seeks a certificate of eligibility, the bureau determines that the petitioner's criminal history, including previously expunged convictions, contains any of the following:

- (i) three or more felony convictions for drug possession offences, each of which is contained in a separate criminal episode; or
- (ii) any combination of five or more convictions for drug possession offences, each of which is contained in a separate criminal episode.

If the petitioner's criminal history contains convictions for both a drug possession offence and a non-drug possession offence arising from the same criminal episode, that criminal episode shall be counted as provided for in the Act if any non-drug possession offence in that episode:

- (i) is a felony or class A misdemeanor; or
- (ii) has the same or a longer waiting period than any drug possession offence in that episode. If, prior to May 14, 2013, the petitioner has received a pardon from the Utah Board of Pardons and Parole, the petitioner is entitled to an expungement order for all pardoned crimes.

(xvi) Washington

4.109 Washington's expungement equivalent is called "vacating a judgment." It allows the court to vacate certain felony convictions which occurred after July 1, 1984. The Act¹³⁸ allows the court to withdraw the finding of guilt and vacate a misdemeanor or gross misdemeanor. Once vacated, or expunged, the person's criminal record will not include that case. State law gives the person the right to state to anyone, including prospective employers, that the person was not convicted of that offense, after a vacate motion has been granted. Section 9.94A.640 WRC provides:¹³⁹

- (1) Every offender who has been discharged under RCW 9.94A.637 may apply to the sentencing court for a vacation of the offender's record of conviction. If the court finds the offender meets the tests prescribed in subsection (2) of this section, the court may clear the record of conviction by: (a) Permitting the offender to withdraw the offender's plea of guilty and to enter a plea of not guilty; or (b) if the offender has been convicted after a plea of not guilty, by the court setting aside the verdict of

138 Revised Code of Washington (RCW) Chapter 9.94A.640. See <http://apps.leg.wa.gov/rcw/> accessed 9 September 2014.

139 Revised Code of Washington (RCW) Chapter 9.94A.640. See <http://apps.leg.wa.gov/rcw/> accessed 9 September 2014.

guilty; and (c) by the court dismissing the information or indictment against the offender.

(2) An offender may not have the record of conviction cleared if: (a) There are any criminal charges against the offender pending in any court of this state or another state, or in any federal court; (b) the offense was a violent offense as defined in RCW 9.94A.030; (c) the offense was a crime against persons as defined in RCW 43.43.830; (d) the offender has been convicted of a new crime in this state, another state, or federal court since the date of the offender's discharge under RCW 9.94A.637; (e) the offense is a class B felony and less than ten years have passed since the date the applicant was discharged under RCW 9.94A.637; (f) the offense was a class C felony, other than a class C felony described in RCW 46.61.502(6) or 46.61.504 (6), and less than five years have passed since the date the applicant was discharged under RCW 9.94A.637; or (g) the offense was a class C felony described in RCW 46.61.502(6) or 46.61.504 (6).

(3) Once the court vacates a record of conviction under subsection (1) of this section, the fact that the offender has been convicted of the offense shall not be included in the offender's criminal history for purposes of determining a sentence in any subsequent conviction, and the offender shall be released from all penalties and disabilities resulting from the offense. For all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime. Nothing in this section affects or prevents the use of an offender's prior conviction in a later criminal prosecution.

No expungement for Immigration purposes

4.110 In the USA an expungement of a conviction for immigration purposes is not available. In reviewing the character and fitness of an immigrant along the different steps from permanent residency to citizenship, United States Citizenship and Immigration Services looks to see if the petitioner has ever been convicted of a crime. Even if an immigrant was convicted, made restitution, and as part of a plea agreement had the court record expunged, the initial conviction will still appear on the immigrant's record and the immigrant may well find himself entailed in deportation proceedings (as was the case of *Padilla v. Kentucky* (2010)). In *Padilla*¹⁴⁰ the Kentucky Supreme Court denied Padilla postconviction relief on the ground that the Sixth Amendment's effective assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a "collateral" consequence of a conviction.

140 See <http://www.supremecourt.gov/opinions/09pdf/08-651.pdf> accessed 5 March 2014.

(b) Australia

4.111 Criminal records in each state of Australia are covered by state law. In New South Wales, the relevant legislation is the Criminal Records Act 1991.¹⁴¹ Under the Act, an offender's criminal record may become spent if they do not re-offend for a period of 10 years. Offences resulting in a prison term of more than six months will not become spent. Additionally, for certain employment occupations (e.g. education or child services), a "full disclosure" check is required, and spent convictions are still visible. The Act provides¹⁴²

Part 2 Spent convictions

7 Which convictions are capable of becoming spent?

(1) All convictions are capable of becoming spent in accordance with this Act, except the following:

- (a) convictions for which a prison sentence of more than 6 months has been imposed,
- (b) convictions for sexual offences,
- (c) convictions imposed against bodies corporate,
- (d) convictions prescribed by the regulations.

(2) A conviction may become spent in accordance with this Act whether it is a conviction for an offence against a law of New South Wales or a conviction for an offence against any other law.

(3) A conviction may become spent in accordance with this Act whether it is a conviction imposed before, on or after the date of commencement of this section.

(4) In this section:

prison sentence does not include a sentence the subject of an intensive correction order or the detaining of a person under a control order.

sexual offences means the following offences:

- (a) the offences under sections 61B–61F, 65A–66D, 66F, 73, 74, 78A, 78B, 78H, 78I, 78K, 78L, 78N, 78O, 78Q, 79, 80, 91A, 91B and 91D–91G of the *Crimes Act 1900*,
- (b) from the date of commencement of Schedule 1 (3) to the *Crimes (Amendment) Act 1989*, the offences under sections 61I–61P of the *Crimes Act 1900*,

141 <http://www.legislation.nsw.gov.au/inforcepdf/1991-8.pdf?id=0820f4a9-fd68-6ca2-b5a1-a6b4f3af6554> accessed 5 March 2014.

142 <http://www.legislation.nsw.gov.au/inforcepdf/1991-8.pdf?id=0820f4a9-fd68-6ca2-b5a1-a6b4f3af6554> accessed 5 March 2014.

- (c) from the date of commencement of Schedule 1 (6) to the *Crimes (Amendment) Act 1989*, the offence under section 80A of the *Crimes Act 1900*,
- (d) the offence under section 5 of the *Summary Offences Act 1988*,
- (e) an offence (such as an offence under section 37 or 112 of the *Crimes Act 1900*) which includes the commission of, or an intention to commit, an offence referred to in paragraph (a), (b), (c) or (d),
- (f) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a), (b), (c), (d) or (e),
- (g) an offence committed: before the date of commencement of this section against a law of New South Wales or a law of a place outside New South Wales, or (ii) after the date of commencement of this section against a law of a place outside New South Wales, which constituted or constitutes an offence of a similar nature to an offence referred to in paragraph (a), (b), (c), (d), (e) or (f), (h) an offence prescribed by the regulations as a sexual offence for the purposes of this section.

8 When is a conviction spent?

- (1) A conviction is spent on completion of the relevant crime-free period, except as provided by this section.
- (2) A finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction is spent immediately after the finding is made.
- (3) An order of the Children's Court dismissing a charge and administering a caution is spent immediately after the caution is administered.
- (4) A finding that an offence has been proved, or that a person is guilty of an offence, and:
 - (a) the discharging of, or the making of an order releasing, the offender conditionally on entering into a good behaviour bond for a specified period, on participating in an intervention program or on other conditions determined by the court, or
 - (b) the releasing of the offender on probation on such conditions as the court may determine, for such period of time as it thinks fit, is spent on satisfactory completion of the period or satisfactory compliance with the program (including any intervention plan arising out of the program) or conditions, as the case may require.
- (5) A conviction in respect of an offence of a kind which has ceased, by operation of law, to be an offence is spent immediately the offence ceased to be an offence, if the offence is prescribed by the regulations to be an offence to which this subsection applies.
- (6) A conviction which is spent is not revived by a subsequent conviction.
- (7) A reference in subsection (4) (a) (as substituted by the *Crimes Legislation*

Amendment (Criminal Justice Interventions) Act 2002) to a good behaviour bond includes a reference to a recognizance to be of good behaviour made before the commencement of the *Crimes (Sentencing Procedure) Act 1999*.

9 What is the crime-free period for convictions of courts (other than the Children's Court)?

(1) The crime-free period in the case of a conviction of a court (other than the Children's Court) is any period of not less than 10 consecutive years after the date of the person's conviction during which:

- (a) the person has not been convicted of an offence punishable by imprisonment, and
- (b) the person has not been in prison because of a conviction for any offence and has not been unlawfully at large.

(2) The crime-free period may commence before the date of commencement of section 7.

10 What is the crime-free period for orders of the Children's Court?

(1) The crime-free period in the case of an order of the Children's Court under section 33 of the *Children (Criminal Proceedings) Act 1987* (other than a finding or order referred to in section 8 (2) or (3) of this Act) in respect of a person is any period of not less than 3 consecutive years after the date of the order during which:

- (a) the person has not been subject to a control order, and
- (b) the person has not been convicted of an offence punishable by imprisonment, and
- (c) the person has not been in prison because of a conviction for any offence and has not been unlawfully at large.

(2) The crime-free period may commence before the date of commencement of section 7.

...

12 What are the consequences of a conviction becoming spent?

If a conviction of a person is spent:

- (a) the person is not required to disclose to any other person for any purpose information concerning the spent conviction, and
- (b) a question concerning the person's criminal history is taken to refer only to any convictions of the person which are not spent, and
- (c) in the application to the person of a provision of an Act or statutory instrument:

- (i) a reference in the provision to a conviction is taken to be a reference only to any convictions of the person which are not spent, and
- (ii) a reference in the provision to the person's character or fitness is not to be interpreted as permitting or requiring account to be taken of spent convictions.

(c) United Kingdom

4.112 The **Rehabilitation of Offenders Act 1974** (c.53) of the UK Parliament enables some criminal convictions to be ignored **after a rehabilitation period**.¹⁴³ The purpose of the Act is to prevent people from being prejudiced because they have been convicted of a minor offence in the past. The rehabilitation period is automatically determined by the sentence imposed, and starts from the date of the conviction. After this period, if the person has no further convictions, the conviction becomes spent. When a conviction is spent it need not be disclosed by ex-offenders in any context, for example when applying for a job or when applying for insurance or in civil proceedings.

4.113 Rehabilitation¹⁴⁴ means "to restore to useful life, as through therapy and education" or "to restore to good condition, operation, or capacity."¹⁴⁵ The assumption of rehabilitation is that people are not permanently criminal and that it is possible to restore criminals to a useful life in which they contribute to themselves and to society. A goal of rehabilitation is to prevent habitual offending. Rather than punishing the criminal rehabilitation seeks to change the mind or attitude of such person to the extent that it would foster his or her re-integration into society.

4.114 For adults, the rehabilitation period is 5 years for most non-custodial sentences, 7 years for prison sentences of up to 6 months, and 10 years for prison sentences of between 6 months and 2½ years. For a young offender (under 18) the rehabilitation period is generally half that for adults. Prison sentences of more than 2½ years can never be spent. Other sentences have variable rehabilitation periods. Compensation orders are only spent once paid in full, but an order to keep the peace would be spent either at the end of the order or a year (depending which is longer).

143 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299916/rehabilitation-of-offenders-guidance.pdf accessed 5 March 2014, See also <http://www.legislation.gov.uk/ukpga/1974/53> accessed 4 March 2014.

144 http://www.worldheritage.org/articles/Rehabilitation_of_Offenders_Act_1974 accessed 4 March 2014.

145 The American Heritage Dictionary, 2009.

4.115 The Act provides that:

1. Rehabilitated persons and spent convictions.

(1) Subject to subsection (2) below, where an individual has been convicted, whether before or after the commencement of this Act, of any offence or offences, and the following conditions are satisfied, that is to say—

(a) he did not have imposed on him in respect of that conviction a sentence which is excluded from rehabilitation under this Act; and

(b) he has not had imposed on him in respect of a subsequent conviction during the rehabilitation period applicable to the first-mentioned conviction in accordance with section 6 below a sentence which is excluded from rehabilitation under this Act; .

then, after the end of the rehabilitation period so applicable (including, where appropriate, any extension under section 6(4) below of the period originally applicable to the first-mentioned conviction) or, where that rehabilitation period ended before the commencement of this Act, after the commencement of this Act, that individual shall for the purposes of this Act be treated as a rehabilitated person in respect of the first-mentioned conviction and that conviction shall for those purposes be treated as spent.

(2) A person shall not become a rehabilitated person for the purposes of this Act in respect of a conviction unless he has served or otherwise undergone or complied with any sentence imposed on him in respect of that conviction; but the following shall not, by virtue of this subsection, prevent a person from becoming a rehabilitated person for those purposes—

(a) failure to pay a fine or other sum adjudged to be paid by or imposed on a conviction, or breach of a condition of a recognizance or of a bond of caution to keep the peace or be of good behaviour; .

(b) breach of any condition or requirement applicable in relation to a sentence which renders the person to whom it applies liable to be dealt with for the offence for which the sentence was imposed, or, where the sentence was a suspended sentence of imprisonment, liable to be dealt with in respect of that sentence (whether or not, in any case, he is in fact so dealt with); .

(c) failure to comply with any requirement of a suspended sentence supervision order.

(3) In this Act “sentence” includes any order made by a court in dealing with a person in respect of his conviction of any offence or offences, other than—

(a) an order for committal or any other order made in default of payment of any fine or other sum adjudged to be paid by or imposed on a conviction, or for want of sufficient distress to satisfy any such fine or other sum; .

(b) an order dealing with a person in respect of a suspended sentence of imprisonment. .

(4) In this Act, references to a conviction, however expressed, include references—

(a) to a conviction by or before a court outside Great Britain; and .

(b) to any finding (other than a finding linked with a finding of insanity) in any criminal proceedings or in care proceedings under section 1 of the Children and Young Persons Act 1969 that a person has committed an offence or done the act or made the omission charged; and notwithstanding anything in section 9 of the Criminal Justice (Scotland) Act 1949 or section 13 of the Powers of Criminal Courts Act 1973 (conviction of a person put on

probation or discharged to be deemed not to be a conviction) a conviction in respect of which an order is made placing the person convicted on probation or discharging him absolutely or conditionally shall be treated as a conviction for the purposes of this Act and the person in question may become a rehabilitated person in respect of that conviction and the conviction a spent conviction for those purposes accordingly.

4.116 Section 2 of the Act also provides for rehabilitation of persons dealt with in service disciplinary proceedings. For the purposes of the Act any finding that a person is guilty of an offence in respect of any act or omission which was the subject of service disciplinary proceedings shall be treated as a conviction and any punishment awarded or order made by virtue of Schedule 5A to the Army Act 1955 or to the Air Force Act 1955 or Schedule 4A to the Naval Discipline Act 1957, in respect of any such finding shall be treated as a sentence.

4.117 Section 3 of the Act contains a special provision with respect to certain disposals by children's hearings under the Social Work (Scotland) Act 1968. It provides that where a ground for the referral of a child's case to a children's hearing under the Children (Scotland) Act 1995 is that mentioned in section 52(2)(i)] of that Act (commission by the child of an offence) and that ground has either been accepted by the child and, where necessary, by his parent or been established (or deemed established) to the satisfaction of the sheriff under section 68 or 85 of that Act, the acceptance, establishment (or deemed establishment)] of that ground shall be treated for the purposes of this Act (but not otherwise) as a conviction, and any disposal of the case thereafter by a children's hearing shall be treated for those purposes as a sentence; and references in this Act to a person's being charged with or prosecuted for an offence shall be construed accordingly.

4.118 It should be noted that certain professions and employments are exempted from the act so that individuals are not allowed to withhold details of previous convictions in relation to their job when applying for positions in similar fields. These professions include:

- Those working with children and other vulnerable groups, such as teachers and social workers;
- Those working in professions associated with the justice system, such as solicitor, police, court clerk, probation officer, prison officer and traffic warden;
- Doctors, dentists, pharmaceutical chemists, registered pharmacists, pharmacy technicians, nurses or paramedics;

- Accountants;
- Veterinarians;
- Managers of unit trusts;
- Anyone applying to work as an officer of the Crown;
- Employees of the RSPCA or SSPCA whose duties extend to the humane killing of animals;
- Any employment or other work normally carried out in bail hostels or probation hostels;
- Certain officials and employees from government and public authorities with access to sensitive or personal information or official databases about children or vulnerable adults;
- Any office or employment concerned with providing health services which would normally enable access to recipients of those health services;
- Officers and other persons who execute various court orders;
- Anyone who as part of their occupation occupies premises where explosives are kept under a police certificate;
- Contractors who carry out various kinds of work in tribunal and court buildings;
- Certain company directorships, such as those for banks, building societies and insurance companies;
- Certain civil service positions are excluded from the act, such as employment with the Civil Aviation Authority and the UK Atomic Energy Authority;
- Taxi drivers and other transport workers; and
- Butlers and other domestic staff.

4.119 Apart from the above trades and professions, the law also exempts certain organisations if questions regarding previous convictions are asked:

- by or on behalf of The Football Association, The Football League or Premier League to assess someone's suitability to work as, or supervise or manage, a steward at football matches;
- by the Financial Services Authority and certain other bodies involved in finance, when asked to assess the suitability of a person to hold a particular status in the financial and monetary sectors; and

- to assess a person's suitability to adopt children, or a particular child, or a question about anyone over the age of 18 living with such a person.

4.120 There are also a number of proceedings before a judicial authority that are excluded from the Act, and where spent convictions can be disclosed. These include applications for adoption or fostering and for firearms certificates. Applicants to university courses are required to declare their criminal records on their admission forms. Students applying to do law, medicine, teaching, nursing and social work (or similar trades) may be barred if they have a conviction, even if it is spent.

(i) Rehabilitation and actions for libel under English law

4.121 In terms of section 8 of the Act, if a person can prove that the details of a spent conviction were published primarily with a motive of causing damage to the subject (malice), then the publisher may be subject to libel damages regardless of whether the details were true or not. This applies where the publisher is relying on a defence of qualified privilege or justification.

4.122 Although the British media remain free to publish details of spent convictions on condition that they are not motivated by malice, they generally avoid mention of such convictions after rehabilitation. However, media barrister Hugh Tomlinson QC is of the opinion that "in practice, the law of libel provides no sanction against the publication of spent convictions".¹⁴⁶ The Act was extended to cover police cautions in 2008.¹⁴⁷ A caution is considered to be spent as soon as it is given.

(d) Germany

4.123 Christine Morgenstern explains expungement in Germany on the following basis:¹⁴⁸

Expunging techniques: desistance-supporting measures

Following the classification of Herzog-Evans (2011b), expunging techniques

146 <http://inform.wordpress.com/2011/03/02/libel-privacy-and-forgetting-claims-by-rehabilitated-offenders-hugh-tomlinson-qc> accessed 4 March 2014.

147 Criminal Justice and Immigration Act 2008, Schedule 10 <http://www.legislation.gov.uk/ukpga/2008/4/contents#sch10> accessed 4 March 2014.

148 "Judicial Rehabilitation in Germany – The Use of Criminal Records and the Removal of Recorded Convictions" Christine Morgenstern, Ernst Moritz Arndt Universität Greifswald, *European Journal of Probation*, *www.ejprob.ro Vol. 3, No.1, 2011, pp 20 – 35 ISSN: 2006 – 2203*.

performed with regard to the criminal records may be divided into three sub-groups: those which are granted automatically; those which are granted based simply on the absence of further reconvictions and those which require some form of desistance evidence. This classification can easily be adopted for the German system, but again it has to be distinguished between the register itself and the certificate of conduct. The legislation has created a graduated (and complicated) system of deadlines. The expiry of recording periods results first in a ban from inclusion of convictions in a certificate of conduct (in the model by Jescheck & Weigend, the second step of rehabilitation). In a last (third) step, after expiry of another period, they are finally removed from the Register altogether (cf. sections 34 and 46 of the Federal Central Criminal Register Act). New convictions lead to suspension of time limits or may lead to the consideration also of minor crimes. As already mentioned above, certain privileges apply to juveniles and drug addicts. On the other hand, stricter rules apply for those convicted for sexual offences.

Automatic measures

According to Art. 24 BZRG, all entries will be removed from the register three years after the official notification of the death of a person. The same applies to entries for persons of 90 years of age. Entries that relate to the fact that a person was not convicted because he or she is not criminally responsible due to a mental disorder, are removed automatically after 10 or – in cases of felonies – 20 years.

Automatic measures based on the mere absence of further reconviction No further inclusion in the certificate of conduct

According to Art. 33 BZRG, convictions shall no longer be included in the certificate of conduct on expiry of specific deadlines. This, however, is not the case when life imprisonment has been imposed if (after 15 years or more), no parole or pardon has been granted; or when preventive detention has been ordered, or, in certain cases of mental hospital orders. The length of the period before the expiration of which a conviction will no longer be included in the certificate differ (Art. 34 BZRG). It is

- * three years after convictions for offences that are punished with a suspended sentence of less than one year;
- * five years for most other convictions;
- * except convictions for sexual offences with a punishment of more than one year, the period here will be ten years.

The period starts with the day of the final judgment and is extended by the length of the respective prison sentence; in cases of life sentences where parole is granted this extension is at least 20 years. The effect of the expiry only occurs when no other entry can be found; no reconviction has been recorded and all sentences have been fully executed. Whenever more than one conviction is recorded in the register, the latest conviction overrides and defines the expiring date. This means nevertheless that an average criminal act may disappear from the certificate of conduct five years after the full execution of a sentence.

Redemption of convictions

Full redemption (with the effect that the convictions may not be used against a person in legal matters any longer) can be achieved after longer periods, usually three times as long as the periods just mentioned. More specifically, these periods are:

- * five years for all convictions that result in a penalty of less than 90 day fine units (as long as no sentence of imprisonment exists in the register; several smaller day fines are irrelevant); of penalties of imprisonment of less than three months or, for juveniles, of less than one year (or two, if suspended);
- * ten years for convictions that result in a punishment of less than one year of imprisonment, if suspended (certain restrictions apply); in cases of juveniles all other convictions;
- * 15 years in most other cases;
- * with the exception of 20 years in cases of sexual offences that result in a punishment of more than one year of imprisonment.

Measures requiring some form of merit

It is possible for the ex-offender to apply for an earlier ban from inclusion in the certificate of conduct (Art. 39 BZRG) or an earlier deletion (Art. 49 BZRG) of convictions in the register. Assuming that the law always has an average case in mind, these legal possibilities are mainly hardship regulations to avoid in rare cases additional discrimination of the person concerned that is contrary to the legal aim as long as this does not affect public interests. In the most comprehensive handbook on the Federal Central Criminal Register Act (Götz & Tolzmann, 2000: Art. 39), only very few examples are mentioned; e. g. when foreign convictions are included in the criminal records which seem to be comparatively (too) harsh; when a rare chance of finding a job will otherwise be lost and the expiry period is almost over etc.

Both privileges are not granted by a court but by the Federal Office of Justice which administers the registry. In our context, the procedure following such a request is interesting: A hearing of the judge of first instance or other authorities concerned is possible, but not always required. It is assumed that the applicant himself will not be heard – the chance to acknowledge positive developments and thus to encourage ongoing desistance in a formal hearing is therefore not taken into account at all. The cases mentioned in the handbook clearly show that not so much the question ‘does the claimant deserve it?’ (thus: merit), is relevant; but unintended additional disadvantage as a consequence of the conviction (Rebmann, 1983: 1513). Only the consideration of restorative justice elements (cf. full and speedy compensation for the victim which may represent a good reason for earlier removal of entries [Götz & Tolzmann, 2000: Art. 49]) involves the aspect of merit.

Rehabilitation rituals: desistance acknowledgement measures

Apart from the possibility of introducing a formal hearing of the applicant in the procedure mentioned above, one more possible option – that of introducing a formal rehabilitation ritual that ‘celebrates full desistance’ (Herzog-Evans, 2011b) - can be found in the Juvenile Justice System. Here, in addition to the register privileges for juveniles I have mentioned already, a so-called ‘elimination of the penal blemish’

(Beseitigung des Strafmarkens) can be declared by the judge of a juvenile court (Art. 97 Youth Justice Act). This declaration is possible for juveniles under 18 and young offenders up to 21 as long as they have been treated as juveniles in the criminal procedure. It requires a request by the young person concerned, his or her counsel, legal representative etc. or the public prosecutor or can be declared by the court ex officio. This can be done (usually) not earlier than two years after full enforcement or remittal of the remainder of a sentence. With regard to our topic, the procedure and the material requirements are more interesting: According to the law, the juvenile has to prove that he or she is (now) an 'integrated personality', is 'righteous' and has shown 'impeccable conduct'. Sometimes it is argued that simply leading a law-abiding life complies with these requirements (Ostendorf, 2009, § 97 marg. note 7). In my opinion, the wording of the laws has to be understood in a way that it requires 'more', e.g. unpaid work for voluntary organizations etc. In cases where such a request is made, the law provides that the (ex-) convict, parents or legal representatives, the competent youth authority and, if applicable, a school representative are heard. This provision would enable the judge to create a form of roundtable that may acknowledge desistance and thus strengthen the ex-offender in his ongoing desistance process. It seems, however, that this is not the case: statistics or empirical findings with regard to that kind of procedure are not available, nor is jurisprudence. The relevant commentaries or handbooks (Ostendorf, 2009; Eisenberg, 2009) only provide general considerations of a formal kind, usually only referring to a certain risk of stigmatization when the school is involved or the court gathers information from third parties. As far as can be seen, the chance of encouraging the young offender is never discussed.

The German system, in short, does not leave much leeway for ceremonies that would formally acknowledge desistance. The ex-offender does not even receive a notice once his or her record has been cleared. As indicated above, an official court ceremony seems to be an idea that appears very strange to the German system and judicial (self-)concept. When Maruna (2001: 161) describes occasions where quite powerful 'redemption rituals' (rather accidentally) took place in a courtroom, he writes, from the viewpoint of the offender, 'Suddenly and unexpectedly, ..., there is justice.'. This, in my view, is a crucial point: It appears to be more a question of procedural fairness (or procedural justice [Tyler, 1990/2006: 115; Tyler, 2008]) than of redemption when positive developments are acknowledged within the criminal procedure. There are several stages where – to come back to the German system – the court is obliged to take into account any step towards desistance. When determining a sentence (which is done in the same hearing in which guilt is established and, at least in adult cases, without the involvement of pre-sentence reports and court social workers) it must take into account all relevant circumstances 'in favour of and against the offender' (Art. 46 Criminal Code, Principles of sentencing), and it has to do this explicitly in the hearing. Among these circumstances is 'the conduct after the offence', the law mentions particularly restorative efforts. Another opportunity where a court has to acknowledge positive developments is the hearing before deciding on early (conditional) release (Art. 57 Criminal Code; Art. 454 Code of Criminal Procedure).

To put it less technically: It is part of a judges' 'job description' to assess positive developments – if this is not done, it is a lack of fairness and a lack of professionalism. Of course, reality may look different and often does, which may partly be explained by the heavily theory-oriented education of German lawyers and

judges. As far as can be seen, in Germany no empirical research has been conducted that addresses this question so far. This perception of procedural fairness by young persistent offenders and its impact on desistance and recidivism will, however, be included in future research by Boers and colleagues (2010).

CHAPTER 5

THE LEGAL FRAMEWORK FOR EXPUNGEMENT IN SOUTH AFRICA

EXPUNGEMENT IN THE SOUTH AFRICAN CONTEXT

5.1 In this part consideration will be given to the legal framework of expungement in South Africa as well as legislation containing provisions which hinders the objects to be achieved by the legislation enabling the principle of expungement namely, facilitating the reintegration into society of persons with a criminal record. In the first part consideration will be given to the legal framework regulating expungement with reference to adult and juvenile offenders and in the second part reference will be made to legislative provisions having an impact on the reintegration of convicted offenders into society.

THE LEGAL FRAMEWORK FOR EXPUNGEMENT IN SOUTH AFRICA

INTRODUCTION

5.2 The legal framework for expungement and the prescribed processes have been discussed in detail in Chapter 2. In this chapter the discussion is limited to an outline of the legal framework with reference to adult and juvenile offenders with the view to identifying the problem areas that need to be addressed in the investigation. The legal framework and the identification of problem areas have been considered by Mr Muntingh and his discussion of the framework and problem areas forms the basis for purposes of this discussion.¹⁴⁹

5.3 It should be pointed out that his discussion includes the legal framework in respect of adult offenders as well as the framework for juvenile offenders. His discussion also includes a reference to legislation which hinders reintegration of offenders and the latter discussion is in particular with reference to the legal framework relating to juvenile offenders. Whereas the Commission's terms of reference for this investigation would on first glance appear to be limited to the provisions dealing with adult offenders, Mr Muntingh's discussion makes it

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clear that a review of those provisions cannot be done without a consideration of the provisions dealing with juvenile offenders. It is for this purpose that the discussion paper has from the outset included a discussion of expungement with reference to both juvenile and adult offenders.

5.4 The criminal record of a person is referred to and used in a number of different statutes and a selection will be outlined in this chapter. An evaluation of the relevant provisions dealing with expungement clearly reveals that different standards and criteria are applied when reference is made to expungement of the criminal record in respect of juvenile offenders and adult offenders and there are notable differences between the Constitution (with reference to Members of Parliament), the Criminal Procedure Act (CPA), the Children's Act 38 of 2005 (hereafter the CA) (with reference to the National Child Protection Register), the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (with reference to the National Sex Offender Register (hereafter the CAA), and the Child Justice Act 75 of 2008 (hereafter the CJA) .¹⁵⁰

5.5 Mr Muntingh points out that these differences, in all likelihood, had their origin in the particular context and history that shaped the particular statute and may be explained by the fact that the different pieces of legislation was considered and passed by Parliament in different years. It should, be noted that the amendment to the CP Amendment Act was assented to in February 2009 and was initiated by the Department of Justice and Constitutional Development. The CA (with reference to the Child Protection Register) was assented to in June 2006, the CAA was assented in December 2007 and the CJA was assented to in May 2009. All three these Acts were passed by Parliament following the completion of three separate investigations by the South African Law Reform Commission. The conclusion reached by Mr Muntingh would appear to have merit. Because of the different dates of passing the legislation it appears that the Acts have not been aligned or that the differences have not been pointed out at the time when the Acts were considered.

5.6 In order to have a clear understanding of the problems in the expungement legislation we distinguish between adult offenders and juvenile offenders. The discussion of the legal framework is followed by an identification of the problem areas with reference to the

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applicable legislation. The problem areas with reference to adult and juvenile offenders will be outlined after a brief outline of the separate legal frameworks.

ADULT OFFENDERS

(a) The Constitution

5.7 The Constitution contains a number of provisions which are relevant for purposes of expungement. The Constitution provides for a disqualification for membership of Parliament and the Provincial Legislature following a conviction of an offence and the imposition of a period of 12 months imprisonment without the option of a fine, unrehabilitated insolvents persons of unsound mind. The relevant provisions relate to membership of the National Assembly and the provincial legislatures and are briefly outlined. Membership of the National Assembly is regulated in section 47 of the Constitution. The section provides that every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except unrehabilitated insolvents; anyone declared to be of unsound mind by a court of the Republic; or anyone **who, after the section took effect, is convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine. No one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this section ends five years after the sentence has been completed** (section 47(1)). Section 47(2) provides that a person who is not eligible to be a member of the National Assembly in terms of subsection (1)(a) or (b) may be a candidate for the Assembly, subject to any limits or conditions established by national legislation. Section 47(3) provides that a person loses membership of the National Assembly if that person ceases to be eligible. Section 106 of the Constitution contains similar provisions for membership of the Provincial Legislature.

(b) The Provisions of the Criminal Procedure Act 51 of 1977

(i) The fall away provision – an automatic process based on sentence and time lapse of 10 years

5.8 Mr Munting points out that section 271A of the Criminal Procedure Act states that

certain convictions fall away after 10 years where a court has convicted a person of:¹⁵¹

- Any offence where a term of imprisonment exceeding 6 months without the option of a fine may be imposed, but the passing of sentence was postponed in terms of section 297(1)(a) and the court discharged that person in terms of section 297(2) without passing sentence or has not called that person to appear before the court in terms of section 297(3).
- Any other offence for which a sentence not exceeding six months without the option of a fine may be imposed

and that person has not, during the period of the postponement, been convicted of an offence for which a sentence of imprisonment exceeding six months without the option of a fine may be imposed.

For the layperson there may be some uncertainty as to what 'fall away' exactly means and whether an application for expungement (as discussed below) still needs to be made. According to Terblanche 'falling away' means that such convictions cannot not be taken into account for the purposes of sentencing at a later stage. However, the same author notes Van Heerden JA commenting that such convictions should in fact be removed from the SAP 69 (the record of previous convictions). This implies that, according to Van Heerden JA, the fall away provision is not sufficient to give the offender a true 'clean slate' again as the court (and third parties) still have access to the record of criminal convictions, even if these occurred more than ten years ago. Therefore, it must be understood that the offender who has been convicted and sentenced in a manner that meets the requirements of section 271A and that a period of ten years has lapsed, must not assume that the conviction has been removed from the criminal records data base; the record still exists but it may not be taken into account if there is a further conviction and sentence must be passed.

(ii) An application process based on the sentence imposed

5.9 With reference to the provisions of section 271B of the CPA Mr Muntingh explains:¹⁵²

Following the amendment, Section 271B provides the list of sentences in respect of which **an application** may be made for the expungement of the record after a period of **ten years has lapsed after the date of conviction and the person has not been sentenced to a period of imprisonment without the option of a fine.** (emphasis added) A person convicted and sentenced as set out below may apply for the expungement of their criminal record following the procedure described below. Persons who had received the following sentences are eligible:

151 Civil Society Prison Reform Initiative *"The law and the business of criminal record expungement in South Africa"* Research Report no 18 by Lukas Muntingh at 8.

152 Civil Society Prison Reform Initiative *"The law and the business of criminal record expungement in South Africa"* Research Report no 18 by Lukas Muntingh at 9.

- The postponement of the passing of sentence in terms of section 297(1)(a) where the persons was discharged in terms of 297(2) or the person was not called back to appear before the court in terms of section 297(3);
- A sentence discharging the person with a caution or reprimand provided for in section 297(1)(c);
- A fine only, but not exceeding R20 000;
- A sentence of corporal punishment before corporal punishment was declared unconstitutional;
- A sentence of imprisonment with the option of a fine but not exceeding R20 000;
- Any sentence of imprisonment that was wholly suspended;
- Correctional supervision as provided for in section 276(1)(h) or (i);
- Periodical imprisonment.

5.10 Section 271B(1)(b) provides that a person who has been convicted of a sexual offence against a child or a person who is mentally disabled and whose name has been included in the National Register for Sex Offenders, as provided for in section 50 of the CAA; or whose name has been included in the National Child Protection Register as a result of a conviction of an offence, as provided for in section 120(1)(b) of the CA do not qualify to have the criminal record expunged unless his or her name has been removed from the National Register of Sex Offenders, as provided for in section 51 of the CAA or section 128 of the CA.

(iii) An automatic process for expungement - The provision dealing with apartheid crimes

5.11 Section 271C deals with the expungement of apartheid era crimes:¹⁵³

Apartheid era legislation created a plethora of apartheid related crimes and these were recorded as criminal convictions for people convicted accordingly. Section 271C lists the relevant apartheid era laws in respect of which expungement are enabled. **A key difference here, compared to section 271B, is that the expungement is automatic in the sense that there are no additional requirements, such as the submission of an application, the issuance of a certificate of expungement and so forth. Moreover, the duty rests with the SAPS Criminal Records Centre to expunge such records without an application for expungement being made.** (emphasis added)

However, if the record of a person convicted of apartheid era crimes was not automatically expunged as required by section 271C(1), the record must be expunged upon the written request of the person subject to the procedure set out in section 271C(3) and section 271D. In addition to the specific apartheid era laws listed in section 271C (1), provision is also made in section 271C(2) for any other act of Parliament, ordinance of a provincial council, municipal by-law, proclamation, decree

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or any other enactment having the force of law, enacted in South Africa, the TBVC states and self-governing territories “which created offences that were based on race or which created offences, which would not have been considered to be offences in an open and democratic society based on human dignity, equality and freedom, under the constitutional dispensation after 27 April 1994”.

5.12 Apart from the automatic expungement referred to above, section 271C(2) includes offences created in terms of legislation enacted prior to the 1994 democratic transition in the scope for expungement in terms of **an application process**. It provides that in respect of any other enactment having the force of law, other than the provisions referred to in subsection (1), which were enacted in the former Republic of South Africa, the former Republic of Transkei, Bophuthatswana, Ciskei or Venda, or in any former self-governing territory (in terms of the Self-governing Territories Constitution Act, 1971 (Act No. 21 of 1971) before the Constitution took effect, and which created offences that were based on race or which created offences which would not have been considered to be offences in an open and democratic society (based on human dignity, equality and freedom under the new constitutional dispensation), the criminal record, containing such convictions and sentences must on the written application of the person affected, be expunged.

(iv) The application procedure for having a record expunged

5.13 The procedure for applying for an expungement of a criminal record is set out in section 271D of the Criminal Procedure Act and the regulations thereto. These have been discussed in detail in chapter 2. Excluding apartheid era offences, the first step in the application for expungement is **to obtain a ‘clearance certificate’ showing that a period of ten years has lapsed after the conviction(s) and sentencing**. The clearance certificate can be applied for at a police station and a fee of R59.00 is payable upon application for a clearance certificate.

5.14 Different application forms are prescribed in the regulations issued in terms of the Act. Applications in respect of section 271B must use Form A. Applications in respect of section 271C (2)(a) (offences based on race) must use Form B. Applications in respect of section 271C(2)(a) (offences listed under apartheid era laws) must use Form C. Form C applies to those instances where the records should have been automatically expunged, but did not happen. In respect of race based offences and specific apartheid era law, there is no need to submit the SAPS certificate of clearance. The full applications must be submitted to the **Director General: Justice and Constitutional Development who, if the applicant**

meets the criteria for expungement, issues a certificate of expungement. The Director General: Justice and Constitutional Development must then submit the **certificate of expungement to the head of the Criminal Records Centre of SAPS. Upon the receipt of the certificate of expungement, the Head of the Criminal Records Centre of SAPS (or such delegated official) must expunge the record as indicated.** The Head of the Criminal Records Centre of SAPS will, however, not automatically inform the applicant of the expungement and will only do so upon the written request of the applicant.¹⁵⁴ In the event that there is a dispute or uncertainty whether an offence meets the requirements in section 271C(1) or section 271C(2), the matter must be referred to the Minister of Justice and Constitutional Development. If the Minister decides that it meets the requirements in section 271C(1) or section 271C(2), the Minister may issue a certificate of expungement (Form E). It should be noted that in respect of applications made under section 271B(1), there is no dispute resolution mechanism.¹⁵⁵

(c) Provisions in legislation impacting on the expungement of a criminal record

(i) The inclusion of the names and convictions in registers

5.15 The inclusion of particulars of the convicted offender and the crimes convicted of in registers in terms of the CAA and the CA creates problems when expungement of the criminal record is considered. In general in the expungement is not allowed unless the particulars of the offender and the offence convicted of, is not removed from the relevant register. However, the removal from the register is not allowed for certain offences and the time lapse set as prerequisite for such removal differs from the periods prescribed for expungement in the relevant legislation. The CAA and the CA created two registers that have an important bearing on the expungement of criminal records. The impact of these provisions will be discussed below when identifying the problem areas in the law dealing with expungement.

JUVENILE OFFENDERS

(a) The Child Justice Act 75 of 2008 (CJA)

154 See discussion in Chapter 2.

155 See discussion in Chapter 2.

5.16 **Section 87 of the CJA provides for the expungement of records of certain convictions and diversion orders. It provides that** where a court has convicted a child of an offence referred to in Schedule 1 or 2 of the Act, such conviction and sentence fall away as a previous conviction and the criminal record of that child must be expunged if certain conditions are met. These conditions are:

- A written application must be made by the child, his or her parent, appropriate adult or guardian;
- after a period of 5 years has elapsed after the date of conviction in the case of an offence referred to in Schedule 1, or 10 years has elapsed after the date of conviction in the case of an offence referred to in Schedule 2; and
- during the periods referred to, above the child has not again been convicted of a similar or more serious offence.

In essence the qualifying prerequisites for expungement are the conviction of certain offences and the time lapse of 5 and 10 years respectively for the offences listed in schedules 1 or 2 respectively, after the date of conviction and on condition that the applicant should not have been convicted of a similar or more serious offence during the relevant period.

5.17 In the case of a dispute or uncertainty as to whether another offence of which a child is convicted during the period is similar to or more serious than the offence in respect of which the record exists, the opinion of the Cabinet member responsible for the administration of justice prevails. The Director-General of the Department of Justice and Constitutional Development must, on receipt of the written application of an applicant issue a prescribed certificate of expungement, directing that the conviction and sentence of the child be expunged. The Director-General must be satisfied that the child complies with the criteria set out, namely the offences, the time lapse of 5 years and 10 and the absence of further convictions during the time periods. However, in addition to the above, the Cabinet member responsible for the administration of justice may, on receipt of an applicant's written application in the prescribed form, issue a prescribed certificate of expungement, directing that the conviction and sentence of the child be expunged, if he or she is satisfied that **exceptional circumstances** exist which justify expungement. He or she may do so where, in the case of the child the period of five years or a period of 10 years has not yet elapsed, if the Cabinet member responsible for the administration of justice is satisfied that the child

otherwise complies with the criteria set out in the Act, namely the applicability of the offences listed in schedule 1 and 2 respectively and the fact that the applicant should not have been convicted of a similar or more serious offence in the period of 5 or 10 years after the conviction in respect of which the application is made.

5.18 An applicant to whom a certificate of expungement has been issued must in the prescribed manner, submit the certificate to the head of the Criminal Record Centre of the South African Police Service. The head of the Criminal Record Centre of the South African Police Service or a senior person or persons on the rank of Director or above, employed at the Centre, who has been authorised in writing by the head of the Centre to do so, must expunge the criminal record of a child if he or she is furnished with a certificate of expungement as provided for in the Act. The head of the Criminal Record Centre of the South African Police Service must on the written request of an applicant confirm in writing that the criminal record of the child has been expunged. Any person who intentionally or negligently expunges the record of a child without the authority of a certificate of expungement is guilty of an offence and liable to a fine or to a sentence of imprisonment for a period not exceeding 10 years or to both a fine and the imprisonment.

5.19 The Act also provides for the expungement of diversions provided for in the Act. In this regard the Act provides that the Director-General of the Department of Social Development must expunge the record of any diversion order made in respect of a child in terms of the CJA on the date on which that child turns 21 years of age, unless the child has been convicted of any other offence before that date or has failed to comply with the diversion order in question.

LEGISLATION IMPACTING ON THE REINTEGRATION OF OFFENDERS WITH A CRIMINAL RECORD

(a) Disqualifications impacting on re-integration into society based on conviction of an offence in terms of legislation in South Africa

5.20 There are a large number of legislative provisions in South Africa providing for disqualifications in terms of employment opportunities following a conviction of particular offences. The record of criminal convictions is referred to and used in a number of different statutes and a selection will be described here. This selection does not represent a complete

list of legislation, but is used to show to what extent existing enactments impacts on the reintegration of offenders. In summary and upon evaluation of the legislation, it appears that in many instances a criminal conviction for particular offences, in many instances, provides a disqualification for employment purposes and the issuing of a license where legislation requires a license for certain conduct, for example, a license to conduct business, a driver's license and a license to possess a firearm. In most instances the legislation lists the conviction of the offences in respect of which a disqualification applies and in many instances the disqualification is also linked to the sentence imposed. In general such legislation deals with appointments in certain areas of the employment field and the disqualification attempts to prevent the employment of appointment of persons convicted of certain offences and where certain sentences were imposed. Professor Mujuzi summarises relevant legislation in the following terms:¹⁵⁶

Having a criminal record could have serious consequences for a particular individual. These consequences have been recognized by South African courts. In *S v. Gilgannon* the High Court held that '[a] criminal record is an impediment to opportunities such as employment, travel and many other areas of life.' Criminal records severely limit people's ability to find employment. In *S v Mutobvu* the accused informed court that he had 'been severely prejudiced in his attempts to find a job because of the criminal record.' In *S v. Tong* because of the criminal record he got after paying an admission of guilt fine, 'he is severely prejudiced and cannot qualify for any teaching placement' and 'was also unable to obtain any freelance opportunities in the filming industry which may require him to travel abroad.' There are many national and provincial pieces of legislation or regulations which prohibit a person with a criminal record from engaging in a particular activity or from being nominated or appointed to a professional body. For example, a person with a traffic conviction (criminal record) does not qualify to be issued with or renew his professional driver's licence; a person's criminal record is one of the factors that have to be considered in deciding whether or not to issue with him a license to undertake a public transport service. A person with a criminal record cannot be nominated or appointed to the Counsel for Further Education and Training Institutions or as a member of the not suitable to enter into certain contracts; he is not suitable to be a financial adviser; does not qualify to do a basic traffic officer's course, a course for examiner for driving licenses, a course of examiner of vehicles and a refresher training; and for a person to be an environmental mediator he 'as a minimum... must not have a criminal record involving dishonesty.' Apart from natural persons, an enterprise (including companies) is also prohibited from taking part in some activities if it has a criminal record. The above examples make it clear that having a criminal record makes it impossible for a person to apply for some jobs, as he is aware that his criminal record disqualifies him from applying for such a job although he may have the necessary education and experience, and that such a person is also barred

156 Jamil Ddamulira Mujuzi "The Expungement of Criminal Records in South Africa: The Drafting History of the Law, the Unresolved Issues, and How They Could be Resolved" Statute Law Review, 2014, Vol. 00, No. 00, 1–26 doi:10.1093/slr/hmu022

from attending some courses that would have enabled him to start his own business or continue with his own business. In most cases, the issue of whether or not the criminal record in question relates to the nature of the job an individual is applying or has applied for is immaterial. What matters is that he has a criminal record.

There are many regulations which require a person to disclose whether or not he has a criminal record in his application for a job or to do business. However, most of these regulations are silent on whether or not having a criminal record will adversely affect a person's application for a job or business license. They are also silent on whether the criminal record in question should be related to the job or business in question. For example, one of the facts that a person has to disclose for his application for a refining license, precious metal beneficiation license, a jeweller's permit, a special permit, a permit to import or export precious metals is whether or not he has a criminal record. Before a person registers as a security service provider he has to disclose his criminal record status. A person who wants to register as a credit provider or debt counsellor must sign a form authorizing the South African Police Service Records Centre to disclose his criminal record to the National Credit Regulator. A person who wants to be a bookmaker must disclose his criminal record in his application; and for a person to be appointed a senior manager, he must disclose in his application whether he has a criminal record.

For one to register as a parking attendant in some municipalities, he has to submit the necessary documents and '[t]he municipality reserves the right to submit any application received...to the South African Police Service for a criminal record screening' although '[t]his screening will not affect the approval of the applicant adversely.' If a person applies for a liquor license in the Western Cape Province, one of the factors that must be considered in deciding whether or not to issue the license is 'the suitability of the applicant with specific reference to the criminal record of the applicant and his or her spouse.' This means that, for example, a husband's criminal record could affect his wife's application for a liquor license. Another unique provision is to the effect that for one to be a member of the hospital board, he 'must not have a criminal record, unless a free pardon has been received or a period of three years has expired since release from prison and certified as fully rehabilitated by the Department of Correctional Services.' This provision recognizes, *inter alia*, that having a criminal record does not necessarily mean that the person in question is a danger to society for the rest of his life or until his criminal record is expunged. If such a person is fully rehabilitated, he should be able to serve on the hospital board. For a person to be employed as a hairdresser, he must 'formally declare[] [in the contract of employment] that he has no criminal record...' Bodies recognized by the South African Qualifications Authority have to '[m]onitor compliance with an agreed code of conduct and/or ethics, including criminal record screening where applicable.' For a person to be a committee member or to be re-elected to the committee and all new staff of the Societies for the Prevention of Cruelty to Animals (SPCA).

Must not have a criminal record where the conviction in question relates to misconduct in regards to animals and further may not take up employment, be employed or serve on the committee of any SPCA in a position where a criminal record and a conviction relates to the type of work they will be engaged in.

5.21 Our discussion of the legislation includes legislation already passed as well as draft legislation under consideration at the time of preparing the discussion paper, to indicate that notwithstanding the passing of the expungement provisions certain convictions and sentences imposed are deemed to be disqualifications for employment. The legislation dealing with expungement does not require a consideration of such disqualifications when an application for expungement is considered or approved.

5.22 Section 10 of the Road Traffic Laws Rationalisation Act, 47 of 1998 provides for the conditions and period of office of board members. Section 10 contains certain disqualifications for appointment as members including:

- (1) An appointed member of the board vacates his or her office immediately if he or she -
 - (a) has been or is convicted -
 - (i) whether in the Republic or elsewhere, of theft, fraud, forgery or uttering a forged statement, perjury or any offence involving dishonesty; or
 - (ii) of any offence in terms of the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, the Companies Act, 1973 (Act 61 of 1973), or this Act;
 - (b) without authorisation, has disclosed or discloses, or improperly has acted or acts on, information gained as a result of his or her membership of the board;
 - (c) is or becomes a political office bearer;
 - (d) is or becomes an unrehabilitated insolvent or has committed or commits an act of insolvency;
 - (e) has been or is removed from an office of trust on account of misconduct; or
 - (f) has been or is relieved of his or her office in terms of subsection (3) or (4).

5.23 Section 79E(1)(c) of the National Health Amendment Act, 12 of 2013 provides for a disqualification from membership of the Board and vacation of office upon conviction of certain offences. It provides that a person may not be appointed as a member of the Board if that person-

- (a) is not a South African citizen and ordinarily resident in the Republic;
- (b) is an unrehabilitated insolvent;
- (c) has at any time been convicted of an offence involving dishonesty, whether in

the Republic or elsewhere, and sentenced to imprisonment without the option of a fine; or

- (d) has been removed from an office of trust.

In terms of subsection (2)(a) of the Act the disqualification is mandatory in that a member of the Board must vacate his or her office if he or she becomes disqualified in terms of subsection (1) from being appointed as a member of the Board;

5.24 The South African Language Practitioners' Council Bill introduced in the National Assembly in 2013¹⁵⁷ also provides for disqualification following a conviction. The Bill provides for the establishment of the South African Language Practitioners' Council; the objects, powers, duties and functions of the South African Language Practitioners' Council; the manner in which the South African Language Practitioners' Council is to be managed, governed, staffed and financed; and regulates the training of language practitioners and control of the accreditation and registration of language practitioners. Section 6 of the Bill provides for disqualification from membership of Council in that a person is disqualified from being appointed to the Council or from remaining on the Council, by reason that he or she -

- (a) is or becomes an unrehabilitated insolvent;
- (b) is or has been declared by a competent court to be of unsound mind;
- (c) is directly or indirectly interested in any contract with the Council and fails to declare his or her interest and the nature thereof in the manner required by the Act;
- (d) is a person under curatorship;
- (e) **has at any time been removed from an office of trust on account of misconduct involving theft or fraud;**
- (f) **has been convicted and sentenced to a term of imprisonment without the option of a fine, except that the Minister may, upon receipt of an affidavit disclosing full details of an offence by a person nominated for appointment, condone a conviction in a manner that is consistent with section 106(1)(e) of the Constitution: Provided that a disqualification in terms of this subsection ends five years after the sentence has been**

157 GG No. 36557 dated 14 June 2013.

completed.

5.25 The Regulations on threatened or protected species in terms of the National Environmental Management: Biodiversity Act, 10 of 2004, published in the Government Gazette¹⁵⁸ provides for certain and reporting of alleged criminal activities criminal disqualifications. Regulation 68(1) deals with the recognition of associations or organisations and provides that any association or organisation representing persons or facilities involved in the utilisation of listed threatened or protected species wishing to be considered for any dispensation in terms of the Biodiversity Act or these Regulations, must apply in writing to the Director-General of the Department for recognition. Regulation 68(2) provides that an application contemplated in subregulation (1) may be approved if the applicant-

- (a) is a juristic person;
- (b) can provide proof that it represents a substantial proportion of its sector on a national level;
- (c) can provide proof that it will be able to perform a function or provide support to the relevant sector to the same standard as the issuing authority or delegated entity;
- (d) has adopted a code of responsible conduct and good practices, which is-
 - (i) ascribed to by its members;
 - (ii) aligned with the objectives of the Biodiversity Act; and
 - (iii) acceptable to the Director-General of the Department;
- (e) gives a written undertaking to the Director-General of the Department that it will-
 - (i) enforce its code of responsible conduct and good practices against members who breach the code; and**
 - (ii) report to the issuing authority any case of alleged criminal conduct by any of its members involving the carrying out of a restricted activity or a breach of any conditions subject to which any permit was granted to such member; ...**

5.26 Regulation 92 provides for removal from office of a member of the Scientific Authority in that the Minister may remove a member of the Scientific Authority from office, but only on grounds of-

- (a) misconduct, incapacity or incompetence;
- (b) insolvency; or
- (c) conviction of a criminal offence without the option of a fine.

158 GG No. 36375 Notice 388 of 2013 dated, 16 April 2013.

5.27 Section 24 of the Licensing of Businesses Bill, 159 introduced in Parliament in 2013, provides for a disqualification for being issued with a license in that the licencing authority may not issue a licence to any person who -

- (a) is an illegal foreigner, prohibited or undesirable person in the Republic as defined in the Immigration Act, Refugees Act or any other legislation;
- (b) **has at any time in the preceding two (2) years been found guilty of contravening this Act or any other law resulting in the revocation of his or her licence;** or
- (c) failed to comply with instruction or application requirements prescribed in this Act or by-law.

5.28 The Road Accident Benefit Scheme Bill, 2013¹⁶⁰ contains the following provisions regarding disqualifications:

Disqualifications

- 11.** A person is disqualified from being a member of the Board if that person-
- (a) is a minor;
 - (b) has at any time been declared insolvent or his or her estate sequestrated;
 - (c) has ever been, or is, removed from an office of trust on account of misconduct;
 - (d) is or becomes subject to an order of court holding him or her to be mentally ill or unfit;
 - (e) within the previous 10 years has been, or is, convicted of theft, fraud, forgery or any offence involving dishonesty; or
 - (f) is otherwise disqualified from serving as director in terms of the Companies Act, 2008 (Act No. 71 of 2008).

And

Removal

- 18.** The Minister must remove a member of the Board if that member-
- (a) is or becomes disqualified as contemplated in section 11;
 - (b) fails to properly perform the functions of office; or
 - (c) becomes unable to continue to perform the functions of office.

159 Introduced by the Minister of Trade and Industry and published in GG No. 36265 dated 18 March 2013.

160 Published by the Department of Transport in Government Notice 98 of 2013.

5.29 The Companies Act, 71 of 2008, also provides for removal of directors. In terms of section 219 of the Act's predecessor, the Companies Act, 61 of 1973 a court may disqualify a director in the following circumstances:

- (a) when such a . . . director has been convicted of an offence in connection with the promotion, formation or management of a company; or
- (b) the Court has made an order for the winding-up of a company and the Master has made a report under this Act stating that in his opinion a fraud has been committed-
. . .
 - (ii) by any director or officer of the company in relation to the company since its formation; or
- (c) in the course of the winding-up or judicial management of a company it appears that any such person-
 - (i) has been guilty of an offence referred to in section 424, whether or not he has been convicted of that offence; or
 - (ii) has otherwise been guilty while an officer of the company of any fraud in relation to the company or of any breach of his duty to the company; or
- (d) a declaration has been made in respect of any person under section 424(1).

5.30 Section 69(8)(b) of the Companies Act, 71 of 2008, provides that directors become disqualified if they are declared insolvent and are unrehabilitated, are prohibited from holding directorships by any public regulation, are removed from an office of trust for dishonesty, or are convicted in South Africa or elsewhere and imprisoned without the option of a fine or fined more than a prescribed amount for specified offences. Formal removal proceedings would afford the director an opportunity to prove that he is not disqualified as alleged. The Act provides:

- (8) A person is disqualified to be a director of a company if-
 - (a) a court has prohibited that person to be a director, or declared the person to be delinquent in terms of section 162, or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984); or
 - (b) subject to subsections (9) to (12), the person-
 - (i) is an unrehabilitated insolvent;
 - (ii) is prohibited in terms of any public regulation to be a director of the company;
 - (iii) has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or
 - (iv) has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence-
 - (aa) involving fraud, misrepresentation or dishonesty;

- (bb) in connection with the promotion, formation or management of a company, or in connection with any act contemplated in subsection (2) or (5); or
- (cc) under this Act, the Insolvency Act, 1936, (Act 24 of 1936), the Close Corporations Act, 1984, the Competition Act, the Financial Intelligence Centre Act, 2001 (Act 38 of 2001), the Financial Markets Act, 2012, or Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004).

5.31 Section 69 of the Companies Act, 71 of 2008 provides for an automatic clearance of the disqualification after 5 years and a court can be approached to extend the period of disqualification on application of the Commission. Section 69(9) provides that a disqualification in terms of subsection (8)(b)(iii) or (iv) **ends at the later of five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence**, as the case may be, or at the end of one or more extensions, as determined by a court from time to time, on application by the Commission in terms of subsection (10). Section 69(10) provides that at any time before the expiry of a person's disqualification in terms of subsection (8)(b)(iii) or (iv) the Commission may **apply to a court** for an extension contemplated in subsection (9)(b); and the court may extend the disqualification for no more than five years at a time, if the court is satisfied that an extension is necessary to protect the public, having regard to the conduct of the disqualified person up to the time of the application.

5.32 Section (11) of the Act provides that a court may exempt a person from the application of any provision of subsection (8) (b). The subsection provides:

- (11A) The Registrar of the Court must, upon—
 - (a) the issue of a sequestration order;
 - (b) the issue of an order for the removal of a person from any office of trust on the grounds of misconduct involving dishonesty; or
 - (c) a conviction for an offence referred in subsection (8) (b) (iv),send a copy of the relevant order or particulars of the conviction, as the case may be, to the Commission.

5.33 Subsection 13 provides for the establishment of a register of disqualified persons serving as directors of companies in terms of a court order or in terms of the Companies Act. It provides that:

(13) The Commission must establish and maintain in the prescribed manner a public register of persons who are disqualified from serving as a director, or who are subject to an order of probation as a director, in terms of an order of a court pursuant to this Act or any other law.

5.34 Tourism is one of the functional areas of concurrent national and provincial legislative competence listed in schedule 4 of the constitution. In terms of section 104(1)(b)(i) the provincial legislatures, in which are vested the legislative authority of the provincial sphere of government, have the power to pass legislation with regard to this matter. Such legislation has been passed in seven provinces.¹⁶¹ All the provinces that have passed legislation dealing with tourism as such have established juristic persons. They are the Eastern Cape Tourism Board, the Free State Tourism Marketing Board, the Gauteng Tourism Authority, the KwaZulu-Natal Tourism Authority, the Northern Cape Tourism Authority, the North West Tourism Council and the Western Cape Tourism Board. All the relevant legislation provides for the appointment of members to the Board and certain disqualification to be appointed on the Board. In most cases the members of the bodies are appointed by the MEC who is responsible for tourism matters, 63 in one case with the approval of the executive council.

5.35 Specific requirements are laid down with regard to the appointment of the members of the bodies. These requirements may be grouped into two categories. The first category relates to the representivity of the bodies, the second to the individual candidates. As far as the requirements relating to individual candidates are concerned, Gauteng is the only province requiring explicitly that each member must be a fit and proper person and possess knowledge of or qualifications or experience in the field of tourism development and promotion. The disqualifications for appointment are:

- to be an unrehabilitated insolvent;
- to be subject to a final court order whereby one's estate is sequestrated under the Insolvency Act 24 of 1936,
- to have assigned one's estate for the benefit of one's creditors,
- not to be a South African citizen, not to be a resident of the province;

161 The relevant statutes are the Eastern Cape Tourism Board Act 9 of 1995 (ECA), the Free State Tourism Marketing Board Act 7 of 1997 (FSA), the Gauteng Tourism Act 18 of 1998 (GPA), the KwaZulu-Natal Tourism Authority Act 11 of 1996 (KNA), 5 the Northern Cape Tourism Act 5 of 1998 (NCA), the North West Tourism Council Act 7 of 1989 (NWA) and the Western Cape Tourism Act 3 of 1997 (WCA).

- to be a habitual criminal;
- to have been convicted of an offence and sentenced to a term of imprisonment either of not less than six months or greater than twelve months without the option of a fine;
- to be of unsound mind or to be declared as such by a competent court;
- to suffer from a mental disorder or defect;
- to be nominated as a candidate for election as a member of the national assembly or any provincial legislature;
- to be nominated as a member of the national council of provinces;
- to be a MEC;
- to be a minister or deputy minister of state; and
- to be the chief executive officer of the body or one of its other officers.

5.36 Section 28(5) of the Estate Agency Affairs Act 112 of 1976 provides that an estate agent's fidelity fund certificate shall lapse if he or she became subject to any disqualification referred to in s 27(a)(i) to (v). Section 27(a)(ii) provides that an estate agent who has at any time been convicted of an offence involving an element of dishonesty is disqualified from holding a fidelity fund certificate. The withholding of income tax collected from employees in contravention of the Income Tax Act.¹⁶² and failure to pay collected VAT to SARS in contravention of section 28(1)(b), read with section 58, of Value-Added Tax Act 89 of 1991 constitute offences involving dishonesty. Failure to pay over income tax collected from employees constituted a deliberate misuse of funds entailing a deception of the employees from whose salaries the tax had been deducted. It was also dishonest as far as the fiscus was concerned. Equally, the levying and receipt of VAT for any purpose other than paying it to the fiscus in accordance with the statute is inherently dishonest. If one of these offences is committed by an estate agent, his or her fidelity fund certificate would lapse *ipso facto*¹⁶³ in the lapse as intended in (the Act). It is conceivable that the context in which the offence was committed could render the conduct dishonest even where dishonesty was not an element of the offence itself.

5.37 Section 33 of the Transkei Liquor Act 1978 provided:

162 Paragraphs 1 and 2(1), read with para 30(1)(b), of the Fourth Schedule to the Income Tax Act 58 of 1962,

163 Section 28(5) of the Estate Agency Affairs Act 112 of 1976

- 33(1) No licence shall be granted, transferred or issued to
- (a) any person, including a nominee -
 - (i) who is not of good character and repute; or
 - (ii) who is under the age of 21 years; or
 - (iii) to whom individually, the sale or supply of liquor is totally prohibited; or
 - (iv) who does not reside in Transkei; or
 - (v) who is an unrehabilitated insolvent; or
 - (vi) who has been declared under s 122(2) to be disqualified from holding a licence, during the period of such disqualification; or
 - (vii) who has been convicted of an offence and sentenced to imprisonment without the option of a fine and the said sentence has not expired at least five years before the date of his application; or
 - (viii) who has, before or after the commencement of this Act, been convicted of an offence under any law of selling or supplying liquor and has subsequently but after the commencement of this Act and within five years of such previous conviction been convicted under any law of a similar offence; or
 - (ix) who, although otherwise qualified, is the wife of any person disqualified under subparagraph (v), (vi), (vii), or (viii) unless she is *bona fide* living apart from her husband under a notarial deed or judicial order of separation;
 - (b) any person whose application relates to premises of which any member of the police is the owner or lessee or in which any such member has any interest;
 - (c) any person who holds an office of profit under the Government of Transkei, or is the wife of such a person; or
 - (d) any administrative body; or
 - (e) any association of persons as such or a corporation as such: Provided that nothing in this paragraph contained shall prohibit the grant or issue of any licence to the nominee of an association of persons or of a corporation.'

5.38 Section 79E of the National Health Amendment Act, 12 of 2013 provides:

Disqualification from membership of Board and vacation of office

- 79E. (1)** A person may not be appointed as a member of the Board if that person-
- (a) is not a South African citizen and ordinarily resident in the Republic;
 - (b) is an unrehabilitated insolvent;
 - (c) has at any time been convicted of an offence involving dishonesty, whether in the Republic or elsewhere, and sentenced to imprisonment without the option of a fine; or
 - (d) has been removed from an office of trust.
- (2) A member of the Board must vacate his or her office if-
- (a) he or she becomes disqualified in terms of subsection (1) from being appointed as a member of the Board;
 - (b) he or she submits his or her resignation to the Minister in writing;
 - (c) he or she is declared by the High Court to be of unsound mind or mentally disordered or is detained under the Mental Health Act, 1973 (Act No. 18 of 1973);

- (d) he or she has, without the leave of the Board, been absent from more than two consecutive meetings of the Board;
- (e) the Minister withdraws the appointment because in the opinion of the Minister, and after consultation with the Board, the member is incompetent or unfit to fulfil his or her duties; or
- (f) he or she ceases to be ordinarily resident in the Republic.

5.39 Section 10 of the Sheriffs Act 90 of 1986 provides:

10 Persons not qualified to be members of Board

No person shall be appointed as a member of the Board if-

- (a) he is not a South African citizen permanently resident in the Republic;
- (b) he is an unrehabilitated insolvent;
- (c) he has been dismissed from a position of trust by reason of improper conduct involving a breach of such trust;
- (d) he has been convicted of any offence involving dishonesty or of any other offence for which he has been sentenced to imprisonment without the option of a fine; or
- (e) he has been found guilty of improper conduct in accordance with Chapter IV.

5.40 Section 5 of the Road Transportation Act 74 of 1977 provides:

5 Disqualification for office as, and termination of office of, member of a board

- (1) No person shall be appointed or co-opted as a member of a board-
 - (a) if he is an unrehabilitated insolvent; or
 - (b) if he has been convicted of an offence and sentenced to imprisonment without the option of a fine; or
 - (c)
 - (d) if he or any of his near relations is financially interested in any business of road transportation or is engaged in any activity connected with road transportation which, in the opinion of the Minister, is calculated to interfere with the impartial discharge by the member of the duties of his office.
- (2) A member of a board (including a co-opted member) shall vacate his office-
 - (a) if he becomes subject to any of the disqualifications for appointment or co-optation mentioned in subsection (1);
 - (b) if he dies or is removed from office under subsection (3) or resigns by notice in writing addressed to the Minister.
- (3) The Minister may remove from office any member of a board (including a co-opted member)-
 - (a) who has failed to comply with a condition of his appointment or co-

- optation; or
- (b) who, in the opinion of the Minister, has been guilty of improper conduct or has regularly neglected his duties as a member or co-opted member of the board; or
- (c) who, in the opinion of the Minister, is unable to perform efficiently his duties as a member or co-opted member of the board.

THE REGULATORY FRAMEWORK FOR COLLECTING, STORING AND DISTRIBUTING INFORMATION RELATING TO CRIMINAL RECORDS IN SOUTH AFRICA

5.41 In this part we refer to how information regarding a criminal record is collected, stored and distributed in South Africa as well as how access to these records is regulated. Knowledge on the regulatory framework is important to determine its impact on expungement of criminal records, with particular reference to the information contained in a criminal record and the legislative provisions regulating the collecting, storing, and distribution of such information.

(a) The Criminal Procedure Act 51 of 1977 (CPA)

5.42 The CPA provides for the taking of fingerprints of persons arrested for crimes and who have been convicted of a crime. Storage of data relating to convictions and maintenance of a data basis on criminal records is regulated by the SA Police Service Act 68 of 1995. The CPA provides that the fingerprints taken must be stored on the fingerprint data base maintained by the National Commissioner as provided for in chapter 5A of the South African Police Service Act. In the case of an adult offender fingerprints taken in terms of the relevant sections must, upon conviction, be retained on a database referred to in Chapter 5A of the South African Police Service Act. In case of a juvenile, it must be retained on a database referred to in Chapter 5A of the South African Police Service Act, subject to the provisions relating to the expungement of a conviction and sentence of a child as provided for in section 87 of the CJA. In cases where a decision was made not to prosecute a person, or if a person is found not guilty, or if the conviction is set aside by a superior court or if the person is discharged at a preparatory examination, or if no criminal proceedings with reference to such fingerprints or body-prints were instituted against the person concerned in any court, or if the prosecution declines to prosecute, **the finger prints must be destroyed**

within 30 days after the officer commanding the Division responsible for criminal records (referred to in Chapter 5A of the South African Police Service Act) has been notified. Access to criminal records is also regulated by the SA Police Services Act and the CPA. Apart from the above regulatory framework it is important to note the content of the Privacy and data Protection Act passed in December 2013 which provides for the controlled regulation of and access to criminal records in the South African context. In what follows we highlight important features of the relevant legislation.

5.43 Sections 36B, 36C and 37 of the Criminal Procedure Act 51 of 1977 provides for the taking of fingerprints of persons arrested for crimes and who have been convicted of a crime. It provides that the fingerprints taken must be stored on the fingerprint data base maintained by the National Commissioner as provided for in chapter 5A of the South African Police Service Act 68 of 1995.

5.44 Section 36B(6) provides that fingerprints retained in terms of the section, **may only be used for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution and it is not prohibited to use of any fingerprints taken under any powers conferred by this section, for the purposes of establishing if a person has been convicted of an offence.** The section also criminalises the use of fingerprints in contravention of the provisions in subsection (6) (see above). Section 36B is important and provides:

36B. Powers in respect of fingerprints of accused and convicted persons

- (1) A police official must take the fingerprints or must cause such prints to be taken of any-
- (a) person arrested upon any charge related to an offence referred to in Schedule 1;
 - (b) person released on bail if such person's fingerprints were not taken upon arrest;
 - (c) person upon whom a summons has been served in respect of any offence referred to in Schedule 1;
 - (d) person convicted by a court and sentenced to a term of imprisonment without the option of a fine, whether suspended or not, if the fingerprints were not taken upon arrest;
 - (e) person convicted by a court in respect of any offence, which the Minister has by notice in the *Gazette* declared to be an offence for the purposes of this subsection.
- (2) A police official may take or cause-

- (a) fingerprints to be taken of any person arrested upon any charge; or
 - (b) fingerprints to be taken of a person deemed under section 57(6) to have been convicted in respect of any offence, which the Minister has by notice in the *Gazette* declared to be an offence for the purposes of this subsection.
- (3) The fingerprints taken in terms of this section must be stored on the fingerprint database maintained by the National Commissioner, as provided for in Chapter 5A of the South African Police Service Act.
- ...
- (5) The fingerprints taken under any power conferred by this section, may be the subject of a comparative search.
- (6) (a) Subject to paragraph (c), any fingerprints, taken under any power conferred by this section-
- (i) **must upon the conviction of an adult person be retained on a database referred to in Chapter 5A of the South African Police Service Act;**
 - (ii) **must, upon conviction of a child be retained on a database referred to in Chapter 5A of the South African Police Service Act, subject to the provisions relating to the expungement of a conviction and sentence of a child, as provided for in section 87 of the Child Justice Act; and**
 - (iii) **in a case where a decision was made not to prosecute a person, if the person is found not guilty at his or her trial, or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceedings with reference to such fingerprints or body-prints were instituted against the person concerned in any court or if the prosecution declines to prosecute, must be destroyed within 30 days after the officer commanding the Division responsible for criminal records referred to in Chapter 5A of the South African Police Service Act has been notified.**
- (b) **Fingerprints retained in terms of this section, may only be used for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution.**
- (c) Subparagraphs (a)(i) and (ii) do not prohibit the use of any fingerprints taken under any powers conferred by this section, for the purposes of establishing if a person has been convicted of an offence.
- (d) Any person who, with regard to any fingerprints, body-prints or photographic images referred to in this Chapter-
- (i) uses or allows the use of those fingerprints, body-prints or photographic images for any purpose that is not related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution; or
 - (ii) tampers with or manipulates the process or the fingerprints, body-prints or images in question; or

- (iii) falsely claims such fingerprints, body-prints or images to have been taken from a specific person whilst knowing them to have been taken from another person or source, is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.

(7) The National Commissioner must destroy the fingerprints of a child upon receipt of a Certificate of Expungement in terms of section 87(4) of the Child Justice Act.

(8) Subsection (1)(d) applies to any person convicted of any crime, irrespective of the sentence, including-

- (a) any person serving such a sentence at the time of the commencement of this section; and
- (b) where applicable, any person released on parole in respect of such a sentence, irrespective of the fact that such a person was convicted of the offence in question, prior to the commencement of this section.

5.45 Section 36C provides for the taking of fingerprints and body-prints for investigation purposes and contains provisions similar to those referred to in section 37B regarding the use and storage of such records. Section 37 of the Act deals with the powers in respect of body-prints and the bodily appearance of accused and convicted persons and again contains provisions similar to those of section 36B regarding the use and storage of such evidence.

(b) The South African Police Service Act 68 of 1995

5.46 Chapter 5 of the South African Police Service Act 68 of 1995 regulates the storage and use of fingerprints taken in terms of sections 36B, 36C and 37 of the Criminal Procedure Act 51 of 1977, section 113 of the Firearms Control Act 60 of 2000, section 9 of the Explosives Act 15 of 2003 or any Order of the Department of Correctional Services. The preamble of the South African Police Service Act 68 of 1995 makes it clear that the Act was passed because the **Constitution requires national legislation to provide for -**

- **the establishment, powers and functions of the South African Police Service to function in accordance with national policing policy and the directions of the Cabinet member responsible for policing;**
- **because there is a need to provide a police service throughout the national territory to ensure the safety and security of all persons and property in the national territory,**

- **to uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the Constitution,**
- **to ensure co-operation between the Service and the communities it serves in the combating of crime,**
- **to reflect respect for victims of crime and an understanding of their needs;**
- **to ensure effective civilian supervision over the Service; and**
- **to ensure that such fingerprints are stored, maintained, administered, and readily available, whether in computerised or other form, and be located within the Division of the Service responsible for criminal records.**

5.47 Section 15A of the Act provides that the provisions of Chapter 5A apply to the fingerprints, body-prints or photographic images stored, maintained and administered by the Division of the Service responsible for criminal records prior to the coming into operation of the Act. Nothing in the Chapter 5 affects the use of such prints and photographic images for the purposes set out in subsections (4) and (5). These subsections provide that the **fingerprints, body-prints or photographic images shall**

- **only be used for purposes related to the detection of crime,**
- **the investigation of an offence,**
- **the identification of missing persons,**
- **the identification of unidentified human remains, or**
- **the conducting of a prosecution.**

Subsection (4) does not prohibit the use of any fingerprints stored, by the police officer commanding the Division responsible for criminal records or his or her delegate for the purpose of establishing whether a person has been convicted of an offence.

5.48 Section 15B of the Act makes it an offence for any person who uses or **who allows the use of fingerprints, body-prints or photographic images stored, for any purpose which is not related to:**

- **the detection of crime,**
- **the investigation of an offence,**

- **the identification of missing persons,**
- **the identification of unidentified human remains,**
- **the conducting of a prosecution;**

or who

- **tampers with or manipulates the process or the fingerprints, body-prints or images in question;**
- **or falsely claims such fingerprints, body-prints or images to have been taken from a specific person whilst knowing them to have been taken from another person or source,**

and liable on conviction to imprisonment for a period not exceeding 15 years.

5.49 In terms of section 15C of the Act the National Commissioner must issue national instructions regarding all matters which are reasonably necessary or expedient to be provided for in relation to Chapter 5A and which must be followed by all police officials. Such instructions include the collection of fingerprints, body-prints and the taking of photographic images, the storage, maintenance and administration of the fingerprints, body-prints and photographic images collected in terms of the Act, the use of the information made available in terms of the Act and the manner in which statistics must be kept by the Division responsible for criminal records in relation to all information collected, stored and analysed in terms of the Act..

5.50 In terms of section 15D of the Act the National Commissioner must secure the integrity of information on the database provided for in the Act, by taking appropriate organisational measures to prevent loss of, damage to or unauthorised destruction of information on the database and unlawful access to or processing of information on the database. In order to give effect to the above, the Commissioner must take reasonable measures to identify all reasonable internal and external risks to information on the database under his or her control. The Commissioner must establish and maintain appropriate safeguards against the risks identified and regularly verify that the safeguards are effectively implemented and updated. The Commissioner must have due regard to generally accepted information security practices and procedures applicable to the Service or required in terms of specific laws and regulations. The Commissioner and the Directors-General of the Departments of Transport, Home Affairs and Correctional Services must, under the chairpersonship of the Commissioner, after the commencement of the Chapter 5 A, develop

standard operating procedures regarding access to the databases and the implementation of safety measures to protect the integrity of information on the databases.

(c) Promotion of Access to Information Act 2 of 2000

5.51 The Promotion of Access to Information Act 2 of 2000 is not applicable to a criminal records. In the first instance section 11 of the Promotion of Access the Act provides for the right of access to records of public bodies. In terms of the section a requester must be given access to a record of a public body if a requester complies with all the procedural requirements in the Act relating to a request for access to that record. A request includes a request for access to a record containing personal information about the requester. A requester's right of access to a record is not affected by any reasons the requester gives for requesting access or the information officer's belief as to what the requester's reasons are for the request. In terms of section 12 the Act does not apply to certain public bodies or officials thereof, for example a record of Cabinet and its committees relating to the judicial functions of a court, a Special Tribunal established in terms of section 2 of the Special Investigating Units and Special Tribunals Act,¹⁶⁴ a judicial officer of such court or Special Tribunal; an individual member of Parliament or of a provincial legislature in that capacity, or relating to a decision referred to in the definition of administrative action in section 1 of the Promotion of Administrative Justice Act 2000¹⁶⁵ regarding the nomination, selection or appointment of a Judicial officer or any other person by the Judicial Service Commission.

5.52 Section 7 provides that **the Act is not applicable to records requested for criminal or civil proceedings after commencement of proceedings**. In terms of subsection (1) of the Act does not apply to a record of a public body or a private body if that record is requested for the purpose of criminal or civil proceedings after the commencement of such criminal or civil proceedings, **and the production of or access to that record is provided for in any other law**. (emphasis added). Access to a criminal record is regulated by the South African Police Service Act of 1995 and the CPA and is therefore excluded from the provisions of the Promotion of Access to Information Act 2 of 2000.

164 Act No. 74 of 1996.

165 Act No. 3 of 2000,

(d) The Protection of Information Act 4 of 2013

5.53 The Act was passed to promote the protection of personal information processed by public and private bodies. The Act establishes minimum requirements for the processing of personal information, and provides for the establishment of an Information Regulator to exercise powers and perform certain duties and functions in terms of the Act and the Promotion of Access to Information Act, 2000. The Act was passed to regulate, in harmony with international standards, the processing of personal information by public and private bodies in a manner that gives effect to the right to privacy subject to justifiable limitations that are aimed at protecting other rights and important interests. An evaluation of the provisions of the Act reveals that it contains specific prescripts on the collection, use and processing of personal information regarding a data subject's criminal behaviour and criminal record. All authorities dealing with personal information should take note of the contents of the Act and comply with the Act.

5.54 Section 5 provides for the rights of data subjects which is defined as the right to have his, her or its personal information processed in accordance with the conditions for the lawful processing of personal information as outlined in Chapter 3 of the Act. These conditions include recognition of -

- the right to be notified that personal information about the subject is being collected in terms of section 18 or that his, her or its personal information has been accessed or acquired by an unauthorised person in terms of section 22
- the right to establish whether a responsible party holds personal information of that data subject and to request access such personal information in terms of section 23;
- the right to request, where necessary, the correction, destruction or deletion of his, her or its personal information in terms of section 24;
- The right to object on reasonable grounds relating to his, her or its particular situation to the processing personal information in terms of section 11(3)(a),
- The right to object to the processing personal information at any time for purposes of direct marketing in terms of section 11(3)(b) or in terms of section 69(3)(c):
- The right not to have personal information processed for purposes of direct marketing by means of unsolicited electronic communications except as prescribed in section 69(1);

- The right not to be subject to a decision which is based solely on the basis of the automated processing of personal information intended to provide a profile of such person in terms of section 71; and

5.55 The Act also provides for exclusions from the Act. The Act does not apply to the processing of personal information -

- in the course of a purely personal or household activity;
- by or on behalf of a public body which involves national security, including activities that are aimed at assisting in the identification of the financing of terrorist and related activities, defence or public safety;
- the purpose of which is the prevention, detection, including assistance in the identification of the proceeds of unlawful activities and the combating of money laundering activities, investigation or proof of offences,
- the prosecution of offenders or the execution of sentences or security measures, to the extent that adequate safeguards have been established in legislation for the protection of such personal information;
- by the Cabinet and its committees or the Executive Council of a province; or relating to the judicial functions of a court referred to in section 166 of the Constitution.

5.56 Section 6 of the Act provides that the responsible party must ensure that the conditions set out in the Act and all the measures that give effect to such conditions, are complied with at the time of the determination of the purpose and means of the processing and during the processing itself. **Personal information must be processed lawfully and in a reasonable manner that does not infringe the privacy of the data subject. Personal information may only be processed if, given the purpose for which it is processed, it is adequate, relevant and not excessive.**

5.57 Personal information may only be processed -

- if the data subject or a competent person, or where the data subject is a child, consents to the processing;
- processing is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party;
- processing complies with an obligation imposed by law on the responsible party;

- processing protects a legitimate interest of the data subject; processing is necessary for the proper performance of a public law duty by a public body; or
- processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied.

The responsible party bears the burden of proof for the data subject's or competent person's consent as referred to above. The data subject or competent person may withdraw consent at any time on condition that the lawfulness of the processing of personal information before such withdrawal or the processing of personal information will not be affected. A data subject may object, at any time, to the processing of personal information on reasonable grounds relating to his, her or its particular situation, unless legislation provides for such processing.

5. 58 If a data subject has objected to the processing of personal information in terms of the Act, the responsible party may no longer process the personal information. In terms of section 12 personal information must be collected directly from the data subject, except as otherwise provided for in the Act. It is not necessary to comply with the above -

- if the information is contained in or derived from a public record or has deliberately been made public by the data subject,
- the data subject or a competent person where the data subject is a child, has consented to the collection of the information from another source;
- collection of the information from another source would not prejudice a legitimate interest of the data subject;
- collection of the information from another source is necessary to avoid prejudice to the maintenance of the law by any public body, including the prevention, detection, investigation, prosecution and punishment of offences;
- for the conduct of proceedings in any court or tribunal that have commenced or are reasonably contemplated; and
- in the interests of national security or to maintain the legitimate interests of the responsible party or of a third party to whom the information is supplied.

5.59 In terms of section 14 records of personal information may be retained for periods in excess of those contemplated in the Act for historical, statistical or research purposes if the responsible party has established appropriate safeguards against the records being used for

any other purposes. A responsible party that has used a record of personal information of a data subject to make a decision about the data subject, must retain the record for such period as may be required or prescribed by law or a code of conduct; or if there is no law or code of conduct prescribing a retention period, retain the record for a period which will afford the data subject a reasonable opportunity to request access to the record.

5.60 A responsible party **must destroy or delete a record of personal information or as soon as reasonably practicable after the responsible party is no longer authorised to retain the record.** The destruction or deletion of a record of personal information must be done in a manner that prevents its reconstruction in an intelligible form. The responsible party must restrict processing of personal information if its accuracy is contested by the data subject for a period enabling the responsible party to verify the accuracy of the information. Personal information referred to in section 14(6) may, with the exception of storage, only be processed for purposes of proof, or with the data subject's consent, or with the consent of a competent person in respect of a child, or for the protection of the rights of another natural or legal person or if such processing is in the public interest.

5.61 Section 15 provides that further processing of personal information must be in accordance or compatible with the purpose for which it was collected, Section 16 provides that a responsible party must take reasonable steps to ensure that the personal information is complete, accurate, not misleading and updated where necessary. In taking the steps the responsible party must have regard to the purpose for which personal information is collected or further processed. Section 17 provides that a responsible party must maintain the documentation of all processing operations under its responsibility as required in section 14 or 51 of the Promotion of Access to Information Act.

5.62 Section 18(1) provides that if personal information is collected, the responsible party must take reasonably practicable steps to ensure that the data subject is aware of the information being collected, including the following,

- the source from which it is collected;
- the name and address of the responsible party;
- the purpose for which the information is being collected;
- whether or not the supply of the information by that data subject is voluntary or mandatory; the consequences of failure to provide the information;

- any particular law authorising or requiring the collection of the information;
- the fact that, where applicable, the responsible party intends to transfer the information to a third country or international organisation and the level of protection afforded to the information by that third country or international organisation;
- any further information such as the recipient or category of recipients of the information; the nature or category of the information;
- the existence of the right of access to and the right to rectify the information collected;
- existence of the right to object to the processing of personal information as referred to in section 11(3) of the Act; and
- the right to lodge a complaint to the Information Regulator and the contact details of the Information Regulator.

5.63 Section 19 provides for security measures on integrity and confidentiality of personal information. In terms of the section a responsible party must secure the integrity and confidentiality of personal information in its possession or under its control by taking appropriate, reasonable technical and organisational measures to prevent loss of, damage to or unauthorised destruction of personal information; and unlawful access to or processing of personal information. In order to give effect to the above the responsible party must take reasonable measures -

- to identify all reasonably foreseeable internal and external risks to personal information in its possession or under its control; establish and maintain appropriate safeguards against the risks identified;
- regularly verify that the safeguards are effectively implemented;
- and ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards.

The responsible party must have due regard to generally accepted information security practices and procedures which may apply to it generally or be required in terms of specific industry or professional rules and regulations.

5.64 Section 23 provides access to personal information by the data subject. In terms thereof a data subject, having provided adequate proof of identity, has the right to request a responsible party to confirm, free of charge, whether or not the responsible party holds personal information about the data subject. The data subject may request the record or a

description of the personal information about the data subject held by the responsible party from the responsible party. This includes information about the identity of all third parties or categories of third parties, who have or had access to the information within a reasonable time. If, in response to a request in terms of the above, personal information is communicated to a data subject, the data subject must be advised of the right in terms of section 24 to request the correction of information.

5.65 Section 26 prohibits the processing of special personal information. **It provides that a responsible party may, subject to section 27, not process personal information concerning the religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health or sex life or biometric information of a data subject; or the criminal behaviour of a data subject to the extent that such information relates to the alleged commission by a data subject of any offence; or any proceedings in respect of any offence allegedly committed by a data subject or the disposal of such proceedings.** Section 27 contains a general authorisation concerning special personal information. It provides that the prohibition on processing personal information, as referred to above, does not apply

- if the processing is carried out with the consent of a data subject;
- processing is necessary for the establishment, exercise or defence of a right or obligation in law;
- processing is necessary to comply with an obligation of international public law;
- processing is for historical, statistical or research purposes to the extent that the purpose serves a public interest and the processing is necessary for the purpose concerned;
- it appears to be impossible or would involve a disproportionate effort to ask for consent, and sufficient guarantees are provided to ensure that the processing does not adversely affect the individual privacy of the data subject to a disproportionate extent; or information has deliberately been made public by the data subject.

5.66 **Section 33 authorises information concerning a data subject's criminal behaviour or biometric information. It provides that the prohibition on processing personal information concerning a data subject's criminal behaviour or biometric information, as referred to in section 26, does not apply if the processing is carried out by bodies charged by law with applying criminal law or by responsible parties**

who have obtained that information in accordance with the law. The processing of information concerning personnel in the service of the responsible party must take place in accordance with the rules established in compliance with labour legislation. The prohibition on processing any of the categories of personal information referred to in section 26 does not apply if such processing is necessary to supplement the processing of information on criminal behaviour or biometric information permitted by this section.

5.67 Section 34 of the Act prohibits processing personal information of children. It provides that a responsible party may, subject to section 35, not process personal information concerning a child. Section 35 contains a general authorisation concerning personal information of children under certain conditions and provides that the prohibition on processing personal information of children, as referred to in section 34, does not apply if the processing is carried out with the prior consent of a competent person; necessary for the establishment, exercise or defence of a right or obligation in law; necessary to comply with an obligation of international public law; for historical, statistical or research purposes to the extent that the purpose serves a public interest and the processing is necessary for the purpose concerned; or it appears to be impossible or would involve a disproportionate effort to ask for consent, and sufficient guarantees are provided for to ensure that the processing does not adversely affect the individual privacy of the child to a disproportionate extent; or of personal information which has deliberately been made public by the child with the consent of a competent person.

5.68 Sections 37 and 38 provide for exemptions in respect of certain functions. Section 38 provides that personal information processed for the purpose of discharging a relevant function is exempt from sections 11(3) and (4), 12, 15 and 18 in any case to the extent to which the application of those provisions to the personal information would be likely to prejudice the proper discharge of that function.

5.69 From the above outline it is clear that current legislation already provides for the conditions of access to information regarding the criminal record of an accused person. It is submitted that the existing legislation sufficiently deals access to information on criminal records in terms of the Constitution and it is not necessary to further regulate such access in legislation dealing with expungement of criminal records.

CHAPTER 6

EXPUNGEMENT AND LESSONS TO BE LEARNED FROM COMPARATIVE JURISDICTIONS

INTRODUCTION

6.1 In this chapter the Commission discusses its findings with reference to the application of expungement in foreign jurisdictions and the extent to which valuable lessons can be learned from its application. In summary the Commission considered the expungement legislation in comparative jurisdictions with reference to the following matters in its endeavor to identify best practices and lessons to be learned:

- The rationale behind the introduction of legislation to regulate the expungement of criminal records;
- The collateral consequences of a criminal record which the legislation aims to address;
- The impact of other relevant legislation on the process of expungement;
- The prescribed process for expungement and limitations of the legislation;
- Prerequisites for expungement; and
- The effectiveness of the legislation in achieving its goals.

EXPUNGEMENT IN COMPARATIVE JURISDICTIONS AND LESSONS TO BE LEARNED¹⁶⁶

6.2 In its comparative research a great deal of emphasis was placed on expungement legislation in the USA and its application in different States. The Commission is of the view that the emphasis on the USA is justified in view of its experience over many years and because of the variety in the legislation in the different states whereas the introduction of the expungement legislation in South Africa is of recent origin. In the United States, criminal records may be expunged, through laws which vary by state and in its application in federal

166 See discussion in chapter 4.

law. A criminal record for many types of offenses may be expunged, ranging from parking fines to felonies and in some jurisdictions extending to expungement of records relating to procedures other than criminal convictions, for example arrest records, diversions, court appearances and postponements. In general, once sealed or expunged, all records of an arrest and/or subsequent court case are removed from the public record, and the individual may legally deny or fail to acknowledge ever having been arrested for or charged with any crime which has been expunged.

6.3 From a comparative perspective it is important to note that in the first instance consideration should be given to the following important basic principles, namely, the rationale behind the introduction of legislation regulating the expungement of criminal records, the collateral consequences of a criminal record which the legislation aims to address, the impact of other relevant legislation on the process of expungement (in other words the prescribed procedure), limitations inherent in the process to give effect to the accepted justification for the legislation and finally the effectiveness of the legislation in achieving its goals.

(a) The rationale behind the introduction of legislation to regulate the expungement of criminal records

6.4 A number of states in the USA provide for the expungement of criminal records in respect of both juvenile and adult offenders. TM Funk¹⁶⁷ states:

Numerous statutes, both federal and state, allow for-and occasionally even mandate-the expungement of juvenile convictions when the juvenile reaches a certain age. While one federal law allows, upon application of the offender, expungement for first-time drug possession by a person under the age of twenty-one who receives not more than one year of probation, another only seals the criminal records of those who have been convicted of a federal juvenile offense. Moreover, every state permits requests to expunge or destroy juvenile records, under varying conditions. It is under these state statutes that the bulk of expungement actually occurs.

6.5 There are differences in operation between the various state and federal statutes 'However they all share one goal and that is they all seek to prevent the courts, law enforcement agencies and employers from gaining access to information concerning an

167 TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" University of Michigan Journal of Law Reform 1996 887-888; http://www.ojdp.gov/PUBS/reform/ch2_i.html#205.

individual's prior juvenile arrest record and juvenile adjudications. Supporters of the principle of expungement contend that it protects a juvenile's chances for rehabilitation and increases the likelihood of a juvenile being reintegrated into mainstream society. However, a major concern is whether expungement provides an appropriate way of dealing with the issue of juvenile recidivism in respect of violent crimes (juvenile delinquents who repeatedly violate societal norms by engaging often in violent criminal conduct) and whether the gains expungement brings to society by rehabilitating former juvenile offenders outweigh the harms it inflicts by preventing courts, the law enforcement community, and employers from obtaining a complete and unmodified picture of the person with whom they are dealing.¹⁶⁸

6.6 From the comparative overview in chapter 4, it seems reasonable to conclude that the initial underlying policy view of the juvenile justice system in the USA was that the system was designed towards promoting rehabilitative efforts and that punishment should have no role or a very limited role in the juvenile justice process. Thus, in line with the above view, some protection measures were built into the system through legislation and policy measures relating to access to information about juveniles in conflict with the law. The point of departure of these measures is that, if it is accepted that the system is a rehabilitative-orientated system, retaining the privacy of juveniles should be strengthened while access to information about juveniles is limited in an attempt order to maximise the benefits of the rehabilitative goal of expungement. Therefore, allowing a child to be branded as a criminal without limitations, should be avoided, because it interferes with the rehabilitative mission of the juvenile justice process. Therefore, the two basic principles on which idea of juvenile record confidentiality rested were, in the first instance that juveniles do not have as a matter of fact the criminal mind-set to be held responsible for what they do, and, secondly, the promotion of rehabilitation as the end result.

6.7 From a comparative perspective it would appear that, in essence, the justification for the expungement of criminal records of adult offenders are similar to those advanced in support of expungement of the criminal records of juvenile offenders. Both are motivated by a desire to mitigate the collateral consequences of having a criminal record by providing convicted offenders with an opportunity to enhance or promote their re-integration into society under certain circumstances. Therefore, the principle motivation for enacting an expungement process in respect of both juvenile and adult offenders, are similar. While the

168 See discussion in chapter 4.

justification for the process are similar, most jurisdictions reflect differences with regard to the process applicable to juveniles and adults. The most obvious and notable difference between expungement of juvenile and adult criminal records relate to the time period within which juveniles and adults would qualify for an expungement order. The qualifying time frame for juvenile offenders is much shorter than for adult offenders. In all the jurisdictions referred to it would be fair to conclude that expungements are allowed under clearly defined circumstances which require compliance with particular conditions. These defined circumstances which **limit** the opportunity to have a record expunged **include the identification offences in respect of which it is permissible and the exclusion of certain offences from qualifying for expungement.**

6.8 Mr Muntingh¹⁶⁹ explains the justification for the legislation dealing with expungement in the following terms:

On a broader level, the question must be asked what purpose(s) the retention of criminal records aims to serve. Fundamental to the debate is the acknowledgment that having a criminal record can be severely detrimental to a person's access to employment and social status in general. Moreover, the effect of a criminal record is that the punishment for the crime committed lasts much longer than the sentence imposed by the court. It is this lasting effect that ex-offenders and ex-prisoners often experience as being exclusionary and marginalising. The effect of a criminal record is that it becomes a debt to society that cannot be re-paid. It is this debt that Van Zyl Smit calls a 'civil disability' – individuals are excluded from certain civil functions and types of employment because at some time in the past they had committed and were convicted of a crime. In the American literature this is also referred to as 'collateral disabilities'. As Van Zyl Smit observed in respect of prisoners in 2003: '*There has been no systematic effort to think through what the fundamental change to the constitutional order should mean for the legal disabilities imposed on former prisoners. Current disabilities are something of a neglected ragbag, typically relegated to a passing paragraph in the major legal textbooks dealing with their legal status generally.*'

Admittedly, criminal records also serve a protective function; they signify to society that a specific person is dishonest or poses a danger to children, or is violent. The protective value of criminal records in such instances have now also found expression in recently passed legislation providing for a sex offenders' register and a register of persons convicted for crimes against children. Criminal records are also used by courts when imposing sentences to assess the criminal history of the offender and previous convictions would normally count against the offender and result in a more severe penalty. There are, however, also different schools of thought

169 Civil Society Prison Reform Initiative "*The law and the business of criminal record expungement in South Africa*" Research Report no 18 on p 5 by Lukas Muntingh at 5.

on this issue.

The retention or expungement of criminal records then centres on two issues: **on the one hand, the duty to promote safety in society and protect citizens from dangerous and dishonest individuals and, on the other hand, the right to equality and the constitutional duty on the state ‘to free the potential of each person’**. (emphasis added) Van Zyl Smit argues that discriminating against former prisoners based on their criminal pasts is not only counter-productive by undermining social reintegration, but that the state has a positive duty to fulfill in respect of social reintegration and to render support to former prisoners. Making information available to third parties about individuals’ criminal histories would thus be to undermine this positive obligation. (emphasis added)

6.9 As explained above by Mr Munthing the retention or expungement of criminal records centres on two issues: **on the one hand, the duty to promote safety in society and to protect citizens from dangerous and dishonest individuals and, on the other hand, the right to equality and the constitutional duty on the state ‘to free the potential of each person’**. (emphasis added) The question that remains to be considered is the State’s responsibilities in respect of both the rights referred to and the extent to which these rights impacts on the State’s responsibilities. In other words, the constitutional validity of the legislation dealing with expungements and the extent to which it could be justified should be done having considered and weighed both the rights in question and having regard to the constitutional framework in South context.

6.10 It is submitted that the justification for the legislation in South Africa should be considered in the light of government’s constitutional obligations to protect society and the accompanying responsibilities with regard to provisions in legislation giving effect to its duties in terms of the effectiveness of the criminal justice system versus the right to equality of convicted offenders and the justification or absence thereof for limitations of the right to equality. With regard to government’s responsibilities to protect society and to ensure an effective criminal justice system the following enactments as interpreted by the courts, in particular the Constitutional Court, should be considered¹⁷⁰:

- * **The Constitution places an obligation on organs of state, through legislative and other measures, to ensure the impartiality, independence, dignity, accessibility and effectiveness of the courts. The fact that**

170 The extent of the principles outlined here and its impact on the legislation enabling expungement will be discussed in detail in chapter 7.

reference is made to the *effectiveness* of the courts means that provision must be made to ensure this functioning, which further means that structures must be created to bring about this effectiveness, if they do not exist.

- * In doing so national legislation (for example the CAA, the CJA, the Witness Protection Act, the Domestic Violence Act and the CPA gives effect to constitutional rights applicable to all citizens, but also includes specific provisions relevant to the treatment of victims and specific categories of victims (e.g. woman and children) and provisions giving effect to principles contained in International Protocols relevant to victims of crime which have been endorsed by government, for example, the right to be treated with dignity and respect, the right to security of the person and the right to protection.
- * The CAA, has, for example, provisions in terms of which certain services must be provided to certain victims of sexual offences, inter alia, to minimise or, as far as possible, eliminate secondary traumatising, including affording a victim of certain sexual offences the right to require that the alleged perpetrator be tested for his or her HIV status and the right to receive Post Exposure Prophylaxis in certain circumstances and making provision for the adoption of a national policy framework regulating all matters in the CAA, including the manner in which sexual offences and related matters must be dealt with uniformly, in a co-ordinated and sensitive manner, by all Government departments and institutions and the issuing of national instructions and directives to be followed by the law enforcement agencies, the national prosecuting authority and health care practitioners to guide the implementation,
- * In addition, constitutional provisions dealing with the establishment of the Police Services and the Courts are relevant for purpose of determining the effectiveness of the criminal justice and are therefore also relevant to the treatment of victims of crime and the protection of society, for example, the SA Police Services is the foremost agency established to detect and investigate crime and bears the primary responsibility to protect women and children against the prevalent plague of violent crimes. National legislation and relevant provisions in the Constitution adopted in the

establishment of the Police Services, give effect to these principles.

- * So too, with reference to the Courts, the Courts are bound by the Constitution and the Bill of Rights, and when they perform their functions, they are obliged, through additional legislative and other measures, to ensure their impartiality, independence, dignity, accessibility and effective functioning. This include, for example, the responsibility, with reference to particular crimes violating the fundamental rights of women and girl-children, to ensure that the rights of women and children are not made hollow by actual or threatened sexual violence.
- * The CPA contains specific provisions aimed at protecting society in that it makes provision for sentencing options and provisions dealing with the criminal record of an accused and the proof of previous convictions. In this regard the courts have a particular responsibility with reference to a the criminal record of an offender and this influences government's responsibility in dealing with the criminal record of an offender in its duty to protect society Section 271 provides that previous convictions may be proved in that the prosecution may, after an accused has been convicted, but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused and if the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted.
- * Section 286 of the CPA provides for the declaration of a person as a habitual criminal (a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person habitually commits offences and that the community should be protected against him, declare him or her a habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which he is convicted. Again, with reference to an accused's criminal record the courts have a duty to protect society. Section 286A of the CPA provides for the declaration of a person as a dangerous criminal in that it provides that a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person represents a

danger to the physical or mental well-being of other persons and that the community should be protected against him, declare him a dangerous criminal. A convicted person's criminal record is of particular importance when a court is considering imposing a sentence in terms of section 286 and 286A of the CPA. These sentencing options in particular are aimed at protection of society.

- * The CJA is primarily aimed at dealing with children (under the age of 18 years) coming into conflict with the law, but the Director of Public Prosecutions may, in accordance with directives issued by the National Director of Public Prosecutions, direct that a matter be dealt with in accordance with the CJA if the person was a child at the time of the alleged commission of the offence, or was older than 18 but younger than 21 years when ordered or summoned to appear at a preliminary enquiry, or arrested.**

6.11 An offender's right to equality and infringement of the right should be considered as interpreted by the courts as outlined above, and in accordance with an understanding of the impact of relevant constitutional principles. Therefore, in order to determine the extent and validity of the legislation dealing with expungement, it is submitted that the validity of the legislation should be considered having regard to the government's constitutional responsibilities as against the right to equality and the courts' interpretation of the extent to which the legislation would be justified.

(b) The collateral consequences of a criminal record which the legislation aims to address

6.12 The Portfolio Committee, in the motivation for a the request to refer the matter of expungement of criminal records for investigation by the SALRC, concluded that the expungement of criminal records is a complex matter that requires a balance between the rights of citizens to be protected against criminals and the recognition that having a criminal record can cause undue hardship for an individual. A Resolution in respect of which certain actions are required was adopted by the Portfolio Committee. The Minister of Justice and Constitutional Development requested the Commission to conduct research on the different systems from a comparative point of view and drawing on best practices followed in the keeping of criminal records and the expungement of such records.

6.13 Prior to the passing of the legislation on expungement in the CPA, the expungement of criminal records was endorsed in the CJA following the Commission's investigation into a new criminal justice system for juveniles. The motivation for the inclusion of the investigation included the following: a criminal record has serious implications; a convicted person is branded for ever as an untrustworthy member of society; a conviction compromises job opportunities permanently and convicts are often the subject of suspicion and mistrust. It was argued that in order to protect the interests of juveniles in this regard legislation should be enacted to allow them to resume their lives without the stigma of a conviction. The aim of the investigation was therefore to determine whether such protection should be given to juveniles and if so, to investigate the circumstances under which such protection should be given, to determine whether such expungement should be automatic or whether it should be allowed only on application to an institution or judicial officer appointed to consider such applications and to determine whether or not expungement should be allowed in respect of any offence or in respect of specified offences only.

6.14 The developments after the passing of the legislation enabling expungement have been highlighted in a research report prepared by Mr L Muntingh.¹⁷¹ Mr Muntingh explains that having a criminal record can have serious implications for an individual's prospects of finding employment and much research has been done especially in the United States with its draconian laws excluding felons from a variety of resources, rights and types of employment.

6.15 From a comparative perspective it is clear that a criminal record poses serious consequences for an individual having a criminal record. In the USA, for example, criminal records impact on a number of areas in civil society. For purpose of discussing examples of the collateral consequences of a criminal record, reference is made to the areas in the USA and South Africa where a conviction and criminal record impacts on an offender's re-integration into society. In the USA, information relating to a person's past contact with the law is readily available. This includes information regarding convictions, but information is also available on a much broader scale, for example, it includes arrest records, court appearances, postponements, acquittals, etc. The information is also used for purposes other than expungements, for example for security clearances, for immigration purposes and

171 Civil Society Prison Reform Initiative *"The law and the business of criminal record expungement in South Africa"* Research Report no 18 by Lukas Muntingh at 4.

for job applications.

(c) The subject matter of expungement and access to criminal records

6.16 In South Africa the subject matter of the legislation dealing with expungement is criminal convictions endorsed on a person's criminal record. From a comparative perspective the subject matter for expungements is broader than mere convictions included in the criminal record and may include information on arrests, court appearances, postponements etc. Secondly, in foreign jurisdictions the legislation dealing with expungement of criminal records in most instances also regulates access to such records. We discuss these two issues briefly below with reference to practices in comparative jurisdictions.

Immigration¹⁷²

6.17 In terms of state and federal law in the USA an expungement of a conviction for immigration purposes, does not exist. In reviewing the character and fitness of an immigrant along the different steps from permanent residency to citizenship, United States Citizenship and Immigration Services looks to see if the petitioner has ever been convicted of a crime. Even if the immigrant was convicted, made restitution, and as part of a plea agreement had the court record expunged, that initial conviction will still appear on the immigrant's record and the immigrant may well find him/herself in deportation proceedings.¹⁷³

Security clearance¹⁷⁴

6.18 When applying for a state professional license or job that is considered to be a public office or a high security position (such as security guard, law enforcement, or related to national security), a convicted offender may be required to disclose that he or she has an expunged conviction or else be denied clearance by the relevant state department.¹⁷⁵

172 See discussion chapter 4.111.. See <http://www.supremecourt.gov/opinions/09pdf/08-651.pdf> accessed 5 March 2014.

173 See footnote above for discussion of the case of *Padilla v. Kentucky* (2010)). In *Padilla*, the U.S. Supreme Court ruled that Padilla has received ineffective assistance of counsel because he had not been warned of the possible immigration consequences of his guilty plea .

174 See discussion in chapter 4.

175 See discussion in chapter 4.

Accessibility of criminal histories in general¹⁷⁶

6.19 Criminal histories, short of convictions, are not part of the public record system in some states. In states where they are, for example California, access to such information is generally restricted in the legislation dealing with expungement with certain exceptions. Convictions are, however, public record in most states, and the modern digital reality is that employers have access to information about applicants and employees just by searching the Internet. However, such data searches may reveal an arrest, but not the outcome (in other words, whether the individual was acquitted, convicted, sent to a diversion program, or released without charge). Arrests that do not lead to formal charges are generally treated differently in terms of the law than convictions and arrests pending trial. Access to arrest records and court appearances are regulated in some states.¹⁷⁷

Convictions¹⁷⁸

6.20 In the USA, for example, a conviction includes a plea, verdict, or judgment of guilt regardless of whether the person charged is sentenced. Convictions also include pleas of *nolo contendere*, also called “no contest” pleas. Most employers enquire into an applicant's or an employee's convictions. Convictions are the most readily and legally accessible data available to employers making enquiries about an applicant's or employee's criminal history. Convictions are easily found in data base searches. Some laws restrict an employer's reliance on convictions for making employment decisions, such as California, which allows employers to consider only convictions within seven years prior to an employment application and decisions based on convictions may violate Title VII, However, as a general rule, employers may base employment decisions on convictions.¹⁷⁹

176 See discussion in chapter 4 on California. See also <http://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-records/pending-criminal-charges.htm> - accessed 10 March 2014; <http://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-records/pending-criminal-charges.htm> - accessed 10 March 2014.

177 See discussion on comparative study in the USA in Chapter 4.

178 See discussion in chapter 4. <http://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-records/pending-criminal-charges.htm> - accessed 10 March 2014.

179 See discussion in Chapter 4.

Arrests¹⁸⁰

6.21 Arrest records are records of arrest and detention that do not result in a conviction or guilty plea. Employer enquiries about arrests are barred in many states and viewed as potentially discriminatory under federal guidelines. An employer may, however, enquire if an applicant or employee has been arrested pending trial, and may use an arrest pending trial in making employment decisions in many states (including California).

Expunged records¹⁸¹

6.22 A criminal conviction may be expunged from an individual's record by order of a court. A conviction that is expunged is to be treated as if it never occurred. As a result, most states prohibit employers from denying employment to or firing individuals based on expunged convictions. However, an order expunging a conviction is not automatic and the convicted individual must apply by motion to the appropriate court for the order. In the modern era of data being available for long periods of time, there is not much protection from a full view. In other words, if one has a conviction, he/she should seek to have it expunged. If one applies for a job, it is highly possible that an employer will still be able to find the conviction (notwithstanding the fact that it may have been expunged). If there is reason to believe that a person has been denied a job based on an expunged conviction, it may be very hard to prove it. Some states, like California, require employers to provide such reports and even to notify an applicant or employee when a report is sought.

Federal Law¹⁸²

6.23 There are also a few federal laws that limit criminal records of an applicant or employee which an employer may access. The Federal Fair Credit Reporting Act (FCRA)¹⁸³ bars outside investigators hired by employers from reporting on an individuals' arrest records

180 See discussion in chapter 4.

181 See discussion in chapter 4. <http://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-records/pending-criminal-charges.htm> - accessed 10 March 2014.

182 <http://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-records/pending-criminal-charges.htm> - accessed 10 March 2014.

183 Cal. Civ. Code § 1785.20.5. See also <http://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-records/pending-criminal-charges.htm> - accessed 10 March 2014.

and expunged convictions.¹⁸⁴ The Act, however, does not apply to investigations that an employer itself conducts. It allows employers to enquire about and investigate any convictions on an applicant's or employee's record.

Equal Employment Opportunity Commission policy guidance¹⁸⁵

6.24 Although a policy guidance issued by the Equal Employment Opportunity Commission (EEOC) does not have the force of law, it will be widely followed and can provide a basis for challenging an employer's actions. In April 2012, the EEOC issued a policy guideline that provided that an employer that makes an employment decision based on an applicant's or employee's criminal history may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964. The EEOC based this position on research indicating that employer criminal background checks disproportionately and negatively affected Black and certain other job applicants.

6.25 Best practices by employers, according to the policy guidance, preclude inquiries into an applicant's or employee's criminal history unless such inquiry is directly related to the job in question or a so-called business necessity. The fact that a person has a marijuana possession conviction does not logically make that person a poor candidate for a barrister position. Using the same principle a person's arrest for child molestation may be considered by a day care facility when making a hiring decision. In terms the policy guide, a blanket rejection of job applicants for arrests (or even convictions), regardless of the circumstances, is suspect.

State Law¹⁸⁶

6.26 Many states, including California, restrict the information that an employer may legally search for or use in making employment decisions. Most of these laws impose the greatest restriction on records of arrest without conviction, while some impose restrictions on

184 5 U.S.C. § 1681.

185 <http://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-records/pending-criminal-charges.htm> - accessed 10 March 2014.

186 <http://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-records/pending-criminal-charges.htm> - accessed 10 March 2014.

convictions, for example convictions that occurred more than a specified number of years in the past, or convictions that have no relationship to the employer's business necessity. But states that have such laws also have exceptions for public safety--sensitive occupations or those that deal with vulnerable people, as discussed below. The California Labor Code is an example of a state law that prohibits an employer from seeking to obtain or demanding a copy of an applicant's or employee's police or arrest record, with certain exceptions.¹⁸⁷ However, the Labor Code does allow employers to ask if applicants if they have been arrested and are waiting to go to trial, or if they are out on bail after an arrest. The exceptions for sensitive jobs are common in both state and federal laws.

Exceptions for Sensitive Jobs¹⁸⁸

6.27 Certain jobs are sensitive in that they justify an employer enquiring into an applicant's or employee's criminal history to a greater extent than most other jobs. Examples of such jobs are:

- requiring governmental security clearance;
- with the federal government;
- with law enforcement agencies;
- with hospitals, particularly positions with patient contact or access to drugs;
- with daycare or disabled care facilities; and
- that are similarly sensitive.

6.28 The consequence of having a criminal record expunged is, in most USA states, a confirmation of the fact that if a person has successfully expunged or sealed a criminal record, that person can answer in the negative when asked whether or not he has a record. The question arises as to what happens when a potential employer, or a prosecutor, for example, asks that any records pertaining to a person be disclosed to them. Whether or not a court can confirm that a person has no record in spite of an order of expungement depends on the law in the relevant state and on who is raising the matter¹⁸⁹ There are a

187 Cal. Lab. Code § 432.7.

188 See discussion in chapter 4. See also <http://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-records/pending-criminal-charges.htm> - accessed 10 March 2014.

189 <http://www.criminaldefenselawyer.com/resources/the-limits-expunging-your-criminal-record.htm>.

number of circumstances under which a sealed or expunged record may come to light. Many states that allow convicted defendants to expunge their records offer the remedy only once. After that, records of criminal convictions cannot be sealed.

6.29 Certain offences become more serious when the defendant has a recorded prior conviction for that offence or for another one. For example, a petty theft (which is theft of property worth less than a specified amount, often \$500) is usually charged as a misdemeanor when it is a defendant's first such charge. However, if he has a recorded criminal conviction for petty theft conviction, he can be charged with "petty with a prior," which may elevate the appropriate offence to file charges for to a felony (thus a more serious offence). In order to know whether or not to charge a person with a "petty with a"¹⁹⁰

6.30 If a person is in conflict with the law later after a first conviction, he may face a more severe punishment the second time. In most instances the sentence will increase for a repeat offender. In such instances a prosecutor can access a person's record to determine whether an enhanced charge is called for.¹⁹¹

6.31 In many states and in charges in terms of federal law, disclosure of an expunged record is allowed in limited situations where the public interest is balanced against the individual's expectation that the expunged record will remain inaccessible. Records may, for example become available during background screening for government positions, such as court administrative jobs; or positions with a juvenile court or agencies delivering juvenile services. Sealed records may also be available to law enforcement agencies in the course of investigations into a possible crime.¹⁹²

6.32 In some states, individuals who apply for work as public school teachers, corrections guards, or police officers should expect that their employers will have access to expunged records. Agencies reviewing applications for professional licenses, including law, pharmacy,

190 <http://www.criminaldefenselawyer.com/resources/the-limits-expunging-your-criminal-record.htm> accessed 10 March 2014. -

191 <http://www.criminaldefenselawyer.com/resources/the-limits-expunging-your-criminal-record.htm> - accessed 10 March 2014.

192 <http://www.criminaldefenselawyer.com/resources/the-limits-expunging-your-criminal-record.htm> accessed 10 March 2014. -

or medicine, may also have access to such records.¹⁹³

6.33 When a witness testifies at a trial or other court proceeding, the defence often tries to discredit the witness by disclosing unsavory but relevant information regarding the past of the witness. If the witness had felony convictions, it could be argued that the witness had previously broken the law and is therefore not reliable. As a general rule information that reflect on a person's honesty are subject to references to convictions that have been expunged.¹⁹⁴

6.34 Sometimes expunged records become relevant in civil cases, such as libel. For example, where a newspaper reports on a citizen's prior conviction for a crime which had been expunged, the question arises whether or not such witness can file for libel action against the newspaper. Courts have answered this question differently, but what is clear is that an expunged record may be raised in such circumstances.¹⁹⁵

(d) The impact of other relevant legislation on the process of expungement

6.35 Having a criminal record negatively affects an individual and is regarded as impediments to employment which is seen as a collateral consequence of a criminal record. These consequences are often embodied in other pieces of legislation providing for disqualifications from employment. These consequences are highlighted below with reference to the position in the USA and also South Africa. With reference to the USA it is important to refer to the initiative known as the Sentencing Project which was established in 1986.¹⁹⁶ The Sentencing Project aimed to establish a fair and effective U.S. criminal justice system by promoting reforms in the sentencing policy, by addressing unjust racial disparities and practices, and by advocating for alternatives to incarceration. In the USA the Sentencing Project was founded in 1986 to provide sentencing advocacy training to defence lawyers

193 <http://www.criminaldefenselawyer.com/resources/the-limits-expunging-your-criminal-record.htm> -
accessed 10 March 2014.

194 <http://www.criminaldefenselawyer.com/resources/the-limits-expunging-your-criminal-record.htm> -
accessed 10 March 2014.

195 <http://www.criminaldefenselawyer.com/resources/the-limits-expunging-your-criminal-record.htm> -
accessed 10 March 2014.

196 <http://www.sentencingproject.org> accessed 10 Dec ember 2013.

and to reduce the reliance on incarceration in sentencing practices. Since its establishment the Sentencing Project has become a leader in efforts to bring national attention to disturbing trends and inequalities in the criminal justice system. As a result of the Sentencing Project's research, publications and advocacy, it became well known that the USA is the world's leader in imposing prison sentences, that one in three young black men is under control of the criminal justice system, that five million Americans can't vote because of felony convictions, and that thousands of women and children have lost welfare, education and housing benefits as a result of convictions for minor drug offences. The Sentencing Project was therefore dedicated to changing the way Americans think about crime and punishment.

6.36 In July 2005 Margaret Colgate Love, with the support from an Open Society Institute fellowship completed a study on *Relief from the Collateral Consequences of a Criminal Conviction, July 2005*.¹⁹⁷ In her executive summary she made a number of conclusions regarding the mechanisms in the criminal justice system which promotes its ability to accept convicted offenders back in the community after serving their sentences. She concluded that the existing mechanisms in the USA reflect a reluctance to re-integrate convicted offenders into society and that it can be attributed to a lack of information on or knowledge of the legislative provisions. She notes that offenders generally don't understand the changes brought about in their legal status by virtue of a conviction, much less what can be done to remedy the situation.

6.37 Love points out that the mechanics of restoration are often unclear, even to those responsible for administering the law. In many instances one jurisdiction has very little knowledge of what is happening in the others. Once someone has been tagged as a criminal, it becomes almost impossible to get rid of that label. The public is easily persuaded that convicted persons must be segregated from the rest of society. She indicates that the while this conclusion is not new, the scale of the problem is new. She concludes that no U.S. jurisdiction has ever attempted to do a comprehensive assessment of its legislative scheme on the collateral consequences convictions. She points out that no U.S. jurisdiction has

197. The information in paragraphs 6.36- 6.40 was obtained from Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction, July 2005* <http://www.sentencingproject.org/doc/File/Collateral%20Consequences/execsumm.pdf> accessed 14 December 2012.

considered it necessary to develop a systematic and accessible way for convicted persons to overcome the legal barriers to reintegration into society. She concludes that whereas the working of the criminal justice system became increasingly efficient in processing people in the system, processing them out have largely been left unattended.

6.38 An important conclusion is that in most U.S. jurisdictions offenders seeking to put their criminal past behind them are frustrated by a legal system that is too complex and unclear and therefore inadequate to the task. Categorical disqualifications are generally overbroad, and discretionary decision-making is often unfair and unreliable. A few states enacted comprehensive statutory restoration schemes in the 1970s, but in the intervening years these schemes have been riddled with exceptions and in some cases dismantled altogether. Pardon has never been routinely available to ordinary people in more than a handful of states, and administrative certificates of rehabilitation have not caught on outside of New York.

6.39 Authority for courts to expunge or seal adult felony convictions, where it existed, was narrowly drawn and excluded many offences. While more than half the states have laws that limit consideration of criminal history in the workplace, these laws are generally subject to exceptions and problematic because of the absence of a mechanism for enforcement. The result is that in practice persons convicted of crime, in most states, have no hope of ever discharging their debt to society.

6.40 She concluded that one of the biggest challenges experienced when considering the collateral consequences of a criminal conviction is the absence of a single source of information about the mechanisms available in each U.S. jurisdiction for avoiding or mitigating these. Although the U.S.A. Department of Justice published a state-by-state survey of civil disabilities of convicted persons, the survey is unreliable and does not present a full picture of the all the possibilities for obtaining relief from the collateral consequences. on convictions.

6.41 In chapter 5 of this paper we discuss a number of legislative provisions impacting on an individual convicted of a particular offence and the consequence of such conviction in South African context. As a general rule, the legislative provisions in South Africa provides for disqualifications in terms of employment opportunities following a conviction of particular

offences. The disqualifications following a criminal conviction is referred to in a number of different statutes and are outlined in Chapter 5. The selection is not an attempt to represent a complete list of legislation, but is used merely to show to what extent legislation other than the legislation dealing with expungement, impacts on the reintegration of offenders. In summary and upon evaluation of these statutory measures, it appears that a criminal conviction, in most instances, provides a disqualification for employment purposes and disqualifications to be eligible for a license where legislation requires a license for certain conduct, for example, a license to conduct business, a driver's license and a license to possess a firearm. In most instances the legislation lists the offences in respect of which a disqualification follows the conviction. In some instances the disqualification is also linked to the offence and the sentence imposed. In general such legislation deals with appointments in certain areas of the employment field and the disqualification attempts to prevent the employment of appointment of persons convicted of certain offences and where certain sentences were imposed.

6.42 The outline in Chapter 5 includes legislation already passed as well as draft legislation under consideration to indicate that the legislature, notwithstanding the passing of the expungement provisions, deem it necessary to provide that convictions of certain offences and the imposition of certain sentences justify disqualifications in terms of employment law. These legislative provisions provide for collateral consequences of convictions whereas **the legislation dealing with expungement does not even require a consideration of such disqualifications in an application for expungement, nor does it provide guidance on how the disqualification could be removed.**

(e) The prescribed process for expungement and limitations of the legislation

(i) The Process

6.43 In general there are three prescribed processes to have a criminal record expunged, namely, an automatic expungement after lapsing of a prescribed time period, an administrative application process outside the court process and approval of expungement by an official and thirdly a formal application to a court by petition by an applicant.

(aa) Automatic expungement

6.44 A typical example of this process is to be found in section 271C of the South African Criminal Procedure Act which provides for the expungement. It provides that certain criminal records (in respect of offences in legislation enacted before the new Constitution of the Republic of South Africa, 1993, took effect and where a court has convicted a person of a listed offence in the Act) containing the conviction and sentence in question, be expunged automatically by the Criminal Record Centre of the South African Police Service, as provided for in section 271D. In essence the offences relates to the so-called apartheid dispensation where offences were created which are no longer criminal conduct in the new dispensation.

6.45 A second example is to be found in the Truth and Reconciliation Act 34 of 1995. Sections 20(8), 20(9) and 20(10) deal expressly with both the formal and procedural consequences of an amnesty in the following terms:

(8) If any person-

- (a) has been charged with and is standing trial in respect of an offence constituted by the act or omission in respect of which amnesty is granted in terms of this section; or
- (b) has been convicted of, and is awaiting the passing of sentence in respect of, or is in custody for the purpose of serving a sentence imposed in respect of, an offence constituted by the act or omission in respect of which amnesty is so granted,

the criminal proceedings shall forthwith upon publication of the proclamation referred to in subsection (6) become void or the sentence so imposed shall upon such publication lapse and the person so in custody shall forthwith be released.

(9) If any person has been granted amnesty in respect of any act or omission which formed the ground of a civil judgment which was delivered at any time before the granting of the amnesty, the publication of the proclamation in terms of subsection (6) shall not affect the operation of the judgment in so far as it applies to that person.

(10) Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public.

6.46 A second example is section 271 A of the Criminal Procedure Act which provides

for the falling away of certain criminal convictions. However it does not regulate an expungement since it merely indicates that the record falls away after a time lapse of 10 years, but the conviction is still reflected on the criminal record. Section 271A provides that:

271A Certain convictions fall away as previous convictions after expiration of 10 years

Where a court has convicted a person of-

- (a) any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed but-
 - (i) has postponed the passing of sentence in terms of section 297 (1) (a) and has discharged that person in terms of section 297 (2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297 (3); or
 - (ii) has discharged that person with a caution or reprimand in terms of section 297 (1) (c); or
- (b) any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine, may be imposed,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed.

- (bb) An administrative process

6.47 A typical example is found in South African legislation. **Section 87 of the CJA provides for the expungement of records of certain convictions and diversion orders in the following terms:**

87 Expungement of records of certain convictions and diversion orders

- (1) (a) Where a court has convicted a child of an offence referred to in Schedule 1 or 2, the conviction and sentence in question fall away as a previous conviction and the criminal record of that child must, subject to subsections (2), (3) and (5), on the written application of the child, his or her parent, appropriate adult or guardian (hereafter referred to as the applicant), in the prescribed form, be expunged after a period of-
 - (i) five years has elapsed after the date of conviction in the case of an offence referred to in Schedule 1; or
 - (ii) 10 years has elapsed after the date of conviction in the case of an offence referred to in Schedule 2,unless during that period the child is convicted of a similar or more serious offence.

(b) In the case of a dispute or uncertainty as to whether another offence of which a child is convicted during the period is similar to or more serious than the offence in respect of which a record exists, the opinion of the Cabinet member responsible for the administration of justice prevails.

(2) The Director-General: Justice and Constitutional Development must, on receipt of the written application of an applicant referred to in subsection (1), issue a prescribed certificate of expungement, directing that the conviction and sentence of the child be expunged, if the Director-General is satisfied that the child complies with the criteria set out in subsection (1).

(cc) A petition for expungement by a court of law

6.48 California's expungement law for example permits someone convicted of a crime to file a petition for dismissal with the court to re-open the case, set aside the plea, and dismiss the case. In order for one to qualify for expungement, the petitioner must have completed probation, paid all fines and restitution, and not currently be charged with a crime. If the requirements for eligibility are met, a court may grant the petition if it finds that it would be in the interest of justice to do so. A successful expungement will not erase the criminal record, but rather the finding of guilt will be changed to a dismissal. The petitioner can then legally answer to a question about his criminal history, with some exceptions, that he has not been convicted of that crime. What is actually stated on the record of the case is that the case was dismissed after conviction. If the petitioner is later convicted of the same crime again, then the expungement may be reversed.¹⁹⁸

(ii) Prerequisites for expungement

(aa) The record to be expunged

6.49 As a general rule and with reference to comparative law, the subject matter of an expungement is usually the criminal record of an accused. A criminal record or police record in the normal sense is a record of a person's criminal convictions. The information included in a criminal record varies between countries and even between jurisdictions within a country. In most cases it lists all non-expunged criminal offences and may also include traffic offences such as speeding and drunk-driving. In most countries the criminal record is limited

198 See discussion in Chapter 4. http://www.leginfo.ca.gov/.html/pen_table_of_contents.html accessed 9 September 2014.

to actual convictions where the individual has pleaded guilty or has been found guilty by a qualified court. However, in some countries the information in the criminal history record includes arrests, charges dismissed, charges pending and charges in respect of which the individual has been acquitted.¹⁹⁹ The inclusion of particulars of arrests, charges withdrawn, charges pending and acquittals in the criminal history is in fact an extension of the meaning of a criminal record in the strict sense which only refers to convictions. From a South African view it can be argued that the inclusion of such information is a human rights violation because it infringes the presumption of innocence in that it exposes people to discrimination on the basis of unproven allegations.

6.50 In the USA, however, the eligibility for the records to be expunged varies from expungement of records of an arrest, criminal investigation, detention, or a conviction record and is based on the law of the jurisdiction in which the record was made. Ordinarily, only the subject of the record may ask that the record be expunged. In some USA jurisdictions, all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system can be expunged. Each state sets its own guidelines as to which records can be expunged. A petitioner, requesting an expungement of his or her record, must complete an application form and submit it to the appropriate authority.

6.51 In the United States, criminal records are compiled and updated on local, state, and federal levels by various law enforcement agencies. In South Africa the criminal record is under the auspices of the South African Police Services. The primary goal of a criminal record is to present a comprehensive criminal history. A criminal record may be used for many purposes, mostly for background checks including identification, employment, security clearance, adoption, immigration/international travel/visa, licensing, assistance in developing suspects in an ongoing criminal investigation, and for enhanced sentencing in criminal prosecutions.

6.52 Criminal histories are maintained by law enforcement agencies at all levels of government. It includes local police departments, sheriffs' offices, and specialty police agencies who may maintain their own internal databases. Law enforcement agencies often

199 See the discussion in chapter 4 on the USA.

share this information with other similar enforcement agencies and such information is usually made available to the public.

6.53 In many countries sex offenders have information about their crimes separately recorded and readily available. The Department of Correctional Services in many states may disseminate such criminal records to the public and through the media such as the internet. In South Africa the CAA provides for the keeping of a register for sex offenders and the CA provides for a National Child Protection Register for the keeping of information offences committed against children. Usually the only group in society that is not subject to dissemination of any criminal records is juveniles.²⁰⁰ Some states have official "statewide repositories" that contain criminal history information contributed by the various county and municipal courts within the state.²⁰¹

6.54 In South Africa knowledge on the regulatory framework is important and has an impact on expungement of criminal records, particularly with reference to the information contained in a criminal record and legislative provisions regulating the collecting, storing, and distribution of such information and notice should be taken of the impact of such legislation on expungement. The relevant Acts and provisions regulating the collecting, storing and distribution of information contained in a criminal record have been discussed in chapter 5.

(bb) Compliance with certain conditions before a record can be expunged.

6.55 Often, the subject must meet a number of conditions before the request will be considered. Some jurisdictions allow expungement for an deceased. Requirements often include one or more of the following:

- Fulfilling a waiting period between the incident and expungement;
- Having no intervening incidents;
- Having no more than a specified number of prior incidents;
- That the conviction be of a nature not considered to be too serious;
- That all terms of the sentence be completely fulfilled;

200 See discussion in Chapter 4 on juveniles in the USA.

201 See discussion in chapter 4 on the position in Canada on suspension of criminal records.

- That no proceedings be pending;
- That the incident was disposed without a conviction; and
- That the petitioner complete probation without any incidents.

6.56 Certain types of convictions which are not eligible for expungement is often listed and examples include:²⁰²

- Murder
- Felonies and first degree misdemeanors in which the victim is under 18 years of age;
- Rape;
- Sexual battery;
- Corruption of a minor;
- Sexual imposition;
- Obscenity or pornography involving a minor;
- Serious weapons charges.

6.57 In some jurisdictions, all records on file within any court, detention or correctional facility, law enforcement or a criminal justice agency concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system can be expunged. In some countries only criminal convictions can be expunged. Each country sets its own guidelines for what records can be expunged.

6.58 Most jurisdictions have laws which allow or require the expungement of juvenile records once the juvenile reaches a certain age. In some cases, the records are destroyed; sometimes they simply are "sealed." The purpose of these laws is to allow a minor who was accused of criminal acts, or in the language of many juvenile courts, "delinquent acts," to erase his record, typically at the age of 17 or 18. The idea is to allow the juvenile offender to enter adulthood with a "clean slate," shielding him or her from the negative effects of having a criminal record.

202 See discussion in Chapter 4.

(cc) Certificate of Rehabilitation

6.59 In many countries and in states of the USA a Certificate of Rehabilitation (CR) is a pre condition or requirement before an expungement can be ordered. A CR does not remove or expunge anything from criminal record. However, the requirement places a positive obligation on a convicted offender (an applicant) to ensure that he/she complies with the conditions for expungement by obtaining a certificate, The obligation is to ensure that proof is provided that he/she has been rehabilitated because the expungement of his/her criminal record is subject to obtaining a certificate of rehabilitation. Among other requirements, an applicant must, for example, in California, live in California and have done so for at least 5 consecutive years prior to applying, and have been law-abiding for 7 years starting from the sooner of his release from prison or court supervision. Once an applicant meets all requirements and receives a CR, his or her rights can be restored.²⁰³

6.60 In the United Kingdom the **Rehabilitation of Offenders Act 1974** (c.53) enables some criminal convictions to be ignored **after a rehabilitation period**. Its purpose is that people do not have a lifelong impediment on their records because of a relatively minor offence in their past. The rehabilitation period is automatically determined by the sentence, and starts from the date of the conviction. After this period, if there has been no further conviction the conviction is "spent" and, with certain exceptions, need not be disclosed by the ex-offender in any context such as when applying for a job, obtaining insurance, or in civil proceedings.

6.61 For purposes of expungement of a criminal record the requirement of rehabilitation²⁰⁴ means that the applicant has been restored to a useful life, through therapy and education. The assumption of rehabilitation is that people are not permanently criminal and that it is possible to restore a criminal to a useful life, to a life in which they contribute to themselves and to society. A goal of rehabilitation is to prevent habitual offending, also known as criminal recidivism. Rather than punishing the a criminal, rehabilitation would seek, by means of education or therapy, to bring a criminal into a more useful state of mind or into an attitude which would be helpful to society.

203 See discussion in Chapter 4.

204 See discussion on rehabilitation by TM Funk "A mere Youthful indiscretion? Re-examining the policy of expunging juvenile delinquency records" University of Michigan Journal of Law Reform 1996 885. at 902; http://www.ojdp.gov/PUBS/reform/ch2_i.html#205.

6.62 In the UK²⁰⁵ the rehabilitation period for adults is 5 years for most non-custodial sentences, 7 years for prison sentences of up to 6 months, and 10 years for prison sentences of between 6 months and 2½ years. For a young offender (under 18) the rehabilitation period is generally half that for adults. Prison sentences of more than 2½ years can never be spent. Other sentences have variable rehabilitation periods. Compensation orders are only spent once paid in full, but being bound over to keep the peace would be spent either at the end of the order or a year (depending which is longer). A conviction that is spent and need not be divulged under British law may not be so considered elsewhere.

6.63 In most instances a person can only apply for an expungement after a prescribed period of time. A prescribed period is also prescribed before a certificate of rehabilitation can be issued. In New Hampshire²⁰⁶ any person who has been convicted may petition for annulment of the conviction after he/she has completed all requirements of his/her sentence, including probation, paid a fee to the department of corrections to cover the cost of an investigation into the criminal history of the petitioner and has thereafter not been convicted of any offence except a motor vehicle related offence. The time periods after which an application can be made is listed below:

- For a violation, one year, unless the underlying conviction was for an offence specified under habitual offender law.
- For a class A or B misdemeanor excluding sexual assault, 3 years.
- For a class B felony other than incest or endangering the welfare of a child by solicitation, 5 years.
- For a class A felony, 10 years.
- For sexual assault, 10 years.
- For felony indecent exposure or lewdness, 10 years.

(dd) Sealing juvenile records

6.64 Juvenile criminal court records remain unless the individual petitions to have them sealed. This may be done when they reach their 18th birthday. Most jurisdictions in the USA have laws which allow or even require the expungement of juvenile records once the juvenile reaches a certain age. In some cases, the records are destroyed; sometimes they

205 See discussion in Chapter 4.115.

206 See discussion in Chapter 4.87.

simply are "sealed." The purpose of these laws is to allow a minor who was accused of criminal acts, or in the language of many juvenile courts, "delinquent acts," to erase his record, typically at the age of 17 or 18. The idea is to allow the juvenile offender to enter adulthood with a "clean slate," shielding him or her from the negative effects of having a criminal record.²⁰⁷

(ee) The effectiveness of the legislation in achieving its goals²⁰⁸

6.65. From a comparative perspective expungement laws are most prominent in the USA and important lessons can be learned from their experience. It would also appear that the laws in the different states in the USA and on federal level have since 2005 been subjected to research and review and in the sentencing project, for the first time, a resource guide has been developed where all the laws in the different states have been collected and published in a resource guide, enabling a comparison and subjected to a comparison which resulted in important findings with regard to different practices and the effectiveness of laws dealing with expungement. For purpose of drawing conclusions on international best practices the findings made in the Sentencing project provide a useful resource. For this purpose full reference is made to the research findings of the Sentencing Project and the conclusions drawn from the research is quoted in full below.

6.66 The resource guide compiled by Margaret Love in the Sentencing Project made important conclusions on the effectiveness of expungement laws in the USA. These conclusions are important for the review of the legislation dealing with expungement in South Africa since it evaluates the differences in laws in the USA and draw particular conclusions on the effectiveness of the legislation in the USA. The following important conclusions from the study into the collateral consequences of a criminal conviction and possible mechanisms to intervene are relevant when considering reform of the law in South Africa.²⁰⁹

207 See discussion in Chapter 4.

208 See discussion in Chapter 4.

209 <http://www.sentencingproject.org/detail/publication.cfm?publication id=115> *Relief from the collateral consequences of a criminal conviction: A State by State Resource Guide*, by Margaret Colgate Love June 2008 accessed 14 December 2012.

SUMMARY OF RESEARCH FINDINGS ON EXPUNGEMENT IN THE USA IN THE SENTENCING PROJECT AND CONCLUSIONS

...The principal conclusions from the research undertaken for this resource guide are as follows:

In every U.S. jurisdiction, the legal system erects formidable barriers to the reintegration of criminal offenders into free society.

...

These legal barriers are always difficult and often impossible to overcome, so that persons convicted of a crime can expect to carry the collateral disabilities and stigma of conviction to their grave, no matter how successful their efforts to rehabilitate themselves.

...

While every jurisdiction provides at least one way that convicted persons can avoid or mitigate the collateral consequences of conviction, the actual mechanisms for relief are generally inaccessible and unreliable, and are frequently not well understood even by those responsible for administering them.

...

Pardon remains the most common relief mechanism, but it has been allowed to atrophy in recent years.

...

The states that have issued the greatest number of pardons are generally ones in which the pardon power has some degree of protection from the political process, through exercise or administration by an independent appointed board.

...

Judicial restoration remedies like expungement and sealing are generally available to adult felony offenders in only a few states, but where they exist they appear to be widely utilized.

...

A number of jurisdictions provide for some form of deferred adjudication or deferred sentencing, whereby minor offenders or persons without a prior criminal record can avoid a criminal record entirely if they successfully complete a term of community supervision.

...

Two-thirds of the states have laws that forbid denial or termination of employment and/or licensure “solely” because of a conviction, and/or require that a conviction by “substantially related” to the license or employment at

issue; but it is unclear how effective these laws are.

...

In all but a handful of states, most offenders regain the vote upon completion of sentence.

...

The ability to overcome the disabling effect of a criminal record is becoming an important issue in the national conversation about offender re-entry.

...

CHAPTER 7

PROBLEM AREAS, EVALUATION AND RECOMMENDATIONS FOR REFORM

INTRODUCTION

7.1 This chapter is devoted to the identification of problem areas followed by an evaluation and recommendations for reform. The evaluation will follow after discussion of problem areas grouped together under different appropriate headings. The problems relating to expungement laws in South Africa are complex in nature and cover a number of areas. In the first instance some of the problems have been identified in the Resolution adopted by Parliament requesting a referral of the matter to the Commission for investigation. Problems have also been identified by Mr L Muntingh following the passing of the new legislation enabling expungement.

7.2 The Minister's request to the Commission explained that during the deliberations on the Bill a number of stakeholders submitted inputs to the Portfolio Committee on a wide range of matters related to the expungement of criminal records. The Portfolio Committee concluded that the expungement of criminal records is a complex matter that requires a balance between the rights of citizens to be protected against criminals and the recognition that having a criminal record can cause undue hardship for an individual. A Resolution in respect of which certain actions are required was adopted by the Portfolio Committee. The Minister requested the Commission to conduct research on the different systems from a comparative point of view and drawing on best practices followed in the keeping of criminal records and the expungement of such records.

7.3 The developments after the passing of the legislation enabling expungement have been highlighted in a research report prepared by Mr L Muntingh.²¹⁰ Mr Muntingh explains that having a criminal record can have serious implications for an individual's prospects of finding employment and much research has been done especially in the United States with its draconian laws excluding felons from a variety of resources, rights and types of **employment**. **In South Africa** the issue of criminal records was brought to the fore by an

210 Civil Society Prison Reform Initiative "*The law and the business of criminal record expungement in South Africa*" Research Report no 18 by Lukas Muntingh.

amendment to the Criminal Procedure Act (51 of 1977) through the Criminal Procedure Amendment Act 65 of 2008 which came into force on 6 May 2009. The amendment to section 271A of the Act for the first time in South Africa created a statutory mechanism and clear procedure for the expungement of certain criminal convictions of adult offenders, including crimes created by apartheid era legislation. Prior to this no mechanism existed to expunge criminal convictions, save through a presidential pardon as provided for in the 1983 and 1996 Constitutions and the Promotion of National Unity and Reconciliation Act, 34 of 1995.

7.4 Whilst the Criminal Procedure Amendment Act 65 of 2008 created the mechanism for the expungement of certain criminal convictions, there were also further developments relevant to expungement and the consequences of a conviction and criminal record in respect of certain crimes. Mr Muntingh²¹¹ is of the view that what emerged from the various legislative interventions is a complex and often confusing system setting different sets of yardsticks when dealing with criminal records and their expungement. The CJA, for example, prescribes that the qualifying criteria for expungement are offence and age specific, whereas the amendments to the CPA which introduced expungement for adult offenders in 2008 give no recognition to the offence and only employ the sentence imposed with the time lapse from the date of conviction as yardsticks. He points out that a third yardstick uses the sentence and the time lapse following the completion of the sentence (with reference to the Final Constitution, 1996 in respect of Members of Parliament).

7.5 In addition to criminal convictions, the establishment of three registers in terms of different Acts became relevant to the debate on expungement and its enabling legislation. The National Sex Offenders Register established under the CAA and Part B of the National Child Protection Register in the CA are both linked to the process of expungement of criminal convictions because such convictions cannot be expunged unless the names of the offenders have not first been removed from the relevant registers. The CJA also created a register of children who have been diverted from the criminal justice system. While the diversion register is not specifically mentioned in relation to sentencing, it may be consulted in relation to a range of functions set out in several chapters of the CJA.

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7.6 Mr Muntingh²¹² is of the view that in the broader context, the question must be asked what purpose(s) the retention of criminal records aims to serve. Fundamental to the debate is the acknowledgment that having a criminal record can be severely detrimental to a person's access to employment and social status in general. Moreover, the effect of a criminal record is that the punishment for the crime committed lasts much longer than the sentence imposed by the court. It is this lasting effect that ex-offenders and ex-prisoners often experience as being exclusionary and marginalising. The effect of a criminal record is that it becomes a debt to society that cannot be re-paid. According to Mr Muntingh it is this debt that Van Zyl Smit calls a 'civil disability' – individuals are excluded from certain civil functions and types of employment because at some time in the past they had committed and were convicted of a crime. In the American literature this is also referred to as 'collateral disabilities'.

7.7 Mr Muntingh²¹³ points out that Van Zyl Smit observed in respect of prisoners in 2003:

...“there has been no systematic effort to think through what the fundamental change to the constitutional order should mean for the legal disabilities imposed on former prisoners. Current disabilities are therefore something of a neglected ragbag, typically relegated to a passing paragraph in the major legal textbooks dealing with their legal status generally.”

Admittedly, criminal records also serve a protective function; they signify to society that a specific person is dishonest or poses a danger to children, or is violent. The protective value of criminal records in such instances have now also found expression in recently passed legislation providing for a sex offenders' register and a register of persons convicted for crimes against children. Criminal records are also used by courts when imposing sentences to assess the criminal history of the offender and previous convictions would normally count against the offender and result in a more severe penalty.

There are, however, also different schools of thought on these issues.

In view of the outline above it would appear appropriate to consider the nature of the disabilities or consequences of a criminal conviction, its impact on a convicted persons as opposed to government's responsibilities to protect society.

212 Civil Society Prison Reform Initiative *“The law and the business of criminal record expungement in South Africa”* Research Report no 18 by Lukas Muntingh at 5.

213 Civil Society Prison Reform Initiative *“The law and the business of criminal record expungement in South Africa”* Research Report no 18 by Lukas Muntingh at .

7.8 Mr Muntingh²¹⁴ explains that the retention or expungement of criminal records centres on two issues:

on the one hand, the duty to promote safety in society and protect citizens from dangerous and dishonest individuals and, on the other hand, the right to equality and the constitutional duty on the state 'to free the potential of each person'.

He²¹⁵ points out that Van Zyl Smit argued that discriminating against former prisoners based on their criminal pasts is not only counter-productive by undermining social reintegration, but that the state has a positive duty to fulfill in respect of social reintegration and to render support to former prisoners. Making information available to third parties about individuals' criminal histories would thus be to undermine this positive obligation. The nature of the information should also be considered, ie whether or not it is limited to the criminal record or should include information regarding arrests or criminal conduct which did not result in a conviction. This calls for an evaluation of the nature of disabilities following a conviction and the extent to which an order for expungement is justified to promote reintegration into the community.

7.9 In this regard consideration should also be given to the legal framework impacting on the effectiveness of orders for expungement. The legal framework includes not only the legislation dealing with expungement, but also legislation impacting on the availability of information contained in a criminal record and in particular the regulatory framework for collection, storage and distribution of information contained in criminal records. To this extent the legal framework includes the recently passed Privacy and Data Protection Act 4 of 2013. In addition it also includes consideration and evaluation of the legislation dealing with access to information, namely, Promotion of Access to Information Act 2 of 2000 and the extent to which it impacts on the effectiveness of the legislation providing for expungement in achieving its goals to promote reintegration in the community following an approved application for expungement. Consideration should be given to the legal framework regulating the collection and distribution of data or information regarding previous convictions regulated in the Criminal Procedure Act 51 of 1977, the South African Police Services Act 68 of 1995 as well as other relevant pieces of legislation, for example, the

214 Civil Society Prison Reform Initiative *"The law and the business of criminal record expungement in South Africa"* Research Report no 18 by Lukas Muntingh at 6.

215 Civil Society Prison Reform Initiative *"The law and the business of criminal record expungement in South Africa"* Research Report no 18 by Lukas Muntingh at 6.

information held in terms of the registers provided for in the CAA of 2007, the CJA of 2008 and relevant provisions of the CA of 2005. Apart from the above it also requires consideration of the impact of other legislative provisions regulating consequences of a criminal conviction in respect of particular offences which are not covered in the legislation dealing with expungement. An extract from such relevant legislation has been discussed in some detail in chapter 5.

7.10 In addition to the above the prescribed process for obtaining an order for expungement appears to be problematic since it has been elevated to the Commission in comment by the Department of Justice and Constitutional Development. Since the referral of the investigation to the SALRC, the Department of Justice and Constitutional Development submitted a request to the Commission to review the process for considering the applications for expungement in view of the large number of applications received since the legislation was passed. The CPA as well as the CJA provide for an administrative application process for expungement which has to be considered by the Director-General of the Department of Justice and Constitutional Development. In comment by the Department of Justice and Constitutional Development, the Commission was requested to consider a broadening of the number of officials responsible for considering and approving expungement applications. The Department submitted the following comment:

EXPUNGEMENTS RECEIVED AND FINALISED:

PERIOD	NEW APPLICATIONS RECEIVED	MATTERS FINALISED
2009	3213	2954
2010	5115	5362
2011	7576	5894
1 April 2012 to 30 June 2012	2301*	1356*

* The projected figures for the year 2012 is about 9204 new matters received and 6000 matters finalised .

The above statistics show that there is a constant increase in applications for expungement. Despite the fact that officials on the first level of work is managing the processing of applications for expungement reasonably satisfactory, the thousands of applications which we are currently receiving annually are simply becoming impossible to handle. These applications have to be processed through at least three levels before they are considered by our Director-General. A

delegation of this function of the DG to a Deputy DG, who is in all probability just as busy as the DG, will not solve the problem. When the expungement process started, the whole process took about 6 to 8 weeks to finalize. Due to the huge increases, the process currently takes about 32 weeks to finalize and this in itself leads to further delays as much more enquiries and complaints above the delays have to be attended to.

The situation is spiraling out of control and the administration, requests, enquiries, etc. with regard to the process make it impossible to handle further increases effectively. Serious problems are foreseen if the above-mentioned issues are not addressed urgently.

7.11 As indicated above a number of problem areas have been identified following the application of the legislation dealing with expungement. These will be identified and grouped hereafter, where possible, under a relevant and appropriate heading. In essence the problem areas have been grouped together under the headings justification for legislation enabling expungement, differences in the legal framework (the Constitution, the CPA, the CJA, the CAA and the CJA) regarding expungement for juvenile and adult offenders, non-alignment of the different pieces of legislation dealing with expungement in so far as it relates to qualifying criteria for expungement with particular reference to the qualifying offences, timeframes, approval of applications and consequences of expungement.

7.12 Problems with regard to process relates to the appropriate process which should be applied, namely an automatic expungement, an administrative application process or a formal court process though application in a court of law. Problems also exist because different rules apply to juvenile offenders and adult offenders. It can be said that the same standards and qualifying criteria are not applied for an application for expungement of a criminal conviction in the different Acts regulating the process. There are notable differences in the enabling legislation. These differences have, according to Mr Muntingh, in all likelihood, their origin in the particular context, time and history that shaped the particular statutes. In identifying the problem areas, generous reference will be made to the report prepared by Mr Muntingh²¹⁶ in this regard and the problem areas identified by him in the report.

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7.13 The Commission is of the view that the justification for the expungement legislation is the first and most important area for consideration in the review of the expungement legislation. It is vital since the justification for the process will inform the legal framework within which the enabling legislation should operate and could be justified. As such it will inform the expungement process, qualifying criteria for expungements and limitations within which the process of expungement is justified. Because of its importance the Commission will deal with the justification of the process first and then deal with the problem areas regarding process as identified in paragraph 7.12 above.

THE JUSTIFICATION FOR EXPUNGEMENT LEGISLATION

INTRODUCTION

7.14 It has been stated in chapter 4 that the most important underlying premise of juvenile expungement statutes, and for that matter, also adult offender expungement statutes, is that it will help the young adult and adult offenders in their rehabilitation efforts and promote their re-integration into society. Although it appears to be a laudable goal it does not give the full picture. It has also been argued that any advantages of the expungement process must be weighed against the “harm” expungement causes or may cause with reference to its impact on crime and the protection of society. In the USA the undifferentiating destruction of virtually all records relating to juvenile delinquency as the appropriate remedy was questioned particularly because of its ineffectiveness in protecting society against serious crime. Therefore, an opposing view has been expressed in the USA that **the usefulness of the expungement principle cannot be determined only with reference to rehabilitating the offender. It must also be measured against the ultimate protection from illegal behaviour it provides to the public. An evaluation of the experience of expungement of juvenile records in the USA has emphasised that it is important that the expungement policy should be assessed by its effectiveness in reducing recidivism and the need for proportionality in sentencing practices in that the sentences imposed should reflect the seriousness of the offences and provide protection to society. Thus, the interests of the offender (the importance of rehabilitating juvenile offenders, the need to maintain and strengthen family relationships wherever possible) should be considered together with the interests of society (the desirability of imposing the least restrictive sanctions consistent with the legitimate aim of**

protecting victims and the community). It is submitted that the view above is equally true and applicable when considering the expungement of records of adult offenders and begs the question whether differences in the process could be justified and if so in which respects differences would be justified.

7.15 From the experience with the expungment of juvenile records in the USA, it should be noted that the most important objection to the expungment scheme relates to its impact on the effectiveness of the criminal justice process. **It was argued that expungement laws interfere with effective law enforcement. Police officers are impeded in their efforts to uncover criminal conduct because of the expungement of arrest and conviction records and identification information of offenders.** An offender's previous contact with the police or his previous arrests, are factors to be considered by a police officer in deciding whether an arrest should be made or not. Criminal records do not only assist prosecutors in handling specific cases or correctional services in developing appropriate treatment programmes, but they also assist police officers directly in their most important function of investigating cases.

7.16 The importance of an effective criminal justice system in South Africa and government's duty to ensure an effective criminal justice system is therefore an important part of determining the justification for expungment legislation and the boundaries within which it can be justified. As such it is considered and highlighted below with reference to case law (in the Constitutional Court as well as other courts), the justification for an expungement scheme and the impact of competing constitutional rights relevant for an expungement scheme. A further complicating fact in this regard is the ever increasing crime statistics in South Africa, in particular, the constant increase in crimes regarding dishonesty and corruption.

7.17 Another important objection to expungement statutes is that they **prevent employers from taking appropriate steps to meet the security and supervision needs of their employees. In essence there is a fundamental conflict between an offender's right to obtain employment for which he or she is qualified and an employer's interest in hiring trustworthy employees.** Arrests do not prove guilt nor do criminal convictions of necessity imply that it should affect employment opportunities. However, depending on the type of offence committed, it can be justified to impede an individual's chances to secure

employment and in particular certain categories of employment. From an employment perspective it is argued that it is valid and reasonable for employers to require that, for example, **persons employed in positions where they have access to valuable property of others, to have a record free from convictions of serious property related or dishonesty offences. Therefore, there is no or little justification to expunge criminal records to prevent employers from discriminating against former criminals.**

7.18 It can also be argued that **legislators are not necessarily better equipped than employers to judge the risks involved in hiring former criminals.** It is against this background that a re-evaluation of the expungement statutes is made and it is submitted that it sets the scene when considering expungement in South Africa.

7.19 The focus of juvenile expungement statutes should be on assessing the probability of today's juvenile delinquents becoming tomorrow's adult criminals, or, more relevant, to focus on prevention of crime and the likelihood of tomorrow's adult criminals having been today's juvenile delinquents. If there is a strong correlation between juvenile delinquency and adult criminality, then the only sound option is to document and monitor those who have come into conflict with the justice system in the past and who therefore are more likely to come into conflict with the justice system again in the future.

7.20 The reasons for the passing of the legislation dealing with expungement of criminal records of juveniles have been discussed in some detail in chapter 4. It is submitted that there is little difference when considering expungement of records of adult offenders since, in essence, the same considerations apply. The purpose of expungement statutes would be to promote and protect the right to equality and therefore promote re-integration into society after a criminal conviction. On the other hand a criminal record has serious implications. In practice a convicted person is branded as an untrustworthy member of society; a conviction compromises job opportunities permanently, and convicted persons are the subject of suspicion and mistrust. These consequences can be especially serious for young persons who have to attempt to enter the job market with the liability of a criminal record for an offence committed whilst still a child. Although the same can be said for adult offenders who also made a once off mistake, the difference is that juvenile offenders are affected in the beginning of their careers whereas adult offenders do not necessarily have the same challenge. Although the matter of expungement of juvenile records was pursued in the

SALRC investigation into a juvenile justice system, it was argued in the Commission's report²¹⁷ that in order to mitigate these negative effects, and to give children a second chance, legislation should be enacted to allow them to resume their lives without the stigma of a conviction. For purposes of this discussion relevant parts of the discussion is copied:

13.1 The Issue Paper did not address the issues of confidentiality and expungement of records. However, since the inclusion of provisions on confidentiality and expungement were contemplated after they were raised during the consultation process that followed the release of the Issue Paper, a detailed discussion of the current position in terms of the Criminal Procedure Act was included in the Discussion Paper.⁴³⁸ The project committee on the Commission's investigation into sentencing identified the expungement of the criminal records of child offenders as an issue that the project committee on juvenile justice should deal with in this investigation.

7.21 The Commission's report on a juvenile justice system dealt with the expungement of criminal records of juveniles in the following terms²¹⁸:

CHAPTER 13: CONFIDENTIALITY AND EXPUNGEMENT OF RECORDS

13.2 In the Discussion Paper (Discussion paper 79), the Commission reviewed two draft provisions that were proposed by the Juvenile Justice Drafting Consultancy concerning the confidentiality of proceedings involving accused persons under the age of 18 years, and prohibiting the publication of information which could reveal the identity of any accused child. The proposed provisions were similar to the applicable sections of the Criminal Procedure Act, which regulates confidentiality and privacy at present. An additional provision stipulated that the prohibition on the publication of information should not be used to prevent people or agencies from seeking access to children in order to offer assistance, or to prevent access to information for the purpose of study or analysis. The additional provision was included because it was contended that the provision in the Criminal Procedure Act had in the past been used to prevent individuals and organisations from obtaining access to information in order to provide para-legal and other assistance to children in detention, and to analyse or conduct research about the situation of children in the criminal justice system.

13.3 Recent amendments to regulations under the Child Care Act 74 of 1983 provide for the introduction of a Child Protection Register in which details must be entered of any child exposed to ill treatment or deliberate injury of which the Director-General of Welfare and Population Development has been notified. The regulations permit the Director-General to approve the examination or inspection of the register for official and *bona fide* research purposes, and also to disclose information contained in the register to such persons as he or she may determine with the sole purpose of serving the interests, safety and welfare of any child. This has provided the Commission with a useful precedent concerning access to otherwise confidential

217 South African Law Commission, Project 106, Report on *Juvenile Justice* July 2000 on p 204 .

218 South African Law Commission, Project 106, Report on *Juvenile Justice* July 2000 on p 204.

information without prejudicing the best interests of the child.

13.4 The Commission proposed in Discussion Paper 79 that the present provisions in the Criminal Procedure Act relating to the protection of the identity of accused persons under the age of 18 years, as well as those pertaining to the privacy of criminal proceedings involving such children, should be incorporated in similar form in the Child Justice Bill. In addition, the Discussion Paper suggested the inclusion of a provision permitting relaxation of the above rules in clearly defined and limited circumstances. This was to ensure that the provisions on confidentiality and privacy were not used in such a way as to prevent people or organisations from gaining access to information pertaining to children accused of offences, if such access would be in the interests of the children concerned or in the interests of the administration of the proposed child justice system.

Expungement of criminal records

13.5 Although it is clear that the privacy of the child's identity and the confidentiality of the criminal proceedings should be protected by law, any record of the conviction of a child for an offence committed whilst below the age of 18 years does not enjoy any special status in our present system. In Discussion Paper 79, the Commission presented a synopsis of the provisions of the Criminal Procedure Act and the relevant case law regarding when, after the expiry of a certain period of time, an accused person's previous convictions fall away. The present position is that under certain circumstances, previous convictions will fall away provided that a period of ten years has elapsed after the date of conviction of the relevant offence. In addition, the relevance of the Promotion of National Unity and Reconciliation Act 34 of 1995 to this area of debate was discussed in Discussion Paper 79.

13.6 A criminal record has serious implications. A convicted person is branded forever as an untrustworthy member of society; a conviction compromises job opportunities permanently, and convicts are often the subject of suspicion and mistrust. These consequences can be especially serious for young persons who have to attempt to enter the job market with the liability of a criminal record for an offence committed whilst still a child. In the Discussion Paper it was argued that in order to mitigate these negative effects, and to give children a second chance, legislation should be enacted to allow them to resume their lives without the stigma of a conviction.

13.7 In Discussion Paper 79 the Commission proposed that in respect of certain specified convictions, the criminal record of child would never be able to be expunged. These were convictions for serious offences, which were specified as murder, rape, indecent assault involving the infliction of grievous bodily harm, robbery with aggravating circumstances, any offence referred to in section 13(f) of the Drugs and Drugs Trafficking Act, 1992 (Act No. 140 of 1992), if it is alleged that the value of the dependence producing substance in question is more than R50000, and any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armaments.

7.22 Mr Muntingh²¹⁹ explains the justification for the legislation dealing with expungement in the following terms:

On a broader level, the question must be asked what purpose(s) the retention of criminal records aims to serve. Fundamental to the debate is the acknowledgment that having a criminal record can be severely detrimental to a person's access to employment and social status in general. Moreover, the effect of a criminal record is that the punishment for the crime committed lasts much longer than the sentence imposed by the court. 6 It is this lasting effect that ex-offenders and ex-prisoners often experience as being exclusionary and marginalising. The effect of a criminal record is that it becomes a debt to society that cannot be re-paid. It is this debt that Van Zyl Smit calls a 'civil disability' – individuals are excluded from certain civil functions and types of employment because at some time in the past they had committed and were convicted of a crime.⁸ In the American literature this is also referred to as 'collateral disabilities'. As Van Zyl Smit observed in respect of prisoners in 2003: *'There has been no systematic effort to think through what the fundamental change to the constitutional order should mean for the legal disabilities imposed on former prisoners. Current disabilities are something of a neglected ragbag, typically relegated to a passing paragraph in the major legal textbooks dealing with their legal status generally.'*

Admittedly, criminal records also serve a protective function; they signify to society that a specific person is dishonest or poses a danger to children, or is violent. The protective value of criminal records in such instances have now also found expression in recently passed legislation providing for a sex offenders' register and a register of persons convicted for crimes against children. Criminal records are also used by courts when imposing sentences to assess the criminal history of the offender and previous convictions would normally count against the offender and result in a more severe penalty. There are, however, also different schools of thought on this issue.

The retention or expungement of criminal records then centres on two issues: **on the one hand, the duty to promote safety in society and protect citizens from dangerous and dishonest individuals and, on the other hand, the right to equality and the constitutional duty on the state 'to free the potential of each person'**. (emphasis added) Van Zyl Smit argues that discriminating against former prisoners based on their criminal pasts is not only counter-productive by undermining social reintegration, but that the state has a positive duty to fulfil in respect of social reintegration and to render support to former prisoners. Making information available to third parties about individuals' criminal histories would thus be to undermine this positive obligation.

7.23 As explained above by Mr Munthing the retention of expungement of criminal records then centres on two issues: **on the one hand, the duty to promote safety in society and protect citizens from dangerous and dishonest individuals and, on the other hand, the**

219 Civil Society Prison Reform Initiative *"The law and the business of criminal record expungement in South Africa"* Research Report no 18 on p 5 by Lukas Muntingh.

right to equality and the constitutional duty on the state ‘to free the potential of each person’. (emphasis added) Therefore the question that remains to be considered is the State’s responsibilities in respect of both rights referred to and the extent to which these rights impacts on the state’s responsibilities. In other words the constitutional validity of the legislation dealing with expungements and the extent to which it could be justified should be done having considered and weighed both the rights in question.

EXPUNGEMENT AND COMPETING CONSTITUTIONAL RIGHTS

7.24 The first leg of enquiry into the justification of expungement legislation requires a consideration of the right to protection of society as pointed out above. In view of the explanation given above it is clear that an in depth analysis of the constitutional issues raised above is required.

(a) The right to protection and the state’s duty to protect society

7.25 In so far as the enquiry concerns government’s **duty to promote safety in society and protect citizens from dangerous and dishonest individuals, it should be noted that state’s constitutional responsibilities and its liability in case of failure have been considered by the Constitutional Court. This was in matters with particular reference to the question of the state’s responsibilities regarding an effective criminal justice system and its liability to pay compensation to victims of crime in cases of failure to meet the required standards. In so far as this is relevant to the issue of expungement of a criminal record, reference will be made to the relevant constitutional principles, legislation and case law.**

(i) Relevant legislative and Constitutional provisions

7.26 With regard to victims of crime and the state’s liability to pay compensation to victims of crime, the Constitutional Court has evaluated the state’s constitutional responsibilities to ensure an effective criminal justice system (promote safety in society), the extent to which it places duties on the state and its liability when these duties and responsibilities have not been complied with. The question whether or not victims of crime have a right to compensation against an offender or the State in criminal proceedings or, following criminal

proceedings in civil proceedings, should be considered with reference to applicable legislation and the Constitution. The relevant provisions of the Constitution and the duties of the state to protect its citizens have recently been considered by the Constitutional Court when considering the state's liability to pay compensation to victims of crime following failure to give effect to its constitutional obligation to protect society.

7.27 It is well established in our law that paying compensation to victims by the offender is a competent order by a court in criminal proceedings or civil proceedings. However, in terms of case law in the Constitutional Court, the state's liability to pay compensation to victims of crime has been extended to the state following criminal acts or negligent conduct by its employees. It is in these cases where the impact of the Constitution on the making of compensation orders and the state's liability to pay compensation to an individual has been considered and sanctioned by the Constitutional Court in civil proceedings based on the common law principles of the law of delict. In order to determine whether the making of an order to pay compensation by the state is competent, cognizance should be taken of the Constitutional Court's interpretation of the applicable constitutional principles and provisions in relevant legislation dealing with the state's responsibility to protect its citizens with reference to compensation orders made against the state to victims of crime. The state's responsibility to protect society and the consequences of such failure is of particular importance when evaluating the legislation enabling expungement of criminal records and the extent to which such legislation would be considered to comply with the state's constitutional obligations.

7.28 In summary the relevant legislative and constitutional provisions and other regulatory instruments in South Africa dealing with victims of crime and the protection of society are the following:

- * The South African Victims' Charter does not create a right to compensation for victims of crime. It is an administrative document which is based on existing national legislation which includes legislation endorsing International Instruments relevant to victims and rights protected in the Constitution;
- * No legislation in South Africa, relevant to victims of crime, nor the Constitution, nor any International Protocol, Instrument or Convention endorsed by the South African government creates or establishes a right to compensation for victims

- of crime;
- * National legislation in South Africa can be divided into three categories, namely:
 - Legislation providing for compensation or restitution to victims of crime by the offender; and
 - Legislation containing provisions relevant to services available to victims of crime and the treatment of victims in the criminal justice system.
 - * The Constitution, which does not create a right to compensation for victims of crime, **but confirms general rights applicable to all citizens which are therefore also applicable to victims of crime and have specific relevance to the treatment of victims, eg the right to be treated with dignity and respect, the right to protection, the right to security of the person, the right to life, etc.**

7.29 With reference to the above categorisation and government's responsibility to protect society, it is submitted that the relevant obligations as it was considered relevant to determine government's liability towards victims of crime, is equally relevant when considering the legislation enabling expungement of criminal records.

(ii) The legal position in respect of compensation prior to the Constitutional era

7.30 In South Africa, an offender's liability to pay compensation has always been recognized in terms of the common law (civil cases) and in terms of national legislation (CPA and various other statutes, (criminal cases). The State's liability to compensate victims has been determined and considered in civil litigation based on claims by victims of crime in terms of the law of delict.²²⁰

- * Prior to the Constitutional era such claims against an offender were based on the common law and relevant national legislation (e.g., the CPA and various other

220 See in general *Carmichele v Minister of Safety and Security* (2001 (4) SA 938 (CC). See also *The Minister of Justice and Constitutional Development v X* (196/13) [2014] ZASCA 129 (23 September 2014).

Acts) and liability of the offender was considered in terms of the law of delict and that of the state was considered in terms of the common law principle of vicarious liability, where the state was held liable for the actions of its employees because of the existence of a special relationship between the State and its employees where the State acts through its employees.

- * Vicarious liability means the state or a person may be held liable for the wrongful acts or omissions of another even though the former did not, strictly speaking, engage in any wrongful conduct. **This would arise where there is a particular relationship between those persons or institutions, such as employment.**
- * an employer is therefore vicariously liable for the **wrongful acts or omissions of an employee causing harm to another and committed within the course and scope of employment, or whilst the employee was engaged in any activity reasonably incidental to it.**
- * Two tests are applied to determine vicarious liability:
 - the first is where an employee commits a wrongful act (commission or omission) while going about the employer's business. This is generally regarded as the 'standard test' where the intention of the wrongdoer is considered (subjective test);
 - The second test finds application where the wrongdoing takes place outside the course and scope of employment. These cases are known as 'deviation cases'.
- * At common law the standard requirements for delictual liability are the intentional or negligent, unlawful (wrongful) conduct (commission or omission) causing harm (damages) to private individuals. No liability arises if any of the required elements are not present.
- * At common law vicarious liability of the state arises from the proposition that employees are extensions of their employers. This is indeed so because, figuratively, employees are the hands through which employers do their work.
- * **Employers could therefore be held to have created a risk of harm to others should their employees prove to be inefficient or untrustworthy. That potential risk imposes an obligation on employers to ensure that the employees they hold out as the hands through which they would serve or do business with others, would not do the opposite of what they are instructed and obliged to do. Should they, however, act inconsistently with**

the employers' core business, some link between the employers' business and the delictual conduct must be established before the employers may be held vicariously liable.

7.31 Vicarious liability of the State in terms of the common law is explained with reference to two cases dealing. In *Feldman (Pty) Ltd v Mall-Pty) Ltd v Mall*²²¹ an employee drove his employer's vehicle to deliver parcels as instructed by his employer. Thereafter, he attended to his personal matters. He then consumed alcohol which significantly impaired his capacity to drive. On his way back to his employer's premises, he negligently collided with, and killed, a man who had two minor dependents. **By a majority, the Appellate Division held the employer vicariously liable for the minor children's claim for damages.** The court explained the rationale behind holding the employer liable, even if the employee has intentionally deviated from his or her duty, to give an indication of the limits of a master's legal responsibility. (It is in particular the master's legal responsibilities in exercising its duties that become relevant when expungement legislation is considered because the CPA provides for an administrative process where a government official takes a final decision on approval or not of an application for expungement. In this regard the legislation becomes vital in so far it regulates the qualifications and conditions of such approval which, it is submitted, must give effect to government's responsibilities in terms of the Constitution.) (See the reasons outlined below). The court explained that, from the reasons, it appears that a master, who does his work by the hand of a servant:

- * **creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy;**
- * because he has created this risk for his own ends, he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work;
- * **the mere giving by him of directions or orders to his servant is not a sufficient** performance of that duty;
- * It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it, are **carried out in a negligent or improper manner so as to cause harm to a third party**, the master is responsible for that harm.

221 1945 AD 733.

7.32 In *Minister of Police v Rabie*²²² a claim for damages against the state (Minister of Police) arising from the wrongful arrest, detention and assault of the plaintiff was considered. The arrest was effected by a mechanic employed by the police service, in pursuit of his personal interests. At the time of the arrest, he was not wearing a police uniform and he was off duty. He identified himself as a policeman to the victim, took the victim to the police station, filled out a docket, wrongfully charged him with attempted housebreaking and locked him up. The court explained delictual liability of the state as follows:

It seems clear that an **act done by a servant solely for his own interests and purposes**, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made **to the servant's intention. The test is in this regard subjective.** On the other hand, if there is nevertheless **a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.**

(iii) **The legal position in the Constitutional era**

7.33 In the new Constitutional dispensation, the breath of fresh constitutional air, that courts are enjoined by section 39(2) of the Constitution to infuse into our common law, required that the parameters of liability (civil and criminal cases) be developed to accord with the new dictates of the Bill of Rights. The application of liability in terms of criminal cases continued to be considered in terms of existing national legislation (CPA together with new provisions in national legislation (e.g. the Sexual Offences Act). However, the influence of the constitutional principles was considered for the first time by the Constitutional Court in *Carmichele v Minister of Safety and Security*²²³ and again in *K v Minister of Safety and Security*²²⁴ when considering vicarious liability in civil cases.

7.34 In *Carmichele v Minister of Safety and Security* the Constitutional Court considered the constitutional obligation on the courts to develop the common law to promote the spirit, purport and objects of the Bill of Rights. The specific issue was whether the High Court and the Supreme Court of Appeal ought to have broadened the concept of "**wrongfulness**" in

222 1986 (1) SA 117 (A).

223 2001 (4) SA 938 (CC).

224 2005 (6) SA 419 (CC); (2005 (9) BCLR 835; [2005] 8 BLLR 74.

the law of delict in the light of the State's constitutional duty to safeguard the rights of women. The case concerned a delictual claim for damages against the State by a victim of a rape by an individual not in the employ of government. The basis of the claim was that:

- * Despite **the accused's history of sexual violence, the police and prosecutor had recommended his release without bail. In the High Court the applicant alleged that this had been an omission by the police and the prosecutor; and**
- * The complainant also relied on the duties **imposed on the police** by the interim Constitution and **on the State under the rights to life, equality, dignity, freedom and security of the person and privacy.**

7.35 The Constitutional Court, in holding the state liable, held that:

- * Although the major engine for law reform should be the legislature, courts are under a general duty to develop the common law when it deviates from the spirit, purport and objects of the Bill of Rights.
- * As to the police, it held that the **State is obliged (has a legal duty) in terms of the Constitution and international law (International Instruments endorsed by government) to prevent gender-based discrimination and to protect the dignity, freedom and security of women.** It is important that women be free from the threat of sexual violence.
- * In the particular circumstances of the case the police's recommendation **for the assailant's release could therefore amount to wrongful conduct giving rise to liability for the consequences.**
- * Similarly, the Court held that prosecutors, who are under a general (legal) duty to place **before a court any information relevant to the refusal or granting of bail, might reasonably be held liable for negligently failing to fulfil that duty.** (emphasis added)

7.36 The case of *F v Minister of Safety and Security*²²⁵ raised the question whether the Minister of Safety and Security should be held vicariously liable for damages arising from the

225 2012 (1) SA 536 (CC).

brutal rape of a 13-year-old girl by a policeman who was on standby duty (therefore off duty) in a typical so-called deviation case covered by the common law. In considering whether the State is vicariously liable for damages the court held that:

- * As a general rule, an employer is vicariously liable for the wrongful acts or omissions of an employee committed within the course and scope of employment, or whilst the employee was engaged in any activity reasonably incidental to it. Employers could therefore be held to have created a risk of harm to others should their employees prove to be inefficient or untrustworthy.

- * In considering vicarious liability two tests apply:
 - One applies when an employee commits the delict while going about the employer's business. This is generally regarded as the 'standard test'. This test is a subjective test and refers to the intention of the wrongdoer.
 - The second test finds application where wrongdoing takes place outside the course and scope of employment. These are known as 'deviation cases'. The matter before the court was a typical deviation case because the police official who raped the complainant was at the time of duty. The Court indicated that should the employee **act inconsistently with the employers' core business, some link between the employers' business and the delictual conduct must be established before the employer may be held vicariously liable.**

7.37 **In the determination of the bounds of vicarious liability of the State**, the Court noted that it is an objective test which requires consideration of the State's constitutional obligations including:

- * The State has a general duty to protect members of the public from violations of their constitutional rights. In grappling with the question of the State's **vicarious liability, the constitutional obligations to prevent crime and to protect members of the public, particularly the vulnerable, must enjoy some**

prominence. These obligations, as well as the constitutional rights of the complainant are the prism through which this enquiry should be conducted;

- * The State's constitutional obligations to respect, protect and promote the citizen's right to dignity, and to freedom and security of the person would have to be taken into account;
- * Equally relevant was the State's establishment of a police service for the efficient execution of its constitutional obligations to prevent, combat and investigate crime, to protect and secure the **inhabitants of the Republic and their property, and to uphold and enforce the law. This is determined with reference to provisions in the Constitution relevant to the establishment of the SAPS, relevant International Instruments endorsed by government and national legislation relevant to the establishment of the SAPS because it deals with the State's obligations in cases of a particular category of crime, as in the particular case, criminal acts relating to sexual offences;**
- * **The trust that the public is entitled to repose in the police also has a critical role to play in the determination of the Minister's vicarious liability in the matter; and**
- * In the event of the Minister being held liable, **it would be necessary to ensure that such decision does not effectively give rise to State liability for all delictual acts committed by the police.**

7.38 The Court held the State liable since, having considered the State's constitutional obligations, the national legislation establishing the SAPS and the State's obligations in terms of International Instruments, there was found to be a sufficient close link between the conduct and the business of the employer. **The Court also unequivocally stated that the way in which the liability is determined and limited does not create absolute liability for the State, and the requirement of a sufficient close link between the conduct and the business of the employer is sufficient to prevent that.**

7.39 In *The Minister of Justice and Constitutional Development v X* (196/13) [2014] ZASCA 129 (23 September 2014) the court again considered the state's responsibilities in respect of the constitutional rights of individuals contained in the Bill of rights and in particular the right to safety and security of persons. The matter concerned a claim for

delictual liability of the state because of the failure by the prosecution to place all relevant information before the court and the combined negligent conduct of police and the prosecutor which caused an arrested accused to be released from custody, thereby allowing him the opportunity to abduct and rape the daughter of the claimant. The court noted:

[13] ...

In a claim, such as the instant, where the conduct complained of manifests itself in an omission, the negligent conduct will be wrongful only if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The omission will be regarded as wrongful when the legal convictions of the community impose a legal duty, as opposed to a mere moral duty, to avoid harm to others through positive action. See *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) para 12 and *Local Transitional Council of Delmas & another v Boshoff* 2005 (5) SA 514 (SCA) paras 18 and 19.

[14] In *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC), it was held that, in developing our common law, as required in terms of s 39(2) of the Constitution, the element of wrongfulness for omissions in delictual actions for damages had to be developed beyond existing precedent, taking into account the rights to life, human dignity and freedom and security of the person (sections 11, 10 and 12 of the Constitution). In particular (para 44), it was emphasised that there is a duty imposed on the State and all of its organs not to perform any act that infringes these constitutional rights of the person. The Constitutional Court added that, in some circumstances, there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.

[15] With regard to the duty of a prosecutor in a bail application hearing, the Constitutional Court in *Carmichele* said the following (para 74):

‘There seems to be no reason in principle why a prosecutor who has reliable information, for example, that an accused person is violent, has a grudge against the complainant and has threatened to do violence to her if released on bail should not be held liable for the consequences of a negligent failure to bring such information to the attention of the Court. If such negligence results in the release of the accused on bail who then proceeds to implement the threat made, a strong case could be made out for holding the prosecutor liable for damages suffered by the complainant.’

[16] To this should be added the observation in para 72 of *Carmichele*, that, although the consideration of bail is pre-eminently a matter for the presiding judicial officer, the information available to the judicial officer can but come from the prosecutor. A prosecutor has a duty to place before the court any information relevant to the exercise of the discretion with regard to the grant or the refusal of bail and, if granted, any appropriate conditions attaching thereto. It follows that a failure to discharge this duty by a prosecutor constitutes wrongful conduct for purposes of the law of delict.

[17] In *Van Eeden v Minister of Safety and Security (Woman's Legal Centre Trust As Amicus Curiae)* 2003 (1) SA 389 (SCA) paras 11-14 it was held that the question whether a particular omission to act should be regarded as unlawful has always been an open-ended and flexible one. This court held that, in determining the wrongfulness of an omission to act, the concept of the legal convictions of the community must now necessarily incorporate the norms, values and principles contained in the Constitution. It was stressed that freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedoms and that s 12(1)(c) of the Constitution requires the State to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violation of the right. In particular, it was held that s 12(1)(c) of the Constitution places a positive duty on the State to protect everyone from violent crime. In this regard reference was made to the seminal decision in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 20, where this court concluded that, while private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat, the State has a positive constitutional duty to act in the protection of the rights in the Bill of Rights.

[18] In *Minister of Safety and Security & another v Carmichele* 2004 (3) SA 305 (SCA) paras 36-37, it was held that the public law duty of employees of the State who performed functions on its behalf to protect the rights of citizens in terms of the Bill of Rights, can, in appropriate circumstances, be transposed into a private law duty which, if breached, may lead to an award of damages. In this regard reference was made to the dictum in *Carmichele* (CC) para 74 regarding the duty of a prosecutor at a bail application hearing. This court concluded that the position of prosecutors in this context can in principle be no different from that of the police. Therefore, this court held that, unless public policy considerations point in the other direction, an action for damages would be the norm.

(iv) Conclusion

7.40 The justification for expungement legislation requires a consideration of two competing constitutional rights. On the one hand it entails the right to protection and on the other hand it entails the right to equality and dignity of citizens. In *Minister of Safety and Security v Van Duivenboden*²²⁶, the Supreme Court of Appeal concluded that, while private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat, **the State has a positive constitutional duty to act in the protection of the rights in the Bill of Rights.** Secondly, the current legislation enabling the expungement of criminal records entail an administrative process of a public official (Director-General of the Department of Justice and Constitutional Development) to approve the expungement of criminal records. In this regard The Supreme Court of Appeal, in *Minister of Safety and*

226 2002 (6) SA 431 (SCA) para 20

*Security v Van Duivenboden*²²⁷ referred to the decision of the Supreme Court of Appeal in *Minister of Safety and Security & another v Carmichele*²²⁸, which held that the public law duty of employees of the State who performed functions on its behalf to protect the rights of citizens in terms of the Bill of Rights, can, in appropriate circumstances, be transposed into a private law duty which, if breached, may lead to an award of damages²²⁹ and concluded that the position of prosecutors in this context can in principle be no different from that of the police. Therefore, this court held that, unless public policy considerations point in the other direction, an action for damages would be the norm. From the above analysis the following important conclusions can be drawn on the state's responsibilities with regard the expungment legislation and interpreting the right to protection of society:

- * **The Constitution places an obligation on the organs of state, through legislative and other measures, to ensure the impartiality, independence, dignity, accessibility and effectiveness of the courts. The fact that reference is made to the *effectiveness* of the courts means that provision must be made to ensure this functioning, which further means that structures must be created to bring about this effectiveness, if they do not exist.**
- * **In doing so national legislation (for example the CAA, the CJA), the Witness Protection Act, the Domestic Violence Act and the CPA, gives effect to constitutional rights applicable to all citizens, but also includes specific provisions relevant to the treatment of victims and provisions giving effect to principles contained in International Protocols relevant to victims of crime which were endorsed by government, for example, the right to be treated with dignity and respect, the right to security of the person and the right to protection.**
- * **The CAA has, for example, provisions in terms of which certain services must be provided to certain victims of sexual offences, inter alia, to minimise or, as far as possible, eliminate secondary traumatising, including affording a victim of certain sexual offences the right to require**

227 See footnote 227.

228 2004 (3) SA 305 (SCA) paras 36-37.

229 See *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) paragraph 74 regarding the duty of a prosecutor in bail proceedings.

that the alleged perpetrator be tested for his or her HIV status and the right to receive Post Exposure Prophylaxis in certain circumstances and making provision for the adoption of a national policy framework regulating all matters in this Act, including the manner in which sexual offences and related matters must be dealt with uniformly, in a co-ordinated and sensitive manner, by all Government departments and institutions and the issuing of national instructions and directives to be followed by the law enforcement agencies, the national prosecuting authority and health care practitioners to guide the implementation,

- * In addition, constitutional provisions dealing with the establishment of the Police Services and the Courts are relevant for purpose of determining the effectiveness of the criminal justice and are therefore also relevant to the treatment of victims of crime and the protection of society, for example, the SA Police Services is the foremost agency established to detect and investigate crime and bears the primary responsibility to protect women and children against the prevalent plague of violent crimes. National legislation and relevant provisions in the Constitution adopted in the establishment of the Police Services, give effect to these principles.
- * So too, with reference to the Courts, the Courts are bound by the Constitution and the Bill of Rights, and when they perform their functions, they are obliged, through additional legislative and other measures, to ensure their impartiality, independence, dignity, accessibility and effective functioning. This include, for example, the responsibility, with reference to particular crimes violating the fundamental rights of women and girl-children to ensure that the rights of women and children in particular are not made hollow by actual or threatened sexual violence.
- * The CPA contains specific provisions aimed at protecting society in that it makes provision for sentencing options and provisions dealing with the criminal record of an accused and the proof of previous convictions. In this regard the courts have a particular responsibility with reference to a the criminal record of an offender and this influences government's responsibility in dealing with the criminal record of an offender in its duty to protect society. Section 271 provides that previous convictions may be proved. The prosecution may, after an accused has been convicted, but

before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused and if the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted.

- * Section 286 of the CPA provides for the declaration of a person as a habitual criminal (a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person habitually commits offences and that the community should be protected against him, declare him an habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which he is convicted.) Again, with reference to an accused's criminal record the courts have a duty to protect society. Section 286A of the CPA provides for the declaration of a person as a dangerous criminal in that it provides that a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him, declare him a dangerous criminal. A convicted person's criminal record is of particular importance when a court is considering imposing a sentence in terms of section 286 and 286A of the CPA. These sentencing options in particular are aimed at the protection of society.
- * The CJA is primarily aimed at dealing with children (under the age of 18 years) coming into conflict with the law, but the Director of Public Prosecutions may, in accordance with directives issued by the National Director of Public Prosecutions, direct that a matter be dealt with in accordance with the CJA if the person was a child at the time of the alleged commission of the offence, or was older than 18 but younger than 21 years when ordered or summoned to appear at a preliminary enquiry, or arrested.

(b) The right to equality

7.41 The second leg of the argument raised by Mr Muntingh concerns the State's

responsibility to ensure and promote reintegration of offenders after conviction and serving their sentences. This in essence requires a consideration of the Constitutional right to equality.

(i) The content of the right to equality

7.42 Section 9 of the Constitution (the right to equality) provides that:

Everyone is equal before the law and has the right to equal protection and benefit of the law.

7.43 The Constitutional Court in *Harksen v Lane* NO²³⁰ set out the stages of an enquiry into a violation of the equality clause as follows:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1) [now s 9(1)]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to 'discrimination'? This requires a two stage analysis:

(b)(i) Firstly, does the differentiation amount to 'discrimination'. If it is on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human being or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2) [now s 9(3) and (4)].

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

7.44 As noted by De Waal et al²³¹, '[a] purposive approach to constitutional interpretation means that section 9 must be read as grounded on a substantive conception of equality'. In

230 1998 (1) SA 300 (CC) at [53].

231 J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* 4ed (2001) 200.

*President of the Republic of South Africa v Hugo*²³² the court held:

We need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. . Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

7.45 The constitutional validity of legislation administered by Government Departments is currently also under investigation in the Commission's project into Statutory Law Revision.²³³ This project focuses on statutes or provisions in statutes that are clearly inconsistent with the right to equality entrenched in section 9 of the Constitution. In practical terms this means infringement of the right to equality includes those statutes or provisions in statutes that:

- Differentiate between people or categories of people, and which are not rationally connected to a legitimate government purpose; or
- unfairly discriminate against people or categories of people on one or more grounds listed in section 9(3) of the Constitution; or
- unfairly discriminate on grounds which impair or have the potential to impair a person's fundamental human dignity as a human being.

7.46 Consequently, a law or a provision in a law which appears, on the face of it, to be neutral and non-discriminatory, but which has or could have discriminatory effect or consequences, has been left to the judicial process. This investigation focuses on the constitutionality of provisions in statutes of South African law, with special attention paid to consonance with section 9 of the Constitution. This investigation also attends to obsolescence or redundancy of provisions. In 2003, Cabinet directed that the highest priority be given to reviewing provisions that would result in discrimination as defined in section 9 of the Constitution, which prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth. The SALRC agreed

232 1997 (4) SA 1 (CC).

233 SA Law Reform Commission, Project 25, Statute Law Review.

that the project should proceed by scrutinising and revising national legislation that discriminates unfairly.²³⁴ However, the section 9 inquiry was limited because it dealt primarily with statutory provisions that were blatantly in conflict with section 9 of the Constitution. This delimitation arose mainly from considerations of time and capacity.

7.47 *Mdodana v Premier of the Eastern Cape and Others*²³⁵ raised some concerns regarding the constitutional validity of several provisions of the Pounds Ordinance, no 18 of 1938. According to the applicant, the Ordinance put in place a scheme that imposed impermissibly sanctions the impoundment and sale of livestock without judicial supervision and unfairly discriminates against the landless. The case therefore considered the right to equality and reference is made to the case in so far as it is relevant for the interpretation of discrimination in terms of section 9 of the Constitution. The applicant, Bension Mphitikezi Mdodana, a blind farmer from Mgcwangele Location, Lady Frere, contended that several sections of the Ordinance are repugnant to the following provisions of the Constitution:

- section 9; which guarantees the right to equality and prohibits unfair discrimination;
- Section 25(1); which prohibits the arbitrary deprivation of property;
- section 33; which guarantees the right to fair administrative action; and
- section 34; which guarantees the right of access to courts or other impartial tribunals.

7.48 Mr Mdodana lived on a small homestead at Buffelsfontein, Lady Frere, from where he conducted his subsistence farming. His socio-economic situation was that he struggled for his existence in an area that was one of the poorest in the country. He and his wife were both unemployed and relied on monthly disability grants in the sum of R1 080 each. Their three children were unemployed, and the Mdodanas were also responsible for their two grandchildren who still attended school. They received a child support grant of R250 for each child which brought the family's total disposable monthly income to a paltry sum of R2 660.

7.49 They owned 90 goats, sheep, cattle and chickens and were dependent on the goats

234 Cathi Albertyn prepared a 'Summary of Equality jurisprudence and Guidelines for assessing the SA Statute Book for Constitutionality against section 9 of the 1996 Constitution', specifically for the SALRC in February 2006 available upon request from pvanwyk@justice.gov.za.

235 1648/10 [2013] ZAECGHC 66 (13 June 2013) <http://www.saflii.org/za/cases/AECGHC/2013/66.html>

to supplement their income. They were thus compelled to sell some of the livestock in order to make ends meet. During May 2010 a relative who looked after his livestock, told him that his goats had gone missing. After an unsuccessful search which lasted several days, he was informed by the villagers that his goats had strayed onto the property of a neighboring farmer, Mr Roy Callaghan, and that they had been taken to the Lukhanji Municipal pound. Mr Mgodana was unable to make contact with Mr Callaghan and instead eventually spoke to the latter's domestic worker who confirmed that the goats had been taken to the municipal pound. When he eventually visited the municipal pound on 13 May 2010, he was told that he had to pay pound fees in the sum of R41 157- 20 to secure the release of his animals. That amount comprised trespass fees, trespass mileage fees, and subsistence and advertising fees. The poundmaster had apparently levied a sum of R14-20 per goat for each day of their impoundment.

7.50 The Court noted that the Ordinance was enacted during a time when there was scant regard for basic human rights. It was therefore not surprising that its language was embarrassingly redolent of an era when the majority of South African citizens were subjected to discriminatory laws which resulted in their social and economic disempowerment. Notwithstanding this, the court noted that there could be little doubt that there still remained a compelling social need for legislation that empowers local authorities to deal with the serious problems caused by unattended animals straying onto public roads and commercial farms.

7.51 The director of the the Lukhanji Municipality (the Fifth Respondent), Gideon Judeel, stated that a substantial portion of the area under the municipality's jurisdiction comprises farm land which is used for livestock farming in particular. Livestock that stray onto public roads posed a serious threat to the safety of motorists. In addition, neglected animals of indifferent breed that stray onto commercial farmland can spread contagious diseases, or cover stud animals which may cause unwanted progeny and resultant economic loss.

7.52 Mr Callaghan stated that the success of a commercial farming venture was dependent on a farmer's ability to obtain maximum production from available grazing, to realise optimum reproduction from breeding livestock and sales, and to limit losses. Unattended livestock that stray onto commercial farmland thus compromised all of these commercial priorities. He has also listed, and described with graphic detail, a plethora of contagious animal diseases.

7.53 Mr Ngcukaitobi, on behalf of applicant, submitted that these impugned provisions unfairly discriminated against the landless. He argued that they thus unjustifiably limit the right to equality guaranteed in terms of section 9 (1) of the Constitution, and accordingly had no place in an open and democratic society based on human dignity, equality and freedom. The municipality conceded that the Ordinance was conceived during a time when legislative authority was supreme. It had accordingly “tempered” enforcement of certain provisions in the spirit of the Constitution, and consequently they did not enforce the aforesaid provisions. Nevertheless, if legislation is unconstitutional for any reason, the court must declare it to be so, and provided that it cannot be saved either by “reading in” or severance, it must be struck down.

7.54 The Court held that the impugned provisions do indeed have disconcerting feudal overtones and are evocative of the regrettable consequences of various laws which have resulted in large scale dispossession of land owned by Africans. Because all the parties were in agreement that they cannot be allowed to stand the court stated:

I will say no more about this issue. Suffice it then to say that in **Zondi** (*supra*), Ngcobo J, in finding that similar provisions in the KwaZulu-Natal Pound Ordinance limit the right to equality guaranteed in terms of section 9(3) of the Constitution and unfairly discriminates against the landless, said the following in this regard (at paragraph 94):

“The alternative qualification for assessment of damages is land ownership. This qualification clearly discriminates against those who are landless. We know that the majority of the landless were, and continue to be, African people who were dispossessed of their land during the apartheid era. The landless are one of the most vulnerable groups.”

And at paragraph 95:

“But the discrimination was not just against the landless; it was against landless black people.”

The learned judge found that the impugned section was consequently “*manifestly and fundamentally racist in its purpose and effect*” (at paragraph 96).

In summary then, apart from section 14 of the Ordinance (which can be read in a manner to ensure consistency with the Constitution) the other impugned provisions can neither be saved by “reading in”, nor can the repugnant words be severed from them without destroying their essential contents, thus rendering them meaningless.

In the event, I consider myself bound by the judgment in **Zondi** (*supra*) where the Constitutional Court held, in respect of similar provisions, that neither “reading in” nor

severance was appropriate. At paragraph 123 of his judgment Ngcobo J stated that:

“A court should be reluctant to read in or sever words from a provision if to do so require the court to engage in the details of law making, a constitutional activity that is assigned to legislatures. Similarly, where curing the defect in the provision would require policy decisions to be made, reading in or severance may not be appropriate. So too where there are a range of options open to the Legislature to cure a defect. This Court should be slow to make choices that are primarily to be made by the Legislature.”

The impugned provisions can therefore in my view not be justified in an open and democratic society based on human rights, equality and freedom. They require fundamental reconsideration by the legislature and cannot be saved either by “reading in” or severance. They therefore do not pass constitutional muster and must accordingly fall.

7.55 In an article Professor Bennett and Mr Pillay²³⁶ explored the validity of the Natal Code and the Code of Zulu Law with reference to the right to equality. They point out that the Natal Code was a product of early colonialism and its counterpart, the KwaZulu Act on the Code of Zulu Law, is a product of the apartheid era. In South Africa’s new constitutional order, they stand out as incongruous elements. Speaking of a similar legacy of the past regime, the Black Administration Act 38 of 1927, Sachs J remarked: ‘It is painful that the Act still survives at all. The concepts on which it was based, the memories it evokes, the language it continues to employ, and the division it still enforces, are antithetical to the society envisaged by the Constitution’.²³⁷ Although the Justice Laws Rationalisation Act 18 of 1996 removed most legislation of this nature, the two Codes were spared. With the introduction of a justiciable Bill of Rights, doubt was cast over the validity of many sections of the Codes, and some, at least, have been repealed. Those encoding the traditional idea of patriarchal authority, for instance, were removed by the Recognition of Customary Marriages Act 120 of 1998, and more amendments will follow if effect is given to the Law Commission’s recommendations for reform of the customary law of intestate succession. They point out that despite these reforms, many of the remaining provisions are at odds with the Bill of Rights.

7.56 In their view, section 9 of the Constitution prohibits only unfair discrimination. The relevant subsections read as follows:

236 *“The Natal and KwaZulu Codes: The case for repeal”* TW Bennett (Professor in the Department of Public Law, University of Cape Town. and A Pillay (Lecturer in the Department of Public Law, University of Cape Town) (2003) 19 SAJHR .

237 *Moseneke v The Master* 2001 (2) SA 18 (CC) para 21.

- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race . . . ethnic or social origin
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

7.57 From these provisions, it follows that a discriminatory law must be considered constitutionally valid if it can be shown to be 'fair'. When the basis for discrimination is a ground listed in section 9(3), however, section 9(5) presumes the law to be unfair. Once unfairness has been shown to exist, a person still has an opportunity to justify the unfair discrimination under section 36 of the Constitution, the general limitation clause. Once discrimination is established, the next step is to decide whether the discrimination is unfair. This inquiry centres on the effect of discrimination on a person's position. This analysis requires reference to the following factors:

- (aa) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage . . .
- (bb) the nature of the provision or power and the purpose sought to be achieved by it . . .
- (cc) with due regard to (aa) and (bb) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

7.58 Professor Bennett and Mr Pillay²³⁸ argue that while section 9 protects 'everyone's right to equality, discrimination against previously disadvantaged persons, or those who are socially vulnerable, is more likely to be unfair, because it exacerbates existing an disadvantage and indignity. With reference to the nature and purpose of the discriminatory law, they point out that the main concern is to establish whether the law is aimed at achieving 'a worthy and important societal goal'. Because the nature and purpose of a discriminatory law arises in the context of unfairness, an applicant must be prepared to

238 TW Bennett (Professor in the Department of Public Law, University of Cape Town. and A Pillay (Lecturer in the Department of Public Law, University of Cape Town) *"The Natal and KwaZulu Codes: The case for repeal"* (2003) 19 SAJHR

argue about the nature and purpose of a law twice. A further enquiry relates to the extent to which individual rights are affected and whether fundamental human dignity is impaired.

7.59 In conclusion, Professor Bennett and Mr Pillay²³⁹ argue that the discrimination and impairment of dignity that flows from enforcement of the Natal Codes cannot be justified by any valuable societal objective. Once this conclusion is reached, it is clear that the law in question discriminates unfairly on the basis of race, ethnicity or citizenship (or a combination of these grounds).

(ii) Limitation of the right to equality

7.60 Professor Bennett and Mr Pillay²⁴⁰ argue that this inquiry entails an argument under section 36 of the Constitution, the general limitation clause. **A right protected in the Bill of Rights may be limited only by a 'law of general application'.** They point out that the Natal Codes would certainly qualify as 'law', for the term has been interpreted widely to include both original and delegated legislation, as well as the common and customary law. They indicate, however that, more pertinent is whether the Codes should be considered to be 'publicly accessible', in the sense that those who are bound must know what is expected of them. Although particular provisions in the Codes may be challenged for being too broad, they are still reasonably certain.

7.61 Professor Bennett and Mr Pillay²⁴¹ argue that **in addition, the law must not arbitrarily target specific or easily ascertainable individuals or groups of individuals. This requirement does not mean that the law has to be uniformly applied across South Africa. The Codes are likely to pass this first leg of the limitation analysis, because the targeting of a specific group cannot be said to be arbitrary: it is based on race, ethnicity and citizenship. The second leg of the limitation analysis balances the purpose sought by the law against the extent to which the Bill of Rights is infringed.**

239 TW Bennett (Professor in the Department of Public Law, University of Cape Town. and A Pillay (Lecturer in the Department of Public Law, University of Cape Town) *"The Natal and KwaZulu Codes: The case for repeal"* (2003) 19 SAJHR.

240 TW Bennett (Professor in the Department of Public Law, University of Cape Town. and A Pillay (Lecturer in the Department of Public Law, University of Cape Town) *"The Natal and KwaZulu Codes: The case for repeal"* (2003) 19 SAJHR.

241 TW Bennett (Professor in the Department of Public Law, University of Cape Town. and A Pillay (Lecturer in the Department of Public Law, University of Cape Town) *"The Natal and KwaZulu Codes: The case for repeal"* (2003) 19 SAJHR.

Professor Bennett and Mr Pillay submit that there is no rational connection between the Codes and the purpose they are supposed to serve. Even if there were, less restrictive means for achieving that purpose are available. In other words, recognition of 'living' customary law adequately serves the purpose of protecting a cultural identity and constitutes a less invasive violation of the right to equality.

7.62 On a balance the right to culture is outweighed in favour of the right to equality. Other possible justifications will suffer a similar fate. Historically, the Natal Code was intended to bring certainty to the administration of justice and the parts of both the Natal and KwaZulu Codes that codify customary law still serve the same purpose. Professor Bennett and Mr Pillay²⁴² point out that it must be appreciated that legal certainty benefits two distinct groups: officials engaged in the administration of justice and the legal subjects themselves. The intention of producing the Natal Code was to benefit the former group, because it was aimed at easing a magistrate's burden in applying customary law. This group is still the principal beneficiary.

7.63 Professor Bennett and Mr Pillay concludes²⁴³ that the emphasis on dignity (although criticised) remains at the centre of any argument seeking to justify discriminatory laws. **Because the Codes apply on grounds offensive to the Constitution and because the subjects of these enactments are not free to escape their application, fundamental human dignity is impaired.** They point out that the Black Administration Act, which has a history and content comparable with the Codes, has been described as 'an egregious apartheid law which anachronistically has survived our transition to a non-racial democracy'. Subordinate legislation passed under the Act generated what has been described as a demeaning and racist system that did not befit a society based on human dignity, equality and freedom. According to them it is unlikely that this impairment to dignity will be found to be justifiable under section 36.

7.64 The Constitutional Court has found administrative and legal convenience to be a

242 TW Bennett (Professor in the Department of Public Law, University of Cape Town. and A Pillay (Lecturer in the Department of Public Law, University of Cape Town) *"The Natal and KwaZulu Codes: The case for repeal"* (2003) 19 SAJHR

243 TW Bennett (Professor in the Department of Public Law, University of Cape Town. and A Pillay (Lecturer in the Department of Public Law, University of Cape Town) *"The Natal and KwaZulu Codes: The case for repeal"* (2003) 19 SAJHR.

reasonable basis for limiting rights,²⁴⁴ although it is still questionable whether this factor can function as a justification on its own. In *Moseneke v The Master*,²⁴⁵ however, the Constitutional Court held that, even if an administrative system held practical advantages for the people bound by it, where that system was rooted in racial discrimination, the dignity of those concerned was severely assailed and the attempt to establish a fair and equitable public administration was undermined. As a result, it seems that considerations of legal certainty and convenience cannot be used as the sole basis on which to justify the Codes when the same enactments are responsible for serious intrusions on fundamental rights and freedoms.

(iii) Section 36 of the Constitution: Limitation of rights

7.65 Limitations of rights enshrined in the Constitution may be found to be compatible with the Constitution if they have a legitimate purpose and are proportional to the goal they aim to achieve. The limitation envisaged in section 36 of the Constitution must be sufficiently important to warrant limiting a constitutionally protected right. Therefore, the limitation must take into account the nature of the right, the importance and the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve its purpose.

7.66 Section 36 of the Constitution provides that:

- (1) The rights of the Bill of Rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic, society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

244 In *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) paras 133-34; 138, for example, a majority of the judges found that there were no less restrictive means for achieving the purpose of preventing drug abuse. Partly because of the immense administrative difficulties for the state, they rejected a suggestion that Rastafari be identified by permits, and then, as permit-holders, be allowed to use cannabis.

245 TW Bennett (Professor in the Department of Public Law, University of Cape Town. and A Pillay (Lecturer in the Department of Public Law, University of Cape Town) 2001 (2) SA 18 (CC) para 20 ff.

7.67 In *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others*²⁴⁶ the Constitutional court considered the constitutionality of the provisions in the Magistrates' Court Act dealing with imprisonment upon failing to comply with a court order to pay a debt. The court found that, with effect from the date of the order, the committal or continuing imprisonment of any judgment debtor in terms of section 65F or s 65G was invalid. The decision of the Court was based on the following considerations:

Per Kriegler J; Chaskalson P, Mahomed DP, Ackermann J, Didcott J, Kentridge AJ, Langa J, Madala J, Mokgoro J, O'Regan J and Sachs J concurring: To determine whether the right provided for in s 11(1) of the Constitution (ie that '(e)very person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial') is limited by the various provisions of ss 65A-65M of the Magistrates' Courts Act 1944 it really is not necessary to determine the outer boundaries of the right. Nor is it necessary to examine the philosophical foundation or the precise content of the right. Certainly to put someone in prison is a limitation of that person's right to freedom. To do so without any criminal charge being levelled or any trial being held is manifestly a radical encroachment upon such right. (Paragraph [10] at 642C-D read with paras [7] and [8] at 641B-G.)

Accepting that the goal of ss 65A-65M of the Act is to provide a mechanism for the enforcement of judgment debts and that such goal is a legitimate and reasonable governmental objective, the question is whether the means to achieve the goal are reasonable. The answer is clearly in the negative. (Paragraph [12] at 643B-C.) The fundamental reason why the means are not reasonable is because the provisions are **overbroad**. The sanction of imprisonment is ostensibly aimed at the debtor who will not pay. But it is unreasonable in that it also strikes at those who cannot pay and simply fail to prove this at a hearing, often due to negative circumstances created by the provisions themselves. There are seven distinct reasons why the provisions are indefensible: **(i) They allow persons to be imprisoned without having actual notice of either the original judgment or of the hearing. It is not only theoretically possible but also quite possible in practice that the debtor's first notice of the case against him is when the warrant of committal is executed. In terms of the procedure permitted by the Act and the Rules promulgated thereunder, there need not necessarily be personal service of any process prior to that. (ii) Even if a person has notice of the hearing, he can be imprisoned without knowing of the possible defences available to him and accordingly without any attempt to advance any of them. The so-called notice to show cause issued pursuant to s 65A does not spell out what the defences are or how they could be established. (iii) The burden cast on the debtor with regard to inability to pay, although possibly defensible in principle as pertaining to matters peculiarly within his knowledge, is so widely couched that persons genuinely unable to pay are nevertheless struck. (iv) The provisions of s 65F(3)(c), which spell out what the debtor must prove, are**

246 1995 (4) SA 631 (CC).

not only unreasonably wide, but also unreasonably punitive. Whatever may be said about a debtor who wilfully frustrates payment (s 65F(3)(c)(i) and (ii)), the nakedly punitive retribution inherent in the provisions of s 65F(3)(c)(iii) and (iv) cannot be justified. (v) The provisions allow a person to be imprisoned without knowing that he has a burden to prove her or his defence or how to discharge such burden. It could possibly be contended that the magistrate ought to explain a debtor's rights and duties to an undefended layman, and would probably do so, but the fact remains that there is no express obligation on the magistrate to do so. (vi) It is hardly defensible to treat a civil judgment debtor more harshly than a criminal. The latter is entitled in terms of s 25(3) of the Constitution to a fair trial with procedural safeguards, including the right to legal assistance at public expense if justice so requires. The debtors, who face months of imprisonment, must fend for themselves as best they can. (vii) The procedure makes no provision for recourse by the debtor to the magistrate or higher authority once an order for committal has been made...

...

In addition to concurring in the judgment of Kriegler J, Didcott J (Langa J concurring) identified **'four draconian effects' of the provisions in issue which rendered the limitation provisions of s 33(1) of the Constitution inapplicable.** (Paragraph [21] at 647E/F-F), read with para [20] at 647A-C.) Firstly, the legislation in question did not insist on the exhaustion by the creditor of his lesser remedies before he threw the book of prospective imprisonment at the debtor. (Paragraph [22] at 647F-F/G.) **The second harsh effect of the legislation was that it allowed the debtor to be imprisoned without a hearing.** The notice issued by the creditor, though served in accordance with the Rules of the Magistrates' Courts, might have been left with somebody else at one of the places permitted for its service and never have come to the debtor's personal attention. Yet the statute expressly empowered the magistrate to sentence the debtor to imprisonment in his absence, a fate never suffered by convicted criminals. (Paragraph [23] at 647J-648A and C.) The third obnoxious effect of the legislation related to the absence of the debtor from court, even when he had received the notice and the preceding documents. An explanation of such absence from court might be the debtor's ignorance of the various defences that were available to him in answering it, in particular the important defence of a poverty afflicting him which was not attributable to his own improvidence. The debtor might labour under the misapprehension that no excuse for his failure to satisfy the judgment would be acceptable, that his imprisonment was an inescapable consequence of the default to which he had to resign himself and that his attendance at the proceedings could not therefore accomplish anything, for the notice did not inform him of any such excuse, nor was it required to do so. (Paragraph [24] at 648C/D-E/F.) The fourth ugly feature of the legislation that would confront the debtor if, on the other hand, he did appear before the magistrate was the *onus* then resting on him to prove that he could not pay the judgment debt and bore no blame for his impecuniosity on various grounds which were listed in s 65F(3)(c) of the Act. The debtor might not manage to establish those facts, although they were the truth, especially when his very poverty had prevented him from hiring a lawyer and he had had to fend for himself in an unfamiliar environment, bewildered by procedures and a forensic methodology to which he was a stranger. The result might well be, and must often have been, that someone who really could not pay, through no fault of his own, went to gaol for his failure to do so. (Paragraph [25] at 648F-G/H.)

Didcott J went on to hold that the interests of creditors were plainly relevant to any

constitutional appraisal of the provisions with the effects set out above, that credit played an important part in the modern management of commerce, **that the rights of creditors to recover the debts that were owed to them should command the Court's respect and that the enforcement of such rights was the legitimate business of South African law.** That did not mean, however, that the interests of creditors should be allowed to ride roughshod over the rights of debtors. The legislation in question permitted that most egregiously in the four respects mentioned above. The legislation was unreasonable and unjustifiable on those cumulatively oppressive scores. Its clear invasion of the right to personal freedom which s 11(1) of the Constitution guaranteed to debtors like everyone else was therefore not countenanced by s 33(1). (Paragraph [26] at 648H-H/I and 648I-649A.)... The bad parts of the statute were not judicially severable from the rest of its provisions that dealt with imprisonment and the Court was left with no option but to declare those provisions as a whole to be constitutionally invalid on account of their **objectionable overbreadth.**

Sachs J (Mokgoro J concurring) concurred in the judgments of Kriegler J and Didcott J, but held that the contention of the Association of Law Societies that the Court should use its powers to keep the committal proceedings provided for in ss 65A-65M of the Magistrates' Courts Act 1944 alive pending rectification thereof by the Legislature required fuller analysis of the institution of civil imprisonment. (Paragraph [41] at 652G-H.)

Per Sachs J: On any analysis, using any approach, there can be no doubt that committing someone to prison involves a severe curtailment of that person's freedom and personal security. Indeed, the very purpose of committal is to limit the freedom of the person concerned. Given the manifest and substantial invasion of personal freedom thus involved, the real issue that the Court has to decide is whether such infringement can be justified in terms of the general limitations on rights permitted by s 33 of the Constitution. (Paragraph [44] at 655A-B/C.)

The only conclusion that can be drawn from international instruments (the American Declaration of the Rights and Duties of Man, the American Convention of Human Rights, the United Nations International Covenant on Civil and Political Rights, Protocol 4 of the European Convention and the Explanatory Report on the Fourth Protocol to the European Convention) is that they strongly repudiate the core element of the institution of civil imprisonment, namely the locking up of people merely because they fail to pay contractual debts, but that there is a penumbra relating to money payments in which imprisonment can be used in appropriately defined circumstances. (Paragraph [54] at 661B-C.)

When the South African Law Commission says that committal of judgment debtors is an anomaly that cannot be justified and should be abolished; when it is common cause that there is a general international move away from imprisonment for civil debt, of which the present committal proceedings in issue are an adapted relic; when such imprisonment has been abolished in South Africa, save for its contested form as contempt of court in the magistrate's court; when the provisions concerned have already been interpreted by the Courts as restrictively as possible, without their constitutionally offensive core being eviscerated; when other tried and tested methods exist for recovery of debt from those in a position to pay; when the violation of the fundamental right to personal freedom is manifest, and the procedures used must inevitably possess a summary character if they are to be economically worthwhile to the creditor, then the very institution of civil

imprisonment, however it may be described and however well directed its procedures might be, must in itself be regarded as highly questionable and not a compelling claimant for survival. The Court should accordingly not exercise its discretion under s 98(5) of the Constitution in favour of keeping the institution of imprisonment in ss 65A-65M of the Magistrates' Courts Act alive. (Paragraphs [70] and [71] at 671H-672C.)

7.68 In conclusion it is submitted that the justification for the expungement legislation should be considered in the light of state's constitutional obligations to protect society and the accompanying responsibilities with regard to provisions in legislation giving effect to its duties in terms of the effectiveness of the criminal justice system as outlined above versus the right to equality dignity of convicted offenders and the justification or not for limitations of the right to equality.

(d) Expungement and the right to protection and equality and dignity – the State v Lawson in Ohio

7.69 Before turning to the South African expungement legislation it is worthwhile to consider how the justification of expungement legislation has been dealt with by the courts in the USA. For purpose of this investigation it is important to note the interpretation of the justification for the expungement legislation and how the court weighed the competing human rights, ie the right to protection and the right to equality in the case of *State v. Lawson*²⁴⁷ in the state of Ohio in the USA. The court considered the justification of Ohio expungement laws and in particular whether or not the exclusion of expungement of the offences of menacing by stalking with trespass and menacing by stalking as an individual with a protection order, violated the Constitutional equal protection. The Court based its finding on clause. R.C. 2953.36(C), which specifically prohibits expungement of violations of an "offense of violence" when the offence is a misdemeanor of the first degree or a felony. An "Offense of violence" is a term defined for purposes of the Ohio Revised Code in R.C. 2901.01(A)(9)(a) and specifically includes violations of R.C. 2903.21 and 2903.211. The court²⁴⁸ rejected appellant's argument that the statutes precluding expungement of her conviction were unconstitutional because no legitimate governmental purpose is served by denying expungement of stalking convictions not involving physical violence.

247 2013-Ohio-2111. in the Court of Appeals of Ohio Tenth Appellate District, No. 12AP-771(C.P.C. No. 11EP-200).

248 Citing *State v. Davenport*, 116 Ohio App.3d 6 (12th Dist.1996).

7.70 In the case the appellant, Patricia Lawson, appealed from a judgment of the Franklin County Court of Common Pleas denying her application filed for sealing of the record (expungement) of two 2006 felony stalking convictions and a first-degree misdemeanor offence. On November 1, 2006, the trial court entered judgment convicting appellant of menacing by stalking with trespass and menacing by stalking an individual with a protection order (in violation of R.C. 2903.211). These two criminal offences were third-degree felonies. The court also convicted appellant of violating a protection order while committing menacing by stalking without trespass (in violation of R.C. 2903.21, a first-degree misdemeanor).²⁴⁹

7.71 On 11 March 2011 the appellant filed her application for expungement as authorized by the relevant legislation.²⁵⁰ On May 26, 2011, the trial court denied her application, and appellant appealed. On remand, the trial court held a hearing on the application for expungement, which both appellant and her counsel attended. After considering the evidence, the trial court found that appellant had met all the statutory requirements for expungement,²⁵¹ but found that appellant was nevertheless ineligible for expungement. The court reached this conclusion because a different statute²⁵² specifically prohibited expungement of violations of an "offense of violence" when the offence is a misdemeanor of the first degree or a felony. "Offense of violence" is a term defined for purposes of the Ohio Revised Code²⁵³ and specifically includes violations of R.C. 2903.21 and 2903.211. The court²⁵⁴ also rejected appellant's argument that the statutes precluding expungement of her conviction were unconstitutional because no legitimate governmental purpose is served by denying expungement of stalking convictions not involving physical violence. The trial court therefore denied appellant's application.

7.72 The appellant appealed and asserted a single assignment of error in the case in that the appellant did not commit an offence of violence and the definition of offence of violence is overly broad and discriminates between non-violent offenders, all contrary to the Fifth and

249 The conviction was affirmed in No. 12AP-771 2. *State v. Lawson*, 10th Dist. No. 06AP-1112, 2007-Ohio-2656.

250 Cite as R.C. § 2953.32(A). (<http://codes.ohio.gov/orc/2953>).

251 As enumerated in R.C. 2953.32(C)(1)(a) to (e).

252 R.C. 2953.36(C).

253 In R.C. 2901.01(A)(9)(a) and specifically includes violations of R.C. 2903.21 and 2903.211.

254 Citing *State v. Davenport*, 116 Ohio App.3d 6 (12th Dist.1996).

Fourteenth Amendments to the U.S. Constitution and the Ohio Constitution.²⁵⁵ It was argued that the Ohio Revised Code²⁵⁶ established a general statutory framework for the expungement of criminal records and pursuant to the Code²⁵⁷ a first offender convicted of a felony may apply for the sealing of the conviction record three years after the offender's final discharge. Pursuant to the Revised Code²⁵⁸ **the court in which the application was filed must set a date for a hearing and notify the prosecutor of the criminal case, who may object to the expungement.** The court must direct probation officers to investigate the applicant and provide the court with written reports. The trial court must then determine whether a number of specified criteria have been met. These criteria included *inter alia* that **the applicant has been rehabilitated, that no criminal proceeding is pending against the applicant and that the interests of the applicant in having the records sealed are not outweighed by any legitimate governmental needs to maintain those records**²⁵⁹

7.73 In the case the trial court found that although the appellant met all the required criteria in the Revised Code for the sealing of the criminal case, it nevertheless denied appellant's application and based its conclusion on section 2953.36(C) of the Ohio Revised Code which precluded expungement. That section provided that sections 2953.31 to 2953.35 of the Revised Code do not apply to any of the following, namely *convictions of an offence of violence when the offence is a misdemeanor of the first degree or a felony.*

7.74 The term "offense of violence" is not defined in the statute²⁶⁰ in the sections governing expungement. However another section in the Code²⁶¹ provides a definition of the term for use in the Ohio Revised Code, and that definition includes the offences of which appellant was convicted. When applying section 2953.36(C) of the Revised Code the Court used the definition of "offense of violence" provided in R.C. 2901.01, as follows:

- (A) As used in the Revised Code:
- (9) "Offense of violence" means any of the following:
- (a) A violation of section ... 2903.21, 2903.211... of the Revised Code.

7.75 Consistent with this statutory text, the Court noted that in two prior cases the Court

255 Article I, Sections 1, 2 and 10.
256 R.C. 2953.31-2953.36.
257 R.C. 2953.32(A)(1).
258 2953.32(B).
259 R.C. 2953.32(C)(2).
260 (R.C. 2953.31 to 2953.36.)
261 R.C. 2901.01.

held that "menacing by stalking is an offense of violence for purposes of the exclusion set forth in Ohio Revised Code. 2953.36(C)," and that records of convictions of menacing by stalking may not be expunged.²⁶² In both these cases, the Court concluded that there is "[no] distinction between the cause "physical harm" and the "cause mental distress" forms of the offence of menacing by stalking. Moreover, the Court noted that R.C. 2901.01(A)(9)(a) expressly included a violation of the Ohio Revised Code 2903.211 as an 'offense of violence,' and **did not differentiate between conduct causing physical harm and conduct causing mental distress.** Since the legislature did not make that distinction the Court concluded that it could not do so either.

7.76 The appellant did not dispute this application of the statutes and that the Court's precedent precluded the court from expunging her convictions. However, she argued that it was improper for the General Assembly to include stalking within the statutory definition of "offense of violence" and that the expungement statutes were therefore unconstitutional when applied to persons convicted of stalking offences not causing physical harm. She contended that the application of these statutes to her case violates due process, equal protection, or both and in the cases referred to by the Court the Court did not discuss the constitutionality of exempting persons convicted of stalking offences from the benefits of expungement.

7.77 The Court started its analysis of the argument **by recognizing that expungement is not a fundamental right, but rather "an act of grace created by the state," and as such is "a privilege, not a right."** (emphasis added).²⁶³ The Court pointed out that, as correctly observed by the Fifth District Court of Appeals, the expungement statute is remedial and not substantive in nature and a party did not have a vested right in a remedial remedy.²⁶⁴ The Court noted that, with reference to the *Moorehart* case, the court found that the application of the expungement statutes to an offender who had been convicted of felonious assault did not violate his right to due process or equal protection or other constitutional safeguards.

7.78 The Court noted that **because expungement is an act of grace,** the General

262 (*State v. Glass*, 10th Dist. No. 10AP-155, 2010-Ohio-4954, at page 5 citing *State v. Miller* 10th Dist. No. 06AP-192, 2006-Ohio-5954).

263 (*Miller*, quoting *State v. Simon*, 87 Ohio St.3d 531, 533 (2000), and *State v. Hamilton*, 75 Ohio St.3d 636, 639 (1996)).

264 (*State v. Moorehart*, 5th Dist. No. 2008-CA-0072, 2009-Ohio-2844, 9).

Assembly **may determine that records of certain offences should not be sealed.** The legislature chose to exclude the stalking offences of which appellant was convicted from the possibility of expungement. That choice was therefore not irrational.

7.79 In support of her application the appellant cited a dictionary definition of the word violence as "use of *physical force* so as to damage or injure." The Court was of the view that it was not relevant to the question whether stalking is, or is not violent as that word was used in a colloquial sense. While the Court acknowledged that general definitions and usage may be of value in determining the intent of the General Assembly when a statute is deemed ambiguous, the Court noted that it previously recognized that the relevant statute was not ambiguous and needs no interpretation.²⁶⁵ The Court was of the view that had the General Assembly not specifically defined the term "offense of violence" for purposes of interpreting the Revised Code, appellant might have had a credible argument that stalking should not be considered to be an offence of violence. The court referred to the case of *U.S. v. Mohr*²⁶⁶ where the Court found stalking to be a "crime of violence" for purposes of federal sentencing guidelines even though the relevant state stalking statute did not include as an element the use, attempted use, or threatened use, of force.

7.80 The Court noted that dictionary definitions of the word "violence" that include references to the use of physical force do not supersede or invalidate the wholly unambiguous specific statutory definition of "offense of violence" expressly contained in R.C. 2901.01(A)(9)(a). Therefore the Court held that read together, R.C. 2901.01(A)(9)(a) and 2953.36(C) were not unconstitutionally vague nor overbroad in violation of due process.

7.81 Similarly the Court rejected appellant's argument that the statutory expungement framework violated the equal protection by excluding from the benefits of expungement individuals who have been convicted of stalking violations. Appellant argued that the General Assembly has authorized the expungement of some other offences which do include elements of physical violence and also precluded the expungement of some other offences that include elements of physical violence. The Court noted that those circumstances do not compel the conclusion that the statutes violate equal protection.

265 See (*Miller* at page 10) quoted in note 40.

266 *U.S. v. Mohr*, 554 F.3d 604 (2d Cir.2010).

7.82 Appellant did not assert that expungement is a fundamental right or that she is in a suspect class. Accordingly the Court **used a rational-basis test** in reviewing the General Assembly's determination that the offences of which she was convicted may not be expunged.²⁶⁷ The Court note that **under this test a challenged statute will be upheld if the classifications it creates bear a rational relationship to a legitimate government interest or are grounded on a reasonable justification, even if the classifications are not precise. The expungement statutes therefore, will survive appellant's equal protection challenge if they bear a "rational relationship to a legitimate government interest."** The Ohio Code²⁶⁸ classified offenders and determines their eligibility for expungement based upon the nature of the offence they were convicted of. Therefore, the statute need only be rationally related to some legitimate governmental interest in order to survive appellant's equal protection challenge because it did not implicate any suspect classification or fundamental right.

7.83 The legislature (General Assembly) had the authority to enact statutes to promote the state's safety and welfare, which is a legitimate governmental interest. The state contended that given the nature of and seriousness of offences involving the commission of or threat of physical harm to person or property, the legislature's decision to maintain public access to those records will protect Ohio citizens. The Court held that a rational relationship existed between the state's legitimate governmental interest in promoting the state's safety and welfare and making available to the public the criminal records of persons who have engaged in past harassing and menacing conduct where that conduct causes mental distress.

7.84 The Court held that equal protection requires that similarly situated persons be treated similarly under the law. However, the Court noted that the "Equal Protection Clause" does not require things which are different in fact ... to be treated in law as though they were the same.²⁶⁹ The Court was of the view that a rational-basis review in equal protection analysis was not a license for courts to judge the wisdom, fairness, or logic of legislative choices.²⁷⁰ The Court noted that a victim of stalking who suffers mental distress

267 *Stetter v. R.J. Corman Derailment Servs, L.L.C.*, 125 Ohio St.3d 280, 2010- Ohio-1029, 80.

268 App.3d 12 (R.C. 2953.36).

269 *GTE North, Inc. v. Zaino*, 96 Ohio St.3d 9 (Feb. 27, 2002), 22, quoting *Tigner v Texas*, 310 U.S. 141,147 (1940).

270 *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993), quoting *FCC v. Beach Communications, Inc.*, 508 U.S.

may suffer as much harm, or more harm, than a victim who suffers physical harm and therefore rejected appellant's argument that the General Assembly could not differentiate within the class of criminal offenders by making expungement unavailable to persons who have engaged in stalking and menacing behavior while making expungement available to persons convicted of other crimes, whether involving physical violence or not. It was of no consequence that the General Assembly codified that policy determination by including stalking offences within the Revised Code²⁷¹ definition of offence of violence. The appellant was therefore not deprived of equal protection by the application of R.C. 2953.36 in her case, as further clarified by the definition of "offense of violence" contained within R.C. 2901.01(A)(9)(a).

EVALUATION OF THE LEGISLATION ENABLING EXPUNGEMENT IN SOUTH AFRICA

7.85 When considering the expungement legislation and the competing constitutional rights to protection and dignity and equality and its impact on the prescribed administrative process for expungement where a state employee is designated to approve expungements, the views of the Constitutional Court in determining the liability of state employees is of particular importance as indicated above when considering the state's liability for actions of its employees impacting on victims of crime. In terms of both the CPA and the CJA the approval of expungements is given by the Director-General of the Department of Justice and Constitutional Development. The legislation furthermore prescribes an administrative application process and outlines the conditions which must be met before expungements are approved. Although the state's liability considered in the constitutional court cases refer to delictual liability, it is submitted the relevance to the expungement legislation is to be found in the exercise of the duties imposed by the legislation in approving expungements and the test applied by the courts as to when and under which circumstances the exercise of the duty to approve expungements in terms of the current legislative requirements. would not conform to the constitutional requirements and could lead to liability of the state. It is furthermore submitted that it provides assistance in determining whether or not the provisions of the current legislation meet constitutional requirements and can be justified on a rational basis in terms of the limitation clause contained in section 36 of the Constitution.

271 307, 313 (1993).
2901.01(A)(9)(a).

(a) Constitutional and legislative provisions guiding the interpretation of the expungement legislation

7.86 For purpose of evaluation of the impact of relevant constitutional principles and constitutional requirements as outlined by the Courts must be considered. In the first instance the following guiding principles as extracted from the case law discussed above are relevant:

- (i) **The Constitution places an obligation on the organs of state, through legislative and other measures, to ensure the impartiality, independence, dignity, accessibility and effectiveness of the courts. The fact that reference is made to the *effectiveness* of the courts means that provision must be made to ensure this functioning, which further means that structures must be created to bring about this effectiveness, if they do not exist.**
- (ii) **In doing so national legislation (for example the CAA, the CJA, the Witness Protection Act, the Domestic Violence Act and the CPA) give effect to constitutional rights applicable to all citizens, but also includes specific provisions relevant to the protection of society. This is reflected in the relevant prescripts on the treatment of victims of crime and legislative provisions giving effect to principles contained in International Protocols relevant to victims of crime which were endorsed by government, for example, the right to be treated with dignity and respect, the right to security of the person and the right to protection.**
- (iii) **The CAA has, for example, provisions in terms of which certain services must be provided to certain victims of sexual offences to minimise or eliminate secondary traumatising, including affording a victim of certain sexual offences. This includes the right to require that the alleged perpetrator be tested for his or her HIV status, the right to receive Post Exposure Prophylaxis in certain circumstances and making provision for the adoption of a national policy framework regulating all matters in the CAA. This also includes the manner in which sexual offences and related matters must be dealt with uniformly in a co-ordinated and sensitive manner by all Government departments and**

institutions and the issuing of national directives to be followed by the law enforcement agencies the national prosecuting authority and health care practitioners to guide the implementation.

- (iv) In addition, constitutional provisions dealing with the establishment of the Police Services and the Courts are relevant for purpose of determining the effectiveness of the criminal justice. It is therefore also relevant to the treatment of victims of crime and the protection of society, for example, the SA Police Services is the foremost agency established to detect and investigate crime and bears the primary responsibility to protect women and children against the prevalent plague of violent crimes. National legislation giving effect to relevant provisions in the Constitution was therefore adopted in the establishment of the Police Services to give effect to these principles.
- (v) So too, with reference to the Courts, the Courts are bound by the Constitution and the Bill of Rights, and when they perform their functions, they are obliged, through additional legislative and other measures, to ensure their impartiality, independence, dignity, accessibility and effective functioning. This include the responsibility, with reference to particular crimes violating the fundamental rights of women and girl-children, to ensure that the rights of women and children in particular are not made hollow by actual or threatened sexual violence.
- (vi) The CPA contains specific provisions aimed at protecting society in that it contains provisions dealing with sentencing options, provisions dealing with the criminal record of an accused and provisions dealing with the proof of previous convictions. In this regard the courts have a particular responsibility with reference to the criminal record of an offender and this influences state's responsibility in dealing with the criminal record of an offender in its duty to protect society. Section 271 provides that previous convictions may be proved and the prosecution may, after an accused has been convicted, but before sentence has been imposed, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused. If the accused admits such previous convictions or such previous

conviction is proved against the accused, the section provides that the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted.

- (vii) Section 286 of the CPA provides for the declaration of a person as a habitual criminal (a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the person habitually commits offences and that the community should be protected against him, declare such person a habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which he is convicted.) Again, with reference to an accused's criminal record the courts have a duty to protect society. Section 286A of the CPA provides for the declaration of a person as a dangerous criminal. It provides that a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him, declare him a dangerous criminal. A convicted person's criminal record is of particular importance when a court is considering imposing a sentence in terms of section 286 and 286A. These sentencing options are in particular aimed at the protection of society.
- (viii) The CJA is primarily aimed at dealing with children (under the age of 18 years) coming into conflict with the law. The Director of Public Prosecutions may, in accordance with directives issued by the National Director of Public Prosecutions, direct that a matter be dealt with in accordance with the CJA if the person concerned was a child at the time of the alleged commission of the offence, or was older than 18 but younger than 21 years when ordered or summoned to appear at a preliminary enquiry, or arrested.

7.87 Secondly, the guiding principles, as outlined by the Courts with regard to the relevant constitutional rights under consideration, are the two competing rights to protection and the right to equality, having due regard to the application of limitation clause in section 36 of the Constitution. It is submitted that in the evaluation process the first question to be answered is

whether or not the expungement legislation allowing certain categories of persons (those with a criminal record as provided for in the legislation) to have their criminal records expunged, (if they comply with certain criteria) whilst the criminal records and convictions of others do not qualify for an expungement, amounts to a limitation of the right to equality. In order to determine whether the right to equality has been breached the stages of the enquiry has been set out as follows by the Constitutional Court in *In Harksen v Lane* NO²⁷²

- (i) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1) [now s 9(1)]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (ii) Does the differentiation amount to 'discrimination'? This requires a two stage analysis:
 - (aa) Firstly, does the differentiation amount to 'discrimination'. If it is on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human being or to affect them adversely in a comparably serious manner.
 - (bb) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2) [now s 9(3) and (4)].
- (iii) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.
- (iv) The conclusion is inevitable that, applying the above criteria, the expungement legislation allows for certain categories of persons (those with a criminal record as provided for in the legislation) to have their records expunged, (if they comply with certain criteria) whilst the criminal records and convictions of others do not qualify for an expungement.
- (v) Once this has been determined the next stage of the enquiry is to determine whether or not the differentiation can be justified in terms of the limitation clause in the Constitution.
- (vi) Section 36 of the Constitution provides that the rights of the Bill of Rights may

272 1998 (1) SA 300 (CC) at [53].

be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (aa) limitations of rights enshrined in the Constitution may be found to be compatible with the Constitution if they have a legitimate purpose and are proportional to the goal they aim to achieve (a determination whether or not the legislation bears a rational connection to a legitimate government purpose);
- (bb) consideration of the fact that even if it does bear a rational connection, it might nevertheless amount to discrimination;
- (cc) the limitation must be sufficiently important to warrant limiting a constitutionally protected right;
- (dd) the limitation must take into account the nature of the right, the importance and the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve its purpose;
- (ee) even if the goal of the legislation is accepted as legitimate and a reasonable governmental objective, the question is **whether the means to achieve the goal are reasonable**; and
- (ff) a fundamental reason why the means may not be reasonable is because the provisions are **overbroad** and the provisions may have draconian effects rendering the limitation clause inapplicable.²⁷³

(vi) Applying the test outlined above whether or not the expungement legislation represents a legitimate purpose it is submitted that legislature has the authority to enact statutes to promote the state's safety and welfare, which is a legitimate governmental interest.

(vii) Using the rational-basis test in reviewing the legislative provisions determining the offences in respect of which a convicted person may apply for

273 *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others.*

an expungement and those which do not qualify for an expungement it is submitted that the classification of the offences, on face value, represent a rational relationship to a legitimate government purpose. However, having regard to the differences in the CJA (using two pre-determined lists (Schedules 1 and 2) of offences in respect of which an expungement may be approved after a period of 5 and 10 years respectively and the provisions in the CPA (a list of sentences in respect of which expungement of a criminal record can be expunged after the time lapse of 10 years), it is submitted that there appears to be a huge difference between being eligible for expungement of a criminal record as a juvenile offender and being eligible for as an adult offender. The particular provisions and problem areas will be highlighted below.

- **Under the rational basis test, a challenged statute will be upheld if the classifications it creates bear a rational relationship to a legitimate government interest or are grounded on a reasonable justification, even if the classifications are not precise;**
- **Expungement statutes will survive an equal protection challenge if they bear a "rational relationship to a legitimate government interest;**
- **the relevant expungement classifies offenders and determines their eligibility for expungement based upon the nature of the offence they were convicted of;**
- **the legislature has the authority to enact statutes to promote the state's safety and welfare, which is a legitimate governmental interest;**
- **given the nature of and seriousness of offences involving the commission of or threat of physical harm to person or property, the legislature therefore has authority to decide to maintain public access to those records will protect citizens;**

- whether or not a rational relationship exists between the state's legitimate governmental interest in promoting the state's safety and welfare and making available to the public the criminal records of persons who have engaged in past criminal behaviour, therefore depends on the nature of the offences qualifying for expungement (in respect of juvenile offenders) and the nature of the sentences imposed as qualifying criteria in respect of adult offenders, the process applied and the qualifying criteria for expungement. Determining a list of offences or identifying the offences with reference to the sentence imposed, on face value, appears to be legitimate or a rational approach to identify the qualifying criteria. However, the enquiry does not end here since, in the final analysis, a fundamental reason why the means may not be reasonable is because the provisions may be **overbroad** and the provisions may have draconian effects rendering the limitation clause inapplicable.²⁷⁴

(b) Applying the above criteria to the expungement legislation

7.88 In order to determine whether or not the expungement legislation in South Africa, the CJA of 2008, and the CPA of 1977 as amended meet the criteria above it is submitted that the provisions should be measured against the limitation clause in the Constitution as well as with reference to particular provisions of the legislation itself having due regard to the state's Constitutional obligations as well as the relevant rights of the convicted offender's as interpreted by the Courts:

7.89 In *F v Minister of Safety and Security*²⁷⁵ the case raised the question whether the Minister of Safety and Security should be held vicariously liable for damages arising from the brutal rape of a 13-year-old girl by a policeman who was on standby duty (therefore off duty) in a typical so-called deviation case covered by the common law. **In the determination of the bounds of vicarious liability of the State**, the Court noted that it is an objective test which requires consideration of the State's constitutional obligations including:

274 *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others.*

275 2012 (1) SA 536 (CC).

- (i) The State has a general duty to protect members of the public from violations of their constitutional rights. In grappling with the question of the State's **vicarious liability, the constitutional obligations to prevent crime and to protect members of the public, particularly the vulnerable, must enjoy some prominence. The court noted that these obligations, as well as the constitutional rights of the complainant are the prism through which this enquiry should be conducted.**
- (ii) The State's constitutional obligation to respect, protect and promote the citizen's right to dignity and to freedom and security of the person would have to be taken into account.
- (iii) The court noted that equally relevant was the State's establishment of a police service for the efficient execution of its constitutional obligations to prevent combat and investigate crime, to protect and secure the **inhabitants of the Republic and their property, and to uphold and enforce the law. This is determined with reference to provisions in the Constitution relevant to the establishment of the SAPS, relevant International Instruments endorsed by government and national legislation relevant to the establishment of the SAPS because it deals with the State's obligations in cases of a particular category of crime.**
- (iv) **The Constitution places an obligation on the organs of state, through legislative and other measures, to ensure the impartiality, independence, dignity, accessibility and effectiveness of the courts. The fact that reference is made to the *effectiveness* of the courts means that provision must be made to ensure this functioning, which further means that structures must be created to bring about this effectiveness, if they do not exist.**
- (v) In doing so national legislation (for example the CAA, the CJA, the Witness Protection Act, the Domestic Violence Act and the Criminal Procedure Act (CPA), gives effect to constitutional rights applicable to

all citizens, but also includes specific provisions relevant to the treatment of victims and provisions giving effect to principles contained in International Protocols relevant to victims of crime which were endorsed by government, for example, the right to be treated with dignity and respect, the right to security of the person and the right to protection.

- (vi) The CAA, has, for example, provisions in terms of which certain services must be provided to certain victims of sexual offences, inter alia, to minimise or, as far as possible, eliminate secondary traumatisation, including affording a victim of certain sexual offences the right to require that the alleged perpetrator be tested for his or her HIV status and the right to receive Post Exposure Prophylaxis in certain circumstances and making provision for the adoption of a national policy framework regulating all matters in this Act, including the manner in which sexual offences and related matters must be dealt with uniformly, in a co-ordinated and sensitive manner, by all Government departments and institutions and the issuing of national instructions and directives to be followed by the law enforcement agencies, the national prosecuting authority and health care practitioners to guide the implementation.
- (vii) In addition, constitutional provisions dealing with the establishment of the Police Services and the Courts are relevant for purpose of determining the effectiveness of the criminal justice and are therefore also relevant to the treatment of victims of crime and the protection of society, for example, the SA Police Services is the foremost agency established to detect and investigate crime and bears the primary responsibility to protect women and children against the prevalent plague of violent crimes. National legislation and relevant provisions in the Constitution adopted in the establishment of the Police Services, give effect to these principles.
- (viii) So too, with reference to the Courts, the Courts are bound by the Constitution and the Bill of Rights, and when they perform their

functions, they are obliged, through additional legislative and other measures, to ensure their impartiality, independence, dignity, accessibility and effective functioning. This include, for example, the responsibility, with reference to particular crimes violating the fundamental rights of women and girl-children to ensure that the rights of women and children in particular are not made hollow by actual or threatened sexual violence.

- (ix) The CPA itself contains specific provisions aimed at protecting society and the role of the prosecution in sentencing (adult offenders) in that it makes provision for sentencing options and provisions dealing with the criminal record of an accused and the proof of previous convictions. In this regard the prosecution and the courts have a particular responsibility with reference to the criminal record of an offender and this impact on government's responsibility in dealing with the criminal record of an offender in its duty to protect society. Section 271 provides that previous convictions may be proved in that the prosecution may, after an accused has been convicted, but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused and if the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted.
- (x) Section 286 provides for the declaration of a person as a habitual criminal (a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person habitually commits offences and that the community should be protected against him, declare him an habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which he is convicted.) Again, with reference to an accused's criminal record the courts have a duty to protect society.
- (xi) Section 286A provides for the declaration of a person as dangerous

criminals in that it provides that a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him, declare him a dangerous criminal. A convicted person's criminal record is of particular importance when a court is considering imposing a sentence in terms of section 286 and 286A. These sentencing options in particular are aimed at protection of society.

(c) Salient features of the legislation enabling expungement in South Africa

(i) The process

(aa) The existing legislation

7.90 With reference to the prescribed process in both the CPA and the CJA it should be noted that an administrative process is prescribed in both Acts.

7.91 The process prescribed for expungement currently involves an administrative application process to the Director General of the Department of Justice and Constitutional Development. A court of law is not required to consider applications in respect of both juvenile and adult offenders. In respect of both the CPA and the CJA the criteria to be met in both instances are similar, namely the imposition of a prescribed sentence (adult offenders) or the commission of a listed offence (juvenile offenders), the time lapse of 10 years after the date of conviction (adult offenders) or a time lapse of 5 or 10 years (depending on the listed offence) after the date of conviction (juvenile offenders) and the fact that no further offence has been committed in the prescribed period in respect of which a sentence of imprisonment without the option of a fine has been imposed (adult offenders) or the child has not been convicted of a similar or more serious offence during the prescribed time lapse (juvenile offenders).

7.92 In respect of juvenile offenders expungements are approved by the Director-General of the Department of Justice and Constitutional development on the written application of the child, after a period of 5 years has elapsed after the date of conviction in the case of an

offence referred to in Schedule 1 of the Act, or 10 years has elapsed after the date of conviction in the case of an offence referred to in Schedule 2 of the Act, unless during that relevant period the child is convicted of a similar or more serious offence (CJA).

7.93 In respect of juvenile offenders the Director-General of the department of Justice and Constitutional Development **must**, on receipt of the written application of an applicant, issue a prescribed certificate of expungement, directing that the conviction and sentence of the child be expunged, if the Director-General is satisfied that the child complies with the criteria set out in the Act which include the three criteria referred to above, namely (i) the commission of certain offences listed in the Act in Schedules 1 and 2, (ii) the prescribed time lapse referred to in the Act (5 and 10 years after the date of conviction in respect of offences listed in schedules 1 and 2 respectively), and (iii) the fact after the date of conviction the child has not been convicted of a similar or more serious offence during the prescribed time lapse.

7.94 In respect of juvenile offenders there is an additional circumstance which could justify an expungement. The CJA provides that the Cabinet member responsible for the administration of justice can approve an expungement if he or she is satisfied that **exceptional circumstances exist** which justify expungement, where, in the case of the child, the period of five years, or the period of 10 years, referred to in the Act, has not yet elapsed, but is satisfied that the child otherwise complies with the criteria mentioned above. **No guidance is given in the Act as to what constitute exceptional circumstances. Such qualification is not available to adult offenders.**

7.95 In respect of adult offenders, the Director-General of the department of Justice and Constitutional Development **must, on receipt of the written application of a person referred to in subsection (1), issue a certificate of expungement, directing that the criminal record of that person be expunged**, if the Director-General is satisfied that the person applying for expungement complies with the criteria (i) relating to the sentence imposed referred to in the Act, (ii) after a period of 10 years has elapsed after the date of conviction for that conviction, and (iii) unless during that period the person in question has been convicted of an offence and has been sentenced to a period of imprisonment without the option of a fine. The qualifying criteria are similar to those in respect of juvenile offenders.

7.96 The process leaves no discretion to the approving authority, the Director-General, once compliance with the Acts concerned have been proved. In respect of both adult and juvenile offenders the Director-General takes a decision. **No further criteria have to be met for the decision to be taken and there is no reference to any motivation for the application, e.g that the applicant has been rehabilitated, or that particular circumstances are present which would justify the application. In addition neither the CPA nor the CJA provide for an applicant to be heard in the process nor does it give any role to the prosecuting authority.**

7.97 As mentioned above in respect of juvenile offenders, the Act does not provide any guidance on what exceptional circumstances would entail which could justify an expungement even before the time period prescribed in the Act has been met. In the absence of any guidance as to what exceptional circumstances entail, it is submitted that such circumstances are in the discretion of the Cabinet Member who is the approving authority and he or she could apply any bench mark. It is submitted that such discretion fringes on taking arbitrary decisions and without having to hear anyone or consider any motivation for the application. A similar provision is not available for adult offenders.

7.98 Apart from the above problem areas, neither the CPA nor the CJA, provides for any limitation to the number of times a request for expungement can be considered. There is no requirement that the approving authority should weigh the personal circumstances of the offender concerned against the interests of society, nor how an expungement would impact on the effectiveness of the criminal justice system in giving effect to the duty placed on courts to impose appropriate sentences having due regard to previous convictions. There is no consideration of how the aforementioned impacts on the responsibility of the state to recognize and give effect to the constitutional right to protection of society. Furthermore, a large number of statutes provide for disqualifications, in particular with regard to employment opportunities, imposed on offenders convicted of certain offences and in respect of which certain sentences have been imposed. Consideration of such disqualifications is not required before an application for expungement is approved. Furthermore, it is not required by the expungement legislation that an applicant must have served the sentence concerned or have completed a prescribed programme indicating that he or she has been rehabilitated or that he or she pose no risk to society.

7.99 Although the qualification criteria for expungement in terms of both the CPA and the CJA limits the offences in respect of which the expungements are possible to less serious offences, the two acts use different yardsticks to determine the seriousness of the offence. Whereas the CPA uses the sentence imposed as yardstick, the CJA uses two lists of offences in respect of which expungements are available and in respect of two different time periods, where the first list of offences allows an application after 5 years and the second list after 10 years. The seriousness of the offences listed in the schedules to the CJA is reflected by making use of a combination of listing the offence by name and listing the offence by name coupled with requiring the financial value of the crime involved where it is possible to do so. Examples of the latter are offences involving dishonesty or robbery. This in itself may be problematic since it is not a requirement for a conviction of an offence where it is possible to have a monetary value, to record such value in the conviction. In other words a conviction of theft does not need to be recorded with reference to the value of the theft involved which would complicate an application for expungement where the value is not recorded. In addition the qualifying criteria in the CPA of the sentence imposed provides a much broader scope of application of expungement in respect of adult offenders than the two lists in the schedule of the CJA in respect of juvenile offenders. This is so because an offence listed in terms of a sentence can include any common law or statutory offence in respect of adult offenders whereas the offences listed in the two schedules in the CJA provides for a much narrower approach in respect of juvenile offenders.

7.100 Lastly, neither the CPA nor the CJA provides for an input by the prosecuting authority in an application for expungement whereas both pieces of legislation provides for a duty on the state (prosecuting authority) to address the court on sentence and to prove previous convictions against a convicted person in order to ensure that an appropriate sentence is imposed. It would appear that the absence of giving the prosecuting authority the opportunity to be heard on an application for expungement of a criminal record may compromise the prosecuting authority in its duty to ensure that effect is given to its duty to protect the community.

(bb) Interpretation of the prescribed application process for expungement of criminal record of juveniles and adult offenders in case law

7.101 With regard to the application process to have a criminal record expunged, reference is made to case law in South Africa regarding the inclusion of a name in the National Sex Offender Register in terms of section 50(2) of the CAA which is compulsory following a conviction. The implications of such inclusion was considered in *Johannes v S*²⁷⁶. The accused, who at the time of the commission of the offence was a 14 year old minor, was charged with the rape of three young boys in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He pleaded guilty and was convicted. In respect of the three rape convictions he was sentenced to compulsory residence in a Child and Youth Care Centre for a period of five years (in terms of the provisions of section 76(1) of the CJA of 2008). In addition, he was sentenced to three years' imprisonment after the completion of the five years' compulsory residence (in terms of the provisions of section 76(3) of that Act). In addition to the sentence, an ancillary order in terms of section 50(2) of the CAA was made, which had the effect that the accused's name would be entered in the National Register for Sexual Offenders.

7.102 The question was raised by the High Court with the Regional Magistrate and the Director of Public Prosecutions ("the DPP") whether it was competent for the court to make an order in terms of section 50(2) of the CAA if regard was had to the provisions of sections 2, 3 and 4 of the CJA dealing with the objects of the Act as well as the provisions of section 28 of the Constitution of the Republic of South Africa 108 of 1996. **The Court held that in terms of section 50(2)(a)(i) of the CAA, a court that has convicted a person of a sexual offence against a child or a person who is mentally disabled, and after sentence has been imposed by that court for such an offence, in the presence of a convicted person, must make an order that the particulars of the person be included in the Register.** The questions for determination by the Court were whether such an ancillary order is a competent order for a Child Justice Court to make in terms of the CJA; and, if so, whether a court is compelled to make such an order in respect of a minor who has been convicted of a sexual offence against a child, **irrespective of the circumstances of the case.**

7.103 The Court found that the provisions of section 50(2) of the CAA, in requiring the particulars of a child sexual offender who has committed a sexual offence against another child to be included in the Register, may violate such child offender's rights. **As a starting**

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point, the preferred manner in dealing with such a purported violation of rights is for the court to interpret the impugned legislation in such a manner that gives effect to the fundamental values of the Constitution. It found that the inclusion of the particulars of an offender who commits a sexual offence against a child, constitutes a limitation that is reasonable and justifiable in an open and democratic society such as ours. Where a child, however, has committed a serious sexual offence, and there is a need to have the child's particulars entered in the Register, **and where there is a need for a court to counterbalance the rights of the child offender against the particular harm and danger such a child offender would pose to victims of sexual abuse and exploitation, the best interests and paramountcy principle of the child offender may be required to be limited. Section 50(2) was found to be over-broad, and was declared invalid and inconsistent with the Constitution, insofar as it does not allow the court to inquire and decide after affording the accused an opportunity to make representations, whether or not the particulars of the accused should be included in the National Register for Sexual Offenders.** (emphasis added).

7.104 What is apparent in the expungement provisions in the CPA and the CJA, is that the prosecution plays no role in any decision to expunge a criminal record. In addition the CJA provides that the Cabinet member responsible for the administration of justice may approve an expungement of a criminal record if he or she is satisfied that exceptional circumstances exist which justify expungement, where, in the case of the child the periods of 5 or 10 years, referred to in the Act, has not yet elapsed, but is satisfied that the child otherwise complies with the criteria mentioned above. **No guidance is given in the Act as to what constitute exceptional circumstances. Such qualification is not available to adult offenders and here too, the prosecution plays no role in the decision and does not have to be heard on the merits. It is therefore submitted that this provision of CJA (the expungement of a criminal record by the Minister without any guidance on what exceptional circumstances entail) is over-broad and ignores the constitutional responsibilities of the courts, the prosecution and the state and confirmed in the CJA in so far as it relates to the right to protection of society and ensuring an effective criminal justice system by the imposition of appropriate sentence with due regard to an offender's criminal record.**

7.105 In terms of the CPA the prosecution has a particular role to play when it comes to

previous convictions and sentencing, for example:

- * **The Criminal Procedure Act 51 of 1977 contains specific provisions aimed at protecting society in that it makes provision for sentencing options and provisions dealing with the criminal record of an accused and the proof of previous convictions. In this regard the courts have a particular responsibility with reference to the criminal record of an offender and this influences the state's responsibility in dealing with the criminal record of an offender in relation to its duty to protect society. Section 271 provides that previous convictions may be proved in that the prosecution may, after an accused has been convicted, but before sentence has been imposed, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused and if the accused admits such previous conviction or such previous conviction is proved against the accused. It furthermore provides that the court shall take such convictions into account when imposing any sentence in respect of the offence of which the accused has been convicted.**
- * **Section 286 provides for the declaration of a person as a habitual criminal (a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the a person habitually commits offences and that the community should be protected against him or her, declare the person an habitual criminal, in lieu of the imposition of any other punishment for the offence or offences convicted of. Again, with reference to an accused's criminal record, the courts have a duty to protect society. Section 286A provides for the declaration of a person as dangerous criminals. A superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him or her, declare the person a dangerous criminal. A convicted person's criminal record is of particular importance when a court is considering imposing a sentence in terms of section 286 and 286A. These sentencing options in particular are aimed at protection of society.**
- * **The CJA is primarily aimed at dealing with children (under the age of 18**

years) coming into conflict with the law, but the Director of Public Prosecutions may, in accordance with directives issued by the National Director of Public Prosecutions, direct that a matter be dealt with in accordance with the Child Justice Act if the person was a child at the time of the alleged commission of the offence, or was older than 18 but younger than 21 years when ordered or summoned to appear at a preliminary enquiry, or arrested.

- * In addition, in terms of the CJA the Director of Public Prosecutions, a prosecutor and a presiding officer in a preliminary enquiry, play important roles when dealing with juvenile offenders with particular reference to decisions on diversion which are set out in detail in Chapter 8 of the Act, the outcome of a preliminary enquiry and a referral to a hearing in a Child Justice Court. It would appear that a proper enquiry is made into the circumstances of commission of the alleged offence and a proper evaluation is done of the circumstances of the child concerned. If a diversion order has not been complied with due to the fault of the offender, the matter may be referred to the Child Justice Court for trial (section 59).
- * During proceedings in a child justice court the court must ensure that the best interests of the child are upheld (section 63(4)).

7.106 The CJA contains elaborate provisions dealing with sentencing of juvenile offenders which include particular reference to the court's responsibilities in regard to effectiveness of the criminal justice system, the protection of society and the duty of the prosecution to ensure that the interests of victims be taken into account in the sentence imposed. The Act provides:

69. Objectives of sentencing and factors to be considered

- (1) In addition to any other considerations relating to sentencing, the objectives of sentencing in terms of this Act are to-
- (a) encourage the child to understand the implications of and be accountable for the harm caused;
 - (b) promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society;
 - (c) promote the reintegration of the child into the family and community;
 - (d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and

- (e) use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.
- (2) In order to promote the objectives of sentencing referred to in subsection (1) and to encourage a restorative justice approach, sentences may be used in combination.
- (3) When considering the imposition of a sentence involving compulsory residence in a child and youth care centre in terms of section 76, which provides a programme referred to in section 191(2)(j) of the Children's Act, a child justice court must, in addition to the factors referred to in subsection (4) relating to imprisonment, consider the following:
 - (a) Whether the offence is of such a serious nature that it indicates that the child has a tendency towards harmful activities;
 - (b) whether the harm caused by the offence indicates that a residential sentence is appropriate;
 - (c) the extent to which the harm caused by the offence can be apportioned to the culpability of the child in causing or risking the harm; and
 - (d) whether the child is in need of a particular service provided at a child and youth care centre.
- (4) When considering the imposition of a sentence involving imprisonment in terms of section 77, the child justice court must take the following factors into account:
 - (a) The seriousness of the offence, with due regard to-
 - (i) the amount of harm done or risked through the offence; and
 - (ii) the culpability of the child in causing or risking the harm;
 - (b) the protection of the community;
 - (c) the severity of the impact of the offence on the victim;
 - (d) the previous failure of the child to respond to non-residential alternatives, if applicable; and
 - (e) the desirability of keeping the child out of prison.

70. Impact of offence on victim

- (1) For purposes of this section, a victim impact statement means a sworn statement by the victim or someone authorised by the victim to make a statement on behalf of the victim which reflects the physical, psychological, social, financial or any other consequences of the offence for the victim.
- (2) The prosecutor may, when adducing evidence or addressing the court on sentence, consider the interests of a victim of the offence and the impact of the crime on the victim, and, where practicable, furnish the child justice court with a victim impact statement provided for in subsection (1).
- (3) If the contents of a victim impact statement are not disputed, a victim impact statement is admissible as evidence on its production.

71. Pre-sentence reports

- (1) (a) A child justice court imposing a sentence must, subject to paragraph (b), request a pre-sentence report prepared by a probation officer prior to the imposition of sentence.
- (b) A child justice court may dispense with a pre-sentence report where a child is convicted of an offence referred to in Schedule 1 or where requiring the report would cause undue delay in the conclusion of the case, to the prejudice of the child, but no child justice court sentencing a child may impose a sentence involving compulsory residence in a child and youth care centre

providing a programme referred to in section 191(2)(j) of the Children's Act or imprisonment, unless a pre-sentence report has first been obtained.

(2) The probation officer must complete the report as soon as possible but no later than six weeks following the date on which the report was requested.

(3) Where a probation officer recommends that a child be sentenced to compulsory residence in a child and youth care centre providing a programme referred to in section 191(2)(j) of the Children's Act, the recommendation must be supported by current and reliable information, obtained by the probation officer from the person in charge of that centre, regarding the availability or otherwise of accommodation for the child in question,

(4) A child justice court may impose a sentence other than that recommended in the pre-sentence report and must, in that event, enter the reasons for the imposition of a different sentence on the record of the proceedings.

7.107 It has been pointed out above, with reference to the state's responsibilities in terms of the Constitution and relevant legislation, particular responsibilities and duties are placed on the state to ensure an effective criminal justice system and to ensure that appropriate sentences are imposed.

7.108 When considering the absence of any role by the prosecution with regard to expungement in the relevant legislation (both the CPA and CJA) the question arises as to whether or not the legislation is constitutionally sound and valid. The expungement legislation provides no discretion to the approving authority. It is submitted that, having regard to the above and in particular the duties of the prosecution to ensure an effective criminal justice system and in giving effect to the constitutional right of protection of society, the absence of a court hearing where the prosecution is given the opportunity the impact on a decision to expunge a criminal record, or even to give an input when an expungement is considered in an administrative process, renders the legislation dealing with expungement overbroad. It is submitted that the arguments used in the matter of *S v Johannes*²⁷⁷ above regarding legislation limiting the right to equality, requires consideration of the constitutional and legislative provisions dealing with the effective protection of society and limitation in terms of the limitation clause (section 36 of the Constitution). It is submitted that, where a person has been convicted of an offence and there is an application to have the person's criminal record expunged, **there is a need for a court to counterbalance the rights of the offender against the particular harm and danger such an offender would pose to victims of crime and exploitation of society. The right to equality and dignity of the offender may be required to be limited to give full effect to the states' responsibility to**

277 [2013] JOL 30822 (WCC).

protect society. It is submitted that failure in the CPA or the CJA to give the prosecution or a court any role in the expungement process, renders an administrative application procedure for expungement of criminal records invalid and over-broad, and therefore inconsistent with the Constitution.

7.109 The CJA furthermore provides that the Cabinet member responsible for the administration of justice may approve an expungement of a criminal record of a juvenile offender if he or she is satisfied that **exceptional circumstances** exist which justify an expungement, where, in the case of the child the periods of 5 or 10 years, referred to in the Act, has not yet elapsed, but is satisfied that the child otherwise complies with the criteria mentioned in the Act. **No guidance is given in the Act as to what constitute exceptional circumstances. Such qualification is not available to adult offenders and it is submitted that here too, the prosecution plays no role in the decision and does not have to be heard. It is therefore also submitted that this provision of CJA is also over-broad and the provision ignores the responsibilities of the courts, the prosecution and government in so far as it relates to the right to protection and the operation of an effective court system.**

7.110 It should also be noted that the SALRC, in its report on a Juvenile Justice system for South Africa in dealing with expungement recommended that expungements should be considered via a court application.

7.111 In addition to the above the Department of Justice and Constitutional Development has submitted comment to the Commission to the effect that that it is overburdened with applications for expungement and it takes inordinately long to finalise applications. The Department has provided statistics that shows that due to the increase in applications for expungement the turnaround time to have 1 application finalized is 32 weeks. If applications are considered via a court application process the undue delays in finalizing applications would be addressed in that courts country wide could be approached to consider applications and it would not be the responsibility of individual officers in the Department of Justice and Constitutional Development to consider these applications. The CPA has already been amended to increase the number of officials who can approve expungements. It is, however, submitted that the current application process does not have the necessary administrative support system in place to effectively deal with the ever increasing number of

applications as is evident from the comments submitted by the Department.

(ii) The qualifying criteria in the administrative application process

(aa) The existing legislation - the problems

7.112 The need to have the matter of expungement considered by a court of law is furthermore substantiated when the current provisions in the relevant legislation are considered. It is submitted that the absence of additional considerations outlined below in the current prescribed process renders the expungement legislation over-broad and constitutionally invalid. The reasoning will become apparent from the discussion below after identifying the problem areas in the qualifying criteria for an approval of expungement in the current legislation. These include:

- There are no criteria or provision in the expungement provisions in terms of which any disqualification following a conviction and sentence, which have or may have an impact on future employment of a convicted offender and which is provided for in another Act, should be considered in an application for expungement in respect of either adult or juvenile offenders. The exception to the above is the requirement of removal of the name from the prescribed registers in respect of a person who has been convicted of a sexual offence against a child or a person who is mentally disabled and whose name has been included in the National Register for Sex Offenders as provided for in the CAA, or persons whose names have been included in the National Child Protection Register as a result of a conviction for an offence as provided for in the CA.
- There is no clear guidance as to how the legislature established the 5, 7 and 10 year time periods set out in section 51 of the CAA as requirement for removal of the names from the National Sex Offender Register, and how the risk that the individual may pose to society upon release in respect of further offending was linked to the time periods. Mr Muntingh²⁷⁸ points out that research elsewhere has found that 19% of sex offenders reoffended after two years, 28% after five years and 36% after ten

278 Civil Society Prison Reform Initiative *“The law and the business of criminal record expungement in South Africa”* Research Report no 18 on p 15 and further by Lukas Muntingh.

years. The same study found that sex offenders were also convicted of other violent and non-violent property offences. Evidently the longer the time period, the greater the chances of re-offending become, but despite extensive research in this regard, age together with a wide range of other variables rather than time lapse appear to be a stronger predictor of offending rates.

- Different criteria apply to the removal of a name from the National Register of Sex Offenders and an expungement in terms of the CJA. It is submitted that these different criteria are difficult to justify. An application for removal from the National Register for Sex Offenders has more formal requirements than an application for expungement. Section 51 of the CAA and the accompanying regulations set out the requirements for removal from the National Sex Offender Register. If a person is eligible to apply for removal from the register, he/she must make such an application on Form 10 in Annexure B of the Regulations to the CAA. The application must be accompanied by a full set of fingerprints. The form requires, in addition to the biographical details of the applicant, a motivation for the application as well as a declaration that there are no further pending cases against the applicant. The Registrar may then, if satisfied, issue a certificate (Form 11) that the person's name has been removed from the register. The same form can also be used to issue a certificate that a person's name has not been removed from the register. The Registrar may also remove a person's details from the register if satisfied that the inclusion of the person on the register was clearly done in error. Furthermore different qualifying periods apply for the removal of a name from the Register and for an application for expungement which is difficult to justify.
- Although the provisions of the Constitution do not specifically provide for expungement, it categorically states that a disqualification for membership of the National Assembly and the Provincial legislature **ends five years after the sentence** following a conviction has been completed and in fact confirms that no effect could be given to a conviction for purposes reintegration into society with reference to appointment in a particular job, five years after completion of the sentence. This provision and many other similar disqualifications are not a qualifying considerations in terms of the current legislation and have not been considered in the drafting of the expungement legislation. It is submitted that the legislation prescribing certain

disqualifications relating to reintegration is an important aspect to be considered in granting an expungement, the absence of which renders the current legislation overbroad and non-compliant with the constitution as will be shown below.

- There is no requirement in the expungement legislation that the sentence relating to the criminal record to be expungement, should have been complied with or served nor that the convicted offender must submit a motivation for an application or provide proof that he/she has been rehabilitated or at least completed a rehabilitation programme. It is submitted that this *lacuna* also raises the question regarding the constitutional compliance of the legislation. Rehabilitation is still regarded by our courts as a purpose of sentencing and it is an important factor to be considered to justify an approval for expungement of a criminal record.²⁷⁹
- It should be noted that the qualifying criteria for expungement in terms of the CPA (section 271A-D) is based on the **sentence** imposed whereas the qualifying criteria in respect of juvenile offenders is, in terms of the CJA, are based on the **offences listed in Schedules 1 and 2 of the Act**. However, both Acts provide for two categories of offences or sentences qualifying for an expungement. Both of these criteria are, however, indicative of the seriousness of the crime (offences) in respect of which an expungement is regarded as justified. In respect of adult offenders, the sentence imposed determines the seriousness of the offence and in respect of juvenile offenders, the offences are listed in the schedules and the Schedules include criteria which indicate the seriousness of the offence and which in turn are linked to different qualifying time periods that apply for less serious offences (5 years) and (10) years for more serious offences. Whilst expungement in terms of the CJA is limited to the offences listed in the schedules, the use of a prescribed sentence in the CPA to determine eligibility for expungement broadens the number of offences in respect of which an expungement is possible. The use of the sentence based criteria therefore allows a much broader form of expungement than the list approach in the CJA. The sentence criterium in the CPA includes eligibility for expungement in respect almost

279 *Uithaler v S* [2014] JOL 31517 (WCC). The sentencing Court should impose an appropriate sentence based on all the circumstances of the case and should reflect the severity of the crime, the blameworthiness of the offender and serve the interest of society. The purposes of sentencing are deterrence, prevention, rehabilitation and retribution.

any offence (statutory or common law) except if an offence is specifically excluded. Ironically the list of offences approach is used for juvenile offenders who, in terms of arguments justifying the principle of expungement, should more appropriately benefit juveniles rather than adult offenders.

- There are no limitations to the number of times an offender (adult or juvenile) may apply for an expungement.
- Names included in the National Register for Sex Offenders is not only based on convictions of offences in terms of the newly enacted CAA, but also covers all previous convictions for sexual offences against children and persons with mental disabilities, in terms of other legislation in operation prior to the coming into effect of the CAA, regardless of whether a custodial or non-custodial sentence was imposed.²⁸⁰ The implications of this retrospective mechanism are considerable, not only from a practical and logistical point of view, but also from a legal point of view. In addition, the application of section 51 is compulsory and includes that the names of persons **who are alleged to have committed** a sexual offence against a child or person with a mental disability, **must also be included in the National Register for Sex Offenders if the court has made a finding in respect of the person's lack of capacity to stand trial or that the person is not criminally responsible due to mental illness or defect as provided for in sections 77(6) and 78(6) of the CPA.**
- A person whose name has been included in Part B of the National Child Protection Register as a result of a conviction as provided for in section 120(1)(b) of the CA, **must first have his or her name removed from the register before an application for expungement can be made.** Mr Muntingh²⁸¹ points out that it should be noted that while the CPA, in section 271B(b)(ii), refers to a conviction (a criminal record) as the subject matter to be expunged, the CA provides for a far lower bar than a conviction for inclusion in Part B of the National Child Protection Register. Section 120(1) of the CA provides that **a finding that a person is unsuitable to**

280 Section 50(1)(a)(iii-iv) Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007).

281 Civil Society Prison Reform Initiative *"The law and the business of criminal record expungement in South Africa"* Research Report no 18 on p 12 and further by Lukas Muntingh.

work with children can be made by a children’s court, any other court in any criminal or civil proceedings, or any forum established or recognised by law in any disciplinary proceedings and therefore does not require a conviction for inclusion in the register.

- A self-contradictory provision is also found in section 297(2) of the CPA, providing for an acquittal, yet it is recorded as a conviction and would thus appear on the criminal record of the person. It should be noted that the record of criminal convictions is not only used by the courts for purposes of sentencing, but that it is also used by prospective employers.

(d) Conclusion and recommendations

(i) The application process

7.113 Having regard to the outline above the following conclusions are drawn in respect of the prescribed process for expungement:

- (aa) The legislation dealing with expungement in South Africa confirms that expungement **is not a fundamental right, but rather an act of grace created by the state, and is therefore a privilege and not a right;**
- (bb) **The current administrative application process for expungement in both the CPA and the CJA, is overbroad in that there is a need for a court to counterbalance the rights of the offender against the particular harm and danger such an offender would pose to society (victims of crime) and exploitation of society and the current prescribed process does not provide any such role.**
- (cc) **The right to equality of the offender may be required to be limited and render an administrative application procedure for expungement of criminal records invalid and found to be overbroad, and therefore inconsistent with the Constitution. This is so because it does not allow a court to inquire and decide on**

the matter having regard to its functions in respect of sentencing> It does not afford the prosecution, having regard to its role in the criminal justice system and in particular with reference to sentencing, the opportunity to prove previous convictions and to comply with its duties to ensure the effectiveness of the criminal justice system in protecting society, an opportunity to make any representations whether or not the criminal record of the offender should be expunged. This argument, based on justifying a limitation of the right to equality by weighing the relevant constitutional provisions, is expanded on below when considering the problem areas identified in respect of the qualifications for expungement in terms of the limitation clause in the Constitution.

(dd) The current turnaround time for administrative applications is 32 weeks and notwithstanding a broadening of the officials authorized to approve an expungement application from 1 person (the Director-General) to a further delegation by the Director-General (to officials on the rank of Deputy-Director-General) to 5 officials at the mos. This increase is, in the Commission's view, still insignificant to resolve the huge backlog in finalization of applications.

(ee) In view of the above the Commission is of the view that

- the current application process should be replaced by a court based process and both the CPA and the CJA should be amended to replace the current application process with an application procedure to a court; and**
- There is little justification for a differentiation in the process for expungement of criminal records in respect of juvenile and adult offenders.**

(ii) The qualifying criteria – applying the constitutional principles to existing legislation

7.114 In terms of the South African Constitution limitations of rights enshrined in the Constitution may be found to be compatible with the Constitution if they have a legitimate purpose and are proportional to the goal they aim to achieve. The limitation envisaged in section 36 of the Constitution must be sufficiently important to warrant limiting a constitutionally protected right. Therefore, the limitation must take into account the nature of the right, the importance and the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve its purpose.

7.115 Section 36 of the Constitution provides that:

- (1) The rights of the Bill of Rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic, society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

7.116 The fact that the expungement legislation (both the CPA and CJA) prescribes an administrative application process, outline the qualifying criteria and authorises the Director-General to approve the expungement of criminal records raises the question as to whether or not the legislation is constitutionally sound. The prescribed process and state's duties and responsibilities in giving effect to the legislation should be considered in the light of relevant constitutional rights, limitation of rights as provided for in the Constitution and other legislative provisions giving effect to constitutional obligations.

7.117 We discuss the application of the relevant constitutional rights below with reference to the content of the enabling legislation including the qualifying criteria and the approval of expungements. The discussion includes a consideration of the approvals to be granted by a state employee and the impact of the constitutional

principles on the process and in particular also with reference to state liability resulting from the exercise of the duties on state officials imposed in terms of the legislation. The exercising of the duties are of particular importance in terms of the content of the duties imposed in terms of the Acts and any possible state liability which may result from the performance of these duties.

(aa) The right to protection

7.118 The influence of the constitutional principles on the civil liability of the State was considered for the first time by the Constitutional Court in *Carmichele v Minister of Safety and Security*²⁸² and again in *K v Minister of Safety and Security*²⁸³ when considering vicarious liability in civil cases. In *Carmichele v Minister of Safety and Security* the Constitutional Court considered the constitutional obligation on the courts to develop the common law to promote the spirit, purport and objects of the Bill of Rights. The specific issue was whether the High Court and the Supreme Court of Appeal ought to have broadened the concept of **"wrongfulness" in the law of delict in the light of the State's constitutional duty to safeguard the rights of women. The case concerned a delictual claim for damages against the State by a victim of a rape by an individual in the employ of government.** The basis of the claim was that:

- * Despite **the accused's history of sexual violence, the police and prosecutor had recommended his release without bail. In the High Court the applicant alleged that this had been an omission by the police and the prosecutor; and**
- * The complainant also relied on the duties **imposed on the police** by the interim Constitution and **on the State under the rights to life, equality, dignity, freedom and security of the person and privacy.**

7.119 The Constitutional Court, in holding the state liable, held that:

- * Although the major engine for law reform should be the legislature, courts are

282 (2001 (4) SA 938 (CC). See also *Minister of Justice and Constitutional Development v X* (196/13) [2014] ZASCA 129 (23 September 2014).

283 (2005 (6) SA 419 (CC); (2005 (9) BCLR 835; [2005] 8 BLLR 74.

under a general duty to develop the common law when it deviates from the spirit, purport and objects of the Bill of Rights.

- * As to the police, it held that the **State is obliged (has a legal duty) in terms of the Constitution and international law (International Instruments endorsed by government) to prevent gender-based discrimination and to protect the dignity, freedom and security of women.** It is important that women be free from the threat of sexual violence.
- * In the particular circumstances of the case the police's recommendation **for the assailant's release could therefore amount to wrongful conduct giving rise to liability for the consequences.**
- * Similarly, the Court held that prosecutors, who are under a general (legal) duty to place **before a court any information relevant to the refusal or granting of bail, might reasonably be held liable for negligently failing to fulfil that duty.** (emphasis added)

7.120 In *F v Minister of Safety and Security*²⁸⁴ the case raised the question whether the Minister of Safety and Security should be held vicariously liable for damages arising from the brutal rape of a 13-year-old girl by a policeman who was on standby duty (therefore off duty) in a typical so-called deviation case covered by the common law. In considering whether the State is vicariously liable for damages the court held that:

- * As a general rule, an employer is vicariously liable for the wrongful acts or omissions of an employee committed within the course and scope of employment, or whilst the employee was engaged in any activity reasonably incidental to it. Employers could therefore be held to have created a risk of harm to others should their employees prove to be inefficient or untrustworthy.
- * In considering vicarious liability two tests apply:
 - One applies when an employee commits the delict while going about the employer's business. This is generally regarded as the 'standard test'. This test is a subjective test and refers to the intention of the wrongdoer.
 - The second test finds application where wrongdoing takes place outside

the course and scope of employment. These are known as 'deviation cases'. The matter before the court was a typical deviation case because the police official who raped the complainant was at the time of duty. The Court indicated that should the employee **act inconsistently with the employers' core business, some link between the employers' business and the delictual conduct must be established before the employer may be held vicariously liable**

7.121 **In the determination of the bounds of vicarious liability of the State**, the Court noted that it is an objective test which requires consideration of the State's constitutional obligations including:

- * The State has a general duty to protect members of the public from violations of their constitutional rights. In grappling with the question of the State's **vicarious liability, the constitutional obligations to prevent crime and to protect members of the public, particularly the vulnerable, must enjoy some prominence. These obligations, as well as the constitutional rights of the complainant are the prism through which this enquiry should be conducted.** (emphasis added)
- * The State's constitutional obligations to respect, protect and promote the citizen's right to dignity, and to freedom and security of the person would have to be taken into account;
- * Equally relevant is the State's establishment of a police service for the efficient execution of its constitutional obligations to prevent crime and investigate crime, to protect and secure the **inhabitants of the Republic and their property, and to uphold and enforce the law. This is determined with reference to provisions in the Constitution relevant to the establishment of the SAPS, relevant International Instruments endorsed by government and national legislation relevant to the establishment of the SAPS because it deals with the State's obligations in cases of a particular category of crime, as in this case, criminal acts relating to sexual offences;**
- * **The trust that the public is entitled to repose in the police has a critical role to play in the determination of the Minister's vicarious liability in this matter; and**

- * In the event of the Minister being held liable, **it would be necessary to ensure that that decision does not effectively give rise to State liability for all delictual acts committed by the police.**

(bb) The right to equality

7.122 In an article Professor Bennett and Mr Pillay²⁸⁵ explored the validity of the Natal Code and the Code of Zulu Law (the KwaZulu codes) having regard to the right to equality. They point out that the Natal Code was a product of early colonialism and its counterpart, the KwaZulu Natal Act 16 of 1985 on the Code of Zulu Law, is a product of the apartheid era. In South Africa's new constitutional order, they stand out as incongruous elements. In *Moseneke v The Master* and with reference to a similar legacy of the past regime, the Black Administration Act 38 of 1927, Sachs J remarked: 'It is painful that the Act still survives at all. The concepts on which it was based, the memories it evokes, the language it continues to employ, and the division it still enforces, are antithetical to the society envisaged by the Constitution'.²⁸⁶

7.123 Professor Bennett and Mr Pillay²⁸⁷ point out that section 9 of the Constitution prohibits only unfair discrimination. The relevant subsections read as follows:

- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race . . . ethnic or social origin
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

7.124 From these provisions, it follows that **a discriminatory law must be considered constitutionally valid if it can be shown to be 'fair'. When the basis for discrimination is a ground listed in section 9(3), however, section 9(5) presumes the law to be unfair.**

285 *"The Natal and KwaZulu Codes: The case for repeal"* TW Bennett (Professor in the Department of Public Law, University of Cape Town. and A Pillay (Lecturer in the Department of Public Law, University of Cape Town) (2003) 19 SAJHR .

286 *Moseneke v The Master* 2001 (2) SA 18 (CC) para 21.

287 *"The Natal and KwaZulu Codes: The case for repeal"* TW Bennett (Professor in the Department of Public Law, University of Cape Town. and A Pillay (Lecturer in the Department of Public Law, University of Cape Town) (2003) 19 SAJHR.

Once unfairness has been shown to exist, the respondent still has an opportunity to justify the unfair discrimination under section 36, the general limitation clause.

7.125 Professor Bennett and Mr Pillay²⁸⁸ explain that in light of section 9, the following courses of action are available to applicants intending to contest the constitutionality of a law. Where they can show that the law differentiates on the basis of a ground listed in section 9(3), the court may presume that discrimination exists and that such discrimination is unfair. However, it is still open to the respondent to attempt to rebut the presumptions. Applicants would first need to establish that the differentiation amounts to discrimination. With reference to the latter the Constitutional Court has been willing to **accept that discrimination exists if the differentiation is based on an attribute or characteristic that has ‘the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner’.**²⁸⁹ Professor Bennett and Mr Pillay therefore argue that a differentiation between people on the basis of race, tribe or ethnic origin and citizenship constitute a potential violation of the constitutional guarantee of equal treatment or non-discrimination.²⁹⁰ As a result legislative provisions made applicable to “blacks” and not to other race groups (whites) like many apartheid laws in the past, clearly differentiate purely on the basis of race and constitutes a violation of the right to equality.whites.²⁹¹

7.126 The Constitutional Court, in *Larbi-Odam v MEC for Education (North-West Province)*²⁹² found the ground of “citizenship” to be such an attribute or characteristic. The basis for the court’s finding was that citizenship is a personal attribute that is difficult to

288 *“The Natal and KwaZulu Codes: The case for repeal”* TW Bennett (Professor in the Department of Public Law, University of Cape Town. and A Pillay (Lecturer in the Department of Public Law, University of Cape Town) (2003) 19 SAJHR

289 Which is protected in section 10 of the Constitution. The term ‘dignity’ has not been precisely defined, partly because it is seen as having the function of protecting all the other rights in the Bill of Rights and partly because it is used in a number of different contexts. See D Leibowitz & D Spitz ‘Human Dignity’ in M Chaskalson et al (eds) *Constitutional Law of South Africa* (RS 5 1999) 17-6A. However, equal respect for human beings and recognition of the ability to make individual choices are held to be part of the content of this right. J De Waal et al *The Bill of Rights Handbook* (2001) 231-32.

290 Which is protected in section 9 of the Constitution.

291 In the case of the Natal Code differentiation is based on race: the enactment repeatedly states that its provisions apply to ‘blacks’ See sections 3, 4, 11, 14 and 15 of the Code. The term race was removed from the KwaZulu Code in favour of ‘citizen’. Section 1 of the Natal Code defines ‘Black’ as ‘a person who is, or is generally accepted as, a member of any aboriginal race or tribe of Africa’. This definition was taken from section 35 of the Black Administration Act 28 of 1927.

292 CCT2/97 [1997] ZACC 16; See also O’Regan J in *Hugo* (in *Harksen v Lane* para 51 footnote 143), *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) paras 41; 47, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 19.

change and that foreigners are always a minority with little political influence. Hence, continuing to differentiate between people on the basis of the so-called homeland citizenship, like the apartheid legislation did, amounts to discrimination.

7.127 Once an applicant established the discriminatory nature of legislation in question the next step is to decide whether the discrimination is unfair.²⁹³ This inquiry centres on the effect of the discrimination on a person in the applicant's position. This analysis requires reference to the following factors:

- the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage;
- the nature of the provision or power and the purpose sought to be achieved by it . . . with due regard to the factors above and any other relevant factors;and
- the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

7.128 Professor Bennett and Mr Pillay²⁹⁴ considered the constitutionality of the Natal Code and the KwaZulu Code on Zulu law and argue that while section 9 protects everyone's right to equality, discrimination against previously disadvantaged persons, or people who are socially vulnerable, is more likely to be unfair, because it exacerbates an existing disadvantage and indignity. When the Natal Code was drafted, its purpose was to establish a separate system of governance for a subordinate section of the population. The writing on the history of segregation in South Africa shows that the Code functioned to maintain the inferior position of the African population. On the other hand the KwaZulu Code applies not to blacks but to citizens. This Code therefore maintains the inferior position of blacks as foreigners in South Africa. In *Bangindawo v Head of the Nyanda Regional Authority*,²⁹⁵ it was argued that the concept of such citizenship infringed both section 1 of the Constitution, which constitutes a single sovereign state, and section 5(1), which provides for one South

293 See section 9 of the Constitution.

294 "The Natal and KwaZulu Codes: The case for repeal" TW Bennett (Professor in the Department of Public Law, University of Cape Town. and A Pillay (Lecturer in the Department of Public Law, University of Cape Town) (2003) 19 SAJHR.

295 1998 (3) SA 262 (Tk) 267.

African citizenship. On the same basis it is argued in *Rehman v Minister of Home Affairs*,²⁹⁶ that the idea of separate citizenships in South Africa was rejected, because it offended the principle of a unified state under the Constitution and because the administrative means for enforcing homeland citizenship laws no longer existed.

7.129 The next step in the enquiry is to establish whether the law is aimed at achieving a worthy and important societal goal. Because the nature and purpose of a discriminatory law arises in the context of unfairness, an applicant must argue about the nature and purpose of the law. When the purpose of the law is considered it must relate to the promotion of equality itself.

7.130 With reference to the KwaZulu Code, the extent to which individual rights are affected and whether fundamental human dignity is impaired, must be pursued with reference to the substance of the Codes. Professor Bennett and Mr Pillay argue that it is not difficult to justify for the repeal since the Codes materially prejudice the interests of blacks living in KwaZulu-Natal and there are various examples of activities that are considered delictual or criminal by the Codes but not by national or provincial law.²⁹⁷

7.131 Professor Bennett and Mr Pillay²⁹⁸ argue that the limitation of the right to equality inquiry entails an argument under section 36 of the Constitution, the general limitation clause. **A right protected in the Bill of Rights may be limited only by a ‘law of general application’.** They point out that the Codes would qualify as ‘law’, for the term has been interpreted widely to include both original and delegated legislation, as well as the common and customary law. They indicate, however that, more pertinent, is whether the Codes should be considered to be ‘publicly accessible’, in the sense that those who are bound must know what is expected of them. Although particular provisions in the Codes may be challenged for being too broad, they are still reasonably certain.

296 1996 (2) BCLR 281 (Tk).

297 Section 94 of both the Codes, for instance, provides that ‘[a]ny unmarried girl whose chastity has been publicly denied, scoffed at, or impeached by any person, is entitled to damages’. Not only does this section appear to infringe freedom of expression (which is protected under section 16 of the Constitution) but it also perpetuates a gender stereotype that is arguably discriminatory.

298 “*The Natal and KwaZulu Codes: The case for repeal*” TW Bennett (Professor in the Department of Public Law, University of Cape Town. and A Pillay (Lecturer in the Department of Public Law, University of Cape Town) (2003) 19 SAJHR.

7.132 Professor Bennett and Mr Pillay²⁹⁹ argue that in addition, the law must not arbitrarily target specific or easily ascertainable individuals or groups of individuals. This requirement does not mean that the law has to be uniformly applied across South Africa. The Codes are likely to pass this first, and not very demanding, leg of the limitation analysis, because the targeting of a specific group in this case cannot be said to be arbitrary: it is based on race, ethnicity and citizenship. The second leg of the limitation analysis balances the purpose sought by the law against the extent to which the Bill of Rights is infringed. They argue that an argument based on the right to culture is unlikely to succeed, because the existence of the Codes is connected in only the most tortuous way to the protection of culture. They submit that there is no rational connection between the Codes and the purpose they are supposed to serve. Even if there were, less restrictive means for achieving that purpose are available – which is evident in the fact that most systems of customary law are applied in South Africa without the need for their codification. (emphasis added).

7.133 In *Moseneke v The Master*,³⁰⁰ the Constitutional Court held that, even if an administrative system held practical advantages for the people bound by it, where that system was rooted in racial discrimination, the **dignity** of those concerned was severely assailed and an attempt to establish a fair and equitable public administration was undermined. As a result, it seems that considerations of legal certainty and convenience cannot be used as the sole basis on which to justify the Codes when the same enactments are responsible for serious intrusions on fundamental rights and freedoms.

7.134 Section 36 of the Constitution deals with the limitation of rights. It provides that:

- (1) The rights of the Bill of Rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic, society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

299 “*The Natal and KwaZulu Codes: The case for repeal*” TW Bennett (Professor in the Department of Public Law, University of Cape Town. and A Pillay (Lecturer in the Department of Public Law, University of Cape Town) (2003) 19 SAJHR.

300 2001 (2) SA 18 (CC) para 20 ff.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

7.135 The expungement legislation requires consideration of the duty to promote safety in society and to protect citizens from dangerous and dishonest individuals and, on the other hand, the right to equality and the constitutional duty on the state 'to free the potential of each person'. It has been argued that discriminating against former prisoners based on their criminal pasts is not only counter-productive by undermining social reintegration, but that the state has a positive duty to fulfill in respect of social reintegration and to render support to former prisoners. Making information available to third parties about individuals' criminal histories would thus be to undermine this positive obligation. The expungement legislation allows for certain criminal records to be expunged whilst others remain intact. It is argued that it therefore limits the right to equality in that it undermines social re-integration in respect of certain convicted offenders.

7.136 The Constitutional Court in *Harksen v Lane* NO³⁰¹ set out the stages of an enquiry into a violation of the equality clause as follows:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1) [now s 9(1)]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to 'discrimination'? This requires a two stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'. If it is on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human being or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then

301 1998 (1) SA 300 (CC) at [53].

there will be no violation of s 8(2) [now s 9(3) and (4)].
(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

7.137 Applying the above test in determination whether or not the expungement legislation imposes a limitation on the right to equality, it is submitted that the legislation indeed limits the right of convicted offenders to equality in that it limits them in their goal to achieve equal worth in society following a conviction and in so far as disqualifications are imposed on them which limits their reintegration into society following the conviction and sentence. Applying the test in *Harksen v Lane* NO³⁰² the first stage of an enquiry into a violation of the equality clause is whether or not the provisions differentiate between people or categories of people. A finding of discrimination would depend upon whether, objectively, the discrimination is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human being or to affect them adversely in a comparably serious manner. The conclusion is inevitable that the expungement legislation allows for certain categories of persons (those with a criminal record as provided for in the legislation) to have their records expunged, (if they comply with certain criteria) whilst the criminal records and convictions of others do not qualify for an expungement. Once this has been determined the next stage is to determine whether or not the differentiation can be justified in terms of the limitation clause in the Constitution, namely to determine whether or not the legislation bears a rational connection to a legitimate government purpose. If it does not then there is a violation of section 9 of the Constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination. With reference to the expungement legislation the discrimination is not based on a specific ground listed in section 9 of the Constitution, but on an unspecified ground. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others which, it is submitted, is discrimination as outlined above, is well established by the effect of expungement legislation as identified above.

7.138 In *President of the Republic of South Africa v Hugo*³⁰³ the court held that we need to develop a concept of unfair discrimination **which recognises that although a society which affords each human being equal worth and freedom is the goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before**

302 1998 (1) SA 300 (CC) at [53].
303 1997 (4) SA 1 (CC).

that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

7.139 The third stage of the enquiry is therefore whether or not the limitation imposed can be justified and this stage requires an application of section 36 of the Constitution. Section 36 deals with the limitation of rights. It provides that the rights of the Bill of Rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose. Limitations of rights enshrined in the Constitution may be found to be compatible with the Constitution if they have a legitimate purpose and are proportional to the goal they aim to achieve. The limitation envisaged in section 36 of the Constitution must be sufficiently important to warrant limiting a constitutionally protected right.

140 In *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others*³⁰⁴ the Constitutional court considered the constitutionality of the provisions in the Magistrates' Court Act dealing with imprisonment upon failing to comply with a court order to pay a debt. The court found that, with effect from the date of the order, the committal or continuing imprisonment of any judgment debtor in terms of section 65F or s 65G was invalid. The court **accepted that the goal of sections 65A-65M of the Act is to provide a mechanism for the enforcement of judgment debts and that such goal is a legitimate and reasonable governmental objective, the question is whether the means to achieve the goal are reasonable.** The Court noted that the answer was clearly in the negative. (Paragraph [12] at 643B-C.)

7.141 The Court found that the fundamental reason why the means are not reasonable is because the provisions are **overbroad**. The Court identified 'four draconian effects' of the provisions in issue which rendered the limitation provisions of section 33(1) of the

304 1995 (4) SA 631 (CC).

Constitution inapplicable. (Paragraph [21] at 647E/F-F) read with para [20] at 647A-C.) Firstly, the legislation in question did not insist on the exhaustion by the creditor of his lesser remedies before he threw the book of prospective imprisonment at the debtor. (Paragraph [22] at 647F-F/G.) The second harsh effect of the legislation was that it allowed the debtor to **be imprisoned without a hearing**. The third obnoxious effect of the legislation related to the absence of the debtor from court, even when he had received the notice and the preceding documents. An explanation of such absence from court might be the debtor's ignorance of the various defences that were available to him in answering it, in particular the important defence of a poverty afflicting him which was not attributable to his own improvidence. The debtor might labour under the misapprehension that no excuse for his failure to satisfy the judgment would be acceptable, that his imprisonment was an inescapable consequence of the default to which he had to resign himself and that his attendance at the proceedings could not therefore accomplish anything, for the notice did not inform him of any such excuse, nor was it required to do so. The fourth ugly feature of the legislation that would confront the debtor if, on the other hand, he did appear before the magistrate, was the *onus* then resting on him to prove that he could not pay the judgment debt and bore no blame for his impecuniosity on various grounds which were listed in s 65F(3)(c) of the Act. The debtor might not manage to establish those facts, although they were the truth, especially when his very poverty had prevented him from hiring a lawyer and he had had to fend for himself in an unfamiliar environment, bewildered by procedures and a forensic methodology to which he was a stranger. The result might well be, and must often have been, that someone who really could not pay, through no fault of his own, went to gaol for his failure to do so.

(cc) Conclusions

7.142 The qualifying criteria for an expungement in the enabling legislation is very broad.

- (i) It in fact lists only three criteria which have to be complied with. In the first instance the legislation provides for expungement in respect of limited offences (see Schedules 1 and 2 in the CJA which lists the offences in respect of which expungement is competent) and in respect of offences for which a prescribed sentence has been imposed (see the provisions of the CPA where the offences are not listed and the qualification criteria is the

actual sentence imposed). Secondly, it requires the lapsing of prescribed time periods before an application for expungement is competent (see the 5 year and 10 year requirements in the CJA and the 10 year requirement in the CPA). Thirdly, the fact that no further offence has been committed in the prescribed period in respect of which a sentence of imprisonment without the option of a fine has been imposed (adult offender) or the child has not been convicted of a similar or more serious offence during the prescribed time lapse (juvenile offender). In the case of a dispute or uncertainty as to whether another offence of which a child is convicted during the period is similar to or more serious than the offence in respect of which a record exists, the opinion of the Cabinet member responsible for the administration of justice prevails. Apart from the above requirements, the only other requirement is the removal of an offender's name from any of two registers where these are applicable (the National Sex Offender Register and the National Child Protection Register) in cases where an offender's name have been recorded in these registers).

- (ii) The first question to be answered is whether or not the expungement legislation that allows for certain categories of persons (those with a criminal record as provided for in the legislation) to have their records expunged, (if they comply with certain criteria) whilst the criminal records and convictions of others do not qualify for an expungement, amounts to a limitation of the right to equality;

- (iii) The enquiry into a violation of the equality clause are:
 - (aa) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1) [now s 9(1)]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.

 - (bb) Does the differentiation amount to 'discrimination'? This requires a two stage analysis:
 - (AA) Firstly, does the differentiation amount to 'discrimination'. If it is on a specified ground, then whether or not there is discrimination will depend upon whether,

objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human being or to affect them adversely in a comparably serious manner.

(BB) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed.

(CC) If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2) [now s 9(3) and (4)].

(cc) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

(iv) The conclusion is inevitable that, applying the above criteria, the expungement legislation allows for certain categories of persons (those with a criminal record as provided for in the legislation) to have their records expunged, (if they comply with certain criteria) whilst the criminal records and convictions of others do not qualify for an expungement.

(v) Once this has been determined the next stage of the enquiry is to determine whether or not the differentiation can be justified in terms of the limitation clause in the Constitution.

(vi) Section 36 of the Constitution provides that the rights of the Bill of Rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- limitations of rights enshrined in the Constitution may be found to be compatible with the Constitution if they have a legitimate purpose and are **proportional to the goal they aim to achieve** (a determination whether or not the legislation bears a rational connection to a legitimate government purpose);

- consideration of the fact that even if it does bear a rational connection, it might nevertheless amount to discrimination;
- the limitation must be sufficiently important to warrant limiting a constitutionally protected right;
- the limitation must take into account the nature of the right, the importance and the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve its purpose;
- even if the goal of the legislation is accepted as legitimate and a reasonable governmental objective, the question is **whether the means to achieve the goal are reasonable**; and
- a fundamental reason why the means may not be reasonable is because the provisions are **overbroad** and the provisions may have draconian effects rendering the limitation clause inapplicable.³⁰⁵

(vii) Applying the test outlined above whether or not the expungement legislation represents a legitimate purpose it is submitted that legislature has the authority to enact statutes to promote the state's safety and welfare, which is a legitimate governmental interest.

(viii) Using the rational-basis test in reviewing the legislative provisions determining the offences in respect of which a convicted person may apply for an expungement and those which do not qualify for an expungement, it is submitted that the classification of the offences, on face value, represent a rational relationship to a legitimate government purpose. However, having regard to the differences in the CJA (using two pre-determined lists Schedules 1 and 2 of offences in respect of which an expungement may be approved after a period of 5 and 10 years respectively) and the provisions in the CPA (a list of sentences in respect of which expungement of a criminal record can be expunged after the time lapse of 10 years), it is submitted that there appears to be a huge difference between being eligible for expungement of a criminal record as a juvenile offender and being eligible for expungement as an adult

305 *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others.*

offender. The particular provisions and problem areas will be highlighted below.

- (ix) **Under the rational basis test, a challenged statute will be upheld if the classifications it creates bear a rational relationship to a legitimate government interest or are grounded on a reasonable justification, even if the classifications are not precise.**
- (x) **Expungement statutes will survive an equal protection challenge if they bear a "rational relationship to a legitimate government interest."**
- (xi) The current expungement legislation **classifies offenders and determines their eligibility for expungement based upon the nature of the offence they were convicted of committing.**
- (xii) **The legislature has the authority to enact statutes to promote the state's safety and welfare, which is a legitimate governmental interest.**
- (xiii) **Given the nature of and seriousness of offences involving the commission of or threat of physical harm to person or property, the legislature has authority to decide to maintain public access to those records will protect citizens.**
- (xiv) Whether or not a rational relationship exists between the state's legitimate interest in promoting the safety and welfare of the public and making available to the public the criminal records of persons who have engaged in past criminal behaviour, depends on the nature of the offences qualifying for expungement (in respect of juvenile offenders) and the nature of the sentences imposed in respect of adult offenders, the process applied and the qualifying criteria for expungement. Determining a list of offences or identifying the offences with reference to the sentence imposed, on face value, appears to be legitimate or a rational approach to identify the qualifying criteria. However, the enquiry does not end there since, in the final analysis, a fundamental reason why the means may not be reasonable is because the

provisions may be **overbroad** and the provisions may have draconian effects rendering the provisions unreasonable and the limitation clause inapplicable.³⁰⁶

- (xv) In order to determine whether or not the expungement legislation in South Africa, the CJA and the CPA meet the criteria above it is submitted that the provisions should be measured against the limitation clause in the Constitution as well as with reference to particular provisions in the legislation itself, having due regard to government's Constitutional obligations and the relevant rights of the convicted offender's as interpreted by the Courts.

(dd) Recommendations

7. 143 It is recommended that the CPA and the CJA be amended to include additional qualifying criteria for expungement of criminal records. Consideration should be given to the inclusion of the following additional qualifying criteria before expungements are approved:

- (i) Consideration of any disqualification imposed in terms of national legislation following a conviction and sentence, which have or may have an impact on future employment of a convicted offender in respect adult and in respect of juvenile offenders. Legislation prescribing certain disqualifications relating to reintegration is an important aspect to be considered in granting an expungement, the absence of which renders the current legislation overbroad and therefore unreasonable in terms of the limitation clause in the constitution.
- (ii) The inclusion of a limitation to the number of times an expungement should be available. Currently there are no limitations to the number of times an offender (adult or juvenile) may apply for an expungement. It is submitted that the absence of any limitation to the number of times an expungement may be approved is not reasonable in terms of the state's duty to protect its citizens and therefore overbroad. In in terms of the criteria discussed above it should

306 *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC).

be included in the qualifying criteria.

- (iii) It was submitted that there should be an alignment of the qualification periods of five, seven and ten year time periods set out in section 51 of the CAA required for removal of the names from National Sex Offender Register with the periods prescribed in the expungement legislation. This recommendation is, however, not supported. It is submitted that the time frames before an application for removal of a name from the National Register for Sex Offenders can be made, was enacted to give effect to government's obligations in terms of the Constitution national legislation and the protection of victims of sexual offences. The fact that an application for removal from the Register can be made after the expiration of 5, 7 and 10 years, does not necessitate that the time frames for expungement should be the same. The time frames prescribed in terms of the CPA and CJA are 10 years and 5 and 10 years respectively.
- (iv) It is submitted that consideration should be given to consider broadening the expungement of adult offenders by providing a category where an expungement is possible after 5 years as well as a category where an expungement is available after 10 years. It has been pointed out above that previous convictions may be highly relevant during the sentencing phase, and **it is for the court and not the prosecutor to decide what weight is to be attached to previous convictions.** The importance of previous convictions in sentencing and its role was dealt with in legislation by section 303ter, read with Schedule 5 of the repealed Criminal Procedure Act, 56 of 1955. The section acknowledged the principle that a previous conviction lapsed after a period of ten years has expired without a further conviction in between.³⁰⁷ Initially the new Criminal Procedure Act, 51 of 1977, did not contain a similar provision and in terms of the new Act the courts had a discretion whether or not to take previous convictions older than ten years into account and, if affirmative, what weight was to be given to such previous convictions. However, in their discretion, the courts did not ignore the principle contained

307 Compare *S v Van der Poel* 1962 (2) SA 19 (CPD) and *S v Makhae en 'n Ander* 1974 (1) SA 578 (OPD).

in the repealed section 303 ter and it continued to influence the decisions taken by the courts.³⁰⁸ Following the remarks in *S v Mqwathi*³⁰⁹ the Criminal Procedure Act was amended during 1991. In terms of the new provision it is specified that, under certain circumstances, previous convictions will fall away as previous convictions provided that a period of ten years has elapsed after the date of conviction of the relevant offence in respect of which the sentences referred to in the Act have been imposed. The lapsing of previous convictions in terms of section 271A is automatic; however, section 271A does only mean that the previous conviction must be left out of consideration when a later sentence is imposed.³¹⁰ In line with the case law that has been developed in this regard it is submitted that consideration could be given to amend the current time framework in respect of adult offenders in respect of the sentences listed in the current framework, from 10 years to 5 years and to add a new category of expungement providing for the lapsing of convictions after a period of 10 years. This new category should be available in instances where a period of 10 years have lapsed after serving the last sentence and a person has not again been convicted of any other offence and at the time of the application there is no other investigation for the commission of an offence pending or outstanding, The additional qualifying criteria for such applications for expungement, should include a list of offences or sentences imposed and recorded in the criminal record as previous convictions in respect of which a disqualification for expungement is introduced. Such disqualification criteria could, for example, include convictions in respect of which a minimum sentence has been imposed, a sentence where an accused has been declared a dangerous offender in terms of the CPA; a sentence where the court has declared the applicant a habitual offender and any offence in respect of which an accused has been sentenced to a period of more than 10 years imprisonment or more without the option of a fine. In addition to the above the additional criteria for consideration by a court should be the same

308 See *S v Mqwathi* 1985 (4) SA 22 (TPD).

309 1985 (4) SA 22 (TPD).

310 See *S v Zondi* 1995 (1) SACR 18 (A).

as the ones recommended in this paragraph in respect of the sentences qualifying for expungement after 5 years and the process should also be an application to the court.

- (v) The inclusion of a consideration of whether or not the sentence relating to the criminal record to be expungement, have been complied with or has been served. It is submitted that absence of such requirement places a question mark on the constitutional compliance of the legislation in view of the fact that, for purposes of protection of society, it is vital to consider the possibilities of re-offending and for this purpose consideration of evidence to the effect of successful rehabilitation or completion of a rehabilitation programme is of critical importance in an application for expungement. It is submitted that rehabilitation is still regarded by our courts as a purpose of sentencing and it is an important factor to be considered to justify an approval for expungement of a criminal record.
- (vi) Importantly the current procedure does not give any role to the prosecution with regard to an application for expungement. The prosecutor is not required to give an input notwithstanding the obligation on the prosecution to prove previous convictions, to address the court on sentencing and to ensure that an appropriate sentence is imposed to give effect to government's obligation to protect society. It is submitted that this failure renders the current legislation overbroad. It is submitted that the prosecution should have the opportunity to object to an application for expungement.
- (vii) Alignment of the criteria applicable to the removal of a name from the National Register of Sex Offenders and those required for an expungement in terms of the CJA and the CPA to include a requirement that if a person is eligible to apply for removal from the register, he/she must make such an application, that the application must be accompanied by a full set of fingerprints, that the biographical details of the applicant should require a motivation for the application as well as a declaration that there are no further pending cases against the applicant. It is submitted that having regard to the current process an additional qualifying criteria should include the submission of a motivated

application for expungement.

- (viii) Although the provisions of the Constitution do not specifically provide for expungement, it categorically states that a disqualification for membership of the National Assembly and the Provincial legislature **ends five years after the sentence** following a conviction has been completed and in fact confirms that no effect could be given to a conviction for purposes reintegration into society with reference to appointment in a particular job, five years after completion of the sentence. **It is recommended that the expungement legislation should include a provision dealing with the effects of a successful expungement for purposes of re-integration into society similar to the provision in the Constitution or in the Promotion of National Unity and Reconciliation Act.**
- (ix) Similarly section 271A of the CPA provides that a criminal conviction followed by a prescribed sentence falls away as a previous conviction if a period of 10 years has lapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence in respect of which a **sentence of imprisonment for a period exceeding six months without the option of a fine**, may be imposed. In terms of the wording “fall away” means that the conviction remains on the criminal record unless it is expunged. In addition it introduces a limitation to the effect that the conviction will not fall away if during that period the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed. This limitation is different from the limitation in section 271B of the CPA which provides that a record will not be expunged if, during the period of 10 years since the last conviction, the person in question has been convicted of an offence for which he has been **sentenced to a period of imprisonment without the option of a fine**. It is submitted that the contradictory provisions in sections 271A and 271B should be addressed. **The fall away provisions are dealt with in paragraph 7.226 and further.**

- (x) Alignment of the qualifying criteria for expungement in the two different Acts, namely the CPA and the CJA in respect of the current two different qualifying criteria (offence based versus sentence based) appears to be overbroad and should be addressed. (It should again be noted that the qualifying criteria for expungement in terms of the CPA (section 271A-D) are based on the **sentence** imposed whereas the qualifying criteria in respect of juvenile offenders are, in terms of the CJA, based on the **offences listed in Schedules 1 and 2 of the Act**).

However, both Acts provide for categories of offences or sentences qualifying for expungements which are indicative of the seriousness of the crime (offence) qualifying for expungement. In respect of adult offenders, the sentence imposed determines the seriousness of the offence and in respect of juvenile offenders, the offences listed in the schedules include criteria indicating the seriousness of the offence with reference to either the offence or coupled with an additional indication of the seriousness of the offence with reference to the value involved, where applicable (e.g. theft where the value of the property involved is a specified amount or with reference to drug related offences where the value of the drugs involved is a certain amount). The two schedules are linked to different qualifying time periods applicable to less serious offences (5 years) and (10) years for more serious offences. It is submitted that the use of a sentence based criteria to determine the seriousness of the offence is the better option since it broadens the offences in respect of which expungements are justified.

The sentence based criteria in the CPA introduces a broader spectrum of offences qualifying for an expungement in respect of adult offenders which approach is not available for juvenile offenders. The use of the sentence based criteria allows a much broader basis for expungement than the list approach in that it includes almost any offence except if an offence is specifically excluded. Ironically the limited list of offences approach is used for juvenile offenders who, in terms of arguments justifying the principle of expungement, would be more appropriately justifiable for juvenile offenders than for adult offenders. However, the current list of offences in the CJA

allows for the expungement of more serious offences for juvenile offenders than is available to adult offenders. **It is recommended that consideration should be given to using the same criteria in both the CPA and the CJA.**

- (xi) Names included in the National Register for Sex Offenders are not only based on convictions of offences in terms of the new CAA, but it also covers **all previous convictions for sexual offences against children** and persons with mental disabilities, regardless of whether or not the convictions resulted in a custodial or non-custodial sentence. In addition, according to Mr Muntingh a qualifying criteria for expungement is a conviction. However, in terms of the provisions of the CAA, it provides for the inclusion of the names of an offender in the National Register for Sex Offenders without that person having been convicted of a crime (as is currently provided for in respect of offenders not convicted because of mental illness). Therefore by requiring the removal of a person's name from the National Register for Sex Offenders as a prerequisite for expungement, the CPA broadens the subject matter of expungement, namely a criminal conviction, to include instances where no conviction has been recorded. The application of section 51 is compulsory and the Register includes that the names of persons **who are alleged to have committed a sexual offence against a child or person with a mental disability, must also be included in the National Register for Sex Offenders if the court has made a finding in respect of the alleged offender's lack of capacity to stand trial or if the alleged offender is not criminally responsible due to mental illness or defect as provided for in sections 77(6) and 78(6) of the CPA.**

Section 50 of the CAA provides for the inclusion of names in the National Sex Offender Register and it includes the names of any person who in terms of the CAA or any other law has been convicted of a sexual offence against a child or a person who is mentally disabled; the names of offenders who is alleged to have committed a sexual offence against a child or a person who is mentally disabled, but in respect of whom a court has made a finding and given a direction in terms of section 77(6) or 78(6) of the CPA; the names of offenders who are serving a sentence of imprisonment or who have served a sentence of imprisonment as the result of a conviction for a sexual offence

against a child or a person who is mentally disabled and the names of offenders having previous convictions for a sexual offence against a child or a person who is mentally disabled or who has not served a sentence of imprisonment for such offence.

It is quite clear that section 50 provides for the inclusion of names in the register in respect of offences that were committed before the passing of the CAA. The provision in the CAA in fact obliges the National Commissioner of Correctional Services forward to the Registrar the particulars referred of every prisoner or former prisoner which he or she has on record, who, at the commencement of the Act, is serving a sentence of imprisonment or who has served a sentence of imprisonment as the result of a conviction for a sexual offence against a child as well as a person who is mentally disabled. Mr Muntingh is of the view that the implications of these provisions are to provide retrospective application in respect of expungement.

Although the provisions in the CPA clearly provides that it is not applicable with retrospective effect, the inclusion of the names of offenders in the National Register for Sex Offenders in respect of offences which have already been served and in respect of convictions of sexual offences in existence prior to the coming into operation of the CAA, the linking of the fact that in terms the CPA an expungement is not available in respect of offenders whose names are included in the Register, by implication means that provisions of the CPA dealing with expungement are applicable to convictions prior to the coming into operation of the provisions of the CPA on expungement and as such disqualify such convictions from expungement unless the names are removed from the register. Mr Muntingh therefore submits that, in this regard, the provisions of the CPA have a retrospective effect.

The question that needs to be answered is whether or not the requirement to exclude an entitlement to expungement in respect of persons whose names have been included in the National Register for Sex Offenders because of convictions incurred prior to the passing of the legislating on expungement, unless such names have been removed

from the Register, is constitutional. It is submitted that, having regard to arguments set out in paragraphs 7.40-7.69 and the tests to be applied in determining the justification of the exclusion, it is submitted that such exclusion can be justified. Applying the directions and arguments of the constitutional court in the cases referred to, it is submitted that such limitation is justified.³¹¹ In pursuing a legitimate interest, namely the protection of society, the legislature can determine exclusions from expungement. In this regard the CPA excludes expungement in respect of sexual offences where a person's name has been included in the National Register for Sex Offenders unless the name has been removed from the Register. It is submitted that this exclusion appears to be included to protect a legitimate government interest (protection of society) and is, in terms of the case law referred to above, justified. The mere fact that a person's name is included in the Register for a conviction of offences committed and convicted of prior to the coming into effect of the CPA expungement provisions does not give the CPA retrospective operation. The names are included in the Register in terms of the CAA and not the CPA.

- (xii) A person whose name has been included in Part B of the National Child Protection Register as a result of a conviction as provided for in section 120(1)(b) of the CA, **must first have his or her name removed from the register before an application for expungement can be made.** Mr Muntingh³¹² points out that it should be noted that while the CPA in section 271B(b)(ii), refers to a conviction (a criminal record) as the subject matter to be expunged, the CA provides for a far lower bar than a conviction for inclusion in Part B of the National Child Protection Register. Section 120(1) of the CA provides that **a finding that a person is unsuitable to work with children can be made by a children's court, any other court in any criminal or civil proceedings, or any forum established or recognised by law in any disciplinary proceedings and therefore does not require a**

311 See discussion in paragraphs 7.40-7.69 and in particular also the arguments *State v. Lawson* 2013-Ohio-2111. in the Court of Appeals of Ohio Tenth Appellate District, No. 12AP-771(C.P.C. No. 11EP-200).

312 Civil Society Prison Reform Initiative "*The law and the business of criminal record expungement in South Africa*" Research Report no 18 on p 12 and further by Lukas Muntingh.

conviction for inclusion in the register. While it is true that the inclusion of a person's name in the National Child Protection Register is possible without a requirement of a conviction, the question which has to be answered is whether or not the provisions of the CPA requiring the clearance of a name from the National Child Protection Register Protection is unconstitutional. Once again, as is the case above, this question should be answered with reference to arguments set out in paragraphs 7.40-7.69 and the test to be applied in determining the justification of the exclusion, it is submitted that such exclusion can be justified. Applying the directions and arguments of the constitutional court in the cases referred to, it is submitted that such limitation is justified.³¹³ It is submitted that the inclusion of a person's name in the National Child Protection Register does not require a conviction, but it requires a finding in terms of section 120(1) of the CA that a person is unsuitable to work with children may be made by a children's court; or any other court in any criminal or civil proceedings in which that person is involved; or any forum established or recognised by law in any disciplinary proceedings concerning the conduct of that person relating to a child. Again the provisions of the CPA do not relate to an expungement of any finding by a court or body referred to above, but is limited to a conviction in respect of which a certain sentence has been imposed. The fact that before an expungement in respect of such conviction can be authorised, a person's name must be removed from the Child Protection Register, does not elevate such finding to the status of a conviction. It merely adds a further requirement to an expungement, namely that, where a person's name has been included in the Register, an expungement should not be available before removal of the name from the register. **The purpose of the Register is clearly to provide protection to children in compliance with government's obligations as outlined in the Constitution, National legislation and International obligations and, as outlined immediately above, it is submitted that such requirement can be justified.**

313 See discussion in paragraphs 7.40-7.69 and in particular also the arguments *State v. Lawson* 2013-Ohio-2111. in the Court of Appeals of Ohio Tenth Appellate District, No. 12AP-771(C.P.C. No. 11EP-200).

(e) Amendments to the CAA by the Department of Justice

7.144 The Department of Justice and Correctional Service is in the process of effecting amendments to the CAA and because of the Constitutional Court judgements in *Teddy Bear Clinic for Abused Children v the Minister of Justice and Constitutional Development and Others*³¹⁴ and *J v the National Director of Public Prosecutions and Others*³¹⁵ and published a draft Bill for consideration in September 2014. **In view of the proposed amendments the Commission is of the view that such amendments should not be duplicated in this discussion paper.** The following amendments are proposed:

Amendment of section 50 of Act 32 of 2007

7.145 Clause 6 of the Bill aims to amend section 50(2)(a) of the Act by the introduction of a proposed new paragraph (c) in terms of which a court will have the discretion to determine whether the particulars of a person, who was younger than 18 years at the time of the commission of a sexual offence, should be included in the National Register for Sex Offenders or not. The proposed amendment is based on the existing provisions of section 128 of the CA and the Regulations under the Act, which provisions deal with the removal of particulars from the National Child Protection Register.

7.146 Section 50 (2) of the CAA is amended to provide that a court that has in terms of the CAA or any other law convicted a person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person; or has made a finding and given a direction in terms of section 77(6) or 78(6) of the CPA that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was by reason of mental illness or mental defect not criminally responsible for the act which constituted a sexual offence against a child or a person who is mentally disabled, must make an order that the particulars of the person be included in the Register. When making such an order the court must, in the case of any person other than a person who was under 18 at the time of the commission of the offence, explain the contents and implications of such an order, including section 45 to the person in question.

314 [2013] ZACC 35.

315 [2014] ZACC 13.

7.147 Subsection (c) is added and provides that before making an order including the name of an offender under the age of 18 at the time of commission of the offence in the National Register for Sex Offenders, the court must inform the offender of the court's power to make an order for inclusion in the Register; receive and consider an assessment report compiled by a psychologist or psychiatrist duly registered or deemed to be registered in terms of the Health Professions Act, 1974 (Act No. 56 of 1974) or a social worker registered in terms of the Social Service Professions Act, 1978 (Act No. 110 of 1978), dealing with the likelihood whether or not the person will commit another sexual offence against a child or a person who is mentally disabled, and afford the person referred to an opportunity to make representations why such an order should not be made, where after the court may direct that the particulars of such a person not be included in the Register.

7.148 Subsection (4)(b) provides that where a court, for whatever reason, fails to make an order under subsection (2)(a) above, in respect of a person other than a person under the age of 18 years, the prosecuting authority or any person must immediately or at any other time bring this omission to the attention of the court and the court must make such order.

Amendment of section 51 of Act 32 of 2007

7.149 Clause 7 of the proposed Bill aims to effect certain amendments to section 51 of the Act. The provisions of section 51, as they stand, allow for a person (an affected person who was a child at the time of the commission of the offence) to apply for the removal of his or her particulars from the Register, without having to comply with any other conditions, after a period of ten, seven or five years have lapsed after expiry of the sentence concerned. It is proposed that a procedure should be introduced in terms of which an affected person will be allowed to submit an application before expiry of the stipulated periods. It is submitted that such a procedure will be in line with the provisions of the CJA and would provide for an individuated response to meet the child's best interest as expressed by the Constitutional Court. The proposed amendment of section 51 is based on section 128 of the CA and Regulation 45 under the Act.

PROBLEMS IDENTIFIED IN THE LEGISLATIVE FRAMEWORK OF EXPUNGEMENT - NON-ALIGNMENT OF THE DIFFERENT ACTS DEALING WITH EXPUNGEMENT.

7.150 In this part attention will be given to general problems with the legislative framework of expungement in respect of juvenile and adult offenders. It includes matters raising the constitutional issues regarding the legislative framework which has been discussed above (relating to the process and qualifying criteria) but in this part the emphasis is on the non-alignment in the different pieces of the enabling legislation. The matters raising constitutional issues have been extracted and discussed above with an evaluation and recommendations and is, for purpose of completeness, repeated in the discussion hereafter where relevant. However, matters not already dealt with above and which require amendment because of concerns regarding non-alignment of the different relevant Acts is highlighted in this part by the inclusion of an evaluation and recommendation. Recommendations regarding the constitutional issues with reference to process and qualifying criteria is not repeated, and recommendations are limited to matters requiring alignment of the different pieces of enabling legislation.

(a) Differences in the legal framework, the Constitution. the CPA, the CJA, the CAA and the CA regarding expungement and which raises constitutional issues.

(i) Differences in process, qualifications and consequences

(aa) Clearing records in terms of expungement legislation and the Constitution

7.151 Although the provisions of the Constitution do not specifically provide for expungement, it categorically states that a disqualification for membership of the National Assembly and the Provincial legislature **ends five years after the sentence** following a conviction has been completed and in fact confirms that no effect could be given to a conviction for purposes reintegration into society with reference to becoming a member of Parliament (holding a particular office) five years after completion of the sentence.

7.152 An evaluation of the legislation dealing with expungement clearly establishes that it provides for reintegration of convicted offenders in society after an application process. However, the Constitution contains provisions providing for the clearing of disqualifications

which inhibit or limit re-integration of convicted offenders following a conviction of an offence after 5 years. The way in which these disqualifications are cleared, is, however, different from the expungement legislation and other legislation dealing with disqualifications with reference to time periods, offences and processes. Although the Constitution does not provide for an “expungement” of a criminal record in the same sense as the CPA, it provides for the clearing or fall away of the consequences of such a criminal conviction for purposes of employment (holding a particular office namely becoming a member of Parliament). The Constitution does not provide for a process of for clearing, **but it clears the consequences of the conviction for purposes of becoming a member of Parliament after a specific time period (5 years after completion of the sentence)**. However, it should be noted that these provisions also do not provide for any limitation as to the number of times that such convictions would be cleared and it would appear that such clearance is **automatic** once the 5 year period time limit has been complied with.

7.153 In addition to the above Mr Muntingh³¹⁶ also points out that the key issues emerging from the Constitutional provisions are, firstly, that the exclusion from membership of Parliament is sentence based (in excess of 12 months’ imprisonment without the option of a fine) and not offence based. Secondly, the exclusion remains in force for a period of five years **after the completion of the sentence**, thus, according to him, clearly extending the punishment imposed by the court. He argues that a person sentenced to life imprisonment, even if released on parole will never be able to become a Member of Parliament as he remains on parole for the rest of his life and the sentence is completed only upon death. **The question whether or not the provision in the Constitution is justified, is in the Commission’s view clearly dependent on an evaluation of all the relevant Constitutional provisions as have been outlined in paragraph 7.87 above and, in the Commission’s view having regard to the judgments referred to, such a limitation on the right to equality and protection of dignity is clearly justified.**

7.154 Section 303ter, read with Schedule 5 of the repealed Criminal Procedure Act, 56 of 1955, acknowledged the principle that a previous conviction lapses after a period of ten years has expired without a further conviction in between.³¹⁷ Initially the new Criminal

316 Civil Society Prison Reform Initiative “*The law and the business of criminal record expungement in South Africa*” Research Report no 18 on p 7 by Lukas Muntingh.

317 Compare *S v Van der Poel* 1962 (2) SA 19 (CPD) and *S v Makhae en 'n Ander* 1974 (1) SA 578 (OPD).

Procedure Act, 51 of 1977, did not contain a similar provision and the courts had a discretion whether or not to take previous convictions older than ten years into account and if so what weight was to be given to such previous convictions. However, in their discretion, the courts did not ignore the principle contained in the repealed section 303 ter and it continued to influence the decisions taken by the courts.³¹⁸ Section 271A of the CPA, inserted by section 12 of Act 5 of 1991, amended by section 6 of Act 4 of 1992 and substituted by section 2 of Act 65 of 2008) now provides for the **falling away of previous convictions if a time period of 10 years has lapsed since the date of conviction and only in respect of offences for which certain sentences have been imposed**. Therefore, the falling away provision, as it is currently worded, introduced a falling away provision only in so far as the conviction attracted a certain sentence. The result is that its application is much narrower than its predecessors where there was no reference to the sentence imposed. In addition the lapsing of previous convictions in terms of section 271A is automatic. Section 271A means that the previous conviction must not be considered when sentence for a later conviction is imposed.³¹⁹

7.155 Mr Muntingh pointed out that it is not certain what the term fall away means and this should be clarified. Section 271A does not require any person to expunge the criminal record in respect of the qualifying convictions mentioned in section 271A and appears to have similar consequences as outlined in the Constitutional provision regarding membership in Parliament referred to above. Section 87(1) of the CJA also uses the terms “conviction and sentence ... fall away” but it is coupled with an application for expungement in terms of section 87(1). The CJA therefore clearly spells out the consequences of the fall away provision.

(bb) Recommendation

7.156 Mr Muntingh recommended that clarity should be provided regarding the implications and consequences of the falling away provision. In this regard it should be noted that the courts have provided clarity on the meaning of the fall away provision prior to its substitution

318 See *S v Mqwathi* 1985 (4) SA 22 (TPD).

319 See *S v Zondi* 1995 (1) SACR 18 (A).

in 2008. In *S v Mqwathi*³²⁰ the court noted that, although the legislature did not re-enact in the new Criminal Procedure Act 51 of 1977 the provisions of section 303 *ter*, read with the Fifth Schedule, of the repealed Criminal Procedure Act 56 of 1955 (which provided that previous convictions should not be taken into account in the imposition of sentence if the last previous conviction was more than 10 years old), the court had an unfettered discretion and does not mechanically take into account the 10 year period on form SAP 69. Furthermore, it does not mean that the salutary principle contained in the Fifth Schedule is no longer applicable. **Therefore, where the court now exercises an unfettered but judicial discretion, it can decide, having regard to the nature, number and extent of similar previous offences and the passage of time between them and the present offence, to leave out of account the previous convictions, even where the last previous conviction is less than 10 years old, and treat the accused as a first offender. The court can also, taking into account the aforementioned factors, nevertheless decide to take the previous convictions into account as an aggravating circumstance even where the last previous conviction is more than 10 years old.** However, the tendency which has recently appeared simply to take into account everything appearing on form SAP 69 regardless of the passage of time, without proper regard to the fact that even a criminal is entitled to ask that the lid on the distant past should be kept tightly closed, should be guarded against. It will nevertheless be a salutary and practical starting point, although not an inflexible yardstick, if the 10 year period is applied to the benefit of the accused.

7.157 After the amendment by Act 65 of 2008 with effect from 6 May 2009, the category under (ii) – section 271A(1)(b) – includes practically all offences. Even for a serious offence like murder, imprisonment of less than 6 months without the option of a fine can be imposed. All other (if there are any) previous convictions remain in place, but the longer the time lapse the less value the court will generally attach to a conviction, **except insofar as a trend appears from the previous convictions.** If the previous conviction falls within the ambit of section 271A it falls away automatically after 10 years (*S v Zondi* 1995 (1) SACR 18 (A), which was decided on the old wording of paragraph (b)). It is submitted that the usefulness of this provision, in its current format, is limited. Judicial officers imposing sentence would in any event attach no weight to such an old conviction. The section would, however, have meaning regarding compulsory sentences which are calculated according to previous convictions, as was the case with corrective training, prevention of crime and declaration as

320 1985 (4) SA 22 (TPD).

habitual criminal under the 1955 Act. The last portions of Schedules 5 and 6 of the CPA also refer, for the purposes of the imposition of minimum sentences, to previous convictions.

7.158 It is recommended that consideration be given to broaden the expungement provisions in the CPA to include applications for expungement in respect of adult offenders as outlined in paragraph 7.143 (iv) above. The matter of the fall away of previous convictions is dealt with in paragraph 7. 237.

(ii) Differences in the qualifying criteria for expungement in the different Acts

(aa) Qualifying criteria: sentence based versus offence based

7.159 It should be noted that the qualifying criteria for expungement in terms of the CPA (sections 271A-D) is based on the **sentence** imposed whereas the qualifying criteria in respect of juvenile offenders is, in terms of the CJA, based on the **offences listed in Schedules 1 and 2 of the Act**. However, both Acts provide for two categories of offences qualifying for expungement, which can be classified to relate to minor offences and more serious offences. The matter has already been discussed under the qualifying criteria above and the discrepancies between the two benchmarks for adult and juvenile offenders have been pointed out. **The recommendation above in paragraph 7.143 is not repeated here.**

(iii) Differences relating to the approval of an application for expungement – discretionary as against mandatory

(aa) Section 271B of the CPA and section 87 of the CJA

7.160 In terms of section 271B of the CPA it would seem that the Director-General of the Department of Justice and Constitutional Development has no discretion to issue a certificate of expungement since a certificate must be issued if the Director-General is satisfied that there is compliance with the criteria in the Act. Section 87 of the CJA, however, in no uncertain terms, provides that the issuing of a certificate of expungement leaves no discretion to the approving authority. It provides that the Director-General of the Department of Justice and Constitutional Development **must**, on receipt of the written application of an

applicant issue the prescribed certificate of expungement, and direct that the conviction and sentence of the child be expunged if the Director-General is satisfied that the child complies with the criteria set down in the Act, namely the time lapse of 5 years in respect of the offences in Schedule 1 and 10 years in respect of Schedule 2. However, section 87(3) the CJA also provides for a discretion to the Cabinet member responsible for the administration of justice who may issue a certificate of the expungement **if exceptional circumstances** exist even if the qualifying time lapse has not been complied with. No such discretion or reference to exceptional circumstances is to be found in the Criminal Procedure Act.

(bb) Recommendation

7.161 This problem is addressed by the recommendations above on the application process as well as the recommendations on the qualifying criteria for the applications. In respect of the process it is recommended above that the administrative process should be replaced by a court application process and with regard to the qualifying criteria it is recommended above that additional qualifying criteria should be included in the legislation which leaves no room for an unqualified discretion of the Minister, as provided for in section 87(3) of the CJA, to approve an expungement on the basis of an uncertain benchmark of 'exceptional circumstances'. On face value there appears to be little justification for allowing juvenile offenders to apply for an expungement of a criminal record not covered in the legislation and not to do so also in respect of adult offenders.

7.162 The question arises whether or not provision should not be made for both juvenile and adult offenders to submit an application to court for an expungement in respect of a criminal conviction in respect of an offence or sentence not covered in the legislation and before expiration of the qualifying time frames based on the amended qualifying criteria and against a benchmark of consideration of the "existence of exceptional circumstances and if the court is satisfied that it is in the interests of justice" to do so. The Commission does not propose such amendment but invites comments on the inclusion of such proposal or not.

(iv) The retention of section 271C of the CPA

7.163 Section 271C of the CPA provides for the expungement of certain criminal records

under legislation enacted before the Constitution of the Republic of South Africa, 1993, took effect. In essence it deals with the expungement of the criminal record based on convictions of offences described as offences under the old apartheid regime. In essence 271C(1) provides for the automatic expungement of the offences listed in the section (1) whilst subsection (2) provides for the expungement of offences listed in (1) which have not been expunged automatically as well as the offences listed in subsection (2), on application of the convicted person.

7.164 The issue of expungement of criminal records is part of recent developments and changes to the law in South African and has, for the first time been dealt with extensively in our law in the Promotion of National Unity and Reconciliation Act, 34 of 1995. The Act, however, applied to offences committed with a political objective only, it did not deal specifically with juveniles, but included expungement for offences committed by persons (therefore juveniles not specifically excluded). Furthermore its operation was not limited to convictions for criminal offences. The matter has been discussed in chapter 2 where it was indicated that sufficient justification existed for the enactment of the legislation as well as the expungement of such criminal records.

7.165 The Promotion of National Unity and Reconciliation Act was passed following the coming into operation of the new Constitution. The epilogue to the new Constitution provided as follows:

National Unity and Reconciliation

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but

not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country."

7.166 Pursuant to the provisions of the epilogue, Parliament enacted during 1995 what is referred to as the Truth and Reconciliation Act. Its proper name is the Promotion of National Unity and Reconciliation Act 34 of 1995. The Act established a Truth and Reconciliation Commission. The objectives of that Commission are set out in section 3. Its main objective is to "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past". It is enjoined to pursue that objective by "establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights" committed during the period commencing 1 March 1960 to the "cut-off date". For this purpose the Commission was obliged to have regard to "the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations". It was also required to facilitate the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective.

7.167 The Commission was further entrusted with the duty to establish and to make known "the fate or whereabouts of victims" and of "restoring the human and civil dignity of such victims" by affording them an opportunity to relate their own accounts of the violations and by recommending "reparation measures" in respect of such violations and finally to compile a comprehensive report in respect of its functions, including the recommendation of measures to prevent the violation of human rights. Section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 provides as follows:

"(7) (a) No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or

offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.

(b) Where amnesty is granted to any person in respect of any act, omission or offence, such amnesty shall have no influence upon the criminal liability of any other person contingent upon the liability of the first-mentioned person.

(c) No person, organisation or state shall be civilly or vicariously liable for an act, omission or offence committed between 1 March 1960 and the cut-off date by a person who is deceased, unless amnesty could not have been granted in terms of this Act in respect of such an act, omission or offence."

7.168 In essence section 271C of the CPA gives effect to the expungement of criminal records in respect of offences listed which were based on race or legislation which created offences which would not have been considered to be offences in an open and democratic society, based on human dignity, equality and freedom, under the constitutional dispensation after 27 April 1994. It has been pointed out in chapter 2 that sufficient justification for the principle of expungement in respect of these offences existed and section 271C therefore gives effect to the automatic expungement and on application of criminal records in relation to so-called apartheid crimes. It is therefore submitted that the provisions of section 271C is justified and should be retained unchanged. The offences listed and the process prescribed for expungement does not require any reconsideration and are in the Commission's view not subject to a review in the same sense as the expungement provisions contained in the other sections in the CPA and the CJA dealing with expungement.

(aa) Recommendation

7.169 It is recommended that section 271C be retained unchanged.

(v) Differences in time lines and calculation of time lines

(aa) Differences in the time lapse before an application for an expungement can be considered versus the calculation of the time line and at the time lines in terms of applications for removal of names from the National Sex Offender Register and the Child Protection Register

7.170 The CPA provides that **if a person has been convicted of a sexual offence**

against a child or a person who is mentally disabled, and his or her name has been included in the National Register for Sex Offenders, the person’s criminal record may not be expunged unless his or her name has been removed from the National Register. The time lapse before a person can apply for an expungement in terms of the CPA is 10 years and in the CJA respectively 5 and 10 years after the date of conviction, depending on the offences involved. In terms of **section 87 of the CJA it is not stated that the removal of a name from the National Register for Sex Offenders or the National Child Protection Register are prerequisites for applications for expungement.**

7.171 However, in terms of the provisions of the CPA, where a person’s name has been included in the National Register for Sex Offenders, an application for expungement cannot be made before the name is removed from the Register. It is important to note that section 51 of the CAA and the accompanying regulations set out the requirements for removal of the name from the Sex Offenders Register. It provides that the time line for removal of the name from the register is based on the sentence imposed and also determines the prescribed time lapse before removal from the register can be done. Section 51 provides for a time lapse for removal of the name from the register ranging between 10 years, 7 years and 5 years, depending on the nature of the sentence imposed. A summary of the criteria is set out in the table below. The provisions of the different Acts are not aligned and different time periods determine whether or not an expungement can be sanctioned and the removal of the name from the Register introduces time frames which do not correspond with the sections in the enabling expungement legislation. The time line for applications for expungements in terms of the CPA is 10 years after the date of conviction and 5 and 10 years after the date of conviction in the CJA. However, removal of names from the two Registers is not a precondition for expungements in terms of the CJA.

7.172 A summary of the removal requirements of section 51 are:

Offence category	Sentence	Time Lapse	Removable
Sexual offence against a child or mentally disabled person	Sexual offence against a child or mentally disabled person, Imprisonment, periodical imprisonment, correctional supervision and imprisonment under section	Not Applicable	No

	276(1)(i) without the option of a fine for a period exceeding 18 months, whether suspended or not.		
	Two or more convictions of a sexual offence against a child or mentally disabled person	Not applicable	No
	Imprisonment, periodical imprisonment, correctional supervision and imprisonment under section 276(1)(i) without the option of a fine for a period of at least 6 months but not exceeding 18 months, whether suspended or not.	10 years after release from prison or the period of suspension has lapsed	Yes
	Imprisonment, periodical imprisonment, correctional supervision and imprisonment under section 276(1)(i) without the option of a fine for a period of at least 6 months or less, whether suspended or not.	7 years after release from prison or the period of suspension has lapsed	Yes
	Any lesser sentence or court order than the above	5 years after release from prison or the period of suspension has lapsed	Yes
	Court makes finding in respect of section 77(6) [capacity to understand proceedings] or 78(6)[mental illness] of the CPA	5 years after release from prison or the period of suspension has lapsed	Yes

7.173 Mr Muntingh notes that there are a number of problem areas in relation to the procedure for removal.³²¹ As is evident from the summary of section 51 of the CAA the Act

321 Civil Society Prison Reform Initiative “*The law and the business of criminal record expungement in South Africa*” Research Report no 18 on p 15 by Lukas Muntingh.

introduces a time line for an application for removal from the National Sex Offenders Register which is different from the time line required for submission of an application for expungement in terms of the CPA. Secondly, the qualifying criteria for expungements in terms of the CPA are sentence based whereas in terms of the CJA it is offence based. Therefore, in terms of the CJA applications for expungement of sexual offences can be made after a period of 5 years or 10 years after the date of conviction in respect of certain offences listed in Schedules 1 and 2 of the Act which have no bearing or reference to the sentence criteria required for removal of a name from the National Sex Offender Register. The result is that because removal of a name from the National Sex Offender Register is sentence based and not offence based, and because removal from the Register is not required for an expungement in terms of the CJA, it is possible to expunge a criminal record in respect of a juvenile offender while his or her name is still recorded on the National Register for Sex Offenders. The following convictions listed in Schedule 1 of the CJA (linked to the 5 year time line) allows for expungements in respect of sexual offences listed in the CAA:

13. Engaging sexual services of persons 18 years or older, referred to in section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007).
14. Bestiality, referred to in section 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.
15. Acts of consensual sexual penetration with certain children (statutory rape) and acts of consensual sexual violation with certain children (statutory sexual assault), referred to in and subject to sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.

And the following sexual offences are listed in Schedule 2 (linked to the 10 year time line):

13. Sexual assault, compelled sexual assault or compelled self-sexual assault referred to in sections 5, 6 and 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), respectively, where grievous bodily harm has not been inflicted.
14. Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation, referred to in section 8 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.
15. Exposure or display of or causing exposure or display of child pornography or pornography as referred to in sections 10 or 19 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.

16. Incest and sexual acts with a corpse, referred to in sections 12 and 14 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.

17. Exposure or display of or causing exposure or display of genital organs, anus or female breasts to any person (“flashing”), referred to in sections 9 or 22 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

1.174 In addition to the above the calculation of the time lines for removal of the names from the Register is different in the CAA than the timelines for applications for expungement in terms of the CPA. The time line in section 51 of the CAA is the **date upon which the offender was “released from prison or the period of suspension has lapsed”** as a result of which there are two different standards for an application for expungement which are linked to the removal of a name from the Sex Offender Register. The time line which qualifies an application for expungement in terms of the CJA is calculated as (i) the lapsing of **five years after the date of conviction** in the case of an offence referred to in Schedule 1 or (ii) the lapsing of 10 years after the date of conviction in the case of an offence referred to in Schedule 2. However, since removal of the name from the Register is not required for an expungement in terms of the CJA this difference is immaterial. However, in terms of section 271A of the CPA conviction shall fall away as a previous conviction **if a period of 10 years has elapsed after the date of conviction** of the said offence. The same calculation method is prescribed in Section 271B.

7.175 Section 51 does not clarify what “release from prison” means and whether that refers to the date of expiry of the sentence or the date that the offender may be released on parole or placed under community corrections or, whether it refers to the date of the actual release if on a date falling between the other two dates. It is this distinction that seized the Supreme Court of Appeal in *Price v Minister of Correctional Services*³²² and the court declared that “the ‘date of release’ referred to in section 276A(3)(a)(ii) of the CPA means, for the purpose of a prisoner subject to the provisions of the Correctional Services Act 8 of 1959 relating to his or her placement under community corrections, the date on which such prisoner may be considered for placement on parole or the date upon which the prisoner may be released upon the expiration of his or her sentence, whichever occurs first.”

322 *Price v Minister of Correctional Services* Para 18 [2007] SCA 156 (RSA).

7.176 Section 73(6)(a) of the Correctional Services Act stipulates that a prisoner must serve the stipulated non-parole period or if no such period was stipulated, then half the sentence before being considered for release. Mr Muntingh concludes that it is from this date of release, most likely halfway through the imposed sentence that the time period (five, seven or ten years) as stipulated in section 51 of the CAA commences.³²³ The decision to release a person serving a sentence of less than 24 months rests not with the Correctional Supervision and Parole Board, but with the Head of the Correctional Centre.³²⁴

7.177 An evaluation of the issues referred to by Mr Muntingh reveals that although there are the discrepancies he referred to in essence it does not affect the time frame for an application for expungement in terms of the CJA. In terms of the CPA the time line for an application for expungement in terms of section 271B of the Act is 10 years after the date of conviction. None of the sentences prescribed in terms of section 51 of the CAA which qualifies for an application for removal of a name from the National Sex Offender Register within a period shorter than 10 years (ie the periods of 5 and 7 years), would qualify an offender to apply for an expungement in less than 10 years. Because 10 years after the date of conviction is the requirement for an application for expungement in terms of the CPA and it is 10 years after release from prison for an application for removal of a name from the Register, the latter period will be longer than the 10 years calculated from the date of conviction which is required for an application for expungement. The net result is that in some instances an application for expungement cannot be made notwithstanding the fact that the qualifying criteria of 10 years after date of conviction have been met. The time requirement for removal of the name from the Register will in such cases inevitably extend the 10 year period required for an application for expungement. However, it is submitted that the two time periods required in the two Acts should not necessarily be the same as it serves different purposes. However, the shorter periods required for removal of names from the Register (5 and 7 years) will have no extending effect on the 10 year period required for applications for expungement, since it will allow for applications for removal from the Register prior to the 10 year qualifying period for an application for expungement. However, if the time period for applications for expungement is reduced to 5 years in respect of the sentences currently listed in the CPA, it will have the same extending effect (as is proposed

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324 Section 75(1) Correctional Services Act 111 of 1998.

in paragraph 7.143 (iv)). In other words, in terms of an application for expungement in terms of the CPA, the fact that an offender may apply for removal of his or her name from the Sex Offender Register within a shorter period than required for an application for expungement, is immaterial where the two periods are different and the expungement application period is the longer.

7.178 Mr Muntingh³²⁵ notes that in addition to the above there is no clear guidance as to how the legislature established the five, seven and ten year time periods set out in section 51 and how the risk the individual may pose to society upon release in respect of further offending was linked to the time lapse periods. He points out that research elsewhere has found that 19% of sex offenders reoffended after two years, 28% after five years and 36% after ten years. The same study found that sex offenders were also convicted of other violent and non-violent property offences. Evidently the longer the time period, the greater the chances of re-offending become, but despite extensive research in this regard, age together with a wide range of other variables rather than time lapse appear to be a stronger predictor of offending rates.

7.179 However, notwithstanding above, it is submitted that the alignment of the time frames in the two Acts should be considered especially in view of the conclusion that additional criteria proposed in paragraph 7.143 above should be introduced. In particular it is proposed that in terms of both the CPA and the CJA the sentences imposed should be the qualifying criteria and it is proposed that the time line should be calculated from after the sentence imposed has been served because a further qualifying criteria is introduced for a successful expungement, namely that of consideration of the extent of rehabilitation before approving or allowing an application for expungement.

(bb) Recommendation

7.180 It is recommended that the provisions in section 51 of the CAA regarding the time lines for removal of the name of a person from the National Sex Offender Register and applications for expungements in the relevant legislation regulating an application for expungement should be aligned. However, the Commission is of the view that its proposals

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regarding the calculation of the time frame for an application for expungement, which includes the requirement that the time frame should be calculated from the date after the serving of the sentence, would achieve the alignment of the provisions in the two Acts. In addition it is proposed that the qualifying criteria for expungements should also be sentence based for both juvenile and adult offenders and the time lines should be calculated from after serving the sentences. It is also proposed that removal of names from the Register should also be a pre-condition for an expungement in respect of juvenile offenders.

7.181 However, it should also be noted that the purpose for inclusion of names in the National Sex Offender Register and the Child Protection Register is to afford protection to victims of sexual offences and children respectively and although the time lines for removal of the names may be different from the time lines set for an application for expungement, requiring the removal of a name from the registers involved before an application for expungement could be considered, would represent a legitimate government interest in the protection of society and in view of the special protection that need to be afforded to these victims or children in terms of the Constitution. It would be justified even though the requirement of removal of the names would mean that an application for expungement in respect of such offences would be longer than for other offences.

(vi) The absence of corresponding sentencing options in the CJA and the CAA

(aa) The absence of the sentencing option in terms of section 77 of the Child Justice Act in section 51 of the CJA

7.182 Mr Muntingh³²⁶ notes that the CAA predates the CJA by some two years and even though the CJA makes provision for a custodial sentence of up to five years in respect of a child and youth care centre, this sentencing option is not covered by the sentences defined in section 51 of the CAA. It therefore follows that the name of a child who is convicted of a sexual offence must be placed on the register, but the name cannot be removed as a sentence to a child and youth care centre is not listed in section 51.

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7.183 Section 56A of the CAA was introduced in 2012 by Act 6 of 2012 (the Criminal Law (Sexual Offences and Related Matters Amendment Act Amendment Act and provides for the penalties which may be imposed in respect of sexual offenses contained in the CAA. It provides that a court shall, if-

- (a) that or another court has convicted a person of an offence in terms of this Act; and
- (b) a penalty is not prescribed in respect of that offence in terms of this Act or by any other Act,

impose a sentence, as provided for in section 276 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which that court considers appropriate and which is within that court's penal jurisdiction..

7.184 Therefore, in terms of the amendment to the CAA the penalties prescribed in section 276 of the CPA may be imposed in respect of any contravention of a sexual offence defined in the CAA subject to the limitations of the trial court's penal jurisdiction. A child justice court may, however, impose any sentence listed in section 276 in respect of an offence defined in the CAA, which includes a committal to any institution established by law for a period not exceeding 5 years. This would cover a sentencing option of a sentence in terms of section 77 of the CJA to compulsory residence in a child and youth care centre providing a programme referred to in section 191(2)(j) of the CA. This sentencing option, according to Mr Muntingh, is not included in section 51 of the CAA which provides for the removal of the name of a person from the National Sex Offender Register and he proposes that the sentencing option be included in the different qualification criteria listed below for removal of particulars from the Register.

7.185 Section 51 of the CAA provides for the removal of particulars of a person's name from the National Sex Offender Register in the following instances, namely the particulars of a name of a person who has been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to a **term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)(f)** of the CPA, without the option of a fine for a period of at least six months but not exceeding eighteen months, whether the sentence was suspended or not, may, on

application be removed from the Register **after a period of ten years** has lapsed after that person has been released from prison or the period of suspension has lapsed; or a person convicted as above and on whom a sentence defined above, without the option of a fine for a period of six months or less, whether the sentence was suspended or not, may, on application, be removed from the Register **after a period of seven years** has lapsed after that person has been released from prison or the period of suspension has lapsed; or a person who is alleged to have committed a sexual offence against a child or a person who is mentally disabled and in respect of whom a court has made a finding and given a direction in terms of section 77(6) or 78(6) of the CPA, may, on application, be removed from the Register after a period of five years has lapsed after such person has recovered from the mental illness or mental defect in question and is discharged in terms of the Mental Health Care Act, 2002 (Act No. 17 of 2002).

7.186 Importantly section 51 provides that the particulars of a person who has been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled, to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276(1)(i) of the CPA, without the option of a fine for a period exceeding eighteen months, whether the sentence was suspended or not, may not be removed from the Register.

(bb) Recommendation

7.187 It is recommended that the sentencing option referred to by Mr Muntingh be redressed through legislative amendment to harmonise the two pieces of legislation. It is recommended that section 51 of the CAA be amended accordingly.

(vii) The problem with reference to section 297(2) of the Criminal Procedure Act

(aa) Section 297 of the CPA provides for an acquittal even though a conviction is recorded

7.188 Mr Muntingh³²⁷ notes that a self-contradictory provision is also found in section 297(2) of the CPA, providing for an acquittal, yet it is recorded as a conviction and would thus appear on the criminal record of the person. He furthermore points out that It should similarly be noted that the record of criminal convictions is not only used by the courts for purposes of sentencing, but that it is also used by, for example, prospective employers.

(bb) Recommendation

7.189 It is recommended that the matter should be clarified by an amendment to section 297 of the CPA. A conviction remains a conviction and cannot be regarded as an acquittal.

(b) Non-alignment of the different Acts dealing with expungements and the National Sex Offender Register and the National Child Protection Register

(i) Differences in the requirements for an application for expungement and removal from the National Sex Offender Register and the National Child Protection Register

(aa) Removal of particulars from Registers not a requirement for application for expungement in terms of the CJA

7.190 The registers introduced by CAA and the CA introduced additional and different requirements for expungements as provided for in the CPA and the CJA. The removal of a person's name from these registers is a prerequisite for an application for expungement in terms of the CPA, but not in respect of an expungement in terms of the CJA. Secondly, different procedures and conditions apply to remove the names from the registers in terms of the legislation establishing these registers. Removal from the National Sex Offender Register requires an application in a prescribed format which includes a motivation for the application as well as a declaration that there are no further cases pending against the applicant. The Registrar may then, if satisfied, issue a certificate that the person's name has been removed from the register. The same form can also be used to issue a certificate that a

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person's name has not been removed from the register.

(bb) Recommendation

7.191 It is recommended that the conflicting provisions in the CJA and the CPA should be aligned in that removal of the name of an offender from the registers should be a prerequisite before an expungement in respect of any offence resulting in the inclusion of names in either register is considered or approved. The Commission is of the view that there are no compelling reasons or need for the process to remove a name from these registers and applications for expungement to be the same. **It is submitted that in so far as the differences referred to above are concerned, the only compelling amendment concerns the fact that both juvenile and adult offenders whose names are included in either register, should not be able to have an offence which resulted in the inclusion of the name/s in either register, expunged without requiring the removal of the name from the register as a precondition for expungement.**

(ii) An application for removal from the National Register for Sex Offenders has more formal requirements than an application for expungement

(aa) Application for removal of particulars from the National Sex Offender Register and application requirements for expungement

7.192 Section 51 of the CAA and the accompanying regulations set out the requirements for removal from the Sex Offenders Register. If a person is eligible to apply for removal from the register, he/she must make such an application on Form 10 in Annexure B of the Regulations to the CAA. The application must be accompanied by a full set of fingerprints. The form (Form 10) requires, in addition to the biographical details of the applicant, a motivation for the application as well as a declaration that there are no further pending cases against the applicant. The Registrar may then, if satisfied, issue a certificate (Form 11) that the person's name has been removed from the register. The same form can also be used to issue a certificate that a person's name has not been removed from the register. The Registrar may also remove a person's details from the register if satisfied that the inclusion

of the person on the register was clearly done in error.³²⁸ Requirements such as the inclusion of a motivation or a declaration that no further cases are pending before removal from the Sex Offender Register, are not conditions to applications for expungement directly provided for in both the CPA or in the CJA. However, in view of the recommendations on the qualifying criteria outlined in paragraph 7.143, it is submitted that qualifying criteria such as a motivated application by the applicant including consideration of the extent to the offender has successfully rehabilitated should be a precondition for applications for expungement for both adult and juvenile offenders and therefore included in the qualifying criteria in respect of both. Currently, in terms of the existing legislation, it is a condition to expungement that there should be no pending criminal cases against offenders applying for expungement

(bb) Recommendation

7.193 The matter has already been considered above when dealing with the qualification criteria and it was recommended that both the CPA and the CJA be aligned to include rehabilitation and the complete serving of the sentences imposed as well as the fact that there should be no pending cases against an applicant be included as qualifying criteria in the legislation.

(iii) Inclusion of a name in the National Child Protection Register is based on conditions, orders of a court or tribunal, which are broader than a conviction of an offence (criminal record) which is the subject matter of an expungement

(aa) Inclusion of name in National Child Protection Register not based on convictions

7.194 A person whose name has been included in Part B of the National Child Protection Register as a result of a conviction as provided for in section 120(1)(b) of the CA, **must first have his or her name removed from the register before an application for expungement can be made.** Mr Muntingh³²⁹ points out that it should be noted that while the CPA in section 271B(b)(ii), refers to a conviction (a criminal record) as the subject matter

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to be expunged, the CA provides for a far lower bar than a conviction for inclusion in Part B of the National Child Protection Register. Section 120(1) of the CA provides that a finding that a person is unsuitable to work with children can be made by a children's court, any other court in any criminal or civil proceedings, or any forum established or recognised by law in any disciplinary proceedings and therefore does not require a conviction for inclusion in the register.

7.195 It is submitted that a person whose name is included in the National Child Protection Register is based on findings by a children's court or any other court in terms criminal or civil proceedings. Such findings may or may not be part of a criminal trial where a conviction and sentence resulted. In so far as the findings do not form part of a criminal trial resulting in a conviction such findings do not qualify for "expungement". It is submitted that having regard to the special provisions regarding the protection of children, the constitutional provisions and government's duties regarding children, relevant International Instruments and case law, it cannot be said that the inclusion of names in the Child Protection Register based on findings by a tribunal falling short of a conviction, is unconstitutional as such and therefore a limitation of the right to equality which is unfair, irrational or overbroad.³³⁰ It is submitted that an investigation as to the inclusion of names in the National Child Protection Register is not part of the terms of reference of this investigation. However, it is relevant in so far as its provisions are relevant to the expungement process.

7.196 The CA provides for the inclusion of the names of persons in two parts of the Register. In terms of section 114 of the Act part A of the register must be a record of all reports of abuse or deliberate neglect of a child made to the Director-General in terms of the Act; all convictions of all persons on charges involving the abuse or deliberate neglect of a child; and all findings by a children's court that a child is in need of care and protection

330 The objects of the Children's Act 38 of 2005 are to promote the preservation and strengthening of families; to give effect to the following constitutional rights of children, namely , family care or parental care or appropriate alternative care when removed from the family environment; social services; protection from maltreatment, neglect, abuse or degradation; and that the best interests of a child are of paramount importance in every matter concerning the child; to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic; to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children; to strengthen and develop community structures which can assist in providing care and protection for children; to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards; to provide care and protection to children who are in need of care and protection; to recognise the special needs that children with disabilities may have; and generally, to promote the protection, development and well-being of children.

because of abuse or deliberate neglect of the child. As such the following must be reflected in the register in the case of reported incidents referred to in the Act the full names, surname, physical address and identification number of the child; the age and gender of the child; whether the child has a disability and if so, the nature of the disability; whether the child has a chronic illness and if so, the nature of the chronic illness; the nature and a brief account of the incident, including the place and date of the incident; the full names, surname, physical address and identification number of the parents or care-giver of the child and the name and physical address of the institution, child and youth care centre, partial care facility or shelter or drop-in centre, if the incident occurred at such a place. In the case of a conviction it must reflect the full names, surname, physical address and identification number of the child; the age and gender of the child; whether the child has a disability and if so, the nature of the disability; whether the child has a chronic illness and if so, the nature of the chronic illness; the full names, surname, physical address, identification number and occupation of the convicted person; the nature and a brief account of the charge and conviction, including the place and date of the incident of which the person was charged; and details of the relationship between the convicted person and the child.

7.197 In the case of a finding by a children's court it must reflect the full names, surname, physical address and identification number of the child; the age and gender of the child; whether the child has a disability and if so, the nature of the disability; whether the child has a chronic illness and if so, the nature of the chronic illness; a brief summary of the court's reasons for finding the child to be in need of care and protection; information on the outcome of the court's finding on the child; the full names, surname, physical address and identification number of the parents or care-giver of the child; and a brief summary of the services rendered to the child found to be in need of care; and other prescribed information.

7.198 Section 115 deals with access to Part A of Register which is limited to the Director-General and officials of the Department designated by the Director-General to have access to Part A of the Register, but the Director-General may, on such conditions as the Director-General may determine, allow access to a provincial head of social development, or an official of a provincial department of social development designated by the head of that department, for the purpose of performing his or her functions in terms of the Act; designated child protection organisations; a member of the unit of the South African Police Service tasked with child protection; or any other person for the purpose of conducting research on

child abuse or deliberate neglect or related issues on condition that the full names, surname, physical address and identification number of the child must be excluded.

7.199 Section 116 provides that no person may disclose any information in Part A of the Register except for the purpose of protecting the interests, safety or well-being of a specific child; within the scope of that person's powers and duties in terms of this Act or any other legislation; for the purpose of facilitating an investigation by the South African Police Service following a criminal charge involving abuse or deliberate neglect of a specific child; to a person referred to in section 117 on written request by such person; or when ordered by a court to do so.

7.200 The following **conclusions can be drawn**, namely the inclusion of the name of a person in Part A of the Register:

- * Reflects a record of all reports of abuse or deliberate neglect of a child made to the Director-General in terms of the Act; all convictions of all persons on charges involving the abuse or deliberate neglect of a child; and all findings by a children's court that a child is in need of care and protection because of abuse or deliberate neglect of the child;
- * it is done for the purpose of protecting the interests, safety or well-being of a specific child; within the scope of that person's powers and duties in terms of the Children's Act or any other legislation and for the purpose of facilitating an investigation by the South African Police Service;
- * Access to information of particulars in the Register is carefully controlled and prescribed in the Act; and
- * the general rule with regard to the disclosure of information in Part A of the Register is limited and disclosure must be in the best interests of the child, unless the information is disclosed following an inquiry in terms of section 117;

7.201 Section 118 provides for the purpose of Part B of the Register is to have a record of persons who are unsuitable to work with children and to use the information in the Register in order to protect children in general against abuse from these persons. In terms of section 119 Part B of the Register must be a record of persons found in terms of section 120 to be unsuitable to work with children, and must reflect the full names, surname, last

known physical address and identification number of the person; the fingerprints of the person, if available; a photograph of the person, if available; a brief summary of the reasons why the person was found to be unsuitable to work with children; in the case of a person convicted of an offence against a child, particulars of the offence of which he or she has been convicted, the sentence imposed, the date of conviction and the case number; and such other prescribed information

7.202 In terms of section 120 a finding that a person is unsuitable to work with children may be made by a children's court; any other court in any criminal or civil proceedings in which that person is involved; or any forum established or recognised by law in any disciplinary proceedings concerning the conduct of that person relating to a child. A finding in terms of subsection (1) may be made by a court or a forum contemplated in subsection (1) of its own volition or on application by an organ of state involved in the implementation of the Act; a prosecutor, if the finding is sought in criminal proceedings; or a person having a sufficient interest in the protection of children. Evidence as to whether a person is unsuitable to work with children may be heard by the court or forum either in the course of or at the end of its proceedings. **In criminal proceedings, a person must be found unsuitable to work with children on conviction of murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child; or if a court makes a finding and gives a direction in terms of section 77(6) or 78(6) of the CPA, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was by reason of mental illness or mental defect not criminally responsible for the act which constituted murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child.**

7.203 It is submitted that the inclusion of the name of a person in the National Child Protection Register is justified in that it gives effect to the constitutional rights of children, namely, the rights to

- * to family care or parental care or appropriate alternative care when removed from the family environment;
- * social services;
- * protection from maltreatment, neglect, abuse or degradation; and

- * the best interests of a child are of paramount importance in every matter concerning the child.

7.204 It also gives effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic; provides for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children; strengthens and develops community structures which can assist in providing care and protection for children; protects children from discrimination, exploitation and any other physical, emotional or moral harm or hazards; provides care and protection to children who are in need of care and protection; recognises the special needs that children with disabilities may have; and generally, promotes the protection, development and well-being of children.

7.204 However, the Act provides that in cases where a criminal conviction followed the court proceedings and a sentence was imposed, such conviction may not be expunged unless the name of the person has been removed from the register.

7.205 The problem according to Mr Muntingh³³¹ is that it should be noted that while the CPA in section 271B(b)(ii), refers to a conviction (a criminal record) as the subject matter to be expunged, **the CA provides for a far lower bar than a conviction for inclusion in Part B of the National Child Protection Register. Section 120(1) of the CA provides that a finding that a person is unsuitable to work with children can be made by a children's court, any other court in any criminal or civil proceedings, or any forum established or recognised by law in any disciplinary proceedings and therefore does not require a conviction for inclusion in the register.**

(bb) Recommendation

7.206 Having regard to the discussion above regarding the objectives of the CA and the discussion above on the right to protection, the right to equality and limitation of the right to equality it is submitted that:

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- (i) There is no right to “expungement of a criminal record;
- (ii) the validity of the inclusion of a person’s name in the Child Protection Register based on a finding made by a children’s court, any other court in any criminal or civil proceedings, or any forum established or recognised by law in any disciplinary proceedings (which therefore does not require a conviction for inclusion in the register that a person is unsuitable to work with children) and a direction in terms of section 77(6) or 78(6) of the CPA that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was by reason of mental illness or mental defect not criminally responsible for the act which constituted murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child, should be determined by the application of the limitation clause in section 36 of the Constitution as outlined in paragraph 7.86 above;
- (iii) under the rational basis test, a challenged statute will be upheld if the classifications it creates bear a rational relationship to a legitimate government interest or are grounded on a reasonable justification, even if the classifications are not precise;
- (iv) the legislature has the authority to enact statutes to promote the state's safety and welfare, which is a legitimate governmental interest;
- (v) given the nature of and seriousness of offences involving the commission of or threat of physical harm to person or property; and
- (vi) In view of the above it is submitted that the inclusion of a person’s name in the National Child Protection Register as discussed above, even though there was no conviction, and the limitation that expungement is only authorised in respect of a criminal record once the name of the applicant, if it was included in the Register, has been removed, is therefore justified.

(iv) Inclusion of the name in the National Sex Offender Register is not only authorised following a conviction in terms of the CAA and covers offences committed and convicted of prior to the passing of the Act

(aa) Inclusion of names in the National Sex Offender Register not limited to convictions under the CAA

7.207 Mr Muntingh³³² argues that names in the National Register for Sex Offenders is not only based on convictions of offences in terms of the CAA, but also covers all previous convictions for sexual offences against children and persons with mental disabilities, regardless of whether a custodial or non-custodial sentence was imposed. He is of the view that the implications of this retrospective mechanism are considerable, not only from a practical and logistical point of view, but also from a legal point of view. **Persons who are alleged to have committed a sexual offence against a child or person with a mental disability, must also be included in the National Register for Sex Offenders if the court has made a finding in respect of the person's lack of capacity to stand trial or that the person is not criminally responsible due to mental illness or defect as provided for in sections 77(6) and 78(6) of the CPA.**

7.208 He points out that a person convicted prior to 1994 of a sexual offence against a child or mentally disabled person did not enjoy the same constitutional and other procedural protections than a post-1994 conviction. **He notes that if the person was convicted based on a confession obtained through coercion, if not torture, the process by which the conviction was obtained would be flawed under the current constitutional order.** Prior to 1994 the courts were far less discerning as to where evidence came from and “generally admitted all evidence, irrespective of how it was obtained, if it was relevant.” This presents a dilemma as it applies one standard to all, but ignoring that the ‘rules of the game’ have changed substantially.

7.209 He furthermore notes that a further element is that a person who has been convicted pre-1994 and who has completed the sentence imposed and who has no further convictions, will be placed on the National Register for Sex Offenders without being informed of this prior to inclusion and given the opportunity to make representations to be excluded based on the criteria for removal as set out in the CAA.

7.210 It is submitted that the inclusion of the names of offenders in the National Register for Sex Offenders is done to give effect government's responsibilities to protect the victims of

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sexual offences as provided for in the Constitution, in terms of International Instruments ratified and national legislation as was argued in the case of the Register in respect of the Protection of children above. It is furthermore submitted that it is justified in terms of the interpretation of the Courts as was argued when considering the justification of the expungement legislation.

7.211 The implications of inclusion of a name in the National Sex Offender Register was considered in *Johannes v S*.³³³ The accused, who at the time of the commission of the offence, was a 14 year old minor, was charged with the rape of three young boys in contravention of section 3 of the CAA (Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007). He pleaded guilty and was convicted. In respect of the three rape convictions he was sentenced to compulsory residence in a Child and Youth Care Centre, for a period of five years, in terms of the provisions of section 76(1) of the CJA. In addition, he was sentenced to three years' imprisonment after the completion of the five years' compulsory residence, in terms of the provisions of section 76(3) of that Act. In addition to the sentence, an ancillary order in terms of section 50(2) of the CAA was made, which had the effect that the accused's name would be entered in the National Register for Sexual Offenders.

7.212 The question was raised by the High Court with the Regional Magistrate and the Director of Public Prosecutions ("the DPP") whether it was competent for the court to make an order in terms of section 50(2) of the Sexual Offences Act if regard was had to the provisions of sections 2, 3 and 4 of the CJA dealing with the objects of the Act as well as the provisions of section 28 of the Constitution of the Republic of South Africa 108 of 1996. **The Court held that in terms of section 50(2)(a)(i) of the CAA, a court that has convicted a person of a sexual offence against a child or a person who is mentally disabled, and after sentence has been imposed by that court for such an offence, in the presence of a convicted person, must make an order that the particulars of the person be included in the Register.** The questions for determination by the Court were whether such an ancillary order is a competent order for a Child Justice Court to make in terms of the CJA and, if so, whether a court is compelled to make such an order in respect of a minor who has been convicted of a sexual offence against a child, irrespective of the circumstances of the case.

333 [2013] JOL 30822 (WCC).

7.213 The Court found that the provisions of section 50(2) of the CAA, in requiring the particulars of a child sexual offender who has committed a sexual offence against another child, to be included in the Register, may violate such child offender's rights. As a starting point, the preferred manner in dealing with such a purported violation of rights is for the court to interpret the impugned legislation in such a manner that gives effect to the fundamental values of the Constitution. It found that the inclusion of the particulars of an offender, who commits a sexual offence against a child, constitutes a limitation that is reasonable and justifiable in an open and democratic society such as ours. Where a child, however, has committed a serious sexual offence, and there is a need to have the child's particulars entered in the Register, and where there is a need for a court to counterbalance the rights of the child offender against the particular harm and danger such a child offender would pose to victims of sexual abuse and exploitation, the best interests and paramountcy principle of the child offender may be required to be limited. **Section 50(2) was found to be over-broad, and was declared invalid and inconsistent with the Constitution, insofar as it does not allow the court to inquire and decide after affording the accused an opportunity to make representations, whether or not the particulars of the accused should be included in the National Register for Sexual Offenders.**

7.214 In *J v National Director of Public Prosecutions and Another*³³⁴ the Constitutional Court handed down a judgment declaring section 50(2)(a) of the CAA unconstitutional. The section provides that when a person is convicted of a sexual offence against a child or person who is mentally disabled, a court **must** make an order to include the offender's particulars on the National Register for Sex Offenders (Register). Having one's particulars entered on the Register entails certain limitations in employment, in licensing certain facilities and ventures, and in the care of children and persons with mental disabilities.

7.215 The applicant was convicted of sexual offences committed against children. He too was a child at the time of the offences. The trial court sentenced the applicant and made an order that his particulars be entered on the Register. On review, the Western Cape High Court, Cape Town (High Court), declared section 50(2) of the CAA constitutionally invalid because it unjustifiably infringes on the rights of offenders, whether children or adults. The

334 CCT 114/13.

High Court suspended the declaration of invalidity for 18 months and ordered that, in the interim, certain words be read into the provision. The matter came before the Constitutional Court for confirmation. None of the parties opposed the confirmation of the declaration of invalidity.

7.216 In a unanimous judgment, the Constitutional Court (Skweyiya ADCJ) held that section 50(2)(a) of the CAA infringes on the right of child offenders to have their best interests considered of paramount importance in terms of section 28(2) of the Constitution. The Register fulfills a vital function in protecting children and persons with mental disabilities from sexual abuse. However, the limitation of the child offender's right is unjustifiable because a court has no discretion whether to make the order and because there is no related opportunity for child offenders to make representations. The Court limited its declaration of constitutional invalidity to child offenders. It held that the constitutionality of the provision in relation to adult offenders was not properly before the Court. The Court suspended the declaration of invalidity for 15 months to give the Legislature an opportunity to correct the constitutional defect. The respondents were further directed to provide a report to the Court setting out the details of child offenders currently listed on the Register.

(bb) Recommendation

7.217 The inclusion of the name of an offender in the National Child Protection Register has been discussed above. It is submitted that the creation of the National Sex Offender Register fulfills the same objectives as the Children's Act (discussed above) and gives effect to the state's responsibilities to protect victims of sexual offences in so far as victims are juveniles. However, the same responsibilities/duties are justified when it relates to any sexual abuse of any victim. (See discussion above on government's delictual liability in respect of victims of sexual offences). It is submitted that, for the reasons discussed under the headings referred to above, the inclusion of an offender's name in the National Sex Offender Register can be justified as rational and reasonable in terms of section 36 of the Constitution as outlined above in paragraph 7.203.

7.218 Mr Muntingh's problem, however, relates to the inclusion of the names of sex offenders in the Register where the convictions relate sexual offences prior to the enactment of the CAA. His objection relates to the fact that such convictions may be based on

convictions of offences of a sexual nature obtained prior to 1994. In his view prior to 1994 an offender of a sexual offence against a child or mentally disabled person did not enjoy the same constitutional and other procedural protections than a post-1994 conviction. **He notes that if the person was convicted based on a confession obtained through coercion, if not torture, the process by which the conviction was obtained would be flawed under the current constitutional order.** Prior to 1994 the courts were far less discerning as to where evidence came from and “generally admitted all evidence, irrespective of how it was obtained, if it was relevant.” This presents a dilemma as it applies one standard to all, but ignoring that the ‘rules of the game’ have changed substantially.

7.219 It is submitted that the justification for the inclusion of the name of an offender in the National Sex Offender Register remains the same, namely, the protection of victims against sexual abuse, and it does not matter whether or not a conviction was obtained under a dispensation prior to 1994 or whether or not it was obtained after 1994 when the constitutional dispensation took effect. The CAA is not in force with retrospective effect notwithstanding the fact that it provides for the inclusion of the names in the Register in respect of offenders convicted of relevant offence prior to the coming into operation of the Act but it is submitted that Act was passed to give effect to the state’s constitutional obligations in terms of protection of society against sexual abuse. It is submitted that the inclusion of sexual offences as they existed prior to the coming into effect of the Act, as offences qualifying for the inclusion of the name of such offender in the National Sex Offender Register is justified in terms of constitutional principles and no amendment to exclude such offences from the Act is recommended. As indicated above the Department of Justice and Constitutional Development is in the process of preparing legislation to give effect to the Constitutional Court judgment referred to above.

(v) Inclusion of a name in The National Child Protection Register has retrospective application in respect of certain offences

(aa) Retrospective application of the expungement legislation

7.220 The National Child Protection Register in terms of the CA (Part B of the National Child Protection Register)³³⁵ has a retrospective mechanism, but this is limited to persons

335 The Children’s Act, 38 of 2005.

convicted of murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm **against a child in the five years prior to the coming into operation of the relevant chapter in the CA**, in this case 1 April 2010. Such persons are found automatically to be unsuitable to work with children. Section 120(4) and (5) provides that:

(4) In criminal proceedings, a person must be found unsuitable to work with children -

(a) on conviction of murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child; or

(b) if a court makes a finding and gives a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was by reason of mental illness or mental defect not criminally responsible for the act which constituted murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child.

(5) Any person who has been convicted of murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child during the five years preceding the commencement of this Chapter, is deemed to have been found unsuitable to work with children.

(bb) Recommendation

7.221 It is submitted that the Act specifically includes the conviction of the offences in the 5 years before the coming into operation of the Act. In terms of the expungement legislation a person whose name has been included in the Register must have his or her name removed before qualifying for an expungement. It is submitted that the above provision lists a number of offences in terms of which expungement requires compliance with the precondition of removal of the name from the registers, before an application for expungement can be considered. For the reasons outlined in paragraph 7.217-7.219 it is submitted that the limitation is justified.

(vi) Removal of a name from the National Child Protection Register requires certificate of rehabilitation which is not required in the CPA or CJA

(aa) Requirement of a certificate for rehabilitation for removal of name from the National Child Protection Register

7.222 Mr Muntingh³³⁶ points out that the procedure for removal from Part B of the National Child Protection Register is outlined in section 128(1) of the Children’s Act, which provides that a person may apply to have his or her name removed from Part B of the National Child Protection Register. An application on the ground that the person has been rehabilitated may only be made after a period of at least five years has lapsed since the entry was made and after consideration is given to the prescribed criteria. Furthermore, the particulars of a person convicted of more than one offence regarding a child may not be removed from Part B of the National Child Protection Register. The discussion here focuses on an application for removal as it pertains to an application for expungement of a criminal record and thus relates to a conviction being the reason for inclusion of a person’s name in Part B of the National Child Protection Register.

(bb) Recommendation

7.223 It has been recommended above, when considering the qualifying criteria that the criteria for expungement should be expanded, that additional criteria for an application for expungement should include consideration of the whether or not the offender has been rehabilitated.

(vii) Removal from the National Child Protection Register may be made to a court whereas the legislation providing for expungement prescribes an administrative process

(aa) Removal of name from National Child Protection Register require court process whereas application for expungement requires administrative process

7.224 Mr Muntingh³³⁷ points out that an application for removal from the register on the grounds that the person has been rehabilitated may be made to any court, including a children’s court. Such an application must be accompanied by proof of the rehabilitation of the person as set out in regulation 45(2) and must include:

336 Civil Society Prison Reform Initiative *“The law and the business of criminal record expungement in South Africa”* Research Report no 18 on p 16 and further by Lukas Muntingh

337 Civil Society Prison Reform Initiative *“The law and the business of criminal record expungement in South Africa”* Research Report no 18 on p 16 by Lukas Muntingh.

- a report from a registered psychologist, psychiatrist or social worker stating that the person has been rehabilitated and is unlikely to commit another act or offence similar to which has led to the inclusion of the person's name in part B of the register;
- an outline of the steps taken by the applicant to rehabilitate him or herself since inclusion in the register;
- an official document from SAPS stating that the applicant has not been convicted of any offence relating to a child during the time that the applicant's name was included in the register;
- an affidavit by the applicant that no proceedings in a court or administrative forum are pending against him or her involving the maltreatment, abuse, deliberate neglect or degradation of a child.

7.225 Mr Muntingh argues that the CA therefore introduces further requirements compared to the other procedures in relation to the CPA and the CAA. Firstly, while the period to lapse is comparatively short (five years), proof of rehabilitation and proof of no further pending actions against the applicant, set difficult requirements to meet. The risk of re-offending is a variable not addressed in any of the other mechanisms and particularly not in respect of the Sex Offenders Register. Secondly, while the expungement procedure in respect of section 271B of the CPA and the CJA (discussed below) is an administrative one handled by functionaries of the Department of Justice and SAPS, an application for removal from Part B of the Child Protection register requires an application to be made to a court, evidently a more onerous and costly process if legal representation is used.

(bb) Recommendation

7.226 This matter is addressed in the discussion above on the process where it is recommended that the administrative application process be substituted by an application in court, the qualifying criteria be expanded and the relevant provision in the different Acts be aligned. In addition the qualifying criteria is also addressed where additional criteria is proposed including the factor of rehabilitation and no outstanding or pending cases.

(viii) Expungement and the registers in terms of the CJA and CA

(aa) Requiring the removal of names from the registers before an application for expungement can be made is not user friendly

7.227 Mr Muntingh³³⁸ is of the view that the procedures in the different Acts are not user-friendly and require a familiarity with legal prescripts and administrative procedures. Firstly, removal from the registers is a pre-requisite for the expungement of a conviction relating to offences against children and sexual offences. The extent to which the state is able to cross check the registers for each application under section 271B of the Criminal Procedure Act is not known and this may result in a significant additional administrative load to ensure that records are not expunged while the name of the person concerned still appear on either of the registers.

(bb) Recommendation

7.228 It is submitted that the problem is addressed by the introduction of a process providing for a court application and where the qualifying criteria are spelled out in detail. Cross checking the registers should be retained since it is submitted that removal of the name from the registers remains a justifiable qualifying criteria for expungement. No further steps need to be taken.

(ix) The provisions of the different Acts are not aligned

(aa) Different provisions dealing with the term of imprisonment linked to offences qualifying for expungement and removal of names from the National Sex Offender Register

7.229 The provisions in section 271B of the CPA sets the most severe sentence for which an expungement may be applied for, as twelve months imprisonment with the option of a fine not exceeding R20 000. The most severe sentence under the CAA applicable to the removal of a name from the Register is 18 months imprisonment without the option of a fine. This sets a significantly more accommodating ceiling compared to the twelve months imprisonment with the option of a fine not exceeding R20 000 provided for in the section 271B of the CPA. Whether it was intentional is unknown, but the consequence is that an offender listed on the Sex Offenders Register who had been sentenced to 18 months or less direct imprisonment without the option of a fine will be able to have his or her name removed from the register, but not have the record expunged. Section 271 B uses the date of conviction and the sentence imposed as the two key variables.

338 Civil Society Prison Reform Initiative *"The law and the business of criminal record expungement in South Africa"* Research Report no 18 on p 17 by Lukas Muntingh

(bb) Recommendation

7.230 It has been recommended that the time line for expungement in the CPA be broadened to provide for an expungement after 5 years for adult offenders (as is provided for juveniles) with the addition of further qualifying criteria and that a new time line of 10 years be introduced for expungement to allow for expungement of a complete criminal record if a period of 10 years has lapsed since serving the last sentence together with a list of sentences or conditions which should disqualify an expungement. An application for expungement of the criminal record in cases where a more severe sentence than the 12 months have been imposed would be accommodated after 10 years if the other qualifying criteria have been met. No further amendments are recommended

(x) Different variables to be considered as key criteria for expungement: offence versus sentence

(aa) Different variables apply to expungements and removal of names from prescribed registers

7.231 Mr Muntingh³³⁹ points out that the CAA uses the offence, the sentence and the date of release from prison as key variables for removal of the name from the Sex Offender Register while the CPA uses the sentence and date of conviction as key variables for an application for expungement. As a result, if all other criteria are met, an application for expungement cannot commence at the earliest possible date, due to the different starting points of two of the key qualifying criteria, namely, the date of conviction versus the date of release from prison because the latter will inevitably extend the time frame. It has been proposed that completion of serving the sentences imposed should be the qualifying criteria in respect of both the removal of names from the Register as well as for an application for expungement which will add to giving effect on government's constitutional duties regarding protection of the community and in terms of the Constitution and national legislation and the requirement will also allow for consideration of the extent to which the offender has been rehabilitated before an order for expungement is made.

7.232 Removal from Part B of the National Child Protection Register does not bring the sentence imposed into the equation, but rather emphasises the behaviour of the person as

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the key variable. However, if all requirements are met a person can have his or her name removed from Part B of the National Child Protection Register after five years after being convicted, but must then wait a further five years to apply for an expungement under section 271B of the CPA. It has been proposed above to broaden the time frame in respect of expungements in terms of the CPA to also provide for a 5 year time frame together with additional requirements and certain limitations to an application for expungement. The latter includes *inter alia* a limitation of the number of convictions in respect of which an expungement can be approved.

7.233 The registers³⁴⁰ have added to the complexity of the expungement provisions by creating a two-step procedure for expungement of criminal records related to sexual offences and offences against children. In addition the registers have also increased the number of government departments involved. Part B of the National Child Protection Register is maintained by the Director General of Social Development and the Sex Offender Register by the Department of Justice and Constitutional Development. Despite these complexities the narrow scope of who is eligible for expungement under section 271B of the CPA places a severe limitation on any incentive for offenders to be law abiding citizens with the prospect of having their criminal records expunged in the future.

(bb) Recommendation

7.234 The Commission is of the view that these matters have been adequately addressed in the proposed amendments which address the differences in the different pieces of legislation having due regard to the purposes of each and the Constitution, in particular the state's responsibilities to give effect to constitutional and International obligations. The Commission therefore recommends that the yardstick for expungement in respect of both adult and juvenile offenders should be worded in terms of the sentence imposed and not as is currently the case with reference to offences (for juveniles) and with reference to sentence (for adults). In addition with reference to the fact that the scope of the expungement legislation is narrow, it is submitted that having regard to the discussion of the justification of the expungement process in the first part of this chapter, it is submitted that eligibility for expungement is not a right in itself. The limitations in respect of offences qualifying for expungement are determined in terms of the state's constitutional duties and responsibilities

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to protect society read together with national legislation on the state's duty to provide for an effective criminal justice system as discussed in the first part of this chapter. It is submitted that in view thereof a narrow application of expungement legislation is justified. In addition, the legislation providing for the inclusion of names of offenders in the National Sex Offender Register and the National Child Protection Register is governed by the CAA and the CA respectively.

7.235 The objectives of these registers are the protection of victims of sexual offences and the protection of children. As such the relevant legislation regulates the requirements and conditions for inclusion and removal of names from these registers and, for purposes of protection of particular victims, prescribes different time frames and procedures for inclusion and removal of names from the registers. These qualifications and conditions are different from the objectives pursued by the legislation dealing with expungement and it is submitted that these differences are well motivated and justified.

7.236 In view of the different objectives pursued by the expungement legislation as discussed in this chapter, the Commission is of the view that the requirements and conditions for inclusion and removal of names from these registers need not be the same as the time frames and conditions for expungement. It is furthermore submitted that the removal of names from these registers before an expungement can be considered represents a legitimate government interest and as such there is no justification for the argument that these conditions and requirements should of necessity be the same. The Commission, therefore, does not support the proposal that the conditions and requirements concerning the inclusion and removal of names should be the same as the ones prescribed for expungement.

(xi) Section 271A of the CPA – Certain previous convictions fall after a period of 10 years

(aa) The fall away of previous convictions

7.237 Section 271A of the CPA was amended in 2008 with the passing of the expungement legislation. It was amended to provide yet another change in the falling away provision. The effect of the amendment was a further limitation of convictions that qualify for a “fall away” of the previous conviction. It provides that where a court has convicted a person of any offence

in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed but has postponed the passing of sentence in terms of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297(3); or has discharged that person with a caution or reprimand in terms of section 297(1)(c); such conviction qualified for the falling away provision. Secondly, any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine may be imposed, such conviction qualifies for the falling away provision.

7.238 In respect of any conviction or sentence referred to above such conviction fall away as a previous conviction if a period of 10 years has lapsed after the date of conviction of the said offence, unless, during the said period, the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, **may be imposed**. From this amendment it is clear that the broad unlimited fall away provision enacted in 1992 was again limited to include only (a) convictions in respect of an offence for which a sentence exceeding 6 months imprisonment may be imposed only where the passing of sentence was postponed and the person discharged without sentence or the convicted person has not been called upon to appear before the court during the period of postponement and (b) in instances where a sentence of less than 6 months imprisonment without the option of a fine may be imposed. This is a far more limited application than the provisions in the predecessor of the CPA (Act 56 of 1955).

7.239 Apart from the limitation to convictions that fall away, the wording in the section appears to be problematic and the limitation extends beyond the sentence actually imposed. The two limitations introduced use different wording. In terms of the first qualifying criterium instances where a sentence of imprisonment exceeding 6 months may be imposed, only convictions in respect of which the actual sentence imposed was a postponement of the passing of sentence and a discharge in terms of section 297 of the CPA where the convicted person has not been called upon to appear before the court during the period of postponement is covered and, where a caution and discharge in terms of section 297 of the CPA is imposed, in effect qualifies for “falling away”. Secondly, in terms of the second qualification criterium the wording does not refer to the actual sentence imposed to render a conviction eligible for falling away, but refer to instances where a sentence of imprisonment not exceeding 6 months may be imposed as the qualifying criteria. The second qualifying

criteria, therefore, unlike the first qualifying criteria, has no bearing on the actual sentence imposed, but uses the maximum sentence that can be imposed as the actual qualifying criterium. In practice this may result in convictions not falling where a very lenient actual sentence has indeed been imposed.

7.240 A practical example clearly shows the distortion. An accused is convicted of an offence of theft in the magistrates' court and sentenced to a fine of R100 or 30 days imprisonment. Theft is a common law offence and theoretically, in terms of the law, a maximum sentence of a fine of R60 000 or imprisonment of 3 years may be imposed upon conviction (in terms of the sentencing jurisdiction of magistrates courts). Such a conviction and sentence imposed do not qualify for "falling away" in terms of either of the qualifying criteria in the current provisions of the CPA. This is so because the qualifying criteria are not the actual sentence imposed, but the prescribed maximum sentence that could be imposed and secondly, the qualifying criteria which refer to the actual sentence imposed, is severely restrictive in that it applies only to a sentence imposed in terms of section 297 as referred to above.

7.241 It is submitted that this approach lead to distortions and the Commission is of the view that it represents an unjustifiable limitation on the application of the principle of "falling away" of previous convictions as developed by the courts and applied in previous enactments. From developments on the "falling away" provision in the CPA as outlined below, it is clear that the current limitations, introduced in 2008, represents a drastic departure from the provisions as enacted in the CPA of 1955 and reintroduced in the CPA in 1991 and amended in 1992.

7.242 In order to determine the role of previous convictions in sentencing and its purpose, it is necessary to refer to relevant statutory provisions as interpreted and applied by the courts. After conviction the State may produce to the court a list of previous convictions which it is alleged the accused committed. Early case law indicated that the prosecution had adiscretion to produce or hand in the list after conviction and before sentence and was not obliged to do so.³⁴¹ However, in *S v Nhlapo*³⁴² Spilg J indicated clearly why such approach is incompatible with the duty of the prosecutor and the adjudicative function of the courts. Du

341 See *S v Maphaha* 1980 (1) SA 177 (V) 178A–B).

342 2012 (2) SACR 358 (GSJ)

Toit³⁴³ argues:

Only in exceptional cases will the list not be produced, however, since previous convictions are usually highly relevant during sentencing, **and it is for the court, and not the prosecutor to decide what weight is to be attached to previous convictions. Once they have been proved the court must take them into account, but the weight to be attached thereto is to be decided by the court.** Where the previous conviction is for a less serious offence, or one committed some time ago, the prosecutor may be fully justified in not proving it. (emphasis added)

7.243 In *S v Nhlapo* Spilg J found it unacceptable that the prosecutor had merely informed the trial court that the police docket contained no SAP 69 (a record extracted from the South African Police Criminal Record System) and that the prosecution did not intend proving any previous convictions. The prosecutor did so despite the fact that the accused had been convicted of robbery with aggravating circumstances (as intended in section 1 of the Act read with section 51(2) and other relevant provisions of the CAA.) The prosecutor, furthermore, adopted this passive attitude despite the fact that a probation officer had recorded in her report that the accused told her about a previous conviction in 2008 for attempted rape³⁴⁴. **Spilg J took the view that the 'permissive nature' of section 271 must yield to the 'peremptory provisions' of section 51 of Act 105 of 1997 (or the so-called minimum sentence legislation) which is the more recent legislation and which requires a prosecutor to present facts which a court can consider when imposing sentence (at [23]–[24]). A presiding judicial officer should, indeed, insist upon proof of form SAP 69 in order to properly discharge his sentencing functions, 'unless good reason exists to avoid a further remand where the offender is to remain in custody'.³⁴⁵ (emphasis added) Spilg J said³⁴⁶:**

Accordingly in order for a court to discharge its adjudicative responsibilities when considering sentence, including those imposed by statute, it is necessary for the court to have details of previous convictions placed before it. To accord the prosecutor a discretion which is not subject to judicial oversight may result in like offenders being treated differently, even if the prosecutor had obtained the SAP69 beforehand. It appears that the permissive nature of section 271 (1) must yield both to the legislative intent of section 51 of Act 105 of 1997 and the inherent danger of conferring an arbitrary and potentially discriminatory power on the prosecution. A failure to properly establish and inform the presiding officer of previous convictions

343 Du Toit Commentary on the Criminal Procedure Act / Act with Commentary/Chapter 27 Previous Convictions **RS 52 2014 ch 27-p 2.**

344 At [30]–[31].

345 At [32].

346 At [27]–[28].

imposed on the offender adversely affects the proper administration of justice and undermines the court's responsibilities where the minimum-sentencing regime applies under Act 105 of 1997. At best, it ought to be countenanced only in exceptional circumstances that are properly explained to the court. Ordinarily there is no apparent reason why the SAP69 should not have been requested by and provided to a prosecutor before sentencing, and in good time to enable the accused to consider it.

7.244 Du Toit³⁴⁷ et al argue that the judgment of Spilg J should not be interpreted narrowly as being limited to cases that involve minimum sentence legislation. A prosecutor has a **general duty** (in conjunction with the investigating officer) to establish whether an offender has previous convictions. This is part of the prosecutor's duty to protect the public and to place before court information relevant to the exercise of the court's function. Spilg³⁴⁸ J pointed out that some cases frequently cited in support of the permissive practice regarding section 271 really originally established no more than a rule that where the prosecutor does not wish to prove the SAP 69, a court may not ask the accused directly whether he has previous convictions. Spilg J also said³⁴⁹ that some cases 'appear to have been influenced by concerns regarding the prejudicial nature of a court undertaking an enquiry *mero motu* with the risk of consequent perceptions of bias and partisanship'. Concern was also expressed about the fallibility of the offender's own recollection. Moreover, the earlier cases were decided at a time when the presiding officer generally exercised a discretion regarding sentencing, unfettered by statutorily imposed considerations regarding previous convictions. Since these cases had regard to the provisions of section 271(1) of the CPA in the limited context of a magistrate assuming the role of inquisitor, the courts were not called on to consider whether the prosecutor had nonetheless a duty to provide details of previous convictions, bearing in mind that the overriding considerations regarding sentencing are to be informed by section 274 of the Act.

7.245 Apart from the above it is also necessary to determine the weight to be accorded to previous convictions having regard to the date they occurred in relation to the present conviction. Prior to the insertion of section 271A of the CPA the Act did not contain any provision dealing with the fall away of previous convictions, since the provision was not taken over from the old CPA, 56 of 1955.

347 Du Toit Commentary on the Criminal Procedure Act, Act with Commentary, Chapter 27 Previous Convictions RS 52, 2014 ch 27-p6.

348 *S v Nhlapo* 2012 (2) SACR 358 (GSJ) (at [16]). At [17]

349 At [18].

7.246 In order to determine the weight to be accorded to previous convictions and the fall away provision inserted in the CPA in 1991 it is necessary to refer to its predecessors and how the courts dealt with the matter in the absence of a similar provision. Section 303 *ter* was inserted in the Criminal Procedure Act 56 of 1955 and provided for the rules relating to previous convictions to be taken into account in imposing sentence.³⁵⁰ Section 303 *ter* provided that:³⁵¹

303*ter* (1) The rules contained in the Fifth Schedule shall be observed by a court when taking previous convictions into account in imposing any sentence on a person convicted by it of an offence.

(2) The Governor-General may by proclamation in the *Gazette* amend or withdraw the rules contained in the Fifth Schedule or add new rules

(3) Any proclamations issued under sub-section (2) shall be laid on the Tables of both Houses of Parliament within fourteen days after promulgation thereof if Parliament is then in ordinary session or if Parliament is not then in ordinary session, within fourteen days after the commencement of its next ensuing ordinary session.

(4) If both Houses of Parliament by resolutions passed in the same session (being a session during which a proclamation has been laid on the Tables of both Houses of Parliament in terms of sub-section (3)) disapprove of any such proclamation or of any provision in any such proclamation, such proclamation or such provision thereof shall thereafter cease to be of force and effect to the extent to which it is so disapproved."

7.247 The Fifth Schedule providing for the Rules provided as follows:

The following Schedule is hereby inserted in the principal Act after the Fourth Schedule, the existing Fifth Schedule becoming the Sixth Schedule:

Fifth Schedule.

RULES WHICH, IN TERMS OF SECTION *THREE HUNDRED AND THREE TER*, SHALL BE OBSERVED WHEN TAKING PREVIOUS CONVICTIONS INTO ACCOUNT IN IMPOSING ANY SENTENCE.

1. (a) No previous conviction shall be taken into account in imposing any sentence on a convicted person, if a period of ten years has elapsed after the date of such conviction or the date of expiration of any unexpired period of imprisonment imposed on the convicted person, whichever is the later date, unless he is proved to have committed an offence during such period of ten years.

350 Criminal Law Amendment Act, 1959 published in the Union Gazette Extraordinary, 25 March, 1959.

351 This Act shall be called the Criminal Law Amendment Act, 1959, and shall, subject to the provisions of sub-section (2), come into operation on a date to be fixed by the Governor General by proclamation in the *Gazette*. Different dates may in terms of sub-section (1) be fixed in respect of the several provisions of this Act. Reproduced by Sabinet Online in terms of Government Printer's Copyright Authority No. 10505 dated 02 February 1959.

- (b) The expression 'unexpired period of imprisonment' in this rule means the aggregate of any periods of imprisonment imposed either before or on the date of the previous conviction and which would have had to be undergone at the time of the previous conviction, in the absence of payment of any fine and of remission of sentence and of suspension of any period of imprisonment.
2. Where there are more counts than one in any charge a conviction on each count shall be treated as a separate conviction.
 3. When an accused has been convicted of more offences than one on the same day, a conviction of each offence shall be treated as a separate conviction.
 4. In calculating any period of imprisonment
 - (a) twenty hours periodical imprisonment shall be equivalent to imprisonment for one day;
 - (b) one week shall be equivalent to seven days;
 - (c) thirty days shall be equivalent to one month;
 - (d) imprisonment for corrective training shall be equivalent to imprisonment for a period of two years;
 - (e) imprisonment for the prevention of crime shall be equivalent to imprisonment for a period of five years;
 - (f) declaration as an habitual criminal shall be equivalent to imprisonment for a period of nine years.
 5. Whenever the date of commission of an offence has not been proved, the date alleged in the charge shall be deemed to be the date of commission of the offence, or if a period is alleged in the charge, the date of commencement of that period shall be deemed to be the date of commission of the offence.

7.248 From the above outline it is clear that the falling away provision relating to previous convictions was not limited to certain offences or any particular sentence imposed by a court. It provided for an unqualified lapsing of previous convictions if a period of 10 years has passed since the expiration of any unexpired period of imprisonment imposed on the convicted person or the date of conviction which ever occurred last. The courts have, notwithstanding the fact that section 303 *ter* of the CPA of 1955 was not included in the new CPA of 1977, continued to consider the weight to be given to previous convictions in determining sentences and expressed the view that the practice to disregard such convictions for purposes of sentencing should continue and where applicable such offenders should be regarded as first offenders. This view was confirmed in *S v Mqwathi*³⁵² where Van Dijkhorst J held that notwithstanding the fact that the principle was not included in the new CPA, the principle remained applicable and the courts continued to have a wider discretion

352 1985 (4) SA 22 (T).

in this regard. At 25A–H the court noted:

Daar moet teen gewaak word dat die boek van die sondes van die verlede altyd geopen bly lê en (in die woorde van die psalmdigter) "die donker skuldverlede bly leef in ons heugenis" ongeag die vervloë tyd. Artikel 303ter geles met die Vyfde Bylae van die herroepe Strafproseswet 56 van 1955 het hierdie beginsel erken deur te bepaal dat die boek gesluit word by verloop van 10 jaar sonder veroordeling. Vergelyk *S v Van der Poel* 1962 (2) SA 19 (K) en *S v Makhae en 'n ander* 1974 (1) SA 578 (O). Daarna is 'n beskuldigde as eerste oortreder beskou. Hoewel die Wetgewer met die nuwe Strafproseswet 51 van 1977 die bepaling nie herverorden het nie, wat tot gevolg het dat die hof 'n vryer diskresie het en nie meganies 'n 10 jaar tydperk op vorm SAP 69 in berekening bring nie, beteken dit tog nie dat die heilsame beginsel wat in die Bylae vervat was nie meer toepaslik is nie. Waar die hof nou 'n ongebonde maar regterlike diskresie uitoefen, kan, met inagneming van die aard, aantal en omvang van vorige soortgelyke misdrywe en die tydsverloop tussen hulle en die onderhawige, besluit word om, waar laasgenoemde tydsverloop selfs weselik minder is as 10 jaar, die vorige oortredings buite rekening te laat en die beskuldigde as eerste oortreder te behandel. Ook kan die Hof met inagneming van gemelde faktore besluit om, waar die laaste vorige veroordeling meer as 10 jaar gelede gevel is, dit tog in ag te neem as 'n verswarende omstandigheid. Daar moet egter gewaak word teen die neiging wat in die jongste tyd ontstaan het om, sonder behoorlike inagneming van die feit dat selfs 'n misdadiger geregtig is om te vra dat die deksel op die verre verlede dig toegehou word, eenvoudig alles in ag te neem wat op vorm SAP 69 verskyn, ongeag die tydsverloop. Dit sal myns insiens tog heilsaam wees indien, as 'n praktiese uitgangspunt, maar nie as 'n onwrikbare meetsnoer nie, die 10 jaar tydperk toegepas word tot voordeel van die beskuldigde.

By oorweging van die tydperk wat verloop het sedert die beskuldigde se laaste veroordeling sou dit korrek wees om ook ag te slaan op 'n tydperk sedert die laaste veroordeling wat die beskuldigde in die gevangenis deurgebring het. *S v Kumalo* 1973 (3) SA 697 (A) op 699H. Die rede hiervoor is dat die beskuldigde ook in die gevangenis misdade kan pleeg. Myns insiens sal die gewig wat geheg word aan die "skoon tydperk" in aanhouding afhang van die aard van die tersaaklike oortreding. Daar is immers kwalik geleentheid tot 'n oortreding soos byvoorbeeld bestuur onder die invloed van drank in die gevangenis en die afwesigheid daarvan is dus niksseggend. Daarenteen kom onder andere geweldsmisdade wel voor.'

7.249 However, in 1991 the provisions of section 271A were inserted in the CPA by section 12 of Act 5 of 1991 and amended by section 6 of Act 4 of 1992 to exempt certain serious common law offences from offences in respect of which a conviction will fall away as a previous conviction after a period of 10 years. Section 271A, which was inserted in the CPA in 1991, reaffirmed the principle that convictions, older than 10 years, could be disregarded for purposes of sentencing. However, the legislator limited the principle to "less serious offences" in that it was not applicable to offences listed in Schedule 1 of the Act (containing mostly common law offences) but only applicable to cases where the sentence imposed for such offences, was limited to the postponement of sentence in terms of section 297 of the

CPA, or cases where the convicted offender was discharged without passing sentence or cautioned and discharged in terms of section 297. In respect of all other offences not listed in Schedule 1, the principle of falling away was applicable in full in that it applied without limitation of any kind. Section 271A provided:³⁵³

Certain convictions fall away as previous convictions after expiration of 10 years

271A. Where a court has convicted a person of

- (a) an offence specified in Schedule 1, and
 - (i) has postponed the passing of sentence in terms of section 297 (1) (a) and has discharged that person in terms of section 297 (2) without passing sentence or has not called upon him to appear before the court in terms of section 297 (3); or
 - (ii) has discharged that person with a caution or reprimand in terms of section 297 (1) (e); or
- (b) any other offence than that referred to in Schedule 1,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period such person has been convicted of an offence specified in Schedule 1.

7.250 From the schedules it would appear that they contained lists of offences which overlapped. Schedule 1 contained a list of all common law offence offences and classified in terms of seriousness in terms of the offence itself without any reference to the sentence imposed. Schedule 1 thus classified an offence as a serious offence not using a sophisticated classification yardstick in that it for example, included the offence of theft and intentional injury to property. In terms of this classification a conviction of theft and injury to property was excluded from the principle of falling away whereas it is clear that such convictions could include circumstances which could be described as petty and not “serious”. Secondly, it seems to be fair to state that the schedules provided lists of common law offences in respect of which the fall away provision would apply and in respect of offences listed in schedule 1 only in cases where the passing of sentence was postponed in terms of section 297 and or where a reprimand or caution an discharge was imposed qualified for the fall away provision. From the listed common law offences in schedules 1, 2

353 Act no 5 of 1991 Criminal Procedure Amendment Act published in Government Gazette 13110 dated 28 March 1991.

and 3 the same common law offences were repeated in the three schedules which complicates determining the offences that fall away in terms of the provision. South Africa does not have a sophisticated system which grade offences in terms of seriousness and the listing of offences without any additional factors indicative of the seriousness of the offence, operates to the disadvantage of offenders convicted of an offence which can, for example, be described as a “petty theft” or “petty injury to property”, which are listed in schedule 1.

7.251 In addition schedule 1, for example, also included the exclusion of the application of the fall away provision in the case of “any offence in respect of which a sentence of imprisonment of more than 6 months without the option of a fine **could** be imposed”. It is submitted that the latter provision is also problematic in that it excluded the application of the fall away principle to convictions not in terms of the actual sentence imposed but in terms of a fictitious imposition of imprisonment of more than 6 months without the option of a fine. As such an offence like possession of drugs could attract a sentence of more than 6 months imprisonment without the option of a fine, but in practice such offender could have been sentenced to pay a fine or received a suspended sentence. Since schedule 1 lists an offence in respect of which a sentence of more than 6 months could be imposed as one in respect of which the fall away provision does not apply, the question arises as to whether a conviction for possession of drugs, where a sentence of a fine was imposed, qualify as a conviction which falls away.

7.252 Schedule 1 included serious offences like treason, sedition, public violence, murder, culpable homicide, rape, sexual assault, robbery, kidnapping, child stealing, assault when a dangerous wound is inflicted, arson, malicious injury (damage) to property, breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence, theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen, fraud, forgery or uttering a forged document knowing it to have been forged, offences relating to the coinage, any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine, escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody, any conspiracy, incitement or attempt to commit any offence referred to in the

Schedule.³⁵⁴

7.253 Section 271A was amended in 1992 to the effect that the reference to offences listed in schedule 1 was deleted and replaced by two new categories in respect of which the fall away provision are applicable. The amended section 271A provided that the fall away provision is applicable to:

- (a) an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine, and;
- (b) any other offence than that for which the punishment may be a period of imprisonment exceeding six months without the option of a fine,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period such person has been convicted of an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine."

7.254 Two problems are noted in respect of this provision. In the first instance the short title notes that section 271A is amended to exempt certain serious common law offences from offences in respect of which a conviction will fall away as a previous conviction after a period of 10 years. However, the common law offences exempted from the falling away provision was specified in schedule 1 and the words "specified in schedule 1" was deleted and replaced by the words " offences in respect of which the punishment may be a period of imprisonment exceeding 6 months without the option of a fine" and subparagraph (b) which

354 Schedule 2, however, also included serious offences and duplicated a number of offences listed in schedule 1, eg Part I (Section 35) included any offence under any law relating to the illicit possession, conveyance or supply of dependence-producing drugs or intoxicating liquor, any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones, breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence, theft, whether under the common law or a statutory provision, Part II (sections 59, 72) included treason, sedition, murder, robbery, assault, when a dangerous wound is inflicted, arson, breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence, theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen, fraud, forgery or uttering a forged document knowing it to have been forged, in each case if the amount or value involved in the offence exceeds R2 500, any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones, any offence under any law relating to the illicit possession of dagga exceeding 115 grams; or any other dependence-producing drugs; or conveyance or supply of dependence-producing drugs, any offence relating to the coinage, any conspiracy, incitement or attempt to commit any offence referred to in this Part, Part III (Sections 59, 61, 72, 184, 185, 189) included sedition, public violence, arson, murder, kidnapping, child stealing, robbery, housebreaking, whether under the common law or a statutory provision, with intent to commit an offence, contravention of the provisions of sections 1 and 1A of the Intimidation Act, 1982 (Act No. 72 of 1982), any conspiracy, incitement or attempt to commit any of the above-mentioned offences, treason.

was worded “any other offence than that referred to in Schedule 1” was replaced by “any other offence than that for which the punishment may be a period of imprisonment exceeding more than six months without the option of a fine”.

7.255 The effect of the amendment was to delete a conviction “specified in schedule 1”, which specified the common law offences in respect of which convictions did not fall away and limited the fall away of convictions in respect of schedule 1 offences to those where the passing of sentence was postponed and the court has discharged the offender in terms of section 297 without the passing sentence or has not called that person to appear before the court in terms of section 297(3), and to replace it with the wording conviction of “an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine”, which convictions fall away after a period of 10 years. Therefore, the amendment achieved the exact opposite of what it intended to achieve in that the exemption of common law offences listed in schedule 1 from falling away was **deleted** and replaced by the falling away of convictions of any offence in respect of which a punishment may be a period exceeding 6 months without the option of a fine and in terms of paragraph (b), convictions falling away being convictions of any offence other than that for which the punishment may be a period of imprisonment exceeding 6 months without the option of a fine. Therefore, in terms of paragraph (a) any conviction for which punishment exceeding 6 months without the option of a fine falls away after 10 years and in terms of paragraph (b) any conviction other than that mentioned in (a) also falls away after a period of 10 years. The real effect of the amendment was thus to reinstate the provisions of section 303 *ter* of the CPA of 1955 which contained no limitation of convictions falling away after 10 years.

7.256 In *S v Zondi*³⁵⁵ the court held that the offence committed in 1973 was not an offence listed in Schedule 1 to the Criminal Procedure Act 51 of 1977 as it was not an offence of assault, when a dangerous wound is inflicted, but merely an assault with intent to do grievous bodily harm. The court furthermore noted that the accused's 1973 conviction therefore **lapsed automatically** on the coming into operation of Act 5 of 1991 as the appellant had not been convicted within the period of ten years after the 1973 offence of any Schedule 1 offence.

355 1995 (1) SACR 18 (A).

7.257 Most importantly the court noted further, that in terms of s 271A the offence fell away: the meaning of the section was clear and did not mean merely that the offence was not to be taken into consideration when sentence was imposed for a later offence. In *S v Mqwathi*³⁵⁶ Van Dijkhorst J decided as follows at 25A–H:

'Daar moet teen gewaak word dat die boek van die sondes van die verlede altyd geopen bly lê en (in die woorde van die psalmdigter) "die donker skuldverlede bly leef in ons heugenis" ongeag die vervloë tyd. Artikel 303ter gelees met die Vyfde Bylae van die herroepe Strafproseswet 56 van 1955 het hierdie beginsel erken deur te bepaal dat die boek gesluit word by verloop van 10 jaar sonder veroordeling. Vergelyk *S v Van der Poel* 1962 (2) SA 19 (K) en *S v Makhae en 'n ander* 1974 (1) SA 578 (O). Daarna is 'n beskuldigde as eerste oortreder beskou. Hoewel die Wetgewer met die nuwe Strafproseswet 51 van 1977 die bepaling nie herverorden het nie, wat tot gevolg het dat die hof 'n vryer diskresie het en nie meganies 'n 10 jaar tydperk op vorm SAP 69 in berekening bring nie, beteken dit tog nie dat die heilsame beginsel wat in die Bylae vervat was nie meer toepaslik is nie. Waar die hof nou 'n ongebonde maar regterlike diskresie uitoefen, kan, met inagneming van die aard, aantal en omvang van vorige soortgelyke misdrywe en die tydsverloop tussen hulle en die onderhawige, besluit word om, waar laasgenoemde tydsverloop selfs wesenlik minder is as 10 jaar, die vorige oortredings buite rekening te laat en die beskuldigde as eerste oortreder te behandel. Ook kan die Hof met inagneming van gemelde faktore besluit om, waar die laaste vorige veroordeling meer as 10 jaar gelede gevel is, dit tog in ag te neem as 'n verswarende omstandigheid. Daar moet egter gewaak word teen die neiging wat in die jongste tyd ontstaan het om, sonder behoorlike inagneming van die feit dat selfs 'n misdadiger geregtig is om te vra dat die deksel op die verre verlede dig toegehou word, eenvoudig alles in ag te neem wat op vorm SAP 69 verskyn, ongeag die tydsverloop. Dit sal myns insiens tog heilsaam wees indien, as 'n praktiese uitgangspunt, maar nie as 'n onwrikbare meetsnoer nie, die 10 jaar tydperk toegepas word tot voordeel van die beskuldigde.

By oorweging van die tydperk wat verloop het sedert die beskuldigde se laaste veroordeling sou dit korrek wees om ook ag te slaan op 'n tydperk sedert die laaste veroordeling wat die beskuldigde in die gevangenis deurgebring het. *S v Kumalo* 1973 (3) SA 697 (A) op 699H. Die rede hiervoor is dat die beskuldigde ook in die gevangenis misdade kan pleeg. Myns insiens sal die gewig wat geheg word aan die "skoon tydperk" in aanhouding afhang van die aard van die tersaaklike oortreding. Daar is immers kwalik geleentheid tot 'n oortreding soos byvoorbeeld bestuur onder die invloed van drank in die gevangenis en die afwesigheid daarvan is dus niksseggend. Daarenteen kom onder andere geweldsmisdade wel voor.'

7.258 In *S v Muggel*³⁵⁷ Ngcobo J set out the law in regard to the extent to which it is permissible to take previous convictions into account. It was also decided that the overemphasis of previous convictions should be avoided.³⁵⁸ *S v Makhaye*³⁵⁹ is a case

356 1985 (4) SA 22 (T).

357 1998 (2) SACR 414 (C).

358 See also *S v Mzazi* 2006 (1) SACR 100 (E) and *S v Matiwane* (unreported, WCC case no

where the trial court's overemphasis of the accused's single previous conviction of almost a decade earlier, was inappropriate to the extent of constituting a material misdirection justifying interference by the court of appeal. The trial court had considered the previous conviction for an offence described as 'possession of housebreaking and car theft implements and not being able to justify such possession' as relevant to the later conviction of theft of a motor vehicle. The trial court had also taken the view that the sentence imposed ten years earlier in respect of the previous conviction, had no deterrent effect on the accused. The earlier sentence was R3000 or six months' imprisonment, half of which was suspended for five years on the usual conditions. The trial court had accordingly sentenced the accused to five years' imprisonment for the theft of the motor vehicle.

7.259 On appeal Seegobin J held that in view of the fact that the two convictions were almost ten years apart, the accused had been sufficiently deterred by the first sentence (at 177c). On the facts it was also clear that the accused was not 'directly involved' (at 175h) in the theft of the vehicle and was not the 'actual thief' (at 177d–e). The link between the two offences was therefore not only weak in time but also in substance. Seegobin J concluded that the magistrate had unduly emphasised the previous convictions at the expense of factors such as the personal circumstances of the accused who was responsible for the support of a large extended family. The regional court had misdirected itself in that its decision to impose five years' direct imprisonment 'was based largely on the previous conviction' (at 177f). In setting aside the sentence of the court *a quo*, the court of appeal imposed the following sentence: Five years imprisonment of which one year was suspended for three years on certain conditions; it was also ordered that the accused could be placed under correctional supervision at the discretion of the Commissioner, as provided for in s 276(1)(a) of the Act.

7.260 In *S v Barnabas*³⁶⁰ undue emphasis on previous convictions led to the reduction of a sentence of 20 years' imprisonment to 12 years. Even where previous convictions are an aggravating factor, it remains the duty of a sentencing court to

CU/2115/2011, 13 August 2012) at [6].

359 2011 (2) SACR 173 (KZD).

360 1991 (1) SACR 467 (A).

tirelessly balance the mitigating and aggravating factors in order to reach an appropriate sentence³⁶¹

7.261 Section 271A of the CPA was amended again in 2008 with the passing of the expungement legislation. It was amended to provide yet another change in the falling away provision. The effect of the amendment was a severe limitation of the convictions that qualify for a falling away of a previous conviction. It provides that where a court has convicted a person of any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed but has postponed the passing of sentence in terms of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297(3); or has discharged that person with a caution or reprimand in terms of section 297 (1)(c); such conviction qualified for the falling away provision. Secondly, a conviction of any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine may be imposed, qualifies for the falling away provision.

7.262 In respect of any conviction or sentence referred to above such conviction fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless, during the said period, the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed. From this amendment it is clear that the broad unlimited fall away provision enacted in 1992 was again limited to include (a) convictions in respect of an offence for which a sentence exceeding 6 months imprisonment may be imposed only in instances where the passing of sentence was postponed and the person discharged without sentence or the convicted person has not been called upon to appear before the court during the period of postponement and (b) in instances where a sentence of less than 6 months imprisonment without the option of a fine may be imposed.

7.263 From the above outline it is clear that the fall away provision in respect of previous convictions has been amended a number of times. It is also clear that it has been changed from an almost unlimited provision to a much more limited position, again

361 *S v Kruger* 2012 (1) SACR 369 (SCA).

to a more an unlimited position and finally to the current very limited position. The current limitation is the most restrictive one in operation and from the many changes there seems to be an absence of a full understanding of the objectives to be achieved by the provisions or insufficient or limited justification informing the amendments.

(bb) Recommendation

7.264 The Commission is of the view that having regard to the history and content of the current wording of section 271A of the CPA, it should be reviewed and amended. In the first instance the current wording introduced a too limited application of the falling away of previous convictions and these limitations were introduced together with the introduction of the principle of expungement of previous convictions. It would appear that the legislator introduced these limitations to give effect to the principle of expungement and to bring the fall away provision into line with the expungement provisions after a period of 10 years. It is submitted that having regard to the discussion above, the limitations introduced do not give effect to the case law on the duties of the court to impose appropriate sentences and giving effect the right to protection of society, as has also been argued earlier in chapter 7 of the discussion paper and is also reflected in the matter of *S v Nhlapo*.³⁶²

7.265 In *S v Nhlapo*³⁶³ Spilg J indicated clearly why this approach is incompatible with the duty of the prosecutor and the adjudicative function of the courts. Du Toit³⁶⁴ argues:

Only in exceptional cases will the list not be produced, however, since previous convictions are usually highly relevant during sentencing, **and it is for the court, and not the prosecutor to decide what weight is to be attached to previous convictions. Once they have been proved the court must take them into account, but the weight to be attached thereto is to be decided by the court.** Where the previous conviction is for a less serious offence, or one committed some time ago, the prosecutor may be fully justified in not proving it. (emphasis added)

7.266 In *S v Nhlapo* Spilg J found it unacceptable that the prosecutor had merely informed the trial court that the police docket contained no SAP 69 (a record extracted

362 2012 (2) SACR 358 (GSJ)

363 2012 (2) SACR 358 (GSJ)

364 Du Toit Commentary on the Criminal Procedure Act / Act with Commentary/Chapter 27 Previous Convictions RS 52 2014 ch 27-p 2.

from the South African Police Criminal Record System) and that the prosecution did not intend proving any previous convictions. The prosecutor did so despite the fact that the accused had been convicted of robbery with aggravating circumstances (as intended in s 1 of the Act read with s 51(2) and other relevant provisions of the CAA.) The prosecutor, furthermore, adopted this passive attitude despite the fact that a probation officer had recorded in her report of 6 September 2011 that the accused told her about a previous conviction in 2008 for attempted rape³⁶⁵. **Spilg J took the view that the 'permissive nature' of section 271 must yield to the 'peremptory provisions' of section 51 of Act 105 of 1997 or the so-called minimum sentence legislation, which is the more recent legislation and which requires a prosecutor to present facts which a court can consider when imposing sentence (at [23]–[24]). A presiding judicial officer should, indeed, insist upon proof of form SAP 69 in order to properly discharge his sentencing functions, 'unless good reason exists to avoid a further remand where the offender is to remain in custody.'**³⁶⁶ (emphasis added)

7.267 From the case law referred to above it is, however, clear that ever since section 303 *ter* of the 1956 CPA introduced the principle of an almost unlimited fall away of previous convictions after a period of 10 years has expired after the conviction or expiration of the sentence imposed, whichever is the longest, and its non-enactment in the 1977 CPA, the courts have continued to give effect to the principle introduced by the old Act. The courts also emphasised that the principle was sound. The non-enactment in the 1977 CPA introduced a more flexible discretion for the courts in terms of which they could determine the weight to be given to such previous convictions (older than 10 years). After its re-enactment in 1991 in the new CPA in a limited version the courts continued to emphasise the role of previous convictions in the sentencing process, the role of the prosecution and the courts in determining an appropriate sentence with reference to their duty to protect society. In particular the courts noted that the prosecution has no discretion in deciding whether or not to prove previous convictions and would fail in its duty to protect society should they fail to provide relevant information to the court in this regard.

365 At [30]–[31].

366 At [32].

7.268 The courts held that in order for a court to discharge its adjudicative responsibilities when considering sentence, including those imposed by statute, it is necessary for the court to have details of previous convictions placed before it. To accord the prosecutor a discretion which is not subject to judicial oversight may result in like offenders being treated differently, even if the prosecutor had obtained the SAP69 beforehand. The courts noted that the permissive nature of section 271 (1) must yield both to the legislative intent of section 51 of Act 105 of 1997 (minimum sentences legislation) and the inherent danger of conferring an arbitrary and potentially discriminatory power on the prosecution. A failure to properly establish and inform the presiding officer of previous convictions imposed on the offender adversely affects the proper administration of justice and undermines the court's responsibilities where the minimum-sentencing regime applies under Act 105 of 1997. At best, it ought to be countenanced only in exceptional circumstances that are properly explained to the court. Ordinarily there is no apparent reason why the SAP 69 should not be requested by the prosecutor and provided to a prosecutor before sentencing, and in good time to enable the accused to consider it.

7.269 The Commission is therefore of the view that the qualifications for the falling away provision should be measured against the same yardstick as the proposed considerations outlined in chapter 7 with reference to applications for expungements. In particular the the protection of society as weighed up against the right to equality of an individual as outlined in chapter 7, should inform the preconditions for the falling away of previous convictions in terms of section 271A of the CPA. In addition it is submitted that in view of current constitutional dispensation and the courts interpretation of the need to give effect to the constitutional right to protection of society, the obligation on the prosecution to prove previous convictions and the obligation on the courts to determine effective and appropriate sentences and the weight to be given to previous convictions in the sentences imposed, also render an administrative application process for expunging criminal records, without any role of the courts or the prosecution or the courts to give effect their constitutional duties, unreasonable and therefore overbroad and unconstitutional.

7.270 The Commission recommends the amendments to the CPA and the CJA as outlined in the attached draft Bill to give effect to its recomednations outlined in Chapter7.

REPUBLIC OF SOUTH AFRICA

CRIMINAL LAW AMENDMENT BILL

(As introduced)

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 2014]

REPUBLIEK VAN SUID-AFRIKA

STRAFREG WYSIGINGS- WETSONTWERP

(Soos ingedien)

(MINISTER VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[B 2014]

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

AMENDMENT BILL

To amend the Criminal Procedure Act, 1977; to amend the Child Justice Act, 2008, and to amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, so as to further regulate the expungement of criminal records, to align the provisions dealing with expungement in the different Acts and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows: B

1. Section 217A of the Criminal Procedure Act, 1977 is hereby amended by the substitution of the section for the following section:

271A. Certain convictions fall away as previous convictions and are expunged after expiration of 10 years

(1) Where a court has convicted a person of any offence and imposed any sentence other than a sentence referred to in subsection (2), that conviction and sentence shall fall away as a previous conviction if a period of 10 years has elapsed after the date on which the sentence imposed has been served or where a sentence has been suspended or passing of the sentence postponed, 10 year has elapsed after the period of suspension or the period of postponement of the sentence, unless the person has again been convicted of or sentenced for any offence committed during such period of ten years.

(2) The provisions of subsection (1) is not applicable to a conviction in respect of any offence in respect of which any of the following sentences is imposed:

- (a) a sentence of imprisonment for a period of more than 10 years with or without the option of a fine;
- (b) declaration as a habitual criminal in terms of section 286;
- (c) declaration as a dangerous criminal in terms of section 286A;
- (d) imprisonment for an indefinite period in terms of section 286B;
- (e) a minimum sentence imposed in terms of section 50 of the Criminal Law Amendment Act 105 of 1997.

[Where a court has convicted a person of-

- (a) any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed but-
- (i) has postponed the passing of sentence in terms of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297(3); or
 - (ii) has discharged that person with a caution or reprimand in terms of section 297 (1)(c);or
- (b) any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine, may be imposed,]

2. Section 217B of the Criminal Procedure Act, 1977 is hereby amended by the substitution for the section of the following section:

271B. Expungement of certain criminal records after a period of 5 years

- (1) (a) Where a court has imposed any of the following sentences on, or has made any of the following orders in respect of, a person convicted of an offence, the criminal record of that person, containing the conviction and sentence or order in question, **[must] may**, subject to paragraph (b) and subsections (2), (3), (4) (5), (6), (7) and (8) and section 271D, on the person's written application, be expunged after a period of **[10] 5** years has elapsed after the date of **[conviction] serving the sentence imposed** for that offence or in respect of a sentence referred to subparagraphs (i) and (vi), where the passing of sentence was suspended in whole or postponed, after the date of conviction, unless during that period the person in question has been convicted of an offence and has been sentenced to a period of imprisonment without the option of a fine:
- (i) A sentence postponing the passing of sentence in terms of section 297(1)(a) where that person was discharged in terms of section 297(2), without the passing of sentence, or where that person was not called upon to appear before the court in terms of section 297(3);
 - (ii) a sentence discharging that person with a caution or reprimand in terms of section 297(1)(c);
 - (iii) a sentence in the form of a fine only, not exceeding R**[2]40** 000;
 - (iv) a sentence of corporal punishment before corporal punishment was declared to be unconstitutional as a sentencing option;

- (v) any sentence of imprisonment with the option of a fine, not exceeding R[2]40 000;
 - (vi) a[ny] sentence of imprisonment not exceeding 1 year [which was] whether suspended wholly, partly or not;
 - (viA) an order in terms of section 290(1)(a) or (b) as that section was before it was repealed by section 99 of the Child Justice Act, 2008 (Act No. 75 of 2008);
 - (vii) a sentence of correctional supervision, referred to in section 276(1)(h) or a sentence referred to in section 276(1)(i); or
 - (viii) a sentence of periodical imprisonment, referred to in section 276(1)(c).
- (b) A person-
- (i) who has been convicted of a sexual offence against a child or a person who is mentally disabled and whose name has been included in the National Register for Sex Offenders, as provided for in section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007); or
 - (ii) whose name has been included in the National Child Protection Register as a result of a conviction for an offence, as provided for in section 120(1)(b) of the Children's Act, 2005 (Act No. 38 of 2005),

does not qualify to have the criminal record in question expunged in terms of this section, unless his or her name has been removed from the National Register of Sex Offenders, as provided for in section 51 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, or section 128 of the Children's Act, 2005, as the case may be.

(2) [The Director-General: Justice and Constitutional Development must, on receipt of the written application of a person referred to in subsection (1), issue a certificate of expungement, directing that the criminal record of that person be expunged, if the Director-General is satisfied that the person applying for expungement complies with the criteria set out in subsection (1).

(3) The Director-General: Justice and Constitutional Development must submit every certificate of expungement that has been issued as provided for in subsection (2) to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with section 271D.]

(2) A person referred to in subsection (1) must apply in writing by notice of motion, and fully motivates the application for the expungement of the relevant

convictions with reference to the factors listed in subsection (7), to the prosecutor of the magistrates' court where he or she resides and the notice of motion together with the motivated application must be submitted to the office of the control prosecutor of the relevant court.

(3) A person may submit an application in terms of subsection (1) in respect of no more than two previous convictions.

(4) For purposes of subsection (3) two or more convictions may be counted as one if they are connected with the same act or result from offences committed at the same time.

(5) The prosecutor may oppose an application in terms of subsection (1) and must, upon receipt of the application, request the SA Police Services to investigate the matter and provide him or her with the statements of witnesses or other evidence with reference to the factors listed in subsection () with the view to assist the court in making a finding.

(6) Upon receipt of an application in terms of subsection (1) the prosecutor must issue a summons in terms of section 54 to secure the presence of the applicant in court and the provisions of section 54 shall *mutatis mutandi* be applicable to an applicant for purposes of the hearing of his or her application for expungement.

(7) The court may, subject to subsection (9), grant the application for expungement after hearing the evidence and submissions of the applicant and the prosecution, if the court, after considering:

- (a) compliance with the requirements listed in subsection (1)(a) and (b);
- (b) the extent to which the applicant has been rehabilitated;
- (c) the extent to which the applicant has complied with and served the sentences imposed in respect of which the application is made;
- (d) the effect of any disqualification following his or her conviction and imposed in terms of legislation, on the application for expungement;
- (e) the interests of society to be protected and the duties of the court as contained in the Constitution and legislation;
- (f) whether the interests of the applicant in having his or her criminal record expunged are not outweighed by any legitimate governmental need to maintain those records;

is satisfied that it is in the interests of justice to do so.

(8) If the court grants the application for expungement the clerk of the court shall record the order on a certificate of expungement and after it has been signed by the presiding officer, submit the certificate of expungement to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with section 271D

(9) Where the court has granted an order in terms of subsection (8) any entry or record of such convictions shall be deemed to be expunged from all official documents or records and the convictions and sentences shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to

have taken place: Provided that the court may make the order subject to the taking of such measures as it may deem necessary for the protection of the safety of the public.

3. Section Insertion 271BA is hereby inserted in the Criminal Procedure Act, 1977 after section 271B:

271BA. Expungement of certain criminal records after a period of 10 years

(1) (a) Where a person has been convicted of any offence and a court has imposed any of the following sentences, or has made any of the following orders in respect of a person convicted of an offence, the criminal record of that person, containing the convictions and sentences or orders in question, may, subject to paragraphs (b), (c) and subsections (2), (3), (4), (5), (6) and (7) and section 271D, on the person's written application, be expunged after a period of 10 years has elapsed after the date of serving the last sentence imposed, as reflected in his or her criminal record, or, in the case where the last sentence was postponed or suspended and the person has not been called upon to appear before the court for purpose of sentencing or putting into operation of the suspended sentence, 10 years has elapsed after the date of conviction, unless, during that period, the person has been convicted of and sentenced for any offence:

(i) A conditional or unconditional postponement or suspension of a sentence imposed in terms of section 297 and not exceeding a fine of R400 000 or imprisonment of 10 years;

(ii) a sentence discharging that person with a caution or reprimand in terms of section 297(1)(c);

(iii) a sentence of periodical imprisonment imposed in terms of section 285;

(iv) a sentence in the form of a fine only, not exceeding R400 000;

(v) a sentence of corporal punishment before corporal punishment was declared to be unconstitutional as a sentencing option;

(vi) any sentence of imprisonment with or without the option of a fine, not exceeding 10 years;

(vii) a sentence of correctional supervision including correctional supervision imposed in terms of section 276(1)(h) or 276(1)(i);

(viii) an order in terms of section 290(1)(a) or (b) as that section was before it was repealed by section 99 of the Child Justice Act, 2008 (Act No. 75 of 2008).

(b) A person-

- (i) who has been convicted of a sexual offence against a child or a person who is mentally disabled and whose name has been included in the National Register for Sex Offenders, as provided for in section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007); or
- (ii) whose name has been included in the National Child Protection Register as a result of a conviction for an offence, as provided for in section 120(1)(b) of the Children's Act, 2005 (Act No. 38 of 2005); or

does not qualify to have the criminal record in question expunged in terms of this section, unless his or her name has been removed from the National Register of Sex Offenders, as provided for in section 51 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, or section 128 of the Children's Act, 2005, as the case may be.

- (c) A person, who has been convicted of any offence in respect of which any of the following sentences have been imposed:
 - (i) a sentence of imprisonment for a period of more than 10 years imprisonment with or without the option of a fine;
 - (ii) declaration as a habitual criminal in terms of section 286;
 - (iii) declaration as a dangerous criminal in terms of section 286A;
 - (iv) imprisonment for an indefinite period in terms of section 286B; or
 - (v) a minimum sentence imposed in terms of section 50 of the Criminal Law Amendment Act, 105 of 1997

does not qualify to have his or her criminal record expunged in terms of this section.

(2) A person referred to in subsection (1) must apply in writing, by notice of motion, and with full motivation of the application for the expungement of the relevant convictions with reference to the factors listed in subsection (7), to prosecutor of the magistrates' court where he or she resides and the notice must be submitted to the office of the control prosecutor of the relevant court.

(3) Where any sentence in respect of which an application in terms of subsection (1) is made, exceeds the jurisdiction of the magistrates' court, the application must be submitted to the control prosecutor of the magistrates' court referred to in subsection (2) who must request the magistrates' court to transfer the matter for hearing in the regional court in terms of section 75(2).

(4) The prosecutor may oppose an application in terms of subsection (1) and

must, upon receipt of the application, request the SA Police Services to investigate the matter and provide him or her with the statements of witnesses or other evidence with reference to the factors listed in subsection () with the view to assist the court in making a finding.

(5) Upon receipt of an application in terms of subsection (1) the prosecutor must issue a summons in terms of section 54 to secure the presence of the applicant in court and the provisions of section 54 shall *mutatis mutandi* be applicable to the applicant for purposes of the hearing of his or her application for expungement.

(6) The court may, subject to subsection (8), grant the application for expungement after hearing the evidence and submissions of the applicant and the prosecution, if the court, after considering:

- (a) compliance with the requirements listed in subsection (1)(a), (1)(b) and (c);
- (b) the extent to which the applicant has been rehabilitated;
- (c) the extent to which the applicant has complied with and served the sentences imposed in respect of which the application is made;
- (d) the effect of any disqualification, imposed in terms of legislation following a conviction, on the application for expungement;
- (e) the interests of society to be protected and the duties of the court as contained in the Constitution and legislation;
- (f) whether the interests of the applicant in having his or her criminal record expunged are not outweighed by any legitimate governmental need to maintain those records;

is satisfied that it is in the interests of justice to do so.

(7) If the court grants the application for expungement in terms of subsection (6), the clerk of the court shall record the order on the certificate of expungement and after it has been signed by the presiding officer submit the warrant of execution to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with section 271D

(8) Where the court has granted an order in terms of subsection (6) any entry or record of such convictions shall be deemed to be expunged from all official documents or records and the convictions and sentences shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the court may make the order subject to the taking of such measures as it may deem necessary for the protection of the safety of the public.

4. Section 271C of the Criminal Procedure Act, 1977 is retained unchanged.

271C. Expungement of certain criminal records under legislation enacted before the Constitution of the Republic of South Africa, 1993, took effect

(1) Where a court has convicted a person of any of the following offences, the criminal record, containing the conviction and sentence in question, of that person in respect of that offence must be expunged automatically by the Criminal Record

Centre of the South African Police Service, as provided for in section 271D:

- (a) A contravention of section 1 of the Black Land Act, 1913 (Act No. 27 of 1913);
- (b) a contravention of section 12 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936);
- (c) a contravention of section 5(1), read with section 5(2), section 6(1), read with section 6(2), section 9(3), section 9(3)bis(a), read with section 9(3)(c), section 10(1), read with section 10(4), section 11(1), read with section 11(2)(a), section 12(1), read with section 12(2), section 12(3), section 15(1), read with section 15(3), section 29(1), read with section 29(9) and section 29(12), section 31(1), read with section 31(2), section 35(1), read with section 35(4), section 35(5), section 35(6), section 40(3), section 43bis or section 44, of the Blacks (Urban Areas) Consolidation Act, 1945 (Act No. 25 of 1945);
- (d) a contravention of section 8(1), read with section 8(3), of the Coloured Persons Settlement Act, 1946 (Act No. 7 of 1946);
- (e) a contravention of section 2 or 4 of the Prohibition of Mixed Marriages Act, 1949 (Act No. 55 of 1949);
- (f) a contravention of section 11 of the Internal Security Act, 1950 (Act No. 44 of 1950);
- (g) a contravention of section 10(6) and (7), 11(4), 14, 15, 16, 20(1), 28(7), 29(1) or 30 of the Black Building Workers Act, 1951 (Act No. 27 of 1951);
- (h) a contravention of section 15 of the Blacks (Abolition of Passes and Co-ordination of Documents) Act, 1952 (Act No. 67 of 1952);
- (i) a contravention of section 2 of the Criminal Law Amendment Act, 1953 (Act No. 8 of 1953);
- (j) a contravention of section 2(2) of the Reservation of Separate Amenities Act, 1953 (Act No. 49 of 1953);
- (k) a contravention of section 16 of the Sexual Offences Act, 1957 (Act No. 23 of 1957);
- (kA) a contravention of section 14, section 20(2), section 20A(4) or section 26(2) of the Black Labour Act, 1964 (Act No. 67 of 1964);
- (l) a contravention of section 46 of the Group Areas Act, 1966 (Act No. 36 of 1966);
- (m) a contravention of section 2 or 3 of the Terrorism Act, 1967 (Act No. 83 of 1967); or

- (n) a contravention of section 2 read with section 4(1), of the Prohibition of Foreign Financing of Political Parties Act, 1968 (Act No. 51 of 1968).
- (2) (a) Where a court has convicted a person of contravening any provision of-
- (i) an Act of Parliament or subordinate legislation made thereunder;
 - (ii) an ordinance of a provincial council;
 - (iii) a municipal by-law;
 - (iv) a proclamation;
 - (v) a decree; or
 - (vi) any other enactment having the force of law, other than those provisions referred to in subsection (1), which were enacted in the former Republic of South Africa, the former Republic of Transkei, Bophuthatswana, Ciskei or Venda, or in any former self-governing territory, as provided for in the Self-governing Territories Constitution Act, 1971(Act No. 21 of 1971), before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), took effect, which created offences that were based on race or which created offences, which would not have been considered to be offences in an open and democratic society, based on human dignity, equality and freedom, under the constitutional dispensation after 27 April 1994,
- the criminal record, containing the conviction and sentence in question, of that person must, on the person's written application, subject to subsection (3) and section 271D, be expunged.
- (b) Where the criminal record of a person referred to in subsection (1) has not been expunged automatically as provided for in that subsection, the criminal record of that person must, on his or her written application, subject to subsection (3) and section 271D, be expunged.
- (3) The Director-General: Justice and Constitutional Development must, on receipt of the written application of a person referred to in subsection (2)(a) or (b), issue a certificate of expungement, directing that the criminal record of the person be expunged, if the Director-General is satisfied that the person applying for expungement complies with the criteria set out in subsection (1) or subsection (2)(a), as the case may be.
- (4) The Director-General: Justice and Constitutional Development must submit every certificate of expungement that has been issued as provided for in subsection (3) or (5)(b) to the head of the Criminal Record Centre of the South African Police

Service, to be dealt with in accordance with section 271D.

- (5) (a) In the case of a dispute or any uncertainty as to whether an offence is an offence as referred to in subsection (1) or (2)(a) or not, the matter must be referred to the Minister for a decision.
- (b) If the Minister decides that the offence is an offence as referred to in subsection (1) or (2)(a), he or she must issue a certificate of expungement, directing that the criminal record of the person be expunged.

5. Section 271D of the Criminal Procedure Act, 1977, is hereby amended by the substitution for the section of the following section.

271D. Expungement of certain criminal records by Criminal Record Centre

(1) The head of the Criminal Record Centre of the South African Police Service or a senior person or persons at the rank of Director or above, employed at the Centre, who has or have been authorised, in writing, by the head of the Centre to do so, must expunge the criminal record of a person if-

- (i) he or she is furnished with a certificate of expungement by the court or the Director-General: Justice and Constitutional Development as provided for in section 271B[(2)] (8), 271BA(7) or section 271C(3) or by the Minister as provided for in section 271C(5); or
- (ii) that person qualifies for the automatic expungement of his or her criminal record as provided for in section 271C(1).

(2) The head of the Criminal Record Centre of the South African Police Service must, on the written request of a person who-

- (a) has applied to have his or her criminal record expunged in terms of section 271B, 271BA or section 271C(2); or
- (b) qualifies to have his or her criminal record expunged automatically in terms of section 271C(1),

in writing, confirm that the criminal record in question has been expunged.

(3) Any person who-

- (a) without the authority of a certificate of expungement as provided for in section 271B, 271BA, 271C or this section; and
- (b) intentionally or in a grossly negligent manner,

expunges the criminal record of any person or confirms that a criminal record has been expunged as provided for in subsection (2), is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not

exceeding 10 years or to both a fine and that imprisonment.

6. Section 271DA is hereby amended by the substitution for the section of the following section:

271DA. Revoking of certificate of expungement erroneously issued

(1) Where the Director-General: Justice and Constitutional Development, in terms of section **[271B(2) or]** 271C(3), or the Minister, in terms of section 271C(5)(b), has issued a certificate of expungement and it subsequently appears that the applicant did not qualify for the expungement of his or her record, the Director-General must-

- (a) inform the applicant in writing of the information that has come to his or her attention and that he or she or the Minister intends to revoke the certificate of expungement;
- (b) afford the applicant an opportunity to furnish compelling written reasons to him or her or the Minister, within 90 working days after the applicant has been informed of the intention to revoke, why his or her record should remain expunged;
- (c) inform the applicant in writing within 30 working days after a decision is made of-
 - (i) his or her or the Minister's decision; and
 - (ii) the reasons for revoking the certificate of expungement; and
- (d) inform the head of the Criminal Record Centre of the South African Police Service in writing within 14 working days after the decision was made, to revoke the certificate of expungement and to reinstate the convictions and sentences in question.

(2) If the applicant fails to furnish compelling written reasons contemplated in subsection (1)(b), the Director-General or the Minister, as the case may be, may, subject to the Promotion of Administrative Justice Act, 2000 (Act No. 2 of 2000), revoke the certificate of expungement.

7. Section 271DB is hereby amended by the substitution for the section of the following section:

271DB. Delegation of powers and assignment of duties by Director-General

(1) The Director-General: Justice and Constitutional Development may delegate any power or assign any duty conferred on or assigned to him or her in terms of section **[271B(2) or (3) or]** 271C(3) or (4) to an appropriately qualified official in the employ of the Department of Justice and Constitutional Development at the rank of Deputy Director-General.

- (2) A delegation or assignment in terms of subsection (1)-
 - (a) is subject to any limitation, condition and direction which the Director-General may impose;
 - (b) must be in writing; and
 - (c) does not divest the Director-General of the responsibility concerning the exercise of the power or the performance of the duty.
- (3) The Director-General may-
 - (a) confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and
 - (b) at any time, in writing, withdraw a delegation or assignment.

8. Section 271DA is hereby amended by the substitution for the section of the following section:

271E. Regulations

The Minister-

- (a) must make regulations regarding-
 - (i) the form on which a person's written application for the expungement of his or her criminal record must be made, as provided for in section 271B(1)(a), 271BA(2) and section 271C(2)(a) and (b);
 - (ii) the certificate of expungement to be issued by the court, Director-General: Justice and Constitutional Development or the Minister, as provided for in sections 271B(2), 271BA(2) and section 271C(3) and (5)(b); and
 - (iii) the manner in which the court, or Director-General must submit certificates of expungement that have been issued, to the head of the Criminal Record Centre of the South African Police Service, as provided for in section 271B(3), 271BA (3) and section 271C(4); and
- (b) may make regulations regarding any other matter which is necessary or expedient in order to achieve the objects of sections 271B, 271BA, 271C and 271D.

9. Section 297 of the Criminal Procedure Act is hereby amended by the substitution for the section of the following section:

297. Conditional or unconditional postponement or suspension of sentence,

and caution or reprimand

(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion -

(a) postpone for a period not exceeding five years the passing of sentence and release the person concerned -

(i) on one or more conditions, whether as to -

(aa) compensation;

(bb) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;

(cc) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);

(ccA) submission to correctional supervision;

(dd) submission to instruction or treatment;

(ee) submission to the supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Probation Services Act, 1991 (Act No. 116 of 1991);

(ff) the compulsory attendance or residence at some specified centre for a specified purpose;

(gg) good conduct;

(hh) any other matter,

and order such person to appear before the court at the expiration of the relevant period; or

(ii) unconditionally, and order such person to appear before the court, if called upon before the expiration of the relevant period; or

(b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) which the court may specify in the order; or

- (c) discharge the person concerned with a caution or reprimand, and such discharge shall have the effect **[of an acquittal, except]** that the conviction and sentence shall be recorded as a previous conviction.

(1A) ...

(2) Where a court has under paragraph (a)(i) of subsection (1) postponed the passing of sentence and the court, whether differently constituted or not, is at the expiration of the relevant period satisfied that the person concerned has observed the conditions imposed under that paragraph, the court shall discharge him without passing sentence, and such discharge shall be deemed to be discharged with a caution or reprimand under subsection (1)(c), [have the effect of an acquittal, except] and [that] the conviction and sentence shall remain to be recorded as a previous conviction.

(3) Where a court has under paragraph (a)(ii) of subsection (1) unconditionally postponed the passing of sentence, and the person concerned has not at the expiration of the relevant period been called upon to appear before the court, such person shall be deemed to have been discharged with a caution under subsection (1)(c) and the conviction and sentence shall remain to be recorded as a previous conviction.

(4) Where a court convicts a person of an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) of subsection (1).

...

10. Section 87 of the Child Justice Act 75 of 2008 Principal Act is hereby amended by the substitution for the section of the following section:

[87. Expungement of records of certain convictions and diversion orders

(1) (a) **Where a court has convicted a child of an offence referred to in Schedule 1 or 2, the conviction and sentence in question fall away as a previous conviction and the criminal record of that child must, subject to subsections (2), (3) and (5), on the written application of the child, his or her parent, appropriate adult or guardian (hereafter referred to as the applicant), in the prescribed form, be expunged after a period of-**

(i) five years has elapsed after the date of conviction in the case of an offence referred to in Schedule 1; or

(ii) 10 years has elapsed after the date of conviction in the case of an offence referred to in Schedule 2,

unless during that period the child is convicted of a similar or more

serious offence.

- (b) In the case of a dispute or uncertainty as to whether another offence of which a child is convicted during the period is similar to or more serious than the offence in respect of which a record exists, the opinion of the Cabinet member responsible for the administration of justice prevails.

(2) The Director-General: Justice and Constitutional Development must, on receipt of the written application of an applicant referred to in subsection (1), issue a prescribed certificate of expungement, directing that the conviction and sentence of the child be expunged, if the Director-General is satisfied that the child complies with the criteria set out in subsection (1).

(3) Notwithstanding the provisions of subsection (1), the Cabinet member responsible for the administration of justice may, on receipt of an applicant's written application in the prescribed form, issue a prescribed certificate of expungement, directing that the conviction and sentence of the child be expunged, if he or she is satisfied that exceptional circumstances exist which justify expungement, where, in the case of the child-

- (a) the period of five years, referred to in subsection (1)(a)(i); or
- (b) the period of 10 years, referred to in subsection (1)(a)(ii),

has not yet elapsed, if the Cabinet member responsible for the administration of justice is satisfied that the child otherwise complies with the criteria set out in subsection (1).

(4) An applicant to whom a certificate of expungement has been issued as provided for in subsection (2) or (3) must, in the prescribed manner, submit the certificate to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with subsection (5).

(5) (a) The head of the Criminal Record Centre of the South African Police Service or a senior person or persons at the rank of Director or above, employed at the Centre, who has or have been authorised, in writing, by the head of the Centre to do so, must expunge the criminal record of a child if he or she is furnished by the applicant with a certificate of expungement as provided for in subsection (2) or (3).

(b) The head of the Criminal Record Centre of the South African Police Service must, on the written request of an applicant, in writing, confirm that the criminal record of the child has been expunged.

(c) Any person who-

- (i) without the authority of a certificate of expungement as provided for in this section; or

(ii) intentionally or in a grossly negligent manner,

expunges the criminal record of any child, is guilty of an offence and is, if convicted, liable to a fine or to a sentence of imprisonment for a period not exceeding 10 years or to both a fine and the imprisonment.

(6) The Director-General: Social Development must, in the prescribed manner, expunge the record of any diversion order made in respect of a child in terms of this Act on the date on which that child turns 21 years of age, unless the child has been convicted of any other offence before that date or has failed to comply with the diversion order in question.

(7) Where the Director-General: Justice and Constitutional Development, in terms of subsection (2), or the Minister, in terms of subsection (3), has issued a certificate of expungement and it subsequently appears that the applicant did not qualify for the expungement of his or her criminal record, the Director-General must-

- (a) inform the applicant in writing of the information that has come to his or her attention and that he or she or the Minister intends to revoke the certificate of expungement;
- (b) afford the applicant an opportunity to furnish compelling written reasons to him or her or the Minister within 90 working days after he or she is informed of the intention to revoke, why his or her record should remain expunged;
- (c) inform the applicant in writing within 30 working days after a decision is made of-
 - (i) his or her or the Minister's decision; and
 - (ii) the reasons for revoking the certificate of expungement;and
- (d) inform the head of the Criminal Record Centre of the South African Police Service, in writing within 14 working days after the decision was made, to revoke the certificate of expungement and to reinstate the convictions and sentences in question.

(8) If the applicant fails to furnish compelling reasons contemplated in subsection (1)(b), the Director-General or Minister, as the case may be, may, subject to the Promotion of Administrative Justice Act, 2000 (Act No. 2 of 2000), revoke the certificate of expungement.

(9) (a) The Director-General: Justice and Constitutional Development may delegate any power or assign any duty conferred upon or assigned to him or her in terms of subsection (2) to an appropriately qualified official in the employ of the Department of

Justice and Constitutional Development at the rank of Deputy Director-General.

- (b) A delegation or assignment in terms of paragraph (a)-**
 - (i) is subject to any limitation, condition and direction which the Director-General may impose;**
 - (ii) must be in writing; and**
 - (iii) does not divest the Director-General of the responsibility concerning the exercise of the power or the performance of the duty.**
- (c) The Director-General may-**
 - (i) confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of this subsection, subject to any rights that may have accrued to a person as a result of the decision; and**
 - (ii) at any time, in writing, withdraw a delegation or assignment.]**

87. Expungement of certain criminal records after a period of 5 years

- (1) (a) Where a court has imposed any of the following sentences on, or has made any of the following orders in respect of, the child convicted of an offence, the criminal record of that child, containing the conviction and sentence or order in question, may, subject to paragraph (b) and subsections (2), (3), (4) (5), (6), (7) and (8), on the written application of the child, his or her parent, appropriate adult or guardian (hereafter referred to as the applicant), be expunged after a period of 5 years has elapsed after the date of serving the sentence imposed for that offence or, where the passing of sentence was suspended in whole or postponed, 5 years has elapsed after the date of conviction, unless during that period the child in question has been convicted of an offence and has been sentenced to a period of imprisonment without the option of a fine or, where the passing of sentence was postponed or the sentence suspended, the child has been called upon to appear before the court and a sentence was imposed:**
 - (i) A community based sentence in terms of section 72;**
 - (ii) A restorative justice sentence in terms of section 73;**
 - (iii) A sentence in the form of a fine or alternative to a fine in terms of section 74, not exceeding R 40 000;**

- (iv) A sentence of correctional supervision in terms of section 75, and to be executed in accordance with section 276(1)(h) or section 276(1)(i) of the Criminal Procedure Act 51 of 1977;
- (v) A sentence of compulsory residence in a child and youth care centre years in terms of section in terms of section 76 not exceeding 1 year;
- (vi) A sentence postponing the passing of sentence in terms of section 78 where the child was discharged in terms of section 297(2) of the Criminal Procedure Act, 51 of 1977, without the passing of sentence, or where that child was not called upon to appear before the court in terms of section 297(3) of the Criminal Procedure Act, 51 of 1977;
- (vii) A sentence discharging that person with a caution or reprimand in terms of section 297(1)(c) of the Criminal Procedure Act, 51 of 1977;
- (viii) A sentence of corporal punishment before corporal punishment was declared to be unconstitutional as a sentencing option;
- (ix) A sentence of imprisonment, whether suspended or not, in terms of section 77 not exceeding 1 year; or
- (x) An order in terms of section 290(1)(a) or (b) as that section was before it was repealed by section 99 of the Child Justice Act, 2008 (Act No. 75 of 2008);

(b) A child -

- (i) who has been convicted of a sexual offence against a child or a person who is mentally disabled and whose name has been included in the National Register for Sex Offenders, as provided for in section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007); or
- (ii) whose name has been included in the National Child Protection Register as a result of a conviction for an offence, as provided for in section 120(1)(b) of the Children's Act, 2005 (Act No. 38 of 2005),

does not qualify to have the criminal record in question expunged in terms of this section, unless his or her name has been removed from the National Register of Sex Offenders, as provided for in section 51 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, or section 128 of the Children's Act, 2005, as the case may be.

(2) The applicant referred to in subsection (1) must apply in writing on notice of

motion, and full motivation for the application for expungement of the relevant convictions with reference to the factors listed in subsection (7), to the child justice court where he or she resides and the notice of motion together with the motivated application must be submitted to the office of the control prosecutor of the relevant court.

(3) The applicant may submit an application in terms of subsection (1) in respect of no more than two previous convictions.

(4) For purposes of subsection (3) two or more convictions may be counted as one if they are connected with the same act or result from offences committed at the same time.

(5) The prosecutor may oppose an application in terms of subsection (1) and must, upon receipt of the application, request the SA Police Services to investigate the matter and provide him or her with the statements of witnesses or other relevant evidence with reference to the factors listed in subsection (7) with the view to assist the court in making a finding.

(6) Upon receipt of an application in terms of subsection (1) the prosecutor must issue a summons in terms of section 54 of the Criminal Procedure Act, 51 of 1977 to secure the presence of the applicant in court and the provisions of section 54 of the Criminal Procedure Act, 51 of 1977 shall, *mutatis mutandi*, be applicable to the applicant for purposes of hearing his or her application.

(7) A child justice court may, subject to subsection (9), grant an application for expungement, after hearing the evidence and submissions of the applicant and the prosecution, if the court, after considering:

- (a) compliance with the requirements listed in subsection (1)(a) and (b);
- (b) the extent to which the applicant has been rehabilitated;
- (c) the extent to which the applicant has complied with and served the sentences imposed in respect of which the application is made;
- (d) the effect of any disqualification, imposed in terms of legislation following his or her conviction, on the application;
- (e) the interests of society to be protected and the duties of the court as contained in the Constitution and legislation;
- (f) whether the interests of the applicant in having his or her criminal record expunged are not outweighed by any legitimate governmental need to maintain those records;

is satisfied that it is in the interests of justice to do so.

(8) If the court grants the application for expungement the clerk of the court shall, record the order on a certificate of expungement and, after it has been signed by the presiding officer, submit the certificate of expungement to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with subsection (10).

(9) Where the court has granted an order in terms of subsection (7) any entry or record of such convictions shall be deemed to be expunged from all official

documents or records and the convictions and sentences shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the court may make the order subject to the taking of such measures as it may deem necessary for the protection of the safety of the public.

(10) (a) The head of the Criminal Record Centre of the South African Police Service or a senior person or persons at the rank of Director or above, employed at the Centre, who has or have been authorised, in writing, by the head of the Centre to do so, must expunge the criminal record of a child if he or she is furnished by the clerk of the court with a certificate of expungement as provided for in subsection (8).

(b) The head of the Criminal Record Centre of the South African Police Service must, on the written request of an applicant, in writing, confirm that the criminal record of the child has been expunged.

(c) Any person who-

(i) without the authority of a certificate of expungement as provided for in this section; or

(ii) intentionally or in a grossly negligent manner,

expunges the criminal record of any child, is guilty of an offence and is, if convicted, liable to a fine or to a sentence of imprisonment for a period not exceeding 10 years or to both a fine and the imprisonment.

(11) The Director-General: Social Development must, in the prescribed manner, expunge the record of any diversion order made in respect of a child in terms of this Act on the date on which that child turns 21 years of age, unless the child has been convicted of any other offence before that date or has failed to comply with the diversion order in question.

(12) No diversion order issued in terms of Chapter 8 of this Act or the payment of an admission of guilt fine in terms of sections 57 or 57A of the Criminal Procedure Act, 51 of 1977, is regarded as a previous conviction and is not recorded in the criminal record of a child.

11. Section 87A is hereby inserted after section 87 of the Child Justice Act, 75 of 2008

87A Certain convictions fall away as previous convictions after expiration of 10 years

(1) Where a court has convicted a person of any offence and imposed any sentence other than a sentence for a conviction of an offence referred to in subsection (2), that conviction and sentence shall fall away as a previous conviction if a period of 10 years has elapsed after the date on which the sentence imposed has been served or where a sentence has been suspended or passing of the sentence postponed, 10 years has elapsed after the period of suspension or the period of

postponement of the sentence, unless the person has again been convicted of or sentenced for any offence committed during such period of ten years.

(2) The provisions of subsection (1) is not applicable to a conviction in respect of any offence in respect of which any of the following sentences is imposed:

- (a) a sentence of imprisonment for a period of more than 10 years imprisonment with or without the option of a fine;
- (b) declaration as a habitual criminal in terms of section 286;
- (c) declaration as a dangerous criminal in terms of section 286A;
- (d) imprisonment for an indefinite period in terms of section 286B;
- (e) a minimum sentence imposed in terms of section 50 of the Criminal Law Amendment Act 105 of 1997.

12. Section 50 of the Criminal Law (Sexual Offences and related Matters) Amendment Act, 32 of 2007 is amended by the substitution for the section of the following section:

51. Removal of particulars from Register

(1) Subject to subsections (2) and (3), the particulars of a person -

(a) who -

(i) has been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to a term of imprisonment, periodical imprisonment, correctional supervision, a sentence of compulsory residence in child and youth care centre in terms of section 76 of the Child Justice Act, 2008, or to imprisonment as contemplated in section 276(1)(f) of the Criminal Procedure Act, 1977, without the option of a fine for a period of at least six months but not exceeding eighteen months, whether the sentence was suspended or not, may, on application as contemplated in subsection (3), be removed from the Register after a period of ten years has lapsed after that person has been released from prison or the period of suspension has lapsed;

(ii) has been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to a term of imprisonment, periodical imprisonment, correctional supervision, a sentence of compulsory residence in child and youth care centre in terms of section 76 of the Child Justice Act, 2008, or to imprisonment as contemplated in section 276(1)(i) of the Criminal Procedure Act, 1977, without the option of a fine for a period of six months or less, whether the sentence was suspended or not, may, on application as contemplated in subsection (3), be removed from the Register after a period of seven years has lapsed after that person has been released from prison or the period of suspension has lapsed; or

(iii) is alleged to have committed a sexual offence against a child or a person who is mentally disabled in respect of whom a court,

whether before or after the commencement of this Chapter, has made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, may, on application as contemplated in subsection (3), be removed from the Register after a period of five years has lapsed after such person has recovered from the mental illness or mental defect in question and is discharged in terms of the Mental Health Care Act, 2002 (Act No. 17 of 2002), from any restrictions imposed on him or her; or

- (b) who has been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to any other form of lesser punishment or court order may, on application as contemplated in subsection (3), be removed from the Register after a period of five years has lapsed since the particulars of that person were included in the Register.

(2) The particulars of a person who has -

- (a) been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to a term of imprisonment, periodical imprisonment, correctional supervision, a sentence of compulsory residence in child and youth care centre in terms of section 76 of the Child Justice Act, 2008, or to imprisonment as contemplated in section 276(1)(i) of the Criminal Procedure Act, 1977, without the option of a fine for a period exceeding eighteen months, whether the sentence was suspended or not; or
- (b) two or more convictions of a sexual offence against a child or a person who is mentally disabled,

may not be removed from the Register.

13. Short title and commencement

This Act shall be called the Criminal Procedure Amendment Act, 20.., and shall come into operation on a date determined by the State President in the **Gazette**.