

Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited grounds of Discrimination

Report Commissioned by the
Department of Justice, Equality and Law Reform

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The law as stated in this Report is correct as of December 31 2002. Readers should be aware that at the time of writing the Report, a number of legislative changes were pending in the jurisdictions reviewed. These have not had any significant impact on the grounds under discussion. However, the particular legislative provisions referred to may have changed.

Foreword

by Michael McDowell, T.D., Minister for Justice, Equality and Law Reform

The Employment Equality Act 1998 currently prohibits discrimination in relation to employment on nine grounds, namely gender, marital status, family status, sexual orientation, religious belief, age, disability, race and membership of the Traveller community. The Equal Status Act 2000 prohibits discrimination on the same nine grounds in the non-workplace area and thus complements the 1998 Act.

The last six years have witnessed extraordinary advances in our anti-discrimination code with the introduction of the 1998 and 2000 Acts. Our earlier equality legislation was confined to the workplace and related to gender only. Our legislation now places us at the cutting edge of European equality legislation. Our legislation will be further strengthened later this year on the transposition of three equality directives — the Race Directive which provides a flexible general framework for the prohibition of discrimination on grounds of racial or ethnic origin in the employment and non-employment areas, the Framework Employment Directive which provides a general framework for the prohibition of discrimination in relation to employment on grounds of religion or belief, disability, age and sexual orientation and the Gender Equal Treatment Directive which updates and improves the earlier 1975 Equal Pay and 1976 Equal Treatment Directives.

The Employment Equality Act 1998 provides for a review of its operation, within 2 years of its coming into force, with a view to assessing whether there is need to add to the discriminatory grounds set out in the Act. As part of this review, a Round Table Conference involving the social partners, relevant Government Departments, the Equality Authority, the ODEI — the equality tribunal and the Labour Court was held in September 2001. At this Conference it was argued by some interest groups that the Employment Equality Act should be amended to include the following new grounds — socio-economic status (including social origin), trade union membership, criminal conviction/ex-prisoner/ex-offender and political opinion. It was also acknowledged, however, that the legislation, which has led to new challenges for enforcement bodies, employers and Government, is relatively new and that the practical implications of extending its scope to include the proposed new grounds require detailed examination and debate.

The arguments advanced at the Round Table Conference warrant detailed consideration. In order to assist with this consideration, UCC Law Department was commissioned in 2002 to carry out a comparative review of the international experience of employment legislation prohibiting discrimination on the four grounds suggested. I would like to thank them for their work over the last year in preparing a comprehensive report. I believe that this valuable report will serve to inform future debate in relation to this issue.

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Executive Summary

This Report arises from a review of the grounds covered under the Employment Equality Act, 1998. Provision was made for such a review in section 6(4) of the Act, which states:

The Minister shall review the operation of this Act, within 2 years of the date of the coming into operation of this section, with a view to assessing whether there is a need to add to the discriminatory grounds ...

This Report undertakes a comparative review of the prohibition of discrimination on four distinct grounds: Socio-Economic Status/Social Origin; Trade Union membership; Political Opinion; and Criminal Conviction/Ex-offender/Ex-prisoner. The following jurisdictions are reviewed: Australia; New Zealand; Canada; Great Britain; Northern Ireland; and the Netherlands. The comparative review presented here is intended to provide the knowledge base necessary to assess whether to include additional discriminatory grounds in the Employment Equality Act, 1998.

I. Socio-Economic Status/Social Origin

A concern to prohibit discrimination on the basis of social origin/socio-economic status is evident in many international legal instruments, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the ILO Convention No.111, Discrimination (Employment and Occupation) Convention, 1958. This concern recognises that discrimination on the basis of social origin/socio-economic status is pervasive and operates as a constraint on an individual's social mobility. However, despite the widespread recognition that individuals face discrimination on the basis of their social and economic backgrounds, little has developed in the way of an effective legal remedy.

The links between poverty and discrimination are well documented. In this jurisdiction, collaborative work between the Equality Authority and the Combat Poverty Agency in relation to poverty proofing, has attempted to address these links. Discrimination on the basis of socio-economic status/social origin is frequently raised by individual complainants and organisations working in the field of equality law. Yet these concerns rarely lead to an effective legal remedy. It would seem, therefore, that there is a considerable unmet legal need in this area. Although many jurisdictions and legal instruments prohibit discrimination on the basis of social origin, little jurisprudence has developed in relation to this ground. The most extensive protection against discrimination on the basis of socio-economic status/social origin was found to be available in Canada, where the term "social condition" is more widely used. A body of jurisprudence in this area has already developed in Québec, and a range of legal precedents and guidelines are available to give a more precise definition to the meaning and scope of the term social condition. The Northwest Territories have recently included social condition amongst the list of prohibited grounds of discrimination

in their human rights legislation, which extends to the sphere of employment. For the first time, a statutory definition of the term social condition has been adopted.

The recent review of Canada's human rights legislation has given us useful insights into the issues that arise in prohibiting discrimination on the basis of social condition. Human rights bodies in a number of jurisdictions in Canada, most notably British Columbia, have called for legislative prohibitions on discrimination in employment to be extended to include social condition as a prohibited ground. Related grounds of discrimination such as "being in receipt of public assistance" or "source of income" are prohibited in jurisdictions such as Saskatchewan, Manitoba and Ontario. Though narrower in scope, these prohibited grounds address a form of discrimination that is related to a person's socio-economic status. Many of the complaints of discrimination that have arisen on these grounds, however, concern the provision of goods, services and accommodation rather than employment *per se*.

In New Zealand, a useful body of case-law has developed in relation to discrimination based on employment status. While this ground is much narrower in scope than social origin or socio-economic status, it does address a related form of discrimination often experienced by groups living in poverty. Again, though some of the complaints have arisen in the context of employment, the majority of the complaints arising in relation to this ground, have arisen in the context of applying for goods, services and accommodation.

In Northern Ireland, the Northern Ireland Human Rights Commission has proposed that social origin would be included in the proposed Bill of Rights. This would bring the Bill of Rights into compliance with the anti-discrimination provisions of the ECHR and Protocol No.12. The Equality Commission of Northern Ireland has expressed some concern about proposals to include socio-economic status amongst the list of prohibited grounds of discrimination in the *Single Equality Bill*. The Commission's concern relates to the possibility that a legislative provision prohibiting discrimination on the basis of socio-economic status/social origin, would not necessarily benefit disadvantaged groups and could be used to challenge Governmental programmes designed to alleviate poverty or social exclusion. The Equality Commission of Northern Ireland does not conclude against the inclusion of socio-economic status in the Single Equality Bill. They recommend that careful thought be given to the model of protection to be employed if such socio-economic status/social origin is included as a prohibited ground of discrimination in the Single Equality Bill.

However, these concerns have been addressed in the Canadian context. The statutory definition of social condition, adopted in the 2002 Human Rights Act of the Northwest territories, specifically refers to:

... a socially identifiable group that suffers from social or economic disadvantage resulting from poverty, source of income, illiteracy, level of education or any other similar circumstance.

The reference to disadvantaged groups in the Northwest Territories Human Rights Act guards against the possibility of socially advantaged groups relying on anti-discrimination provisions to challenge Government programmes designed to tackle disadvantage.

The failure to develop more effective anti-discrimination provisions relating to socio-economic status/social origin would seem to be due to a lack of political will and a reluctance to adopt a rights-based approach to problems of socio-economic inequality. This reluctance

applies generally in relation to social and economic rights and its impact can be seen in debates on this area of anti-discrimination law. In Canada, for example, it has been argued that addressing problems of discrimination based on social condition is a legislative or executive task rather than a judicial one. Socio-economic inequality is viewed as raising issues of policy rather than rights violations *per se*. Similar arguments have been made in the Irish context. This limited understanding of the role of anti-discrimination law is likely to hinder the progress of any proposal to outlaw discrimination based on social origin/socio-economic status.

Yet, prohibiting discrimination on the basis of social origin/socio-economic status would serve the objectives underpinning the adoption of equality legislation, namely the pursuit of a more equal and just society. It would also promote a more sophisticated intersectional approach to discrimination, leading to greater recognition of the multiple forms of discrimination that many groups face. It is argued that social origin or socio-economic status is difficult to define with the degree of clarity necessary for a legislative document. However, concerns about problems of definition are not unique to this area of anti-discrimination law. Similar concerns have been voiced as to the definition of disability and 'race', yet, definitional problems have not precluded developments in anti-discrimination law in these areas. Definitional problems are not insurmountable, as we can see from recent developments in Canada, in both the Northwest Territories and in Québec.

The experience of other jurisdictions in developing anti-discrimination provisions relating to socio-economic status/social origin, suggest that the key indicators in assessing such disadvantage would be:

- Level of education
- Level of literacy
- Homelessness
- Geographical location
- Source of income
- Level of income
- Type of work or profession
- Employment status

Proposals to extend the scope of anti-discrimination law to include socio-economic status/social origin, in Northern Ireland and in this jurisdiction, have included similar indicators.

II. Trade Union Membership

All of the jurisdictions prohibit employment discrimination based on trade union membership in one form or another. This is usually done primarily by means of provisions in comprehensive Labour Relations legislation, and some might argue that the enactment of such legislation is required in Ireland, and that prohibition of discrimination of this type ought not to be included in the Employment Equality Act. However, many jurisdictions already refer to trade union membership or activities in their anti-discrimination laws, Ireland has already

outlawed dismissals based on trade union membership,¹ and Ireland has ratified ILO Conventions 87 and 98² and the European Social Charter.³

It should be noted that generally Irish law provides the fullest level of protection to members of trade unions holding negotiation licences, but the European Committee of Social Rights has reported that this is “contrary to the very notion of freedom of association, within the meaning of the Charter.”⁴

In reviewing trade union membership as a prohibited ground for employment discrimination in the various jurisdictions, particular attention was paid to the following issues:

1. The scope of the trade union membership ground: does it apply to membership and non-membership; does it cover trade union activities?
2. Whether it covers refusals of employment as well as dismissals and detriment short of dismissal.
3. Whether there is specific reference to the ‘closed shop’ in the legislation.
4. Whether the employer may grant benefits to union members (e.g. time off to union officers for union business).

The scope of the trade union membership ground

In most of the jurisdictions, the ground covers union membership, non-membership and activities. However, legislation in the Canadian jurisdictions does not mention non-membership and union activities are not specifically mentioned regarding refusals of employment in England and Northern Ireland.

Whether the ground covers refusals of employment as well as dismissals and detriment short of dismissal

In all of the jurisdictions, the ground covers refusals of employment as well as dismissals and detriment short of dismissal. The European Committee of Social Rights has noted that there is no express protection for Irish workers against lesser forms of detriment than dismissal based on trade union membership and has stated that such protection ought to be introduced.⁵

Whether there is specific reference to the ‘closed shop’ in the legislation

There is wide variation between the jurisdictions regarding the status of the ‘closed shop.’

‘Closed shops’ are not protected by British or Northern Irish law, and in New Zealand it is stated that a contract cannot confer any preference on trade union members. Australian case-law states that it is impermissible to provide absolute preference of employment to

¹ Unfair Dismissals Act 1977, s. 6 (2)(a).

² International Labour Organisation, Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO 87) and Right to Organise and Collective Bargaining Convention 1949 (ILO 98), available at www.ilo.org (visited 7 December 2002).

³ The European Committee of Social Rights has stated that appropriate protection against discrimination in employment on the grounds of political opinion and trade union membership must be provided — European Committee of Social Rights *European Social Charter: Conclusions XVI-1* Vol. 1 (2001), chapter 10, Ireland, available at http://www.coe.int/T/E/Human_Rights/Esc/ (visited 7 December 2002). See Gomien D *Law and Practice of the European Convention on Human Rights and the European Social Charter* Council of Europe Publishing: Strasbourg; 1996, p.383.

⁴ *Ibid.* The Irish Government has stated that “it is national policy to encourage workers to belong to a strong and consolidated trade union movement. The requirement of recognised trade unions to hold a negotiation licence is part of that strategy.” — Government of Ireland, *20th Report on the Implementation of the European Social Charter*, RAP/Cha/IRL/XX (2002), available at http://www.coe.int/T/E/Human_Rights/Esc/ (visited 7 December 2002).

⁵ European Committee of Social Rights, *op.cit.*

members of a union but a clause may grant a union exclusive rights to represent the industrial interests of employees covered by an agreement.

In most of the Canadian jurisdictions 'closed shops' are specifically protected by Union Security Clauses in the legislation, while in the Netherlands a 'closed shop' clause is valid but an employee may apply for a waiver of the clause.

If trade union membership were to be introduced as a prohibited ground under the Employment Equality Act, consideration would need to be given to the policy question of whether an exemption should be included for closed shops (or perhaps certain types of closed shops.) The questions of compatibility with the Constitution, the European Convention on Human Rights and the European Social Charter⁶ would be important in this regard.

Whether the employer may grant benefits to union members (e.g. time off to union officers for union business)

Some jurisdictions specifically provide that the employer may provide benefits to union members, and it may be considered necessary to provide for such benefits in the Irish legislation to avoid challenges from non-union members to such benefits. For example, Canadian legislation allows the employer to grant time off to attend to the business of the trade union and to use the employer's premises for the purposes of the trade union. British and Northern Irish legislation provides for obligatory paid time off for union officials, and in New Zealand an employer must allow each employee to attend at least two union meetings per year.

III. Criminal Conviction/Ex-Offender/Ex-Prisoner

In contemporary society, particularly in the United States, there is a perception that the interests of convicted offenders 'are fundamentally opposed to those of the public'.⁷ This risk averse approach is in marked contrast to the 'penal-welfare' approach of the 1960s and early 1970s which witnessed the introduction of expungement laws both in the United States and the United Kingdom. These laws were designed to make it illegal to disclose information about an ex-offender's criminal record after a certain qualifying period had elapsed. Such laws were promoted on the basis of their rehabilitative potential. In particular, it was felt that measures which concealed criminal records would assist in breaking the cycle of 'labelling' and exclusion which was often the experience of ex-offenders. More recently, however, these arguments are losing favour in countries such as the United States where greater priority is now given to public safety concerns. As part of this reprioritisation, there is also an increased focus on making offenders take responsibility for their own actions.

This increased emphasis on safety concerns is, to some extent, evident in our review of the various jurisdictions. For example, the Australian Law Reform Commission and the New Zealand Penal Review Group both recommended in the 1980s that expungement laws should apply to all offenders. When Pt VIIC of the Crimes Act, 1914 (Cth) became law in

⁶ The European Committee of Social Rights (*Ibid.*) considers that any form of compulsion on a worker to belong to a trade union violates the right to freedom of association. See Gomien, *op.cit.*, p.391.

⁷ Garland D *The Culture of Control: crime and social order in contemporary society* OUP: Oxford; 2001, pp. 180-181.

1990 in Australia, however, it was limited to offenders who were sentenced to prison sentences of less than 30 months. Similarly, both current Bills in New Zealand are limited to offenders who were not sentenced to prison, or, in the case of the private member's Bill, were sentenced to custodial sentences of less than 6 months. Moreover, a review of the jurisdictions also appears to indicate that whilst the qualifying periods before a conviction could become spent have remained static (usually 10 years in the case of adults),⁸ there has been a stark reduction in the length of prison sentences which fall within the ambit of spent conviction or discriminatory schemes.⁹ For example, Queensland, in 1986, was the first State in Australia to introduce a spent convictions law. Custodial sentences of less than 30 months were included in the scheme. In contrast, New South Wales, in 1991, the Northern Territories in 1992, and the Australian Capital Territory, in 2001, all limited their schemes to custodial sentences of less than 6 months. Indeed, it could, to some extent, be argued that the trend should have moved in the opposite direction to reflect the increases which have taken place in prison rates and average prison sentence lengths in recent years. For example, between 1987 and 1998, the imprisonment rate in Australia increased from 72.3 per 100,000 of the population to 98.9 per 100,000 of the population, or by 36.8%.¹⁰ In England and Wales, it has been estimated that the average prison sentence length has increased by 30% since 1974 when provision was first made for a spent conviction scheme. Similarly, in the United States,¹¹ it has been suggested that the 'legislative trend is to make expungement laws less effective in concealing criminal histories and expungement more difficult for offenders to obtain'.¹²

Coupled with this reduction in the length of prison sentences for which a spent conviction or discriminatory law applies, there has also been an expansion in the range of exemptions to such schemes. This increased emphasis on public safety has resulted, for example, in moves to centralise the issuing of good conduct certificates in the Netherlands to ensure tighter control and greater probity. In England and Wales, it has led to accusations of a 'checking culture' being created, particularly following the introduction of the Police Act, 1997. In Utah, a victim of crime has the right, since 1994, to oppose the petition of the perpetrator of the crime to have the conviction expunged.¹³

On the other hand, it would be wrong to suggest that jurisdictions systematically disregard the rights of offenders and deny them rights to citizenry. The fact that jurisdictions are still willing to introduce spent conviction laws and discriminatory provisions which seek to offer some degree of protection to ex-offenders (as in New Zealand and the Australian Capital Territory), that some States do not set extremely restrictive limitations on the application of their schemes (as in Tasmania), and, that some jurisdictions remain disposed to critically reviewing the relative merits and demerits of their particular schemes (as in Great Britain), all signpost a continued inclination to restore the *status quo ante* by reintegrating and resettling ex-offenders. Such provisions and debates exist in contradistinction to the proposition that there 'is no such thing as an ex-offender'.¹⁴

⁸ Most jurisdictions set qualifying periods which apply equally to all sentences imposed by the Courts. The only distinction made is on the basis of whether the offender was sentenced as a minor or an adult. So, for example, in Queensland, the qualifying periods are 10 years for adults and 5 years in the case of juveniles. In England and Wales, however, the qualifying period varies according to the sentence imposed, though a distinction is also made between adults and juveniles.

⁹ The issue of past criminal convictions is usually dealt with legislatively in one of three ways — anti-discrimination legislation, spent conviction legislation, or a hybrid scheme incorporating both spent conviction and discriminatory provisions. See also pp. 27-28 of this report.

¹⁰ Freiberg A "Three Strikes and You're Out — it's not cricket" in Tonry M and Frase RS (eds) *Sentencing and Sanctions in Western Countries* OUP: Oxford; 2001, pp. 29-61 at p. 48.

¹¹ See Appendix 1 to this report.

¹² Mayfield M (1997) 'Revisiting Expungement: concealing information in the information age' *Utah Law Review* p. 1085.

¹³ See Appendix 1 to this report.

¹⁴ Garland D Op. Cit. pp. 180-181.

As regards schemes of discrimination, most include direct and indirect discriminatory provisions. They invariably include convictions and ancillary circumstances pertaining to convictions, but allow for exceptions premised on the inherent requirements of particular jobs. All include discrimination in relation to work and many include provisions in relation to accommodation, education, the provision of goods, services, facilities, insurance and superannuation.

As regards spent conviction schemes and hybrid models, most of the jurisdictions under review include exclusions on the basis of sentencing, admissibility of evidence in criminal proceedings, criminal investigations, and occupations such as the judiciary, police, probation officers, and persons employed with vulnerable members of society. Many schemes specifically exclude sexual offences. One interesting development is the application of sunset clauses to exemptions from certain occupations and professions (as provided for in the Northern Territories). Such a provision has the advantage of subjecting the justifications for such exclusions to close scrutiny over protracted periods. All jurisdictions provide for a qualifying period within which there should be no further reoffending in order to come within the ambit of the various schemes. A distinction is sometimes made between serious and non-serious offences, and traffic and non-traffic offences, for the purposes of determining whether or not there has been an intervening conviction during the qualifying period. Some jurisdictions also make provision for immediate spent convictions that do not require any qualifying period. Two final points can be made. First, certain jurisdictions, such as New South Wales, allow applications to be made to have criminal record destroyed in limited circumstances. Secondly, in most jurisdictions a conviction is spent automatically after a qualifying period; in jurisdictions such as Western Australia and Canada, however, the onus is on the ex-offender to apply for his or her conviction to become spent following a qualifying period.

IV. Political Opinion

While political opinion is a protected ground across a wide range of jurisdictions (New Zealand, Northern Ireland, most provinces of Canada, most Australian States and the Netherlands) there are relatively few complaints of discrimination based on political opinion.

Various terms are used in the relevant legislative provisions. These include political belief, political convictions and political opinion. In some cases, the protection extends beyond political opinion or belief to include political affiliations or activities. The extension of the protection to include political activities is a feature of the Australian legislation in particular. The legislation in some jurisdictions contains a definition of the relevant term.¹⁵ Where such a definition exists however it tends not to be expressed in substantive terms. Such definitions usually focus on ensuring that the protected ground includes within its scope the condition of not having a political belief. Many jurisdictions provide for a special exception in the case of political advisors or employees of political parties.

Interpretation of political belief/opinion/convictions has varied between the jurisdictions. The definition relied upon in the Prince Edward Island legislation is unusual in that it equates political belief with belief in the tenets of a registered political party. In the Australian State of Victoria, where there are a number of decided cases, the approach to interpretation of

¹⁵ Tasmania and Victoria in Australia, Prince Edward Island in Canada and New Zealand.

political belief has been a relatively narrow one. In particular, industrial activities have been excluded from its scope, as have ethical beliefs. The focus is on beliefs or activities which bear on the form, role, structure, features, purpose, obligations or duties of government. Where public servants have held the alleged political beliefs, the Victorian approach has been to judge whether or not the activity amounts to political belief on the basis of whether the criticism occurred outside rather than inside the framework of government. A broader approach has been taken in New Zealand in relation to trade union related activities in particular. There, political opinion has been found to be wide enough to include the expression of the complainant's views through trade union activity. The New Zealand Human Rights Commission has taken the view that the term political opinion should not be confined to opinions involving just the policies, roles or activities of the government of the day. In Northern Ireland, the approach has been to characterise political opinions as opinions relating to the conduct of the government of the state or matters of public policy. In both Victoria and New Zealand jurisdictions the enforcement bodies have expressed a reluctance to extend the definition of political belief to include distribution or utilization of economic, social or cultural powers in society.

While protection against discrimination on grounds of political opinion is common, such protection does not exist at federal level in either Australia or Canada. The issue of extending the Canadian Human Rights Act 1995 to include discrimination on political grounds was considered in a review of the Act carried out in 2000. The main substantive argument put forward against the addition of the ground was that consideration of political belief was sometimes legitimate, for example in cases of national security. Concern was also expressed that the addition of the ground might protect those who disseminate hate propaganda. The Review also noted that many of the cases that have been decided in the past had related to the issue of political patronage. While it was acknowledged that the existence of patronage is a legitimate concern, it was felt that human rights legislation was not the best vehicle to deal with this issue and that many of these cases did not relate to a person's ongoing inequality but rather to "the termination of special advantages that a person has previously enjoyed because of association with the party formerly in power".¹⁶ This conclusion is based in particular on experience of the operation of the relevant provision of the Prince Edward Island Human Rights Act where the majority of Canadian complaints of discrimination based on political belief have arisen.

¹⁶ Canadian Human Rights Act Review Panel *Promoting Equality: A New Vision* Canada: Dept. of Justice; June 2002, available at <http://canada.justice.gc.ca/chra/en/toc.html>.

Introduction

Background

The Employment Equality Act 1998, which came into operation on 18 October, 1999, prohibits discrimination in relation to employment on nine distinct grounds, namely, gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community. The scope of the Act covers access to employment, conditions of employment, promotion, vocational training and equal pay.

This Report arises from a review of the grounds protected under the Employment Equality Act, 1998. The Review was carried out in accordance with section 6(4) of the Employment Equality Act, which provides:

The Minister shall review the operation of this Act, within 2 years of the date of the coming into operation of this section, with a view to assessing whether there is a need to add to the discriminatory grounds ...

As part of the Review, a discussion paper was produced by the Department of Justice, Equality and Law Reform, and a Round Table Conference was held in September 2001, involving the social partners, relevant Government Departments, the Equality Authority, the Office of the Director of Equality Investigations (ODEI — the *equality tribunal*) and the Labour Court. Discussion focused in particular, on the proposal to extend the scope of the Employment Equality Act to include the discriminatory grounds of socio-economic status/social origin; trade union membership; criminal conviction/ex offender/ex-prisoner; and political opinion. It was noted that equality law in Ireland had expanded rapidly over the last five years, moving beyond the sphere of employment and covering nine distinct grounds of discrimination. This expansion of equality law has led to new challenges for enforcement bodies, for employers and for Government. Nonetheless, the Equality Authority, the trade union and community and voluntary pillars of the social partnership concluded in favour of extending the prohibited grounds of discrimination in the Employment Equality Act. The Round Table agreed, however, that extending the scope of the Employment Equality legislation would raise complex legal problems of definition and enforcement. The Minister for Justice, Equality and Law Reform decided, therefore, that it was necessary to examine in detail the implications of extending the Employment Equality Act to the new grounds suggested, and to review the experience of other jurisdictions in tackling these forms of discrimination.

The comparative review presented in this Report is intended to provide the knowledge base necessary to assess whether it would be possible and/or desirable to include additional discriminatory grounds in the Employment Equality Act. This research has been undertaken in two parts. In the first part, we undertook a preliminary review of ten jurisdictions, with a view to identifying which states had the most well-established jurisprudence and practice in relation to the four discriminatory grounds under consideration. The jurisdictions reviewed were as follows: the U.S.A., Canada, Great Britain and Northern Ireland, New Zealand, Australia, South Africa, the Netherlands, Sweden, Norway and Germany. Following on from

this preliminary review, it was decided to undertake a more detailed analysis of a limited number of jurisdictions. This more detailed analysis forms the substance of this Report. The following jurisdictions are examined: Great Britain and Northern Ireland, Canada, Australia, New Zealand and the Netherlands. These jurisdictions were found to be the most relevant to Ireland's legal system and offer us the most useful information in terms of assessing proposals for law reform and legal practice in the area of employment equality. Within the two federal jurisdictions examined, we have selected the most significant states/provinces/territories for the purposes of the Report. In Australia, these are: New South Wales, Victoria and Queensland. In Canada, these are: Ottawa, British Columbia and Québec. Additional information concerning the practice of other provinces/states/territories is given where there have been relevant legal developments in those jurisdictions.

Methodology

This Report reviews the legislative provisions applying in the context of Employment Equality. Both the 'written law' and the 'law in action' are examined. Where possible a review of relevant case law, reports of enforcement bodies and academic commentary is also included.

To gain a fuller understanding of the scope of employment equality provisions in other jurisdictions, it has been necessary to extend our research beyond employment equality and anti-discrimination legislation *per se*. In a number of the jurisdictions examined, employment equality provisions come within the scope of human rights legislation, and are enforced by human rights bodies, rather than dedicated equality/labour relations bodies. The statutory framework and the context of enforcement, therefore, differs considerably from the Irish context. In relation to the discriminatory ground of trade union membership, prohibitions on discrimination are often found in industrial relations legislation rather than in employment equality legislation *per se*. Similarly, the discriminatory ground of past criminal conviction is often addressed in expungement or 'clean slate' legislative provisions, that extend beyond the sphere of employment. A wide range of legislative provisions are, therefore, reviewed. In some instances, case law concerning discrimination in the provision of goods and services, or the provision of accommodation, is referred to, where it adds further insights to the definition of the ground being considered.

In order to familiarise the reader with the law applicable in each jurisdiction surveyed, the introductory section to each chapter gives an overview of the relevant legislative provisions applicable in each state (including, where relevant, the federal and provincial legislative frameworks). The introductory sections to each chapter also outline the scope of the employment equality provisions, the general exemptions from the prohibition on discrimination and the bodies responsible for enforcement.

As requested by the Department of Justice, Equality and Law Reform, this Report sets out the negative and positive experiences of other states in prohibiting discrimination on the four discriminatory grounds under consideration. Where possible, the Report adopts a contextual approach to the law, examining the cultural, socio-economic and historical factors that have influenced the development and implementation of employment equality legislation.

The research undertaken for the Report has involved extensive use of internet legal resources, including, in particular, those available through LEXIS-NEXIS, Bailii, Austlii, Canlii and ILOLEX. A list of the internet resources consulted, is provided in the bibliography attached to this Report.

The Four Grounds: Introductory Notes

I. Socio-Economic Status/Social Origin

A person's social origin/socio-economic status may create significant obstacles to equality of opportunity, to equality of outcomes and to equality of participation. In most countries, overt discrimination on the basis of social origin or socio-economic status is rare. However, even in societies where rigid stratification on the basis of class or caste has disappeared, social mobility is considerably constrained by a person's social origin. Like discrimination on the basis of political opinion, discrimination on the basis of socio-economic status/social origin is not necessarily revealed by distinctive external features. Difficulties may arise, therefore, in providing proof of discrimination, particularly where the burden of proof lies with the victim of discrimination. As a result of these and other difficulties, legal practice in this area is less well developed than in other areas of equality law. Nonetheless, a consistent feature of discussions on equality law is the recognition that discrimination on the basis of socio-economic status/social origin, is linked with and underpins discrimination on the more widely covered grounds, such as disability and 'race'. In the Irish context, it is recognised that many of the groups covered under the Employment Equality Act are also identified as being groups that experience a higher risk of poverty and social exclusion. It is this link that gives added impetus to proposals to prohibit discrimination on the basis of socio-economic status/social origin.

The more widely covered grounds of discrimination tend to refer to individual qualities, characteristics and attributes, the majority of which are understood to be immutable. In this context, social origin or socio-economic status is somewhat different, in that the characteristic referred to is not necessarily immutable. However, as many studies have shown, poverty and social exclusion are frequently passed on from one generation to the next. Socio-economic status or social origin is closer to the characteristic of immutability, therefore, than one might expect.

Problems of definition

The term socio-economic status is not generally used in employment equality legislation. The term social origin is more widely used, though primarily in anti-discrimination provisions found in human rights legislation rather than employment equality provisions *per se*. However, even in human rights legislation, the term social origin is rarely defined. The ILO Committee of Experts notes that the problem of discrimination based on social origin is "unquestionably one of the most difficult to define". According to the Committee, discrimination on the basis of social origin arises where an individual's membership in a class, socio-occupational category or caste determines his or her occupational future. Applying this definition, discrimination on the basis of social origin can be understood as limiting a person's social mobility, defined as the possibility for an individual to move from one class or social category to another.

The term social origin is widely used in international human rights instruments. Article 2(1) of the Universal Declaration of Human Rights prohibits discrimination on a range of grounds. These are: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The two UN human rights covenants, the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), prohibit discrimination on the basis of: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (articles 2). The list of prohibited grounds of discrimination is non-exhaustive.

The prohibited grounds of discrimination in the ICCPR and the ICESCR is similar to those set out in Article 14 of the European Convention on Human Rights (ECHR), which prohibits discrimination on the basis: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Article 14 must be interpreted, however, in the light of the jurisprudence of the European Court of Human Rights. The Court has found that Article 14 is not a freestanding equality guarantee, as such. For the protection of Article 14 to come in to play, there must be a breach of one of the substantive articles of the Convention (e.g. right to a fair trial or right to respect for private and family life). Article 14 has a more limited application than one might expect. The new Protocol No.12 to the ECHR remedies this limitation. However, not all States parties to the ECHR will ratify the Protocol.

The ILO Convention No.111 on Discrimination (Employment and Occupation) prohibits discrimination on a number of grounds including, *inter alia*, social origin. Article 1(1) provides: ... The term “discrimination” includes:

“Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

The Convention does not give any definition of social origin. However, from the preparatory documents on the Convention, we can gain an insight into the scope of this prohibited ground. The ILO Committee of Experts notes that social origin, as used in Convention No. 111, can be understood as including “birth” and “legitimacy at birth”, thus covering discrimination on the basis of “birth or other status”, in the sense used in the ICCPR, the ICESCR and the ECHR.

Few cases have arisen at national or international level, concerning discrimination on the basis of socio-economic status/social origin. The European Court of Human Rights, for example, has not dealt with any cases on the meaning of social origin as used in Article 14 of the ECHR. We find a similar absence of information under ILO Convention No.111. Despite the inclusion of a reference to social origin in the Convention, the information brought to the attention of the ILO Committee of Experts has rarely concerned cases of discrimination on this ground. The Committee has noted that social origin is not usually covered in the same way as other grounds of discrimination in national legislation. One

explanation given for this failure is that the measures necessary to eliminate discrimination on the basis of social origin cover a whole range of governmental activities, the co-ordination of which is frequently a sensitive political issue.

Comparative perspectives

In carrying out the research for this Report, we found that the most well-developed body of jurisprudence on social origin/socio-economic status discrimination is to be found in Canada. These particular terms, as such, are not widely used in Canada. The more common term in human rights legislation and in equality legislation is “social condition”, which includes socio-economic status and issues relating to class-based discrimination. Related grounds of discrimination such as being “in receipt of public assistance” and “source of income” are also covered in a number of Canadian jurisdictions. Many of the complaints that have arisen on these grounds concern discrimination in the provision of accommodation or goods and services rather than employment *per se*. Though not directly applicable to the context of employment, this case-law provides us with useful insights into the definition of social condition. We have included references to this case-law within this Report as is helpful, in identifying the key elements of anti-discrimination provisions covering social origin/socio-economic status.

In New Zealand, we examine the prohibition of discrimination on the basis of “employment status”, which, though narrower than the ground of socio-economic status/social origin, raises similar concerns as to social mobility and class-based discrimination.

In Australia, though discrimination on the basis of social origin is prohibited, there is no legislative definition of social origin and little guidance is available as to how the prohibition on discrimination is to be implemented. Social origin is grouped with national origin/national extraction, suggesting a link with ethnicity rather than class as such.

In Great Britain and Northern Ireland, employment equality legislation does not prohibit discrimination on the basis of social origin. However, following the incorporation of the ECHR, through the 1998 Human Rights Act, article 14 of the Convention, including the prohibition on discrimination on the basis of social origin, is now part of domestic law. As we shall see, however, this provision is limited in scope as it is not a freestanding equality norm and the Convention does not include any specific provisions concerning employment. Recent discussions on a Single Equality Bill and a Bill of Rights for Northern Ireland have included references to discrimination on the basis of socio-economic status/social origin. Where relevant, these are included in this Report.

In the Netherlands, there is no prohibition on discrimination on the basis of social origin/socio-economic status. The Netherlands is, however, a State party to ILO Convention No.111 and to the ECHR, and has signed, though not yet ratified, Protocol No.12.

Appendix 1, attached to this Report, includes some additional information on anti-discrimination provisions concerning social origin/socio-economic status in select European jurisdiction: Romania; Spain; Portugal; Slovenia.

II. Trade Union Membership

International Labour Organisation Conventions 87 and 98 of 1948-1950¹ recognise freedom of association and state that workers must be protected against acts of anti-union discrimination in respect of their employment.² The majority of the jurisdictions considered in this Report have ratified these two Conventions³ and they were also ratified by Ireland in 1955. The European Social Charter also protects the right to organise and the right to bargain collectively in Articles 5 and 6.⁴

Many jurisdictions outlaw employment discrimination based on trade union membership, and also discrimination on related grounds such as trade union activities. Irish law already deems *dismissal* based on trade union membership or activities to be unfair⁵ and allows claims for unfair dismissal for taking part in a strike in certain circumstances.⁶ It also deems a dismissal based on political opinion to be unfair⁷ and this might apply in some trade union-related situations.⁸ The constitutional right of freedom of association⁹ and the European Convention right to freedom of association¹⁰ could possibly be invoked in other circumstances in which employees were discriminated against due to trade union membership or activities.

In reviewing trade union membership as a prohibited ground for employment discrimination in the various jurisdictions, particular attention will be paid to the following issues:

1. The scope of the trade union membership ground: does it apply to membership and non-membership; does it cover trade union activities?
2. Whether it covers refusals of employment as well as dismissals and detriment short of dismissal.
3. Whether there is specific reference to the 'closed shop' in the legislation.
4. Whether the employer may grant benefits to union members (e.g. time off to union officers for union business).

¹ International Labour Organisation, Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO 87) and Right to Organise and Collective Bargaining Convention 1949 (ILO 98), available at www.ilo.org (visited 7 December 2002).

² ILO 98, Art. 1: "1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. 2. Such protection shall apply more particularly in respect of acts calculated to (a) make the employment of a worker subject to a condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason or because of participation in union activities outside working hours or, with the consent of the employer, within working hours." National laws shall determine the extent to which this applies to the armed forces and the police (Art. 5.1).

³ Australia ratified both ILO87 and ILO98 in 1973; New Zealand has not ratified either; Canada ratified ILO87 in 1972 but has not ratified ILO98; the UK ratified ILO87 in 1949 and ILO98 in 1950; the Netherlands ratified ILO87 in 1950 and ILO98 in 1993.

⁴ Note also art. 1(2) by which contracting parties undertake "to protect effectively the right of the worker to earn his living in an occupation freely entered upon." This means that appropriate protection against discrimination in employment on the grounds of political opinion and trade union membership must be provided — European Committee of Social Rights *European Social Charter: Conclusions XVI-1* Vol. 1 (2001), chapter 10, Ireland, available at http://www.coe.int/T/E/Human_Rights/Escc/ (visited 7 December 2002). See Gornien D *Law and Practice of the European Convention on Human Rights and the European Social Charter* Council of Europe Publishing: Strasbourg; 1996, p.383.

⁵ s.6(2)(a) Unfair Dismissals Act 1977. See generally Redmond M *Dismissal Law in Ireland* Butterworths: Dublin; 1999, pp.355-361 and cases cited therein; Madden D & Kerr T *Unfair Dismissal: Cases and Commentary* 2nd ed. Irish Business and Employers Confederation: Dublin; 1996, pp.233-271.

⁶ s.5(2) Unfair Dismissals Act 1977 as substituted by s.4 Unfair Dismissals (Amendment) Act 1993; Redmond, op.cit., pp.372-382.

⁷ s.6(2)(b) Unfair Dismissals Act 1977.

⁸ Some tribunals in other jurisdictions have taken the view that trade union membership or activities may be included in political opinion, e.g. Northern Ireland: the Fair Employment Tribunal; New Zealand: the Complaints Division of the Human Rights Commission; Tasmania: the Anti-Discrimination Commission. See the Northern Ireland, New Zealand and Tasmania sections of this Report.

⁹ Article 40.6.1(iii), Constitution of Ireland, 1937. See Kerr A & Whyte G *Irish Trade Union Law* Professional Books: Abingdon; 1985, chapter 1 and cases cited therein; Fennell C & Lynch I *Labour Law in Ireland* Gill and Macmillan: Dublin; 1993; Forde M *Industrial Relations Law* Round Hall Press: Dublin; 1991.

¹⁰ Article 11, Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS No. 5. See Young, James & Webster v UK Appl. 7601/76 (1982) 4 EHRR 38.

III. Criminal Conviction/Ex-Offender/Ex-Prisoner

The purpose of this section of the report is to highlight the provisions made for persons with criminal convictions in Australia, New Zealand, Canada, Great Britain, Northern Ireland and the Netherlands.¹¹ With the exception of New Zealand, all of the jurisdictions referred to have made legislative and administrative responses to the problem of old criminal records. In New Zealand, there are currently two Bills — a private member's Bill and a government Bill — regarding spent conviction schemes before a Select Committee. The findings of the Select Committee are due to be published in July, 2003. Before commencing a comparative analysis, a brief overview of current debate and law on ex-offenders in Ireland is set out below.

The issue of ex-offenders and the need for expungement and discriminatory provisions has received a considerable degree of attention in recent years in Ireland. The National Economic and Social Forum, for example, recommended in January 2002 that legislative changes should be introduced to allow for the criminal records of adults to be expunged after a period of time. This period of time, it suggested, should be determined by the seriousness of the offence, the length of time since the offence, and the lack of reconvictions in the intervening period. In particular, it suggested:

In relation to employment, Ireland is the only country in the EU that does not allow for some form of rehabilitation whereby mainly short-term prison sentences are considered spent after a period of time ... Many of those the team consulted mentioned this is a substantial barrier to gaining employment on release, especially in periods of high unemployment. There are two practical reasons why change in this area is now required: the Government has made available significant resources under the Connect Project to prepare prisoners for employment on their release. The effectiveness of this spending will be improved by reducing barriers to acquiring gainful employment, such as long-term prison records; and there is also a human rights issue here — once a person has completed a sentence of imprisonment s/he should not continue to experience discrimination for that crime.¹²

At a conference held in Dublin and Belfast in 1999, entitled *Accessing Employment, 2000 and Beyond*, Brendan Butler, Director of Social Policy of the Irish Business Employers' Confederation, suggested that a significant number of employers in the Republic of Ireland would not employ ex-offenders. Moreover, he also pointed out that employers routinely asked applicants for employment positions to declare any criminal records.¹³ His findings were confirmed by a recent survey of 200 employers in Dublin which indicated that only 52% of respondents would consider employing ex-offenders.¹⁴ Some attempts at reform have been made in respect of persons under the age of 18. Section 258 of the Children Act, 2001 provides that where such a person is found guilty of an offence (and it is an offence not required to be tried before the Central Criminal Court), and a period of 3 years has elapsed since the finding of guilt (and the person has not been dealt with for any other offence in the 3 year period), he or she shall be treated for all purposes in law as a person who has not committed the offence.

¹¹ An appendix is also provided on the expungement laws that exist in four selected States in America.

¹² The National Economic and Social Forum *Re-integration of Prisoners* (Report No. 22) 2002, p. 91.

¹³ Conference Report. *Accessing Employment, 2000 and Beyond* 25-27 November, 1999, Dublin and Hillsborough Castle.

¹⁴ Lawlor P and McDonald E *Story of Success: Irish Prisons Connect Project, 1998-2000*, Stationery Office: Dublin; 2001, pp. 40-41.

As regards a comparative overview, it should be pointed out, to begin with, that there is considerable variation in approaches to contending with previous criminal records. Different jurisdictions, and indeed different States within jurisdictions, adopt dissimilar procedures to the issue, particularly having regard to application, enforcement mechanisms, offences covered, repositories, qualifying periods and exceptions. Nonetheless, three broad frameworks or models can be identified. They are as follows:

1. *A discriminatory model*: such a framework prevents discrimination on the grounds of a criminal record in relation to a variety of activities including employment (as provided for, for example, in Tasmania and Ontario). Discrimination on the grounds of a criminal record is not unlawful, however, provided it can be justified on the inherent requirements of the employment position.
2. *A spent convictions model*: under such a framework, offences are expunged after prescribed qualifying periods (as provided for, for example, in Great Britain, Northern Ireland, Queensland, and New South Wales). Following the prescribed period, an offender need not disclose the record of the conviction or ancillary circumstances relating to the conviction.
3. *A hybrid model incorporating spent conviction and discriminatory provisions*: under such a framework, provision is made for the elimination of discrimination on the grounds of an irrelevant criminal record. What constitutes an irrelevant criminal record, however, is provided for under spent convictions legislation (as provided for, for example, in the Northern Territories, Australian Capital Territory, Western Australia, British Columbia, Quebec, and as recommended in current Bills in New Zealand).

All of the jurisdictions alluded to recognise the problems which confront ex-offenders. Justifications for the protection of ex-offenders are premised on a number of grounds. To begin with, it is argued that by focusing too readily on previous criminal information, society deprives itself of the opportunity to enlist the talents, skills and energies of individuals in whose development it has a vested interest. Secondly, it is suggested that legislative inaction can result in the creation of a continuum of exclusion (in terms of seeking employment, maintaining employment, and access to services and facilities).¹⁵ Thirdly, it is suggested that a failure to reintegrate ex-offenders can unintentionally act as a criminogenic force, thereby assisting in the creation of a self-fulfilling prophecy of further crime and offending. Fourthly, it has been suggested that a criminal record itself can become the most punitive of all sanctions (creating a *de facto* life sentence), notwithstanding that there may be little or no nexus between the informal effects of the criminal record and the formal sentence imposed. Fifthly, it is argued that certain groupings are already grossly over-represented in crime statistics (particularly lower socio-economic groupings).¹⁶ Finally, it is suggested that the incidence of crime reduces with age. Indeed, most crime is committed by young males. It is estimated, for example, that 1 in 4 males in New Zealand have been convicted in court before they reach the age of 24; similarly it has been estimated that 1 in 3 males in Northern Ireland under the age of 35 have a criminal record.

On the other hand, and as evident in the comparative literature, such justifications have to be balanced against other public interest considerations such as informed decision-making,

¹⁵ Indeed, this argument has recently been made in Ireland. See National Development Plan, 2000-2006 (PN 7780) 1999, p. 194.

¹⁶ For such an analysis in Ireland, see Bacik I and O'Connell M *Crime and Poverty in Ireland* Round Hall, Sweet and Maxwell: Dublin; 1998; O'Donnell I "Crime, Punishment and Poverty" 1997 (7) *Irish Criminal Law Journal*, pp. 134-151; O'Mahony P *Mountjoy Prison: a sociological and criminological profile* Government Publications: Dublin, 1997; O'Mahony P "Punishing Poverty and Personal Adversity", in O'Mahony P (ed) *Criminal Justice in Ireland* IPA: Dublin; 2002, pp. 615-634.

the proper administration of justice, and the needs of victims. More particularly, it has been argued that expungement and discriminatory provisions vis-à-vis criminal records restrict freedom of expression and lead to the suppression of the truth. From an employment perspective, restricting the right to knowledge of employers can affect the abilities of parties to an employment contract to reach *consensus ad idem*, and, it has the potential to undermine the relationship given its foundation on principles of trust and good faith. From a criminal justice perspective, it is argued that more emphasis needs to be placed on offenders taking responsibility for their own actions. If an ex-offender makes the rational choice to commit crime, he or she is not entitled to expect or rely upon a presumption of trust from society. Allowing offenders to conceal rather than reveal their past is inconsistent with the view that offenders must take personal responsibility for their choices. Such an argument attempts to bring more focus to bear on the proximal conditions of crime (the fact that the crime was committed) as opposed to its distal conditions (the causal factors underpinning the committal of the crime). It does not see criminality as a social problem that is connected with broader social and psychological influences; rather it focuses instead on the calculated, rational choices that remain open to offenders at all times. Once an offender chooses to utility-maximise through crime, then he or she, in keeping with this emphasis upon individual responsibility, forfeits all presumptions of trust from society. Disenfranchisement is justified on this basis.

Balancing these respective dyads of protection for society (exclusion) and increased resettlement of offenders (inclusion) is a complex process, particularly given the supposed 'paroxysm of fear' of crime that exists in societies, coupled with increasingly politicised approaches to law and order.¹⁷ Much of the dualism at play is evident, for example, in a recent report in England and Wales, entitled *Breaking the Cycle*. On the one hand, and in order to promote resettlement and reintegration, it recommended, in reviewing the Rehabilitation of Offenders Act, 1974, that the qualifying periods for convictions to become spent were too long (10 years, for example, in the case of a sentence of imprisonment of 6 to 30 months, to run from the date of conviction) and should be reduced. On the other hand, and mindful of the need to protect society (particularly in relation to employment positions that demand a high degree of trust or involve work with vulnerable members of society), it also recommended that increased discretion should be given to the judiciary to disapply normal qualifying periods in respect of offenders who had a high risk of re-offending (thereby ensuring that their convictions did not become spent under the terms of the Act).

Nonetheless, it should be possible to reconcile these dyads by carefully balancing the goals of reintegration and public safety. Moreover, both concerns should not be presented in mutually exclusive terms. By introducing expungement laws for certain classes of offences and offenders, it should be possible to break the cycle of exclusion experienced by many offenders, thereby enhancing integration and resettlement. Such reintegrative initiatives should also contribute to public safety by breaking the continuum of exclusion and further crime. In many instances, and having regard to the need to strike a proper balance between risk aversion and risk taking, the adverse and unfair consequences of a criminal record outweigh the public's right to know. Enabling such records to be concealed will better ensure that a proper priority is resolved between the public's right to safety and the offender's ability to re-enter mainstream society.

¹⁷ In Ireland, see O'Donnell I and O'Sullivan E. *Crime Control in Ireland: the politics of intolerance* CUP: Cork; 2001. More generally, see Tonry M and Frase RS (eds) *Sentencing and Sanctions in Western Countries* OUP: Oxford, 2001.

IV. Political Opinion

The need to protect freedom of political opinion is widely accepted internationally. The right to hold political opinions is recognised in the major international legal instruments such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and ILO Convention No.111. Direct protection can be found in the right to freedom of expression. Article 19 of the ICCPR, for example provides that everyone shall have the right to hold political opinions without interference while Article 10 of the ECHR states that the right to freedom of expression shall include “freedom to hold opinions and to receive and impart information and ideas”. Indirect protection can be found in the provisions of international human rights instruments which guarantee the right to freedom of association since exercise of the right to freedom of political opinion can involve associating with other like minded persons. Incidental protection is to be found in the anti-discrimination provisions of the international human rights instruments such as Article 14 of the ECHR which prohibits discrimination on *inter alia* the ground of political opinion in the enjoyment of the rights and freedoms set forth in the Convention.

It is clear however from the text of the various international instruments that freedom of political opinion is not an absolute right. In the case of ECHR for example the exercise of the rights to freedom of expression is subject to limitations which are prescribed by law and are necessary in a democratic society in the interests of

national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation and rights of others, for preventing the disclosure of information received in confidence, or for maintaining the impartiality of the judiciary.

Article 11 further permits “the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

There have been a number of cases before the European Court of Human Rights in which public sector workers have challenged employment-related discrimination connected with their political beliefs and activities. The case law suggests “a high degree of deference to the State on the part of the Court, particularly where applicants have challenged refusals to appoint on grounds of their political opinion.”¹⁸

In Irish law, the constitutional rights to freedom of expression and freedom of association could be invoked with regard to discrimination on grounds of political opinion. Irish law also deems dismissal on grounds of political opinion to be unfair.¹⁹

¹⁸ Collins H, Ewing K D, McColgan A *Labour Law: Text and Materials* Hart Publishing: Oxford; 2001, p.628.

¹⁹ Unfair Dismissals Act 1977, s. 6 (2)(b).

1 Australia

Australia has a federal system of government, with three layers of government: Commonwealth; State or Territory; and local government. There are eight States and Territories, with the States having more powers of self-government than the Territories. Australian employment equality legislation is found at the Commonwealth level and at the State and Territory level of government. Protection against discrimination in employment is found in Commonwealth, State and Territory anti-discrimination or equal opportunity legislation, industrial relations legislation and criminal legislation. The Commonwealth government can only pass laws in relation to matters in respect of which the Constitution has conferred the power on it to do so. The power of the Commonwealth government to legislate in the area of discrimination derives from the external affairs power (s.51(xxix)). Because the Commonwealth government has ratified the international treaties which deal with discrimination issues such as the International Covenant on Civil and Political Rights and various ILO Conventions, it may introduce laws relating to these matters. Where the Commonwealth government has the power to legislate in a particular area, and does so, such a law will take precedence over any State law which is inconsistent with it.¹

Commonwealth Legislative Framework

The Human Rights and Equal Opportunity Commission Act, 1986 (the HREOC Act, 1986), the Workplace Relations Act, 1996 and the Crimes Act, 1914 all provide protection against discrimination in employment at Commonwealth level.

The HREOC Act, 1986 forms part of the scheme of Commonwealth anti-discrimination or equal opportunity legislation which also includes the Racial Discrimination Act, 1984, the Sex Discrimination Act, 1975 and the Disability Discrimination Act, 1992. The three latter Acts prohibit discrimination by an employer on the basis of race, sex and disability. The HREOC Act, 1986 incorporates the International Labour Organisation (ILO) Convention No. 111, Discrimination (Employment and Occupation) Convention, 1958 into national Australian law. The HREOC Act, 1986 adopts the definition of discrimination found in Article 1 of ILO Convention No. 111 1958. Discrimination under s. 3 (1) of the HREOC Act, 1986 means:

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.²

Any other distinction, exclusion or preference that nullifies or impairs equality of opportunity or treatment in employment or occupation constitutes discrimination for the purposes of the HREOC Act, 1986.³ Regulations made under s. 3 (1)(b)(ii) can declare other distinctions, exclusions or preferences as constituting discrimination.

¹ Constitution of Australia, s.109.

² Human Rights and Equal Opportunity Commission Act, 1986, s. 3 (1)(a).

³ Human Rights and Equal Opportunity Commission Act, 1986, s. 3 (1)(b)(i).

In January 1990, the Human Rights and Equal Opportunity Commission Regulations, 1989 came into force. The 1989 Regulations declared any distinction, exclusion or preference based on any of the ten enumerated grounds as constituting discrimination for the purposes of s. 3 (1) of the HREOC Act, 1986.⁴ The prohibited grounds of discrimination as enumerated in s.4(a) of the 1989 Regulations, are:⁵

- (i) age
- (ii) medical record
- (iii) criminal record
- (iv) impairment
- (v) marital status
- (vi) mental, intellectual or psychiatric disability
- (vii) nationality
- (viii) physical disability
- (ix) sexual preference
- (x) trade union activity.

The 1989 Regulations further stipulates that a distinction, exclusion or preference based on one or more of the grounds enunciated in s. 4 (a)(iii) to (x) constitutes discrimination even where the attribute has ceased to exist or existed.⁶ By virtue of s. 4 (b) a distinction, exclusion or preference based on the imputation to a person of any ground specified in s. 4(a) of the 1989 Regulations also constitutes discrimination for the purposes of s. 3 (1) of the HREOC Act, 1986.

The Workplace Relations Act, 1996 and the Crimes Act, 1914 provide protection against discrimination in employment on the basis of trade union membership/non-membership and activity and on the basis of criminal conviction respectively. The legislative framework for each of these Acts will be examined in the sections entitled Trade Union Membership and Criminal Conviction/Ex-Offender/Ex-Prisoner respectively.

In summary, the HREOC Act, 1986, the Workplace Relations Act, 1996 and the Crimes Act, 1914 together prohibit discrimination in employment on the basis of social origin, trade union membership/non-membership and activity, criminal conviction and political opinion.

Exceptions

The principle of non-discrimination in employment and occupation is subject to two general exemptions found in s. 3 (1)(c) and (d) of the HREOC Act, 1986. A distinction, exclusion or preference based on the inherent requirements of employment or occupation is permitted by virtue of s. 3 (1)(c). An institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, is permitted to make distinctions, exclusions or preferences in relation to employment at the institution in order to protect the “religious susceptibilities of adherents of that religion or creed.”⁷

⁴ Human Rights and Equal Opportunity Commission Regulations, 1989, s. 4 (a).

⁵ Human Rights and Equal Opportunity Commission Regulations, 1989, s. 4 (a)(i)-(x).

⁶ Human Rights and Equal Opportunity Commission Regulations, 1989, s. 4 (a)(xi).

⁷ Human Rights and Equal Opportunity Commission Act, 1986, s. 3 (1)(d).

The HREOC Act, 1986 defines unlawful discrimination as acts, omissions or practices that are unlawful under the Sex Discrimination Act, 1975, the Racial Discrimination Act, 1984 and the Disability Discrimination Act, 1992.⁸

Enforcement procedure

The Human Rights and Equal Opportunity Commission, established by s. 7 (1) of the HREOC Act, 1986, has a number of functions and responsibilities for the promotion of human rights and the elimination of discrimination. The Sex Discrimination Act, 1975, Racial Discrimination Act, 1984 and other legislation, such as the Disability Discrimination Act, 1992 have conferred functions on the Commission⁹ and, further, the Commission can hear complaints of unlawful discrimination as defined by s.3 (1) of the HREOC Act, 1986.¹⁰ The Commission may also “inquire into any act or practice, including systemic practice, that may constitute discrimination”. Section 31 (b)(i) confers on the Commission the ability to effect a settlement, by way of conciliation, in respect of acts or practices which may constitute discrimination. Where such acts or practices constitute discrimination and conciliation is considered inappropriate by the Commission, or where conciliation has failed, the Commission may report to the Attorney General of Australia on the acts or practices which gave rise to the complaint of discrimination.¹¹ Unlike complaints under the Sex Discrimination, Racial Discrimination or Disability Discrimination Acts, complaints under the HREOC Act are therefore not subject to court action.

State Legislative Framework

Anti-discrimination or equal opportunity legislation exists in each of the Australian states and territories. Industrial legislation and criminal legislation also affords some protection against discrimination in employment in a selected number of states. In this Report we examine the states of Queensland, Tasmania and Victoria in respect of the protection afforded against discrimination in employment by anti-discrimination or equal opportunity legislation and by industrial legislation. In respect of the protection afforded by criminal legislation against discrimination in employment, reference will be made to the Discrimination Act, 1991 of Australian Capital Territory as amended by the Spent Convictions Act, 2000 and to the Criminal Law (Rehabilitation of Offenders) Act, 1986 of Queensland. The Criminal Records Act, 1991 of New South Wales, the Anti-Discrimination Act, 1992 of Northern Territory in conjunction with the Criminal Records (Spent Convictions) Act, 1992 and the Spent Convictions Act, 1988 of Western Australia, will also be examined in this regard.

Queensland

The purpose of the Anti-Discrimination Act, 1991 is to promote equality of opportunity and to provide protection from “unfair discrimination in certain areas of activity, including work, education and accommodation.”¹² The 1991 Act aims to achieve this purpose by prohibiting discrimination on the basis of enumerated attributes and by prohibiting certain types of discrimination.¹³ These prohibitions against discrimination are applied to specified areas

⁸ Human Rights and Equal Opportunity Commission Act, 1986, s. 3 (1).

⁹ Human Rights and Equal Opportunity Commission Act, 1986, s. 11 (1)(a).

¹⁰ Human Rights and Equal Opportunity Commission Act, 1986, s. 11 (1)(aa).

¹¹ Human Rights and Equal Opportunity Commission Act, 1986, s. 31 (b)(ii).

¹² Anti-Discrimination Act, 1991, s. 6 (1).

¹³ Anti-Discrimination Act, 1991, s. 6 (2)(a)(iii).

of activity¹⁴ insofar as an exemption provided for by the Act does not apply.¹⁵ The Anti-Discrimination Act, 1991 also establishes agencies and procedures¹⁶ to deal with complaints of discrimination and to protect against discrimination.

The Anti-Discrimination Act, 1991 prohibits discrimination on twelve grounds.¹⁷ Discrimination in employment on the grounds of political belief or activity¹⁸ and trade union activity¹⁹ are covered by the Act. There is no prohibition in this Act on discrimination on the basis of criminal conviction/ex-offender/ex-prisoner status or socio-economic status/social origin. The 1991 Act prohibits discrimination against a person due to “association with, or in relation to, a person identified on the basis of any” of the other twelve attributes listed in the Act.²⁰

The Criminal Law (Rehabilitation of Offenders) Act, 1986 and the Industrial Relations, Act, 1999 both afford protection against discrimination in employment on the basis of criminal conviction/ex-offender/ex-prisoner status and trade union membership, respectively. The provisions and scope of the protection afforded under these Acts is examined in the sections entitled Trade Union Membership and Criminal Conviction/Ex-Offender/Ex-Prisoner.

Discrimination is defined by the Anti-Discrimination Act, 1991 as discrimination on the basis of:

- (a) a characteristic that a person with any of the attributes generally has; or
- (b) a characteristic that is often imputed to a person with any of the attributes; or
- (c) an attribute that a person is presumed to have, or have had at any time, by the person discriminating; or
- (d) an attribute that a person had, even if the person did not have it at the time of discrimination.²¹

The prohibition against discrimination includes direct and indirect discrimination.²² Direct discrimination occurs when a person treats or proposes to treat a person with an attribute less favourably than a person without the attribute is or would be treated in similar circumstances.²³ In order for such discrimination to occur the motive of person discriminating is irrelevant²⁴ and whether the person discriminating considers the treatment less favourable is deemed to be unnecessary by s. 10 (2). Further, where there are more than two reasons for the less favourable treatment or proposed less favourable treatment, such treatment or proposed treatment is considered to be on the basis of an attribute if the attribute is a substantial reason for the treatment or proposed treatment.²⁵

¹⁴ Anti-Discrimination Act, 1991, s. 6 (2)(a)(iii).

¹⁵ Anti-Discrimination Act, 1991, s. 6 (2)(b).

¹⁶ Anti-Discrimination Act, 1991, s. 6 (c).

¹⁷ Anti-Discrimination Act, 1991, s. 7 (1).

¹⁸ Anti-Discrimination Act, 1991, s. 7 (1)(j).

¹⁹ Anti-Discrimination Act, 1991, s. 7 (1)(k).

²⁰ Anti-Discrimination Act, 1991, s. 7 (1)(m).

²¹ Anti-Discrimination Act, 1991, s. 8 (a) to (d).

²² Anti-Discrimination Act, 1991, s. 8.

²³ Anti-Discrimination Act, 1991, s. 10 (1).

²⁴ Anti-Discrimination Act, 1991, s. 10 (3).

²⁵ Anti-Discrimination Act, 1991, s. 10 (4).

The definition of indirect discrimination is found in s.11(1) and occurs when a person imposes or proposes to impose a term based on an attribute:

- (a) with which a person with an attribute does not or is not able to comply; and
- (b) with which a higher proportion of people without the attribute comply or are able to comply; and
- (c) that is not reasonable.²⁶

For such discrimination to occur it is not necessary for the person imposing or proposing to impose a term to be aware of the indirect discrimination.²⁷

A term is considered to be unreasonable in light of all the circumstances, particularly in reference to:

- Consequences of failure to comply
- Cost of an alternative term
- Financial circumstances of person imposing or proposing to impose a term.²⁸

A general principle of non-discrimination in the 'work or work-related area' is enunciated in s. 13 (1). This general principle applies to a wide range of employment as work is defined in the Anti-Discrimination Act, 1991 of Queensland as including:

- Full-time, part-time, casual, permanent and temporary employment
- Work under a contract for services
- Work remunerated in whole or in part on a commission basis
- Statutory appointment
- Work experience
- Vocational placement
- Voluntary or unpaid work
- Work done by a person with an impairment in a sheltered workshop, whether paid or unpaid
- Work under a guidance program, apprenticeship training program, or other occupational training or retraining program.²⁹

In addition, the 1991 Act applies to acts done on ships connected with Queensland.³⁰

Sections 14 and 15 of the Anti-Discrimination Act 1991 elaborate on the general principle of non-discrimination found in s. 13 (1). Discrimination in the arrangements for deciding

²⁶ Anti-Discrimination Act, 1991, s. 11 (1)(a) to (c).

²⁷ Anti-Discrimination Act, 1991, s. 11 (3).

²⁸ Anti-Discrimination Act, 1991, s. 11 (2)(a) to (c).

²⁹ Anti-Discrimination Act, 1991, s. 4 (a) to (h).

³⁰ Anti-Discrimination Act, 1991, s. 3A (1). A ship is deemed to be connected with Queensland for the purposes of the Act, if it is registered to a port in Queensland (s. 3A (3)(a)), is or required to be registered/licensed under an Act of Queensland (s. 3A (3)(b)), or is owned or chartered by a person whose residence/principal residence/business/principal business/principal place of business for managing the operation of the ship is in Queensland (s. 3A (3)(c)(i) to (iii)).

who is offered work,³¹ in deciding who is offered work,³² in the terms offered,³³ in failing to offer work,³⁴ and in denying an applicant access to a guidance program, apprenticeship training program or other occupational training or retraining program,³⁵ is prohibited by the Act. Moreover, a person must not discriminate in developing the scope and range of guidance programs, apprenticeship training programs, or other occupational training or retraining programs.³⁶

Discrimination in the work area is prohibited by s. 15 (1), which states that a person must not discriminate:

- (a) in any variation of the terms of work; or
- (b) in denying or limiting access to opportunities for promotion, transfer, training or other benefit to a worker; or
- (c) in dismissing a worker; or
- (d) by denying access to a guidance program, an apprenticeship training program or other occupational training or retraining program; or
- (e) in developing the scope or range of such a program; or
- (f) by treating a worker unfavourably in any way in connection with work.³⁷

For the purposes of s. 15 (1) dismissing includes forced retirement, failure to provide work or otherwise.³⁸ Both s. 14 (1) and s. 15 (1) are subject to an exception in relation to discrimination in the pre-work area and work area respectively. Discrimination in these areas on the basis of the attribute of trade union activity is permitted when s. 105 of the Industrial Relations Act 1999 of Queensland applies.³⁹ Section 105 applies to the employment of independent contractors.

Employment agencies are similarly prohibited from discriminating against prospective employees or employers. Section 23 states that an employment agency must not discriminate:

- By failing to supply a service of the business to a prospective employee or employer
- In the terms on which the service is offered or supplied
- In the way in which the service is supplied
- By treating a prospective employee or employer unfavourably in connection with a service.⁴⁰

Exceptions

The following exceptions to the prohibition on discrimination in the work or work related area apply to the prohibited grounds of political belief and activity and trade union activity.

³¹ Anti-Discrimination Act, 1991, s. 14 (1)(a).

³² Anti-Discrimination Act, 1991, s. 14 (1)(b).

³³ Anti-Discrimination Act, 1991, s. 14 (1)(c).

³⁴ Anti-Discrimination Act, 1991, s. 14 (1)(d).

³⁵ Anti-Discrimination Act, 1991, s. 14 (1)(e).

³⁶ Anti-Discrimination Act, 1991, s. 14 (1)(f).

³⁷ Anti-Discrimination Act, 1991, s. 15 (1)(a) to (f).

³⁸ Anti-Discrimination Act, 1991, s. 15 (3).

³⁹ Anti-Discrimination Act, 1991, s. 14 (2) and s. 15 (2).

⁴⁰ Anti-Discrimination Act, 1991, s. 23 (a) to (d).

- Genuine occupational requirements⁴¹
- Residential domestic services in the home (discrimination on race is unlawful)⁴²
- Residential childcare services in the home (discrimination on race is unlawful)⁴³
- Educational or health-related institution with religious purposes (discrimination on age, race or impairment is unlawful).⁴⁴

Part V of the Anti-Discrimination Act, 1991 sets out further general exemptions that apply in respect of all areas including that of work. These include:

- Welfare measures⁴⁵
- Equal opportunity measures⁴⁶
- Acts done in compliance with legislation and court and tribunal orders⁴⁷
- Public health, workplace health and safety⁴⁸
- Religious bodies⁴⁹
- Charities⁵⁰
- Legal incapacity⁵¹
- Exception granted by the Anti-Discrimination Tribunal.⁵²

Enforcement procedure

The Anti-Discrimination Act 1991 establishes two agencies and one office in furtherance of the purposes to promote equal opportunity and to protect from unfair discrimination. The Anti-Discrimination Commission and the office of the Anti-Discrimination Commissioner are established by virtue of s. 234 (1) and s. 234 (2) of the 1991 Act respectively.

The Anti-Discrimination Commission is charged with promoting “an understanding and acceptance, and the public discussion, of human rights in Queensland.”⁵³ The 1991 Act also confers on the Commission the powers:

- To inquire into complaints⁵⁴
- To carry out investigations of any contravention of the Act⁵⁵
- To examine Acts and proposed legislation for compliance with the 1991 Act⁵⁶
- To undertake research and educational programs⁵⁷

⁴¹ Anti-Discrimination Act, 1991, s. 25.

⁴² Anti-Discrimination Act, 1991, s. 26.

⁴³ Anti-Discrimination Act, 1991, s. 27.

⁴⁴ Anti-Discrimination Act, 1991, s. 29.

⁴⁵ Anti-Discrimination Act, 1991, s. 104.

⁴⁶ Anti-Discrimination Act, 1991, s. 105.

⁴⁷ Anti-Discrimination Act, 1991, s. 106.

⁴⁸ Anti-Discrimination Act, 1991, s. 107 and 108.

⁴⁹ Anti-Discrimination Act, 1991, s. 109.

⁵⁰ Anti-Discrimination Act, 1991, s. 110.

⁵¹ Anti-Discrimination Act, 1991, s. 112.

⁵² Anti-Discrimination Act, 1991, s. 113.

⁵³ Anti-Discrimination Act, 1991, s. 235 (i).

⁵⁴ Anti-Discrimination Act, 1991, s. 235 (a).

⁵⁵ Anti-Discrimination Act, 1991, s. 235 (b).

⁵⁶ Anti-Discrimination Act, 1991, s. 235 (c).

⁵⁷ Anti-Discrimination Act, 1991, s. 325 (d).

- To research and develop additional grounds of discrimination and make recommendations for the inclusion of such grounds in the 1991 Act.⁵⁸

The Anti-Discrimination Commissioner complements and supports the Commission and is charged “to do all things that are necessary or convenient to be done for or in connection with the performance of the Commission’s function.”⁵⁹

A person alleging discrimination in contravention of the Act, or an agent of such a person,⁶⁰ may lodge a complaint with the Commissioner within one year.⁶¹ Complaints that are frivolous, vexatious, misconceived or lacking on substance must be rejected by the Commissioner.⁶² The Commissioner is also bound to attempt to resolve an allegation of discrimination by conciliation.⁶³ This is similar to the duty placed on the Commission in inquiring into a complaint to effect resolution by conciliation.⁶⁴ An unconciliated complaint may be referred to the Tribunal for arbitration by virtue of s. 166 (1), which can then be referred to the Supreme Court of Queensland on a point of law⁶⁵ within 28 days.⁶⁶ Where a complaint is proved, the powers of the Tribunal include the making of orders: requiring the respondent not to commit a further contravention of the Act against the complainant; requiring the respondent to pay compensation for loss or damage caused by the contravention and/or requiring the respondent to do specified things to redress loss or damage suffered by the complainant and another person because of the contravention.⁶⁷

Tasmania

The Anti-Discrimination Act 1998 of Tasmania prohibits discrimination based on nineteen attributes,⁶⁸ including industrial activity,⁶⁹ political belief or affiliation,⁷⁰ political activity⁷¹ and irrelevant criminal record.⁷² Under current anti-discrimination law, socio-economic status/social origin is not covered. The nineteenth attribute is “association with a person who has, or is believed to have, any of these attributes.”⁷³

The 1998 Act prohibits direct and indirect discrimination based on any of the attributes enumerated in s. 16.⁷⁴ Direct discrimination is defined as when a person treats another on the basis of:

a prescribed attribute, imputed prescribed attribute, or a characteristic imputed to that attribute less favourably than a person without that attribute or characteristic.⁷⁵

⁵⁸ Anti-Discrimination Act, 1991, s. 235 (f).

⁵⁹ Anti-Discrimination Act, 1991, s. 236 (2).

⁶⁰ Anti-Discrimination Act, 1991, s. 134 (1)(a) and (b).

⁶¹ Anti-Discrimination Act, 1991, s. 134 (1).

⁶² Anti-Discrimination Act, 1991, s. 139 (a) and (b).

⁶³ Anti-Discrimination Act, 1991, s. 151.

⁶⁴ Anti-Discrimination Act, 1991, s. 235 (a).

⁶⁵ Anti-Discrimination Act, 1991, s. 217 (1).

⁶⁶ Anti-Discrimination Act, 1991, s. 217 (2)(a).

⁶⁷ Anti-Discrimination Act, 1991, s. 209.

⁶⁸ Anti-Discrimination Act, 1998, s. 16.

⁶⁹ Anti-Discrimination Act, 1998, s. 16 (l). For the definition of “industrial activity”, see later in this chapter, Trade Union Membership section — Tasmania.

⁷⁰ Anti-Discrimination Act, 1998, s. 16 (m).

⁷¹ Anti-Discrimination Act, 1998, s. 16 (n).

⁷² Anti-Discrimination Act, 1998, s. 16 (q).

⁷³ Anti-Discrimination Act, 1998, s. 16 (s).

⁷⁴ Anti-Discrimination Act, 1998, s. 14 (1).

⁷⁵ Anti-Discrimination Act, 1998, s. 14 (2).

For direct discrimination to occur the motive of the person discriminating is irrelevant⁷⁶ and whether the prescribed attribute is the sole or dominant reason for the less favourable treatment is considered unnecessary by s. 14 (3). Moreover, it is unnecessary for the occurrence of direct discrimination whether the person discriminating regards the treatment as unfavourable.⁷⁷

The imposition of a condition, requirement or practice which is unreasonable in the circumstances will constitute indirect discrimination when such conditions, requirements or practices disadvantage a group of people more than a person who is not a member of the group.⁷⁸ Such a group of people:

- (a) share, or are believed to share a prescribed attribute; or
- (b) share, or are believed to share, any of the characteristics imputed to that attribute.⁷⁹

The person imposing the condition, requirement or practice need not be aware that they disadvantage a group of people for indirect discrimination to occur.⁸⁰

Section 22 (1)(a) of the Anti-Discrimination Act 1998 applies the general principle of non-discrimination, direct and indirect, based on the prescribed attributes, to employment. Given the definition of employment, the prohibition against discrimination in employment applies to a multitude of employments. For the purposes of the 1998 Act, employment includes:

- Employment or occupation in any capacity, with or without remuneration
- Memberships of partnerships
- Registration or recognition by, or membership of, a professional or trade organisation
- Registration or recognition by qualifying bodies
- Commission agents
- Registration or placement by employment agencies
- Engagement under a contract for services
- Employment by any person
- Registration or enrolment by vocational training bodies.⁸¹

The Anti-Discrimination Act, 1998 prohibits discrimination on the basis of the attributes of irrelevant criminal record, political belief or affiliation, political activity and industrial activity. The Industrial Relations Act, 1999 also protects against discrimination in employment on the basis of trade union membership. The criminal legislation of Tasmania does not provide any additional protection to those convicted of a criminal offence, or of the status of ex-offender or ex-prisoner, than that found in the Anti-Discrimination Act, 1998.

⁷⁶ Anti-Discrimination Act, 1998, s. 14 (3)(c).

⁷⁷ Anti-Discrimination Act, 1998, s. 14 (1)(b).

⁷⁸ Anti-Discrimination Act, 1998, s. 15 (1).

⁷⁹ Anti-Discrimination Act, 1998, s. 15 (1)(a) and (b).

⁸⁰ Anti-Discrimination Act, 1998, s. 15 (2).

⁸¹ Anti-Discrimination Act, 1998, s. 3 (a) to (i).

Exceptions

The 1998 Act contains five general exemptions to the principle of non-discrimination, which apply to the prohibition against discrimination in employment enunciated in s. 22 (1)(a). A person can discriminate in any area, including employment, if the purpose is to carry out a scheme for the benefit of a group that is disadvantaged or has a special need because of a prescribed attribute.⁸² Equal opportunity programs, plans or arrangements are similarly permitted to discriminate against a person.⁸³ Discriminatory provisions in a document for charitable benefits or acts done in furtherance of such a provision are permitted under s. 23 of the Anti-Discrimination Act, 1998. In order to ensure compliance with a Tasmanian or Commonwealth law or compliance with an order of a commission, court or tribunal a person may discriminate against another if it is reasonably necessary.⁸⁴ The Anti-Discrimination Commissioner can also grant exemptions from the provisions of the 1998 Act. In considering applications for such exemptions, the Commissioner may have regard to

- (a) the desirability of certain actions being permitted to redress the effect of past discrimination or prohibited conduct; and
- (b) any other factor that the Commissioner considers relevant.

The Commissioner has granted a number of such applications for exemption. In the year 2000-2001, for example, nine such applications were granted. These allowed *inter alia* for the employment of persons of a particular gender or for the employment of persons with disabilities in certain circumstances. In granting such exemptions the Commissioner has made it a condition of the grant that the parties/bodies gaining the exemption must undertake training or community education in the Act.

The Act further stipulates a number of exceptions in relation to specific prescribed attributes. The prohibition of discrimination in employment on the basis of industrial activity is subject to the defence of "genuine occupational qualification in relation to a particular position."⁸⁵ This term is undefined by the 1998 Act. Discrimination on the basis of irrelevant criminal record is permitted in relation to the education, training or emotional well-being of children.⁸⁶ Section 53 allows discrimination on the basis of political belief, affiliation or activity where the employment is as:

- (a) an adviser to a Minister; or
- (b) a member of staff of a political party; or
- (c) a member of the electorate staff of any person' or
- (d) in any other similar position.⁸⁷

Enforcement procedure

The office of the Anti-Discrimination Commissioner⁸⁸ and the Anti-Discrimination Tribunal⁸⁹ are established by the 1998 Act. The functions of the Commissioner include:

⁸² Anti-Discrimination Act, 1998, s. 25.

⁸³ Anti-Discrimination Act, 1998, s. 26.

⁸⁴ Anti-Discrimination Act, 1998, s. 24 (a) and (b).

⁸⁵ Anti-Discrimination Act, 1998, s. 49.

⁸⁶ Anti-Discrimination Act, 1998, s. 50.

⁸⁷ Anti-Discrimination Act, 1998, s. 53 (a) to (d).

⁸⁸ Anti-Discrimination Act, 1998, s. 5 (1).

⁸⁹ Anti-Discrimination Act, 1998, s. 12 (1)(a).

- Promotion of the recognition and approval of acceptable attitudes, acts and practices in relation to discrimination and prohibited conduct⁹⁰
- Consultation and inquiries into discrimination and prohibited conduct and the effects thereof⁹¹
- Research and educational programs⁹²
- Examination of legislation⁹³
- Investigation and conciliation of complaints.⁹⁴

In addition to the power to grant exemptions from the 1998 Act,⁹⁵ the Commissioner can, determine the procedures to be followed during investigation and conciliation,⁹⁶ intervene in court and tribunal proceedings involving issues of discrimination and prohibited conduct⁹⁷ and “do anything necessary or convenient to perform the functions of the Commissioner.”⁹⁸

The Anti-Discrimination Tribunal can review the Commissioner’s decision to grant, withdraw or deny an exemption.⁹⁹ It also has the ability to conduct an inquiry into a complaint.¹⁰⁰

The complaint process begins with the Commissioner, who can receive complaints from a person alleging discrimination or prohibited conduct,¹⁰¹ a trade union,¹⁰² an organisation,¹⁰³ an agent or a person acting on behalf of the person alleging discrimination.¹⁰⁴ Moreover, a person alleging discrimination and who belongs to a class of persons who have alleged similar discrimination, can lodge a complaint on behalf of that class of persons.¹⁰⁵ A complaint must be lodged with the Commissioner within a year of the alleged discrimination or prohibited conduct¹⁰⁶ and may be rejected by the Commissioner if it is trivial, vexatious, misconceived or lacking in substance.¹⁰⁷ Moreover, the Commissioner may reject a complaint if:

- It does not relate to discrimination or prohibited conduct
- Proceedings have been commenced in a commission, court or tribunal in relation to the same events
- A similar complaint is being dealt with by a commission, court or tribunal
- A more appropriate remedy is reasonably available
- The subject matter has already been adequately dealt with

⁹⁰ Anti-Discrimination Act, 1998, s. 6 (b).

⁹¹ Anti-Discrimination Act, 1998, s. 6 (c).

⁹² Anti-Discrimination Act, 1998, s. 6 (e).

⁹³ Anti-Discrimination Act, 1998, s. 6 (g).

⁹⁴ Anti-Discrimination Act, 1998, s. 6 (h).

⁹⁵ Anti-Discrimination Act, 1998, s. 7 (c).

⁹⁶ Anti-Discrimination Act, 1998, s. 7 (a).

⁹⁷ Anti-Discrimination Act, 1998, s. 7 (b).

⁹⁸ Anti-Discrimination Act, 1998, s. 7 (d).

⁹⁹ Anti-Discrimination Act, 1998, s. 13 (b).

¹⁰⁰ Anti-Discrimination Act, 1998, s. 13 (a).

¹⁰¹ Anti-Discrimination Act, 1998, s. 60 (1)(a).

¹⁰² Anti-Discrimination Act, 1998, s. 60 (1)(c).

¹⁰³ Anti-Discrimination Act, 1998, s. 60 (1)(d).

¹⁰⁴ Anti-Discrimination Act, 1998, s. 60 (1)(e) and (f).

¹⁰⁵ Anti-Discrimination Act, 1998, s. 60 (1)(b)(i) and (ii).

¹⁰⁶ Anti-Discrimination Act, 1998, s. 63 (1).

¹⁰⁷ Anti-Discrimination Act, 1998, s. 64 (1)(a).

- The subject matter would be more effectively or conveniently dealt with by a State authority or Commonwealth statutory authority.¹⁰⁸

Upon accepting a complaint the Commissioner must attempt conciliation of the complaint,¹⁰⁹ which if unsuccessful,¹¹⁰ or the Commissioner believes that conciliation is not possible,¹¹¹ the complaint may be referred to the Anti-Discrimination Tribunal.¹¹² A complaint may also be referred to the Tribunal when the Commissioner is of the opinion that it should be referred for inquiry.¹¹³ On concluding its inquiry the Tribunal may make an enforceable order. The orders which can be made by the Tribunal are set out in the Act and include orders as follows:

The discrimination or prohibited conduct must not be repeated or continued.

The respondent must redress any loss, injury or humiliation.

The respondent must pay compensation.

The complainant must be re-employed.

The respondent apologise to the complainant.

If the complaint is not substantiated then the complaint is dismissed.

Victoria

The Equal Opportunity Act, 1995 of Victoria counts among its objectives the promotion of the recognition and acceptance of the right to equality of opportunity¹¹⁴ and the elimination of discrimination.¹¹⁵ The 1995 Act aims to achieve this second objective by prohibiting discrimination on the basis of various attributes.¹¹⁶ To this end the Equal Opportunity Act, 1995 establishes an Equal Opportunities Commission and Anti-Discrimination Tribunal and a complaint mechanism.

Section 6 lists eleven attributes on the basis of which discrimination is prohibited, including industrial activity¹¹⁷ and political belief or activity.¹¹⁸ Personal association with a person identified by reference to any of the attributes enumerated in section 6 is also included as a prohibited ground of discrimination.¹¹⁹

Discrimination based on an attribute includes discrimination on the basis:

- that person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination;
- of a characteristic that a person with that attribute generally has;

¹⁰⁸ Anti-Discrimination Act, 1998, s. 64 (1)(b) to (g).

¹⁰⁹ Anti-Discrimination Act, 1998, s. 74.

¹¹⁰ Anti-Discrimination Act, 1998, s. 78 (1)(b).

¹¹¹ Anti-Discrimination Act, 1998, s. 78 (1)(a).

¹¹² Anti-Discrimination Act, 1998, s. 78 (1)(a) and (b).

¹¹³ Anti-Discrimination Act, 1998, s. 78 (1)(c).

¹¹⁴ Equal Opportunity Act, 1995, s. 3 (a).

¹¹⁵ Equal Opportunity Act, 1995, s. 3 (b).

¹¹⁶ Equal Opportunity Act, 1995, s. 3 (b).

¹¹⁷ Equal Opportunity Act, 1995, s. 6 (c).

¹¹⁸ Equal Opportunity Act, 1995, s. 6 (g).

¹¹⁹ Equal Opportunity Act, 1995, s. 6 (m).

- (c) of a characteristic that is generally imputed to a person with that attribute;
- (d) that a person is presumed to have that attribute or to have had it at any time.¹²⁰

Such discrimination can be either direct or indirect¹²¹ with direct discrimination occurring when a person treats or proposes to treat another with an attribute less favourably than the person would treat or propose to treat a person without that attribute or with another attribute, in similar circumstances.¹²² The 1995 Act states that the person discriminating does not have to be aware of the discrimination or consider the treatment less favourable for direct discrimination to occur for the purposes of the Act.¹²³ Further, it is unnecessary for the attribute to be the sole or dominant reason for the discrimination to constitute direct discrimination.¹²⁴

Indirect discrimination is defined as the imposition or proposed imposition of a condition, requirement or practice that someone with an attribute can not comply with,¹²⁵ and where there is a higher proportion of people without that attribute or different attribute, that can comply with the condition, requirement or practice.¹²⁶ Further the condition, requirement or practice must be unreasonable¹²⁷ with reference to the consequences of failing to comply, the cost of alternative conditions, requirements or practices and the financial circumstances of the person imposing or proposing to impose a condition, requirement or practice.¹²⁸ For such indirect discrimination to occur whether the person imposing or proposing to impose conditions, requirements or practices is aware of the discrimination is irrelevant.¹²⁹

The person's motive for discrimination is irrelevant for the purposes of direct and indirect discrimination.¹³⁰ It is also irrelevant whether the person discriminating is acting alone or with others, or occurs due to an action or omission by a person or persons.¹³¹

Sections 13 and 14 of the Equal Opportunity Act 1995 prohibit discrimination in employment on the basis of the enumerated grounds. An employer is prohibited from discriminating against a person in determining who should be offered employment, the terms of employment offered, and by refusing or deliberately omitting to offer employment.¹³² Moreover, an employer can not discriminate in denying access to a guidance program, an apprenticeship, training program or other occupational training or retraining program.¹³³

An employer must not discriminate:

- (a) by denying or limiting access by the employee to opportunities for promotion, transfer or training or to any other benefits connected with the employment;
- (b) by dismissing the employee or otherwise terminating his or her employment;

¹²⁰ Equal Opportunity Act, 1995, s. 7 (2).

¹²¹ Equal Opportunity Act, 1995, s. 7 (1).

¹²² Equal Opportunity Act, 1995, s. 8 (1).

¹²³ Equal Opportunity Act, 1995, s. 8 (2)(a).

¹²⁴ Equal Opportunity Act, 1995, s. 8 (2)(b).

¹²⁵ Equal Opportunity Act, 1995, s. 9 (1)(a).

¹²⁶ Equal Opportunity Act, 1995, s. 9 (1)(b).

¹²⁷ Equal Opportunity Act, 1995, s. 9 (1)(c).

¹²⁸ Equal Opportunity Act, 1995, s. 9 (2)(a) to (c).

¹²⁹ Equal Opportunity Act, 1995, s. 9 (3).

¹³⁰ Equal Opportunity Act, 1995, s. 10.

¹³¹ Equal Opportunity Act, 1995, s. 11 (a) and (b).

¹³² Equal Opportunity Act, 1995, s. 13 (a) to (c).

¹³³ Equal Opportunity Act, 1995, s. 13 (d).

- (c) by denying the employee access to a guidance program, an apprenticeship training program or other occupational training or retraining program;
- (d) by subjecting the employee to any other detriment.¹³⁴

Exceptions

Fourteen exceptions to the protection afforded against discrimination in employment are set out in sections 16 to 28 of the Equal Opportunity Act, 1995 of Victoria. There is a specific exception in relation to political belief or activity. Discrimination by employer in offering employment as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or in any similar employment is permitted under s. 18 of the 1995 Act. There is no specific exception in relation to industrial activity.

A number of general exceptions apply to the prohibition against discrimination in employment. These include:

- Domestic or personal services in the home¹³⁵
- Welfare services¹³⁶
- Family business¹³⁷
- Small business¹³⁸
- Reasonable and genuine requirements¹³⁹
- Care of children.¹⁴⁰

A further list of general exceptions from the prohibition against discrimination are found in ss. 69 to 84 of the 1995 Act. These apply to employment and beyond and include:

- Compliance with legislation, courts and tribunals¹⁴¹
- Charities¹⁴²
- Legal incapacity¹⁴³
- Protection of health, safety and property¹⁴⁴
- Welfare measures and special needs¹⁴⁵
- Exceptions granted by the Anti-Discrimination Tribunal.¹⁴⁶

¹³⁴ Equal Opportunity Act, 1995, s. 14 (a) to (d).

¹³⁵ Equal Opportunity Act, 1995, s. 16.

¹³⁶ Equal Opportunity Act, 1995, s. 19.

¹³⁷ Equal Opportunity Act, 1995, s. 20.

¹³⁸ Equal Opportunity Act, 1995, s. 21.

¹³⁹ Equal Opportunity Act, 1995, s. 23 (a).

¹⁴⁰ Equal Opportunity Act, 1995, s. 25.

¹⁴¹ Equal Opportunity Act, 1991, s. 69 and s. 70.

¹⁴² Equal Opportunity Act, 1995, s. 74.

¹⁴³ Equal Opportunity Act, 1995, s. 79.

¹⁴⁴ Equal Opportunity Act, 1995, s. 80.

¹⁴⁵ Equal Opportunity Act, 1995, s. 82.

¹⁴⁶ Equal Opportunity Act, 1995, s. 83.

Enforcement procedure

The Equal Opportunity Act, 1995 continues the Equal Opportunity Commission¹⁴⁷ and establishes an Anti-Discrimination Tribunal.¹⁴⁸ The functions of the Anti-Discrimination Tribunal were assumed by the Victorian Civil and Administrative Tribunal under the Victorian Civil and Administrative Tribunal Act, 1998. The functions of the Commission include:

- To receive and investigate complaints¹⁴⁹
- To establish and undertake information and education programs.¹⁵⁰

The Commission is the first body in the complaint procedure. It can receive a complaint from a person¹⁵¹ within twelve months¹⁵² that is not frivolous, vexatious, misconceived or lacking in substance.¹⁵³ The Commission may reject a complaint that involves subject matter that would be better dealt with by a Tribunal, other than the Victorian Civil and Administrative Tribunal.¹⁵⁴ A complaint can be referred to the Victorian Civil and Administrative Tribunal when conciliation has failed, or is inappropriate.¹⁵⁵ An appeal from a decision of the Victorian Civil and Administrative Tribunal is available to the Court of Appeal of Victoria on a point of law.¹⁵⁶

Criminal legislation in Victoria does not prohibit discrimination in employment based on criminal conviction/ex-offender/ex-prisoner status. In addition, Victoria has ceded some of its industrial relations powers to the Commonwealth. In summary, the protection afforded against discrimination in employment is primarily found in the Equal Opportunity Act, 1995, which prohibits discrimination on the basis of a number of grounds, including political belief or activity and industrial activity.

I. Socio-Economic Status/Social Origin

There is no prohibition of discrimination on the basis of socio-economic status, at commonwealth, federal or state levels in Australia. However, “social origin” is included as a prohibited ground of discrimination in legislation, at federal and state levels. The term social origin, as used in Australia, is based on the usage in the ILO Convention No.111, concerning Discrimination in Employment and Occupation. Correspondence with the relevant enforcement bodies in Australia, and a survey of the relevant legislation and case-law databases, suggests that social origin as a protected ground has not given rise to a body of jurisprudence as yet.

The Human Rights and Equal Opportunity Commission (HREOC) Act, 1986 prohibits discrimination on the basis of *inter alia* social origin. The Act applies to Commonwealth bodies or agencies and to the sphere of employment. The *HREOC Act* incorporated a number of

¹⁴⁷ Equal Opportunity Act, 1995, s. 160 (1). This body had already been established under the Equal Opportunities Act, 1984.

¹⁴⁸ Equal Opportunity Act, 1995, s. 180 (1).

¹⁴⁹ Equal Opportunity Act, 1995, s. 161 (1)(b).

¹⁵⁰ Equal Opportunity Act, 1995, s. 161 (1)(c).

¹⁵¹ Equal Opportunity Act, 1995, s. 104 (1)(a).

¹⁵² Equal Opportunity Act, 1995, s. 108 (1)(c).

¹⁵³ Equal Opportunity Act, 1995, s. 108 (1)(a).

¹⁵⁴ Equal Opportunity Act, 1995, s. 108 (1)(b).

¹⁵⁵ Equal Opportunity Act, 1995, s. 117 (2).

¹⁵⁶ Victorian Civil and Administrative Tribunal Act, 1998, s. 148. Under the Equal Opportunity Act, 1995 appeal to the Supreme Court of Victoria on a point of law was available by virtue of s. 150 (1).

international treaties into Australian law, notably ILO Convention No. 111, which lists social origin as a prohibited ground of discrimination in employment.

At Commonwealth level, the Workplace Relations Act, 1996, includes limited references to social origin/socio-economic status. The Act sets out a commitment to respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis *inter alia* of “national extraction or social origin”.¹⁵⁷ This is stated as one of the principal objects of the Act, rather than a justiciable provision *per se*. The Act includes provisions, intended to give effect to the ILO Convention No.111 concerning Discrimination in respect of Employment or Occupation. Section 170CK, prohibits termination of employment on grounds *inter alia* of national extraction or social origin.¹⁵⁸ Exceptions from the prohibition on discrimination are permitted where such discrimination is:¹⁵⁹

based on the inherent requirements of the particular position concerned;

or where, social origin is a reason:

for terminating a person’s employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the employer terminates the employment in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.

At State level, the only legislative provisions on social origin/socio-economic status were found in Tasmania. In Tasmania, the Anti-Discrimination Act, 1990 originally included socio-economic status as a prohibited ground of discrimination. This provision, however, was subsequently removed and socio-economic status is not included as a prohibited ground in the Anti-Discrimination Act, 1998. However, Tasmania’s Anti-Discrimination Commission has argued that failing to include this ground limits the operation of the Act. In its annual report for 2000-1, the Commission cites occupation and socio-economic status as the grounds that are most often raised in discussion with organisations and by claimants or prospective claimants under the Anti-Discrimination Act.¹⁶⁰

II. Trade Union Membership

Australia — Commonwealth

The Workplace Relations Act 1996, having stated that its objects include ensuring that employees are not discriminated against or victimised because they are, or are not, members or officers of industrial associations,¹⁶¹ prohibits various kinds of discrimination¹⁶² against an employee, independent contractor or other person for “prohibited reasons”. The “prohibited reasons” are as follows:

¹⁵⁷ Workplace Relations Act, 1996, s. 3(k)(j).

¹⁵⁸ Workplace Relations Act, 1996, s.170CK(2)(f).

¹⁵⁹ *Ibid.* s.170CK(3) and (4).

¹⁶⁰ Anti-Discrimination Commission of Tasmania, Annual Report 2000-01, ‘Operation of the Act’, <http://www.justice.tas.gov.au/adc/annualreport2001-2002.htm>.

¹⁶¹ Workplace Relations Act 1996, s.298A(b). The Act also states that one of its principal objects is ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association (s.3(f) and s.298A(a)).

¹⁶² The prohibited discrimination includes dismissal, injury of the employee in his/her employment, alteration of the position of the employee to the employee’s prejudice, refusal to employ another person, and discrimination against another person in the terms or conditions on which the employer refuses to employ the other person — s.298K Workplace Relations Act 1996.

298L Prohibited Reasons

- (1) Conduct referred to in subsection 298K(1) or (2) is for a prohibited reason if it is carried out because the employee, independent contractor or other person concerned:
- (a) is, has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association;¹⁶³ or
 - (b) is not, or does not propose to become, a member of an industrial association; or
 - (c) in the case of a refusal to engage another person as an independent contractor:
 - (i) has one or more employees who are not, or do not propose to become, members of an industrial association; or
 - (ii) has not paid, or does not propose to pay, a fee (however described) to an industrial association; or
 - (d) has refused or failed to join in industrial action; or
 - (e) in the case of an employee-has refused or failed to agree or consent to, or vote in favour of, the making of an agreement to which an industrial association of which the employee is a member would be a party; or
 - (f) has made, proposes to make or has at any time proposed to make an application to an industrial body for an order under an industrial law for the holding of a secret ballot; or
 - (g) has participated in, proposes to participate in or has at any time proposed to participate in a secret ballot ordered by an industrial body under an industrial law; or
 - ...
 - (l) in the case of an employee, or an independent contractor, who is a member of an industrial association that is seeking better industrial conditions-is dissatisfied with his or her conditions; or
 - (m) in the case of an employee or an independent contractor-has absented himself or herself from work without leave if:
 - (i) the absence was for the purpose of carrying out duties or exercising rights as an officer of an industrial association; and
 - (ii) the employee or independent contractor applied for leave before absenting himself or herself and leave was unreasonably refused or withheld; or

¹⁶³ An "industrial association" is defined as follows in s.298B of the Workplace Relations Act 1996: (a) an association of employees and/or independent contractors, or an association of employers, that is registered or recognised as such an association (however described) under an industrial law; or (b) an association of employees and/or independent contractors a principal purpose of which is the protection and promotion of their interests in matters concerning their employment, or their interests as independent contractors, as the case requires; or (c) an association of employers a principal purpose of which is the protection and promotion of their interests in matters concerning employment and/or independent contractors; and includes a branch of such an association, and an organisation.

- (n) as an officer or member of an industrial association, has done, or proposes to do, an act or thing for the purpose of furthering or protecting the industrial interests of the industrial association, being an act or thing that is:
 - (i) lawful; and
 - (ii) within the limits of an authority expressly conferred on the employee, independent contractor or other person by the industrial association under its rules.
- (o) in the case of an employee or an independent contractor — has not paid, has not agreed to pay, or does not propose to pay, a bargaining services fee.¹⁶⁴

A variety of remedies for breach of this Part of the Act¹⁶⁵ are provided, e.g. compensation, injunctions, or penalties.¹⁶⁶ It is also stated that a provision of an agreement is void to the extent that it requires or permits any conduct that would contravene this Part of the Act.¹⁶⁷

The Act has recently been amended to include a specific prohibition on provisions in collective agreements which require the payment of bargaining services fees by non union members to the relevant trade union which is party to the agreement.¹⁶⁸

Similar restrictions concerning *termination* of employment are laid down elsewhere in the Act:¹⁶⁹

s. 170CK Employment not to be terminated on certain grounds

- (2) Except as provided by subsection (3) or (4), an employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:

...

- (b) trade union¹⁷⁰ membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;
- (c) non-membership of a trade union;
- (d) seeking office as, or acting or having acted in the capacity of, a representative of employees.

There is also a non-discrimination clause concerning the negotiation of "certified agreements":

170NB Employers not to discriminate between unionist and non-unionist

- (1) An employer must not, in negotiating an agreement under Division 2 or 3, discriminate between employees of the employer:

¹⁶⁴ Paragraph (o) was added by the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003, s.6.

¹⁶⁵ Part XA of the Act ('Freedom of Association'), which includes sections 298A – 298Z.

¹⁶⁶ Workplace Relations Act 1996, s.298U. The previous legislation, the Industrial Relations Act, did not provide for such a broad range of remedies — Creighton, Ford & Mitchell *Labour Law: Cases and Materials* 2nd ed. Law Book Company: Sydney; 1993, p.46.

¹⁶⁷ Part XA of the Act ('Freedom of Association'), which includes sections 298A – 298Z.

¹⁶⁸ Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003, available at <http://scaleplus.law.gov.au> (visited 11 June 2003).

¹⁶⁹ Remedies in termination of employment cases include reinstatement or payment in lieu of reinstatement.

¹⁷⁰ Under s.4 of the Workplace Relations Act 1996, "trade union" means: (a) an organisation of employees; (b) an association of employees that is registered or recognised as a trade union (however described) under the law of a State or Territory; or (c) an association of employees a principal purpose of which is the protection and promotion of the employees' interests in matters concerning their employment.

- (a) because some of those employees are members of an organisation¹⁷¹ of employees while others are not members of such an organisation; or
 - (b) because some of those employees are members of a particular organisation of employees, while others are not members of that organisation or are members of a different organisation of employees.
- (2) In so far as a purpose of the agreement is to settle some or all of the matters that are the subject of an industrial dispute to which the employer is a party, subsection (1) does not require the agreement to cover:
- (a) matters that are not the subject of that dispute; or
 - (b) employees whose terms and conditions of employment are not the subject of that dispute.
- (3) In so far as a purpose of the agreement is to prevent industrial disputes of a particular kind, subsection (1) does not require the agreement to cover:
- (a) matters that are not likely to be the subject of a dispute of that kind; or
 - (b) employees whose terms and conditions of employment are not likely to be the subject of a dispute of that kind.

The Act also provides for certification of conscientious objection to organisations of employees.¹⁷²

The Australian Industrial Relations Commission has ordered the removal of a clause in an agreement stating that “absolute preference of employment shall be given to financial members of the union”¹⁷³ and of a clause stating that “the union is the exclusive representative of eligible employees of the company” in certain matters.¹⁷⁴ However, it has not removed a clause which stated that a union had exclusive rights to represent the industrial interests of employees covered by an agreement.¹⁷⁵

The Human Rights and Equal Opportunity Commission Act 1986 delegated power to the Commission to declare additional grounds as constituting discrimination.¹⁷⁶ In 1989, the Commission made regulations adding “trade union activity” (amongst other grounds) as a ground covered by the Act.¹⁷⁷ No definition of trade union activity is provided.¹⁷⁸ Three reports have been made to the Attorney General concerning such activity.¹⁷⁹ One example

¹⁷¹ “Organisation” means an organisation registered under the Act — Workplace Relations Act 1996, s.4.

¹⁷² Workplace Relations Act 1996, s.267. This section is rarely used — O’Neill *S Bills Digest No. 108 2001-2002* Department of the Parliamentary Library, available at www.aph.gov.au/library/pubs/bd/ (visited 7 December 2002).

¹⁷³ *CEPU and Longreach Fire Services*, Case 768/98 Print Q2546, 29 June 1998.

¹⁷⁴ *P.R. Dawson & Sons* Dec. 1146/98 Print Q6068, 11 September 1998.

¹⁷⁵ *Chris’s Coaches* Dec. 993/98 Print Q4539, 5 August 1998. Extract: “In my view the clause does not contravene the freedom of association provisions. Section 170LJ of the Act clearly recognises the right of an employer and an organisation to negotiate an agreement on behalf of persons eligible to be members of it provided the agreement is approved by a valid majority of the employees concerned. The Act contemplates an employer recognising an organisation for purposes of negotiating agreements. Moreover, the Act does not appear to preclude an employer exclusively recognising, under s.170LJ, one particular organisation. In my view a clause which provides for the recognition of an association for purposes of representing the industrial interests of employees does not contravene Part XA of the Act unless either directly or by some other indirect means it seeks to force employees to join the organisation.”

¹⁷⁶ Human Rights and Equal Opportunity Commission Act 1986, s. 3(1)(b).

¹⁷⁷ Human Rights and Equal Opportunity Commission Regulations, 1989 (No. 407 of 1989), s. 4(a)(x).

¹⁷⁸ However, under s.3(1) of the Human Rights and Equal Opportunity Commission Act 1986, “trade union” means (a) an organization of employees that is a registered organization within the meaning of the Workplace Relations Act 1996; or (b) a trade union within the meaning of any State Act or law of a Territory; or (c) any other similar body.

¹⁷⁹ Human Rights Commissioner Reports: Report No. 3, 1997; Report No. 4, 1997 and Report No. 9, 2000, available at www.humanrights.gov.au/human_rights/trade_union/ (visited 7 December 2002).

is *Edwards, Farrell & Moate v O'Brien Metal Products Pty Ltd*.¹⁸⁰ in which three employees joined a union because of concerns about safety at a plant. They were subjected to harassment and claimed they were forced to leave their work. The Commissioner found that the company had discriminated against the three employees on the basis of trade union activity and recommended that they receive \$5,000 compensation each.¹⁸¹ The Commissioner also called for reform of the law:

I still consider that a comprehensive federal anti-discrimination law should be enacted to ensure effective protection from discrimination on any prescribed ground in or under ILO 111¹⁸² through enforceable remedies.¹⁸³

Summary of Trade Union Membership Ground — Australia (Commonwealth)

1. Scope: Membership, non-membership and activities.
2. The ground applies to refusals of employment as well as dismissals and detriment short of dismissal.
3. There is no specific reference to the 'closed shop' in the legislation (but see case-law).
4. There is no specific provision permitting the employer to grant benefits to union members (e.g. time off to union officers for union business).

Queensland

The Industrial Relations Act 1999 prohibits various kinds of conduct¹⁸⁴ for a "prohibited reason." The list of prohibited reasons is very similar to the list contained in s.298L of the Workplace Relations Act 1996 as outlined above, but with some minor variations:

s. 104(1)

- (a) is, has been, proposes to cease being or become, or has proposed to cease being or become a member or representative of an industrial association; or
- (b) is not, or does not propose to become, a member or representative of an industrial association; or
- (c) has not paid, or does not propose to pay, a fee, however called, to an industrial association; or
- (d) is, has been, proposes to cease being or become, or has proposed to cease being or become an exempted person;¹⁸⁵ or
- (e) has not or does not propose to join in industrial action; or

¹⁸⁰ Human Rights Commissioner, Report No. 9, 2000.

¹⁸¹ As was noted earlier in the chapter, when the HREOC makes a report of this type to the Attorney General, the report is not legally enforceable.

¹⁸² International Labour Organisation, Discrimination (Employment and Occupation) Convention 1958 (ILO 111).

¹⁸³ *Ibid.*

¹⁸⁴ This conduct includes refusing to engage the person as an employee or independent contractor, terminating a person's contract, disadvantaging or injuring a person, discriminating against a person in the conditions on which the person is offered a contract, discrimination between members and non-members of an employee organisation, and discrimination between members of one employee organisation and another — s.105 Industrial Relations Act 1999.

¹⁸⁵ An exempted person is a person who has received a certificate of exemption from trade union membership on the basis of his or her conscientious beliefs. The person must pay an amount equivalent to the membership subscription to the registry — ss.111-116 Industrial Relations Act 1999.

- (f) has not agreed or consented to, or voted for, the making of an agreement to which an industrial association of which the person is a member, would be a party; or
- (g) has participated in, proposes to participate in or has proposed to participate in, a secret ballot ordered by an industrial body under an industrial law; or
- ...
- (k) is a member of an industrial association that is seeking better industrial conditions; or
- (l) is dissatisfied with the person's industrial conditions; or
- (m) has absented himself or herself from work as an employee or independent contractor without leave and—
 - (i) the absence was to carry out a duty or exercise a right as an officer of an industrial association; and
 - (ii) the person applied for leave before absenting himself or herself and leave was unreasonably refused or withheld; or
- (n) as an officer or member of an industrial association has done, or proposes to do, an act or thing that is lawful and authorised by the association's rules to further or protect the industrial interests of the association or its members; or
- (o) is a health and safety representative appointed under the Workplace Health and Safety Act 1995.

Elsewhere in the Act,¹⁸⁶ a *dismissal* is deemed to be unfair if it is for an “invalid reason”, which includes the following:

- (b) seeking office as, or acting or having acted in the capacity of, an employees' representative;
- (c) membership of an employee organisation or participation in the organisation's activities outside working hours or, with the employer's consent, during working hours;
- (d) non-membership of an employee organisation;
- ...
- (m) discrimination.¹⁸⁷

The Anti-Discrimination Act 1991 prohibits employment discrimination on the basis of “trade union activity”¹⁸⁸ but does not provide a definition of such activity. Certain sections of the 1991 Act are stated not to apply to discrimination based on trade union activity if s.105 of the Industrial Relations Act 1999 applies.¹⁸⁹ There are also standard exemptions applicable to the 1991 Act (e.g. genuine occupational requirements) but none of these has been particularly drafted with the trade union activity ground in mind.

¹⁸⁶ Industrial Relations Act 1999, s.73(2).

¹⁸⁷ Discrimination is defined in Schedule 5 to the 1999 Act as meaning discrimination that would contravene the Anti-Discrimination Act, 1991, or is based on sexual preference or family responsibility.

¹⁸⁸ Anti-Discrimination Act 1991, s.7(1)(k).

¹⁸⁹ Anti-Discrimination Act 1991, s.14(2) and s.15(2). Section 105 defines prohibited conduct based on trade union membership — see fn. 184 above.

Summary of Trade Union Membership Ground — Queensland

1. Scope: Membership, non-membership and activities.
2. The ground applies to refusals of employment as well as dismissals and detriment short of dismissal.
3. There is no specific reference to the 'closed shop' in the legislation (but see Commonwealth case-law).
4. There is no specific provision permitting the employer to grant benefits to union members (e.g. time off to union officers for union business).

Tasmania

Section 87 of the Industrial Relations Act 1984 (as amended) states that "it is not compulsory for any person to be or not to be a member of, or to join or not to join, any organisation or association."¹⁹⁰ It also makes it a criminal offence for a person to take any action with the effect of making another person join or not join an association, or to take any action with the intention of coercing another person to join or not to join an association.¹⁹¹

The Anti-Discrimination Act 1998 prohibits employment discrimination based on "industrial activity" and s.3 of the Act defines such activity as follows:

- (a) being or not being a member of, or proposing or refusing to join, an industrial organisation; or
- (b) participating in, not participating in, or proposing or refusing to participate in, a lawful activity organised or promoted by an industrial organisation.¹⁹²

The Anti-Discrimination Commission has pointed out that industrial activity is narrowly defined in the Act to focus only on membership or non-membership of a union, and activity promoted by a union.¹⁹³ The Commissioner has expressed the view that the whole union need not have officially established a campaign of some sort in order for an individual employee to be able to claim discrimination based on the industrial activity ground.¹⁹⁴

Claims based on industrial activity constituted 5.8% of claims in 1999-2000 (11 of 192 claims) and 4.2% of claims in 2000-2001 (12 of 287 claims.)¹⁹⁵ Many of the claims relate to the promotion of occupational health and safety, where union members raise industrial hazards with their employer and suffer detriment because of this. These claims are accepted both under the industrial activity ground and also under the political belief or activity ground because it is a political belief in the promotion of health and safety at work that leads to the employee complaining about the hazard.¹⁹⁶ Another type of claim has been summarised as follows:

¹⁹⁰ Industrial Relations Act, 1984, s.87(1).

¹⁹¹ Industrial Relations Act, 1984, s.87(2).

¹⁹² An 'industrial organisation' means an organisation of employees, a trade union, an organisation of employers or any other organisation established for the purposes of persons who carry on a particular industry, trade, profession, business or employment — Anti-Discrimination Act 1998, s.3.

¹⁹³ Annual Report of the Anti-Discrimination Commission 1999-2000, available at www.justice.tas.gov.au/adc/ar99-00/ar.htm. The same point is made in the 2000-2001 Annual Report at www.justice.tas.gov.au/adc/annualreport2001-2002.htm (both visited 7 December 2002).

¹⁹⁴ Electronic mail, 18 November 2002, to the authors of this Report from Dr Jocelyne Scutt of the Anti-Discrimination Commission of Tasmania.

¹⁹⁵ *Ibid.*

¹⁹⁶ Electronic mail, 16 November 2002, to the authors of this Report from Dr Jocelyne Scutt of the Anti-Discrimination Commission of Tasmania.

We also had a claim where the worker contended that he had been discriminated against because the union negotiated an enterprise agreement and as he was not a member of the union, he was cut out of involvement in the negotiations, etc. We ultimately dismissed the claim (after investigation) because in the next round of the enterprise agreement, he went to the industrial commission and sought leave to intervene and the industrial commission allowed him to do so and ‘have his say’. This meant that although he was not a member of the union, he had involvement in the negotiation of the enterprise agreement, effectively, in that he was allowed to make his submissions at the industrial commission level.¹⁹⁷

Summary of Trade Union Membership Ground — Tasmania

1. Scope: Membership, non-membership and activities.
2. The ground applies to refusals of employment as well as dismissals and detriment short of dismissal.
3. There is no specific reference to the ‘closed shop’ in the legislation (but see Commonwealth case-law).
4. There is no specific provision permitting the employer to grant benefits to union members (e.g. time off to union officers for union business).

Victoria

Victoria has ceded aspects of its powers regarding industrial relations to the Commonwealth and so Victoria does not have an Industrial Tribunal.¹⁹⁸

The Equal Opportunity Act 1995 prohibits employment discrimination based on “industrial activity”¹⁹⁹ and defines this as follows:

s. 4 “industrial activity” means—

- (a) being or not being a member of, or joining, not joining or refusing to join, an industrial organisation;²⁰⁰
- (b) participating in, not participating in or refusing to participate in a lawful activity organised or promoted by an industrial organisation.

There are various standard exceptions and exemptions, but none of particular relevance to the industrial activity ground. Employment discrimination complaints based on the industrial activity ground constituted 4.9% of all employment discrimination complaints in 1999-2000, and 2.7% of such complaints in 2000-2001.²⁰¹

In *Dickenson v Shire of Yarra Ranges*²⁰² a swimming teacher made representations to his employer in relation to improving safety, service and other aspects of the business. The

¹⁹⁷ *Ibid.*

¹⁹⁸ Commonwealth Powers (Industrial Relations) Act 1996 (Vic); Part XV, Division 2 of the Workplace Relations Act 1996 (Cth).

¹⁹⁹ Equal Opportunity Act 1995, s.6(c).

²⁰⁰ An ‘industrial organisation’ means an organisation of employees, an organisation of employers or any other organisation established for the purposes of people who carry on a particular industry, trade, profession, business or employment — s.4 Equal Opportunity Act 1995.

²⁰¹ Equal Opportunity Commission, Annual Reviews, available at www.eoc.vic.gov.au (visited 7 December 2002). In 1999-2000 employment discrimination complaints based on the industrial activity ground constituted 139 out of a total of 2,834 employment discrimination complaints and they constituted 65 out of a total of 2,445 such complaints in 2000-2001.

²⁰² Victorian Civil and Administrative Tribunal [2000] VCAT 1093 (31 May 2000), available at www.austlii.edu.au (visited 7 December 2002).

employee alleged that his hours of work had been reduced because of these actions, and the tribunal held that his actions could constitute “industrial activity.”²⁰³

Summary of Trade Union Membership Ground — Victoria

1. Scope: Membership, non-membership and activities.
2. The ground applies to refusals of employment as well as dismissals and detriment short of dismissal.
3. There is no specific reference to the ‘closed shop’ in the legislation (but see Commonwealth case-law).
4. There is no specific provision permitting the employer to grant benefits to union members (e.g. time off to union officers for union business).

III. Criminal Conviction/Ex-Offender/Ex-Prisoner

A mix of spent conviction and discriminatory legal provisions exist in Australia that regulate the criminal records of ex-offenders. This is so given that each State, as well as the Commonwealth, administers its own criminal justice system. As regards spent conviction schemes, the Federal and State structure differ on important issues such as convictions covered, the length of rehabilitation periods, and the means of obtaining spent conviction status. As regards the protection of human rights, all Australians are afforded protection from unfair discrimination in relation to their dealings with Federal, State, local government bodies and private employers. This protection is governed by the Federal Human Rights and Equal Opportunity Commission Act, 1986, which implements Australia’s commitment to ILO Convention No. 111, the Discrimination (Employment and Occupation) Convention, 1958. On 21 December, 1989, the Governor General introduced new regulations which declared a further 12 grounds of discrimination under the framework of the Human Rights and Equal Opportunity Act, 1986. They included discrimination on the ground of a criminal record and they came into effect on 1 January, 1990. The Human Rights Commission, accordingly, has jurisdiction to inquire into complaints of discrimination on the grounds of previous criminal records but, as we shall see, it does not have the power to make final orders. A number of States have also incorporated provisions prohibiting discrimination on the basis of a previous criminal record.²⁰⁴

The Australian Law Reform Commission, Discussion Paper, 1985

In 1985 the Law Reform Commission of Australia published a discussion paper, entitled *Criminal Records*.²⁰⁵ It pointed out, to begin with, that there was a misconception in Australia that spent conviction laws were uncommon. Such schemes were in fact remarkably widespread and could be found in many common law countries as well as in most countries in Europe. Indeed the discussion paper noted that Australia’s ‘lack of a scheme for spent convictions is a distinguishing characteristic which [it] ... shares with the Third World, these schemes being the norm in countries with which Australia compares itself’.²⁰⁶ It was also

²⁰³ This was an application to strike out the complaint, which failed. The final decision in the case is not known.

²⁰⁴ See Knowler J “Living Down the Past — spent conviction schemes in Australia” 1994 *Privacy Law and Policy Reporter* pp 80-92.

²⁰⁵ The Law Reform Commission, *Criminal Records* (Discussion Paper No. 25) 1985.

²⁰⁶ *Ibid*, p. 88.

noted that there was considerable variation in the comparative material on spent convictions as regards approach, application mechanisms, offences covered and permitted use of records. Approaches documented included: destruction of the actual record (as practised in Japan and France); sealing (closing the record so that it cannot be readily examined); annotation of the record (this is simply an annotation on the record, for example that the offence is pardoned, as utilised in Belgium); deeming (where a person's criminal record, in certain circumstances, is deemed to be spent, as in Great Britain), and; restrictions on dissemination or limiting the use to which it is put. Moreover, the discussion paper noted that a comparative analysis of spent conviction schemes revealed that they could also be categorised according to the manner in which they were regulated. Three means of regulation were identified:

1. Automatic. Under such a scheme, the individual with a previous criminal record did not need to apply for his or her conviction to become spent; it occurred automatically after a prescribed conviction free period (as in Great Britain).
2. Non-automatic. Under such a scheme, the individual with a criminal history will petition the court which has a discretion to order that the criminal record be regarded as spent (most U.S. states, according to the discussion paper, operated along these lines).
3. Hybrid. Such schemes treat records as automatically spent in certain circumstances, but may also place the onus on a person to apply in others. For example, it was noted that in Japan the process occurs automatically after a fixed period but could be accelerated by allowing the individual to make an application for 'earlier restoration of rights'.

A variety of jurisdictions also enacted provisions which ensured that certain offences remained outside the ambit of the scheme. In Great Britain, for example, it was not available to individuals sentenced to more than 30 months of imprisonment. In New Jersey, certain offences including kidnapping, sexual assault, robbery, arson, and drug trafficking offences could not be treated as spent. A number of jurisdictions, according to the discussion paper, also provided for situations in which criminal records could be employed even though they were formally treated as spent. These situations related to:

- Sentencing (where an individual's prior history could be available in the disposal of the offence, even though the said history may be spent)
- Admissibility in evidence in criminal proceedings (similar fact evidence, cross examination as to credibility)
- Admissibility in other court proceedings relating to adoption, guardianship, wardship, marriage, custody and care of a minor.
- Criminal investigations
- Third party rights and victim compensation
- Occupations and licences
- Bail

In conclusion, the discussion paper noted the following from its review of comparative materials:

What emerges ... is that the need for these laws has been recognised very widely, except in the Third World. The response has differed remarkably from country to country. There is not a great deal of useful guidance on the form which laws should take. Overseas law tend to be ad hoc in their response to the problem of the old criminal record, and tend to be tailor made in the sense that a country's laws tend very much to reflect its particular legal system and system of administration of records. No great assistance is derived from the comparative study as to the rationale which should underlie laws in this area. However, it is instructive that the issue of old convictions is perceived to be a problem in such a wide and diverse range of countries, and they have thought that old criminal records to be a sufficiently serious problem to make legislative and administrative responses.²⁰⁷

Following widespread dissemination of the Commission's findings, the Law Reform Commission produced a 126 page report on the specific issue of whether criminal records should be deleted after a specified period had elapsed.

The Law Reform Commission Report, 1987

This Report arose out of the discussion paper which suggested that a separate inquiry should be held on the question of criminal records, and particularly the means by which they could be expunged. To begin with, the Commission suggested that there was a

strong case for doing something about the problems faced by former offenders. If nothing were done, society would be needlessly depriving itself of the talents and energies of people in whose positive development it has a distinct interest. It would be encouraging offenders to stay trapped in a vicious cycle of crime, prison, and more crime. On the other hand, the Commission was also mindful of the need to balance such interests against other public interest considerations including freedom of expression, criminal investigation, informed decision making, the administration of justice and the interests of victims.²⁰⁸

As regards spent convictions, the Commission concluded that the appropriate legislative response should be to provide that there is no obligation to disclose a spent conviction. If the obligation was to be required in certain circumstances, these circumstances would have to be established expressly by legislation. The Commission, however, rejected the 'statutory lie' approach to spent convictions, which made it lawful for an individual to deny, whether on oath or otherwise, the existence of a spent conviction. There were two reasons for this: a) it would be wrong for a legislature to give an individual the statutory authority to lie, and b) no statutory provision can rewrite history.

²⁰⁷ *Ibid*, p. 102. See also Council of Europe Committee of Ministers. Recommendation No R (84) 10 of the Committee of Ministers of Member States on the Criminal Record and Rehabilitation of Convicted Persons (Adopted by the Committee of Ministers on 21 June 1984). Its recommendation, referred to in the discussion paper, suggested that 'considering that a crime policy aimed at crime prevention and the social integration of offenders should be pursued and developed in the member states, ... and considering that any other use of criminal records [other than in assisting the judiciary to dispose of individual cases] may jeopardise the convicted person's chances of social integration, and should therefore be restricted to the utmost, the Committee of Ministers ... recommends that the governments of member states review their legislation and their practice relating to criminal records.'

²⁰⁸ Law Reform Commission, *Spent Convictions* (Report No. 37), 1987, para. 6.

As regards exemptions, the Commission noted that the courts, when sentencing offenders, would be exempt from the obligation to disregard spent convictions. Evidence of prior convictions would also be admissible under evidentiary rules if the conviction itself was in issue at trial, if it would support or undermine the credibility of a witness, in relation to similar facts, and in civil proceedings of proof of facts on which the decision to convict was based. As regards the issue of credibility and similar facts, the Commission recommended that leave of the court should be required before such evidence could be adduced. The evidence would also have to be substantially similar in the case of similar fact evidence, and, in the case of credibility, would have to have strong probative value. As regards exemption from other decision makers (i.e. employers), the Commission suggested:

The underlying rationale for the spent conviction scheme requires that, before there can be an exemption for a particular class of decision maker, the relevance of the spent conviction to the decision making process, and the public interest in allowing its consideration, must clearly be demonstrated.²⁰⁹

Any claim for such an exemption should be scrutinised by an expert body to ensure that exemption could be justified on those grounds. Such exemptions would also have to be subject to a 'sunset clause' — the exemptions should only have effect for five years after coming into operation; this, it was submitted, would ensure continued scrutiny of the justifications for a particular exemption.²¹⁰ In relation to the expert body, the Commission noted that the protections a scheme would afford should not be delayed because of any lengthy negotiations which may be necessary before such a body could function effectively.

The Commission also considered the type of convictions that could be included on the scheme. It suggested that protection should extend to all convictions including serious offences:

the principle underlying any spent conviction scheme is that, as time progresses, the relevance of past offences to making decisions about offenders decreases. For the offender whose life has since the offence been free of further conviction, this is particularly so. And it is so regardless of the type of offence for which the offender was convicted. Any discussion, therefore, of the range of convictions that should be covered by a spent conviction scheme should start from the premise that strong and persuasive reasons are required before a particular class of offences are excluded, whether because of their innate seriousness or for any other reason.²¹¹

A conviction could be regarded as old under the Commission's proposals after 10 conviction free years for adults and after 2 years for juveniles. If juveniles were convicted of a serious offence, however, for the purposes of the scheme, they should be treated as adults. As such, no convictions, according to the Law Reform Commission, should be excluded from the scheme and all offences would become spent automatically — provided particular decision makers had not been exempted — after the expiration of a prescribed number of years.²¹²

²⁰⁹ *Ibid*, para 40.

²¹⁰ *Ibid*, para 43.

²¹¹ *Ibid*, para 45.

²¹² Mr George Zdenowski, dissenting, suggested that the prescribed period for adult offenders of 10 years was too conservative. This argument was premised on the belief — supported by research — that the majority of ex-offenders who committed further crimes did so within a period of three years after release. He suggested a period of five years and noted that this was the period recommended in New Zealand.

As regards discrimination, the Commission noted that there were virtually no limits in a person's power to discriminate against another on the ground of a criminal record. The Commission did point out however that, at the time of reporting, it was possible to complain about discrimination on the ground of a criminal record in the area of employment and occupation to the National or State Committees on Discrimination in Employment and Occupation, established in conformity with ILO Convention (No. 111).²¹³ In November 1986 these functions were assumed by the Human Rights and Equal Opportunity Commission. Its remit is to inquire into practices which may be inconsistent with human rights as recognised by 'any relevant international instrument'. Discrimination on the ground of a criminal record could, according to the Commission, fall within the schema of Article 2(1) of the International Covenant on Civil and Political Rights which provides that rights are to be available 'without distinction of any kind such as race, colour, sex ... religion, political and other opinion, national or social origin, property, birth *or other status*'. The Commission suggested a number of reforms:

- First, regulations should be made under the Human Rights and Equal Opportunity Act 1986 to provide that discrimination on the ground of criminal convictions — or of the facts relating to convictions — could be covered by the equal opportunity provisions of that Act.
- Secondly, the Human Rights and Equal Opportunity Commission should acknowledge that discrimination on the ground of criminal record falls within the framework of 'other status' provisions of the International Covenant on Civil and Political Rights and that its powers extend accordingly.
- Thirdly, and in order to ensure enforceable rights, and formal enforceable mechanisms, commonwealth legislation should be introduced. This would have to be supported by complimentary State action. Under the Human Rights and Equal Opportunity Act of 1986, the Commission's functions were primarily conciliatory and didactic in nature. It did not have the power to make a determination on questions of discrimination — this was in marked contrast to its power to make such determinations, enforceable through the courts, under the Sex Discrimination Act, 1984 (Cth).²¹⁴

As regards direct discrimination provisions, the Law Reform Commission suggested that it should extend to characteristics that appertain generally or are generally imputed to former offenders. Moreover, it was suggested that a requirement that direct discrimination be unreasonable was needed given that there would be instances where discrimination could be justified. The Law Reform Commission of Western Australia had earlier suggested that it was wrong to restrict discriminatory provisions to a requirement of reasonableness.²¹⁵ The Commission, however, saw no reason to depart from a requirement of reasonableness:

Once a case of discrimination is made out, the requirement places the onus on the person who is alleged to have discriminated to demonstrate that the actions were reasonable. Rather than creating uncertainty, the requirement of reasonableness encourages flexibility. Should the requirement be dropped, it would be necessary to create a large number of exemptions to cover those circumstances in which it would be legitimate to make distinctions between people on the ground of criminal record.²¹⁶

²¹³ *Ibid*, para 72.

²¹⁴ *Ibid*, para. 79.

²¹⁵ *Ibid*, para 86.

²¹⁶ *Ibid*.

The Commission also recommended that discriminatory provisions be limited to direct discrimination, that the provisions should extend to cover records of charges and arrests, and that they should not be limited to spent convictions.

The Commonwealth Protection of Human Rights

On 21 December, 1989, the Governor General made regulations which declared an additional 12 grounds of discrimination for the purpose of the Human Rights and Equal Opportunity Commission Act, 1986 (Cth). They included discrimination on the ground of a criminal record and it came into effect on 1 January 1990. Discrimination on the basis of a criminal record was not however made unlawful so that the Commission only has the power to conciliate a claim of discrimination.²¹⁷

The workings of the Act as it relates to discrimination on the ground of a criminal record is evident in *Ms Renai Christensen v. Adelaide Casino Pty Ltd*.²¹⁸ On 6 November, 2000, the complainant lodged a complaint with the Commission alleging discrimination on the basis of her criminal record when seeking employment with Adelaide Casino. The respondent employer had rejected her application for employment as a bar attendant in October 2000. In the course of that application the complainant had notified the respondent that she had been convicted of larceny as a juvenile (at the age of 16, the complainant stole two bottles of alcohol from a shop). She claimed that the casino rejected her application on the basis of this criminal record. The respondent claimed that the decision to reject her application was not made on the basis of her criminal record but as a result of the nature and circumstances of the offence. The casino did not proceed with her employment as it could not be satisfied that she met the requirements of trustworthiness and good character.

In accordance with section 31(b) of the Act, the Commission attempted to effect a settlement between the parties; this was unsuccessful. The Commission then made the following preliminary findings in respect of the unconciliable complaint:

- The relationship between the parties was one that fell within the definition of 'employment or occupation'.
- Although the respondent asserted that it was not the larceny offence that it considered relevant, but the circumstances of the offence, this was an arbitrary distinction and there was, accordingly, exclusion on the grounds of the complainant's criminal record.
- The act complained of impaired the complainant's equality of opportunity.
- The complainant's criminal offence would not prevent her from performing the specific tasks of bar attendant.
- The complainant's criminal record was not relevant to the position of bar attendant: 'the offence did not occur in the context of her employment and the complainant subsequently worked in the hospitality industry, including as a bar manager'. Moreover, the preliminary finding suggested that the larceny offence could not be taken to indicate that the complainant was not trustworthy and of good character as required of Casino employees under the Casino Act, 1997. The offence occurred 8

²¹⁷ Human Rights and Equal Opportunity Commission Regulations 1989, No. 407, s. 4(a).

²¹⁸ HREOC Report, No. 20. See <http://www.heroc.gov.au>.

years prior to the complainant's application, when she was a juvenile, and there was no evidence of further offending.²¹⁹

Following the dissemination of the preliminary findings, both parties were invited, pursuant to section 27 and 33 of the Act, to make further submissions. The respondent made a submission on the 15 November. It disagreed with the preliminary findings on 3 counts. First, it disagreed with the finding that there was an arbitrary distinction between the offence itself and the circumstances in which the offence took place. Secondly, it contested the finding that the complainant's conduct was not relevant to the position of bar attendant. Thirdly, it disagreed with the view that the complainant's conduct did not indicate that the complainant was untrustworthy. On 20 March, 2002, the Commission issued its findings and recommendations in relation to the complaint under section 35 of the Act. A number of issues were dealt with in a systematic manner.

1. *Was there an act or practice within the meaning of section 30(1) of the Act?*

It was held that the decision to reject her application for employment was an act within the meaning of the legislation.

2. *Was there a distinction, exclusion or preference on the basis of her criminal record?*

The Commission noted that there was no definition of 'criminal record' in the Regulations or in the Act. Nor was there any distinction drawn between spent and unspent convictions. The Commission suggested that the term criminal record 'encompasses not only the actual record of a conviction but also the circumstances of the conviction including the underlying conduct'.²²⁰ The Commission went on to note:

The submission of Adelaide Casino would suggest that the term 'criminal record' should be confined to the actual record of the conviction itself, thereby drawing a distinction between the record and the circumstances of the offence. In my view such an approach involves a construction which enables 'the ascription of negative stereotypes or the avoidance of individual assessment which will result in the essential object of the Act ... being frustrated'.²²¹ If [one] was to permit such a distinction to be drawn between a person's criminal record and the circumstances in which the offence was committed, a respondent could avoid a complaint of criminal record discrimination by simply asserting that the discrimination was on the basis of the circumstances of the offence, not the fact of the criminal record.²²²

Accordingly, the Commission was satisfied that the distinction was made on the basis of criminal record.

²¹⁹ *Ibid.*, p. 7.

²²⁰ *Ibid.*, p. 9. Such a construction was consistent with the Law Reform Commission Report in 1987. The Commission also cited the Canadian case of *Woodward Stores (British Columbia) Ltd v. McCartney* (1983) 4 CHRR D/1325 as further support. Here British Columbia legislation dealing with criminal records was given a similarly wide construction, pursuant to which 'charge' was taken to mean 'the things specified in the information and the circumstances surrounding them', rather than simply 'the nature of the offence charged'.

²²¹ See also *Commonwealth v. Bradley* (1999) 95 FCR 218 at 235, per Black CJ.

²²² HREOC Report No. 20, p. 9.

3. *Did the distinction or exclusion nullify or impair equality of opportunity or treatment in employment or occupation?*

For the act or practice to be discriminatory, the complainant had to demonstrate that it impaired or nullified her equality of opportunity in employment and that the distinction was not premised on the inherent requirements of the employment or occupation. The Commission was satisfied that the complainant discharged the first leg of this burden; the distinction nullified or impaired her equality of opportunity.

4. *Was the distinction based on the inherent requirements of the job?*

The Commission examined the term 'inherent requirement' having regard to various case law. In *Quantas Airways v. Christie*,²²³ for example, the High Court considered the term in relation to the Industrial Relations Act 1988 (Cth). Brennan CJ stated:

The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking ... In so saying, I should wish to guard against too final a definition of the means by which the inherent nature of a requirement is determined. The experience of the courts of this country in applying anti-discrimination legislation must be built case by case. A firm jurisprudence will be developed over time; its development should not be confined by too early a definition of its principles.

Similarly in *X v. The Commonwealth*²²⁴ Gummow and Hayne JJ suggested that the inherent requirements of employment will usually be those which are 'characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral'. Having regard to these interpretations, the Commission formed the view that trustworthiness and good character were inherent requirement for the position of bar attendant. The next question for consideration, then, was whether there was a 'close connection' between the requirement that the holder of the position of bar attendant be trustworthy and of good character and the exclusion applied to the complainant on the basis of her criminal record. In other words, was the exclusion 'based on' the described inherent requirements.

The Commission examined the term 'based on' having regard to various case law. In *Commonwealth v. Human Rights and Equal Opportunity Commission and Others*²²⁵ Wilcox J interpreted the phrase as follows:

[T]here are policy reasons for requiring a tight correlation between the inherent requirements of the job and the relevant distinction, exclusion or preference. Otherwise ... the object of the legislation would be easily defeated. A major objective of anti-discrimination legislation is to prevent people being stereotyped; that is, judged not according to their individual merits but by reference to a general or common characteristic of people of their race, gender, age, etc as the case may be. If the words 'based on' are so interpreted that it is sufficient to find a link between the restriction and the stereotype, as distinct from the individual, the legislation will have the effect of perpetuating the very process it was designed to bring to an end.²²⁶

²²³ (1998) 193 CLR 280 at 284.

²²⁴ (1999) 200 CLR 170 at 208.

²²⁵ (1998) 158 ALR 468 at 482.

²²⁶ See also *Commonwealth v. Bradley* (1999) 95 FCR 218 at 235, per Black CJ. "In my view, the definition adopted by Wilcox J — that is, as requiring a connection that is tight or close — sits easily with the language of par (c) and promotes the objects of the Act by closing a path by which consideration of individual merit may be avoided."

In the Commission's view, the connection was not sufficiently close. Given the information available on the claimant's trustworthiness (i.e. character references), the fact that the conviction occurred 8 years prior to her application for employment and took place when she was a juvenile, and the positions she had worked in since then, it was of the view that there was not a sufficiently close connection between the rejection of the complainant's application on the basis of her criminal record and the inherent requirements of trustworthiness and good character. Accordingly, the Commission found that the complainant had been discriminated against on the basis of criminal record. Under section 35 of the Act, the Commission recommended that the respondent apologise to the complainant and not further exclude her from applying for employment because of that conviction. Under section 35(2)(e) of the Act, the Commission was obliged to state in its report to the A.G. whether the respondent took any action as a result of its findings and recommendations. On 22 March 2002, the Commission wrote to the respondent to see what action had been taken. In correspondence on 11 April 2002, the respondent suggested that it did not propose taking any action as a result of the findings and recommendations of the Commission. The Commission was then entitled to report the matter to the Federal A.G. who subsequently tables the report in Parliament in accordance with section 46 of the Act.

The decision of *Mark Hall v. NSW Thoroughbred Racing Board* is also instructive.²²⁷ On 22 June 1999, Mr Hall lodged a complaint with the Commission alleging discrimination in his²²⁸ employment and occupation on the ground of his criminal record. Mr Hall alleges that the reason, or one of the reasons, for the Board's refusal to allow him to continue working as a stablehand and its refusal to issue him with a licence was his criminal record. The Board denied this complaint and claimed that it decided that Mr Hall was not a 'fit and proper' person for the following reasons: he failed to disclose his prior convictions and falsified his written application for a licence; he failed to explain his prior convictions with honesty and candour, and; he failed to adequately explain his non-disclosure and false statements in his application. Alternatively, the Board claimed that it was not Mr Hall's criminal record *per se* that formed the basis of its decision, but the nature of the offences he had committed — according to the Board, a criminal record was more than a mere record of conviction but gives some guidance as to the type of character of the particular person.²²⁸ More particularly, the Board claimed that it was an inherent requirement of any position of employment within the racing industry that the person does not have a criminal record which includes convictions that could bring the reputation of the industry into disrepute. This was mandated, according to the Board, by sections 13 and 14 of the Thoroughbred Racing Act, 1996 which conferred powers on it to regulate racing and to grant or refuse licences:

The racing industry has historically been known as an industry where there have been persons involved who have not maintained the industry in an up-front and straight manner. It is critical that the industry not be involved in any sort of capacity in conduct which is dishonest, is conduct that would lead a reasonable member of the public to think there is a possibility that certain things occurring in the industry are fixed ...

Accordingly, it was appropriate to take account of the existence of any criminal record of a person applying for a licence and the nature of the conviction contained in such a record.

Conciliation was unsuccessful. The Commission's preliminary finding, following submissions, was that the respondent had discriminated against the claimant. Further submissions were then sought. The Commission first asked whether or not there was an act or

²²⁷ HREOC Report No. 19, 24 April, 2002. See <http://www.hreoc.gov.au/>.

²²⁸ One of Mr Hall's offences included wilful and obscene exposure on 12 September, 1996.

practice that arose in the course of employment or occupation. It was held that there were two relevant acts: (a) the act of requiring Mr Hall on 20 April, 1999 to stand down from his work as a stablehand with Mrs Waterhouse; (b) the act of refusing to issue Mr Hall with a licence to enable him to work for Mrs Waterhouse on 17 June, 1999. The Commission then investigated whether or not there was a distinction, exclusion or preference on the basis of criminal record. The Commission cited *Commonwealth v. Bradley*²²⁹ and posited the view that the term encompasses not only the actual record of a conviction but also the circumstances of the conviction including the underlying conduct. The next issue addressed by the Commission was whether or not the Board was correct in stating that Mr Hall was stood down on the basis of his lack of candour to questions asked, as opposed to his criminal record. On the facts the Commission opined that the Board rejected the complainant on the basis of his criminal record. It also noted, however, that the decision was to some extent premised on the complainant's lack of candour in his application form.²³⁰

The next question the Commission had to consider was whether the distinction nullified or impaired equality of opportunity in employment or occupation. Given that without a licence, the complainant was unable to work in his chosen career, it was held that the exclusion nullified or impaired equality of opportunity. The Commission then had to consider whether the distinction was premised on the inherent requirements of the job. Having considered *Quantas Airways v. Christie*²³¹ and *X v. The Commonwealth*²³² the Commission held that in determining the inherent requirements of the complainant's job, it must also consider 'the broader, social, legal, and economic context in which Mr Hall's job is located'. The specific duties of the job as stablehand included feeding, grooming, walking horses, and mucking out stables as required. The Commission also noted that the complainant had two references, one from Mrs Waterhouse and one from her stable foreman, praising the complainant. To the argument that the requirement of criminal records was mandated by the Racing Act of 1996, the Commission noted that the Act was silent on whether or not a stablehand should be refused a licence by reason of having a criminal record.²³³ The only other argument put forward by the Board was that a criminal record requirement was justified in the light of the impact it may have on public confidence in the racing industry. The Commission was of the view that such evidence only established that the inherent requirements of each particular job in the racing industry will include requirements that could broadly be labelled as 'fitness and propriety' requirements. These requirements, however, could only be considered in respect of each particular job. In other words, industry wide or systematic applications of requirements were inadmissible. It was impossible in the circumstances to consider whether there was a close connection between the exclusion of the complainant and the alleged inherent requirements of the position of stablehand — the fitness and propriety requirements of a stablehand were too vague and inadequately specified to consider the connection.

²²⁹ *Op cit.*

²³⁰ In applying for a licence, the complainant's attention was drawn to the following clause that appeared at the foot of his application: "Answers to questions in this application will be checked. Failure to answer questions truthfully will lead to a review of your registration and could result in the cancellation of your right to work in the racing industry."

²³¹ *Op cit.*

²³² *Op cit.*

²³³ Section 31 of the Racing Act did render an individual ineligible to sit on the Racing Industry Participants Advisory Committee if during the previous 10 years that individual had been convicted of an offence punishable with imprisonment of 12 months or more, or convicted elsewhere of an offence which, if committed in New South Wales, would be an offence so punishable. Such a provision could give rise to an inherent requirement in the broader sense as evident in the *Christie* and *X* cases. The absence of a comparable provision in relation to a stablehand meant that the Racing Act could not give rise to a similar inherent requirement in respect of the position of stablehand.

Accordingly, the inherent requirements exception did not apply in the case and it was held that the complainant had been discriminated against on the basis of his criminal record. It was recommended that the Board pay the complainant the amount of \$33,303.05 in damages for distress and loss of reputation, and lost wages (this figure was arrived after a reduction due to the complainant's lack of candour in the application form). It was also recommended that the Board review its process in relation to criminal records:

if criminal records are to be used, they must be used to make proper assessments of whether or not a person is able to do the inherent requirements of a particular job, not the inherent requirements as asserted of a general industry, but of the particular job.²³⁴

Commonwealth Protection through Spent Convictions

In 1989, following the Law Reform Commission Report, the Commonwealth A.G. introduced into Parliament a Bill which became the Crimes Legislation Amendment Act 1989. The Act became law on 30 June, 1989 and the spent conviction scheme which it established commenced on 1 July 1990. The scheme is established under Pt VIIC of the Crimes Act, 1914 (Cth), as amended. It provides that an individual is not required to disclose a conviction, or the related charge, if the conviction is the subject of a pardon, has been quashed, or is spent. A conviction is spent if either a pardon was granted for reasons other than wrongful conviction or all of the following requirements are met:²³⁵

- (i) It is five years or more since the date of conviction in respect of minors, or 10 years or more since the date of conviction for adults.
- (ii) The sentence imposed was a fine, bond, community service, or imprisonment for a period of less than 30 months.²³⁶
- (iii) No further offences had been committed in the qualifying periods.²³⁷
- (iv) An exclusion does not apply.

This protection was afforded to individuals throughout Australia with regard to commonwealth and territory laws. It also applies to State laws where the individual is dealing with a commonwealth agency. People and organisations who possess information about spent commonwealth and territory convictions cannot, without the consent of the individual in question, disclose the fact that the person was charged with, or convicted of, the offence to any other person, commonwealth or state authority, where it is lawful for the individual in question not to disclose it, or take account of the fact that the person was charged with, or convicted of, the offence.

Exclusions from the scheme are dealt with in Division 6 of the Act.²³⁸ The following bodies are specifically excluded from the scheme under section 85ZZH:

- (a) law enforcement agencies
- (b) intelligence or security agencies

²³⁴ HREOC report, no. 19, p. 30.

²³⁵ Crimes Act, 1914, s. 85ZM 2(a) and (b).

²³⁶ Note that the Law Reform Commission recommended that it apply to all convictions.

²³⁷ Crimes Act, 1914, s. 85 ZX.

²³⁸ Exclusions are not permitted in respect of quashed convictions for free and absolute pardons. See sections 85ZR and 85ZT.

- (c) courts or tribunals for the purpose of making a decision including a decision in relation to sentencing
- (d) a person who makes a decision under various immigration statutes²³⁹
- (e) a person or body who employs or otherwise engages other persons in relation to the care, instruction or supervision of minors, for the purpose of finding out whether a person who is being assessed by the person or body for that employment has been convicted of a designated offence²⁴⁰
- (f) a person or body who otherwise makes available care, instruction or supervision services for minors, for the purpose of finding out whether a person who is being assessed by the person or body in connection with those services has been convicted of a designated offence
- (g) a commonwealth authority for the purpose of assessing appointees or prospective appointees to a designated position²⁴¹
- (h) the Australian Transaction Reports and Analysis Centre²⁴²
- (i) the Australian Government Solicitor, for the purpose of instituting or conducting proceedings for commonwealth offences
- (j) a prescribed person or body for a prescribed purpose, in relation to a conviction for a prescribed offence.

Under section 85ZZ, the Privacy Commissioner is responsible for receiving and examining written requests for complete or partial exclusion of persons or bodies from the scheme. The Commissioner also has a duty to advise the A.G. whether an exclusion should be granted, and, whether there should be any restrictions on the circumstances in which an exclusion should apply.²⁴³ The A.G. usually follows the advice of the Privacy Commissioner. However, in 1996, it was decided that persons employed or contracted by the Australian Securities Commission could no longer have the protection of the spent convictions scheme. Statutory Rule 1996 No 7 was gazetted on 31 January 1996, and it has meant that any Australian Securities Commission employee, consultant or contractor, can be asked questions about their criminal record which would normally be considered spent under the scheme. In making the amendment, the AG rejected the advice of the Privacy Commissioner.²⁴⁴ Enforcement responsibility was given to the Office of Privacy Commissioner given its familiarity with record keeping. Having received a written complaint, the Commissioner can investigate and make decisions regarding the dismissal of a complaint, declarations that the respondent should employ, re-employ or promote the complainant, and determine that the complainant is entitled to compensation for loss or damage. Enforcement

²³⁹ See *Ivanayevska v. Minister for Immigration and Multicultural Affairs* [2000] AATA 489 (19 June, 2000), and, *Bone Jovcevski v. Minister for Immigration, Local Government and Ethnic Affairs* (No. NG496 of 1989) Fed. No. 694.

²⁴⁰ Designated offence means (a) a sexual offence or, (b) any other offence against the person if the victim of the offence was under 18 at the time the offence was committed.

²⁴¹ A designated position means a position in a commonwealth authority which the head of the authority had determined to be a designated security assessment position, the duties of which are likely to involve access to national security information.

²⁴² This Centre operates as Australia's anti-money laundering regulator and specialist financial intelligence unit.

²⁴³ Exclusions have been granted in respect of the administration of justice, government employment and contracting, and participation in sensitive activities such as opium poppy production. The functions of the Privacy Commissioner include the investigation of Commonwealth and State Authority practices, the settlement of matters that give rise to such investigations, the examination of written requests for the exclusion of persons, and, advice to the A.G. on the granting of such exclusions. For the determinations that a Privacy Commissioner can make after receiving a complaint, see section 85ZZD of the Act. For the manner in which such determinations may be enforced, see section 85ZZF.

²⁴⁴ N Waters. "Securities Commission exempted from Spent Convictions Scheme" 1996 *Privacy Law and Policy Reporter* 18.

of these orders can be made through the Federal Court either by the Commissioner or the complainant.²⁴⁵

The State Protection of Human Rights

No provision is made in Queensland or Victoria for discrimination on the grounds of a criminal record. However, provisions are made in Tasmania, Western Australia, the Northern Territory and the Australian Capital Territory.

Tasmania

The Anti-Discrimination Act, 1998, in Tasmania prohibits discrimination on the ground of an irrelevant criminal record. Irrelevant criminal record is taken to mean 'a record relating to arrest, interrogation or criminal proceedings where: (a) further action was not taken in relation to the arrest, interrogation or charge of the person; or (b) a charge has not been laid; or (c) the charge was dismissed; or (d) the prosecution was withdrawn; or (e) the person was discharged, whether or not on conviction; or (f) the person was found not guilty; or (g) the person's conviction was quashed or set aside; or (h) the person was granted a pardon; or (i) the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which discrimination arises.'²⁴⁶

General exemptions are provided for in Part 5 and relate to charities, actions required by law, disadvantaged groups and special needs, and equal opportunities. Part 5, Division 7 relates to exceptions to irrelevant criminal record. Section 50 provides that:

A person may discriminate against another person on the ground of irrelevant criminal record in relation to the education, training or care of children if it is reasonably necessary to do so in order to protect the physical, psychological, or emotional well-being of children having regard to the relevant circumstances.

Application for further exceptions can be made under Part 5, Division 11 of the Act.²⁴⁷

As regards the number of claims by attribute or identity under the Act, the Annual Report of the Anti-Discrimination Commission of Tasmania noted that between 1 July, 2000 and 30 June, 2001, 1.4% of claims (four in total) related to criminal record. This can be contrasted with the figures for 1999 to 2000 where 3.1% of the claims (six in total) related to irrelevant criminal record.²⁴⁸

An example may help to illustrate the workings of the Act in respect of discrimination on the grounds of irrelevant criminal record. In 2002, the Poppy Board wrote to the Commission in relation to the employment of persons under the Board's jurisdiction. The problem confronting the Poppy Board was that it was an industry which could lend itself to criminal conduct and to exploitation of a criminal nature. The Commission, operating under section 96 of the Act, wrote back and pointed out that in order to exclude individuals from employment with a criminal record, it must be shown that such a record was directly relevant to

²⁴⁵ This is to be contrasted with the powers of the Human Rights Commission. Moreover, the Human Rights and Equal Opportunity Commission Act, 1986 applies only to employment and occupation whereas the spent conviction scheme is broader.

²⁴⁶ Anti Discrimination Act, 1998 (Tasmania), s. 3. Like many of the discriminatory provisions in Australia dealing with irrelevant criminal record, it also prohibits discrimination as a result of an association with an individual with a criminal record.

²⁴⁷ Anti-Discrimination Act, 1998, s. 56 and s. 57.

²⁴⁸ <http://www.justice.tas.gov.au>.

the position. The Poppy Industry was instructed to examine the inherent requirements of its positions:

- ‘are there inherent requirements of the various positions in the poppy industry’
- ‘if so ... what are they — ... it is essential ... to think about what they are, about what qualifications, qualities ... a person could not do without in order to properly or effectively do the job’
- ‘is there anything about these inherent requirements that would preclude a person with a criminal record from being a properly functioning and effective worker in that particular position’
- ‘if so, what is the nature of the criminal record and the circumstances surrounding it that would make the person inappropriate for the job, and unable to carry out its inherent requirements’
- ‘The question the Poppy Board needs to ask is: what criminal offences would come into direct conflict with the real ability or capacity of a person to do these jobs, or any particular job in the industry? You need to list these being careful to ensure that there is a clear rationale for saying that the particular offence you are listing does come within the required parameters. That is, is the particular offence and the circumstances surrounding the person’s conviction ... directly relevant to the particular position’.²⁴⁹

Western Australia

The Western Australian Parliament passed a spent conviction law in 1988 but it did not come into operation until 1 July, 1992. The scheme is based on an anti-discrimination framework. Under section 3 of the Spent Convictions Act, 1988 spent conviction means a conviction that is spent under sections 6, 7 or 8, or, that is spent by virtue of a spent conviction order under section 39 of the Sentencing Act, 1995. Under section 4 of the 1998 Act, the scheme does not apply to certain convictions including a sentence of life imprisonment. Part 2 of the Act deals with requirements for a conviction to become spent. It should be noted that this Act adopts a different approach to other similar legislation in Australia in so far as it allows offenders, who have not reconvicted for a prescribed period, the right to apply for an order declaring a conviction to be spent. In the case of a serious offence,²⁵⁰ the application has to be made to a judge; in the case of other ‘lesser’ offences it is to the Commissioner of Police. As regards a serious conviction, the judge, in using his or her discretion, under section 6(4), should have regard to the length and kind of sentence imposed in respect of the conviction, the length of time since the conviction was incurred, whether the conviction may prevent the applicant from engaging in a particular profession, trade or business or in a particular employment, all the circumstances of the applicant, the nature and seriousness of the offence, the circumstances surrounding the commission of the offence, and whether there is a public interest to be served in not making the order. As regards lesser offences, the Commissioner of Police does not have a discretion to refuse a certificate if it conforms with the Act. The prescribed waiting period, as provided for under section 11, is 10 years.

²⁴⁹ Dr Jocelyne A Scutt, Anti-Discrimination Commissioner, *Poppy Board and the Employment of Persons with a Criminal Record*, 15 May, 2002 (personal correspondence).

²⁵⁰ A serious offence means imprisonment for more than one year or a fine of \$15,000 or more. See section 9 of the Act.

Part 3, Division 2, of the Act deals with exceptions. They include proceedings in court (section 14) and bail decisions (section 15). Regulations can also be made for further exceptions under section 33.²⁵¹ The discriminatory provisions are contained in Part 3, Division 3 of the Act. Under section 17(2), a discriminator discriminates against another person on the ground of spent conviction if (a) on the ground of the conviction or charge to which it relates, the discriminator treats the aggrieved person less favourably than that discriminator treats a person who had never incurred a conviction, or, (b) the discriminator requires an aggrieved person to comply with a requirement that is not reasonable having regard to the circumstances of the case. Section 18 provides that it is unlawful for an employer to discriminate against a person on the ground of a spent conviction: (a) in the arrangements made for the purpose of determining who should be offered employment; (b) in determining who should be offered employment; (c) or in the terms or conditions on which the employment is offered. Under section 18(2) it is unlawful for a employer to discriminate against an employee on the ground of a spent conviction of the employee: (a) in the terms or conditions of employment that the employer affords the employee; (b) by denying the employee access, or limiting the employee's access to opportunities for promotion, transfer or training, or in any other benefits associated with employment; (c) by dismissing the employee; or, (d) by subjecting the employee to any other detriment. Similar provisions are made in respect of contract workers, by organisations of workers in terms of membership, by authorities that confer qualifications, and by employment agencies. Moreover, sections 25 and 26 of the Act provides that where a written law of the State permits a person to consider or determine the good character or convictions of a person for the purposes of written law, the person shall not in so doing have regard to a spent conviction or to a charge to which the conviction relates. As regards enforcement, section 24 states that a complaint can be lodged under section 83(1) or (2) of the Equal Opportunity Act, 1984 as if the alleged contravention were a contravention of that Act. Unlawful access to criminal records can result in a penalty of \$1,000.

The Act has come up for judicial consideration on a number of occasions. In *R. v. Tognini*,²⁵² Murray J stated:

Ordinarily of course a conviction remains on an offender's record and is part of his or her history which the person carries into the future as a member of the community. The provisions of the Spent Conviction Act ... are clearly based on the proposition that after the conviction, in time, when there has been no reoffending, a convicted person may be considered to be rehabilitated and deserving of relief from the effects of conviction in the way it is described in the Act so that the offender may put the offence behind them and function in the future without the need to disclose the conviction.

In *Smith v. C*²⁵³ the Supreme Court of Western Australia had to consider the following circumstances. On 1 May, 2001, the accused was found to have a percentage of alcohol in his blood exceeding 0.08 per cent, namely 0.133 per cent, whilst driving a car. This was contrary to section 64(1) of the Road Traffic Act. The accused pleaded guilty to the charge. Under the Road Traffic Act, penalties are prescribed in a table and the courts are mandated

²⁵¹ Schedule 3 of the Act contains a list of exceptions. They include the Parole Board, the Supervised Release Review Board, Justices of the Peace, police constables, prison officers, casino employees, security officers, persons applying for licenses under the Firearms Act, 1973, and the Anti-Corruption Commission. Exceptions are also provided to protect children — they include teaching staff, kindergartens, child care services, foster parents, safety house schemes, and adoptive parents. The criminal offences to which such exceptions relate include offences against morality, homicide, suicide, concealment of birth, offences of endangering life or health, assaults, sexual offences, offences against liberty, child stealing, and desertion of children. See also Spent Conviction Regulations, 1992.

²⁵² (2000) 22 WAR 291 at 296.

²⁵³ [2001] WASCA 262 (29 August 2001).

to dispose of cases according to the table. According to the table, if the percentage of alcohol in the convicted person's blood exceeds 0.13 per cent but is less than 0.14 per cent, then in respect of the first offence he or she is liable to a minimum penalty of 14 Penalty Units and disqualification for 5 months; the liability in respect of a second offence is a minimum of 24 PU and disqualification for 10 months. The penalty for a subsequent offence is a minimum of 24 PU and disqualification for 12 months. The accused had incurred two previous convictions for drink driving. These two convictions, however, were spent pursuant to section 7(1) of the Spent Convictions Act, 1988. The trial judge proceeded on the basis that that he was not to take account of the previous convictions in determining the appropriate penalty. A sentence of 20 PU and disqualification for 8 months was imposed. An appeal was made on the basis that the trial judge should have had regard to the two previous convictions, notwithstanding the accused's spent conviction certificates. Specifically, section 14(2)(ii) of the Spent Conviction Act, 1988 provides that a determination of the appropriate punishment to be imposed by the court or tribunal for an offence was exempted from the said Act.²⁵⁴ The Supreme Court noted that the aim of the Spent Conviction Act was to *limit* the effects of a conviction, not to extinguish all consequences of a conviction. Accordingly, and having regard to section 14, the sentence imposed by the learned trial judge was set aside and the matter was remitted to the trial court for a sentence to be imposed according to law.

Interestingly, spent convictions, for the purposes of the Act, are also taken to include spent conviction orders, as provided for under section 39 of the Sentencing Act, 1995. This provision allows offenders, in certain circumstances, to have a spent conviction order imposed. Section 45 provides that such an order can only be made when the court is satisfied that: (a) it considers that the offender is unlikely to commit such an offence again, and (b) having regard to the fact that the offence was trivial, or, the previous good character of the offender, it considers the offender should be relieved immediately of the adverse effect that the conviction might have on the offender. The effect of such an order is that the conviction becomes spent immediately, without the offender having to wait and not re-offend for the prescribed period. In *R. v. Tognini*,²⁵⁵ Murray J noted:

A spent conviction order should be regarded as being of exceptional character. If the necessary preconditions are established, the court should go on to have regard to the seriousness of the offence ... the circumstances of its commission, and ... the circumstances personal to the offender. It should take as the ordinary rule the fact that a conviction will be a matter of record with all the consequences that may entail in the future. It should therefore look to see whether there is some particular circumstance to show that it would be desirable, not only from the point of view of the offender but also, having regard to his or her rehabilitation, from the point of view of the community, why the adverse effect of the conviction should immediately be set aside.

In *Brewer v. Baynes*²⁵⁶ the appellant was charged with and pleaded guilty to seeking a person to act as a prostitute contrary to section 5(1) of the Prostitution Act, 2001. He was granted leave to appeal after the trial judge declined to make a spent conviction order. On appeal, the appellant claimed that, having regard to the fact that he was undertaking a Ph.D. at Murdoch University, that he had designed a sophisticated assessment procedure

²⁵⁴ Section 25(1) of the Spent Conviction Act, 1998 does provide that reference in a written law to a conviction of a person for an offence did not include a spent conviction. However, section 14(2) (b) states expressly that section 25(1) did not apply in a court or tribunal for the purpose of making a determination as to appropriate punishment.

²⁵⁵ *Op cit* at p. p. 297.

²⁵⁶ [2002] WASCA 37 (26 February, 2002).

to identify ADHD (attention deficit hyperactivity disorder), that he was at a stage in his studies where he had to conduct evaluative research in schools involving children between the ages of 6 and 12, and that he would be unable to qualify as a clinical psychologist, such an order should have been made. It was held however that the nature and circumstances of the offence weighed heavily against the granting of such an order. Though the fact of a conviction would be brought to the attention of the relevant educational institutions and authorities, professional associations and future employers, the public interest in the case dictated that a spent conviction order could not be made.²⁵⁷

Northern Territory

In the Northern Territories, the Anti-Discrimination Act of 1992, as amended, makes provision for the elimination of discrimination on the grounds of irrelevant criminal record in the area of work, accommodation, or education; in the provision of goods, services and facilities; in the activities of clubs and in insurance and superannuation.²⁵⁸ According to section 4, irrelevant criminal record is taken to mean: (a) a spent record within the meaning of the Criminal Records (Spent Convictions) Act, 1992, as amended, or, (b) a record relating to arrest, interrogation or criminal proceedings where no further action was taken in relation to the arrest, no charge was laid, the charge was dismissed, the prosecution was withdrawn, the person was discharged, the person was found not guilty, the person's finding of guilt was quashed or set aside, the person was granted a pardon, or the circumstances relating to the offence for which the person was found guilty are not directly relevant to the situation in which discrimination arises.

In section 5 of the Spent Convictions Act, 'criminal record' does not include a criminal record of a sexual offence, an offence by a body corporate, or a prescribed offence. It also does not include a record of a conviction in respect of which a sentence of imprisonment for more than 6 months was imposed, whether or not the sentence was suspended. The crime free period for juveniles convicted in the Juvenile Court is 5 years and 10 years in all other cases.²⁵⁹ For offenders under 18 convicted other than in the Juvenile Court, once the five years has expired since the date of conviction, they can apply to the Commissioner of Police for the conviction to become spent.²⁶⁰ Moreover, under section 7, as amended by the Criminal Records (Spent Convictions) Amendment Act, 2002, where a person has been convicted of an offence but a court, without recording the conviction, discharges the person absolutely, the criminal record (if any) of the conviction is a spent conviction immediately after the person is discharged. Similarly, a criminal record, in respect of a finding that an offence is proved without the court proceeding to conviction, is a spent conviction immediately after the finding or order is made.

Under section 11 of the Spent Conviction Act, where a record is a spent record:

- (a) the person to whom it relates is not required to disclose to another person that spent record
- (b) a question concerning a person's spent convictions, criminal history, or criminal record shall only be taken to refer to a record which is not a spent record
- (c) in the application to a person of a provision of an Act or instrument of a legislative

²⁵⁷ See also *Lynch v. Heidrich and Anor* [2002] WASCA 154 (13 June 2002).

²⁵⁸ Anti-Discrimination Act, 1992 (NT), s. 3.

²⁵⁹ Section 6. Note that traffic and non-traffic offences are kept separate.

²⁶⁰ Spent Conviction Act, 1992 (NT), s. 6A (3).

character, (i) a reference to a conviction, criminal history or criminal record, shall be taken to be a reference only to unspent records, and, (ii) a reference to a person's character or fitness shall be taken only as permitting or requiring a spent record to be taken into account.

Section 15 of the Act deals with exclusions which include judges, justices of the peace, magistrates, police, parole officers, probation officers, juvenile justice officers, and detention centre workers, teachers, teachers' aides, providers of child care services, licences under the Firearms Act, arson offences in relation to fire fighting and fire prevention positions, suitability of persons as jurors, and proceedings before court including the giving of evidence and the making of a decision. Section 19 of the Act allows for regulations to be made excluding further circumstances, persons or records from the Act. Such regulations are subject to review every five years by the relevant Minister.

The functions of the Anti-Discrimination Commissioner are laid out in section 13 of the Discrimination Act, 1992 and include inter alia the duty to carry out investigations and hearings and endeavour to effect conciliation. According to section 65, a complainant shall make a complaint not later than six months after the alleged prohibited conduct took place; if appropriate to do so, however, the Commissioner may receive complaints after the time limit. The complaint process involves four stages. A written complaint is received by the Commission. The Commission makes a determination whether or not the complaint is within its jurisdiction. The complaint is investigated. If a *prima facie* case of discrimination is evident, the complaint is referred to conciliation. If conciliation is not possible or successful, it is referred to a hearing before the Anti-Discrimination Commissioner. If the complainant can prove his or her case on the balance of probabilities, the Commission may award damages up to \$60,000 and make various orders. The Anti-Discrimination Commission Annual Report for 2001 noted that 11 enquiries were conducted into complaints of discrimination on the ground of irrelevant criminal record between 1 July, 2000 and 30 June, 2001. These were further broken down as follows: one enquiry related to education; eight related to work; and, two related to the provisions of goods and services.²⁶¹

Section 19(1)(q) of the Discrimination Act states generally that a person shall not discriminate against another person on the ground of irrelevant criminal record. Section 19(2) however provides that it is not unlawful for a person to discriminate against another person on the ground of irrelevant criminal record if an exemption under Part 4 or 5 of the Act applies. Under section 20 (1) of the Discrimination Act, discrimination is taken to include: (a) any distinction, exclusion, or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity, and; (b) harassment on the basis of an attribute in the area of an activity referred to in Part 4. These activities include: education, work, accommodation, goods, services, facilities, insurance and superannuation.²⁶² Exemptions are provided for in relation to education (section 30); work (section 35); accommodation (section 40); goods, services and facilities (sections 42-45); clubs (section 47); and, insurance and superannuation (section 49). Part 5 of the Act deals with general exemptions including legal incapacity, religious bodies, charities, acts done in compliance with legislation, pregnancy or childbirth, public health, sport, and special measures where accommodating special needs are unreasonable.

²⁶¹ <http://www.nt.gov.au/justice/adc>.

²⁶² Prohibited conduct under the Act includes discrimination, harassment on the basis of an attribute, victimisation of a party to a complaint (s. 23), discriminatory advertising (s. 25), seeking unnecessary information on which discrimination could be based (s. 26), unreasonable failure to accommodate a special need because of an attribute (s. 24), and aiding the contravention of the Act. See *Hosking v. Chris Fraser Centralian Recruiting No. 2 of 1996* [1996] NTADC 2. <http://www.austlii.edu.au>.

As regards work, the most prominent enquiry vis-à-vis irrelevant criminal record, Section 31(1) of the Discrimination Act states that a person shall not discriminate: (a) in deciding who should be offered work, (b) in the terms and conditions of work that is offered, (c) in failing or refusing to offer work, (d) by failing to provide access to guidance, vocational, occupational or retraining programmes. Section 31(2) provides that a person shall not discriminate: (a) in any variation in the terms or conditions of work, (b) in failing or refusing to grant or limiting access to opportunities for promotion, transfer, training or other benefit to a worker, (c) in dismissing a worker, or (d) by treating a worker less favourably in any way in connection with the work. Section 35(1)(b) provides however that a person could discriminate against another in the area of work if the discrimination is based on:

- (i) a genuine occupational qualification
- (ii) the other person's inability to adequately perform the inherent requirements of the work.

Under section 35(2), a person may also discriminate in offering work if it is of a kind to be performed in the person's home. Section 59 of the Act allows the Commissioner to grant exemptions in respect of discriminatory conduct that would otherwise contravene the Act.

Australian Capital Territory

On 28 September, 2000, the Spent Convictions Act, 2000 was gazetted, amending the Discrimination Act 1991 to include the new ground of spent convictions. It is now unlawful to discriminate against a person where his or her conviction has become spent under the terms of the Spent Conviction Act.²⁶³ As the Bill passed through parliament, its purpose was outlined:

It is basically legislation designed to give a second chance to people who are convicted of a minor offence but who manage to keep their noses clean for a period of time after that conviction and who at some point are entitled to go back into the community without the burden of that offence. It basically goes to the notion of the way in which our criminal justice system works. We have a system which encourages people by punishment, in theory at least, to move from a criminal based lifestyle into a law abiding lifestyle. The assumption — whether it is true or not is another matter — is that by punishing people we create a sufficient disincentive to them and to others to continue on a path of criminal activity. It goes hand in hand with the notion that once punishment has been administered ... it is then appropriate for that person to restore themselves into a law-abiding frame of mind and to be able to move around the community on the basis that they have done time for the crime and they are entitled to be considered as reformed people. We do not facilitate that in the present state of affairs by having a continuing stigma attached to these people.²⁶⁴

The objectives of the Spent Conviction Act, as provided for in section 3, is 'to provide a scheme to limit the effect of a person's conviction for certain offences if the person completes a period of crime-free behaviour'. Under section 11(2) the following convictions cannot become spent:

- a conviction for which a prison sentence of longer than 6 months has been imposed
- a conviction for a sexual offence

²⁶³ Discrimination Act, 1991 (Australian Capital Territory), s. 7(k).

²⁶⁴ Australian Capital Territory, 2000. Week 9, Hansard, 5th September, p. 2583 per Mr Humphries <http://www.hansard.act.gov.au>.

- a conviction of a corporation
- a conviction prescribed under regulations

A conviction becomes spent on completion of the relevant crime free period, 5 years in respect of non-adults, and 10 years for all adults.²⁶⁵ Under section 16, if a conviction of a person is spent, (a) the person is not required to disclose information about the spent conviction to anyone; and, (b) a question about the person's criminal history is taken not to refer to the spent conviction. There are significant exceptions to the spent conviction scheme. Section 19 provides that spent convictions do not apply, *inter alia*, to the appointment of judges, magistrates, justices of the peace, police officers, prison officers, teachers, teachers' aides, childcare providers, aged care providers, disability care providers, anyone employed in the supervision of children, the elderly or disabled, casino employees, anyone convicted of arson in relation to fire fighting or fire prevention, to proceedings before a court or the making of a decision by a court, and to applications under the Firearms Act, 1996.

Section 8 of the Discrimination Act, 1991, provides that a person discriminates against another person if: (a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7; or (b) the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging persons because they have an attribute referred to in section 7. Section 8(b) does not apply to a condition or requirement that is reasonable in the circumstances. In determining reasonableness, matters to be taken into account include: (a) the nature and extent of the resultant damage; and (b) the feasibility of overcoming or mitigating the disadvantage; and (c) whether the disadvantage is disproportionate to the result sought by the person who imposes or proposes to impose the condition or requirement.

Section 10 of the Act provides that it is unlawful for an employer to discriminate against a person: (a) in the arrangements made for the purposes of determining who should be offered employment; or (b) in determining who should be offered employment; or (c) in terms or conditions on which employment is offered. Section 10(2) provides that it is unlawful for an employer to discriminate against an employee: (a) in terms or conditions of employment that the employer affords the employee; (b) by denying the employee access, or limiting the employee's access to opportunities for promotion, transfer or training or to any other benefit associated with employment; or, (c) by dismissing the employee; or (d) by subjecting the employee to any other detriment. Section 17 makes it unlawful for an employment agency to discriminate against an individual on any of the grounds of discrimination.²⁶⁶

Part IV of the Act deals with general exceptions. They include *inter alia*: domestic duties, residential care of children, pre-selection by employment agencies where had the proposed employer so discriminated, it would not be unlawful, measures intended to achieve equality, the insurance industry (if the discrimination is reasonable in the circumstances having regard to actuarial or statistical data, acts done under statutory authority, and voluntary bodies). Further exemptions may also be granted to professions and other bodies provided the discrimination is reasonable in the circumstances.

²⁶⁵ Spent Convictions Act, 2000 (ACT), s. 13. Some offences can become spent earlier as provided for in sections 12(2) – 12(8) of the Act. It is also important to note that, under section 14, convictions for traffic offences are considered separately from non-traffic offences in defining the crime free period.

²⁶⁶ Other areas of discrimination include education and access to premises, goods, services, facilities, accommodation and clubs.

Part VIII of the Act deals with complaints. Such complaints should be lodged with the Anti-Discrimination Commissioner. Division 8.2 makes provision in respect of the investigation, conciliation and referral of complaints. Division 8.3 deals with hearings before the Discrimination Tribunal.²⁶⁷ Section 102 of the Act regulates the power of a Tribunal following a hearing. It can, *inter alia*, dismiss a complaint, order a respondent not to repeat or continue the unlawful conduct, order the respondent to perform any reasonable act, or redress any damage or loss suffered. The Tribunal has the same powers to enforce its decisions as a Magistrates Court when exercising its discretion.

State Protection through Spent Convictions

Aside from the expungement laws provided for in the Northern Territories, Australian Capital Territory, and in Western Australia — which operate in conjunction with discriminatory provisions — certain other States also provide for spent conviction schemes.

Queensland

Spent convictions are regulated in Queensland through the Criminal Law (Rehabilitation of Offenders) Act, 1986. The Law Reform Commission of 1987 had indicated support for the model introduced in 1986 in Queensland, albeit that the scheme was limited to circumstances where the offender was not ordered to serve a custodial sentence or a custodial sentence where less than 30 months was imposed. The rehabilitation periods are 10 years in respect of adults (commencing on the date the conviction is recorded) and 5 years in respect of juveniles (commencing on the date the conviction is recorded). Under section 9A, convictions of certain offences have to be disclosed in respect of positions such as a police officer, persons employed under the Corrective Services Act 2000, justices of the peace, teachers, teachers' aides, licensees under the Casino Control Act, 1982, persons licensed, approved or registered under the Child Care Act, 1991 or the Child Protection Act, 1999, persons employed under the Training and Employment Act, 2000, persons employed at an agricultural college, security providers and security officers, and candidates for election to office of chairperson, mayor president, councillor or member of local government.²⁶⁸ In respect of these positions, under section 9A(2) the Commissioner of the Police Service has the power to make available the criminal histories to requesters (provided the requester has a legitimate and sufficient interest in obtaining the information).

Under section 12 of the Penalties and Sentences Act, 1992, provision also exists for the non-recording of convictions which can give rise to an immediate spent conviction. For example, in *R v. Ronald Edward Reid and Attorney-General of Queensland*²⁶⁹ the Court of Appeal held, overturning the decision of the trial judge, that offences involving one count of indecent treatment²⁷⁰ of a child of under 16 years of age and two counts of stalking should not result in a non-recorded conviction. As McMurdo P. noted:

²⁶⁷ Under section 91, the Tribunal can hear, *inter alia*, applications to strike out a complaint, complaints referred to it by the Commissioner, and applications for interim orders.

²⁶⁸ For example, in respect of an application to become a police officer, the offences would include contraventions or failures to comply with any provision of law whether committed in Queensland or elsewhere.

²⁶⁹ [2001] QCA 301.

²⁷⁰ "Indecent treatment" is defined as follows: — Any person who — (a) unlawfully and indecently deals with a child under the age of 16 years; (b) unlawfully procures a child under the age of 16 years to commit an indecent act; (c) unlawfully permits himself or herself to be indecently dealt with by a child under the age of 16 years; (d) wilfully and unlawfully exposes a child under the age of 16 years to an indecent act by the offender or any other person; (e) without legitimate reason, wilfully exposes a child under the age of 16 years to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter; (f) without legitimate reason, takes any indecent photograph or records, by means of any device, any indecent visual image of a child under the age of 16 years — s.210 Criminal Code Act 1899 (Qld) as amended. "Deals with" includes doing any act which, if done without consent, would constitute an assault as defined in the Code.

In this case, the nature of the offences was so serious that the recording of the convictions was warranted, but this needed to be tempered by the offender's excellent prior character over a lifetime and the physical and mental illness which contributed to his offending behaviour and moral culpability. The community also has an interest in the recording of convictions in serious cases.

Similarly, in *R. v. Hoch*²⁷¹ the respondent pleaded guilty in the District Court at Brisbane on 11 August 1997 to possession of child abuse publications, possession of child abuse photographs and possession of a child abuse computer game. He was fined \$2,000 and no conviction was recorded. On appeal it was held:

It is reasonable to think that this power [under the Penalties and Sentences Act, 1992] has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received. This potential oppression may stand in the way of rehabilitation, and it may be thought to be a reasonable tool that has been given to the courts to avoid undue oppression ...

Nevertheless, and on the facts, the court held that the circumstances of the case overrode the interests of the accused and it ordered that a conviction be recorded.

New South Wales

In New South Wales, expungement laws are governed by the Criminal Records Act, 1991, the primary object of which is 'to implement a scheme to limit the effects of a person's conviction for a relatively minor offence if the person completes a period of crime-free behaviour'.²⁷² All convictions are capable of becoming spent except those for which a prison sentence of more than 6 months was imposed, convictions for sexual offences, convictions against bodies corporate, and convictions prescribed by the regulations.²⁷³ The crime free period in the case of a conviction of the Court (other than a Children's Court) is any period of not less than 10 consecutive years after the date of the person's conviction.²⁷⁴ This is reduced to three years in the case of an order of the Children's Court. If, however, an individual is convicted of an offence punishable by 'imprisonment' during the crime free period, the period resets and he or she has to start the crime free period again. So, if an adult individual is convicted of theft in 1998, and violent disorder in 2004, neither conviction is spent until at least 2014.²⁷⁵

Under section 12, 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,
- (b) a question concerning the person's criminal history is taken to refer only to any convictions which are not spent,

²⁷¹ [2001] QCA 63.

²⁷² Criminal Records Act, 1991 (NSW), s. 3.

²⁷³ See, for example, the Criminal Record Regulations 1999 which prevent convictions from becoming spent, inter alia, in relation to applicants seeking employment in the office of the Director of Public Prosecutions.

²⁷⁴ Criminal Records Act, 1991 (NSW), s. 9.

²⁷⁵ It should be noted that under section 11(2) and 11(3) a conviction for a traffic offence is to be disregarded in calculating the crime free period for a conviction for a non-traffic offence. Similarly, a conviction for a non-traffic offence is to be disregarded in calculating the crime free period for a conviction for a traffic offence.

- (c) in the application to the person of a provision of an Act or statutory instrument, reference to a conviction, or character or fitness, is taken to mean only convictions, or character or fitness, checks which are not spent.

As regards exemptions, the scheme does not apply to law enforcement agencies making information relating to spent convictions available to other law enforcement agencies; to certain occupations (i.e. judges, magistrates, justices of the peace, police officers, prison officers, teachers, teachers' aides, providers of child care services, and child related employment); to people with convictions for arson being employed in fire fighting or fire prevention services;²⁷⁶ and, to proceedings before Court (including the giving of evidence and sentencing).

In 1992, a complainant had been dismissed from part-time employment by the Department of Corrective Services because her minor spent criminal record had been disclosed to the Department. The New South Wales Privacy Commissioner investigated and the Department claimed to be unaware of its obligations under the Act. The complainant succeeded on an unfair dismissal action on the ground that the Department had acted improperly in sacking her because of her spent record.²⁷⁷ In *Pearce v. Commissioner of Police, New South Wales Police Service*²⁷⁸ Robinson MA suggested that the underlying policy of spent convictions in Australia is as follows

'Aside from the stain of a criminal investigation on a person's character, a criminal conviction, or even a finding of guilt by the court, may potentially disadvantage a person in many aspects of his or her life. These disadvantages range from an inability or difficulty in obtaining or retaining a gun licence or obtaining or maintaining employment in a particular trade or profession, to difficulty in obtaining an Australian passport or visa.²⁷⁹ ... However, this problem has been resolved to a large extent by the enactment of spent convictions legislation ... Some further limited statutory protection in respect of old convictions is also provided for in section 579 of the Crimes Act, 1900. That section provides that if a person is released on recognisance with or without a conviction, and for 15 years after that recognisance he or she is not convicted of an indictable offence or an indictable offence is not proven, that person is entitled to have the conviction disregarded and it is inadmissible in any criminal, civil or other legal proceedings.²⁸⁰

The case concerned the application of the Security Industry Act, 1997. Section 16(1)(b) of the Act provided that the Commissioner of Police must refuse to grant a licence if he or she was satisfied that the applicant has 'within the five years before the application for the licence was made, been found guilty (but with no conviction being recorded) by a Court in New South Wales. The principle issue for consideration in the case was whether section 12 of the Criminal Records Act, 1991, was repealed by implication or made subject to section 16(1)(b). The applicant was charged in Corowa Children's Court on 11 July 1995 with possession of a prohibited drug. The sentence recorded was that the applicant was released

²⁷⁶ Some of the statutes which allow for exemptions include the Casino Control Act, 1992, the Commission for Children and Young People Act, 1998, the Firearms Act, 1996, the Security Industry Act, 1997, the Weapons Prohibition Act, 1998, and the Tow Truck Industry Act, 1998.

²⁷⁷ Greenleaf G "Unfair dismissal for Spent Conviction" 1994 *Privacy Law and Policy Reporter*, 54. On the false perception that existed in the community about all juvenile related offences becoming expunged after a period of time, see *G v. J and H* [2001] NSWIR Comm. 69.

²⁷⁸ [2000] NSWADT 99.

²⁷⁹ *Laws of Australia* (LBC Information Services), Topic 12, Criminal Sentencing, Chapter 12.10, "The Consequences of a Conviction" at [1].

²⁸⁰ Note as well that section 556A of the Crimes Act 1900 gives the court the power to discharge a person without recording a conviction, even where an offence has been proved.

without conviction entered on the condition that he enter into a \$300 self-recognition and be of good behaviour for 12 months. The critical issue related to the effect of section 12 of the Criminal Records Act when read in the light of section 16(1)(b) of the Security Industry Act. Under the Criminal Records Act, the applicant's conviction was spent immediately on 11 July, 1995,²⁸¹ as no conviction was recorded on that day, or it was spent after three years, on 11 July, 1998, after the relevant crime free period expired. The applicant only applied for the licence on 8 June, 1999; his application was refused on the ground that section 16(1)(b) applied (the five years were not up). According to Robinson MA, the Criminal Records Act, 1991 is ambulatory in design

and is plainly intended by Parliament to operate in future in respect of future legislation and regulation of a kind then unforeseen by Parliament ... The later Act [Security Industry Act] here is more specific and relates only to the security industry licensing ... Accordingly, I find that section 12 of the Criminal Records Act should be read as being subject to section 16(1)(b) of the Security Industry Act, 1997.

An individual can also apply to the Police Commissioner of New South Wales to have criminal information destroyed. However, the Commissioner will usually only destroy this information if:

- charges have been withdrawn or dismissed
- a person is acquitted or has this or her conviction quashed on appeal
- a discharge without conviction is more than 15 years old and there have been no further convictions
- it is an old juvenile offence
- it is a very old and minor conviction.²⁸²

IV. Political Opinion

Legislative Framework

Provisions regarding discrimination on the grounds of political belief are to be found in State equal opportunities/anti-discrimination legislation. Political belief and activities is a prohibited ground in Tasmania, Northern Territory, Victoria, the Australian Capital Territory, Western Australia and Queensland. The position at federal level is not so clear cut and is set out in the next section.

Commonwealth

The Human Rights and Equal Opportunity Commission Act, 1986 (the HREOC ACT) incorporates ILO Convention No. 111, Discrimination (Employment and Opportunity) Convention, 1958 into Australian law. As such, section 3 of the HREOC Act, 1986 adopts the ILO definition of discrimination found in Article 1 of the ILO Convention No. 111 which includes political opinion amongst the grounds of discrimination. Neither the ILO Convention nor the

²⁸¹ See section 8(2) and 8(4) of the Criminal Records Act, 1991 (NSW).

²⁸² Criminal Records Act, 1991 (NSW), s. 23.

HREOC Act define the term political opinion. The Commission can inquire into acts or practices that may constitute discrimination.²⁸³ Where such acts or practices constitute discrimination and conciliation is considered inappropriate by the Commission, or where conciliation has failed, the Commission may report to the Attorney General of Australia on acts or practices which gave rise to the complaint of discriminations. No reports have been made to the Attorney General by the Commission in respect of political opinion to date. While further protection in the form of individual remedies is available in relation to discrimination based on the grounds of sex,²⁸⁴ disability²⁸⁵ and race,²⁸⁶ there is no such mechanism at Commonwealth level with regard to complaints of discrimination based on the other grounds, including that of political opinion.

State Legislation

Each of the three States under examination: Queensland, Tasmania and Victoria have equal opportunities/anti-discrimination provisions protecting against discrimination based on political opinion: Tasmania protects against discrimination based on political belief or affiliation and political activity while the Victorian and Queensland legislation contains a prohibition of discrimination based on political belief or activity. In Tasmania and Victoria political belief, affiliation and activity are defined but there is no statutory definition in the Queensland legislation.

Queensland

Legislative Framework

The Queensland Anti-Discrimination Act, 1991 includes discrimination based on political belief or activity in its list of discriminatory grounds.²⁸⁷ There is no definition of political belief or activity in the Act. The Act also includes association with, or relation to, a person identified on the basis of any of the other attributes referred to in the list of discriminatory grounds.²⁸⁸ The general exemptions provided for sections 25-29 of the Act apply with respect to political belief or activity and there is no specific exception which applies in respect of this ground alone.

In its annual report for 2000-2001 the Queensland Anti-Discrimination Commission reported that complaints based on political belief and activity amounted to 1.48% of all complaints received in that year. There was a total of c21 complaints.

Selected Case-Law

In *Byrne v State of Queensland*²⁸⁹ it was held that dismissal of the Director General of a government department following a change of government was discriminatory. The Tribunal took the view that knowledge by the Premier and/or the Minister of the complainant's political associations, beliefs or affiliations, if proved and acted upon, could fulfil the required criteria under the Act, namely that the complainant had been discriminated against on the basis of the attribute of political belief or activity, or association with a person identified on the basis of that attribute. The respondent claimed in its defence that it was a genuine

²⁸³ Human Rights and Equal Opportunity Commission Act, 1985, s. 31(b).

²⁸⁴ Sex Discrimination Act 1975.

²⁸⁵ Disability Discrimination Act 1992.

²⁸⁶ Racial Discrimination Act 1984.

²⁸⁷ Anti-Discrimination Act, 1991, s.7(1)(j).

²⁸⁸ Anti-Discrimination Act, 1991, s.7(1)(m).

²⁸⁹ [1998] QADT 20 (27 November 1998).

occupational qualification that a Minister have trust and confidence in a Director General. The Tribunal rejected this argument. The Tribunal stated that even if such a genuine occupational qualification existed the respondent would have to show on an objective basis that it was reasonable for him to have found the complainant to be person with whom he could not work and he had failed to do this.

Tasmania

Legislative Framework

The Anti-Discrimination Act, 1998 of Tasmania proclaims a general principle of non-discrimination in s. 16. This section enumerates 18 grounds of prohibited discrimination, including discrimination based on political belief or affiliation²⁹⁰ and political activity.²⁹¹ This is a comparatively broad approach to political opinion. Discrimination due to association with a person who has, or is believed to have, any of the 18 attributes listed in s. 16 is also prohibited.²⁹² By virtue of s. 22(1)(a) discrimination on the basis of any of the attributes of prohibited discrimination listed in s. 16 is prohibited in employment. Employment is broadly defined in s. 3 of the Anti-Discrimination Act, 1998 of Tasmania. The Anti-Discrimination Act, 1998 defines political belief or affiliation as “holding or not holding a political belief or view” and defines political activity as “engaging in, not engaging in, or refusing to engage in, political activity.”²⁹³ The four general exemptions to the principle of non-discrimination provided for in the Anti-Discrimination Act, 1998 apply in the case of discrimination on grounds of political belief/activity.²⁹⁴ In addition the Act provides for a specific exception to the prohibition against discrimination based on political belief, affiliation or activity in employment by virtue of s. 53. A person can discriminate against another on this basis where the employment is:

- (a) as an adviser to a Minister; or
- (b) as a member of staff of a political party; or
- (c) as a member of the electorate staff of any person; or
- (d) in any other similar position.

As the Anti-Discrimination Tribunal established under the Act has not had the opportunity to decide a case alleging discrimination based on either of these attributes, the extent of the protection afforded by this “definition is uncertain. The “Anti-Discrimination Commissioner for Tasmania,” Dr “Jocelyne A. Scutt, has indicated that her office will adopt a relatively broad approach to political belief and activity to the extent, for example of accepting claims regarding health and safety matters for investigation under the political belief/activity ground as well as under the separate “industrial activity” ground because it is a political belief in the promotion of health and safety at work that leads to the worker ‘taking a stand’ on such matters.²⁹⁵

Between July 1, 2000 and June 30, 2001 the Tasmanian Anti-Discrimination Commission, the overseeing body of the Anti-Discrimination Act, 1998, received two new complaints under s. 16 (m) — political belief or affiliation, and four new complaints under s. 16 (n) —

²⁹⁰ Anti-Discrimination Act, 1998, s. 16(m).

²⁹¹ Anti-Discrimination Act, 1998, s. 16(n).

²⁹² Anti-Discrimination Act, 1998, s. 16(s).

²⁹³ Anti-Discrimination Act, 1998, s. 3.

²⁹⁴ These are in respect of charities (s.23), actions required by law (s. 24), disadvantaged groups and special needs (s. 25) and equal opportunities (s. 26).

²⁹⁵ E-mail sent to project researcher 6th November 2002.

political activity. This latter figure represents an increase from the previous year, where no complaints were filed under this provision and amounts to 1.4% of the total complaints received by the Commission. The new complaints filed alleging discrimination based on the attribute of political belief or affiliation represent 0.7% of the total complaints received. Of the total number of complaints received by the Commission, 173 alleged discrimination in employment, which amounted to 60.3% of the total received. Discrimination in employment consistently receives the largest number of complaints.

Selected Case-Law

There have been no substantive decisions of the Anti-Discrimination Tribunal, the enforcement body of the Anti-Discrimination Act, 1998, regarding discrimination in employment on the basis of political belief, affiliation or activity. In *Maynard v. Tasmanian Aboriginal Centre*²⁹⁶ the Anti-Discrimination Tribunal had to decide whether it had jurisdiction to hear a complaint alleging discrimination on the basis of political belief, affiliation or activity that had occurred before the enactment of the Anti-Discrimination Act, 1998. The Anti-Discrimination Tribunal concluded that the conduct complained of had indeed occurred, but had been completed before the Act came into force and therefore the Tribunal did not have the jurisdiction to hear the issue.

Victoria

Legislative Framework

The Equal Opportunity Act, 1995 of Victoria includes political belief or activity as a prohibited ground of discrimination in the general principle of non-discrimination found in s. 6.²⁹⁷ Discrimination on the basis of personal association with a person who is identified by reference to any of the twelve attributes, including political belief or activity, is prohibited by virtue of s.6(m).

The Act defines political belief or activity as:

- (a) holding or not holding a lawful political belief or view;
- (b) engaging in, not engaging in or refusing to engage in a lawful political activity.²⁹⁸

The general exemptions to the principle of non-discrimination in employment set out in ss.20-25 apply with regard to discrimination on the grounds of political belief or activity. A specific exemption regarding political belief or activity is found in s. 18. This provides:

An employer may discriminate on the basis of political belief or activity in the offering of employment to another person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment.

The Annual Report of the Equal Opportunity Commission of Victoria, the overseeing body of the Equal Opportunity Act, 1995 compares the number of complaints on the basis of the prohibited grounds of discrimination in each of the areas covered by the Equal Opportunity Act, 1995.²⁹⁹ In the financial year 1999-2000, 39 complaints of discrimination in employment on the basis of political belief or activity were filed with the Commission, compared with seven for the fiscal year 2000-2001.

²⁹⁶ Tasmania Anti-Discrimination Tribunal, Case No. ADT-41/2001, 19th September 2001.

²⁹⁷ Equal Opportunity Act, 1995, s. 6(g).

²⁹⁸ Equal Opportunity Act, 1995, s. 4.

²⁹⁹ These areas are: employment, education, clubs, accommodation, goods and services, sport and public place.

Selected Case-Law

The meaning of political belief and activities has been examined in a number of Victorian cases. In *Nestle Australia Ltd v Equal Opportunity Board*³⁰⁰ the Victorian Supreme Court held that the term political should be given the meaning ascribed to it by common usage which is concerned with the processes of government and not, in general, the structure and interactions of industrial relations. Here the applicants who had been involved in union related activities had been dismissed in the course of an industrial dispute and their applications for re-employment had been rejected. Their claim of discrimination on grounds of political belief and activities was rejected on the grounds that it related to industrial relations rather than political belief or activities. In *CPS Management Ltd v Equal Opportunity Board*³⁰¹ the applicants alleged that they had been dismissed on the grounds of their political beliefs or activities. They had assisted in an audit of their company by a government agency and had provided information regarding billing irregularities by the company. The Supreme Court held that their activities were not political. The court held that a requisite qualifying characteristic of political belief or activity is that

the belief or activity is one which bears on government. This means that a belief is not political where it has no bearing on the form, role, structure, feature, purpose, obligations, duties or some other aspect of government.

A distinction was drawn between political beliefs and beliefs which underpin the existing social structure such as beliefs in honesty. The court characterized the applicants belief as “ethical” rather than political and the claim was dismissed.

In *Nevill Abolish Child Support and Family Court v Telstra Corporation*³⁰² the Tribunal elaborated on the definition developed in *Nestle* and *CPS Ltd* saying that in its view a belief or activity will also bear on government if it concerns the relationship between government and the governed — that is, the citizens and society in question. However it stopped short of defining political to include “the distribution or utilization of economic social or cultural powers in society”. This broad approach to defining political had been taken in the Western Australian case: *Croatian Brotherhood Union of West Australia v Yugoslav Clubs and Associations of West Australia*.³⁰³

There have been various other unsuccessful attempts to invoke the prohibition of discrimination based on political belief or activities. In *Laroche v Equality Opportunity Board*³⁰⁴ the Supreme Court held that submissions to parliamentary and other inquiries concerning the administrative reform of the Ambulance service were not political activities, because they occurred within and not outside the framework of government. In *Jolley v Equal Opportunity Board*³⁰⁵ criticism of the premises and staff of a particular prison made by the newly married wife of a prisoner was held by the Victorian Equal Opportunity Board to be a personal rather than a political belief. In *Atkinson v. State of Victoria (Dept. of Human Services — Aboriginal Affairs Section)*,³⁰⁶ the Victorian Civil and Administrative Tribunal cast doubt on the suggestion that the right of Aboriginal people to control their own affairs and the right to be treated as equals constituted a political belief. In *Boase v State of Victoria*³⁰⁷ the Victorian Civil and

³⁰⁰ [1990] VR 805.

³⁰¹ [1991] 2 VR 107.

³⁰² Anti-Discrimination Tribunal, Case No. 124/1997, 28th October, 1997.

³⁰³ [1987] EOC 92-190.

³⁰⁴ Unreported, Supreme Court, Gobbo J., 18th March 1991.

³⁰⁵ [1985] EOC 92-124.

³⁰⁶ [2000] VCAT 6.

³⁰⁷ Victorian Civil and Administrative Tribunal, 19th August 1999.

Administrative Tribunal held that beliefs in the values shared by those involved in community welfare work were ethical values and not political beliefs or values and that questioning of departmental practice in the handling of child protection matters did not go so fundamentally to the core of the existence of the child protection system that it was capable of being characterized as a political activity. Instead it was criticism which occurred inside rather than outside the framework of government.

However the Tribunal in *Boase* went on to decide that opposition on the part of the applicant to the administration of the child protection service based on political imperatives was capable of being characterized as coming within the definition of political belief and activity. There was evidence to the effect that the government had become extensively and politically involved in the administration of the child protection service because of intense public scrutiny and that the administration of the service was driven by political imperatives. These imperatives included an emphasis on throughput of cases rather than individual professional judgment of case workers, an emphasis on conformity rather than individual reflective case practice and the expectation that workers would follow certain guiding principles in their work such as that children never lie and that men should be discouraged from involvement in child protection work.

The characterization of beliefs and activities as political was upheld by the Equal Opportunity Board in the context of the advocating of changes in the law in relation to age of consent to sexual intercourse (*Thorne v R*)³⁰⁸ and in relation to affirmative action (*Oldham v Women's Information and Referral Exchange*).³⁰⁹ In *Nevil Abolish Child Support* a surname (Abolish Child Support) was held to be capable of constituting evidence or a manifestation of a belief and the attempt to publicise it and what it advocated constituted an activity. The belief or activity represented by the surname was held to be capable of being characterised as a political belief or activity. In *Foley v. Shop Distributive and Allied Employees Association*³¹⁰ the applicant claimed that he had been discriminated against because of his failure to join a political party. The Tribunal found that Foley was a person with the attribute of political belief as by declining to join the Australian Labour Party (ALP) he had "refused to engage in a lawful political activity". In arriving at its decision the Tribunal referred to the decision in *Nevil Abolish Child Support* in which it was held that "if a person refuses or fails to engage in a political activity, the person's reasons for doing so need not be political. It is the activity which must be political". The Victorian Civil and Administrative Tribunal in *Foley* established that Foley had no political objections to joining the ALP, instead his decision was based on time commitment.

³⁰⁸ [1986] EOC 92-182.

³⁰⁹ [1986] EOC 92-158.

³¹⁰ [1999] VCAT 651.

2 New Zealand

Legislative Framework

New Zealand's employment equality law primarily consists of two pieces of legislation, the Human Rights Act, 1993 and the Employment Relations Act, 2000. Regulations and guidelines on good practice issued under the respective Acts are a secondary source of employment equality law. In respect of criminal conviction/ex-offender/ex-prisoner status, the Green Party of New Zealand proposed the Clean Slate Bill in 2000, which was followed by the Government's proposed Criminal Records (Clean Slate) Bill, 2002. The differences between these two proposals and their passage through the legislature are explored in the section entitled Criminal Conviction/Ex-Offender/Ex-Prisoner.

As the Employment Relations Act, 2000, covers Trade Union membership only, the general provisions of the Act are outlined under the Trade Union ground below.

Human Rights Act, 1993

The Human Rights Act, 1993 prohibits discrimination on the grounds of:

- Sex
- Marital status
- Religious belief
- Ethical belief
- Colour
- Race
- Ethnic or national origin
- Disability
- Age
- Political opinion
- Employment status
- Family status
- Sexual orientation¹

The definition of discrimination in the Human Rights Act, 1993 states that discrimination on any of the grounds enumerated in s. 21(1) is a prohibited ground of discrimination:

- (a) if it pertains to a person or to a relative or associate of a person; and
- (b) it either,

¹ Human Rights Act, 1993, s. 21.

- (i) currently exists or has in the past existed; or
- (ii) is suspected or assumed or believed to exist or to have existed by the person alleged to have discriminated.²

Discrimination on any of the grounds listed in s. 21 (1) is prohibited in three distinct stages of the employment relationship. It is unlawful for an employer or a person acting or purporting to act on behalf of an employer on a prohibited ground of discrimination:

- to refuse or omit to employ an applicant³
- to offer less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for promotion, transfer, training as are made available to a similarly placed employee⁴
- to terminate employment, or subject the employee to any detriment⁵
- to retire the employee, or require or cause the employee to resign or retire⁶

Employment agencies are similarly bound not to discriminate against persons seeking employment, who are in the same or similar situation as another person, on the basis of a prohibited ground of discrimination.⁷ It is also unlawful to use or circulate an employment application form, or to make an inquiry of or about an applicant that “indicates, or could reasonably be understood as indicating, an intention to commit a breach of section 22 of this Act”,⁸ which prohibits discrimination in employment.

Human Rights Act, 1993: Exceptions

The Human Rights Act, 1993 stipulates eleven exceptions to the prohibition against discrimination in employment in ss. 24 to 36. Of note are the exceptions for crews of ships and aircrafts,⁹ national security,¹⁰ work performed outside New Zealand,¹¹ and domestic employment.¹² A specific exemption in relation to discrimination in employment based on political opinion is found in s. 31, which provides that employment of a political nature, such as a political adviser to a member of Parliament is exempt from the Human Rights Act, 1993.¹³ In addition to these exceptions, a general exemption for measures to ensure equality is provided for by the Human Rights Act, 1993.¹⁴

These provisions setting out the prohibited grounds of discrimination, the application of the principle of non-discrimination based on the enumerated grounds in employment, and the exceptions to and the exemption of measures to ensure equality, were incorporated into the Employment Relations Act, 2000 by virtue of ss. 104 to 106. Section 104 reiterates the prohibition against discrimination in employment by an employer or a person acting or purporting to act on behalf of an employer, although it does not extend this prohibition to employment agencies or employment application forms. Notably, the Employment Relations

² Human Rights Act, 1993, s. 21 (2).

³ Human Rights Act, 1993, s. 22 (1)(a).

⁴ Human Rights Act, 1993, s. 22 (1)(b).

⁵ Human Rights Act, 1993, s. 22 (1)(c).

⁶ Human Rights Act, 1993, s. 22 (1)(d).

⁷ Human Rights Act, 1993, s. 22 (2).

⁸ Human Rights Act, 1993, s. 23.

⁹ Human Rights Act, 1993, s. 24.

¹⁰ Human Rights Act, 1993, s. 25.

¹¹ Human Rights Act, 1993, s. 26.

¹² Human Rights Act, 1993, s. 27 (2).

¹³ Human Rights Act, 1993, s. 31 (a).

¹⁴ Human Rights Act, 1993, s. 73 (1).

Act, 2000 extends the prohibited grounds of discrimination to include trade union activity.¹⁵ The exceptions relating to discrimination in employment and the exemption for measures to ensure equality are incorporated by s. 106.¹⁶

Enforcement procedures

The Human Rights Act, 1993 ensures the continuation of the Human Rights Commission,¹⁷ a division of which exclusively deals with complaints.¹⁸ The Complaints Division's primary function is to act as a conciliator, though it has the power to refer complaints to the Complaints Review Tribunal.¹⁹ This Tribunal has numerous powers, including the ability to make an interim order.²⁰ If a party is dissatisfied with a decision of the Tribunal, the complaint can then be referred to the High Court of New Zealand²¹ and again to the Court of Appeal on a point of law.²²

The Employment Relations Act, 2000 similarly emphasises mediation and conciliation, though it does provide for arbitration in the form of the newly established Employment Relations Authority. This Authority is under a duty to consider mediation before utilising its powers of arbitration. The Authority or any party to a dispute can refer questions of law to the newly established Employment Court,²³ which can in turn refer the matter to the Court of Appeal of New Zealand.²⁴

I. Socio-Economic Status/Social Origin

The Human Rights Act does not include socio-economic status/social origin in the list of prohibited grounds. However, it does include the related, though narrower ground, of “employment status”. Discrimination based on employment status is prohibited *inter alia* in all matters relating to employment. Employment status is defined as:²⁵

- (i) Being unemployed; or
- (ii) Being a recipient of a benefit or compensation under the *Social Security Act 1964* or the *Accident Rehabilitation and Compensation Insurance Act 1992*.

The policy reason behind incorporation of the ground of “employment status” is to provide protection for those who might otherwise suffer discriminatory treatment by reason of either not having a regular job, or by being in receipt of state income support. The two limbs of the legislative prohibition overlap; one can suffer discrimination because of being unemployed, or because of receiving a benefit, including the unemployment benefit. The ground was added to the prohibited grounds of discrimination because of the Human Rights Commission's experience of some practical problems with, for example, the extension of credit to unemployed persons and/or beneficiaries. At the time of drafting the Human Rights Bill, the Department of Justice was not aware of any corresponding overseas legislation which

¹⁵ Employment Relations Act, s. 104 (1).

¹⁶ As noted whilst discussing the exceptions in relation to employment matters under the Human Rights Act, 1993, the exceptions include, *inter alia*: crews of a ship and aircraft, work involving national security, work performed outside New Zealand, and domestic employment.

¹⁷ Human Rights Act, 1993, s. 4.

¹⁸ Human Rights Act, 1993, s. 75-82.

¹⁹ Human Rights Act, 1993, s. 93.

²⁰ Human Rights Act, 1993, s. 95.

²¹ Human Rights Act, 1993, s. 122.

²² Human Rights Act, 1993, s. 123.

²³ Employment Relations Act, 2000, s. 178 (referral) and s. 186 (establishment).

²⁴ Employment Relations Act, 2000, s. 211.

²⁵ Human Rights Act, 1993, s. 21 (k).

included the ground of employment status.²⁶ The inclusion of “employment status” was viewed as being an innovative and progressive step.

Definition

The phrase “being unemployed” is not defined in the Human Rights Act. For social welfare purposes, a person is “unemployed” if he or she is temporarily out of the paid work force and in need of income support for that reason. The Human Rights Commission has adopted a broad interpretation of the term, noting that “being unemployed” should be interpreted to refer to, not just those who are temporarily unable to find paid work, but also to those who are not gainfully employed for a range of reasons including illness, disability, family responsibilities, retirement, etc. Any other interpretation, the Commission has noted, would reduce the protection from discrimination embodied in the ground of employment status and hence run counter to the policy goal of equal opportunity and non-discrimination.²⁷

Discrimination by association

Discrimination is prohibited on the basis of one’s presumed status or association with a person defined with reference to a prohibited ground, including “employment status”.²⁸

Exceptions

The general exceptions provided for under the Human Rights Act also apply in the context of discrimination based on “employment status”.

Selected Case-Law

R v G & E Human Rights Commission (Complaints Division) (C28/99) — 12 August 1999²⁹

The case involved a complaint of discrimination based on employment status and disability. The complainant completed a work trial for the respondent employers. On the completion of the work trial, the employers became aware that he was in receipt of compensation benefits under the *Accident, Rehabilitation and Compensation Insurance Act 1992*. They refused to hire the complainant. Evidence was submitted that they had stated their unwillingness to hire recipients of compensation benefits because of previous difficulties with staff members who were recipients of such benefits. The Complaints division concluded that the complainant’s status as a compensation benefit recipient and his disability, were significant and operative factors in the employer’s decision not to employ him. The case was found to come within the prohibited grounds of discrimination under the Human Rights Act — disability and employment status.

A275/00 — Conciliation: Employment Status Discrimination in Pre-Employment

The complainant was informed that she did not meet the entry requirements for a position in real estate sales, because she had not been in full-time employment for the previous five

²⁶ Department of Justice, Government of New Zealand *Report to the Justice and Law Reform Select Committee* (28th May 1993), p 16.

²⁷ Human Rights Commission Consistency 2000: *Report to the Minister of Justice pursuant to section 5 (1) (k) of the Human Rights Act, 1993*, (Wellington; 1998) available at: http://www.justice.govt.nz/justicepubs/reports/1998/hrc_consistency/part_c_10.html, accessed on Nov. 22nd 2002, Part C, para. 10.1.

²⁸ S.21 of the Human Rights Act.

²⁹ A summary of the case proceedings is available at: <http://www.hrc.co.nz>, accessed on Nov. 22nd, 2002. The case was settled during conciliation.

years. The complainant had been working full-time as a housewife for the previous 18 years. The complaint came within the scope of discrimination on the basis of “employment status”. The matter was settled in conciliation proceedings.

C122/94 Complaints Division 7 July 1994

The Valuers Act, 1984 provided that to register as a valuer with the Valuer’s Registration Board, an applicant must have completed one year’s practical experience in New Zealand under the supervision of a registered valuer. The complainant argued, *inter alia*, that this condition discriminated on the basis of employment status. However, the Complaints Division concluded that, because there was no requirement that the applicant be employed by the supervising registered valuer, the condition did not discriminate on the basis of “employment status”. The complainant argued that this requirement indirectly discriminated against a person who was unemployed, as it was “virtually impossible” to comply unless one was working with a registered valuer. The Complaints Division commented that this argument might have force were it not for the Board’s advice to the complainant that the supervision might be a “loose” arrangement; that is, that the complainant need not be an employee of the supervisor. In addition, as the requirement was a statutory one, it could not come within the scope of the Human Rights Act, 1993.

C127/96 Human Rights Commission: Complaints Division 18 June 1996 (Discrimination by a service provider on the basis of employment status)

This complaint concerned an allegation of discrimination in the provision of services. The complainant applied to join a study exchange team to travel overseas. He was informed by the respondent organisation that a condition for participation in the study exchange programme was that applicants were “currently employed in any recognised business or profession on a full-time basis ...”. The commissioners investigating the complaint concluded that a person who was currently unemployed might still fit the criteria of having a recognised professional vocation. The requirement “to be currently employed” was, therefore, considered unlawful by reason of employment status. The respondent organisation had claimed in its defence that it was exempt from the prohibition on discrimination set out in the Human Rights Act, by virtue of its charitable status and the objects of its work. The organisation was:

“A not for profit corporation providing worldwide humanitarian grants to needy peoples and worthy projects and educational awards for international exchanges of scholars and teachers and business and professional people.”

The organisation claimed that its work was designed to promote greater equality and to expand the opportunities available to disadvantaged groups. The Commissioners concluded, however, that the object of promoting equality was not clearly stated in the organisation’s work. Rather the over-riding objective seemed to be to provide international exchanges for scholars, teachers, business and professional people. An exemption could not, therefore, be claimed. In the case at hand, the benefit were being conferred in a way which specifically excluded the conferring of a benefit on a person against whom discrimination was unlawful under Part II of the Act, that is, a person who was unemployed.

II. Trade Union Membership

Legislative Framework

Freedom of association is recognised in s.17 of the Bill of Rights Act 1990.

One of the two main aims of the Employment Relations Act 2000 was to recognise that unions play an important role in the employment relationship.³⁰

Part 3 of the Employment Relations Act 2000 protects freedom of association and states:

s. 8 Voluntary membership of trade unions

A contract, agreement, or other arrangement between persons must not require a person—

- (a) to become or remain a member of a union or a particular union; or
- (b) to cease to be a member of a union or a particular union; or
- (c) not to become a member of a union or a particular union.

Section 9 deals with preferential treatment based on union membership:

s. 9 Prohibition on preference

- (1) A contract, agreement, or other arrangement between persons must not confer on a person, because the person is or is not a member of a union or a particular union,
 - (a) any preference in obtaining or retaining employment; or
 - (b) any preference in relation to terms or conditions of employment (including conditions relating to redundancy) or fringe benefits or opportunities for training, promotion, or transfer.
- (2) Subsection (1) is not breached simply because an employee's employment agreement or terms and conditions of employment are different from those of another employee employed by the same employer.³¹

The employer must allow each employee to attend at least two union meetings per year, each of a maximum two hours' duration, and pay ordinary pay to the employee for the duration of the meetings.³²

There are also provisions prohibiting exertion of undue influence on another person to join or not to join a union.³³ Access to workplaces by union organisers is restricted where none of the employees is a union member, there are no more than 20 workers in the workplace, and the employer is an individual and holds a certificate of exemption on the grounds that "the employer is a practising member of a religious society or order whose doctrines or

³⁰ Roth P "Employment Law" (2000) NZLR at 341.

³¹ Employment Relations Act 2000, s.9. Section 10 states that "a contract, agreement, or other arrangement has no force or effect to the extent that it is inconsistent with section 8 or section 9."

³² Employment Relations Act 2000, s.26.

³³ Employment Relations Act 2000, s.11.

beliefs preclude membership of any organisation or body other than the religious society or order of which the employer is a member.”³⁴

The Human Rights Act 1993 prohibits employment discrimination on 13 grounds, including political opinion,³⁵ but trade union membership is not one of the grounds covered (although it was contained in an earlier version of the Human Rights Bill).³⁶ By virtue of sections 104-106 of the Employment Relations Act 2000, the definition, grounds and exceptions to the principle of non-discrimination in employment contained in the 1993 Act are incorporated into the 2000 Act. The latter Act then prohibits discrimination based on trade union activities:

s. 104 Discrimination

- (1) For the purposes of section 103(1)(c), an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or by reason directly or indirectly of that employee's involvement in the activities of a union in terms of section 107, —
 - (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
 - (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
 - (c) retires that employee, or requires or causes that employee to retire or resign.
- (2) For the purposes of this section, detriment includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.
- (3) This section is subject to the exceptions set out in section 106.³⁷

The definition of trade union activities is contained in section 107:

s. 107 Definition of involvement in activities of union for purposes of section 104

For the purposes of section 104, involvement in the activities of a union means that, within 12 months before the action complained of, the employee—

- (a) was an officer of a union or part of a union, or was a member of the committee of management of a union or part of a union, or was otherwise an official or representative of a union or part of a union; or
- (b) had acted as a negotiator or representative of employees in collective bargaining; or
- (c) was involved in the formation or the proposed formation of a union; or

³⁴ Employment Relations Act 2000, ss. 23 and 24. “In principle it seems odd that an employer's religious beliefs should be imposed on employees in this way” — Roth P “Employment Law” (2001) NZLR 475 at 506.

³⁵ The political opinion ground may have relevance to some trade union cases — see below.

³⁶ *BHP New Zealand Ltd. v O'Dea* [1997] ERNZ 667 (NZ High Court, 24/97, 3 October 1997), citing Hansard Parliamentary Debates. See summary of *BHP* case available at: www.hrc.co.nz (visited 7 December 2002). The removal of the trade union membership ground from the Bill was a political decision — E-Mail to authors of this report from Professor Paul Rishworth of University of Auckland, 10 June 2003.

³⁷ These exceptions are standard exceptions which have no particular relevance to the trade union ground.

- (d) had made or caused to be made a claim for some benefit of an employment agreement either for that employee or any other employee, or had supported any such claim, whether by giving evidence or otherwise; or
- (e) had submitted another personal grievance to that employee's employer; or
- (f) had been allocated, had applied to take, or had taken any employment relations education leave under this Act; or
- (g) was a delegate of other employees in dealing with the employer on matters relating to the employment of those employees.

The Bill which led to the 2000 Act was welcomed by the Human Rights Commission as enabling ratification of ILO Conventions 87 and 98.³⁸ The Commission also recommended that the Human Rights Act should be amended to include trade union activity as a ground of discrimination,³⁹ but this recommendation has not been acted upon.

Selected Case-Law

Complaints concerning breaches of the 2000 Act are heard by the Employment Court and may be reviewed by the Court of Appeal. It was held under previous legislation that additional payments to employees who did not participate in a strike were discriminatory⁴⁰ but the 2000 Act does not provide explicit protection of this nature.⁴¹

There has been some case-law of the Human Rights Commission under the political opinion ground where trade union membership and/or activity has been considered. For example, it has been held to be discriminatory

- to include a statement that “an affinity with the union movement is desirable” in an advertisement for the post of network administrator with a trade union⁴²
- to ask at an interview if the candidate was a “union man”.⁴³

In a High Court appeal, it was held that the political opinion ground did not cover an employer's concerns about an employee's potential to interfere in the industrial relations on a particular site.⁴⁴ An advertisement seeking applicants for teaching vacancies who would “put professional matters before union matters” was held by the Human Rights Commission

³⁸ Human Rights Commission Submission on the Employment Relations Bill, Employment and Accident Insurance Legislation Select Committee, 3 May 2000, available at: www.hrc.co.nz (visited 7 December 2002). ILO Convention 87 concerns Freedom of Association and the Protection of the Right to Organise; ILO Convention 98 concerns the Right to Organise and Collective Bargaining. Section 3 of the Employment Relations Act 2000 states that one of the objects of the Act is to promote observance in New Zealand of the principles underlying ILO Conventions 87 and 98.

³⁹ *Ibid.*

⁴⁰ *Tranz Rail Ltd v Rail & Maritime Transport Union Inc* [1999] 1 ERNZ 460 (CA 149/97, 3 May 1999), decided under the previous statute — s.28 of the Employment Contracts Act 1991.

⁴¹ “Section 107 of the Employment Relations Act ... takes a different approach from that in the previous legislation by expressly setting out a code of all the activities that are intended to be covered by the union involvement discrimination grievance. In the legislation as first introduced, the grounds of discrimination included the situation where the employee ‘had been on strike, or had a notice of strike given on his or her behalf under this Act.’ It is surprising that this ground of discrimination was subsequently struck out from the Employment Relations Bill during the select committee process — Roth P “Employment Law” (2001) NZLR 475 at 506.

⁴² Case C301/95, 14 November 1995, available at: www.hrc.co.nz (visited 7 December 2002). The Complaints Division stated that it would have been quite different if the advertisement sought a trade union organiser, for example and that a reference to “an understanding and acceptance of the role of the trade union movement” would have been acceptable.

⁴³ Case W39/99, May 2002.

⁴⁴ *BHP New Zealand Ltd. v O'Dea* [1997] ERNZ 667 (NZ High Court, 24/97, 3 October 1997).

not to be discrimination on the political opinion ground⁴⁵ and previous management experience (which might lead to trouble with the union) did not, on its own, constitute political opinion.⁴⁶

Summary of Trade Union Membership Ground — New Zealand

1. Scope: membership, non-membership and activities.
2. The ground applies to refusals of employment as well as dismissals and detriment short of dismissal.
3. 'Closed shops': A contract cannot confer any preference on union members.
4. The employer must allow each employee to attend at least two union meetings per year.

III. Criminal Conviction/Ex-Offender/Ex-Prisoner

In 1981, the New Zealand Policy Review Committee reported on criminal records. It recommended an anti-discriminatory approach, but allowed exclusions to be made where there was a direct relationship between the criminal record and the relevant area. Such exceptions, however, could not be relied upon 10 years after conviction. It also recommended that such records be sealed after a qualifying period without further conviction. In particular, it suggested that after 5 years, it should be unlawful to ask questions or publish information which might disclose the existence of a conviction. This was subject to the 'direct relationship' proviso. After a further 5 years, all other disabilities relating to a conviction would be removed. The qualifying periods should, according to the Committee, run from the date of conviction if no custodial sanction was imposed or from the date of release from a custodial sanction. Provision was also made for exceptions including, for example, in the areas of sentencing and national security. The Report was never implemented.⁴⁷ In 1985, a discussion paper posited the view that a criminal record 'may well be the severest of all penalties'.⁴⁸ An attempt was made in 1988 to introduce a Criminal Record Bill but it was never enacted.

In 2000, a Clean Slate Bill was proposed by the Green Party. Under section 6 of the proposed Bill, all convictions — except convictions for which a prison sentence of more than 6 months or a fine exceeding \$2000 had been imposed, convictions for sexual offences, and convictions imposed against corporate bodies — were capable of becoming spent after a qualifying period. This qualifying period was 7 years for an adult, to run from the date of conviction provided that the individual was not convicted of a further offence in the interim period. In the case of a child or young person, the qualifying period was 3 years provided the individual was tried in the Youth Court and a sentence not greater than 3 months of imprisonment was imposed. Once a conviction was spent under the terms of the Bill, no person or organisation could require disclosure of the criminal record. Exclusions

⁴⁵ Case 123/96, 24 April 1996.

⁴⁶ Case C380/00, May 2002. The complainant alleged that his employer had turned him down for a team leader position because he had previously held a management role in a related company and had represented management during negotiations with a union. He said his employer was worried that if he was made team leader there would be trouble with the union. The Complaints Division considered that previous management experience did not, on its own, constitute political opinion.

⁴⁷ See Law Reform Commission (Australia), *Criminal Records*, Discussion Paper, 1985, for a discussion of the New Zealand Policy Review Committee's Report.

⁴⁸ Law Reform Division *Living Down a Criminal Record: problems and proposals* Government Publications: Wellington; 1985, p. 8.

were provided for under section 9 and included appointments as judges, magistrates, justices of the peace, police and prison officers, teachers, teachers' aides, or providers of child care services; it also excluded individuals convicted of arson or attempted arson in relation to the fire fighting service, and, similar fact evidence. Section 12 provided that it was unlawful to discriminate against individuals in respect of spent convictions and imposed a maximum penalty of \$7000 for such unlawful discrimination. Section 14 provided that the Bill did not authorise a public authority to destroy records relating to spent convictions. The Clean Slate Bill is currently with a Select Committee. Final date for submission to the Committee was 27 November, 2002. A report is expected on 25 July, 2003. In February, 2001, the Justice Minister, Phil Goff, welcomed the introduction of the private member's Bill, stating: "I am conscious of the plight of people who cannot free themselves of the stigma of old minor convictions no matter how successful their rehabilitation has been."⁴⁹ Nonetheless, the government has also introduced its own Criminal Records (Clean Slate) Bill.

It received its first reading on 2 May, 2002. It allows minor criminal convictions, where a prison sentence is not imposed, to be concealed after 10 years, provided there has been no further offending. According to the Minister for Justice, research indicated that, following a period of 10 years free from crime, an ex offender posed no greater risk to public safety than a person with a clean record.⁵⁰ Individuals who were sentenced to imprisonment are excluded from the scheme on the grounds that a sentence of imprisonment was only imposed as a last resort. Moreover, convictions for any sexual offence where the victim was a child under 16 or was mentally impaired are excluded. In addition, full access to criminal records for criminal investigation, and prosecution and sentencing purposes are provided for in the Bill. As regards employment, full access to criminal records is allowed as regards selection for positions where 'significant coercive powers of the State are being exercised', work with children and young persons, national security, the judiciary, police, prison, probation service, and the education sector. Access is also available for authorised research purposes. Some concern was expressed that the Bill would enable 'serial burglars' to get a clean slate. However, the Minister noted that the threshold of the Bill rendered most career burglars ineligible.⁵¹ A similar argument was made in respect of repeat drink drivers. Again, the Minister noted that research was also conducted on the 4,195 people who had two or more previous convictions for drink driving. At least 6 out of every 10 of those individuals were ineligible from the scheme on the basis of the imposition of custodial sanctions.⁵² A report from the Select Committee is also due on this Bill in July, 2003.

The main differences between the two Bills are as follows:

- The private member's Bill includes convictions for which a prison sentence of no more than 6 months has been imposed.
- Custodial sentences are not included on the government scheme.⁵³

⁴⁹ New Zealand Government Executive 'Government supports principles of cleaning the slate bill' (22/2/01). Available at: <http://www.greens.co.nz>.

⁵⁰ Hon Phil Goff, Criminal Record (Clean Slate) Bill 1st Reading, 2 May, 2002. Available at <http://www.beehive.govt.nz>.

⁵¹ As the Minister noted: 'Of the 714 people convicted of burglary in 1995 ... none would currently be eligible for a clean slate. 514 of the 714 received a custodial sentence for a burglary conviction in 1995, 189 had previously been sentenced to a custodial sentence and would be deemed ineligible. The remaining 11 who may be eligible were reconvicted within 2 years of the 1995 conviction and would be ineligible at this point in time'. *Ibid.*

⁵² *Ibid.*

⁵³ The New Zealand Prisoners' Aid and Rehabilitation Society noted that convictions for which a prison sentence of not more than 6 months was imposed should have been included. Many arguments were made for this inclusion including the following: community based penalties may not be a true indicator of the seriousness of the offence; most offending happens in late teenage/early 20s age groups and declines rapidly thereafter; and, the fact that, presently in New Zealand, there are a far greater range of custodial sanctions available. Available at <http://www.pars.org.nz>.

- The qualifying period in the private member's Bill is 7 years; it is 10 years in the government Bill.
- Both Bills exclude sexual offences but the government Bill specifies the sexual offences and excludes less serious ones.
- The Private Member's Bill distinguishes between adults and children; the government Bill does not.
- The Private Member's Bill excludes convictions for arson or attempted arson; the government Bill does not.
- The government Bill provides a more blanket approach to exceptions in respect of police investigations and court proceedings; the private member's Bill only excludes similar fact evidence.

As regards both, the New Zealand Prisoners' Aid and Rehabilitation Society noted that:

It is perhaps a reflection of how punitive attitudes in New Zealand have become that the Penal Policy Review Committee of 1981 considered that all offenders should be included in the scheme. Both of the current bills target only those who have received lower level sanctions.⁵⁴

Even if more punitive in design than earlier models, both Bills have encountered resistance. Richard Prebble, for example, a member of the ACT political party, suggested that: 'it's an attack on free speech. But more fundamentally, the law is an attack on the rule of law ... I'm voting to uphold the rule of law and to say to everybody, if you break the law there'll be consequences that you may have to live with for the rest of your life.'⁵⁵ On 2 May, 2002, the ACT Justice spokesperson, Stephen Franks, stated:

Clean slate supporters mean well. They talk of overcoming the past and forgetting the criminal stigma, but what it really means is suppression of the truth. It removes the right of everyone outside the justice establishment to decide whether and when they should forgive and forget for past misdemeanours ... Clean slate is government ordered lying for the offender ... When we suppress normal sanctions as a community — such as shame and a poor reputation — we are forced to rely on stronger formal institutional punishment.⁵⁶

Employers could not, it was argued, be expected to hire employees whilst blind to issues of character. In the mid 1980s, similar attempts were made, as noted, to introduce a criminal records bill. Much of the argument then centred around the belief that employers had a 'right to knowledge' about convictions based on the risks and dangers associated with employing such individuals. Commenting on the Department of Justice Paper, *Living Down the Past*, Greenslade argued as follows:

- (a) The relationship of employment is based on trust and good faith. Prohibitions on seeking information damage that relationship.
- (b) 'Real rehabilitation' requires an individual with a criminal record to confront, not conceal, his or her past.

⁵⁴ *Ibid.*

⁵⁵ Prebble, R 'The law's tough? — try living without law' (14 December, 2001) <http://www.act.org.nz>.

⁵⁶ ACT, Press Release, (2/5/02) Available at: <http://www.scoop.co.nz>.

- (c) The fundamental goal should be a society in which mistakes can be faced up to, not lived down.⁵⁷

He also made a number of points on the offending/rehabilitation nexus:

- (a) Citizens do extend and are entitled to expect an initial presumption of trust.
- (b) A conviction cancels the entitlement to expect that presumption.
- (c) The most significant factor reducing the risk of recidivism is a major change in the offender's attitudes or circumstances.
- (d) Risk of recidivism attenuates rather than disappears. Only when the risk of recidivism is less than the risk of initial offending is the presumption of trust effectively reinstated.
- (e) The most persuasive indicator of rehabilitation, that of a changed attitude, first requires a personal commitment to change by the offender.

Indeed this emphasis on knowledge appears to have intensified in the last decade in New Zealand. MacKinnon and Wells noted, for example, that the number of employers who requested information about criminal records increased from 13,000 in 1996 to 36,500 in the first half of 2000.⁵⁸ The same authors also noted:

[I]n line with classical legal and economic reasoning, in a contract of service full disclosure means that the parties to the contract are well informed so as to allow rational choices, including the choice of an employer as to who to have. Any non-disclosure of a criminal record, or restrictions on the ability of the employer to take it into account, potentially affects the voluntary nature of the contract between the parties. There is a certain elegant logic in arguing that the normal forbidden grounds for discrimination entail at least some degree either of involuntary character (age, gender and race) or normal behaviour (marital status, family status). A criminal record, on the other hand, is obtained as a direct consequence of aberrant, socially unacceptable behaviour and the criminal should suffer the consequences of his or her actions. All this is reasonable.⁵⁹

On the other hand, this had to be weighed against the argument that:

People who were caught committing a minor offence should not be punished for the rest of their lives. A conviction on a person's record can limit ... [his or her] ability to travel or get a job. This can be a much greater punishment than the original crime ever deserved — or that the original punishment ever intended.⁶⁰

More specifically, Wells and MacKinnon noted:

Statistics disclose that in 1998 alone, 101,109 people were convicted of an offence. Excluding the 622 persons aged between ten and 16 years, 100,731 people had a conviction entered against their names. If disclosure of their criminal record is a requisite part of the application process, this means that over 100,000 individuals may face

⁵⁷ Greenslade B "Eyes Open Policy: employment of a person with a criminal record" 1986 (November) *New Zealand Law Journal*, pp. 386-388.

⁵⁸ Wells P and MacKinnon J "Criminal records and employment: a case for legislative change" 2001 (19) *New Zealand Universities Law Review* pp. 287-308 at p. 291.

⁵⁹ *Ibid*, p. 300.

⁶⁰ Tanzos, 'Cleaning the Slate — why we should wipe old minor convictions'. Available at <http://www.greens.org.nz>.

expulsion from the labour market. Furthermore, in the same year, 25,100 New Zealand Europeans were convicted of criminal offences (excluding traffic offences). This can be compared with 24,071 Maori, 4,588 Pacific Islanders and 877 from 'other' ethnic groups. If these conviction patterns are compared to the relative sizes of these ethnic groupings in the general population, it becomes clear that certain groups are grossly over-represented in the crime statistics. If this is the case, discrimination on the basis of a criminal record may have a disparate impact on those groups when compared to others.⁶¹

The authors had a further concern:

Conviction for a criminal record involves a sentence — custodial or otherwise. Completion of this sentence is the punishment that society, through its agent (the court), deems appropriate. Continued employment discrimination against ex-offenders could arguably be regarded as a *de facto* life sentence given the fact that it has the potential for preventing such a person from earning a living commensurate with his or her skills and talents. It may also lead to a greater tendency amongst such persons to reoffend, a phenomenon contrary to the best interests of society. Thus, a failure of such individuals to find meaningful and rewarding employment brings into sharp relief the tension between rehabilitation and 'labour market' choice.⁶²

The New Zealand Prisoners' Aid and Rehabilitation Society supports the enactment of clean slate provisions for the following reasons:

1. It is estimated that between 1 in 4 and 1 in 3 New Zealand males have been convicted in court before the age of 24.
2. Many offences occur when a person is young and unsettled and the incidence of offending reduces with age.
3. After seven to ten years, the risk of re-offending is greatly reduced.
4. The ex-offender groups identified in the Bills are not a serious 'danger' to society.
5. It would provide an incentive for offenders to remain out of trouble.
6. Discrimination against ex-offenders, particularly in the area of employment and applying for insurance, is a serious impediment to rehabilitation.
7. Criminal convictions which occurred years before may be irrelevant and can return to haunt the person.
8. The consequences of criminal convictions can impact also on the family and it is unfair that they should suffer forever.
9. The negative consequence of a criminal conviction impacts mostly on the lower socio-economic sector of society, and in particular on Maori, and reinforces the social divisions within New Zealand.
10. New Zealand is proud of its human rights record, but in respect of clean slate legislation, it had fallen behind Canada, UK, some states of Australia and the USA.

⁶¹ *Op cit* p. 301.

⁶² *Ibid.*

11. The discrimination arising from the use of criminal convictions contradicts our vision of New Zealand as a tolerant and just society in which everyone can participate.⁶³

Albeit not directly relevant, one case worth noting in New Zealand as regards criminal records is *The Director of Human Rights Proceedings v. Thoroughbred Racing Inc.*⁶⁴ The case was taken on the discriminatory ground of marital status. Here, the Rules of Racing prohibited individuals with criminal records (and their spouses) from training or racing horses. Ms Lamb was the spouse of a man who had been convicted of assaulting her. He had also been convicted of theft in 1959. After separating in 1995, both parties continued to train and race horses. The rules contained a provision enabling an exemption to be granted to a person affected by the ban. Ms Lamb's husband successfully applied for an exemption from the NZ Racing Conference. Ms Lamb, however, was unaware that she was prohibited from training or racing horses as a result of her husband's convictions. Nor was she aware of her right to apply for an exemption. As a result, the New Zealand Racing Conference prosecuted Ms Lamb for breaching the Rules of Racing (a fine of \$700 was imposed and she was ordered to pay legal costs of \$1,500).⁶⁵ Ms Lamb complained to the Human Rights Commission. The Complaints Review Tribunal held that NZ Racing Conference was in breach of section 44(1)(b) of the Human Rights Act, 1993 on the grounds of family status. The Tribunal, *inter alia*, awarded \$8,000 damages to the complainant and ordered the Racing Conference to amend its Rules.⁶⁶

IV. Political Opinion

Legislative Framework

The Human Rights Act, 1993 prohibits discrimination in every aspect of the employment relationship, from application to dismissal, on the grounds of, *inter alia*, political opinion. The Act defines political opinion as including a lack of opinion.⁶⁷ The general exceptions provided for in sections 24⁶⁸ and 25⁶⁹ and 73(1)⁷⁰ apply with respect to discrimination based on political opinion. The Act also provides that the prohibition against discrimination on the basis of political opinion in the employment relationship does not apply where a person is employed in a domestic position in a private household.⁷¹ Discrimination on the basis of political opinion in employment is further lawful if the person is a political advisor or secretary to a Member of Parliament, or a political advisor to a local authority member. Alternatively, such discrimination is lawful if the person is a member of staff of a political party.⁷² The general prohibition on discrimination in employment along with the exceptions to the prohibition, were incorporated into the Employment Relations Act, 2000. Thus, the above provisions in respect of political opinion apply to the area of employment activity covered by the Employment Relations Act, 2000 i.e. duration and termination of employment.

⁶³ New Zealand Prisoners' Aid and Rehabilitation Society 'Submission on Clean Slate Bill and Criminal Records Clean Slate Bill' 2002, available at: <http://www.pars.org.nz>.

⁶⁴ [2002] NZCA 88 (7 May, 2002).

⁶⁵ The Racing Conference did however grant her a retrospective exemption so that she, or other persons who had interests in the winning horses, did not forfeit stake winnings — the conviction, fine and costs remained.

⁶⁶ The High Court reversed the decision of the Tribunal but the Court of Appeal reinstated it.

⁶⁷ Human Rights Act, 1993, s. 21 (1)(j).

⁶⁸ Exception concerning non-New Zealand ships and aircraft if the person was employed or applied for the position outside of New Zealand.

⁶⁹ Exception concerning work involving national security.

⁷⁰ Exception concerning measures to ensure equality.

⁷¹ Human Rights Act, 1993, s. 27 (2).

⁷² Human Rights Act, 1993, s. 31.

In 2001-2002 enquiries to the New Zealand Human Rights Commission involving issues of discrimination based on political opinion amounted to 17 a figure which comprised 1% of all enquiries received by the Commission.⁷³

Selected Case-Law

A number of cases have been brought under the prohibition of discrimination on grounds of political opinion in the Human Rights Act. In Case No. C225/94⁷⁴ the Human Rights Commission held that a bus operator had been discriminated against on the grounds of political opinion when he was disciplined for distributing Communist party literature in his own time which criticised the company's Chief Executive Officer and the company's policy of supporting government reform of public transport through deregulation. The company disputed that the material distributed by the complainant was political, rather it argued that the material was a personalised attack on the company and its CEO, and as such was a potential breach of the employee's duty of fidelity to the employer. This argument was rejected by the Commission on the grounds that the company's record of its reasons for disciplining the complainant indicated that they went "far beyond personal issues and well into the political arena". For example, it referred to the complainant's "inferring that company employees have low wages, bad conditions and lack of union rights" and his "advocating strikes, pickets and protests". The Commission held that it was not necessary to establish that political opinion was the only factor in the disciplinary action — all that was required was that it was a "substantive and operative" factor. Commenting on the scope of the definition of political opinion, the Commission held that it should be given a wider definition than simply relating it to membership of a political party or even any opinions to do with the "policies, roles or activities of government". It was noted that some jurisdictions had defined the term to mean any belief or opinion concerning the distribution and utilisation of economic, social and political power in a society. Without accepting that definition, the Commissioners considered the term wide enough to include the expression of the complainant's views through the trade union activity involved in the complaint. The issue of whether trade union activities amounted to political opinion also arose in case no C301/95.⁷⁵ Here an advertisement which contained a statement to the effect that "an affinity with the union movement is desirable" was held to be discriminatory. The deciding body noted that it had taken the view that trade union involvement could, in appropriate circumstances, fall within the definition of political opinion. The Commission reiterated its view that the term political opinion should not be confined to opinions involving just the policies, roles or activities of the government of the day.

A slightly narrower approach to the definition of political opinion than that adopted in Case C225/95 was taken by the High Court in *BHP Steel v O'Dea*⁷⁶ when it held that political opinion as protected by the Human Rights Act refers to "opinions on the policies, structure, composition, role, obligations, purposes or activities of Government". Mr O'Dea had been dismissed because his strong views in opposition to workplace reform had come to the attention of management at a time when workplace reform was soon to be voted upon by the workers. Robertson J. held that it was evident from any factual analysis that his

⁷³ New Zealand Human Rights Commission, Annual Report 2002, available at: <http://www.hrc.co.nz/hrc/pdfdocs/Annual%20Report%202002.pdf>.

⁷⁴ Human Rights Commission, 8 December 1994.

⁷⁵ Human Rights Commission, 14 November 1995.

⁷⁶ *BHP New Zealand Ltd. v O'Dea* [1997] ERNZ 667 (NZ High Court, 24/97, 3 October 1997).

employers were not interested in his political views. Instead his dismissal was due to his potential to interfere in the industrial relations at the workplace and his views upon and attitude towards the industrial framework the employer was trying to create. This, it was held, was not a question of political opinion. In case C380/00⁷⁷ the complainant argued that his employer had turned him down for a team leader position because he had previously held a management role in a related company and had represented management during negotiations with a union. The man said that his employer was worried that if he was made team leader there would be trouble with the union. The Commission noted the decision in *BHP Steel v O'Dea* and concluded that previous management experience did not, on its own, constitute political opinion.

The issue of discrimination on the basis of lack of particular opinion arose in Case C123/96.⁷⁸ The complaint concerned an advertisement which sought applicants for a teaching position who “would put professional matters before union matters” and “happily support the direct resourcing of teachers’ salaries”. It was held that the latter phrase required applicants to hold a particular political opinion concerning a controversial policy of the Government of the day and could reasonably be understood as indication of an intention to discriminate on the ground of political opinion. The Commission noted that the definition of political opinion in s.21 was described as “including the lack of a particular opinion”. In arriving at the conclusion that the applicant had been discriminated against, the Commission took into account the fact that the wording in question required applicants to actually support bulk funding. It indicated that even applicants who held neutral views about direct resourcing would not meet the employer’s requirements and thus be disadvantaged. The Commission indicated that if the respondent simply wished to indicate the ethos of the school then other wording could have been used, such as “This school has direct resourcing of teachers’ salaries since 1996.”

⁷⁷ Human Rights Commission, May 2000.

⁷⁸ Human Rights Commission, 24 April 1996.

3 Canada

Canada is a federation with two levels of government: federal and provincial/territorial. Each level of government has enacted human rights legislation and labour legislation prohibiting discrimination in employment matters in their respective jurisdictions. The legislation is designed so as to avoid conflicts between federal, provincial and territorial provisions. In case any conflict does arise, however, federal legislation takes priority.

For the purposes of this Report, we have focused on the protection available at a federal level and the following provinces: British Columbia, Ontario, Québec. Other provincial/territorial jurisdictions are examined in relation to particular grounds, where there is particularly useful information available.

Federal Legislative Framework

The Canadian Human Rights Act, 1985 and the Canada Labour Code, 1985 govern discrimination in employment at a federal level in Canada. Both statutes apply to federal government, federal businesses and private businesses operated at a federal level. Of the four grounds under consideration in this Report, only discrimination on the basis of trade union membership and a pardoned criminal conviction is prohibited at federal level. The Canada Labour Code, 1985 prohibits discrimination on the basis of trade union membership. The Canada Human Rights Act, 1985 (CHRA), prohibits discrimination on a range of enumerated grounds, including conviction for which a pardon has been granted.¹ A recent review of the CHRA has led to proposals to extend the scope of the prohibition against discrimination.

An overview of the CHRA is outlined below. As the Canada Labour Code, 1985, is of relevance only to Trade Union membership, it is covered under this particular ground below.

The Canada Human Rights Act, 1985

The CHRA includes a general guarantee of equality:

All individuals should have the opportunity, equal with other individuals, to make for themselves the lives that they are able and wish to have and to have their needs accommodated (s.2).

Under the CHRA, it is a discriminatory practice to use or circulate an employment application² form or to publish an employment advertisement that discriminates on a prohibited ground.³ Under section 7 of the Act, it is a discriminatory practice, directly or indirectly to:

... refuse to employ or continue to employ any individual or; (b) differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

¹ Canadian Human Rights Act, 1985, s. 3 (1).

² *Ibid*, s. 8(a).

³ *Ibid*, s. 8(b).

The CHRA also sets out detailed provisions regulating discriminatory practices in relation to, *inter alia*, employee organizations,⁴ policies or practices of employers, employee organisations and employer organizations,⁵ and harassment.⁶

CHRA: Exceptions

There are a number of exceptions to the principle of non-discrimination in employment. An apparently discriminatory practice may be justified, if it is based on a bona fide occupational requirement.⁷ An employer establishes a bona fide occupational requirement by proving that accommodation of the needs of an individual or class of individual would cause undue hardship with respect to health, safety and cost.⁸ If an employer can so establish his claim, the alleged discriminatory practice is not unlawful. Further, it is not a discriminatory practice if an individual is discriminated against on any of the proscribed grounds if the guidelines, issued by the Canadian Human Rights Commission, consider it reasonable.⁹ Exceptions are also provided for in relation to affirmative action or “special programs”, designed to eliminate or reduce the disadvantages suffered by any group or individuals based on or related to the prohibited grounds of discrimination.¹⁰ It is not a discriminatory practice to collect information relating to a prohibited ground of discrimination if the information is intended to be used in adopting or carrying out a special program, plan or arrangement.

CHRA: Enforcement Procedures

The CHRA establishes a Human Rights Commission¹¹ and a Human Rights Tribunal¹² with functions to investigate and hear complaints arising under the Act. The functions of the Commission also include:

- To develop and conduct information programs¹³
- To undertake or sponsor research¹⁴
- To review regulations, rules, orders, by-laws made under an Act of Parliament¹⁵
- To discourage and reduce discriminatory practices¹⁶

The complaint process begins with the Commission, which accepts complaints of discriminatory practices from any individual or group of individuals,¹⁷ within a year of the alleged act of discrimination.¹⁸ The complaint must not be trivial, frivolous, vexatious or made in bad faith.¹⁹ The Commission will not deal with a complaint when the:

- complainant has not exhausted grievance or review procedures;²⁰

⁴ Canadian Human Rights Act, 1985, s. 9.

⁵ Canadian Human Rights Act, 1985, s. 10.

⁶ Canadian Human Rights Act, 1985, s. 14.

⁷ Canadian Human Rights Act, 1985, s. 15 (1)(a).

⁸ Canadian Human Rights Act, 1985, s. 15 (2).

⁹ Canadian Human Rights Act, 1985, s. 15 (1)(c).

¹⁰ Canadian Human Rights Act, 1985, s. 16 (1).

¹¹ Canadian Human Rights Act, 1985, s. 26.

¹² Canadian Human Rights Act, 1985, s. 48. 1.

¹³ Canadian Human Rights Act, 1985, s. 27 (1)(a).

¹⁴ Canadian Human Rights Act, 1985, s. 27 (1)(b).

¹⁵ Canadian Human Rights Act, 1985, s. 27 (1)(g).

¹⁶ Canadian Human Rights Act, 1985, s. 27 (1)(h).

¹⁷ Canadian Human Rights Act, 1985, s. 40 (1).

¹⁸ Canadian Human Rights Act, 1985, s. 41 (1)(e).

¹⁹ Canadian Human Rights Act, 1985, s. 41 (1)(d).

²⁰ Canadian Human Rights Act, 1985, s. 41 (1)(a).

- complaint would be more appropriately dealt with under another procedure²¹ and;
- complaint is beyond the jurisdiction of the Commission.²²

If the Commission is of the opinion that a complaint warrants further inquiry, it will refer the complaint to the Tribunal.²³ The emphasis throughout the complaint procedure is on conciliation and mediation.²⁴

CHRA: Proposals for Reform

A review of the CHRA was initiated in 1999 by the Minister of Justice. An independent Review panel was established. The Panel reported to the federal government in June 2000.²⁵ The Review Panel's mandate included examining the purpose and grounds of the CHRA to ensure compliance with modern human rights and equality principles and to determine the adequacy of the scope and jurisdiction of the Act. The Panel examined whether the Act should be extended to include, *inter alia*, socio-economic status and political opinion. The Review Panel also examined the protection afforded by the Act to those with criminal records. The discussions and recommendations of the Panel in respect to each of these grounds are discussed below.

Provincial/Territorial Legislative Framework

Human rights legislation prohibiting discrimination in employment on the basis of enumerated grounds exists in each of Canada's provinces and territories. Three provinces and territories prohibit discrimination based on social condition or social origin, and six include the related ground 'source of income'. Discrimination based on political opinion is prohibited in seven provinces and territories. Record of criminal conviction and/or pardoned conviction is included as a prohibited ground of discrimination in six provinces. Labour relations legislation in each of the provinces and territories provides protection against discrimination on the basis of trade union membership.

British Columbia

Two pieces of legislation regulate discrimination in employment in British Columbia: the Labour Relations Code, 1996 and the Human Rights Code, 1996.

The Labour Relations Code, 1996, prohibits discrimination on the basis of trade union membership (see further below under Trade Union Membership).

The Human Rights Code, 1996 prohibits discrimination, *inter alia*, on the basis of political belief and criminal or summary conviction offence unrelated to the employment or the intended employment.²⁶ Socio-economic status/social origin is not covered, though proposals for its inclusion have been recommended by the Human Rights Commission of British Columbia, in its report, *Human Rights for the Next Millennium*, published in 1998 (see

²¹ Canadian Human Rights Act, 1985, s. 41 (1)(b).

²² Canadian Human Rights Act, 1985, s. 41 (1)(c).

²³ Canadian Human Rights Act, 1985, s. 49 (1).

²⁴ Canadian Human Rights Act, 1985, s. 26-38 and s. 47.

²⁵ Canadian Human Rights Act Review Panel *Promoting Equality: A New Vision* Canada: Dept of Justice; 2000 June.

²⁶ Human Rights Code, 1996, s. 13 (1).

further below). The Commission's proposals were supported by the Review Panel of the Canadian Human Rights Act, reporting to federal government in 2000.

Human Rights Code, 1996

The Human Rights Code, 1996 prohibits discrimination in employment. Employment agencies are similarly prohibited from discriminating against a person on the basis of a prohibited discriminatory ground.²⁷ The Code further prohibits discrimination in relation to the publication of employment advertisements.²⁸

Exceptions

Exemptions from the general prohibition on discrimination in the Human Rights Code, are provided for in relation to the following:

Bona fide occupational requirement;²⁹

Charitable, philanthropic, educational, fraternal, religious or social organisations or corporations not operated for profit are not considered to have contravened the Code in preferring members of an identifiable groups or class or persons characterised by one of the prohibited grounds;³⁰

An employment equity plan designed to ameliorate the conditions of individuals or groups disadvantaged because of race, colour, ancestry, place of origin, physical or mental disability or sex.³¹ (Political belief/Previous criminal conviction are not included within the general exception in relation to employment equity plans.)

Enforcement Procedures

The Human Rights Code, 1996 establishes a Human Rights Commission,³² a Human Rights Advisory Council³³ and a Human Rights Tribunal.³⁴ The Commission hears complaints of alleged discrimination within one year of the alleged contravention³⁵ from any person or group of persons.³⁶ The Tribunal can hear complaints referred to it by the Commission.³⁷ The functions of the Human Rights Advisory Council are:

- To inform the public about the work of the Commission
- Ensure the concerns of the public are brought to the attention of the Commission
- Advise the Commission on matters relevant to the Code³⁸

Ontario

The Labour Relations Act, 1995, prohibits discrimination on the basis of trade union membership. (See further below, under Trade Union Membership).

²⁷ Human Rights Code, 1996, s. 13 (2).

²⁸ Human Rights Code, 1996, s. 11.

²⁹ Human Rights Code, 1996, s. 13(4).

³⁰ Human Rights Code, 1996, s. 41.

³¹ Human Rights Code, 1996, s. 42.

³² Human Rights Code, 1996, s. 15 (1).

³³ Human Rights Code, 1996, s. 20(1).

³⁴ Human Rights Code, 1996, s. 31 (1).

³⁵ Human Rights Code, 1996, s. 22 (1).

³⁶ Human Rights Code, 1996, s. 21 (1).

³⁷ Human Rights Code, 1996, s. 26 (1)(c) and s. 28.1 (3)(a).

³⁸ Human Rights Code, 1996, s. 20 (3)(a) to (c).

The Human Rights Code, 1990 prohibits discrimination in employment on fifteen enumerated grounds, including, *inter alia* record of offences. Socio-economic status/social origin is not covered, though there have been proposals to extend the scope of the anti-discrimination provision to these grounds. The Human Rights Code, 1990, however, does prohibit discrimination on the basis of the related ground, being “in receipt of public assistance”, but only in relation to occupancy of accommodation. Discrimination on the basis of political opinion is not prohibited under the Code.

The general prohibition against discrimination in employment applies to employment advertisements,³⁹ application forms,⁴⁰ questions asked at interview⁴¹ and employment agencies.⁴² Harassment in employment on the basis of the enumerated grounds is also prohibited.⁴³

Exceptions

Under the Human Rights Code, 1990, exemptions from the general prohibition on discrimination in employment are provided for in relation to:⁴⁴

bona fide occupational requirements. To satisfy this requirement, it must be shown that the needs of a group cannot be accommodated without undue hardship with respect to cost, outside sources of funding, and health and safety requirements.

Special interest organisations and special programs which serve the interests of persons identified by a prohibited ground of discrimination and which are designed to achieve equality of opportunity.

Religious, philanthropic, educational, fraternal or social institutions or organisations, primarily engaged in serving the interests of persons identified by one of the prohibited grounds.

When the primary duty of the employment is attending to the medical or personal needs of a person or child, aged, infirm or ill spouse, same sex-partner or relative of the person.

A person who decides to grant or refuse employment to family members does not infringe the right to equal treatment in employment.

Vocational organisations are prohibited from discriminating on the basis of all of the enumerated grounds, excluding record of offences.⁴⁵

Enforcement Procedures

The Human Rights Code, 1990 ensures the continuance of the Ontario Human Rights Commission⁴⁶ and establishes the Human Rights Tribunal.⁴⁷ The functions of the Commission include:

Promotion of an understanding and acceptance of and compliance with the Code⁴⁸

³⁹ Human Rights Code, 1990, s. 23 (1).

⁴⁰ Human Rights Code, 1990, s. 23 (2).

⁴¹ Human Rights Code, 1990, s. 23 (3).

⁴² Human Rights Code, 1990, s. 23 (4).

⁴³ Human Rights Code, 1990, s. 5 (2).

⁴⁴ Human Rights Code, 1990, s. 24.

⁴⁵ Human Rights Code, 1990, s. 6.

⁴⁶ Human Rights Code, 1990, s. 27 (1).

⁴⁷ Human Rights Code, 1990, s. 35 (1).

⁴⁸ Human Rights Code, 1990, s. 29 (b).

Examination and review of statutes or regulations, programs and policies, to ensure compliance with the Code⁴⁹

Inquire into incidents of and conditions leading to tending to lead to tension or conflict based on identification by a prohibited discriminatory ground⁵⁰

The Commission can receive complaints from a person alleging discrimination under the Code⁵¹ within six months,⁵² provided that the complaint is not vexatious, frivolous, trivial or made in bad faith.⁵³ The Commission refers complaints to the Human Rights Tribunal when a settlement can not be reached and, in the opinion of the Commission, the evidence warrants an inquiry.⁵⁴ A decision made by the Tribunal can be appealed to the Divisional Court of Ontario.⁵⁵

Québec

Prohibitions on discrimination in employment are set out in the Québec Labour Code R.S.Q. C-27 (updated to 2002)⁵⁶ and in the Québec Charter of Human Rights and Freedoms, 1975.

The Québec Labour Code prohibits discrimination on the basis of trade union membership (See further below under Trade Union Membership).

The Québec Charter of Human Rights and Freedoms, 1975 prohibits discrimination in employment on a range of grounds, including political convictions, social condition, and a criminal offence, for which a pardon has been granted (s.16-18).

Québec Charter of Human Rights and Freedoms, 1975

Under the general provisions relating to discrimination in employment, an employer may not request information in an application form or in the course of an interview, in relation to any of the prohibited grounds of discrimination.⁵⁷ This prohibition does not apply, however, in relation to previous criminal convictions, even where covered by s.18(2). The Charter prohibits harassment on the basis of any of the thirteen enumerated grounds in section 10.⁵⁸

Exceptions

The Charter provides exemptions from the general prohibition on discrimination⁵⁹ in relation to:

- affirmative action programs;
- charitable, philanthropic, religious or educational institutions, or an institution devoted exclusively to the well-being of an ethnic group (This provision does not apply in relation to previous criminal convictions covered by s.18(2)).

⁴⁹ Human Rights Code, 1990, s. 29 (e).

⁵⁰ Human Rights Code, 1990, s. 29 (f).

⁵¹ Human Rights Code, 1990, s. 32 (1).

⁵² Human Rights Code, 1990, s. 34 (1)(d).

⁵³ Human Rights Code, 1990, s. 34 (1)(b).

⁵⁴ Human Rights Code, 1990, s. 36 (1).

⁵⁵ Human Rights Code, 1990, s. 42 (1).

⁵⁶ Québec Labour Code, R.S.Q., c.C-27, available at <http://www.canlii.org> (consolidated to 1 November 2002).

⁵⁷ Charter of Human Rights and Freedoms, 1975, s. 18. 1.

⁵⁸ Charter of Human Rights and Freedoms, 1975, s. 10. 1.

⁵⁹ These exceptions do not apply to the trade union membership ground which is covered in the Québec Labour Code.

Enforcement Procedures

The Charter provides for the establishment of the *Commission des Droits de la Personne et des Droits de la Jeunesse*.⁶⁰ The Commission can hear complaints of alleged discrimination by any person, group of persons, or organisation on behalf of a victim or victim group.⁶¹ Where the parties to a dispute do not agree to a settlement or to arbitration by the Commission, the Commission may refer the case to the Human Rights Tribunal. Provision for referral is also made where the Commission believes that the life, health or safety of a person alleging discrimination is threatened.⁶²

1. Socio-Economic Status/Social Origin

There has been considerable debate in Canada in recent years, concerning discrimination on the basis of socio-economic status. Socio-economic status is not listed as a prohibited ground of discrimination as such at federal or provincial/territorial levels. The term “social condition” is more widely used. Until recently, Québec was the only province that prohibited discrimination on the basis of social condition. However, many other jurisdictions prohibit discrimination on grounds that are linked with or include social condition or socio-economic status. Nova Scotia, Alberta, Manitoba, Prince Edward Island, and the Yukon prohibit discrimination on “source of income”. Similarly, Ontario and Saskatchewan protect “receipt of public assistance” as an enumerated ground in their codes. Newfoundland prohibits discrimination on the basis of “social origin”, though this is narrower in scope than social condition. The Northwest Territories has recently included discrimination on grounds of social condition as a prohibited ground in its Human Rights Act, passed by the legislative Assembly on October 30th 2002. Thus, the vast majority of Canada’s provinces appear to be moving towards protecting against discrimination based on social condition under their human rights legislation. This trend has been given an added momentum by the recent review of the Canadian Human Rights Act.

British Columbia

Social condition is not included amongst the prohibited grounds of discrimination in the British Columbia Human Rights Code, 1996. However, discrimination based on the related ground, “source of income”, is prohibited in the rental of property, under the Residential Tenancies Act, 1994. Enforcement of this provision is carried out under the Human Rights Code. No such prohibition applied in the context of employment. However, the interpretation of the prohibited ground, “source of income”, provides useful guidance as to the possible scope of an anti-discrimination provision concerning socio-economic status.

“Source of income” includes all lawful sources of income, such as employment earnings, welfare assistance, pensions, spousal support, employment insurance, student loans, grants and scholarships. It is broader in scope than “receipt of public assistance”, which does not protect those on low incomes or those who are discriminated against because of another source of income such as spousal support. Statistics available from the British Columbia Human Rights Commission for the period 2001-2 indicate that 0.9% of complaints received by the Commission concerned discrimination on the basis of source of income.

⁶⁰ Charter of Human Rights and Freedoms, 1975, s. 57.

⁶¹ Charter of Human Rights and Freedoms, 1975, s. 74.

⁶² Charter of Human Rights and Freedoms, 1975, s. 81.

Links have been made between socio-economic status and recognized grounds of discrimination under the Human Rights Code. In *Trudeau v. Chung*,⁶³ the complainant was receiving a long-term disability pension owing to his disability. He was refused an apartment on the basis that he was unemployed and on sick leave. The status of being unemployed or on sick leave was not a prohibited ground of discrimination yet it was found that the policy of refusing unemployed tenants had an adverse impact on the complainant due to his disability.

Proposals for Reform

In its report, *Human Rights for the Next Millennium*, published in 1998, the British Columbia Human Rights Commission made a number of recommendations to amend the Human Rights Code, including:⁶⁴

- “To amend the Code to include protections from discrimination based on “social condition.”
- In the event that the Government decides not to proceed with this recommendation, the Commission recommends amending the Code to include protections from discrimination based on “lawful source of income.”
- In the event that the Government decides not to proceed with either of the two previous recommendations, the Commission recommends that section 10 of the Code be amended to prohibit discrimination in tenancy because of “lawful source of income.” (This would bring the Code into line with the provisions of the *Residential Tenancy Act*, 1994).

The proposed amendment would apply to, but would not be limited to, discrimination in employment. The amendment was also recommended as being in line with Canada’s obligations under the United Nations’ International Covenant on Economic, Social and Cultural Rights (ICESCR). The majority of submissions received by the Commission supported this amendment. A submission received from the Canadian Bar Association — BC Branch, noted:

People who live in poverty are subject to widespread systemic discrimination. These people are routinely denied housing and access to services and they are reviled in popular culture as being morally inferior. People who live in poverty are not even on the political agenda. They are marginalized to the point of invisibility. This is precisely the kind of societal disadvantage and exclusion that human rights legislation is meant to alleviate.

Another submission highlighted the discrimination faced by people in receipt of social assistance:

There is a real problem for people on social assistance being stigmatized, and often offered only low paying jobs or minimal wages in the false belief that that is all they are worth. —Anthony Kennedy, *Quesnel*

The majority of submissions received by the Commission recommended prohibiting discrimination on the basis of “social condition” rather than “lawful source of income”. It was

⁶³ (1991), 16 C.H.R.R. D/25 (B.C. Human Rights Council).

⁶⁴ See: British Columbia Human Rights Commission *Human Rights for the Next Millennium* Recommendations 9.(a), (b) and (c). Vancouver; 1998, available at: <http://www.bchrc.gov.bc.ca/home.htm>, accessed on Nov. 21st 2002.

argued that the term “lawful source of income” does not adequately protect poor people from discrimination in accommodation, service, facility, purchase of property, employment and by unions and associations. “Social condition” was felt to be a more appropriate term and also in line with Canada’s human rights obligations under the ICESCR.

The Commission also received submissions arguing against including “social condition” within the prohibited grounds of discrimination. It was argued, for example, that it would not be viable to force businesses to contract with people who may not be able to live up to the agreement. Also, concern was expressed that the proposed amendment would require banks to lend money to people on social assistance. The Commission agreed that businesses have the right to take reasonable steps to determine whether people can fulfil their financial obligations. However, it concluded that adopting the proposed amendment would not interfere with that right. The Human Rights Code clearly entitles businesses to base decisions on bona fide and reasonable credit concerns. Such distinctions were both permissible and reasonable. In the Commission’s view, it was unfair to treat people receiving income from social assistance differently from those with comparable income from a different source.

As yet, the Human Rights Commission’s recommendations have not led to legislative reform in British Columbia. Amendments to the Human Rights Code, introduced in 2001 and 2002, have focused on procedural rather than substantive issues.

Northwest Territories

The Northwest Territories has recently included discrimination on grounds of “social condition” in its *Human Rights Act*, passed in October 2002. The new Act replaces the Northwest Territories’ *Fair Practices Act* and represents almost three years of consultation and development by the Department of Justice and the Legislative Assembly’s Standing Committee on Social Programs. The Fair Practices Act prohibited discrimination based on race, creed, colour, sex, marital status, nationality, ancestry, place of origin, disability, age, family status, or because of conviction for which a pardon has been granted. The Human Rights Act extends the prohibited grounds of discrimination and includes, for the first time, “social condition”.⁶⁵ The prohibition on discrimination applies in the context of employment, the provision of goods, services, accommodation and facilities.

The inclusion of discrimination on the basis of social condition within the scope of the Act has been welcomed by the Standing Committee on Social Programs of the legislative assembly.⁶⁶ The Committee noted that Canadian citizens face discrimination on the basis of their socio-economic status, in the delivery of services, rental accommodations, and employment. It also noted consistent public support in favour of including social condition amongst the prohibited grounds of discrimination in the Act. Some concern was expressed, however, at the ambiguity of the term “social condition”. The Committee agreed that the term was ambiguous and imprecise. However, it concluded that this lack of precision would be corrected over time through interpretation by adjudicators and courts. It also concluded

⁶⁵ Human Rights Act, 2002, s. 5 (1).

⁶⁶ See: Standing Committee on Social Programs, Northwest Territories Legislative Assembly. *Report on Bill-1: Human Rights Act*, available at: <http://www.assembly.gov.nt.ca/Committees/pdf/report-humanrightsact.pdf>, accessed on Nov. 21st, 2002.

that the uncertainty created by including social condition was far outweighed by the potential that the ground of social condition has to advance equality rights in the Northwest Territories.⁶⁷

Social condition is defined in Section 1 of the Act as:

The condition of inclusion of the individual, other than on a temporary basis, in a socially identifiable group that suffers from social or economic disadvantage resulting from poverty, source of income, illiteracy, level of education or any other similar circumstance.

In parliamentary debates on the Bill, the prohibition on discrimination on the basis of “social condition” was explained as follows:⁶⁸

Under the definition, a person has protection against discrimination if he or she is part of a disadvantaged group. The disadvantage has to be social or economic and result from poverty, source of income, illiteracy, meaning a lack of literacy skills, level of education or another condition that is similar to these.

The reference to “illiteracy” in the definition gave rise to some debate. In the final reading of the Bill, the term was identified as referring to a “lack of literacy skills” — being unable to read or write. The Standing Committee had recommended that the term “illiteracy” be replaced with “levels of literacy”. This recommendation was rejected, however, on the ground that it would broaden the scope of the prohibition and impose additional duties of accommodation. The definition was felt to be sufficiently broad as currently formulated.

Under section 5(3), protection is provided against multiple forms of discrimination, where a person is discriminated against on the basis of two or more prohibited grounds. Protection is also provided against discrimination on the basis of a person’s “actual or presumed” relationship or association with an individual or class of individuals identified by a prohibited ground of discrimination.⁶⁹

Exceptions

An exemption from the prohibition of discrimination in employment is provided in respect of *bona fide* occupational requirements.⁷⁰ However, the “duty to accommodate”, provides that in order for a practice to qualify as a *bona fide* occupational requirement, it must be established that accommodation would impose “undue hardship” on an employer.⁷¹ A further exception is provided in section 7(6), which allows organizations, societies or corporations to give preference in employment, where the preference is: (a) “solely related to the special objects” for which they were created; and (b) the discriminating body is not operated for private profit.

Harassment

Harassment on the basis of social condition is prohibited in respect of: employment; the provision of goods, services, facilities or accommodation; and the provision of commercial premises or residential accommodation.⁷²

⁶⁷ *Ibid.* p.9.

⁶⁸ See: NorthWest Territories Hansard debates, at: <http://www.assembly.gov.nt.ca/Hansard/PDF/14th%20Assembly/5thSession/hn021029.PDF>, p.1253, per Ms Cooper.

⁶⁹ Human Rights Act, 2002, s. 5 (3)(b).

⁷⁰ Human Rights Act, 2002, s. 7 (4).

⁷¹ Human Rights Act, 2002, s. 7 (5).

⁷² Human Rights Act, 2002, s. 14.

Affirmative Action

Part 6 of the Act provides for affirmative action programs:

Nothing in this Act precludes any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, including those who are disadvantaged because of any characteristic referred to in subsection 5(1) [the prohibited grounds of discrimination].

Enforcement procedures

Part 3 of the Act provides for the establishment of an independent Human Rights Commission with powers of investigation. The Commission is charged with *inter alia*, hearing and investigating complaints from “aggrieved” individuals or groups of individuals, with “reasonable grounds” for believing that a person has contravened the Act. The Commission may also initiate a complaint under the Act, where it has “reasonable grounds” for believing that a person has contravened the Act. The Director of the Human Rights Commission may appoint an investigator to investigate the complaint. S/he may also refer a complaint for a hearing before an adjudication panel, established under Part 5 of the Act.

Ontario

Under the Ontario Human Rights Code, 1990, the Ontario Human Rights Commission has a mandate for the investigation and enforcement of discrimination and harassment complaints. The Human Rights Code applies to private actors as well as to government, including government actions, policies, programs and legislation. The prohibited grounds of discrimination in the Code do not include socio-economic status/social condition. However, section 2(1) of the Code protects against discrimination in the occupancy of accommodation, on the basis of “receipt of public assistance”. This provision includes not only the right to enter into an agreement and occupy a residential dwelling, but also the right to be free from discrimination in all matters relating to the accommodation. The prohibition on discrimination in the *Code* applies to direct and indirect discrimination. Section 11 provides protection against adverse impact on the basis of receipt of public assistance as a result of the application of a neutral rule (s. 11). The *Code* also protects against harassment in accommodation based on “receipt of public assistance.”

Over the last ten years, receipt of public assistance has consistently been one of the most cited grounds in complaints to the Commission in the area of accommodation. Most complaints received by the Commission deal with either outright denial of accommodation or adverse impact/constructive discrimination. Examples where discrimination on the basis of “receipt of public assistance” was found include a 1987 case in which the Ontario Board of Inquiry found that when the complainant took occupancy and offered to pay the second month’s rent, she was told by the owner that he did not want to rent to her because she was on welfare.⁷³ A more recent decision involved a single mother receiving welfare assistance who was denied an apartment, because she was in “receipt of public assistance.”⁷⁴

Although discrimination on the basis of socio-economic status is not explicitly prohibited in Ontario, there has been recognition of the intersection between socio-economic status and

⁷³ *Willis v. David Anthony Philips Properties* (1987), 8 C.H.R.R. D/3847 (Ont. Bd. Inq.).

⁷⁴ *Kostanowicz v. Zarubin* (March 7, 1994), £593 (Ont. Bd. Inq.) [unreported].

recognized grounds of discrimination. The case of *Kearney v. Bramalea Ltd. (No. 2)*,⁷⁵ involved the use by several landlords of minimum income criteria or rent-to-income ratios when assessing applications for tenancy. Statistical evidence showed that the landlords' use of such criteria had a disparate impact on individuals based on their sex, race, marital status, family status, citizenship, place of origin, age and the receipt of public assistance. The landlords could not establish a defence as they could not demonstrate that the use of the criteria was reasonable and *bona fide* or that stopping the use of the criteria would cause undue hardship. The approach used in *Kearney* recognized the intersection between socio-economic status and grounds that are protected in the Code. The case set a very important precedent for adjudicating discrimination claims, where evidence exists that discrimination based on socio-economic status disproportionately affects groups that have been traditionally protected under human rights legislation.⁷⁶ The case has already been cited in several other decisions involving denial of rental accommodation.⁷⁷ It has also been cited as a crucial victory for groups that are disadvantaged because of poverty and socio-economic status.⁷⁸ Following on from the *Kearney* case, the Ontario government passed legislation amending the Ontario Human Rights Code to expressly permit the use of income information, credit checks, credit references, rental history, guarantees or other similar business practices in selecting tenants.⁷⁹ (Such checks were already implicitly permitted under the Code).

Proposals for Reform

A recent report commissioned by the Ontario Human Rights Commission examined the possibility of including "social condition" within the prohibited grounds of discrimination at provincial level.⁸⁰ The Report concludes that adding social condition to the prohibited grounds of discrimination could ensure greater protection of social and economic rights in Canada. The addition of a ground, such as social condition, that deals directly with poverty, would give human rights commissions more latitude to protect and promote social and economic rights. The report also points out, however, that prohibiting discrimination on the basis of social condition would not be a panacea for all aspects of socio-economic inequality in Canadian society. It notes that the Québec experience has shown that anti-discrimination provisions based on social condition are limited in scope. Other measures are also needed to combat social and economic inequalities.

Prince Edward Island

Under the Human Rights Act, 1988, discrimination is prohibited on a range of grounds. While "social condition" is not included, the related ground of "source of income" is listed as a prohibited ground. As judicially interpreted, the term "source of income" refers to lawful sources of income. The Human Rights Act prohibits discrimination on the basis of "source of income" in:

⁷⁵ (1998), 34 C.H.R.R. D/1 (Ont. Bd. Inq.); aff'd *Shelter Corp. v. Ontario* (Human Rights Comm.) (2001), 39 C.H.R.R. D/111 (Ont. Sup. Ct.) [hereinafter *Kearney*].

⁷⁶ It is not clear what type of evidence is required to make the connection to a prohibited ground of discrimination. However, in *Kearney* statistical evidence was presented to support the claim. Some cases have failed in the absence of empirical evidence (for example, *Symes and Vander Schaaf*).

⁷⁷ *Vander Schaaf v. M & R Property Management Ltd.* (2000), 38 C.H.R.R. D/251 (Ont. Bd. Inq.) [hereinafter *Vander Schaaf*] and *Birchall v. Guardian Properties Ltd.* (2000), 38 C.H.R.R. D/83 (B.C.H.R.T.).

⁷⁸ See, for example, International Human Rights Internship Program and Asian Forum for Human Rights and Development *Circle of Rights, Economic, Social & Cultural Rights Activism: A Training Resource* International Human Rights Internship Program; 2000 at 169.

⁷⁹ O. Reg 290/98 under the Code, made on May 13, 1998, permits landlords to request and consider income information from a prospective tenant if credit references, credit checks and rental history information are also requested and considered in the screening process.

⁸⁰ Ontario Human Rights Commission. *Human Rights Commissions and Economic and Social Rights*. Ontario; 2001.

Employment

Volunteering

Offering accommodations, services or facilities to the public

Membership in professional, business or trade associations and employee organizations

Leasing or selling property

Publishing, broadcasting and advertising.

Exemptions

Exemptions from the general prohibition on discrimination are provided for in respect of a “genuine occupational qualification” (s.6 (4)). Exemptions are also provided for certain government programs. The Government of Prince Edward Island, Crown agencies, and regional health authorities can require that persons be receiving social assistance benefits in order to qualify for access to certain accommodations, services, programs or facilities established to assist persons who are receiving social assistance benefits, including employment training programs (s.15(1)).

Enforcement Procedures

The Human Rights Commission is responsible for the enforcement of the Human Rights Act. The Commission is an independent body, with powers of investigation and adjudication. On receiving a complaint, alleging a violation of the Act, the Executive Director of the Commission investigates the complaint with a view to effecting a settlement. The Chairperson of the Human Rights Commission may also refer the complaint to a Human Rights Panel, in circumstances specified under the Act (s.26)

Québec

Québec is the only Canadian province to include social condition within the prohibited grounds of discrimination. The Québec Charter of Human Rights and Freedoms, 1975 (hereinafter the Charter), is also unique in recognising a number of economic and social rights⁸¹ including the right to free education, the right to a decent standard of living and the right to fair and reasonable conditions of work. Section 10 of the Charter provides for the:

equal recognition and exercise of human rights and freedoms, without distinction, exclusion or preference based on [...] social condition.

Harassment based on social condition is also prohibited.⁸² Exemptions are set out in section 20 of the Charter (see above).

The prohibition of discrimination on the basis of “social condition” applies to, but is not limited to the sphere of employment. The guarantee of equality applies to all rights and freedoms protected in the Charter.

⁸¹ Section 39-48. See generally: Bosset P. “Les droits économiques et sociaux: parents pauvres de la Charte québécoise?” 1996 75 Canadian Bar Review 583-603.

⁸² Charter of Human Rights and Freedoms, 1975, s. 10 (1).

No legislative definition of social condition is provided in the Charter and so the term has fallen to be interpreted through case law. Social condition has been held to refer to:

one's position within society, as determined by origins, education, occupation or income.⁸³

There are three important elements to the definition.⁸⁴

- It is not necessary that all four factors be involved. The presence of only one factor may be sufficient.⁸⁵
- Both actual and *perceived* social condition is covered. Social attitudes and prejudices towards a given social status (e.g. casual work) must be considered.⁸⁶
- Temporary conditions are included. (An example of a temporary condition would be unemployment).⁸⁷

The absence of a legislative definition of social condition has led to some confusion and uncertainty in the application of the Québec Charter. To remedy this, the *Commission des droits de la personne et des droits de la jeunesse* adopted guidelines in 1994 identifying a series of criteria to be used in assessing the objective and subjective components of the "social condition" definition.⁸⁸ According to the Commission, social condition can be assessed by such objective factors as education, income or occupation. Social condition can also be assessed by one's status in society. In other words, the prestige attached to an individual's achievements such as level of education, level of income and work or profession, will also be indicative of social condition. A complaint based on social condition is well founded when an individual is excluded or discriminated against based on one or more of these socio-economic indicators.

The following situations have been found to involve discrimination on the basis of social condition:

- Refusing to rent an apartment to a person living on welfare or living below the poverty line, without first ascertaining the person's capacity to pay the rent⁸⁹
- Refusing to rent an apartment to a casual worker based on negative stereotypes⁹⁰
- Refusing a mortgage to a welfare recipient⁹¹
- Denying a legislative benefit to a student⁹²
- In family matters, denying a litigant the right to a trial *in camera* based on his status of member of the judiciary.⁹³

⁸³ *Johnson c. Commission des affaires sociales*, [1984] C.A. 61 (Qué.) [translation].

⁸⁴ The following information is based on correspondence received from, Pierre Bosset, Director, Research and Planning, *Commission des droits de la personne et des droits de la jeunesse du Québec*. Copy on file with the authors.

⁸⁵ *Commission des droits de la personne c. Ianiro* (1997), 29 C.H.R.R. D/79 (T.D.P., Qué.).

⁸⁶ *Commission des droits de la personne et des droits de la jeunesse c. Sinatra* (1999), C.H.R.R. D/218 (T.D.P., Qué.).

⁸⁷ *Johnson, op.cit.*

⁸⁸ Berry H and Lepage M "Social Condition — Literature Search", available at: <http://canada.justice.gc.ca/chra/en/socondlit.html>.

⁸⁹ *Whitton c. Commission des droits de la personne et des droits de la jeunesse*, [1997] R.J.Q. 1823 (C.A., Qué.).

⁹⁰ *Commission des droits de la personne et des droits de la jeunesse c. Sinatra*, T.D.P. no. 500-53-000102-986.

⁹¹ *D'Aoust c. Vallières* (1994), 19 C.H.R.R. D/322 (T.D.P., Qué.).

⁹² *Lévesque c. Procureur général du Québec*, [1988] R.J.Q. 233 (C.A., Qué.).

⁹³ *Droit de la famille — 1473*, (1991) R.D.F. 691 (C.S., Qué.).

On the other hand, in the following situations, discrimination on the basis of social condition was found (*ratio decidendi*) or stated (*obiter*) not to be involved:

- Denying an apartment based on actual incapacity to pay the rent⁹⁴
- Denying the protection of labour standards to a welfare recipient, where no affront to dignity has been demonstrated⁹⁵
- Denying social welfare to a student, where a system of student grants exists and where social welfare can still be provided in exceptional circumstances⁹⁶
- Denying social welfare to a worker on strike⁹⁷
- While abroad, denying public health insurance to snowbirds (Québec citizens spending winter abroad)⁹⁸
- Denying a worker on probation the right to file a grievance⁹⁹
- Prohibiting police officers from becoming members of the Bar¹⁰⁰
- Distinguishing, in work conditions, between *stagiaires* (articling students) and full members of the Bar¹⁰¹
- Distinctions based on union membership¹⁰²
- Distinctions based on the status of retired member of the Armed Forces¹⁰³
- Distinctions based on the status of non-profit organization.¹⁰⁴

Select Case-Law

“Social Condition” was interpreted for the first time in 1978 in *La Commission des droits de la personne c. Centre Hospitalier St-Vincent-de-Paul de Sherbrooke*.¹⁰⁵ The case involved a part time employee at a hospital who was asked to undergo a medical examination. Following the examination, the doctor’s report indicated that she suffered from alcoholism, that she had suicidal tendencies and that she should not be kept on as an employee. Her employment was terminated and she filed a complaint with the Québec *Commission des droits de la personne et de la jeunesse*, alleging discrimination on the basis of social condition. Justice Toth concluded that the term social condition should be interpreted on the basis of a common sense understanding of the term. In his view, social condition referred to social rank, an individual’s position in society and the social class they belonged to by birth, by their income, by the level of education or by their occupation. These factors taken together identified an individual with a specific social group. In this case, the court concluded that the complainant’s dismissal was based on her medical condition and not on her social condition.

⁹⁴ *Commission des droits de la personne c. J.M. Brouillette Inc.* (1996), 23 C.H.R.R. D/495 (T.D.P., Qué.).

⁹⁵ *Ministère du Tourisme du Québec c. Lambert*, [2002] R.J.Q. 599 (C.A., Qué.), reversing [1997] R.J.Q. 726 (T.D.P.).

⁹⁶ *Lévesque op cit.*

⁹⁷ *Johnson op cit.*

⁹⁸ *Couët c. Procureur général du Québec*, J.E. 97-2145 (C.S., Qué.).

⁹⁹ *Produits Johnson & Johnson c. Syndicat des travailleurs de l’énergie et de la chimie*, D.T.E. 95T-479 (T.A., Qué.).

¹⁰⁰ *Patry c. Barreau du Québec*, [1991] R.J.Q. 2366 (C.S., Qué.).

¹⁰¹ *Vaillancourt c. Centre communautaire juridique Laurentides-Lanaudière*, J.E. 93-1412 (C.S., Qué.).

¹⁰² *Graybec Calc. Inc. C. Syndicat national de l’industrie de la chaux de Lime Ridge*, D.T.E. 99T-661 (T.A.).

¹⁰³ *Corps canadien des commissionnaires c. Union des agents de sécurité du Québec*, D.T.E. 96T-995 (T.A.).

¹⁰⁴ *Garderie Blanche-Neige c. Office des services de garde à l’enfance*, [1993] R.J.Q. 729 (C.A.), leave to appeal denied: [1993] 2 R.C.S. vii.

¹⁰⁵ *C.S. St-François jugement inédit dossier no 450-05-000856-78*, 7 Sept. 1979.

The standard definition used today by the Québec Human Rights Tribunal comes from a 1993 case, *Québec (Comm. des droits de la personne) v. Gauthier*.¹⁰⁶ This case involved discrimination in the context of accommodation, rather than employment. However, the definition of social condition given by the Tribunal is now generally applied. The case involved a dispute between a landlord and a welfare recipient. The landlord refused to provide the complainant with accommodation, because he was in receipt of welfare assistance, despite his ability to pay the monthly rent. The Tribunal ruled that the landlord, in presuming that the complainant would not be a dependable tenant, discriminated against him on the basis of social condition. In defining social condition, the Tribunal concluded that the term included both an objective and a subjective component:¹⁰⁷

... The definition of “social condition” contains an *objective* component. A persons’ standing in society is often determined by his or her occupation, income or education level, or family background. It also has a subjective component, associated with the perceptions that are drawn from these various objective points of reference.

To establish discrimination on the basis of social condition, the complainant did not have to prove that all of these factors influenced the act complained of. However, she or he would have to show that, as a result of one or more of these factors, they were regarded as part of a socially identifiable group and that it was in this context that the discrimination occurred.

In *D’Aoust v. Vallières*, (1993)¹⁰⁸ the Tribunal concluded that social condition could be a temporary status, and could include the status of being in receipt of public assistance. In this case, the respondent credit union was found to have discriminated against the complainant on the basis of ‘social condition’ when it failed to consider her loan application. The complainant, a single mother of two children, was on social assistance. The fact that the complainant was “for the time being” receiving public assistance was sufficient to constitute social condition for the purposes of the Act.

In *Québec v. Janiro*(1996),¹⁰⁹ a case involving a denial of accommodation because the complainant was on social assistance, the Tribunal stated that:

Social condition may be based on a person’s education, employment, absence of resources of various kinds, and family origins. It is not necessary that the discrimination be based on all of these elements; if the distinction is based on any one of the elements which defines a person’s social condition, discrimination exists

The Tribunal held that refusing accommodation because a person was in receipt of social assistance amounted to discrimination based on social condition as per s. 10 of the Québec Charter.

In *Lambert v. Québec (Ministère du tourisme)*(1996),¹¹⁰ the complainant was in receipt of social assistance benefits. He expressed interest in participating in the provincial government’s work incentive program and signed a contract with the Department of Tourism. The contract was to provide him with workplace training over 16 weeks, for payment of less than

¹⁰⁶ (1993) 19 CHRR D/312.

¹⁰⁷ English language summary, *ibid.* at D/313.

¹⁰⁸ (1993) 19 C.H.R.R. D/322.

¹⁰⁹ (1996) 29 CHRR D/79.

¹¹⁰ (1996), 29 C.H.R.R. D/246.

minimum wage. The complainant was dismissed after five weeks, on the basis of his poor attitude to his work. The Human Rights Tribunal ruled that the contract did not develop the complainant's workplace training, as no training had been provided. Rather, it was an employment contract. Further, it ruled that the complainant was discriminated against because minimum employment standards were not applied to him, and, this discrimination was based on the fact that he was in receipt of social assistance.

The uncertain nature of a person's income may also be linked with status and social condition. In a case involving discrimination in the provision of accommodation, the Québec *Commission des droits de la personne et des droits de la jeunesse* found that a house owner had unlawfully discriminated against a freelance journalist on the basis of his social condition, when he refused to rent housing to the journalist because of the uncertain nature of his income.¹¹¹ The house owner subsequently complained against the Commission's decision to the Human Rights Tribunal. The Tribunal upheld the finding of the Commission, and in its judgment highlighted the negative prejudice that can attach to freelance work. Such prejudice could, in its view, amount to discrimination on the basis of social condition.¹¹²

In 2001 a total of 93 complaints based on social condition were filed with the *Commission des droits de la personne et des droits de la jeunesse* in Québec, representing 8.8% of the 1,058 complaints for that year. Seventy-one of those complaints involved access to housing, while the remainder were concerned with goods and services (16), work (5), and transportation and access to public places (1). Complaints based on disability, race/colour/ethnic or national origin, age and sex represented, respectively, 24.5%, 17.6%, 13.8% and 12.5% of the total number of complaints.¹¹³

Saskatchewan

The Human Rights Code, 1979 prohibits discrimination in employment, education, public services, housing, contracts, publications, professional associations and trade unions, on a range of grounds. While it does not include "social condition", it does include the related ground of discrimination on the basis of "receipt of public assistance".¹¹⁴ Discrimination based on "receipt of public assistance" is prohibited in employment and in the other fields listed above.

Under the Code, "receipt of public assistance" is defined as:

- (i) assistance under The Saskatchewan Assistance Act; or
- (ii) a benefit under The Saskatchewan Income Plan Act;"

Affirmative Action

The Code also empowers the Human Rights Commission to approve special programs designed to prevent, eliminate or reduce disadvantages suffered by groups of individuals because of a prohibited ground of discrimination. To date, the Commission has approved

¹¹¹ See: Commission des droits de la personne et des droits de la jeunesse c. Sinatra, T.D.P. no. 500-53-000102-986.

¹¹² See: 1999 *Annual Report of the Commission des droits de la personne et des droits de la jeunesse (Quebec)*, available at: <http://www.cdpcj.gc.ca/htmfr/pdf--repertoire/ra99ang.pdf>, accessed on Nov 21st, 2002.

¹¹³ See : Commission des droits de la personne et des droits de la jeunesse *Rapport annuel d'activités et de gestion 2001*. available at: <http://www.cdpcj.gc.ca/>, accessed on Nov. 21st 2002.

¹¹⁴ Human Rights Code, 1979, s. 2 (1).

equity programs for four groups: women, Aboriginal peoples, people with disabilities, and members of visible minorities.

Exemptions

The Human Rights Commission may grant exemptions from the Code, where this is necessary and advisable. Specific exemptions are provided for in respect of employment in the following cases:

Where the distinction is based on a “reasonable occupational qualification and requirement for the position or employment”¹¹⁵ (s.16(7)).

Where the employee is employed in a private home or living in the home of the employer.¹¹⁶

Non-profit organisations may give preference to a person defined with reference to a protected ground under s.2, where this is “reasonable” and a “*bona fide* occupational qualification because of the nature of the employment”.¹¹⁷

Proposals for Reform

In a recent report, the Chief Commissioner of Human rights in Saskatchewan strongly advocated the inclusion of “social condition” as a protected ground in the *Human Rights Code*. He argued that differences in social and economic status are as much a source of inequality as ancestry, gender and disability.¹¹⁸ As yet, this recommendation has not been taken up by the legislature in Saskatchewan.

Proposals for Reform of the Canadian Human Rights Act, 1985

In June 1998, Senator Erminie Cohen introduced Bill S-11, proposing to add the ground of “social condition” to the Canadian Human Rights Act. The Bill passed unanimously through the Senate. It received its first reading in the House of Commons on October 19th, 1998. However, the Bill was defeated in the House of Commons in Spring 1999. Prior to the debate on the Bill, on April 8, 1999, the Minister for Justice, Anne McClellan, announced the creation of the Canadian Human Rights Act Review Panel, to consider, among other things, the addition of “social condition” to the prohibited grounds of discrimination in the Act. Five days later, Bill S-11 was defeated in the House of Commons.

The Human Rights Act Review Panel was mandated to examine the purpose of the Human Rights Act and the grounds listed in it, to ensure that the Act kept current with human rights and equality principles. The Act had not been comprehensively reviewed since it was passed in 1977. As part of this review, the Panel sought submissions, *inter alia*, on the addition of the ground of social condition to the prohibited grounds of discrimination in the Human Rights Act. The consultation process on this issue was undertaken publicly and was prioritised by the Review Panel because of its high profile within political debate in Canada. Submissions were received from a wide range of statutory bodies, non-governmental organisations and academics. The Review Panel’s report, *Promoting Equality: A New Vision*,¹¹⁹

¹¹⁵ Human Rights Code, 1979, s. 16 (7).

¹¹⁷ Human Rights Code, 1979, s. 16 (10).

¹¹⁸ See: Human Rights Commission of Saskatchewan *Annual Report of Human Rights Commission, 2000-01*, Chief Commissioner’s message, available at: http://www.gov.sk.ca/shrc/annreport2001/Annual_report_18.htm, accessed on Nov. 22nd 2002.

¹¹⁹ Canadian Human Rights Act Review Panel *Promoting Equality: A New Vision* Canada: Dept of Justice; 2000 June (hereinafter *Promoting Equality*).

published in June 2000, sets out detailed arguments in favour and against including social condition as a prohibited ground of discrimination in the Human Rights Act.

Arguments against including social condition as a prohibited ground of discrimination in the Canadian Human Rights Act

The term social condition was viewed as lacking in specificity. Potentially, it was argued, it could apply to every member of society and could apply at numerous levels.¹²⁰ Given its vagueness and lack of specificity, it appears not to be directed towards the protection of a particular group, but rather every member of society. Linked with this concern was the argument that the addition of social condition would give too much discretionary power to an administrative agency and that such potentially broad jurisdiction could be abused by complainants. Against this, it was noted that similar concerns were raised in the past about the existing grounds of discrimination and there have not been major problems of abuse on the part of either the Commission or its agencies. They have been able to distinguish legitimate from frivolous complaints.

It was also pointed out that anti-discrimination provisions seek to protect against discrimination that is based on an immutable characteristic. Social condition failed this test of immutability as a person's social condition at any point in time was not necessarily immutable. Rather than using the mechanism of anti-discrimination legislation, it was argued that other mechanisms, such as public policy programmes, should be deployed to address socio-economic disadvantage. Concerns were also expressed that the addition of this ground could overwhelm the Human Rights Commission and Human Rights Tribunal with new complaints and that the new ground would overshadow the traditional grounds, causing the Commission and Tribunal to lose focus.¹²¹ Another issue raised was whether or not the term social condition was an appropriate term when the protection really being sought is that of economic security guaranteeing a basic standard of living.¹²²

Calls for Reform: Arguments in favour

A central theme in the submissions received by the Review Panel was the need to address growing inequality and poverty in Canada. Extending the scope of anti-discrimination legislation was viewed as a potentially useful instrument in addressing this problem. Submissions received by the Commission included the following:

“Discrimination on the basis of poverty is not simply an attack on the dignity and equal citizenship of people living in poverty. It is itself a major cause of poverty [...] Systemic patterns of discrimination because of social condition in the private sector [...] exacerbate poverty. Here, they are immune from Charter scrutiny and adequate human rights protections for the poor are therefore of even more critical importance [...]” (Charter Committee on Poverty Issues)

“It is possible that a more expansive application of this ground might have a considerable impact, for example, in corrections and conditional release, given that a large majority of federally sentenced offenders come from relatively disadvantaged socio-economic situations.” (Solicitor General, Canada).

¹²⁰ Submission from the Canadian Bankers Association, cited in *Promoting Equality op.cit.* p.105.

¹²¹ See *Promoting Equality, op.cit.* p.110.

¹²² See: Berry H and Lepage M *op cit.*

Anti-poverty groups have supported the prohibition of discrimination on the basis of social condition as a useful tool in combating prejudice and discrimination against people who are poor. They argue that including social condition as a prohibited ground of discrimination would have an important symbolic significance.¹²³

It would give recognition to the idea that differences in economic status are as much a source of inequality in our society as race, gender or disability...[P]oor Canadians live daily with social stigma and negative stereotypes and face prejudice similar to those who are discriminated against on the other grounds enumerated in the [Canadian Human Rights] Act ... Adding “social condition” to the CHRA would send the message to Canadians that prejudice against people who are poor is as unacceptable in our society as prejudice against people who are black or aboriginal or disabled or female.

A note of caution has been voiced by many of those supporting the inclusion of social condition. Human Rights Chief Commissioner Falardeau-Ramsay has noted that including social condition in human rights legislation is a small part of a much broader issue: how to make the link between the overall question of poverty and the effective enjoyment of human rights. Prohibiting discrimination on the basis of social condition is a useful but limited measure. Shelagh Day and Gwen Brodsky, two experts on women’s equality issues, voice a similar concern. Having reviewed the Québec experience with social condition, they conclude that the usefulness of the ground may be limited. While social condition might provide an effective avenue to challenge laws and practices that negatively categorize and stereotype the poor, it may not allow challenges to laws and practices that cause, maintain or exacerbate poverty and economic inequality. While they are not opposed to recognizing discrimination on the basis of social condition, Day and Brodsky express concern that including a prohibited ground that deals only with negative stereotyping could send a message that this is the only measure required to ensure that social and economic inequality is addressed.

Submissions concerning the provision of goods and services, particularly in the banking industry, suggested that including social condition would be particularly useful in combating indirect discrimination. This point was highlighted, in particular, by the Association Cooperative d’Economie Familiale du Centre de Montreal, which makes it clear that the inclusion of social condition could resolve much of the discrimination faced in the banking industry. In addition to receipt of social assistance, related factors such as education, age and low income all were found to play a role in the direct and indirect discrimination against potential banking clients.

It was also argued that including social condition as a prohibited ground of discrimination would be consistent with the recognition of multiple discrimination. The inclusion of social condition would promote a “more sophisticated intersectional approach” to discrimination.¹²⁴

Finally, a number of submissions highlighted the importance of complying with Canada’s international obligations, in particular, under the ICESCR. The UN Committee on Economic, Social and Cultural Rights had consistently recommended that Canada extend its domestic

¹²³ Falardeau-Ramsay M, Chief Commissioner, Canadian Human Rights Commission *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, 1st Sess., 36th Parl., (May 27, 1998).

¹²⁴ Mackay, A W, Piper T and Kim M. *Social Condition as a Prohibited Ground of Discrimination Under the Canadian Human Rights Act*, Submission to the Canadian Human Rights Act, Review Panel, available at <http://canada.justice.gc.ca/chra/en/socond2.html#2>, accessed on Dec. 6th 2002.

human rights protections, especially towards the alleviation of poverty. Prohibiting discrimination on the basis of social condition would, it was argued, enhance the protection of social and economic rights.¹²⁵

Conclusions and Recommendations

Having considered the submissions it received, and having commissioned various pieces of research, the Review Panel concluded in favour of adding social condition to the list of prohibited grounds of discrimination in the Human Rights Act. The research papers and submissions received by the Panel had provided evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy. In its view, there was a clear need to protect people who were poor from such discrimination. The Review Panel identified a number of barriers to employment that specifically affect socio-economically disadvantaged groups:¹²⁶

- Education requirements may be set unnecessarily high, creating a serious barrier to employment;
- The unemployed have more difficulty finding a job than those who are employed;
- The requirement that job applicants pay for an aptitude test, or supply tools or expensive uniforms can also be barriers to employment for the poor.

Some of these barriers, which related to poverty, were also barriers that faced groups characterised by other grounds, such as ‘race’ or disability. For example, in the Canadian context, it was noted that a disproportionate number of people from the First Nations, lived in extreme poverty and have few educational or employment opportunities. It might be possible, therefore, to challenge barriers to employment faced by such groups by relying on existing prohibited grounds of discrimination. In the Review Panel’s view, such an approach would be unlikely to succeed, as it does not directly challenge the nature of the discrimination. More fundamentally, it argued that this approach would be a “piecemeal solution”:¹²⁷

... If a policy or practice affects all poor people or all people with a low level of education, a ground-by-ground consideration of the issue can be seen as a piecemeal solution that fails to take into account the cumulative effect of the problem.

A number of factors were considered relevant to deciding whether anti-discrimination provisions should cover individuals or groups. The factors listed by the Review Panel are based on considerations by the courts in applying the equality provisions of the Canadian Charter of Rights and Freedoms:¹²⁸

- (i) Whether the personal characteristic is immutable because it is beyond the control of the individual or cannot be altered except at an unacceptable cost to the individual;
- (ii) Whether those possessing the characteristic lack political power;
- (iii) Whether there are historical patterns of discrimination against individuals with this characteristic

¹²⁵ *Ibid.*

¹²⁶ *Promoting Equality*, op.cit.

¹²⁷ *Ibid.* p.107.

¹²⁸ *Ibid.* p.108.

- (iv) Whether members of the group experience similar social and economic disadvantage
- (v) Whether there is a relationship between the personal characteristic shared by members of the group and the grounds listed in the Charter.

The factors listed in (ii)-(v) above, were generally not disputed before the panel. Characteristics such as poverty and a low level of education have historically been associated with patterns of disadvantage. However, with regard to the ‘immutability’ requirement in para. (i), there was some dispute. As was pointed out, some people escape poverty and improve their levels of education. The attribute of poverty therefore seemed, at least on a *prima facie*, reading, not to be immutable. Ultimately, however, the Review Panel concluded that poverty was immutable in the sense that it was a condition that was beyond the control of many people who were poor, at least for considerable periods of time. To support this claim, research commissioned by the Panel, provided evidence that poverty was inherited. People living in poverty were likely to come from families that had also experienced poverty. There are strong correlation between educational levels of children and parents. And, while people may move from being unemployed into employment, few actually move into income levels that are sufficient to escape poverty.

As to whether the term “social condition” was too vague, the Review Panel noted that problems of definition also arise with grounds such as ‘race’, disability and age. All involve the use of relative criteria and their precise meaning and scope is often disputed. As was also pointed out, the existence of stereotypes about people who were poor, supports the conclusion that they are often seen and treated as a distinct group. A memo concerning the federal strategy on child poverty was quoted by the Review Panel:¹²⁹

Welfare recipients are seen in unremittingly negative terms by the economically secure. Vivid stereotypes [bingo, booze, etc.] reveal a range of images of SARs [Social Assistance Recipients] from indolent and feeble to instrumental abusers of the system.

If a narrower ground such as “receipt of public assistance” were to be used, it was felt that the protection of the Act would become fragmented. Protection would be provided temporarily while people were living on welfare assistance, but would be discontinued when the source of income changed, although discrimination based on poverty might continue.

The Review panel was concerned that the addition of the social condition ground could lead to litigation over complex government programs, designed to benefit specific sectors of society. This could in turn lead to reluctance on the part of the Government to initiate social programs. To avoid this, it would be necessary to define social condition with reference to disadvantage. It would also be necessary to exempt certain programs from the scope of the Act, for a limited renewable time.¹³⁰

The Review Panel recommended that:

- social condition be added to the prohibited grounds for discrimination listed in the Act;

¹²⁹ *Ibid.* p.109.

¹³⁰ *Ibid.* p.110.

- the ground be defined after the definition developed in Québec by the Commission des droits de la personne and the courts, but limit the protection to disadvantaged groups;
- the Minister recommend to her Cabinet colleagues that the government review all programs to reduce the kind of discrimination we have described here and create programs to deal with the inequalities created by poverty;
- the Act provide for exemptions where it is essential to shield certain complex governmental programs from review under the Act;
- the Act provide that both public and private organizations be able to carry out affirmative action or equity programs to improve the conditions of people disadvantaged by their social condition, and the other grounds in the Act;
- the Commission study the issues identified by social condition, including interactions between this ground and other prohibited grounds of discrimination and the appropriateness of issuing guidelines to specify the constituent elements of this ground.

The Standing Canadian Senate Human Rights Committee has also recommended amending the Canadian Human Rights Act to include social condition within the prohibited grounds of discrimination.¹³¹ This, it argued, would lead to a better understanding of poverty as a human rights issue. The Committee noted that poverty had long been recognised as a contributing factor in the discrimination suffered by various disadvantaged social groups. In its Concluding Observations on Canada's Third Report under the *International Covenant on Economic, Social, and Cultural Rights*, the UN Committee on Economic, Social and Cultural Rights recommended including social condition amongst the prohibited grounds of discrimination in Canada's federal, provincial and territorial human rights legislation. The Canadian Association of Statutory Human Rights Agencies (CASHRA) has made a similar recommendation.

II. Trade Union Membership

The Canada Labour Code 1985¹³² states that every employee is free to join the trade union of their choice and to participate in its lawful activities¹³³ and that no employer or person acting on behalf of an employer shall:

- (a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person
 - (i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

¹³¹ Report of the Standing Senate Committee on Human Rights. *Promises to Keep: Implementing Canada's Human Rights Obligations*. December 2001, available at: <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/huma-e/rep-e/rep02dec01-e.htm>, accessed on Nov. 22nd 2002.

¹³² According to Arthurs et al, the provisions of the Labour Code considered here were originally introduced in the 1940s and were influenced by the 'Wagner Act' in the United States, i.e. the National Labor Relations Act 1935 — Arthurs H et al *Labour Law and Industrial Relations in Canada* 4th ed. Kluwer Law and Taxation: Deventer; 1994, pp.196-7.

¹³³ Canada Labour Code, s.8(1). For a corresponding provision for public sector employees, see s.6 Public Service Staff Relations Act, 1985. The right to freedom of association is also recognised in s.2(d) of the Canadian Charter of Rights and Freedoms.

- (ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union,
 - (iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,
 - (iv) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Part,
 - (v) has made an application or filed a complaint under this Part, or
 - (vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;
- (b) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on them by this Part;
- (c) suspend, discharge or impose any financial or other penalty on an employee, or take any other disciplinary action against an employee, by reason of their refusal to perform all or some of the duties and responsibilities of another employee who is participating in a strike or subject to a lockout that is not prohibited by this Part;
- (d) deny to any employee any pension rights or benefits to which the employee would be entitled but for
- (i) the cessation of work as the result of a lockout or strike that is not prohibited by this Part, or
 - (ii) the dismissal of the employee contrary to this Part;
-
- (e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union ...
- (f) suspend, discharge or impose any financial or other penalty on a person employed by them, or take any other disciplinary action against such a person, by reason of that person having refused to perform an act that is prohibited by this Part; or
- (g) bargain collectively for the purpose of entering into a collective agreement or enter into a collective agreement with a trade union in respect of a bargaining unit if another union is the bargaining agent for that bargaining unit.¹³⁴

The burden of proof is reversed by s.98(4).¹³⁵ There are corresponding prohibitions with respect to trade unions¹³⁶ and a requirement that “no person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a

¹³⁴ Canada Labour Code 1985, s.94(3).

¹³⁵ “Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.”

¹³⁶ Canada Labour Code 1985, s.95.

member of a trade union.”¹³⁷ Under s.94(1)(a), an employer or person acting on behalf of an employer may not interfere with the representation of employees by a trade union and under s.94(1)(b) the employer may not financially contribute to or otherwise support a trade union.¹³⁸ However there are exceptions:

s.94 (2) An employer is deemed not to contravene subsection (1) by reason only that they

- (a) in respect of a trade union that is the bargaining agent for a bargaining unit comprised of or including employees of the employer,
 - (i) permit an employee or representative of the trade union to confer with them during hours of work or to attend to the business of the trade union during hours of work without any deduction from wages or any deduction of time worked for the employer,
 - (ii) provide free transportation to representatives of the trade union for purposes of collective bargaining, the administration of a collective agreement and related matters, or
 - (iii) permit the trade union to use their premises for the purposes of the trade union;
- (b) contribute financial support to any pension, health or other welfare trust fund the sole purpose of which is to provide pension, health or other welfare rights or benefits to employees; or
- (c) express a personal point of view, so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

It is stated in section 68 that nothing in this Part of the Code prohibits a collective agreement which provides that membership of a particular union shall be a condition of employment or grants employment preference to a member of a particular union. This type of section is referred to as a Union Security Clause in the textbooks.¹³⁹ There is a limited exemption for employees who object to joining a union on religious grounds.¹⁴⁰

The Canada Industrial Relations Board,¹⁴¹ which hears complaints concerning breaches of this part of the Canada Labour Code 1985, has issued decisions in which it states that its focus in deciding cases under s.94(3) is to ensure that “anti-union animus” was not a motivating factor in the employer’s decision.¹⁴² Anti-union animus need only be a proximate cause for an employer’s conduct to run foul of the code and the Board may decide that the employer’s purported cause for the action was a pretext that masked anti-union animus.¹⁴³

¹³⁷ Canada Labour Code 1985, s.96.

¹³⁸ Canada Labour Code 1985, s.94(1)(a) and (b).

¹³⁹ Adams GW *Canadian Labour Law: A Comprehensive Text* Canada Law Book: Ontario; 1985, p.96.

¹⁴⁰ “Where the Board is satisfied that an employee, because of their religious conviction or beliefs, objects to joining a trade union or to paying regular union dues to a trade union, the Board may order that the provision in a collective agreement requiring, as a condition of employment, membership in a trade union or requiring the payment of regular union dues to a trade union does not apply to that employee so long as an amount equal to the amount of the regular union dues is paid by the employee, either directly or by way of deduction from their wages, to a registered charity mutually agreed on by the employee and the trade union” — Canada Labour Code, s.70(2).

¹⁴¹ The Canada Industrial Relations Board was established in 1999 to replace the Canada Labour Relations Board which had previously heard similar complaints. See *An Act to amend the Canada Labour Code (Part I)*, R.S. 1998 C. 26, which came into force on January 1, 1999; Canada Industrial Relations Board *Report on Plans and Priorities 2001-02* available at www.cirb-ccri.gc.ca/download/rpp01e.pdf (visited 7 December 2002).

¹⁴² *Echo Bay Mines Ltd.* (1996) 102 di 91 (CLRb no. 1179).

¹⁴³ See the review of the previous cases in *UMG Cable Telecommunications Inc.*, Board File 20981-C, Decision no. 105, January 30 2001, available at www.cirb-ccri.gc.ca/index_e.asp (visited 7 December 2002). See also Adams, *op.cit.*, pp.489ff.

The Board has regard to the fact that the employment relationship is a continuous one, and that experience has shown that other justifications for employer actions (e.g. failure to report to work one day) are often relied upon around the time an employee is seeking to exercise his/her trade union related rights. Employers must not only come before the board with clean hands; they must be “squeaky clean.”¹⁴⁴ To take an example of a successful case, in *Denis Tousignant et al.*,¹⁴⁵ the employee satisfied the board that he was discriminated against because the employer assigned truck trips to employees with less seniority than him. The employer’s decision coincided with the employee’s union activities as the drivers’ new union representative. However, in another case it was decided that a complaint could not be made against a company which did not choose the complainant for an on-the-job training programme (allegedly based on anti-union animus) because that company was never the complainant’s “employer.”¹⁴⁶

Where it is alleged that an employer has interfered with trade union representation of employees, the employee does not need to establish an anti-union animus and so s.94(1)(a) has become the principal means of protecting employee rights under this part of the Code.¹⁴⁷ Complaints may be made if an employer attempts to influence employees’ choice between two unions.¹⁴⁸ A complaint was upheld where the host of a current affairs radio programme was forced by the employer to choose between his job and his role as president of a union. The employee’s right to belong to the union overrode the employer’s concern that his public involvement as president of the union violated its policy requiring impartiality of journalists. The Board’s decision was confirmed by the Supreme Court of Canada.¹⁴⁹

The Criminal Code prohibits refusal of employment, dismissal or threats which are intended to inhibit union membership and organisation.¹⁵⁰ This provision, however, has been described as “largely vitiated.”¹⁵¹

The Canadian Human Rights Act 1985 prohibits employment discrimination on eleven grounds, but these grounds do not include trade union membership. While a review of the grounds was undertaken in 2000, this review did not consider whether to include trade union membership as a new ground.¹⁵²

Summary of Trade Union Membership Ground — Canada (Federal)

1. Scope: Membership and activities (non-membership not mentioned).
2. The ground applies to refusals of employment as well as dismissals and detriment short of dismissal.
3. ‘Closed shops’ are protected by the union security clause.
4. The employer may grant benefits to union members (e.g. time off to union officers for union business).

¹⁴⁴ *Yellowknife District Hospital Society* (1979) 20 di 281; 77 CLLC 16,083 at pp.284-285 and 16,549.

¹⁴⁵ Board Files 21301-C and 210666-C, Decision No. 119, April 24, 2001, available at www.cirb-ccri.gc.ca/index_e.asp (visited 7 December 2002). This decision was based on the fact that the company involved (Securecheck) provided on-the-job training programmes which did not create an employer/employee relationship.

¹⁴⁶ *BHP Diamonds Inc et al* Decision no. 81 August 18 2000, available at www.cirb-ccri.gc.ca/index_e.asp (visited 7 December 2002).

¹⁴⁷ See review of case-law in *UMG Cable Telecommunications Inc.*, cited above.

¹⁴⁸ *Transport de l'Est Inc* (1993) 90 di 214 (CLRB no. 987).

¹⁴⁹ *Canadian Broadcasting Corporation v Canada (Labour Relations Board)* [1995] 1 S.C.R. 157, available at www.canlii.org (visited 7 December 2002).

¹⁵⁰ Criminal Code, R.S.C. 1985, c.C-46, s.425.

¹⁵¹ “[C]ertain textual difficulties and the inefficacy of criminal prosecution in labour relations matters largely vitiated this provision” — Arthurs et al, *op.cit.*, p.196.

¹⁵² *Promoting Equality: A New Vision 2000*, available at <http://canada.justice.gc.ca/chra/en/> (visited 7 December 2002).

British Columbia

The Labour Relations Code 1996 states that every employee is free to be a member of a trade union and participate in its lawful activities¹⁵³ and goes on to place a duty on employers and persons acting on behalf of employers not to:

- (a) discharge, suspend, transfer, lay off or otherwise discipline an employee, refuse to employ or to continue to employ a person or discriminate against a person in regard to employment or a condition of employment because the person
 - (i) is or proposes to become or seeks to induce another person to become a member or officer of a trade union, or
 - (ii) participates in the promotion, formation or administration of a trade union,
- (b) discharge, suspend, transfer, lay off or otherwise discipline an employee except for proper cause when a trade union is in the process of conducting a certification campaign for employees of that employer,
- (c) impose in a contract of employment a condition that seeks to restrain an employee from exercising his or her rights under this Code,
- (d) seek by intimidation, by dismissal, by threat of dismissal or by any other kind of threat, or by the imposition of a penalty, or by a promise, or by a wage increase, or by altering any other terms or conditions of employment, to compel or to induce an employee to refrain from becoming or continuing to be a member or officer or representative of a trade union.¹⁵⁴

This does not limit the employer's right to discharge, suspend, lay off or discipline an employee for good cause and to make changes in business operation necessary for the proper conduct of that business.¹⁵⁵ In addition, there is a Union Security Clause stating that nothing prevents a collective agreement which provides that union membership shall be a condition of employment or grants employment preference to a member of a particular union.¹⁵⁶ There is an exemption for employees who object to joining a union on religious grounds, but these employees must still pay dues to the union.¹⁵⁷

An employer must not participate in or interfere with the formation, selection or administration of a trade union, or contribute financial or other support to it, but employees and trade union representatives may be given time off for union business without deduction of pay.¹⁵⁸

Recently, the Labour Relations Code was reviewed and amended, but there was no discussion of amendment of the sections quoted above.¹⁵⁹

¹⁵³ Labour Relations Code 1996, s.4(1).

¹⁵⁴ Labour Relations Code 1996, s.6(3). For an example of a case concerning dismissal of employees for trade union membership, see *Forano Limited* BCLRB No. 2/74, summarised at <http://www.lrb.bc.ca/decisions/Leadingcases.htm> (visited 7 December 2002).

¹⁵⁵ Labour Relations Code 1996, s.6(4).

Labour Relations Code, s.15(1). Note also s.15(2): "Despite subsection (1), a trade union or person acting on its behalf must not require an employer to terminate the employment of an employee due to his or her expulsion or suspension from that trade union on the ground that he or she is or was a member of another trade union."

¹⁵⁷ Labour Relations Code 1996, s.17. Contrast the Ontario statute, which requires that an amount equivalent to the union dues be paid to a charity — Labour Relations Code 1995, s.52.

¹⁵⁸ Labour Relations Code 1996, s.6(1) and (2).

¹⁵⁹ Labour Relations Code Review, available at www.labour.gov.bc.ca/lrcreview/ (visited 7 December 2002) and Labour Relations Code Amendment Act 2002, available at www.legis.gov.bc.ca/37th3rd/3rd_read/gov42-3.htm (visited 7 December 2002).

For public sector employees, the relevant section is s.6(1) of the Public Service Labour Relations Act 1996:

- 6** (1) A person acting on behalf of the government must not
- (a) interfere with the formation or administration of a union, or the representation of employees by that union, or
 - (b) in any way discriminate against an employee engaged in the lawful activities of a union

The Human Rights Code 1996 prohibits discrimination on various grounds, but trade union membership is not one of those grounds.

Summary — British Columbia

1. Scope: Membership and activities of trade unions (non-membership not mentioned).
2. The ground applies to refusals of employment as well as dismissals and detriment short of dismissal.
3. 'Closed shops' are protected by the union security clause.
4. The employer may grant benefits to union members (e.g. time off to union officers for union business).

Ontario

The Labour Relations Act 1995 provides that every person is free to join a trade union of the person's own choice and to participate in its lawful activities (s.5). According to section 72 of the Act,

No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act

Nothing prevents a collective agreement which provides that union membership shall be a condition of employment or grants employment preference to a member of a particular

union (the Union Security Clause.)¹⁶⁰ There is an exemption for employees who object to joining a union on religious grounds, but these employees must still pay an equivalent amount to charity.¹⁶¹ The Union Security Clause may require dismissal of employees who cease to belong to the trade union but the employer will not have to dismiss a person expelled from a trade union if the reason for the expulsion is that the person became a member of another trade union, agitated against the union at a rival union's behest or otherwise dissented in a reasonable manner.¹⁶²

Section 70 states that

No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

The employer may also permit the union to use the employer's premises for meetings and may grant time off to union officers for union business.¹⁶³

The Ontario Labour Relations Board has ruled that, except in certain narrow circumstances, an anti-union animus is an essential element of an unfair labour practice (such as a breach of section 70). This allows the employer to contract out work or relocate the workplace no matter what the consequences for the union and the reasoning on which it has been based has been criticised as being at odds with the purpose of the Act.¹⁶⁴

The Board has also ruled that union organisers have no right to meet with a group of employees in non-work areas of the employer's property without the employer's consent, and employees risk being disciplined or even discharged for discussing a union's organising drive during working time.¹⁶⁵

The Human Rights Code 1990 does not include trade union membership or activities as a prohibited ground of discrimination.

Summary — Ontario

1. Scope: Membership and activities of trade unions (non-membership not mentioned).
2. The ground applies to refusals of employment as well as dismissals and detriment short of dismissal.
3. 'Closed shops' are protected by the union security clause.
4. The employer may grant benefits to union members (e.g. time off to union officers for union business).

¹⁶⁰ Labour Relations Act 1995, s.51(1)(a).

¹⁶¹ Labour Relations Act 1995, s.52.

¹⁶² Arthurs et al, *op.cit.*, pp.185-186, referring to earlier version of Labour Relations Act 1990. Note s.51(2) of the 1995 Act in this regard.

¹⁶³ Labour Relations Act 1995, s.51(1)(b) and (c).

¹⁶⁴ Beatty D "Labour Law in a Nutshell: The Influence of a National Casebook" (1996) 75 *Canadian Bar Review* 35 at 50.

¹⁶⁵ Adams Mine, Cliffs of Canada [1982] O.L.R.B. Rep. 1767 and other cases cited in Beatty, *op.cit.*, p.45.

Québec

Having stated that every employee has the right to belong to and participate in an employee association,¹⁶⁶ the Labour Code¹⁶⁷ later states

s.14 No employer nor any person acting for an employer or an employer's association may refuse to employ any person because that person exercises a right arising from this Code, or endeavour by intimidation, discrimination or reprisals, threat of dismissal or other threat, or by the imposition of a sanction or by any other means, to compel an employee to refrain from or to cease exercising a right arising from this Code.

This section does not prevent an employer from suspending, dismissing or transferring an employee for a good and sufficient reason, proof whereof shall devolve upon the said employer.¹⁶⁸ A collective agreement may contain any provision which is not prohibited by law.¹⁶⁹ There is no exemption for employees who object to joining a union on religious grounds. A collective agreement might require dismissal of employees who cease to belong to a trade union but the employer will not be obliged to dismiss a person expelled from a trade union unless the person was employed contrary to a provision in the agreement, or participated, at the instigation of the employer, in an activity against the union.¹⁷⁰

While trade union membership is not a prohibited ground of discrimination in Québec's Charter of Human Rights and Freedoms, discrimination complaints will nevertheless be considered by the Commission des droits de la personne et des droits de la jeunesse under the "political convictions" ground if the alleged ground of discrimination is a trade union's stance towards legislation, government policies, political parties or political movements.¹⁷¹ There have been no reported cases of this type to date.¹⁷²

Summary — Québec

1. Scope: Membership and activities (non-membership not mentioned).
2. The ground applies to refusals of employment as well as dismissals and detriment short of dismissal.
3. 'Closed shops': A collective agreement may contain any provision which is not prohibited by law.
4. There is no specific provision permitting the employer to grant benefits to union members (e.g. time off to union officers for union business).

¹⁶⁶ Labour Code, R.S.Q., c.C-27, s.3. Freedom of association is also protected by s.3 of Québec's Charter of Human Rights and Freedoms, R.S.Q., c.C-12, available at www.cdpdj.gc.ca (visited 7 December 2002).

¹⁶⁷ Québec Labour Code, R.S.Q., c.C-27, available at <http://www.canlii.org> (consolidated to 1 November 2002).

¹⁶⁸ Labour Code, R.S.Q., c.C-27, s.14.

¹⁶⁹ Labour Code, R.S.Q., c.C-27, s.62.

¹⁷⁰ Labour Code, R.S.Q., c.C-27, s.63.

¹⁷¹ Commission des droits de la personne et des droits de la jeunesse, Résolution 183-8.1.1 (Oct. 6, 1983), cited in an e-mail dated 18 November 2002 from Pierre Bosset of the Commission to the authors of this Report.

¹⁷² E-mail from Pierre Bosset, 18 November 2002.

III. Criminal Conviction/Ex-Offender/Ex-Prisoner

The Canadian Human Rights Act, 1985 and human rights legislation in four provinces¹⁷³ and two territories¹⁷⁴ prohibit discrimination in employment on the basis of record of criminal conviction and/or pardon for criminal conviction. Criminal legislation, which is the responsibility of the federal government, also affords protection against discrimination in employment on the basis of a pardoned conviction and/or discharge.

Federal Legislation

The Canadian Human Rights Act, 1985 prohibits discrimination in employment on the basis of a pardoned conviction. This protection is afforded in relation to federal government employment, employment in a federal business and employment in a private business operated at a federal level. The Canadian Human Rights Act, 1985 also prohibits harassment on the basis of a prohibited ground of discrimination, including on the basis of a pardoned conviction. The general exceptions from the prohibition on discrimination, set out in the introduction, apply also with regard to pardoned convictions.

The Canadian Human Rights Act, 1985 defines a pardoned conviction as:

a conviction of an individual for an offence in respect of which a pardon has been granted by any authority under law and, if granted or issued under the Criminal Records Act, has not been revoked or ceased to have effect¹⁷⁵

A person who has been convicted of an offence under an Act of Parliament or under any regulation of such an Act, may apply to the National Parole Board for a pardon under s. 3 (1) of the federal Criminal Records Act, 1985. Before applying for a pardon, the sentence, which includes imprisonment, probation or payment of a fine, must have expired.¹⁷⁶ A pardon granted by the National Parole Board is taken as evidence of the fact that the conviction “should no longer reflect adversely on the applicant’s character.”¹⁷⁷ It, therefore, removes any disqualification to which the person so convicted was subject to by federal law.¹⁷⁸ A pardon can also be granted by any “authority under law”¹⁷⁹ for the purposes of the Canadian Human Rights Act, 1985, that is any individual or body with legal authority to grant a pardon.

The Canada Criminal Code, 1985 affirms the Royal prerogative to grant pardons¹⁸⁰ which are granted by the Governor General of Canada. The Criminal Code, 1985 also provides for the Governor in Council of Canada to grant free or conditional pardons.¹⁸¹ A person who has been granted a free pardon by the Governor in Council is deemed to have never

¹⁷³ British Columbia, Human Rights Code, 1996, s. 13 (1); Ontario, Human Rights Code, 1990, s. 5 (1); Quebec, *Charter of Human Rights and Freedoms*, 1975, s. 18. 1; Prince Edward Island, *Human Rights Act*, 1988, s. 6 (1)(b).

¹⁷⁴ The Yukon, *Human Rights Act*, 1986, s. 6 (i) and the Northwest Territories was subject to the federal *Canadian Human Rights Act*, 1985 until October 2002 when the Legislative Assembly enacted a *Human Rights Act*. Clause five of this Act prohibits discrimination in employment on the basis of a pardoned conviction.

¹⁷⁵ Canadian Human Rights Act, s. 25.

¹⁷⁶ Criminal Records Act, 1985, s. 4. The qualifying periods, in order to be eligible to apply for a pardon under the Criminal Records Act, 1985, are five years in the case of an indictable offence and three years in the case of a summary offence. Such qualifying periods run from the date of expiration of sentence.

¹⁷⁷ Criminal Records Act, s. 5 (a)(ii).

¹⁷⁸ Criminal Records Act, s. 5 (6).

¹⁷⁹ Canadian Human Rights Act, 1985, s. 25.

¹⁸⁰ Criminal Code, 1985, s. 748 (1).

¹⁸¹ Criminal Records Act, s. 748 (2).

committed the offence by virtue of s. 748 (3) of the Criminal Code, 1985. Further, a person who has received an absolute discharge under s. 730 (1) of the Criminal Code, 1985, is deemed never to have been convicted of the offence. A young person who has received an absolute discharge under s. 20 (1)(a) of the Young Offenders Act, 1985 is similarly deemed to have never been convicted of the offence, as well as never been found guilty of the offence.

A pardon requires the judicial record of the conviction to be kept “separate and apart” from other criminal records.¹⁸² In addition the record of the conviction or its existence shall not be disclosed without the prior approval of the Solicitor General of Canada. Two exemptions to this general prohibition on disclosure are found in s. 6.2 and s. 6.3 of the Criminal Records Act, 1985 in respect of identification of a person by a police force and in respect of records of sexual offences where employment is sought concerning children or vulnerable groups, respectively.

The Criminal Records Act, 1985 provides protection against discrimination in employment on the basis of a pardoned conviction, for public employees only. Section 8 contains a general prohibition on the use or authorisation of the use of an application form that requires the applicant to disclose a pardoned conviction in relation to employment in:

- federal government departments,¹⁸³
- employment in any Crown Corporation,¹⁸⁴ enrolment in the Canadian Forces,¹⁸⁵
- “employment on or in connection with the operation of any work, undertaking, or business within the legislative authority of Parliament.”¹⁸⁶

A similar prohibition against the use or authorisation of the use of an application form for federal employment is found in s. 36 (3) of the Young Offenders Act, 1985 in respect of an absolute discharge.

The Supreme Court of Canada examined the meaning and effect of a pardon issued under s. 5 of the Criminal Records Act, 1985 in *Re Therrien*.¹⁸⁷ The Court distinguished between the types of pardon available by virtue of the Royal prerogative, the provisions of the Criminal Code, 1985 and under s. 5 of the Criminal Records Act, 1985. Gonthier J. in delivering the English version of the Supreme Court’s judgment examined the effects of a pardon. He observed:

In and of themselves, these provisions do not persuade me that the pardon can operate to retroactively wipe out the conviction. Rather, they are an expression of the fact that it still exists, combined with a desire to minimise its future consequences.¹⁸⁸

His reasoning was threefold:

- Section 5 (a)(ii) states that the conviction should no longer adversely reflect on the applicant’s character, implying that it still exists.

¹⁸² Criminal Records Act, s. 5 (b).

¹⁸³ Criminal Records Act, s. 8 (a).

¹⁸⁴ Criminal Records Act, s. 8 (b).

¹⁸⁵ Criminal Records Act, s. 8 (c).

¹⁸⁶ Criminal Records Act, s. 8 (d).

¹⁸⁷ *Re Therrien* [2001] 2 SCR 3.

¹⁸⁸ *Ibid*, para 116, *per* Gonthier J.

- The pardon removes federal legal disqualifications, not disqualifications under provincial legislation.
- Information contained in the criminal record is kept separate and apart, not destroyed.

Gonthier J. found that the purpose of the relevant sections in the Criminal Records Act, 1985 “is to eliminate the potential future effects of the conviction, which would be pointless if the conviction were deemed never to have existed”.¹⁸⁹ The Supreme Court thus concluded that a pardon issued under the Criminal Records Act, 1985, unlike a pardon granted by royal mercy or under the provisions of the Criminal Code, 1985, “does not make the past go away [but rather] ... expunges consequences for the future”.¹⁹⁰

Proposals for Reform

A Review Panel of the Canadian Human Rights Act, 1985 observed in its 2000 report that “a number of convicted Canadians do not know about or have access to the pardon process”¹⁹¹ under the Criminal Records Act, 1985. The Panel described the distinction drawn in the Canadian Human Rights Act, 1985, between pardoned and unpardoned conviction as arbitrary. It recommended that the protection afforded by the Canadian Human Rights Act, 1985 should be extended to include individuals convicted or charged with an offence, where this offence is unrelated to the employment.¹⁹² The Panel recommended that the burden of proof in establishing whether a conviction or charge is unrelated to the employment would lie with the person alleging discrimination. Further, a defence of *bona fide* justification would be available to an employer, where concerns arose relating to the protection of national security or the protection of vulnerable groups. The Panel argued that this would assist in the social reintegration of offenders and would promote public safety and security. It was also a recognition of the principle, innocent until proven guilty. These reasons for extending the protection of the Canadian Human Rights Act, 1985 were voiced by the National Parole Board and the federal Corrections Service in the roundtable discussions held as part of the review process. However, the Review Panel noted the objections of employers, which were also voiced at such roundtable discussions:

Some said they had to conduct security checks to ensure the trustworthiness of employees dealing with confidential information. Concerns were also expressed by employers who handle client’s investments, or who provide home services.¹⁹³

The Review Panel aimed to alleviate these concerns by recommending that the Government should pass regulations dealing with specific security concerns, which would specify offences that should be taken into account for certain types of employment, such as working with young people. Further the Panel did not envisage that background checks on an employee or prospective employee would be illegal or even difficult. The burden of proof in establishing whether the offence or conviction is unrelated to the employment lies with the person alleging discrimination. Once the claimant has shown *prima facie* evidence of

¹⁸⁹ *Ibid.*, para. 120, per Gonthier J.

¹⁹⁰ *Ibid.*, para. 127, per Gonthier J.

¹⁹¹ ‘Promoting Equality: A New Vision’, p. 103, <http://canada.justice.gc.ca/chrc/en>, as viewed 29/11/02.

¹⁹² *Ibid.*, p. 104. In the legislative debates concerning the enactment of the *Human Rights Act* of the Northwest Territories, concerns were expressed about the restrictive nature of including pardoned conviction as a prohibited ground of discrimination. It was noted in the debates that few Canadians know of the pardon process and that it currently takes two years for the National Parole Board to process an application. Notwithstanding, the legislative assembly decided not to extend the protection afforded by the new Human Rights Act to include conviction for an offence unrelated to the employment.

<http://www.assembly.gov.nt.ca/Hansard/PDF/14th%20Assembly/5thSession/hn021022.PDF>.

¹⁹³ *Ibid.*, p. 103.

discrimination based on a criminal conviction or charge, and has shown that such a conviction or charge is unrelated to the employment, the employer must show a *bona fide* justification in conducting a background check. The Panel suggested that such a justification could be based on national security and the protection of vulnerable groups.

The 2001 Annual Report of the Canadian Human Rights Commission, tabulates the number of new complaints received by the Commission in the preceding two years on each of the eleven prohibited grounds of discrimination. The majority of complaints filed alleged discrimination in employment. Conviction for an offence for which a pardon has been granted represented 0.34%, 0.5% and 0.22% of the new complaints filed in 1999, 2000 and 2001 respectively.¹⁹⁴

Provincial Legislation

Four provinces and two territories prohibit discrimination in employment on the basis of pardoned conviction and/or record of offences. This prohibition is found in human rights legislation.

British Columbia

The Human Rights Code, 1996 of British Columbia prohibits discrimination in employment on thirteen enumerated grounds, including conviction for a “criminal or summary conviction offence that is unrelated to the employment or intended employment of that person”.¹⁹⁵ The prohibition against discrimination in employment advertisements found in s. 11 of the Code, does not extend to criminal or summary conviction offence unrelated to the intended employment.

Exemptions from the prohibition on discrimination are provided under the Human Rights Code, for special programs adopted by ‘not for profit’ organizations, and in relation to employment equity plans. These exemptions do not apply, however, with regard to the criminal conviction ground.

The Criminal Records Review Act, 1996 imposes a duty on employers to ensure that every individual hired for employment with children and every employee working with children undergoes a criminal record check.¹⁹⁶

The British Columbia Human Rights Commission observed in its 2001/2 Annual Report that 1 of its 169 files on discrimination filed during the period related to discrimination on the prohibited ground of criminal or summary conviction offence unrelated to the employment or intended employment.¹⁹⁷

Select Case-Law

In *McCartney v. Woodward Stores Ltd.*¹⁹⁸ a British Columbia Board of Inquiry had the opportunity to explore the meaning of conviction that is unrelated to the employment or intended

¹⁹⁴ Canadian Human Rights Commission, Annual Report, 2001, www.chrc-ccdp.ca/ar-ra/RapportAnnuel2001/AR2001index.asp?l=e.

¹⁹⁵ Human Rights Code, 1996, s. 13 (1).

¹⁹⁶ Criminal Records Review Act, 1996, s. 8 (1).

¹⁹⁷ See <http://www.human-rights-coalition.bc.ca/arpt2002.htm>.

¹⁹⁸ *McCartney v. Woodward Stores Ltd.* (1982), 3 C.H.R.R. D/1113 (B.C. Bd. Inq.)

employment. The Board of Inquiry analysed s. 8 of the Human Rights Code, 1979, which corresponds to s. 13 (1) of the Human Rights Code, 1996. The complainant had applied for a promotion within the respondent's business, which required a security check. This security check revealed that the complainant had misrepresented having a previous conviction for shoplifting for which he had obtained a pardon. The complainant was denied the promotion and dismissed from employment. The Board of Inquiry held that all the circumstances of a case must be considered in determining whether a particular employee's criminal record relates to the particular employment of the employee. The Board propounded a test for determining whether a conviction is related to the employment or intended employment, including:

- Does the behaviour for which the charge was laid, if repeated, pose any threat to the employer's ability to carry on its business safely and efficiently?
- What were the circumstances of the charge and the particulars of the offence involved, e.g. how old was the individual when the events in question occurred, were there any extenuating circumstances?
- How much time has elapsed between the charge and the employment decision? What has the individual done during that period of time? Has he shown any tendencies to repeat the kind of behaviour for which he was charged? Has he shown a firm intention to rehabilitate himself?¹⁹⁹

The Board of Inquiry ordered that the complainant be reinstated as the conviction, in light of the above factors, was not a reasonable cause for the dismissal. However, the Board did find that insufficient time had elapsed between the complainant's conviction for theft in 1970 and his application for promotion to the night shift maintenance crew in 1979 considering the requirements of that position. Thus, the complainant's conviction was unrelated to his employment in the furniture stockroom and related to his intended employment as a member of the night maintenance crew. The respondent appealed this decision to the Supreme Court of British Columbia, which upheld the Board of Inquiry's decision.²⁰⁰

The British Columbia Human Rights Tribunal, examined the question of whether a period of incarceration is included in the meaning of conviction for the purposes of s. 13 (1) of the Human Rights Code, 1996. In *McLaughlan v. Fletcher Challenge Canada Ltd.* in 1998²⁰¹ the complainant had worked with the respondent as a watchman since 1981. He pleaded guilty to unlawfully touching a person under fourteen for a sexual purpose and was sentenced to one year imprisonment in 1994. The complainant's trade union representative applied on his behalf for an extended leave of absence, which was refused without any reasons given. Consequently, the complainant was notified that his employment was terminated. The complainant claimed that the respondent discriminated against him on the basis of a "criminal or summary conviction offence unrelated to the employment" contrary to the Human Rights Code, 1996 for failing to grant him an extended leave of absence. It was argued by the complainant and the Deputy Chief Commissioner of the Human Rights Commission, who had been joined in the proceedings, that the protection afforded by the Human Rights Code, 1996 extends to the period of imprisonment, as incarceration is a necessary incident of conviction.

¹⁹⁹ As quoted at para. 26, *McLaughlan v. Fletcher Challenge Canada Limited* (1998) British Columbia Human Rights Tribunal, <http://www.bchrt.gov.bc.ca/mclaughl.htm>.

²⁰⁰ *McCartney v. Woodward Stores Ltd.* (1983), 4 C.H.R.R. D/1325 (BCSC).

²⁰¹ *McLaughlan v. Fletcher Challenge Canada Limited*, *supra*.

The Tribunal rejected the complaint, finding that:

an employee's inability to report to work because that individual is incarcerated renders the individual's conviction related to the employment or the intended employment within the meaning of section 13 of the Code.²⁰²

The Tribunal therefore concluded that an employer is not required to grant an extended leave of absence to employees who have been imprisoned. The Supreme Court²⁰³ affirmed the Tribunal's decision, remarking that "[t]he sentence component of the conviction confining him to jail therefore directly related the offence to the complainant's ability to perform his employment obligations"²⁰⁴ and so:

The protection afforded by s. 13 (1) of the Code is that an employer may not refuse to continue to employ a person because he has been convicted of an offence. It is the fact of conviction, not the consequences of conviction which is afforded protection under the section.²⁰⁵

The complainant in *Korthe v. Hillstrom Oil Company Limited* claimed that she had been dismissed as a result of the respondents belief that she had a criminal record and was involved in criminal activity. The complainant did not have a criminal record. It was held that the protection afforded by s. 13 (1) of the Code, 1996 extends to those presumed to have a criminal record:

... [t]o give a more narrow reading of the protection granted . . . would create a situation whereby persons convicted of an offence unrelated to employment were protected, but persons who are erroneously believed to have a conviction related to the employment could be dismissed with impunity.²⁰⁶

Ontario

Section 5 (1) of the Human Rights Code, 1990 of Ontario prohibits discrimination in employment, *inter alia*, on the basis of record of offences. This prohibition covers the whole of the employment relationship from advertisement to dismissal. The Code also prohibits harassment in the workplace on the basis of any of the prohibited grounds of discrimination, including record of offences.²⁰⁷ Indirect discrimination is prohibited under the Act, as well as discrimination "because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination"²⁰⁸

The Human Rights Code, 1990 of Ontario defines record of offences as:

a conviction for,

- (a) an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or
- (b) an offence in respect of any provincial enactment;²⁰⁹

²⁰² *Ibid*, para. 37, per Barbara Humphreys, Tribunal Member.

²⁰³ *British Columbia Human Rights Commission v. British Columbia Human Rights Tribunal*, (1999-09-01) BCSC 990672.

²⁰⁴ *British Columbia Human Rights Commission v. British Columbia Human Rights Tribunal*, *supra*, para. 34, per Holmes J.

²⁰⁵ *Ibid*, para. 31, per Holmes J.

²⁰⁶ *Ibid*, para. 34, per Eastwood, Member Designate.

²⁰⁷ Human Rights Code, 1990, s. 5(2).

²⁰⁸ Human Rights Code, 1990, s. 12.

²⁰⁹ Human Rights Code, 1990, s. 10 (1).

The general exceptions to the prohibition on discrimination in employment apply in relation to record of offences (s.24). However, the exception provided for in relation to the activities of religious, philanthropic, educational, fraternal or social institutions or organizations does not apply (s.24(1)(a)).

In 2001, seven new complaints of discrimination on the basis of record of offences in employment were filed with the Ontario Human Rights Commission, the overseeing body of the Human Rights Code, 1990.²¹⁰ This figure represents less than 0. 2% of the total number of complaints received by the Commission.

Québec

Pardoned conviction and/or record of criminal conviction was originally not included in the general prohibition on discrimination in the Charter of Human Rights and Freedoms, 1975. The Charter was amended in 1982 to insert a stand alone provision regulating discrimination in employment based on pardoned conviction and record of criminal conviction. Section 18(2) states:

No one may dismiss, refuse to hire or otherwise penalise a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence.

The general prohibition against discrimination by an employment bureau “in respect of the reception, classification or processing of a job application or in any document intended for submitting an application to a prospective employer,”²¹¹ does not apply to discrimination based on this ground. Thus, a person may be required in an employment application form or in an employment interview to disclose any penal or criminal convictions or pardoned convictions. This reading of s. 18.1 of the Charter of Human Rights and Freedoms, 1975 was recently confirmed by the Supreme Court of Canada in *Re Therrien*.²¹²

Select Case-Law

In *Re Therrien* the Supreme Court of Canada had to consider whether a selection committee appointing persons as provincial judges of Québec could ask applicants “have you ever been in trouble with the law?” The Supreme Court held that s. 18. 1 did not protect the appellant against a question concerning his criminal record.²¹³ Gonthier J. in delivering the English version of the Supreme Court’s judgment, reached this conclusion after a careful analysis of s.18. of the Charter of Human Rights and Freedoms, 1975. He observed that a criminal record, even one for which a pardon has been granted²¹⁴ is not included as a prohibited ground of discrimination in s. 10 of the Charter of Human Rights and Freedoms, 1975 and so, s.18. does not prevent an employer from asking during an interview whether an applicant has been in trouble with the law. Thus, the disclosure of a penal or criminal

²¹⁰ Ontario Human Rights Commission, Annual Report, 2001-02, available at www.ohrc.on.ca/english/publications/2001-2002-annual-report.shtml.

²¹¹ Charter of Human Rights and Freedoms, 1975, s. 18.

²¹² *Re Therrien* [2001] 2 SCR 3.

²¹³ *Re Therrien*, *op cit*, para. 139, *per* Gonthier J.

²¹⁴ *Ibid*, para. 137, *per* Gonthier J.

conviction or indeed, a pardoned conviction in employment application forms or in employment interviews is permitted under the Charter. Further, Gonthier J. stated that a pardon does not entitle a person to “deny the existence of his conviction or, more generally, that he had been in trouble with the law”.²¹⁵

In this case, the appellant had been convicted of unlawfully assisting four members of the Front de liberation du Québec in 1970 for which he obtained a pardon in 1987 under the federal Criminal Records Act, 1985. Between 1989 and 1996 the appellant submitted his candidacy for judicial appointment in five selection procedures and disclosed his pardoned conviction in the first two procedures. In 1996 he was appointed a Judge of the Court of Québec after responding no to the question posed by the selection committee as to whether he had ever been in trouble with the law. The Minister of Justice was subsequently informed of the appellant’s pardoned conviction and his omission to disclose its existence to the selection committee. Disciplinary proceedings were initiated and the disciplinary panel recommended that Judge Therrien be removed from office. The appellant submitted to the Supreme Court of Canada that first, his removal from office was as a result of the mere fact that he was convicted of a criminal offence even though he had been pardoned and second, that he had been discriminated against when asked by the selection committee whether he had been in trouble with the law.

In *Re Therrien*²¹⁶ Gonthier J. observed that even if penal or criminal conviction and/or pardoned conviction were included as a prohibited ground of discrimination in s. 10, thereby ensuring the operation of s. 18.,

the question would still be permitted in the selection process for persons qualified for appointment as judges, since the distinction is based on the aptitudes or qualifications required for judicial office, which is deemed non-discriminatory by s. 20 of the *Québec Charter*.²¹⁷

In summary, s. 18. 2 of the Charter of Human Rights and Freedoms, 1975 “is a self-contained discrimination code with its own internal exemptions”.²¹⁸ These internal exemptions or conditions for the application of s. 18. 2 of the Québec Charter of Human Rights and Freedoms, 1975 were summarised by Gonthier J. in *Re Therrien*.²¹⁹ There are four conditions to be met:

- (1) a dismissal, a refusal to hire or any kind of penalty;
- (2) in the persons employment;
- (3) owing to the mere fact that the person was convicted of a penal or criminal offence;
- (4) the offence was in no way connected with the employment or the person has obtained a pardon for the offence.²²⁰

²¹⁵ *Ibid*, para. 138, *per* Gonthier J.

²¹⁶ *Re Therrien*, *op cit*.

²¹⁷ *Ibid*, para. 137, *per* Gonthier J.

²¹⁸ Electronic mail, 18 November 2002, to the authors of this Report from Pierre Bosset, Director of Research and Planning, Commission des droits de la personne et des droits de la jeunesse du Québec.

²¹⁹ *Re Therrien*, *op cit*.

²²⁰ *Ibid*, para. 140, *per* Gonthier J.

In this case, the Supreme Court found that the second condition was not satisfied, given the distinctive nature of judicial appointments.

*Maksteel Inc. c. Commission des droits de la personne et droits de la jeunesse*²²¹ concerned an employee who had been dismissed from his employment due to imprisonment which had prevented him from carrying out his duties. The Tribunal liberally interpreted mere fact of a penal or criminal conviction. It ruled that s. 18. 2 extended to people who had been acquitted and to those in prison. In the latter case, the Tribunal found that an employer had a duty to accommodate the imprisoned employee short of undue hardship. This ruling was reversed by the Court of Appeal of Québec and is currently pending before the Supreme Court of Canada. As the position stands in Québec, s. 18. 2 does not extend to incarcerated employees as dismissal is not based on the mere fact of conviction, but rather on the fact that the employee can no longer perform his duties. However, a liberal interpretation of this internal exemption of mere fact of penal or criminal conviction, has been applied in cases of people awaiting trial.²²²

The Québec Commission des droits de la personne et des droits de la jeunesse du Québec, has ruled that the prohibition on discrimination in relation to a pardoned offence cannot be invoked against a local authority's decision to refuse a coach licence, as this activity is a form of private enterprise not employment.²²³ The Commission has ruled, however, that s. 18. 2 applies to a refusal by a private association to admit a person thereby preventing him from earning a living.²²⁴ This decision is currently being appealed.

In deciding whether or not an offence is connected with the employment, due regard must be had to the effect of the offence on the employee's ability to perform his duties. The nature of the employment and the type of offence are crucial to this assessment. Pierre Bosset, Director of Research and Planning at the Commission des droits de la personne et des droits de la jeunesse states, "[t]he fact that the job involves a vulnerable client base is highly relevant".²²⁵ A vulnerable client base not only includes children, but also an elderly person or person with intellectual disability. In considering the nature of the offence a moral judgment is not passed on the offender, but rather an assessment of the prejudicial, tangible, concrete and real impact on the employment relationship must be made. Thus, in *Provençal c. Ville de Magog*,²²⁶ it was held, that the applicant's previous conviction for incest was not related to his employment as a labourer.

The 2001 Annual Report of the Commission des droits de la personne et des droits de la jeunesse du Québec recorded 26 complaints based on penal or criminal conviction, representing 2.5% of the 1,058 complaints for that year.²²⁷

²²¹ *Maksteel Inc. c. Commission des droits de la personne et droits de la jeunesse* [2001] R.J.Q. 28 (C.A. Que), reversing [1997] R.J.Q. 2891 (T.D.P., Que).

²²² *Ville de Saint-Hubert c. Syndicat des cols bleus de la Ville de Saint-Hubert* (C.S.D), D.T.E. 98T-313; *Leclerc c. Guichet unique d'information et de développement économique*, D.T.E. 97T-1313 (C.T.); *Hayes c. Alliance Québec*, D.T.E. 96T-248 (C.S); *St-Jean c. Commission scolaire régionale de l'Outaouais*, [1985] C.S. 637.

²²³ *Belanger c. Ville de Québec*, J.E. 2000-1585 (C.S.Que).

²²⁴ *Baillargeon c. Association du trot et amble du Québec*, J.E. 96-1591 (C.S.Que).

Pierre Bosset, *op cit*.

²²⁶ *Provençal c. Ville de Magog*, C.S. St-Francois n 450-05-000061-941, Feb. 16, 1996.

²²⁷ Québec, Commission des droits de la personne et des droits de la jeunesse du Québec, *Annual Report*, 2001, http://www.cdpcj.qc.ca/html/fr/pdf/pdf_repertoire/RA_2001.pdf.

IV. Political Opinion

Legislative Framework

Provisions regarding discrimination on the grounds of political belief are to be found in provincial Canadian Human Rights legislation but not at federal level. Political belief is a prohibited ground in British Columbia, Québec, Prince Edward Island, Manitoba, Nova Scotia, Newfoundland and the Yukon.

Public employment legislation also impacts on the issue of discrimination on grounds of political belief. Legislation at a federal and provincial level in Canada pertaining to public employees usually provides for a leave of absence for public employees that wish to stand for election. A public employee that is successful in his candidature is no longer considered an employee in the service of the federal or provincial government. To varying degrees, the federal and provincial legislation prohibit public employees from expressing a political opinion and/or from engaging in political activities.

Federal Legislation

The general principle of non-discrimination which is found in s.2 of the Canadian Human Rights Act 1985 does not include political opinion as a discriminatory ground. A review of the Act by the Canadian Human Rights Review Panel which culminated in a report published in 2000²²⁸ considered the issue of including discrimination on grounds of political opinion or political belief in the scope of the Act. A paper commissioned by the Commission in the course of the review set out arguments which favoured the inclusion of political belief within the scope of the Act.²²⁹ These included the argument that adding political beliefs to the list of prohibited grounds is consistent with the purpose of the CHRA and the anti-discrimination provisions of the Canadian Charter on Rights and Freedoms namely that of protecting individuals from differential treatment based on attributes they share with others. Another argument was that failure to include this ground could render the legislation vulnerable to charges that it is unconstitutionally under inclusive. This argument was based on a decision of the Court of Appeal²³⁰ to the effect that failure to include sexual orientation as a prohibited ground in the CHRA offended against section 15 of the Charter which provides:

15(1) Everyone is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

A legal challenge of this nature could, it was suggested, be based on the argument that those with unpopular political beliefs can be described as belonging to discrete and insular minorities who are in need of protection. Further support for this argument is to be found in the June 2002 decision of the Supreme Court of Prince Edward Island to the effect that

²²⁸ Canadian Human Rights Act Review Panel *Promoting Equality: A New Vision* Canada: Dept. of Justice; June 2002 available at: http://canada.justice.gc.ca/chra/en/chrareview_report_2000.pdf.

²²⁹ Steinberg, "Assessing the Need to Protect Political Beliefs under the CHRA" available at <http://canada.justice.gc.ca/chra/en/steinberg1.html>.

²³⁰ *Haig v Canada* 91992) 9 O.R. (3d) 495. See also *Vriend v Alberta* [1998] 1 S.C.R. 493.

political belief is a right analogous to the rights protected under s.15(1) of the Canadian Charter of Rights and Freedoms.²³¹

The Report set out the views of those who had made submissions during the course of the review. It acknowledged that while several submissions had supported the addition of this ground, others were against the idea. One argument made against the addition of the ground which emanated from Government departments was that consideration of political belief was sometimes legitimate, for example in cases of national security. Concern was also expressed that the addition of the ground might protect those who disseminate hate propaganda. The Review ultimately came down in favour of maintaining the status quo by not recommending the addition of this ground. This decision appeared to be based, at least in part, on the fact that few cases had been brought on this ground at provincial level. Steinberg had however warned against this approach arguing that

the number of allegations of discrimination should not be the determining factor to include or exclude the grounds. The purpose of the prohibition is to protect vulnerable persons or groups from discrimination, regardless of how many claims it gives rise to.

Public Employment Legislation

The Public Service Employment Act, 1985 prohibits federal public employees from engaging in work for or against a candidate or a political party²³² and provides that no federal public employee shall be a candidate in a federal, provincial, or territorial election.²³³ A federal public employee does not contravene this general prohibition against political activity “by reason of attending a political meeting or contributing money for the funds of a candidate or political party.”²³⁴ A federal public employee who contravenes this general prohibition can be dismissed.²³⁵

The federal Public Service Employment Act, 1985 states that a public employee who wishes to seek nomination for election or to be a candidate for election, can apply for a leave of absence (s.33(3)). Upon successful election to the House of Commons, any provincial legislature or to any of the territorial governments, the federal public employee “ceases to be an employee” (s.33(5)).

Provincial Legislation

Of the three main provinces, two (British Columbia and Québec) have Human Rights provisions protecting against discrimination based on political opinion: British Columbia protects against discrimination based on political belief while the Québec legislation contains a prohibition on discrimination based on political convictions. In neither case is there a statutory definition of the relevant term. Ontario does not include political belief, opinion or convictions amongst the discriminatory grounds it protects against but it does include discrimination based on creed.

The province of Prince Edward Island will be included in this survey as it is the jurisdiction which has given rise to the most case law. In British Columbia and Québec, complaints

²³¹ *Condon v Government of Prince Edward Island and Human Rights Commission* unreported, Supreme Court, 26th June 2002.

²³² Public Service Employment Act, 1985, s. 33 (1)(a) and (b).

²³³ Public Service Employment Act, 1985, s. 33 (1)(c).

²³⁴ Public Service Employment Act, 1985, s. 33 (2).

²³⁵ Public Service Employment Act, 1985, s. 34 (2).

based on this ground make up less than 1% of all registered complaints.²³⁶ By way of contrast, Steinberg estimates that over 80% of all complaints filed in P.E.I. were based on this ground in 1999.²³⁷ Prince Edward Island is also interesting in that it is the only jurisdiction in which the relevant term has a statutory definition.

Public employment legislation in Ontario and Québec contains provisions concerning political opinion of public servants.

British Columbia

Legislative Framework

The Human Rights Code, 1996 of British Columbia states that a person must not refuse to employ, continue to employ, or discriminate against a person in relation to employment or any term or condition of employment on the basis of any of the thirteen enumerated grounds, including political belief.²³⁸ Employment agencies are similarly prohibited from discriminating against a person on the basis of these grounds.²³⁹ However, a bona fide occupational requirement can be claimed by an employer or employment agency to justify their refusal, limitation, specification or preference.²⁴⁰

The Human Rights Code, 1996 of British Columbia further stipulates that a person must not publish or cause to be published an employment advertisement that expresses a limitation, specification or preference as to the thirteen enumerated prohibited grounds of discrimination, including political belief.²⁴¹ This prohibition is similarly subject to the defence of a bona fide occupational requirement.

A general exemption to the principle of non-discrimination in employment on the basis of the enumerated grounds, including political belief is found in s. 41. Organisations or corporations which are not operated for profit and are of a charitable, philanthropic, educational, fraternal, religious or social nature are not considered to have contravened the Human Rights Code, 1996 in preferring members of an identifiable group or class of persons. A group or class of persons for the purpose of this provision are characterised by physical or mental disability, race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin.²⁴²

In the area of public employment legislation, the Public Service Act, 1996 of British Columbia merely states that a public employee can be suspended or dismissed for just cause.²⁴³

Complaints in the area of discrimination in employment on the grounds of political belief in British Columbia are sparse. Of the total number of cases dealt with by the Human Rights Commission, 6% of them related to political belief.²⁴⁴ Even then, not all of these cases may relate to discrimination in the area of employment since the Act covers 7 grounds of

²³⁶ In 1999, there were 6 complaints of discrimination on the basis of political belief in British Columbia and in Québec there were 5 such complaints: Sources: Annual Report of the Human Rights Commission of British Columbia, 1999; Annual Report of the Commission de la personne et des droits de la jeunesse, Québec, 1999.

²³⁷ Steinberg, *op cit*, para 3.0.

²³⁸ Human Rights Code, 1996, s. 13(1).

²³⁹ Human Rights Code, 1996, s. 13(2).

²⁴⁰ Human Rights Code, 1996, s. 13(4).

²⁴¹ Human Rights Code, 1996, s. 11.

²⁴² Human Rights Code, 1996, s. 41.

²⁴³ Human Rights Code, 1996, s. 22 (1) and (2).

²⁴⁴ British Columbia Human Rights Commission *Annual Report 2001/2002*, available at: www.bchrc.gov.bc.ca.

discrimination. Discrimination in employment does however account for the vast majority of complaints.²⁴⁵

Select Case Law

In *Jameson v Victoria Native Friendship Centre*²⁴⁶ the complainant alleged that he was refused a position at the Centre because of his support of the Mohawk Nation. Since “political belief” was not defined under the B.C. legislation, the Tribunal accepted the dictionary definition of the terms. It found that the complainant’s beliefs were political because

“[t]hey concern the way first nations communities are organised and governed and how those communities relate to each other and to other levels of government”

and concluded that Jamieson had been discriminated against based on these beliefs. This decision established the proposition that possessing political beliefs does not require an affiliation with any registered political party. In *Potter v College of Physicians and Surgeons of B.C.*²⁴⁷ the claimants had alleged that they had been discriminated against when a doctor refused to provide one of them with artificial insemination. They complained that the College discriminated against them on the grounds of political belief by criticising them for airing their concerns in the public domain. The Tribunal held that if the criticisms amounted to discrimination, they offended a person’s right to participate in open debate and not an individual’s political beliefs. The Tribunal concluded that the protection afforded to political beliefs did not cover the alleged rights of citizens to participate openly in debates. The Tribunal member took the view that the right to participate openly in public debates on issues affecting the public well-being “is not a belief *per se* but rather a belief about how to effect change”. The decision in *Mamela v Vancouver Lesbian Connection*²⁴⁸ is noteworthy as an unsuccessful attempt to expand the boundaries of political belief. Here the complainant argued that she had been discriminated against with regard to her employment on the basis of inter alia her political beliefs. The complainant identified as a lesbian female who is a transsexual and vigorously rejected the use of the term “woman” both as applied to her and to others. She believed that a dispute regarding this matter had led to her employment being terminated and on this basis she felt that she had been discriminated against on the grounds of her political beliefs. The Tribunal rejected the application on the grounds that she was not an employee and therefore did not proceed to consider whether she had suffered discrimination on grounds of political belief.

Québec

Legislative Framework

The Charter of Human Rights and Freedoms, 1975 of Québec enunciates a general principle of non-discrimination in s.10. This provision enumerates thirteen grounds on the basis of which discrimination is prohibited, including political convictions. The Charter of Human Rights and Freedoms, 1975 does not define the term political convictions. Section 20 of the Charter of Human Rights and Freedoms, 1975 provides for two general exemptions to the principle of non-discrimination in employment and these apply with respect to discrimination based on political convictions. The general exemptions are in respect of: distinctions based on aptitudes or qualifications required for an employment.

²⁴⁵ 78.5% in 2001/2002.

²⁴⁶ (1994) 22 C.H.R.R. D/250 (B.C.C.C.H.R.).

²⁴⁷ Decision of the British Columbia Human Rights Tribunal, 23rd January 1998.

²⁴⁸ Decision of the British Columbia Human Rights Tribunal, 16th June 1999.

There are very few complaints of discrimination based on political convictions in employment in Québec. In 2001, for example, a total of 5 complaints of discrimination based on political convictions were filed with the Commission. This represented 0.5% of all the complaints filed with the Commission in that year. Of the 5 complaints filed, only one related to employment.

Select Case-Law

Political convictions have been defined by Québec courts as referring to “the organization, functioning, goals or nature of society.”²⁴⁹ As such, the concept has been held to exclude “purely administrative matters” such as, for instance, which regional authority a local government authority should report to.²⁵⁰

In *Commission des droits de la personne du Québec c. Ville de LaSalle*²⁵¹ the decision of a local government authority not to invite a local community group to an official function, based on the circulation of an opinion poll questioning the local authority’s environmental policy, was found to be based on political convictions. In *Commission des Droits de la Personne du Québec v Collège d’Enseignement Général et Professionnel St-Jean sue Richelieu*,²⁵² a college teacher having Marxist-Leninist beliefs was hired to teach in the Philosophy department. At the end of the year, the teacher’s contract was not renewed. A complaint alleging discrimination on the basis of political belief was filed. The trial judge held that the Commission had not met the burden of proof and that there was evidence that the teacher’s behaviour harmed the reputation of the College. The Commission appealed and the appeal was dismissed. It was held that the College failed to renew the contract because the teacher did not adequately fulfil her duties and the Commission had not discharged its burden of proving that the reason for the failure to renew was the teacher’s political convictions.

The Public Service Act, 1983 of Québec states:

Nothing in this Act prohibits a public servant from being a member of a political party, attending a political meeting or making, in accordance with the law, a contribution to a political party or a local association of a political party or to a candidate in an election.²⁵³

However a public employee “shall be politically neutral in performing his duties”²⁵⁴ and “shall act with reserve in any public display of his political opinions.”²⁵⁵ A public servant that contravenes these standards is liable to disciplinary action, including dismissal.²⁵⁶ A public employee who wishes to be a candidate in a provincial election can apply for a leave of absence without pay,²⁵⁷ and a successful candidate is no longer considered a public employee.²⁵⁸

²⁴⁹ *Morel Corporation de Saint-Sylvestre* (1987) R.L. 242; [1987] D.L.Q. 391 (C.A., Que.) (Obiter) [translation].

²⁵⁰ *Ibid.*

²⁵¹ (1982) 3 C.H.R.R. D/659 (C.P., Que.).

²⁵² (1980) 1 CHRR D/85 (C.S., Que.), affirmed at (1984) R.D.J 76 (C.A.).

²⁵³ Public Service Act R. S. Q. c F-3.1.1, s. 12.

²⁵⁴ Public Service Act R. S. Q. c F-3.1.1, s. 10.

²⁵⁵ Public Service Act R. S. Q. c F-3.1.1, s. 11.

²⁵⁶ Public Service Act R. S. Q. c F-3.1.1, s. 16.

²⁵⁷ Public Service Act R. S. Q. c F-3.1.1, s. 24.

²⁵⁸ Public Service Act R. S. Q. c F-3.1.1, s. 26.

Ontario

Legislative Framework

Political opinion is not included amongst the discriminatory grounds in the Ontarian Human Rights Code 1990. The Act does, however, prohibit discrimination based on creed.²⁵⁹ In the case of *Jazairi v Ontario Human Rights Commission and York University*²⁶⁰ the complainant alleged that his views on the Israeli-Palestinian conflict had formed the basis of discrimination against him on the ground of creed. The Ontario Court of Appeal rejected the argument that the word “creed” in the Code included discrimination on the basis of political opinion. The Court endorsed the approach of the Divisional Court to the effect that even if it can be said that political opinion may constitute creed, there was no evidence that the applicant’s views amounted to a creed. The Court of Appeal held that “the personal opinion of the appellant on this single issue of the relationship between the Palestinians and Israel does not amount to a creed”. The Court did however leave open the possibility that political opinion, could, in some circumstances, amount to a creed saying “Whether or not some other system of ‘political opinion’ could amount to a ‘creed’ is not before the court. It is a mistake to deal with such important issues in the abstract”.

The Public Service Act, 1990 of Ontario states “No Crown employee shall engage in political activity in the workplace.”²⁶¹ A Crown employee is a person employed by the Government of Ontario and such an employee engages in political activity when he or she:

- (a) does anything in support of or in opposition to a federal or provincial political party;
- (b) does anything in support of or in opposition to a candidate in a federal, provincial or municipal election;
- (c) comments publicly and outside the scope of the duties of his or her position on matters that are directly related to those duties and that are dealt with in the positions or policies of a federal or provincial political party or in the positions publicly expressed by a candidate in a federal or provincial election.²⁶²

A Crown employee who contravenes the prohibition against political activity in the workplace “is subject to the full range of available disciplinary penalties, including suspension and dismissal.”²⁶³

Under s. 28.4(4) of the Public Service Act, 1990, a leave of absence to pursue election to a federal, provincial or municipal office can be granted to a Crown employee.

Prince Edward Island

Legislative Framework

The Human Rights Act, 1988 of Prince Edward Island includes political belief as a prohibited ground of discrimination.²⁶⁴ The Human Rights Act, 1988 defines this term as:

²⁵⁹ Human Rights Code, 1990, s.5(1).

²⁶⁰ (1999), 175 D.L.R (4th) 302 (Ont. C.A.).

²⁶¹ Public Service Act, 1990, s. 28.1 (2).

²⁶² Public Service Act, 1990, s. 28.1(1).

²⁶³ Public Service Act, 1990, s. 28.8.

²⁶⁴ Human Rights Act, 1988, s. 1(1).

belief in the tenets of a political party that is at the relevant time registered under section 24 of the Election Act as evidenced by

- (i) membership of or contribution to that party, or
- (ii) open and active participation in the affairs of that party.²⁶⁵

Section 24 of the Election Act, 1988 requires a political party to register with the Chief Electoral Officer. In order to be registered as a political party, the party in question must meet the following requirements:

- (a) held at least one seat in the Legislative Assembly following the most recent election;
- (b) endorsed at least 10 nominated candidates in the most recent general election;
- (c) endorses at least 10 nominated candidates following the date of a writ of election for a general election; or
- (d) at any time, except between the date a writ of election and polling day, provides the Chief Electoral Officer with the names, addresses and signatures of persons who
 - (i) represent 0.35% of the number of electors eligible to vote at the last general election,
 - (ii) are currently eligible to vote in an election, and
 - (iii) request the registration of that political party.²⁶⁶

The Human Rights Act, 1988 prohibits discrimination in employment matters in s.6, including discrimination on the basis of political belief. Section 6(1)(a) states that no person shall refuse to employ or continue to employ a person on a discriminatory basis “including discrimination in any term or condition of employment”. Employment agencies are similarly prohibited from discriminating against any individual. Employment agencies are also under a duty to refuse an inquiry in relation to employment by an employer or employee that directly or indirectly expresses a limitation, specification or preference or invites information that is discriminatory.²⁶⁷ The use and circulation of application forms or publication of an employment advertisement that directly or indirectly expresses a limitation, specification or preference on the basis of a prohibited ground of discrimination, including political belief, is prohibited under s. 6(3). This provision also prohibits inquiries in relation to employment that “invites information that is discriminatory.”²⁶⁸

A general exemption to the principle of non-discrimination is provided by s. 6(4)(a). It states that a refusal, limitation, specification or preference based on a genuine occupational qualification is not considered as contravening the Human Rights Act, 1988. The burden of proof in respect of a genuine qualification is placed on the person claiming such a qualification. Nevertheless, s. 1(3) of the Human Rights Act, 1988 stipulates that the onus of establishing an allegation of discrimination in relation to political belief is placed on the person alleging such discrimination.

²⁶⁵ Human Rights Act, 1988, s. 1(m).

²⁶⁶ Election Act, 1988, s. 24(2).

²⁶⁷ Human Rights Act, 1988, s. 6(2).

²⁶⁸ Human Rights Act, 1988, s. 6(3).

The issue of discrimination in employment on grounds of political belief is a significant source of complaints to the Prince Edward Island Human Rights Commission. Of the 117 complaints filed with the Commission between 1998-2000, 46 related to political belief and all of these concerned discrimination in employment.

Select Case-Law

The original version of the Human Rights Act, the Human Rights Act, 1974 contained in section 13 a prohibition on discrimination because of *inter alia* “political belief as registered under section 24 of the Electoral Act”. As a result of confusion as to the meaning of s. 13, the Lieutenant Governor in Council referred the issue of the interpretation of this provision to the Supreme Court in 1987. The Supreme Court held that the purpose of section 24 of the Electoral Act was to establish an administrative process for the orderly conduct of the election process.²⁶⁹ Since section 24 did not set out what political belief enjoyed the protection of section 13 of the Human Rights Act, section 13 was not capable of a reasonable interpretation. As a result of this decision, the Act was amended in 1988. In *Burge v Prince Edward Liquor Control Commission*²⁷⁰ the issue of the onus of proof in claims of discrimination on grounds of political belief arose. The Supreme Court held that the Human Rights Act be given such fair, large and liberal construction as best ensures the attainment of its objects. The court noted that the issue of the onus of proof was determined by the clear language of the Act which left no doubt that in cases of alleged political discrimination, the burden rests with the complainant throughout and never shifts to the respondent. What was required was that the complaint be supported by a reasonable preponderance of the evidence. In *Trainor v Prince Edward Island (Department of Transportation)*²⁷¹ the complainant, who had been employed as a labourer in a temporary capacity, alleged that he had been discriminated against on grounds of his political belief as a result of a failure to re-employ him following a change in government. The Board of Inquiry acknowledged that if one of the factors in the decision not to re-hire him was his political belief, then he is deemed to have been discriminated against because of such belief when the Department refused to rehire him. However it went on to hold that Trainor had failed to establish his political belief because he did not advance proof of his membership in the party nor of his contribution thereto nor did his evidence show that he demonstrated an unconcealed, overt and active participation in the affairs of the party. He simply made flat statements which were not supported by any independent witnesses who ought to have been available to him if his statements had any merit. As a matter of fact, the Board found that he was not rehired because of the concerns of his superiors as to his skills. This decision was appealed to the Supreme Court on the grounds that the Board’s interpretation of the meaning of belief in the tenets of a political party was too narrow. It was also argued that the onus of proof which had been applied was too heavy and in particular that it extended beyond the balance of probabilities. The Supreme Court held that in order to succeed in a complaint of discrimination based on political belief, the complainant must do two things. In the first place, he or she must establish his or her political beliefs. Secondly he or she must establish discrimination in relation to political belief by a reasonable preponderance of the evidence.²⁷² The Court held that the complainant had failed to discharge the onus of proof as required by the second of these requirements regardless of whether he had established his political belief as defined. On that basis the Court concluded that there was no need to consider whether his political beliefs had been established. With regard to the onus of proof the

²⁶⁹ *Re Reference to the Supreme Court: Interpretation of Section 13 of the Human Rights Act* [1988] P.E.I.J. no.36, Action No.AD-0023.

²⁷⁰ Board of Inquiry, September 12, 1991.

²⁷¹ Board of Inquiry, April 30, 1991.

²⁷² *Trainor v Prince Edward Island (Department of Transportation and Public Works)* Supreme Court, April 16, 1992.

Court amplified the requirement enunciated in *Burge* that the complaint be supported by a reasonable preponderance of the evidence saying that the burden of proof on a reasonable preponderance of the evidence means that “the trier of fact must find on reasonable grounds that the existence of the contested fact is more probable than its non-existence”. The Court concluded that there was evidence to support the Board’s finding that the applicant had failed to discharge the onus of establishing the alleged discrimination in relation to political belief by reason of a reasonable preponderance of the evidence and dismissed the appeal. In *Burge v Prince Edward Island (Liquor Control Commission) (No.2)*²⁷³ the complainant alleged discrimination on grounds of political belief based on his replacement as a beer hauler following a change of government. The respondent admitted that one of the reasons for dismissal was the complainant’s political beliefs but they argued that this was not the only reason. It was suggested that the dismissal was also due to the complainant’s poor record of service. There was evidence to refute that suggestion however in the form of a letter sent to the complainant by the respondents in which they thanked him for his excellent service. The Board of Inquiry held that discrimination did not need to be the sole or even the dominant factor in the treatment of a complainant and that it is sufficient that discrimination was a material element in the decision to dismiss. Evidence of the complainant’s political beliefs was to be found in the fact that the complainant was a high profile member of the outgoing political party who had acquired the position on a previous change of government following persistent canvassing on his part of the two members of parliament in his area. The Board held that the decision to dismiss was not based on anything other than the complainant’s political belief. When considering remedies, the Board refused the order reinstatement on the grounds that

such engagements are highly political in nature in Prince Edward Island and the complainant’s reinstatement ... would be likely to result in a highly charged workplace within the Commission, a condition that is undesirable

Instead compensation of \$2,000 for injured feelings was ordered together with a sum of over \$275,000 for economic loss based on losses suffered over a 6 year period. In 1997 amending legislation was introduced to limit the remedies available to casual employees who complained of discrimination on the grounds of political opinion. The only available remedy was to be compensation and that was limited by the operation of a formula to 3.846% of total wages earned by the employee. This legislation was the subject of a challenge based on the right to equality in the Canadian Charter of Rights and Freedoms. The challenge succeeded and the legislation was struck down. The Supreme Court held that political belief was a right analogous to the rights protected under s.15(1) of the Charter of Rights and Freedoms.²⁷⁴

²⁷³ Board of Inquiry, February 19, 1993.

²⁷⁴ Section 15(1) protects against discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

4 Great Britain

Legislative Framework

Protection against discrimination in employment in Great Britain is found in various pieces of legislation. The framework for employment equality is provided by the Equal Pay Act, 1970, the Sex Discrimination Act, 1975, the Race Relations Act, 1976 and the Disability Discrimination Act, 1995. These Acts provide for equal remuneration for equal work, and prohibit discrimination on the basis of sex, race and disability, respectively. The Trade Union and Labour Relations (Consolidation) Act, 1992 is the primary piece of industrial relations legislation in Great Britain. It provides a measure of protection against discrimination in employment on the basis of trade union membership. Criminal legislation plays a significant role in protecting those with a criminal conviction against discrimination in employment, and in this respect the primary Act is the Rehabilitation of Offenders Act, 1974. This Act is subject to numerous exceptions provided for in the Police Act, 1997. In addition to criminal legislation, the Employment Rights Act, 1996 also provides a measure of protection for those with a criminal record in relation to unfair dismissal. The Trade Union and Labour Relations (Consolidation) Act, 1992, the Rehabilitation of Offenders Act, 1974, the Police Act, 1997 and the Employment Relations Act, 1996 are discussed in detail below in the sections entitled Trade Union Membership and Criminal Conviction/Ex-Offender/Ex-Prisoner.

I. Socio-Economic Status/Social Origin

Discrimination on the basis of socio-economic status/social origin is not prohibited under employment equality legislation applicable in Great Britain. However, the Human Rights Act 1998 incorporates the European Convention on Human Rights (ECHR) into domestic law, thereby giving effect to the Convention's prohibition on discrimination (article 14). Section 6 of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way that is incompatible with a Convention right (which includes Article 14 of the Convention). A public authority includes a court or tribunal and any body with functions of a public nature (including Parliament). Social origin is included in the list of prohibited grounds of discrimination in article 14 of the ECHR. This requires to be construed according to the case law of the European Court of Human Rights. The Court has held article 14 not to be a freestanding article in its own right. For this Article to come in to play, there must be a breach of one of the substantive articles of the Convention (e.g. right to a fair trial or right to respect for private and family life). The prohibition on discrimination, therefore, has a more limited application than one might expect. Protocol No.12 to the ECHR remedies this limitation. However, this Protocol is not yet in force and has not been signed or ratified by the U.K. As yet, social origin has not been defined by the European Court of Human Rights and has not given rise to any case-law.

Correspondence from the Equality Unit within the Scottish Executive indicates that social origin, as used in the Human Rights Act, 1998, is understood to refer to:¹

¹ Copy of correspondence is on file with the authors.

- The social class (e.g. working, middle, upper) that the person perceives him or herself to be or which others perceive them to be;
- Where they were born and brought up (including the family make-up and life-style);
- Their parents' wealth, occupation and standing in society;
- The kind of education they received; and
- Aspects of national or ethnic origin.

II. Trade Union Membership

Under Article 11 of the European Convention on Human Rights, as incorporated into British law by the Human Rights Act 1998, the right to freedom of association is recognised.

The Trade Union and Labour Relations (Consolidation) Act 1992 prohibits discrimination based on trade union membership in refusals of employment, in actions or omissions short of dismissal (e.g. failure to promote) and in dismissals. The Employment Rights Act 1996 prohibits discrimination against employee representatives and the Employment Relations Act 1999 creates a power to make regulations prohibiting the creation of 'blacklists' of union officials or members.

Refusals of Employment

Section 137 of the 1992 Act² is the key section on refusals of employment:

137 Refusal of Employment on grounds related to trade union membership

- (1) It is unlawful to refuse employment to a person:
- (a) because he is, or is not, a member of a trade union, or
 - (b) because he is unwilling to accept a requirement—
 - (i) to take steps to become or cease to be, or to remain or not to become, a member of a trade union, or
 - (ii) to make payments or suffer deductions in the event of his not being a member of a trade union.
- ...
- (3) Where an advertisement is published which indicates, or might reasonably be understood as indicating—
- (a) that employment to which the advertisement relates is open only to a person who is, or is not, a member of a trade union, or
 - (b) that any such requirement as is mentioned in subsection (1)(b) will be imposed in relation to employment to which the advertisement relates,

² Trade Union and Labour Relations (Consolidation) Act 1992, s.137. Section 137 consolidates s.1 of the Employment Act, 1990.

a person who does not satisfy that condition or, as the case may be, is unwilling to accept that requirement, and who seeks and is refused employment to which the advertisement relates, shall be conclusively presumed to have been refused employment for that reason.

- (4) Where there is an arrangement or practice under which employment is offered only to persons put forward or approved by a trade union, and the trade union puts forward or approves only persons who are members of the union, a person who is not a member of the union and who is refused employment in pursuance of the arrangement or practice shall be taken to have been refused employment because he is not a member of the trade union.
- (5) A person shall be taken to have been refused employment if the employer:
 - (a) refuses or deliberately omits to entertain and process his application or enquiry, or
 - (b) causes him to withdraw or cease to pursue his application or enquiry, or
 - (c) refuses or deliberately omits to offer him employment of that description, or
 - (d) makes him an offer of such employment the terms of which are such as no reasonable employer who wished to fill the post would offer and which is not accepted, or
 - (e) makes him an offer of such employment but withdraws it or causes him not to accept it.
- (6) Where a person is offered employment on terms which include a requirement that he is, or is not, a member of a trade union, or any such requirement as is mentioned in subsection (1)(b), and he does not accept the offer because he does not satisfy or, as the case may be, is unwilling to accept that requirement, he shall be treated as having been refused employment for that reason.
- (7) Where a person may not be considered for appointment or election to an office in a trade union unless he is a member of the union, or of a particular branch or section of the union or of one of a number of particular branches or sections of the union, nothing in this section applies to anything done for the purpose of securing compliance with that condition although as holder of the office he would be employed by the union.

For this purpose an “office” means any position—

- (a) by virtue of which the holder is an official of the union, or
- (b) to which Chapter IV of Part I applies (duty to hold elections).

It is also unlawful for an employment service to refuse service on the basis of trade union membership or non-membership (s.138).

These provisions have been described as being “the final nail in the coffin of the closed shop” in England and Wales.³ They were intended “to attack the practice of the pre-entry

³ Selwyn *NM Law of Employment* 11th ed. Butterworths: London; 2000, p.539, referring to the corresponding provision of the Employment Act, 1990.

closed shop, not to provide additional protection for union members.”⁴ The Green Paper on which they were based made no mention of extra protection for union members.⁵

While section 137 refers only to trade union “membership” and not “activities”, the Employment Appeals Tribunal has held that if a person is refused employment because the person is a trade union activist or because of his or her union activities, it is open to a tribunal to find a breach of the section.⁶ This finding is now somewhat doubtful due to a later case in which the House of Lords stated that there was no general principle that a reference to union membership includes union activities.⁷

Detriment Short of Dismissal

Section 146(1)⁸ states that an employee has the right not be subjected to any detriment short of dismissal⁹ as an individual (by any act *or any deliberate failure to act*)¹⁰ by the employer for the following purposes:

- (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
- (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, or
- (c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

The employer is also prohibited from such conduct for the purpose of enforcing a requirement that, in the event of the employee not being a member of a particular union, he or she must make payments.¹¹

As originally enacted, s.146 referred only to any “action” short of dismissal but the House of Lords held in *Associated Press Newspapers Ltd. v Wilson; Associated British Ports v Palmer*¹² that “action” short of dismissal did not include an omission short of dismissal, in this case “sweetener” pay increases which were offered to employees who gave up their right to have their contract negotiated through collective bargaining. This decision was criticised as “grammatical pedantry”¹³ and as illustrating “just how fragile collective rights can sometimes be in the hands of the judiciary”.¹⁴ It was statutorily reversed¹⁵ by the

⁴ Smith & Thomas *Industrial Law* Butterworths: London; 2000, p.565. For discussion of the history of legislation concerning the closed shop in Britain, see *ibid.*, pp.586-589.

⁵ *Removing Barriers to Employment* (Cm. 655, 1989); cited in Smith & Thomas, *loc.cit.*

⁶ *Harrison v Kent County Council* [1995] ICR 434, EAT.

⁷ *Associated Press Newspapers Ltd. v Wilson; Associated British Ports v Palmer* [1995] 2 AC 454. The case involved action short of dismissal under s.146.

⁸ As amended by the Employment Relations Act 1999, s.2 and sch.2.

⁹ Section 146(6) states that for the purposes of the section detriment is detriment short of dismissal.

¹⁰ The reference to deliberate failure to act was added by the Employment Relations Act 1999 in order to reverse the effect of the *Associated Press* case — see below.

¹¹ Trade Union and Labour Relations (Consolidation) Act 1992, s.146(3).

¹² [1995] 2 AC 454.

¹³ Ewing K.D. “Freedom of Association and the Employment Relations Act 1999” (1999) 28 *Industrial Law Journal* 283 at 287.

¹⁴ Smith & Thomas, *op.cit.*, p.568.

¹⁵ Employment Relations Act 1999, s.2 and schedule 2. Note the White Paper *Fairness at Work* Cm. 3968, 1988, available at www.dti.gov.uk/er/fairness/ (visited 7 December 2002), which included a proposal to reverse this aspect of the *Associated Press* case.

Employment Act 1999, with the addition of the words “or deliberate failure to act.”¹⁶ Ironically, it was noted in 2000 and 2001 that it was possible that the actual decision on the facts of *Associated Press* could still be made at that time.¹⁷ However, in 2002, the European Court of Human Rights held that the effect of the *Associated Press* decision constituted a breach of Article 11 of the European Convention.¹⁸

The detriment (action or omission) must be against the employee “as an individual”, e.g. where the employer refused to allow union representation in disciplinary proceedings.¹⁹ The courts have also emphasised that the “purpose” of the employer’s action must be distinguished from its “effect”, so that it is not unlawful for an employer to advise an employee to reduce his union activities in order to gain greater line management experience and therefore gain promotion.²⁰

The first limb of the section, paragraph (a), refers to preventing or deterring the employee from becoming a union member, or penalising the employee for doing so. An important question is whether “membership” is to be narrowly or broadly construed.²¹ It was held in *Discount Tobacco and Confectionery Ltd. v Armitage*²² (a dismissal case) that this extended to invoking the assistance of a union representative, but the House of Lords later held that this case did not establish any general principle that membership of a trade union and making use of its services are in some way to be equated.²³ It has been accepted that paragraph (a) may apply to inter-union disputes which lead to different treatment by the employer.²⁴

Turning to limb (b), union “activities” include, for example, taking part in union meetings²⁵ but not industrial action.²⁶ “Appropriate time” means either outside the employee’s working hours or during the employee’s working hours but with the agreement or consent²⁷ of the employer.²⁸ This can include a tea-break²⁹ and the employer’s consent is not subject to an implied limitation on the employee not to say anything critical of the employer.³⁰

¹⁶ Note also s.17 of the Employment Relations Act 1999 which confers a power on the Secretary of State to make regulations concerning situations where a worker is subjected to a detriment by his or her employer or dismissed “on the grounds that he refuses to enter into a contract which includes terms which differ from the terms of a collective agreement which applies to him”. However, it is provided that certain forms of conduct (e.g. payment of higher wages to other workers) will not constitute a detriment so long as the workers receiving those enhanced payments or benefits are not contractually inhibited from being trade union members and the payments or benefits reasonably relate to services provided by the worker. This section has been criticised by the International Labour Organisation (88th Session 2000; report of the Committee of Experts on the Application of Conventions and Recommendations, report II (Part 1A); reproduced in Collins et al, p.789) and may need to be repealed due to *Wilson v UK* (ECHR, 2002, cited below.)

¹⁷ Smith & Thomas, *op.cit.*, pp.570-572; Collins H, Ewing KD & McColgan A *Labour Law: Text and Materials* Hart Publishing: Oxford; 2001, p.789.

¹⁸ *Wilson v UK* Application Nos. 30668/96 etc., 2 July 2002, available at www.echr.coe.int (visited 7 December 2002).

¹⁹ *Cheall v Vauxhall Motors Ltd.* [1979] IRLR 253.

²⁰ *Gallacher v Department of Transport* [1994] IRLR 231, CA.

²¹ “The question of what constitutes trade union membership for present purposes has recently proved to be extremely controversial. Does it mean the right to protection simply for holding a union card, or does it mean more to include protection from discrimination for using the service or benefits of trade union membership?” — Collins et al, *op.cit.*, p.785.

²² [1990] IRLR 15, EAT.

²³ *Associated Press v Wilson* [1995] 2 AC 454. The House of Lords said that the decision in *Discount Tobacco* may have been correct on its facts. Smith and Thomas (*op.cit.*, p. 576) point out that employers are in practice more likely to object to the consequences of union membership rather than to the mere fact of membership.

²⁴ *National Coal Board v Ridgeway* [1987] IRLR 80, CA. In this case a pay rise was applied to members of one union but not another.

²⁵ *Miller v Rafique* [1975] IRLR 70.

²⁶ *Brennan v Ellward (Lancs) Ltd* [1976] IRLR 378, EAT.

²⁷ Consent may be implied — *Marley Tile Co Ltd v Shaw* [1980] IRLR 25, CA.

²⁸ Trade Union and Labour Relations (Consolidation) Act 1992, s.146(2).

²⁹ *Post Office v UPOW* [1974] 1 All ER 229, HL.

³⁰ *Bass Taverns Ltd v Burgess* [1995] IRLR 596, CA.

Dismissals

As regards dismissals, section 152(1) states:

[T]he dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee:

- (a) was, or proposed to become, a member of an independent trade union, or
- (b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, or
- (c) was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused, or proposed to refuse, to become or remain a member.³¹

A dismissal for redundancy is unfair if it is shown that the circumstances surrounding the redundancy applied equally to other comparable employees in the same undertaking who were not dismissed, and the employee was selected for dismissal for any of the reasons given in s.152(1).³² An employer or dismissed employee may request the tribunal to join a trade union or other party to the proceedings where it is claimed that (a) the employer was induced to dismiss the complainant by industrial pressure exercised by that third party (whether by strike or otherwise) and (b) that pressure was exercised because the complainant was *not* a union member.³³

It can be difficult for an employee to prove that a dismissal or a redundancy selection was motivated by trade union membership or activities.³⁴ Paragraphs (a) and (b) of this section are very similar to paragraphs (a) and (b) of section 146(1) on actions short of dismissal and so cases on one section apply also to the other. The reference to “proposed to take part” in union activities may apply where the employee’s reputation as a union activist in previous employment leads the employer to fear that she will become a disruptive influence in the future.³⁵ But trade union activities do not include industrial action.³⁶

The Employment Rights Act 1996 provides that a person is unfairly dismissed if the reason or principal reason for the person’s dismissal is that the person is an employee representative or was a candidate for election as an employee representative.³⁷

³¹ Section 152(1)(c) also extends to the employee’s refusal to make payments in the event of non-membership of the union — see s.152(3).

³² Trade Union and Labour Relations (Consolidation) Act 1992, s.153.

³³ Trade Union and Labour Relations (Consolidation) Act 1992, s.160.

³⁴ Smith & Thomas, *op.cit.*, p.578.

³⁵ *Fitzpatrick v British Railways Board* [1991] IRLR 376, CA. Contrast *Birmingham District Council v Beyer* [1978] 1 All ER 910, EAT, where a well-known union activist gained employment by using a false name and was held to have been fairly dismissed. See Evans & Lewis, “Anti-Union Discrimination: Practice, Law and Policy” (1987) 16 *Industrial Law Journal* 88.

³⁶ *Obiter Dictum in Drew v St Edmundsbury Borough Council* [1980] IRLR 459, EAT. This statement was based on the fact that there are special rules applying to employees dismissed while on strike in sections 237-238A of the 1992 Act, discussed in Selwyn, *op.cit.*, pp.456-461.

³⁷ Employment Rights Act 1996, s.103. This covers an employee representative for the purposes of Chapter II of the Trade Union and Labour Relations (Consolidation) Act 1992 (redundancies) or Regulations 10 and 11 of the Transfer of Undertakings (Protection of Employment) Regulations 1981.

Other Provisions

The employee has the right to reasonable paid time off work for trade union duties (s.168 1992 Act) or to act as an employee representative³⁸ and reasonable unpaid time off work for trade union activities (s.170).³⁹

Employees who are health and safety representatives are protected from being subjected to detriment by their employer by s.44 of the Employment Rights Act 1996.⁴⁰ Those who are employee representatives⁴¹ are similarly protected by s.47 of the same Act.

Schedule A1 of the 1992 Act, inserted in 1999, provides protection for any worker against suffering a detriment because the worker did or did not do any of a wide range of actions in connection with the statutory procedure for recognition or derecognition of trade unions.⁴² There will be no protection if what the employee did was unreasonable.⁴³

Section 3 of the Employment Relations Act 1999 confers a power on the Secretary of State to make regulations prohibiting the compilation of “blacklists” of union members or persons who have taken part in trade union activities which are compiled for the purposes of discrimination in relation to recruitment or treatment of workers.⁴⁴

Summary of Trade Union Membership Ground — Great Britain

1. Scope: Membership, non-membership and (to a certain extent) activities.⁴⁵
2. The ground applies to refusals of employment as well as dismissals and detriment short of dismissal.
3. ‘Closed shops’ are no longer protected by British law.
4. The employer may grant benefits to union members (e.g. time off to union officers for union business). In fact, such time off is obligatory.

III. Criminal Conviction/Ex-Offender/Ex-Prisoner

Spent conviction provisions in Great Britain have their origins in the 1972 Report of the Gardiner Committee, entitled *Living it Down — the problem of old convictions*. The focus of the report’s attention was people who offended once, or a few times, who had paid the penalty which the court imposed on them, and then ‘settle down to become hard working and responsible citizens’.⁴⁶ Its recommendations found statutory recognition in the Rehabilitation of Offenders Act, 1974.

³⁸ Employment Rights Act 1996, ss.61-62.

³⁹ For discussion of these provisions, see Smith & Thomas, *op.cit.*, pp.581-586.

⁴⁰ This also covers employees who raise safety issues with employers if, for example, there is no health and safety representative at the workplace in question.

⁴¹ This covers employee representatives as defined at footnote 37 above.

⁴² These actions include supporting or opposing the application, influencing others to support or oppose the application, and voting in a ballot — Trade Union and Labour Relations (Consolidation) Act 1992, Schedule A1, para. 156. Schedule A1 was inserted by the Employment Relations Act 1999.

⁴³ It is unclear whether breach of contract by the worker, e.g. a strike, is unreasonable conduct on the worker’s behalf — Selwyn, *op.cit.*, p.451.

⁴⁴ The International Labour Organisation has criticised the practice of such blacklisting in the UK — ILO, 287th Report of the Freedom of Association Committee (1992), para. 267; cited in Smith & Thomas, *op.cit.*, p.567.

⁴⁵ Union activities are mentioned in s.146(1)(b) (detriment short of dismissal) and s.152(1)(b) (dismissals). They are not mentioned in s.137 (refusals of employment) — see discussion of *Harrison v Kent County Council* [1995] ICR 434 and *Associated Press v Wilson* [1995] 2 AC 454 above.

⁴⁶ Gardiner Committee *Living it Down — the problem of old convictions* London: HMSO; 1972, p. 5.

Rehabilitation of Offenders Act, 1974

The Act provides that where an individual has been convicted of any offence, the sentence imposed is not excluded under the terms of the Act, and the individual was not subject to a subsequent conviction during the rehabilitation period, that individual, once the rehabilitation period has been completed, is entitled to treat the conviction as spent. Subject to limitations provided for under sections 7 and 8, a person who is entitled to treat his or her convictions as spent under the terms of the Act must be treated for all purposes in law as a person who has not committed, or been charged with, or prosecuted for, or convicted of, or sentenced for, the offence or offences in question. No evidence of spent convictions can be adduced in evidence in any judicial proceedings and a person shall not be asked, or if asked, shall not be required to answer, any question relating to spent convictions or ancillary circumstances.⁴⁷ Under section 4(2), questions regarding a person's previous convictions, offences, conduct, or circumstances put to an individual otherwise than before a judicial authority will be treated as not relating to spent convictions. Under section 4(3)(a), an obligation imposed on any individual by rule of law or by the provisions of any agreement to disclose matters to another person shall not extend to spent convictions or ancillary circumstances. Section 4(3)(b) provides that a spent conviction shall not be a ground for dismissing or excluding a person from any office, profession, occupation or employment.

Provision is also made for the Secretary of State to exclude or modify section 4(2).⁴⁸ The Rehabilitation of Offenders Act, 1974 (Exceptions) Order 1975 makes such provisions.⁴⁹ The exempted professions include *inter alia*: medical practitioners, barristers and solicitors, accountants, dentists, veterinary surgeons, nurses, opticians, pharmacists, osteopaths, chiropractors, psychologists, actuaries, legal executives and receivers.⁵⁰ Exempted offices, employment and work include *inter alia*: judicial appointments, Crown Prosecution Service, court clerks, police, prisons, remand centres, detention centres, young offender institutions, traffic wardens, probation officers, care services to vulnerable adults, provision of health services, children and family court advisory service, national crime squad, serious fraud office, and any employment which is concerned with the monitoring, for the purposes of child protection, of communications by means of the internet.⁵¹ Regulated occupations include *inter alia* firearms dealers, Gaming Board, management of a place where an abortion can be legally obtained, carrying on a nursing home, and taxi drivers.⁵² Excepted licences, certificates and permits include those under the Firearms Act, 1968, and the Explosives Act, 1875.⁵³ Excepted proceedings are governed by Schedule III and include *inter alia* those listed under Schedule I, Part I.

Essentially, section 4(2) of the Rehabilitation of Offenders Act, 1974 does not apply to questions asked in order to assess the suitability of a person under Schedule I or II where the person questioned is informed at the time that the question includes spent convictions.⁵⁴ Under section 3(aa) of the Rehabilitation of Offenders Act, 1974 (Exceptions) Order 1975, section 4(2) of the 1974 Act does not apply in respect of any questions asked of any person

⁴⁷ Section 4(1)(a) and (b). But see sections 7 and 8. The circumstances ancillary to a conviction include the offence, the conduct constituting the offence, and any preliminary proceedings prior to a conviction.

⁴⁸ See section 4(4) and 7(4).

⁴⁹ For the most recent amendment to this Order, see The Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) Order 2002 (no. 441).

⁵⁰ See Schedule 1, Part I Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975.

⁵¹ See Schedule I, Part II.

⁵² See Schedule I, Part III.

⁵³ See Schedule II.

⁵⁴ See section 3(a) Rehabilitation of Offenders Act, 1974 (Exceptions) Order 1975.

in order to assess the suitability of a person to work with children, where the person is informed at the time that spent convictions are to be disclosed.⁵⁵ Moreover, section 4 of the 1975 Order provides that section 4(3)(b) of the 1974 Act does not apply *inter alia* to Part I, Schedule I, II, or III of the 1975 Order, any action taken for the purpose of safeguarding national security, decisions by the financial services authority, the Financial Ombudsman Service, the Council of Lloyds, and UK recognised investment exchanges.

Under section 5 of the 1974 Act, sentences excluded from rehabilitation include a sentence for life imprisonment, a sentence of imprisonment for a term exceeding 30 months, and a sentence of preventive detention or detention at her majesty's pleasure. Any other sentence is capable of rehabilitation under the Act, provided it has not been exempted. Under section 5(2), the rehabilitation periods are to be reckoned from the date of the conviction in respect of which the sentence was posed. The rehabilitation periods are as follows for an adult: a sentence of imprisonment between 6 and 30 months (10 years); a sentence of imprisonment for a term not exceeding 6 months (7 years); any other sentence subject to rehabilitation under the Act (5 years). Where the sentence was imposed on a person who was under 18 years of age at the date of his or her conviction, the rehabilitation periods are halved.⁵⁶ If you are convicted during the rehabilitation period of an offence which can only be tried by a magistrate's court, the new sentence will only carry its own rehabilitation period and will not affect the earlier one. If, however, the second offence is more serious than the original offence, the earlier conviction will only become spent when the latter one becomes spent. If a person is given a sentence for a second offence which can never become spent, this also prevents an earlier unspent conviction from becoming spent.⁵⁷ Moreover, where a person receives two or more prison sentences in the same proceedings, the rehabilitation period will be contingent upon whether or not the sentences are consecutive or concurrent. If concurrent, the offences are treated separately for the purposes of the Act. If consecutive, the offences are treated as a single total term.

Under section 7(2)(a), it is provided that nothing in section 4 shall affect the determination of any issue, or prevent the admission or requirement of any evidence, relating to a person's previous convictions or to ancillary circumstances in any *criminal* proceedings before a court. A practice statement was issued in 1975 by Lord Widgery in respect of section 7(2)(a). It stated as follows:

2. Section 4(1) of the 1974 Act does not apply however to evidence given in criminal proceedings (s 7(2)(a)). Convictions are often disclosed in such criminal proceedings. When the Bill was before the House of Commons on 28th June 1974 the hope was expressed that the Lord Chief Justice would issue a practice direction for the guidance of the Crown Court with a view to reducing disclosure of spent convictions to a minimum and securing uniformity of approach.
3. During the trial of a criminal charge reference to previous convictions ... can arise in a number of ways. The most common is when the character of the accused or a witness is sought to be attacked by reference to his criminal record, but there are,

⁵⁵ For other circumstances in which questions can be asked (thereby disapplying section 4(2) of the 1974 Act) see *inter alia* 3(b) national security, 3(bb) air traffic services, 3(d) building societies, 3(e) adoption agencies, 3(f) day care, 3(g) financial services authority, the Council of Lloyds, UK recognised clearing houses, and the National Lottery Commission of the 1975 Order.

⁵⁶ For the rehabilitation periods of certain young offenders, see Table B of section 5(2) of the 1974 Act. For the periods that apply *inter alia* in respect of discharge, hospital orders, under the Mental Health Act, 1983, disqualifications, prohibitions or penalties, see sections 5(3) to 5(10). For example, for a conditional discharge, probation order, binding over, care order, or supervision order, the period of rehabilitation is 1 year after conviction or 1 year after the order ends, whichever is the longer.

⁵⁷ See section 6.

of course, cases where previous convictions are relevant and admissible as, for instance, to prove system.⁵⁸

4. It is not possible to give general directions which will govern all these different situations, but it is recommended that both court and counsel should give effect to the general intention of Parliament by never referring to a spent conviction when such reference can be reasonably avoided. If unnecessary references to spent convictions are eliminated much will have been achieved.
5. After a verdict of guilty the court must be provided with a statement of the defendant's record for the purposes of sentence. The record supplied should contain all previous convictions, but those which are spent should, so far as practicable, be marked as such.
6. No one should refer in open court to a spent conviction without the authority of the judge, which authority should not be given unless the interests of justice so require.
7. When passing sentence the judge should make no reference to a spent conviction unless it is necessary to do so for the purpose of explaining the sentence to be passed.⁵⁹

In section 7(3), however, it is also provided that in any proceedings before a judicial authority, other than those outlined in section 7(2), and where the authority is satisfied that justice cannot be done in the case except by admitting evidence of a person's spent convictions (or ancillary circumstances), such evidence can be admitted. Under section 9 unlawful disclosure of a spent conviction by an official can result in a maximum fine of £2,500; if a person obtains details of a spent conviction from any official record by means of fraud, dishonesty or a bribe, the penalty is a maximum of 6 months' imprisonment and/or a fine of £5,000.

The Police Act, 1997⁶⁰

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

1. Basic Level Check and Criminal Conviction Certificate

This check relates to any type of employment. The certificate will only reveal details of unspent convictions under the 1974 Act and the certificate will only be issued to the individual who is the subject of the check.⁶¹

⁵⁸ In proving system, the prosecution is in effect demonstrating that the manner in which a specific act was done on one occasion suggests that it was also done on another occasion by the same individual with the same intent.

⁵⁹ [1975] 2 All ER 1072. See also [2002] 3 All ER 904 for a consolidation of all practice statements.

⁶⁰ See Thomas T "Employment Screening and the Criminal Records Bureau" 2002 *Industrial Law Journal*, pp. 55-70.

⁶¹ See section 112 of the Police Act, 1997.

2. Intermediate Level Check and Criminal Record Certificate

This type of check is available to anyone seeking a position involving regular contact with persons under 18 years of age or for occupations excepted under the 1974 Act. It is a joint application made by the relevant individual and employer. Such a check will provide details of both spent and unspent convictions and also police cautions, reprimands and warnings. Moreover, if the position involves children, details will also be furnished with regard to whether or not the individual is named on lists held by the Department of Education and Skills under the Protection of Children Act 1999 or the Education Reform Act 1988. This certificate is issued to both the individual and the registered organisation (employer).⁶²

3. High Level Check and Enhanced Criminal Record Certificate

This check relates to work involving persons under 18 or vulnerable adults, or those seeking judicial appointments, lottery or gaming licences. Again, it involves a joint application. Details furnished will include:

- All spent and unspent convictions
- Cautions, reprimands and warnings
- Appearances on the lists cited
- Criminal intelligence information, records of acquittals, inconclusive police investigations, uncorroborated allegations

The Certificate is issued to both the individual and the registered organisation.

The Criminal Records Bureau satisfy the individual's rights under the Data Protection Act, 1988, through ensuring that the information is processed with his or her knowledge, that only information which is needed is collected and processed, and that such information can only be seen by those needed to fulfil their obligations. Moreover, if individuals are unhappy with any of the information provided, they can challenge it or seek to have it reviewed.⁶³ A one-off fee is charged by the Criminal Records Bureau in respect of organisations registering to enable them to receive higher level disclosures. Additionally, standard fees apply to all three categories of disclosure for each disclosure made. By 31 March, 2002, 5,954 bodies had applied to become a registered organisation.⁶⁴ Moreover, in March 2002, the Criminal Records Bureau commenced live operations and by the end of that month had received 15,000 applications for higher level disclosures.⁶⁵ It had been anticipated that the basic disclosure service would be available from Autumn, 2002; this has now been postponed until demand has been fully met for the higher two levels.

Judicial Interpretations

(i) Unfair Dismissals

Though not recorded specifically as automatically leading to an unfair dismissal, section 4(3)(b) of the 1974 Act provides that once a conviction has become spent under the terms of the Act, a failure to disclose such a conviction is not a proper ground for dismissing a

⁶² See section 120 of the Police Act, 1997.

⁶³ See section 117 of the Police Act, 1997.

⁶⁴ See Criminal Records Bureau *Annual Report and Accounts, 2001-2002*, 2002, p. 12; see <http://www.crb.gov.uk>.

⁶⁵ *Ibid*, p 28. As of 10th July, 2003, two million disclosures had been issued by the Criminal Records Bureau. Press Release 11 July, 2003 www.crb.gov.uk/pr/110703.asp.

person from employment.⁶⁶ In *Property Guards Ltd v. Taylor and Kershaw*⁶⁷ two employees signed a statement to the effect that neither they nor any member of their families had been convicted of a criminal or civil offence. It was discovered that the said employees had been convicted of minor offences of dishonesty and dismissed. Given that the convictions were spent under the terms of the Rehabilitation of Offenders Act, 1974, it was held that their dismissals were unfair.

It is important to note however that job applicants are not relieved from disclosing unspent convictions. In *G.E. Torr v. British Railways Board*⁶⁸ an employee falsely stated, when applying for a job as a railway guard, that he had never been found guilty of any offence. He had in fact been convicted of larceny and sentenced to three years' imprisonment in 1958, and, in 1968 he had again been convicted of larceny and was sentenced to 9 months' imprisonment. The employer found out about the first offence and the employee was prosecuted for dishonestly obtaining a pecuniary advantage. He pleaded guilty and was conditionally discharged for a year. The employee was then dismissed by the Railways Board. At an industrial tribunal, the employee claimed unfair dismissal. It was held, however, having regard to the nature of the offence, that the employer had acted reasonably. On appeal, the employee claimed that although his convictions were not spent under the terms of the 1974 Act, the employer, nevertheless, ought to have regard to public policy in relation to the rehabilitation of offenders and that it was unfair to dismiss the employee because of his previous convictions. His appeal was dismissed. The Employment Appeal Tribunal noted:

In our view, there is no rule of law that employers must follow and extend the social philosophy that has found expression in the Rehabilitation of Offenders Act, 1974, and to assert such a principle of public policy would only lead to confusion. The duty of an employer contemplating dismissal is to be fair and to have regard to all the relevant circumstances, so as to take a course of action which properly reconciles the requirements of the business and the interests of an employee. It is of the utmost importance that an employer seeking an employee to hold a position of trust should be able to select for employment a candidate in whom he can have confidence. It is fundamental to that confidence that the employee should truthfully disclose his history so far as it is sought by the intending employer.

It is also important to note that though an employee has a right not to be unfairly dismissed by his or her employer under the Employment Rights Act, 1996, such a right is subject to the qualifying service requirements of the Act which provide *inter alia* that an employee must have been in continuous employment for two years ending with the effective date of termination.⁶⁹

(ii) Criminal Proceedings

Evidentiary issues, as they relate to the Rehabilitation of Offenders Act, 1974, have caused some confusion. In the House of Lords in *Murdoch v. Taylor*,⁷⁰ for example, it was held that a co-accused had an unfettered right to cross-examine his or her co-accused about previous convictions in court. Following the introduction of the Rehabilitation of Offenders Act, 1974,

⁶⁶ See, for example, *P.M. and E.M. v. Scottish Liberal Club* [1977] IRLR 5.

⁶⁷ [1982] IRLR 175.

⁶⁸ [1977] IRLR 184.

⁶⁹ Automatically unfair dismissals include *inter alia* pregnancy and childbirth, health and safety, shop workers and betting workers who refuse Sunday work, trustees of occupational pension schemes, employee representatives, and assertion of statutory rights. The qualifying period does not apply to such dismissals.

⁷⁰ [1965] AC 574.

one issue in need of resolution was whether such a right was affected by spent convictions under the Act. In *R v. Evans*⁷¹ the Court of Appeal held that it was appropriate for a defendant to be able to cross-examine a prosecution witness about his or her spent previous convictions. Moreover, in *R. v. Corelli*⁷² Longmore LJ noted:

The question whether a rehabilitated person's spent convictions can be referred to in court depends ... on the true construction of ss. 4 and 7 of the Act. Section 7 is the prevailing section and expressly provides that nothing in section 4 is 'to affect the determination of any issue ... relating to a person's previous convictions'. The determination of such issue is, therefore, to be made in accordance with the law of the land. The law of the land is as stated in *Murdoch v. Taylor* and it seems to us, therefore, ... [and if the question which it is proposed to put is relevant] ... that the judge has no discretion to disallow the cross-examination.

This, to some extent, seems at enmity with Paragraphs 4 and 6 of the Practice Statement.⁷³ Indeed the Law Commission, in a Consultation Paper on Evidence in 1996, noted that the practice statement provided useful guidance and was an important adjunct to the Act. It added that in deciding whether or not to allow a party to refer to a spent conviction, the court should take into account all relevant factors including the issue in the case, the length of time that had elapsed since the date of conviction, and the age of the relevant witness at the time the offence was committed.⁷⁴

(iii) Civil Proceedings

A determination of the admissibility of spent convictions under section 7(3) of the 1974 Act was made in *Thomas v. Commissioner of Police of the Metropolis*.⁷⁵ The plaintiff in the action brought proceedings against the defendant seeking damages for assault, damage to property, false imprisonment and malicious prosecution. In particular, the plaintiff claimed that he had been subjected to abusive remarks and brutally mishandled by the arresting officers. He also claimed that he was arrested without lawful cause. At trial, the judge was asked in the absence of a jury to determine whether two previous convictions — both of which were spent — could be put to the plaintiff in cross-examination. The trial judge, in accordance with section 7(3) of the 1974 Act, ruled that such cross-examination could take place as justice could not be done except by admitting the convictions. The cross-examination, in particular, was pertinent as regards the credibility of the plaintiff as a witness. The plaintiff appealed on the basis that the judge could only admit evidence of spent convictions under section 7(3) if such convictions were relevant to the issues in hand, and not where they were relevant merely as to his credibility as a witness. It was held in the Court of Appeal that a trial judge could,

⁷¹ [1992] Crim LR 125. As Lord Lane CJ noted: "So the sweeping provisions of s 4(1) ... do not apply to criminal cases [as per s. 7(2) of the 1974 Act]. The matter is complicated by a Practice Direction which was issued under the authority of the then Chief Justice ... Without going into the constitutionally difficult area, namely to what extent a Practice Direction can override what seems to be the plain terms of the statute, whatever may be the effect of those Practice Directions read against the word of the statute, this is clearly a case where the judge, if he had a discretion about the matter at all, should have allowed the convictions to be put to the witness."

⁷² [2001] EWCA Crim 974.

⁷³ *Op cit.*

⁷⁴ The Law Commission *Evidence in Criminal Proceedings* (Consultation Paper 141) 1996, para 14.19-14.23. On spent convictions as they relate to the credibility of a witness, see *R v. Nye* (1982) 75 Cr App 247 where Talbot J noted: "In our view, when this question arises, it is entirely a question for the discretion of the judge. It may well be that the past spent conviction ... happened when the defendant being tried was a juvenile, for instance for stealing apples, a conviction of many years before. In those circumstances quite plainly a trial judge would rule that such a person ought to be permitted to present himself as a man of good character. At the other end of the scale, if the defendant is a man who has been convicted, shall we say, of some offence of violence, and his conviction has only just been spent, and the offence for which he is then standing trial involves some violence, then it would be plain, we would think, that a trial judge would rule that it would not be right for such a person to present himself as a man of good character ... The exercise of discretion of the trial judge ... must be carried out having regard to the 1974 Act and the practice direction. It should be exercised, so far as it can be, favourably towards the accused person."

⁷⁵ [1997] 1 All ER 747.

pursuant to section 7(3), admit such cross-examination if its relevance merely related to credibility provided that justice could not otherwise be done. It also noted however that some degree of relevance was required for admitting such evidence of spent convictions. Moreover, since such evidence had some potential for prejudice, the judge should weigh the degree of relevance against the amount of prejudice and should only admit the evidence if satisfied that otherwise the parties would not have a fair trial. In the instant case, the trial judge had not misdirected himself as to the test to be applied and, accordingly, this was not an invalid exercise of discretion under section 7(3) of the 1974 Act.

(iv) Exemptions

The issue of exemptions to the Act has come up for consideration on a number of occasions. In *Wood v. Coverage Care Ltd*⁷⁶ the claimant was employed by the respondents as a deputy head at a residential home until her dismissal in 1995. The home included among its residents persons over the age of 65. In the early 1970s, the claimant had been convicted of a number of offences.⁷⁷ All convictions were spent by 1994. At the end of 1993, the claimant's post became redundant and the question of alternative employment arose. The claimant was interested in two other posts, bursar and outreach manager. However, paragraph 12 of Part II of Schedule I of the Exception Order, as it now reads, excludes from the Act 'any employment ... which is concerned with the provision of care services to vulnerable adults which is of such a kind to enable the holder of that employment ... to have access to vulnerable adults in receipt of such services in the course of his normal duties'. The respondent took the view that the exemption applied to the claimant and decided that she was not suitable for either post. She was eventually dismissed by reason of redundancy. At an industrial tribunal, it was held that the exception applied and the respondent's decision was reasonable in the circumstances. The decision was confirmed on appeal to the Employment Appeals Tribunal.⁷⁸

(v) Duty of Disclosure in Insurance Law

Though an assured does not have to reveal previous criminal information to an insurer where it is spent under the terms of the Rehabilitation of Offenders Act, 1974, he or she would have to disclose unspent convictions, together with ancillary unspent information (i.e. an arrest, charge, and committal for trial). In *March Cabaret v. London Assurance*⁷⁹ it was held that such ancillary information would have to be revealed irrespective of whether or not it was well founded. In *Reynolds and Anderson v. Phoenix*⁸⁰ however, it was held that such information would only have to be revealed to an insurer if it was well founded.⁸¹ Furthermore, in addition to an assured's own convictions being capable of being construed as material by insurers, so too are those of persons with whom he or she associates (which are not spent).⁸²

A review of the Rehabilitation of Offenders Act, 1974

A review of the Act is now on-going in England and Wales. The terms of reference of this review are to examine the scope and reference of the Rehabilitation of Offenders Act, 1974 (including the Exceptions Order, and how it works). It is also mandated to consider whether

⁷⁶ [1996] IRLR 264.

⁷⁷ They included convictions for handling stolen goods, theft and defrauding the DHSS.

⁷⁸ See also *R v. Secretary of State for the Home Department, ex parte McNeil* CO/2599/99 (14 July 1999).

⁷⁹ [1975] 1 Lloyd's Rep. 169.

⁸⁰ [1978] 2 Lloyd's Rep. 440 at 460.

⁸¹ In a more recent case, *Inversiones Manria S.A. v. Sphere Drake Insurance Co. Plc. (The Dora)* [1989] 1 Lloyd's Rep. 69, the reasoning of *March Cabaret* was preferred.

⁸² *Lambert v. Co-op Insurance Society Limited* [1975] 2 Lloyd's Rep. 485.

the Act 'adequately achieves the policy goal of reducing crime by facilitating the rehabilitation of offenders and the protection of the public, or whether any other arrangements might better deliver this objective'.⁸³

A report, entitled *Breaking the Cycle*, was produced in July 2002 as part of the review. It began by suggesting that there are no winners if offenders are excluded from the labour market:

Not those with a criminal record denied the opportunity to put their past behind them. Not employers who lose out on committed and conscientious employees, and on resources and skills that otherwise may not be on offer. And certainly not our communities, because denying employment opportunities to people with a criminal record increases the risk of re-offending. Disclosure of a criminal record can be a real barrier to ex-offenders who want to lead law-abiding and productive lives. Opening up employment to people who want to put their offending behind them will make our communities safer and more productive. Otherwise, everyone loses out.⁸⁴

A number of issues have been raised in relation to the operation of the Act. They are outlined below.

(i) Exceptions

The number of exceptions to the Rehabilitation of Offenders Act, 1974, it has been suggested, has robbed the original Act of much of its intention. It has been submitted that a mechanism should be introduced by which people with previous convictions, which are not spent because of the Exemptions Order, could apply to an independent assessment tribunal to determine whether or not, in particular cases, the exception should not apply.⁸⁵

(ii) Cautions

The 1974 Act does not allow for cautions, reprimands or final warnings to become spent under the terms of the Act. Increasing use of police cautions has come about as a result of Home Office circulars and the Crime and Disorder Act, 1998. The 1974 Act, it is argued, should reflect this trend through enabling cautions, reprimands and final warnings to become spent immediately (as opposed to allowing a qualifying period of, for example, 6 months).⁸⁶

(iii) The need to simplify and rationalise rehabilitation periods

It has also been suggested that the Act should be reviewed in order to simplify and rationalise rehabilitation periods. One commentator has suggested that the Act is 'ill-conceived, over complex, cumbersome and anachronistic'.⁸⁷ Similarly the Better Regulation Task Force noted in 1999:

The Act has proved its worth to citizens and employers alike in promoting greater fairness and transparency around the issue of spent convictions. The Act, in its

⁸³ See <http://www.homeoffice.gov.uk>.

⁸⁴ Rehabilitation of Offenders Act Review *Breaking the Cycle: a report of the review of the Rehabilitation of Offenders Act* HMSO; London; 2002, p. 2.

⁸⁵ House of Commons Parliamentary Reports 'Draft Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) Order 2002' Tuesday, 12 February, 2002, col. 6.

⁸⁶ Home Office. *The Rehabilitation of Offenders Act, 1974 and Cautions, Reprimands and Final Warnings: a consultation paper*. HMSO; London; 1999.

⁸⁷ Broadhead J "Denying the Past" 2001 (No 7005) *New Law Journal*, p 1533.

amended form, nevertheless sets out a complex array of rehabilitations to determine when different types of convictions are spent. These periods seem to have arisen more from political expediency than any rational justification.⁸⁸

(iv) Exclusion

- It is argued that the Act is unnecessarily restrictive in its contribution to public safety. Large numbers are excluded. On 31 March 1999, 63% of the 51,409 sentenced prisoners were serving sentences over 30 months and were, accordingly, excluded from the benefits of the Act.⁸⁹ It was also estimated that 70,000 people aged 40 and under had served custodial sentences of more than 30 months which excluded them from the spent conviction scheme.⁹⁰
- It is also suggested that sentencing practice has changed considerably since 1974. The Prison Reform Trust has estimated that the average prison sentence length has increased by 30% since the introduction of the Act.⁹¹ Further evidence of sentencing inflation was provided in *Breaking the Cycle* which pointed out that whereas 3,537 offenders were sentenced to custody for over 30 months in 1974, the number had risen to over 11,000 by 2000.⁹²
- Some commentators have also pointed out that the rehabilitation periods are over-long and do not serve the needs of society. More emphasis needed to be placed on encouraging offenders to lead law-abiding lives. This was particularly so given the clearly established links between crime and unemployment.⁹³
- The Rehabilitation Review Team also noted the following in *Breaking the Cycle*:

Research suggests that employers who routinely ask for information on previous convictions as part of the recruitment process tend to use it in a blanket discriminatory way rather than to inform their assessment of the general suitability of candidates, and any risk they may present in the workplace. This may stem partly from a lack of understanding. There is evidence that some employers are under the impression that they may not employ anyone with an unspent conviction. However, more often than not it is likely to be symptomatic of the increasingly risk-averse culture of our communities. It also reflects a common view that society is divided into offenders, unworthy of our help and support, and on the other side of the divide the law-abiding population. It is common to feel that the divide may never be crossed. However, the huge number of people with previous convictions — as well as those who may have evaded conviction — is proof enough that no such clear-cut divide exists.⁹⁴

In a survey undertaken by the Home Office in 2001, for example, 57 per cent of those looking for work said they had experienced difficulty in finding employment post-release due to their previous convictions.⁹⁵ It also appears that employers look very unfavourably

⁸⁸ Better Regulation Task Force *Review of Fit Person Criteria* HMSO: London; 1999, p. 124.

⁸⁹ Prison Reform Trust 'A Review of the Rehabilitation of Offenders Act, 1974' 2001. See <http://www.prisonreformtrust.org.uk>.

⁹⁰ *Ibid.* It is estimated that the total number of people with previous convictions who will never be rehabilitated is 100,000. Rehabilitation of Offenders Act Review *Breaking the Cycle: a report of the review of the Rehabilitation of Offenders Act* HMSO: London; 2002, p. 37. The review team also noted, in examining the criminal careers of those born in England and Wales between 1958 and 1978, that it was estimated that 22% of men and 5% of women aged 10-45 have a criminal record. See <http://www.policecareers.gov.uk/roareview.roakeystats.htm>.

⁹¹ *Op. cit.*

⁹² *Op. cit.*, p. 6.

⁹³ On the link between crime and unemployment, see Webster, R. et al *Building Bridges to Employment for Prisoners* HMSO: London; 2001 (Research Study 226).

⁹⁴ *Breaking the Cycle Op. cit.*, p. 22.

⁹⁵ Home Office *Criminality Survey: drugs follow up* London: HMSO; 2001; see also D Fletcher et al *Recruiting and employing Offenders* London: 2001.

on those with criminal convictions. Research has indicated that half of employers would routinely ask about criminal convictions; three quarters of those surveyed would treat a candidate less favourably on the basis of a criminal conviction; one in seven would reject an applicant with a criminal record irrespective of the relevance and nature of the offence.⁹⁶

- The creation of a 'checking culture' — particularly with the use of basic disclosures under the Police Act, 1997 — will also, it is argued, lend itself to the possibility of social exclusion through the creation of barriers to employment.⁹⁷

Recommendations arising from the Review

- The review recommended, to begin with, the need to maintain and indeed enhance protection of the public. It suggested that a new judicial discretion should be considered to disapply the normal disclosure periods in cases where the sentencer was of the view that there was a particular risk of significant harm.⁹⁸ The exercise of such discretion would only apply in exceptional circumstances and it is envisaged that it would only apply to cases where the risk of re-offending is high.
- The report also suggested that a mechanism be put in place to ensure that offenders understand how the disclosure requirements apply to them.⁹⁹
- It also recommended that the disclosure scheme should be based on fixed periods; these fixed periods should be based on sentence,¹⁰⁰ with different periods applying to custodial and non-custodial sentences.¹⁰¹
- Disclosure periods should comprise of the length of the sentence plus an additional buffer period. It had been suggested that the disclosure period should be the sentence itself as this was the period in which rehabilitation should take place. However, the review team noted that the risk of re-offending was minimised whilst an individual was under supervision either in the community or in prison. The review team did not settle on the length of buffer periods, but tentatively posited, as a reference point for further discussion, a period of one year for non-custodial sentences and two years for custodial sentences.¹⁰²
- There should be no requirement to disclose cautions, reprimands and final warnings.
- The cut-off point of a 30 month custodial sentence should be removed so that the scheme applies to all ex-offenders who have served their sentence.
- Consideration should be given to the development of criteria to identify young offenders convicted of minor and non-persistent crime so that their records could be wiped clean for purposes of employment (except through enhanced disclosure) at age 18.

⁹⁶ Metcalf, H et al *Barriers to employment for offenders and ex-offenders* 2001 (Report No. 155) <http://www.dwp.gov.uk>; the Social Exclusion Unit has produced a recent report on reducing reoffending by ex-offenders which is available online at <http://www.socialexclusionunit.gov.uk>. See also Gill, M (1997) Employing Ex-Offenders: a risk or an opportunity *The Howard Journal of Criminal Justice* Vol 36(4), pp. 337-351; Maxwell, P and Mallon, D (1997) Discrimination against Ex-Offenders *The Howard Journal of Criminal Justice* Vol. 36(4) pp. 352-366.

⁹⁷ Thomas, *op cit*, p. 68.

⁹⁸ *Breaking the Cycle*, Op. Cit. p. 16.

⁹⁹ *Ibid*, p. 21.

¹⁰⁰ It had been suggested that the Act was a blunt instrument in that it took no account of an individual's circumstances. However the review team pointed out that a sentence length and type was calculated to take into account the seriousness of the offence, the degree of harmfulness, the offender's culpability, and the offender's criminal history. All such factors were of direct relevance to the issue of risk, particularly as it related to employers.

¹⁰¹ *Breaking the Cycle*, Op. Cit. p. 27.

¹⁰² *Ibid*, p. 30.

IV. Political Opinion

Political opinion is not one of the grounds of discrimination covered by British employment equality legislation. Nor is dismissal on the ground of political opinion included within the scope of the British unfair dismissals legislation. However the Human Rights Act 1998 has incorporated the European Convention on Human Rights (ECHR) into British law. The article of the ECHR of most relevance is Article 10 which concerns freedom of expression. Article 10, which is a free standing provision for the ECHR, refers expressly to opinions. It provides that:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas.

There has, to date, been no decision of the British courts on the operation of this provision in the context of discrimination based on political opinion.

5 Northern Ireland

Legislative Framework

The Belfast Agreement, 1998 and the consequent Northern Ireland Act, 1998 provide the constitutional framework for employment equality law in Northern Ireland. The Belfast Agreement affirms civil rights and religious liberties, in particular the right to free political opinion and the “right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity”.¹ The declaratory principles enunciated in the Belfast Agreement are given effect by the Northern Ireland Act, 1998. In order to realise the right to equal opportunity the Act imposes a statutory duty on all public authorities² to have due regard to the right in carrying out their functions between, *inter alia* persons of different political opinion.³

The Northern Ireland Act, 1998 also establishes a single regulatory equality body, the Equality Commission,⁴ replacing the Fair Employment Commission, the Equal Opportunities Commission, the Commission for Racial Equality and the Northern Ireland Disability Council. The Standing Advisory Commission on Human Rights is reconfigured by s.68, which establishes the Northern Ireland Human Rights Commission. Its functions are primarily advisory and promotional, although it can assist individuals in court or tribunal proceedings.⁵

The Fair Employment and Treatment (Northern Ireland) Order, 1998 prohibits discrimination on the basis of religious belief or political opinion.⁶ Such discrimination can also occur by way of victimisation.⁷ The Order defines discrimination as less favourable treatment. It also includes the application of a condition or requirement

which is such that the proportion of persons of the same religious belief or of the same political opinion as that other who can comply with it is considerably smaller than the proportion of persons not of that religious belief or, as the case requires, not of that political opinion who can comply with it.⁸

Further, the imposition of the condition or requirement must be unjustifiable and result in detriment to the person to whom the condition or requirement is applied.⁹

The Order also confers functions on the Equality Commission in respect of the promotion of equality of opportunity and affirmative action measures,¹⁰ to work towards the elimination of unlawful discrimination and review the Order.¹¹

¹ Belfast Agreement, 1998, s. 6 (1).

² Public authorities are defined in Northern Ireland Act, 1998, s. 75 (3).

³ Northern Ireland Act, 1998, s. 75 (1).

⁴ Northern Ireland Act, 1998, s. 73.

⁵ Northern Ireland Act, 1998, s. 69.

⁶ Fair Employment and Treatment (Northern Ireland) Order, 1998, s. 3 (1)(a).

⁷ Fair Employment and Treatment (Northern Ireland) Order, 1998, s. 3 (1)(b).

⁸ Fair Employment and Treatment (Northern Ireland) Order, 1998, s.3(2)(b)(i).

⁹ Fair Employment and Treatment (Northern Ireland) Order, 1998, s. 3(2)(b)(ii) and (iii).

¹⁰ As defined in Fair Employment and Treatment (Northern Ireland) Order, 1998, s. 4 and 5.

¹¹ Fair Employment and Treatment (Northern Ireland) Order, 1998, s. 7 (c) and (d).

In addition to the Fair Employment and Equal Treatment Order, 1998, various pieces of British industrial relations legislation and criminal legislation have been enacted in Northern Ireland. These Acts provide protection against discrimination in employment on the basis of trade union membership and criminal conviction/ex-offender/ex-prisoner status.

I. Socio-Economic Status/Social Origin

At present, anti-discrimination law in Northern Ireland does not prohibit discrimination on the basis of social origin/socio-economic status. However, recent debates on a Single Equality Bill and a Bill of Rights have given rise to proposals for inclusion of such a ground in anti-discrimination provisions. The Equality Commission for Northern Ireland has addressed this issue in its recent position paper on the Single Equality Bill.¹² The Commission has expressed some concern about the operation and effect of a socio-economic status ground. Their concern is that if this ground is framed in a symmetrical way, similar to other prohibited grounds of discrimination, it could be used to protect social advantages of the already socially advantaged. It would not necessarily, therefore, become a tool for addressing poverty or disadvantage. While not opposed to extending the scope of equality law to this area, the Commission argues that the model of protection to be adopted would need to be carefully thought out, so as to avoid the misuse of the protections by those who are richer or more powerful. Citing the South African case, *City Council of Pretoria v Walker*,¹³ the Commission points out that human rights law can be used by people in advantageous positions to tackle government social policy/redistribution actions.

In its position paper on the *Single Equality Bill*, the Equality Commission remains cautious about adopting a symmetrical non-discrimination approach to the socio-economic status ground. The Commission recommends that the concerns raised in its Position paper and the debate around socio-economic discrimination, should be addressed in the forthcoming White Paper. The Commission suggests that discussions concerning the protection of human dignity, as they have developed in relation to protection of rights, could if applied to the socio-economic scenario, protect those in disadvantaged groups and less so those in advantaged groups. It should be noted that the concerns raised by the Equality Commission have already been addressed in the Canadian context. The Human Rights Act, 2002, adopted in the Northwest Territories of Canada, specifies that discrimination based on social condition must target a “socially identifiable group that suffers from social or economic disadvantage“(s.1), thereby ensuring that socially advantaged groups cannot invoke the prohibition on discrimination.

The Equality Commission has proposed that a Single Equality Bill would prohibit discrimination on the basis of ‘other status’. This residual category would allow for greater flexibility in equality law and would remove the need for legislative amendments when new grounds arose for consideration. This proposal follows the South African example of adopting a similar ‘catch-all’ term in its equality law. This residual category would have to be applied, subject to the understanding that, as a residual category, the other status relied on in this category must be interpreted consistently with the other specific stated grounds. The use

¹² Equality Commission for Northern Ireland. *Update on the Single Equality Act — Position Paper*, Autumn 2002. Available at: <http://www.equalityni.org/publications/recentpubdetails.cfm?id=10>, accessed on December 10th 2002.

¹³ Constitutional Court of Republic of South Africa — CCT8/97 17 February 1998.

of such a residual category might also open up the possibility of addressing discrimination based on social origin/socio-economic status.

Proposals for a Northern Ireland Bill of Rights have also raised the issue of discrimination based on social origin/socio-economic status. The Northern Ireland Human Rights Commission has recommended the inclusion of a social origin ground in the general non-discrimination clause of the proposed Bill of Rights so as to ensure compliance with the ECHR.¹⁴ The proposal to include “other status” in the equality guarantee allows the clause to remain flexible as the groups needing protection change over time. This additional clause may also provide protection against discrimination based on socio-economic status.

The Northern Ireland Human Rights Commission has not defined social origin in its published proposals. However, the NIHRC Equality Working group discussed the elements of social origin discrimination. A list of issues was not prepared by the group. However, discrimination on the basis of geographical location and post code were considered. It was pointed out that on occasion, people are treated differently depending on whether they are rural or urban dwellers, West and East of the Bann, of no fixed abode and so on. In the end, the Working Group decided that many of the most egregious problems were likely to flow from the fact that postcodes and the like were used to determine someone’s social origin or political beliefs, and that this issue was already covered in the proposed general equality clause.¹⁵ In its discussion on the scope of the anti-discrimination provision, the Working Group relied, in particular, on section 15 of the South African Constitution (1996) and section 15 of the Canadian Charter of Rights and Freedoms (1982).

II. Trade Union Membership

There is no significant difference between the statutory provisions in Northern Ireland and those in Great Britain.

Refusal of Employment

The Employment Rights (Northern Ireland) Order 1996 contains the same provisions concerning refusal of employment on the basis of trade union membership as are contained in the British Trade Union and Labour Relations (Consolidation) Act 1992. The key paragraph is as follows:

- 26(1)** It is unlawful to refuse a person employment—
- (a) because he is, or is not, a member of a trade union, or
 - (b) because he is unwilling to accept a requirement—
 - (i) to take steps to become or cease to be, or to remain or not to become, a member of a trade union, or

¹⁴ Northern Ireland Human Rights Commission. *Making a Bill of Rights for Northern Ireland*. September 2001, available at: <http://www.nihrc.org>, accessed on Dec 10th 2002.

¹⁵ Northern Ireland Human Rights Commission. *Report on the Independent Bill of Rights from the Equality Working Group*, available at: <http://www.nihrc.org>, accessed on Dec 10th, 2002.

- (ii) to make payments or suffer deductions in the event of his not being a member of a trade union.¹⁶

The other paragraphs are virtually identical to those in the British Act, already described earlier in this Report.

Detriment Short of Dismissal

Acts and omissions short of dismissal are dealt with in article 73, covering detriment for the purposes of

- (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so
- (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, or
- (c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions¹⁷

Again, the other sections are the same as those in the corresponding British Act.¹⁸

Dismissal

Dismissals based on trade union membership or activities are covered by article 136:

136 Trade union membership or activities

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for his dismissal is that the employee—
 - (a) was, or proposed to become, a member of an independent trade union, or
 - (b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, or
 - (c) was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused, or proposed to refuse, to become or remain a member.¹⁹

As the wording of all of these Northern Ireland provisions is so similar to the British legislation, it is to be assumed that similar interpretations may be applied.²⁰

¹⁶ Employment Rights (Northern Ireland) Order 1996, 1996 No. 1919 (N.I. 16), Art. 26(1), available at www.northernireland-legislation.hmso.gov.uk (visited 7 December 2002).

¹⁷ Employment Rights (Northern Ireland) Order 1996, Art. 73(1) as amended by the Employment Relations (Northern Ireland) Order 1999.

¹⁸ Article 19 of the Employment Relations (Northern Ireland) Order 1999 is not yet in force, according to www.legal-island.com/tableerel.htm (visited 7 December 2002). Art. 19 is the equivalent of section 17 of the Employment Relations Act 1999 (conferring a power to make regulations concerning situations where a worker is subjected to a detriment by his or her employer or dismissed "on the grounds that he refuses to enter into a contract which includes terms which differ from the terms of a collective agreement which applies to him"). This article may be in breach of the European Convention on Human Rights due to *Wilson v UK* Application Nos. 30668/96 etc., 2 July 2002, referred to earlier in this Report.

¹⁹ Employment Rights (Northern Ireland) Order 1996, Art. 136(1). The other provisions concerning dismissal correspond with the British provisions already described earlier in this Report.

²⁰ See the description above of British case-law interpreting the British legislation.

Other Provisions

Employees who are discriminated against due to trade union activities may argue that this is prohibited under the “political opinion” ground in the Fair Employment and Treatment (Northern Ireland) Order, 1998, according to the decision in *Neill v Belfast Telegraph*.²¹

The Equality Commission for Northern Ireland has issued three position papers on a Single Equality Bill, and has concluded that there is no need to have a separate “trade union” ground in such a Bill:

There is ... substantial protection available to workers engaged, or otherwise, in trade union activities in the various employment codes. In addition the tribunals have accepted that trade union activity can amount to ‘political opinion’ in the context of anti-discrimination legislation.

The Commission sees no need to extend the legislation to have a separate ‘trade union’ ground. Indeed, to bring this into the jurisdiction of anti-discrimination legislation may take away from the current approach of mainstreaming trade union protection in all employment legislation.²²

Summary of Trade Union Membership Ground — Northern Ireland

1. Scope: Membership, non-membership and (to a certain extent) activities.²³
2. The ground applies to refusals of employment as well as dismissals and detriment short of dismissal.
3. ‘Closed shops’ are no longer protected by Northern Irish law.
4. The employer may grant benefits to union members (e.g. time off to union officers for union business). In fact, such time off is obligatory.

III. Criminal Conviction/Ex-Offender/Ex-Prisoner

The Rehabilitation of Offenders (NI) Order 1978²⁴ makes it possible for convictions to become spent in Northern Ireland. The Order was drafted directly from the 1974 Rehabilitation of Offenders Act, 1974 in Great Britain. In *Re Euro Security (92) Limited (in Liquidation), the Department of Economic Development v. Abraham and Abraham*²⁵ it was stated that the purpose of the Order was ‘to rehabilitate offenders who have not been reconvicted of any serious offence for periods of years and to penalise any unauthorised

²¹ Fair Employment Tribunal, 4 July 2002. See the Political Opinion section of this chapter.

²² Equality Commission for Northern Ireland *Position Paper: Update on the Single Equality Act* Autumn 2002, p.6, available at <http://www.equalityni.org/publications/recentpubdetails.cfm?id=10> (visited 7 December 2002).

²³ Union activities are mentioned in art.73(1)(b) (detriment short of dismissal) and art.136(1)(b) (dismissals). They are not mentioned in art.26 (refusals of employment) — see discussion of *Harrison v Kent County Council* [1995] ICR 434 and *Associated Press v Wilson* [1995] 2 AC 454 in the England and Wales section above.

²⁴ 1978 No. 1908 (NI 27).

²⁵ Chancery Division (Companies) 1996 C23(D) 24 June, 1997; see also *In the matter of an application by Joseph McParland for judicial review* [2002] NICA 22. Here the appellant wished to commence a bus service. However, his application for a licence was refused on the ground that he was convicted in 1990 of possession of explosives, firearms and ammunition with intent to endanger life. He was sentenced to 10 years imprisonment and his conviction, accordingly, could not become spent under the terms of the 1978 Order. It was argued on behalf of the appellant that the terms of the 1978 Order were so unnecessarily harsh on individual applicants for road service licences that it offended the principle of proportionality. The court accepted that there may be circumstances in which an unspent conviction would have little bearing on an individual's fitness to receive a road service licence and it would not be proportional to prevent such a person from being granted a licence. The principle, however, did not apply in this instance since the EU Directive (89/438) — which made provision for the adoption of common rules for the granting of licences to transport operators — specifically envisaged that the rehabilitation provisions applying in various Member States would be applied. Though this could make for ‘hard cases’, the Directive had to be applied.

disclosure of their previous convictions'. After a period, a person can be treated for certain purposes as if the conviction never happened. This period of time depends on the sentence imposed and may be extended by subsequent convictions. However, the Rehabilitation of Offenders (Exceptions) Order (NI) 1979 makes certain exceptions in terms of professions, employment and occupations to which the 1978 Order does not apply.

Article 5(1) of the 1978 Order deems evidence relating to spent convictions inadmissible in proceedings before a judicial authority and prevents the asking of any questions in such proceedings that relate to spent convictions. Article 8, however, disapplied Article 5 in respect of criminal proceedings, as regards the determination of any issue or the admission of evidence of previous convictions. Under Article 8(3), if, in any proceedings before a judicial authority, that authority was satisfied that justice could not be done except by admitting or requiring evidence relating to a person's spent convictions or circumstances ancillary thereto,²⁶ the authority may admit or require such evidence. Article 8(4) provides a power to the Secretary of State to further exclude a number of specified proceedings.

Article 5(2) provides that any question seeking information about previous misconduct put otherwise than in proceedings before a judicial authority shall be treated as not relating to spent convictions or any circumstances ancillary thereto. Under article 5(3)(a), any obligation imposed by any rule of law which relates to disclosure shall not extend to spent convictions or ancillary circumstances; article 5(3)(b) provides that failure to disclose a spent conviction shall not be a ground for dismissal from any office, profession, occupation or employment (provided it is not exempted under the 1979 Order).

Under Article 6, the following sentences are automatically excluded from the 1978 Order:

- (a) a sentence of imprisonment for life;
- (b) a sentence of imprisonment for a period exceeding 30 months
- (c) a sentence of detention during the pleasure of the secretary of State or for life, or for a term exceeding 30 months, passed under article 45 of the Criminal Justice (Children) (Northern Ireland) Order 1998 or a corresponding court-martial punishment.

The rehabilitation periods are reckoned from the date of the conviction in respect of which the sentence was imposed.²⁷ For adults, for a prison sentence between 6 months and 30 months, the rehabilitation period is 10 years; for a prison sentence of six months or less, the period is 7 years; and, for a fine or community service order, it is five years. The rehabilitation period for similar sentences imposed on offenders aged 17 or under on conviction is reckoned at half the adult rate. The periods for the following offences are the same for those under and over 17 years age on conviction:

²⁶ Ancillary circumstances include the offences or offences which were the subject of the conviction, the conduct constituting the offence, or offences, and any proceedings preliminary to that conviction.

²⁷ Art. 6(2) of the 1978 Order.

- | | |
|---|--|
| • Absolute Discharge | 6 months |
| • Probation, Supervision,
Care-Order, Conditional Discharge,
Binding Over | 1 year or until the order expires²⁸ |
| • Attendance Centre Order | 1 year after order expires |
| • Hospital Order ²⁹ | 5 years or 2 years after order expires³⁰ |

If there is a conviction which is not spent and a further offence is committed, the new conviction may affect the rehabilitation period of the initial conviction, if it was for a serious offence (one that could be tried in the Crown Court). In such circumstances neither conviction will become spent until the rehabilitation period for both offences has been completed. If, however, the sentence imposed for the second offence exceeds 30 months' imprisonment, then neither offence can ever become spent.³¹ Moreover, where a person receives two or more prison sentences in the same proceedings, the rehabilitation period will be contingent upon whether or not the sentences are consecutive or concurrent. If concurrent, the offences are treated separately for the purposes of the Act. If consecutive, the offences are treated as a single total term. The Criminal Records Bureau in England and Wales already has access to most Scottish convictions via the Scottish Criminal Records Office. It is currently working with the Home Office and the Police service of Northern Ireland to obtain access to information on convictions in Northern Ireland.

Exempted posts and occupations under the Exemptions Order, 1979 include *inter alia*:

- Judicial appointments
- Employment in the office of the Director of Public Prosecutions
- Justices' clerks and their assistants
- Police
- Traffic wardens
- Probation officers
- Any office or employment concerned with the provision to persons aged under 18 of accommodation, care, leisure and recreational facilities, schooling, social service, or supervision or training.
- Employment connected with the provision of social services which involves access to the young, old, mentally or physically impaired, or the chronic sick or disabled.
- Employment concerned with the provision of health services
- Firearms dealers
- Any occupation requiring a licence, certificate or registration from the Gaming Board
- Director, controller or manager of an insurance company
- Director or other officer of a building society
- Any occupation concerned with the running of a nursing home

²⁸ Whichever is longer.

²⁹ With or without restrictions.

³⁰ Whichever is longer. For a suspended sentence, the rehabilitation period commences on the date of conviction and ceases when the sentence no longer has effect.

³¹ See Art. 6 of the 1978 Order.

- National security
- Medical practitioners
- Barristers
- Solicitors
- Accountants
- Dentists and their assistants
- Veterinary surgeons
- Nurses
- Opticians
- Chemists
- Teachers

A number of issues have arisen regarding the employment of ex-offenders in Northern Ireland:

1. It is estimated that one in every three males, under the age of 35, in Northern Ireland has a criminal record. This excludes traffic offences.³² As the Northern Ireland Association for the Care and Resettlement of Offenders has noted: "Dealing with people with criminal convictions is therefore a regular occurrence for personnel managers. Since we all have stereotypical images of crime and criminality, often based on fear and misunderstanding, it is an area of personnel practice which can be easily mishandled."³³
2. As in Great Britain, cautions, reprimands and warnings are not covered by the 1978 Order.
3. 'Ex-offenders are over represented amongst the unemployed. Whilst many people commit offences when they are young, this is not a good indicator of their potential future worth as employees. Indeed, given the large numbers of people with criminal records, it is wasteful and inefficient for employers to discount such a pool of potential employees'.³⁴
4. '[I]t is not in the interest of our society to create a permanent underclass who are debarred from employment on the grounds of criminal convictions. Ex-offenders who find employment are much less likely to re-offend'.³⁵

'The [1978] Order was a direct transposition of the British Rehabilitation of Offenders Act, 1974. It therefore does not take into account the very different prison population in Northern Ireland where three quarters of the prisoners are serving long term sentences. Given that a sentence of more than two and a half years can never become spent, it is largely irrelevant to a significant proportion of people who serve prison sentences [in Northern Ireland]'.³⁶

³² Department of Economic Development *Criminal Records and Employment* (Employment Rights 22) Stationery Office: Belfast; (nd), p. 1. See <http://www.nics.gov.uk/ni-direct/ded/ired.htm>.

³³ Northern Ireland Association for the Care and Resettlement of Offenders, *Coping with Convictions: an employer's guide to good practice in the employment of people with criminal records in Northern Ireland* NIACRO: Belfast (nd), p. 4.

³⁴ *Ibid.* See also Northern Ireland Association for the Care and Resettlement of Offenders, *Regulating the Yellow Ticket: the laws, policies and practices which affect the employment of people with criminal records in the European Union* NIACRO: Belfast; 1996. See also Tús Nua *The Cost of Imprisonment: an examination of the economic and social requirements of those imprisoned as a result of the conflict from the Upper Springfield Area of West Belfast* Tús Nua; Belfast 1999.

³⁵ *Ibid.*

³⁶ *Ibid.*, p. 24.

IV. Political Opinion

Constitutional and Legislative Framework

The Northern Ireland Act, 1998 provides by virtue of s. 76(1) that discrimination by a public authority on the basis of political opinion is unlawful, whilst the Fair Employment and Treatment (Northern Ireland) Order, 1998 also prohibits discrimination on the basis of political opinion. However, the protection afforded to discrimination on the ground of religious belief in employment is more extensive than that given to political opinion. The Fair Employment and Treatment (Northern Ireland) Order, 1998 provisions in relation to equality of opportunity and affirmative action measures refer to discrimination on the ground of religious belief only. These provisions relate to all aspects of the employment relationship,³⁷ including trade union membership.³⁸

Section 76(1) of the Northern Ireland Act provides that “it shall be unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of persons on the ground of ... political opinion.”

Part 3 of the Fair Employment and Treatment (Northern Ireland) Order, 1998 prohibits discrimination in a range of areas. Discrimination is defined in Article 3 to include discrimination on the ground of political opinion. There is no definition of “political opinion”. References in the Order to a person’s political opinion are said to include references to his supposed political opinion and to the absence or supposed absence of any, or any particular, political opinion.³⁹ There is an explicit exception from the scope of political opinion of “an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear.”⁴⁰ In its position paper on The Single Equality Bill, the Equality Commission of Northern Ireland stated that it may be necessary to have legislation which enables a distinction to be made between political opinions which have supported violence in the past but which do not do so now and those which continue to do so.⁴¹ The prohibitions on discrimination do not apply to or in relation to an employment or occupation where the essential nature of the job requires it to be done by a person holding, or not holding, a particular political opinion.⁴²

Selected Case-Law

The predecessor to the Fair Employment and Treatment (Northern Ireland) Order, the Fair Employment (Northern Ireland) Act 1976 also prohibited discrimination on the ground of religious belief or political opinion. Again there was no definition of political opinion. In *McKay v Northern Ireland Public Service Alliance*⁴³ the applicant claimed he had been discriminated against on grounds of political opinion in relation to the failure to appoint him

³⁷ Fair Employment and Treatment (Northern Ireland) Order, 1998, Art. 5 (4)(a).

³⁸ Fair Employment and Treatment (Northern Ireland) Order, 1998, Art. 5 (4)(b).

³⁹ Article 2(3).

⁴⁰ Article 2(4).

⁴¹ Equality Commission for Northern Ireland *Position Paper: The Single Equality Bill* para 6.15.

⁴² Article 70(4).

⁴³ [1994] NI 103.

to a position as Assistant Trade Union Side Secretary with the Northern Ireland Public Service Alliance (NIPSA). The appellant's case was based on his membership of "NIPSA Broad Left" which supported a left wing approach and which was opposed to what the "broad left" regarded as the right wing approach and tendencies of the leadership of NIPSA. He expressly stated that his claim was unconnected to religious discrimination. When the matter was heard by the Fair Employment Tribunal it held that his case did not come within the scope of the legislative provisions since discrimination on the grounds of political opinion was unlawful if, and only if, such political opinion displayed some connection or correlation between religion and politics in Northern Ireland. The Tribunal's decision was appealed and the appeal was upheld on the grounds that "to confine the term 'political opinion' to Unionist/Nationalist politics would be to read words of restriction into the Act which it does not contain". In arriving at this decision Kelly J of the Court of Appeal offered some comments on the meaning of political opinion. He said

There can be no difficulty as to the meaning of the word 'opinion' and none as to the word 'political.' When they come together in the phrase 'political opinion' it means, in broad terms, and without attempting any exhaustive definition, an opinion relating to the policy of government and matters touching the government of the state. The word 'political' is defined in the Shorter Oxford Dictionary as:

'Of , belonging or pertaining to the state, its government and policy; public, civil; of or pertaining to the science or art of government.'

It seems to me clear that a person who holds an opinion on matters relating to any of the elements of this definition, holds a political opinion.

In *Neill v Belfast Telegraph Ltd*⁴⁴ the applicant was father of the NUJ chapel at the Belfast Telegraph at a time when the newspaper had refused to engage in collective bargaining with the NUJ. He unsuccessfully applied for the post of Business Editor at the newspaper and claimed that the reason for his non-appointment was directly related to his trade union membership and activities and that such treatment amounted to direct and/or indirect discrimination on the grounds of his political opinion. The Tribunal held that the organisation of trade unions, the legislation relating to them, and the high profile they have always maintained in the employment field can all be viewed as matters which relate to the government of the state, and following the decision in *McKay* the Tribunal held that they constitute a political opinion within the meaning of the Fair Employment and Treatment Order.

In *Gill v Northern Ireland Council for Ethnic Minorities*⁴⁵ the complainant also alleged that his applicant for a position was unsuccessful due to discrimination on grounds of political opinion. Specifically he alleged that the reason he was unsuccessful was because of his association with "an anti-racist" approach to the solution of racial problems in Northern Ireland which differed from the approach of the respondent and of the successful candidate which was to adopt a "culturally sensitive" approach to this issue. The Tribunal upheld his complaint and the matter was appealed to the Northern Ireland Court of Appeal. The Court referred to the remarks of Kelly J and the dictionary definition quoted by him as giving the most useful guidance and went on to say:

It seems to us that the type of political opinion envisaged by the fair employment legislation is that which relates to one of the opposing ways of conducting the government

⁴⁴ Fair Employment Tribunal, 4 July 2002.

⁴⁵ Unreported, Northern Ireland Court of Appeal, Carswell LCJ, 27th June 2001.

of the state, which may be that of Northern Ireland but is not confined to that political entity. The object of the legislation is to prevent discrimination against a person which may stem from the association of that person with a political party, philosophy or ideology and which may predispose the discriminator against him. For this reason we consider that the type of political opinion in question must be one relating to the conduct of the government of the state or matters of public policy.

The Court concluded that the difference of opinion regarding the use of “anti-racist” or “culturally-sensitive” approaches to dealing with the problems of ethnic minorities might possibly be described as constituting a divergence of political opinion, but “we do not think that it is the type of political opinion intended by Parliament in enacting the fair employment legislation.”

6 The Netherlands

Legislative Framework

The Dutch Constitution of 1963 enunciates the principle of equality in Art.1, which enumerates five grounds of discrimination including political opinion. The other three grounds considered for the purposes of this Report, are not enumerated in Article 1.

The Equal Treatment Act, 1994 aims to ensure the equal treatment of persons irrespective of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation, or civil status in a number of areas of activity, including employment.¹ Of the four grounds under consideration in this Report, political opinion is the only ground specifically listed. The Act prohibits direct discrimination and indirect discrimination on any one of the prohibited grounds. The Act does not apply to legal relations within religious communities or within other associations of a spiritual nature.²

S.5 of the Act deals with discrimination in employment and provides that discrimination is unlawful in respect of:

- (a) Public advertisements of employment and procedures in relation to vacancies
- (b) Commencement and termination of employment
- (c) Appointment and dismissal of civil servants
- (d) Terms and conditions of employment
- (e) Education and training during employment
- (f) Promotion

Termination of employment on any of these grounds is automatically invalid, whilst any provision that conflicts with this prohibition on discrimination in employment is null and void.³ Persons who maintain that they have been discriminated against in employment matters due to their, for example, political opinion, have the right to complain to the Equal Treatment Commission as established by the 1994 Act.⁴

I. Socio-Economic Status/Social Origin

Neither the constitutional guarantee of equality nor the Equal Treatment Act 1994 prohibit discrimination on the basis of socio-economic status/social origin. However, the Netherlands has ratified the ILO Convention No. 111, Convention concerning Discrimination in Employment and Occupation, 1958, which prohibits discrimination *inter alia* on the basis of social origin. The Netherlands is also a party to the European Convention on Human Rights

¹ The Equal Treatment Act, 1994, s. 1 (b).

² The Equal Treatment Act, 1994, s. 3.

³ The Equal Treatment Act, 1994, s. 8 (1).

⁴ The Equal Treatment Act, 1994, s. 11.

(ECHR), article 14 of which prohibits discrimination, *inter alia*, on the basis of social origin. The Convention forms part of the domestic law of the Netherlands. However, the prohibition on discrimination contained in article 14 applies only in the context of protected Convention rights and does not apply specifically to the sphere of employment *per se*. The Netherlands has signed, but not yet ratified, Protocol No. 12 to the ECHR, which broadens the scope of the prohibition on discrimination.

II. Trade Union Membership

The Collective Agreements Act, 1927 (WCAO)⁵ declares that a collective agreement that requires an employer to hire solely or not hire employees who are members of a certain association is null and void.⁶ The rule does not forbid discrimination *per se*, but it prohibits the assumption of the obligation to discriminate by means of a collective agreement.

The Extension of Collective Agreements Act, 1937 (WAVV)⁷ provides that an agreement that demands employers or employees belong to a particular trade union is not binding. Further, it declares that a provision that results in unequal treatment between employees belonging to a trade union and those who do not cannot be declared generally binding.⁸ Discrimination is not in itself prohibited; only the imposition of the duty to discriminate on those who are not yet bound by collective agreement.

A clause in a collective agreement obliging the employer to employ only unionised workers is valid under Dutch law, according to the Dutch Government,⁹ although there is academic opinion to the contrary.¹⁰ Employees may apply for a waiver of the clause and a waiver will be granted if the employee submits grounds against the obligatory membership which in all reasonableness carry such weight for the employee that the membership cannot be asked of him/her.¹¹ The European Committee of Social Rights has reported that this aspect of Dutch law is not in conformity with Article 5 of the European Social Charter.¹²

Article 611 of Book 7 of the Civil Code imposes a general obligation on the employer to behave fairly as an employer. This has been interpreted to mean that discrimination against an employee because of trade union activities is normally a breach of the employer's legal obligations.¹³ Article 670 of Book 2 of the Civil Code provides that employers cannot terminate the contract of employment of a worker by reason of his/her membership of a trade

⁵ Wet op de Collectieve Arbeidsovereenkomst.

⁶ Collective Agreements Act 1927, Art.1, para.3, cited in Asscher-Vonk I "The Netherlands", in Blanpain R et al (eds.) *Bulletin of Comparative Labour Relations: Bulletin 14* Kluwer Law and Taxation: Deventer, 1985, pp.173-183 at 173. A recent report confirms that the 1927 Act is still in force and has been amended with respect to only a few minor points — van het Kaar R "Debate over viability of collective bargaining system" European Foundation for the Improvement of Living and Working Conditions, 21 November 2002, available at www.eiro.eurofound.ie (visited 7 December 2002).

⁷ Wet op het algemeen verbindend en onverbinden verklaren van bepalingen van collectieve arbeidsovereenkomsten.

⁸ Extension of Collective Agreements Act 1937, Art. 2 para. 5; cited in Asscher-Vonk, loc.cit. Van der Kaar, *op.cit.* 21 November 2002, confirms that the 1937 Act is still in force and has been amended with respect to only a few minor points.

⁹ Government of the Netherlands 14th Report on the Implementation of the European Social Charter RAP/Cha/NE/XX (2001), available at http://www.coe.int/T/E/Human_Rights/Esc/ (visited 7 December 2002).

¹⁰ E-Mail dated 16 June 2003 to the authors of this report from Filip Dorssemont of the University of Utrecht: "I read a similar description of practices in a collective agreement in the report of the Dutch government regarding the XVI cycle of control. Nearly each year the government explains how it transposes or implements the European Social Charter. The government describes the content of a collective agreement in the print industry. The content of that collective agreement, a closed shop, is anyhow at odds with the mandatory law of the Netherlands in my view. Therefore the collective agreement cannot prevail. It is a pity that the government does not mention that at all."

¹¹ *Ibid.* The 14th Report states that in practice a waiver is always granted on request.

¹² European Committee of Social Rights *European Social Charter: Conclusions XVI-2 Volume 2* Council of Europe: Strasbourg; 2002, chapter 13, available at http://www.coe.int/T/E/Human_Rights/Esc/ (visited 7 December 2002).

¹³ *Ibid.*

union or activities within that union, except as regards union activities carried out during working time without the employer's consent.¹⁴

It was recently reported that the Dutch system of collective bargaining, as regulated by the 1927 and 1937 Acts, is problematic and increasingly under debate. For example, the system has been criticised because non-unionised employers are forced against their will to offer terms of employment that they had no part whatsoever in formulating.¹⁵

In the related area of regulation of works councils, there is a legal provision which states that an employee may not be disadvantaged because of his or her employee participation activities¹⁶ and another to protect current, former and potential works council members from losing their jobs.¹⁷ Case-law on this topic marginally shifted to the disadvantage of employees in 2001.¹⁸

Case-law has recognised trade union rights such as the right to organise, the right to bargain collectively and the right to collective action.¹⁹ This has been partly due to a Supreme Court (Hoge Raad) decision attributing direct and horizontal effect to Article 6(4) of the European Social Charter.²⁰

Summary of Trade Union Membership Ground — The Netherlands

1. Scope: Discrimination against an employee because of trade union activities is normally prohibited as employers must behave fairly. Dismissal based on trade union membership or activities is also illegal.
2. This general obligation of fairness presumably applies to refusals of employment as well as dismissals and detriment short of dismissal.
3. 'Closed shops': According to the Dutch Government, a clause in a collective agreement obliging the employer to employ only unionised workers is valid, but employees may apply for a waiver of the clause. However, it has also been argued that such a clause is contrary to Dutch law.
4. As far as can be established for the purposes of this Report, there is no specific provision permitting an employer to grant benefits to union members (e.g. time off for union business).

III. Criminal Conviction/Ex-Offender/Ex-Prisoner

There are two kinds of registration for criminal records in the Netherlands. To begin with, there is a general documentation system which acts as a source of information for judges and prosecutors. Such criminal records are erased after 20 years provided there has been no intervening convictions.

¹⁴ E-Mail dated 16 June 2003 to the authors of this report from Filip Dorssemont of the University of Utrecht.

¹⁵ Van het Kaar, *op.cit.* 21 November 2002.

¹⁶ Works Councils Act 1950 as amended, Article 21; cited in van het Kaar R "Problems emerge as works councils' role expands" European Foundation for the Improvement of Living and Working Conditions, 3 April 2002, available at www.eiro.eurofound.ie (visited 7 December 2002).

¹⁷ Provision of Dutch Civil Code cited in van het Kaar, *op.cit.* 3 April 2002.

¹⁸ Van het Kaar, *op.cit.* 3 April 2002.

¹⁹ Van Peijpe T "Employed or Self Employed? The Role and Content of the Legal Distinction: Independent Contractors and Protected Workers in Dutch Law" (1999) 21 *Comparative Labor Law and Policy Journal* 127 at 151.

²⁰ Hoge Raad 30 May 1986, NJ 1986, 688, *Dutch Railroad (NS)* case. Article 6(4) refers to "the right of workers and employers to collective action in cases of conflict of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

Penal files contain only those cases where sentences are imposed by the courts. They are removed after 4 years provided no new conviction has taken place. In the case of custodial sanctions, however, the files are only removed eight years after the prison term has been served. Employers do not have a right to consult criminal records. Under the present rules, a person who wishes to obtain a good conduct certificate must apply to the burgomaster of his or her local municipality. The burgomaster decides whether to issue a certificate on the basis of the objective for which it is required and any criminal record which the applicant may be found to have. Employers in the Netherlands often require job applicants to produce good conduct certificates. The burgomaster then makes a decision whether or not to issue the certificate by reference to the information available to him or her. The relevance of particular offences may differ according to the job application. For example, a conviction for a sex offence may be highly relevant in the case of a person applying for a teaching post. If the burgomaster believes that a certificate should be issued, no reference will be made to any criminal record that may have been discovered in the penal files. The certificate will merely state that there are no known objections to issuing the certificate. For civil service positions, the burgomaster can ask to see complete criminal records (including erased offences).

It has been argued that the system of screening by the burgomaster is ineffective in practice. In particular, it has been suggested that good conduct certificates are issued too readily. To ensure greater probity, it has been recommended that the issuing of certificates should be centralised in the hands of the Ministry of Justice. Burgomasters will remain involved in the decision making process. In effect, an individual seeking a certificate will apply initially to his or her burgomaster. The burgomaster will then pass this request to the Ministry of Justice, pointing out any local or other relevant issues in respect of the request. The Ministry of Justice will then decide on the request. Provision is made for a consultation process in the event that the burgomaster does not agree with the decision of the Minister.²¹

It should also be noted that there are many special programmes in existence for young offenders which are designed to reintegrate them into society. For example, a number of HALT disposals have been introduced which enable young offenders to avoid the stigma of a criminal record by undertaking community work. It is however only available for first time offenders guilty of petty crime.²²

IV. Political Opinion

Legislative Framework

Article 1 of the Constitution provides that “All persons in the Netherlands shall be treated equally in equal circumstances.” It goes on to list political opinion amongst the grounds of discrimination which are prohibited. The Equal Treatment Act 1994 prohibits discrimination on the grounds inter alia of political opinion. There is no definition of political opinion. Of the 211 opinions issued by the Equal Treatment Commission in 1998, 6 (3%) were concerned discrimination based on political conviction. The Commission issued no opinions with regard to discrimination based on political conviction from 1999-2001 inclusive.

²¹ See www.ministerievanjustitie.nl:8080/C_ACTUAL/PERSBER/PB0564.HTM.

²² See www.ministerievanjustitie.nl:8080/C_actuall/persber/pb0942.htm.

1

Socio-Economic Status — Other European Jurisdictions

Romania

The Constitution of Romania lists “social origin” as a prohibited ground of discrimination. Government Ordinance no. 137/2000 introduces a legislative prohibition on discrimination, which includes “social class” and “belonging to any disadvantaged category” amongst the prohibited grounds of discrimination. The Ordinance applies to the use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life. It applies, therefore, in the context of employment. The Ordinance was passed by the Senate in March, 2001.

Spain

The Constitution of Spain (English translation) uses the term ‘social condition’ in its general equality guarantee.¹ However, it is not considered a separate head of prohibited discrimination but is used in the context of extending a non-exhaustive list of prohibited social and economic grounds of discrimination. Article 14 [equality] of the Constitution states: “Spaniards are equal before the law, without any discrimination for reasons of birth, race, sex, religion, opinion, or any other personal or social condition or circumstance.”

Portugal

The 1976 version of the Constitution of Portugal (English translation) included “social condition” as a prohibited ground of discrimination. However, the revised Constitution of 1992 no longer uses the term. In 1976, Article 13 of the Constitution, read:

No one is privileged, favoured, injured, deprived of any right, or exempt from any duty because of his ancestry, sex, race, language, territory or origin, religion, political or ideological convictions, education, economic situation, or social condition.

Slovenia

The Constitution of Slovenia, adopted in 1991, guarantees equal human rights and fundamental freedoms irrespective of *inter alia*, “material standing, birth, education, social status or any other personal circumstance”. This broad prohibition on discrimination is similar to the interpretation given to “social condition” in the Canadian legal system. The Slovenian “Law about work relations” (in force since Oct 24, 1998) explicitly bans discrimination based on *inter alia*, social origin. Slovenia’s penal code bans discrimination based on, *inter alia*, “material wealth, birth, education, social standing, or any other circumstance” (Article 141). This prohibition on discrimination applies to any deprivation of a human right or fundamental freedom, acknowledged by the international community or stated in the Constitution or domestic law. It applies therefore in the context of employment. A finding of discrimination may lead to a fine or prison up to a year.

¹ See www.oefre.unibe.ch/law/icj/.

Utah

The need for expungement provisions in America was first formally recognised at the 1956 National Conference on Parole. It was actively embraced by most States in the ensuing two decades. Indeed, as Kogon et al noted: 'Record sealing and expungement have been accepted casually and extended uncritically over the years, prospering in the rosy glow of good intentions and expediency, with little attention to the evaluation of results'.² In 1980, Utah introduced a significant package of expungement provisions. It provided that 'any person who has been convicted of any crime within this state may petition the convicting court for a judicial pardon and for sealing of his record in that court ... [if] the rehabilitation of the petitioner has been attained to the satisfaction of the court, [the court] shall enter an order that all records in the petitioner's case ... be sealed'.³ The offender seeking expungement had to demonstrate that he or she had not been charged or convicted of a felony or misdemeanour involving moral turpitude subsequent to the crime in question. The prescribed qualifying period also had to have passed (5 years in respect of felony or Class A misdemeanours, 3 years for any other misdemeanour or infraction; expungement of arrest records required a waiting period of 1 year which was later shortened to 30 days). Accordingly, the provisions applied to all offenders and offences. Once a record was expunged, it meant, for example, that in answering questions at an employment interview about arrests which had been expunged or convictions which had been sealed, the ex-offender could answer as though they had not occurred. Since the 1980 statute, however, there has been a gradual whittling away of ex-offenders' rights to expunge previous criminal information.⁴

- In 1987, for example, new laws were introduced which prevented certain offences, such as capital felony, first degree felony, or second degree forcible felony, from being eligible for expungement. A higher threshold for rehabilitation was also set in particular circumstances by increasing the qualifying periods (7 years in the case of a felony and 6 years in the case of an alcohol related traffic offence).⁵
- In 1994, provision was made for victims to be included in the expungement process. A duty was imposed on the Department of Corrections to notify victims when offenders who perpetrated crimes against them petitioned for expungement of the conviction. Victims also had the right to oppose the petition at a hearing.⁶
- In the same year, offenders who committed sexual acts against minors were denied the right to have such records expunged.
- Certain employers were also given the right since 1994 to examine the criminal records, including sealed or expunged records, of potential employees. These

¹ In general, see Mayfield M "Revisiting Expungement: concealing information in the information age" 1997 *Utah Law Review* pp. 1057-1085; Funk TM and Polsby DD. "The Problem of Lemons and why we must maintain Criminal Records" 1998 18(1) *Cato Journal* pp. 75-81.

² Kogon B et al "Sealing and expungement of Criminal Records-the big lie" 1970 *Journal of Criminal Law, Criminology and Police Science* p. 378. (as quoted in Mayfield).

³ Mayfield, *op cit.* p. 1073.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*, p. 1075.

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

- The 1994 statute also gave power to the judiciary to deny expungement, even where a certificate of eligibility was granted. Such a denial had to be justified on the ground that there was clear evidence that expungement would be contrary to public policy.⁷
- Provision was also made in the same statute for redaction, the blotting out of names from police records, as an alternative to the sealing of records.
- Registerable sex offenders will also be ineligible. Moreover, the qualifying period for alcohol related offences has recently been extended to 10 years.⁸

As Mayfield noted:

In short, from 1978 to the present, the requirements for expungement have grown more arduous, making expungement available to fewer types of crimes, and criminals. The trend in Utah is to limit expungement, both in terms of its availability to offenders and its effectiveness on concealing the record from the public.⁹

New Jersey

According to New Jersey law, expungement 'shall mean the extraction and isolation of all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detention, apprehension, arrest, detention, trial or disposition of an offence within the criminal justice system'. Expunged records include complaints, warrants, arrests, commitments, processing records, finger prints, photographs, index cards, 'rap sheets' and judicial docket records. Before applying for expungement relief, an individual, in the case of an indictable offence, must wait 10 years from the date of conviction, payment of a fine, satisfactory completion of probation or parole, or release from incarceration, whichever is later. In the case of violating municipal ordinances, the qualifying period is 2 years. As regards juvenile delinquents, the qualifying period is 5 years from the date of final discharge of the person from legal custody or 5 years from the entry of any other court order not involving custody or supervision.

A person who has been arrested or held to answer for a crime, and against whom proceedings were dismissed, or who was acquitted, or discharged without a conviction or finding of guilt, may petition for expungement immediately after the entry of the order or dismissal. Records of conviction for the following crimes specified in the New Jersey Code of Criminal Justice cannot be expunged: criminal homicide; kidnapping; luring or enticing; aggravated sexual assault; aggravated criminal sexual contact; criminal restraint; false imprisonment; robbery; arson and related offences; endangering the welfare of a child by engaging in sexual contact which would impair or debauch the morals of the child; endangering the welfare of a child; perjury and false swearing. Records of conviction for any person holding a public office, position or employment, cannot be expunged if the crime related to the office, position or employment. Convictions for the sale of drugs cannot be expunged unless it related to: marijuana (provided the total quantity was less than 25 grams) and hashish (provided the total quantity was less than 5 grams).

⁷ *Ibid.*

⁸ See <http://www.bci.utah.gov/Records/Expunge.html>.

⁹ *Op. cit.* p. 1076.

If an order of expungement is granted, the arrest, conviction and related proceedings are deemed not to have occurred. A petition for expungement will, however, be denied, if the need for the availability of records outweighs the desirability of having a person freed from having to disclose the records. Moreover, if the criminal conviction is the subject matter of civil proceedings, the petition will also be denied. A petition will also be denied if the petitioner has had a previous record expunged.¹⁰

Illinois

In Illinois, expungement provisions enable the record of an individual's arrest to be removed from the official records of the arresting authority and the Department of State Police, and the records of the Circuit Clerk are sealed. A judge, however, can order that the record of your arrest be sealed instead of removed from the records of the Department of State Police. An adult is entitled, if not previously convicted of any criminal offence or municipal ordinance violation, if acquitted or released without being convicted of a municipal ordinance, felony, or misdemeanour, to petition a judge to have any record of an arrest or charge expunged. The type of criminal records that can be expunged include the following: a not guilty order or acquittal; an arrest where there is no conviction or is dismissed; a sentence of supervision or certain forms of probation; and, a Governor's pardon. The qualifying period is 2 years for most types of supervision and 5 years for any other criminal record. There is no qualifying period if the order is one of not guilty, acquittal, dismissal, or when a pardon specifically permits the record to be expunged.¹¹ The Illinois State Police is the central repository for criminal record information. All law enforcement agencies, state's attorneys, circuit clerks and Department of Corrections officials are required to submit arrest, charge, disposition and custodial information to the repository within set period of time. "On January 1, 1991, the Uniform Conviction Information Act (UCIA) became law in Illinois. This statute provided that all criminal history record conviction information collected and maintained by the Illinois State Police should be made available to the public. This law permits only conviction information to be disseminated to the public.

California

Under Penal Code Section 1203.4, an individual convicted of a felony or misdemeanour must be reinstated as a law-abiding member of society in any case in which the person has been granted and successfully completed probation, by either fulfilling the conditions of probation for the entire period or being discharged before the end of the probation period. An applicant is not eligible for expungement if he or she is serving a sentence or is on probation for any offence, or if he or she is charged with the commission of a crime. The burden is on the applicant to prove that the probation requirements have been fulfilled, unless he or she has previously been relieved from probation restrictions. In order to receive the benefit of expungement, the petitioner must petition the court and show the successful completion of probation. Application for an expungement may be filed one year after the date of sentence or after the completion of probation on a misdemeanour. A record clearance of this type (certificate of rehabilitation) does not eliminate all possible adverse consequences or release a person from all "penalties and disabilities" resulting from the charges in the case. For example it will not prevent a conviction from being used against a

¹⁰ See <http://www.home.pro-usa.net/rstewart/lexpunge.htm>.

¹¹ See <http://www.illinoislawhelp.org>.

person as a prior conviction in any future criminal proceedings, such as for enhancing a prison sentence; nor will it permit the person convicted to own, possess, or have in his or her custody or control any firearm capable of being concealed upon the person. If the person is not released on probation, the qualifying period is 5 years residence in California plus between 2 and 4 years depending on the offence. As regards arrest record, a person who is found to be innocent may have his or her arrest record sealed and destroyed when he or she is acquitted of the charge, no pleadings have been filed, or no conviction has occurred.¹²

Pardon applications will not be considered unless the applicant has been discharged from probation or parole for at least 10 years and has not engaged in any further criminal activity. According to section 4852.05: 'During the period of rehabilitation, the person shall live an honest and upright life, shall conduct himself or herself, with sobriety and industry, shall exhibit a good moral character, and shall conform to and obey the laws of the land. When a certificate of rehabilitation or pardon is granted, the California Department of Justice and FBI are notified.

A pardon does involve a restoration of rights. After the granting of a pardon, a person can have firearms privileges reinstated, can sit on a jury, and seek appointment as a peace or probation officer. A pardon does not, however, entitle an individual to state that he or she has no record of arrests or convictions. The person can state that he or she has been convicted, but has been pardoned.¹³

¹² See <http://www.e-law-online.com/page23.html>.

¹³ See <http://www.bpt.ca.gov/pardon.html>.

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