PRIVACY COMMITTEE

GOODSELL BUILDING
8-12 CHIFLEY SQUARE, SYDNEY
BOX 6 G.P.O., SYDNEY, N.S.W. 2001
TELEPHONE: 238 7713

REF. GWG/MF

November 1977

BP 41.

THE USE OF CRIMINAL RECORDS IN THE PUBLIC SECTOR

This report is published for public discussion, comment and criticism. No firm decisions have yet been taken by the Committee.

It is expressly asked that organisations not change their present practices before the final report without prior discussion with the Committee.

Submissions should be forwarded to the Committee by 28 February 1978.

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INTRODUCTION

The second largest number of complaints received by the Committee has been on the various uses of criminal records. Almost without exception they involve either use by Government instrumentalities or questions asked by private sector employers and insurers on application forms and rarely involve the Police Department itself.

The extent of access by Government instrumentalities to Police records and the automatic reporting by courts is indicated by the tables at the end of this introduction and where available the number of checks made in 1976.

In view of the large number of persons affected the Committee's first report in its study "The Use of Criminal Records in N.S.W." deals with how this information is used by Government. The second report will deal with the Collection, Storage and Dissemination of Criminal Record Information by the Police and the third will deal with juvenile records.

Access to a person's criminal record is undoubtedly an invasion of privacy but having regard to other competing community interests it is in some instances a justifiable one. The Committee has always attempted in all areas of privacy to find a way to allow organisations to achieve their legitimate aims without undue intrusion into peoples lives.

Our research and complaints experience indicate that:

1. there is considerable misunderstanding as to what constitutes a person's criminal record,
2. sometimes the check and the decision take place without the person's knowledge,
3. the instrumentality does not always understand the technical significance of the terms used in the report,
4. errors of fact do occur in reports,
5. the instrumentality can act unfairly if it does not first discuss the information with the individual,
6. individuals do not apply for employment, licensing, adoption, etc., due to unjustified fears that a record will prejudice them.

In our experience, rarely will either an old record be taken into account or an unfair decision made on a recent conviction. If through misapprehension the person does not apply however the effect is the same as if he had been wrongly rejected. If this misapprehension could be removed and people who wished to in fact applied, many unjustified fears would be allayed.

The complexity of the situations which give rise to checking and the exceptions which must be made in isolated instances make uniformity impossible. It is possible however to adopt clear guidelines which will minimise unfairness and allay misapprehensions.

The guidelines which are set out in Chapter 10 of this report are built around four Basic Principles:

1. TEN YEAR LIMIT: No questions should be asked or information given relating to convictions or imprisonment beyond 10 years.

2. OPENNESS: No criminal record checking should be carried out without the person's knowledge.

3. DISCUSSION: No adverse decisions should be taken without the person having an opportunity for prior discussion.

4. REVIEW: All adverse decisions should be subject to a right of review.

These guidelines should be given the stamp of statutory approval as Schedules to a

Criminal Record (Fair Practices) Act

after public comment of this report and discussion with all users. A further schedule to the Act would clearly set out any exceptions we believe should be severely limited.

By identifying problems through openness created by the Basic Principles the Committee believes outstanding issues could be resolved.

Table 1:

Criminal Records Office Checks on Applicants for N.S.W. Government Departments and Statutory Authorities 1976

Employment	Names Checked	Found to have a criminal record
1. Public Service Board (includes Education Department): all employees except school and college leavers, Ministerial employees.	28,745	1,760
2. Public Transport Commission: All employees except senior appointments. Bus drivers, conductors, etc. must be licensed by DMT.	7,082	1,491
3. Totalisator Agency Board: All employees agents and spouses, agents staff.	1,942	391
4. Police Department: Public Servants.	3,781	197
5. Department of Motor Transport: Inspectors.		
6. Department of Corrective Services: Prison Officers.		
7. Department of Main Roads: Weight of Loads Inspectors; toll collectors; night security officers.	48	7
8. Central District Ambulance: Ambulance Officers.	405	65
9. Board of Fire Commissioners: All permanent officers and employees.	143	22
10. Grain Elevators Board: Applicants for some salaried positions.		
11. Metropolitan Water, Sewerage and Drainage Board: Officers and Patrolmen, Enquiry and Security Section.	105	36
12. Sheriff: Casual Court Attendants.	190	17

	Names checked	Found to have a criminal record
Licensing/Registration		
13. The Commercial Agents and Private Enquiry Agents Act, 1963.		
14. The Auctioneers and Agents Act, 1941.		
15. The Motor Dealers Act, 1974.		
16. The Securities Industries Act, 1970.		
17. Industrial Arbitration Act, 1940 (Private Employment Agents, and Theatrical Employers).	741	51
18. Travel Agent's Act, 1973.		
19. Builders Licensing Act, 1973.	264	105
20. Liquor Act, 1912.		
21. Firearms and Dangerous Weapons Act, 1973.		
22. Public Motor Vehicle, Tow Truck, etc.		
23. The National Parks and Wildlife Act.	238	119
24. Miscellaneous Licensing.		
Civil Rights and Liberties		
25. Jury Roll		
26. Justices of the Peace		
Administrative Benefits and Miscellaneous		
27. Charitable Collections Act, 1934: (governing bodies of charities applying for registration).		
28. Youth and Community Services: Applicants to become adoptive parents, foster parents or guardians of immigrant children.	6,505	1,114
29. Police Boys' Club Instructors and Scoutmasters.	2,890	162
30. Special Constables.		
31. Summary Offences Act, 1970 (controllers)		
32. Department of the Attorney General and of Justice: Applicants for various benefits administered by the Department. (Remissions, legal aid, ex gratia criminal injuries compensation).		
33. Visa applicants to various countries Commonwealth).		

Note: The Commonwealth instrumentalities conduct checks either directly or through the Commonwealth Police (see para 2, page 5). These will be considered by the Australian Law Reform Commission during its current Reference on Privacy. The Committee defers comment on these so far as they affect N.S.W. citizens until its report is made public.

Table 2:

Bodies Advised of Persons Appearing Before Courts by Clerks of Petty Sessions

Employment

1. Public Service Board: any public servants: charges or convictions for any criminal or quasi-criminal offence (except minor traffic breaches).

2. Education Department: employees under Teaching Services Act (teachers in public schools, academic staff in teachers college; staff inspectors; inspectors of schools; trainee teachers): charges or convictions for any criminal or quasi-criminal offence.

Licensing/Registration

3. Nurses Registration Board: nurses: charges or convictions.

4. Public Accountants Registration Board: Public accountants: charges or convictions.

5. Health Commission: medical practitioners: certificate of convictions only.

6. Council of Auctioneers and Agents: holder of licence or certificate: charge or conviction for offence which affects the good fame and character of the holder.

7. Physiotherapists Registration Board: physiotherapists and holders of conditional certificates: convictions only; Motor Traffic Act offences excluded except ten specified.

8. DMT: Any convictions under Tow Truck Act; any convictions under Motor Vehicles (Third Party Insurance) Act.

9. Board of Optometrical Registration: optometrists: convictions only.

10. Prothonotary: barrister, solicitor, articled clerk: charged with any offence; certificate of conviction.

CHAPTER 1: AN OVERVIEW

1. CRIMINAL RECORDS AND PRIVACY

1.1 The fact that a person has a criminal record is one of the most potentially prejudicial items of information that can be known about him.

A criminal record can result in legal disabilities (e.g. disqualifications from holding certain licences or exercising certain civil rights), social disabilities (discrimination in employment or insurance) and embarrassment.

1.2 To many people with such records, disclosure of their record is one of the most harmful invasions of their privacy that can occur. Complaints concerning such disclosures (actual or feared) constitute the second largest volume of complaints the Privacy Committee receives, after complaints concerning credit reporting.

1.3 In considering what protection should be given against the invasion of privacy involved in disclosure of a criminal record the Privacy Committee must also consider the extent to which such disclosures are necessary and justifiable in some cases for the protection of public and private interests, and to balance this against the invasion of privacy.

It was clear to the Committee that in some cases some degree of disclosure was necessary, and that privacy could only justifiably be protected to the extent of insisting that disclosures be limited to the minimum necessary, and that fair procedures for the use of criminal records existed. "Privacy" is never simply a matter of whether an item of information should or should not be disclosed. The social benefit of disclosure can only be assessed when all aspects of how the information is used are considered, and it is this total system of use which is weighed against the privacy invasion.

Therefore it has been necessary for the Committee to investigate in detail how criminal records are used in order to assess what changes are needed to adequately protect privacy.

2. PUBLIC SECTOR USES OF CRIMINAL RECORDS

A criminal record is more likely to adversely affect a person in his dealings with public sector organisations (government departments, statutory bodies and the Courts) than in his dealings with private sector organisations. The adverse affects may occur in the areas of employment by such public sector bodies, licensing by them, the granting of administrative benefits by them and their supervision of the exercise of various civil rights and privileges.

There are three reasons why it is in dealings with the public sector bodies that criminal records have taken on an importance not found in dealings with private sector bodies. These are:

(i) statutes impose disabilities because of criminal records and these are mainly enforced by a public sector body

(ii) failure to disclose a record when required may result in a prosecution for providing false information; and

(iii) public sector bodies have authorised access to systems of criminal records held by Police, Courts and others.

In dealings with private sector bodies, these factors do not usually apply. This report therefore concentrates on the effect a criminal record has on a person's dealings with public sector bodies in New South Wales.

Although people in New South Wales may be affected by them this Report will not deal with similar practices by Commonwealth Departments. The Committee does not have available to it the information necessary to conduct such a study. Furthermore, the matter is currently being studied by the Australian Law Reform Commission in the course of its reference on privacy.

A later report will assess the effect of a criminal record can have on a person's dealings with private sector organisations.

3. A CRIMINAL RECORD: ANALYSIS OF ITS EFFECT

The Committee's research has identified:

(a) four principal areas where a person's criminal record can affect him in his dealings with public bodies;

(b) that these effects are either based on statutory or de facto disabilities or both; and

(c) four principal mechanisms by which these disabilities are enforced.

3.1 Four Principal Areas of Effect

A person's criminal record can effect him in his dealings with public sector bodies, in the following main areas:

(i) employment by them;

(ii) occupational licensing and registration administered by them;

(iii) the exercise of various civil rights and liberties supervised by them (e.g. voting; holding public office; jury service); and

(iv) the granting of various administrative benefits and approvals (e.g. charity trustees approvals; foster parent approvals; visa certificates; legal aid)

Employment is discussed in detail in Chapter 2 and Licensing, etc. in Chapter 3 of this report. The schedules give details for each specific employer, licensing body etc. (For a list of situations where a criminal record can have some affect, see the list of schedules on p 89.)

3.2 Statutory and De facto Disabilities

Many statutes include prohibitions on people with criminal records. Some provide that specific classes of offences are a bar. Others include a more general form of prohibition in the form of a "character test" such as a requirement that applicants be 'fit and proper persons'. For a list of examples, see Appendix 1 , page 84.

In many cases the adverse affect a person's criminal record can have on his dealings with public sector bodies are simply a result of these bodies enforcing such statutory disabilities. In other cases (particularly public employment) no statutory disability is involved but the public body has decided to discriminate against persons with particular

criminal records in some instances. In many situations the end result of both a statutory and a defacto disability is the same.

3.3 Four Principal Mechanisms of Use

A government body may become aware of an individual's criminal record in the following ways:

(a) Questions asked on application: For examples of the different types of questions asked see Appendix 2, page

Failure to disclose may result in dismissal from employment, revocation of a licence or registration and, in some cases, prosecution for providing false information.

(b) Police checks on applicants: An extensive organised system of checking the names of applicants (in the various areas named in 3.1) against the records of the Police Department's criminal Records Office before approval of their applications has developed. The extent to which government bodies utilise this checking procedure is revealed in Table 1, page 2.

(c) Requirements on benefit-holders to disclose: Some legislation requires employees, licencees and registered persons to inform their employer or the licensing or registration body, when they are charged with or convicted of an offence. Failure to do so may result in dismissal, revocation of a licence, or deregistration.

(d) Surveillance of benefit-holders: As yet there are few effective methods in operation for public sector bodies to find out when a current benefit-holder (employee, licensee, registered person, foster parent, juror, charity trustee etc.) is charged or convicted of an offence so that "disciplinary" action can be taken (e.g. dismissal, revocation of licence, removal from jury roll). Some regular Criminal Records Office checks are done on the renewal of licenses, and Clerks of Petty Sessions are required to inform some public employers and licensing and registration bodies when an employee, licensee or registered person comes before the Court, but this is far less extensive (or effective) than checks on applicants. (See Table 2, page 4)

4. THE UNCO-ORDINATED GROWTH OF USE

4.1 The principal problem that the Committee sees in the practices outlined in 3.1 and 3.2 above is that they have grown up in a piecemeal, unco-ordinated fashion over many years, with no single public body in control, and with little co-ordination between various bodies. This unco-ordinated growth continues today. The constraints on growth of the various disabilities and mechanisms for their enforcement are discussed below.

4.2 Statutory disabilities.

Parliament ultimately determines the existence and form of any statutory disabilities. Under a number of recent statutes, however, disabilities may be imposed or altered by regulation.

4.3 Parliamentary scrutiny of proposed legislation is probably the main check on the proliferation of disabilities. A Department proposing legislation is likely to give the greatest stress to protection of the public, particularly in such areas as new licensing and registration legislation, and to be less mindful or aware of the cumulative effect of the type of disabilities it is proposing.

The cumulative result has been the development of the large number of statutory disabilities set out in Appendix 1 and the Schedules to this report. No doubt there are others that the Committee has not discovered. The number of new statutes imposing disabilities, in recent years, has included such areas as the securities industry (1970), travel agents (1973), builders (1973), motor dealers (1974), and juries (1977). There seems to be no decrease in the frequency of such statutes.

There seems little reason to doubt that the number of occupations or activities to come under licensing, registration or some other form of government supervision will continue to increase. Recent proposals have been made in N.S.W. concerning psychologists and baby-sitter agencies. Any such legislation can be expected to contain some prohibitions on people with criminal records.

4.4 The precise wording of statutory disabilities is greatly influenced by the Parliamentary Draftsman and the precedents in previous legislation of which he is aware. The consistency in wording of many disabilities is no doubt largely a result of these precedents.

The wording of disabilities favoured by the Parliamentary Draftsman (and by Departments) has, however, changed over the years as expressions such as "felony", misdemeanour" and "infamous crime" have fallen out of favour and other expressions have gained favour. The "old" wording of disabilities in prior Acts has usually remained unaltered, however, unless the whole Act has been replaced by a new one. (For example, the differences in disabilities in the Jury Act 1912 and the Jury Act 1977.)

The result is the wide variety of wordings set out in Appendix 1 and the Schedules to this report. Many of the prohibitions use such general or imprecise terms, (e.g. "felony", "indictable offence", "offence involving fraud or dishonesty") that a person likely to be affected would need to obtain legal advice to be sure of his position. The general "character test" provisions seem to vary such that a coherent body of judicial interpretation has not developed (See Chapter 9 for details).

4.5 Questions Asked on Application

There are few direct constraints on public sector bodies which wish to ask people to disclose their criminal records. Some application forms, particularly in the licensing areas, must be approved by regulations or the Minister.

4.6 Appendix 2 and the Schedules illustrate the wide variety of situations where such questions are asked, and the wide varieties of wordings used. Appendix 2 is by no means an exhaustive list, as the Committee has not surveyed every Government Department and Statutory Body to obtain all application forms used (1).

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(1) The Committee has only become aware of questions on application forms by virtue of a questionnaire sent to those public bodies known to have Police checks done or reports provided by Clerks of Petty Sessions, plus, in a number of cases, through complaints.

4.7 Police Checks on Applicants.

The main constraint on the growth of the practice of checking the names of applicants against the records of the Criminal Records Office is that any such checks require either statutory authority or the consent of the Commissioner of Police. A further constraint is created by the manual storage of the present records of the C.R.O. Although computerised records would provide a faster and less expensive checking process,' it is unlikely that C.R.O. criminal record information will be computerised within the next 5 years. (For a discussion on the C.R.O., its procedures and the problems and benefits of computer recording see the Committee's report on the Collection and Storage of Criminal Information by the Police Department to be released.) There has been a steady growth in the number of criminal record checks conducted, at least since the early 1940's (2).

4.8 Although the Police Commissioner controls who has access to information about criminal records, he has no control over what use is made of this information by the twenty or so Departments and authorities which receive it. The Committee's research has revealed that there is a wide variety of procedures applied (whether imposed by statute or adopted administratively) in the use of these records prior to refusal of employment, licence or other benefit.

4.9 Surveillance of Benefit-holders.

For regular checks of benefit-holders to be done at the Criminal Records Office requires statutory authority or the consent of the Police Commissioner, and the same constraints apply as in para 4.7 above. As yet such consent has only been given in the licensing area.

Similarly, for Clerks of Petty Sessions to be instructed to advise public bodies when people come before a Court requires statutory authority or the consent of the Under Secretary of the Department of the Attorney General and of Justice. As yet such consent has only been given in the cases set out in Table 2. In some of these there is statutory authority for the Court to make the report (doctors, physio-therapists) The others mainly concern

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(2) The practice of Government Department and Authorities checking whether applicants for employment have a criminal record against the files of the N.S.W. Police Department's Criminal Records Office dates at least as far back as the early 1940s, when checking by the N.S.W. Public Service Board and the then N.S.W. Railways Department began. In the post-war years Commonwealth Service Department began to check new recruits and employment checks by other Commonwealth Departments followed. In the 1960s and 1970s various New South Wales statutory authorities and other government bodies which employ permanent or casual staff independently of the Public Service Board have followed suit. Approvals have been given on a case-by-case basis by the Police Commissioner following representations by the Department or authority concerned.

By 1976 the volume of pre-employment checks conducted for N.S.W. Government bodies was over 42,000 per annum. Further checks were done for Commonwealth bodies for similar purposes.

Checks in licensing and other areas have largely developed in response to increased numbers of statutory disabilities in licensing and similar legislation.

people who have a statutory obligation to personally inform their employer (public servants, teachers)
or a professional registration body.

4.10 Such methods of surveillance of the convictions of benefit holders are obviously employed far less extensively than criminal record checks of applicants at the time of initial application. Why is this? It does not seem that it would be less important to the protection of the public interest for public bodies to know whether an employee, licensee, registered person, juror or Justice of the Peace had been convicted of an offence that it would be to know this in relation to applicants for such benefits. The answer is more likely that these surveillance mechanisms are, as yet, not very effective and therefore not in great demand.

4.11 Conclusion

With the variety in prohibitions, questions asked of applicants and the level of police checking and associated surveillance practices; the mechanisms for obtaining criminal information for public sector purposes require examination and assessment. In this report the Committee also looks at the effects a criminal record can have on a person's dealings with the public sector and proposes guidelines for the fair use of such information. The uniform draft policies, acquire particular relevance when one considers that responsibility for a control of such effects is divided between a large number of bodies which do not have the benefit of a co-ordinated approach to the use of criminal records.

In this report the Committee does not concern itself with the justifications for the use of criminal record information. Few details presently exist regarding the original and continuing reasons for the development of access to such information amongst current users. The Committee would not recommend the discontinuance of certain access, being given to current users and therefore, has not considered the more general problem of limiting the growth of the use of criminal record information.

With the removal of secrecy and the creation of fair practices, related to the accessing and use of criminal record information, which this report recommends, the Committee is of the opinion that the incidence of checking will reach its own level as each individual or prospective user is more clearly able to assess the necessity for such checks.

Chapters 2 and 3

PART B

An Outline of the Main Public Sector Uses of Criminal Records in N.S.W.

Introduction

Chapter 10 give details of the policies the Committee recommends to public sector bodies which make use of criminal records. The aim of this part of the report is to briefly describe how criminal records are generally used in the four main areas of public sector use identified in Chapter 1, i.e.:

Chapter 2

(i) public employment;

Chapter 3

(ii) occupational licensing and registration;

(iii) exercise of civil rights, liberties and offices; and

(iv) the granting of various administrative benefits and approvals.

Full details of the practices of a selection of public bodies are contained in the Schedules to this report.

(Footnote references will not be given when the practices of a particular public body are referred to, but the relevant Schedule should be consulted for further details if desired.)

CHAPTER 2: THE USE OF CRIMINAL RECORDS IN PUBLIC SECTOR EMPLOYMENT

1. A criminal record can potentially affect a person's ability to gain employment, and to retain it, in most parts of the public sector in N.S.W. Rarely does this result from a public employer enforcing a statutory disability, as most legislation establishing public employers provide no such disabilities (See Appendix 1 , paras A1 to A3 and B1 and B2 for exceptions, page 84-86.) In most cases the employer relies on its right to select employees on whatever grounds it considers appropriate, subject to legislation directing otherwise.

2. QUESTIONS ASKED OF THE APPLICANT

Some public employers ask applicants to disclose any criminal records on application (See Appendix 2, paras 1 to 4, page 87 Usually what is disclosed will be verified by a check of Police records, but there may be employers who ask but do not check. The Public Service Board does not ask any question concerning criminal records. The selection of successful applicants is made prior to criminal checking being carried out and without reference to any criminal record information.

3.1 POLICE CHECKING OF CRIMINAL RECORD INFORMATION

Most, but not all applicants selected for employment in N.S.W. public sector are checked against police records (1). (Full details are given in Table 1, paras 1-12, page 2.) It should be noted that:

(a) The N.S.W. Public Service Board checks most applicants selected for any positions with any Departments or Authorities whose employees are subject to the Public Service Act (with exceptions noted in Appendix 1 , para 1, page 84).

It should be noted that in some cases the Board has delegated the power to employ to the Department or Authority, and other than the criminal record check the Board is not involved in the selection procedure, e.g. employment of youth workers and nurses. It is the Board, however, which decides whether a criminal record should stop a person being employed. The Board's checks comprise over half of the pre-employment checks in N.S.W.

Once an applicant has been appointed to the public service, no further criminal record checks are carried out on him, if he were to apply for a movement within the Service. It seems anomolous that if the Public Service Board considers it necessary to check an applicant's criminal record, prior to his initial appointment, they should deem it unnecessary if he were to transfer to a completely different post, with different obligations and responsibilities.

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(1) By "Police Records" are meant the records of court appearances maintained in the Police Department's Criminal Records Office (C.R.O.) - for details see the Committee Report on The Collection, Storage and Dissemination of Criminal Records by the Police Department (to be released later).

(b) A number of Departments and Authorities whose employees do not come under the Public Service Act conduct their own checks. Some check all employees, but others check only classes of employees in positions considered sensitive. (See Table 1, paras 2 to 12 for details, page 2.)

(c) Some Authorities do not do criminal record checks at all (including the Electricity Commission, the Metropolitan Meat Industry Board, the Metropolitan Waste Disposal Authority and the Rural Bank).

(d) Insofar as the Committee is aware, no criminal record checks are done on employees of local government bodies, except for some who act as caretakers, night watchmen, security guards or in a similar capacity and are appointed as special constables (see Schedule 1A).

3.2 Where no question concerning criminal records is asked on the application form, but a check of Police records is done, (e.g. the Public Service Board), mainly only the applicant who is selected as the most suitable for the position is checked to see if he has a criminal record. The criminal record plays no part in the initial selection procedure.

From studies conducted by the Committee on the Public Service Board's use of criminal record checks on applicants for employment, it was revealed that six out of seven persons with a criminal record were, in fact, accepted for employment.

It is interesting to note that following the Board's consideration of such criminal record information, it is destroyed and no reference to it is made on the individual's employment file. However, when information as to charges and determinations is conveyed to the Board from the Court, Police, or the individual himself, it does become a part of the employment record. This is the case, even with unsuccessful charges.

3.3 Where a question concerning criminal records is asked on the application form it is possible that the criminal record will be considered in the initial process of discriminating between applicants. The Public Transport Commission, one of the bodies which asks such a question, has directed its recruitment officers to disregard convictions in the initial consideration of an applicant's suitability.

3.4 The standard method of "<u>name-checking</u>" Police records for employment purposes is as follows:

(a) The Public Service Board/Authority submits to the Police Department's Criminal Records Office (henceforth "C.R.O.") an alphabetical list of persons to be checked, giving full names and dates of birth. Some also provide such details as current address, place of birth and position applied for. Fingerprints are only provided on applicants for recruitment of Police Officers or prison warders.

(b) The C.R.O. returns the list with "No" marked next to the person's name if no record has been found (a negative check). If a record has been found (a positive check) "Yes" is marked next to the person's name and a resume of his record attached to the list.

(c) A resume usually comprises a typed extract from the person's C.R.O. record card comprising a brief description of each offence and the year it occurred, e.g. "1972 - drive under influence; 1973 - stealing". The following points should be noted:

(i) the penalty imposed is not usually given;

(ii) in some cases the C.R.O. is instructed to provide "full details" of particular types of offences, meaning more details of the offence and the penalty e.g. "3/11/70 - Darlinghurst - stealing (foodstuff from retail store) - fined $30 or 30 days H.L."

(iii) A resume <u>includes</u> the following:

- pending charges
- juvenile court appearances (resulting in convictions, or current bonds imposed where the facts of an offence are found proven if fingerprints were taken and the records lodged with the C.R.O.
- current recognizances under s556A Crimes Act 1900 (where the offence is found proven but the court does not proceed to a conviction)
- convictions
- convictions, where appeals are pending

(iv) A resume <u>does not include</u> the following, which are on record at the C.R.O.:

- arrest details
- charges which have been dismissed or discharged or not proceeded with (including dismissals under s556A, charges withdrawn where no evidence is offered or the Attorney General refused to file a bill and where sine die and nolle prosequi are entered)
- expired recognizances under s556A
- juvenile court appearances not resulting in conviction (admonished and discharged, neglected or uncontrollable child)
- juvenile court appearances where fingerprints not taken
- forfeited recognizances where a bench warrant has not been issued
- successful appeals against conviction.

(v) A resume does not include any comments on a person's character, associates, etc. or any recommendations as to whether the person is suitable for the position.

(d) The TAB is the only state public sector employer to peruse a photocopy of the "court appearances" side of the C.R.O. record card, and therefore able to obtain details of dismissed charges, etc. not included in resumes. The police recruitment division also has access to the details of the "court appearances" side of the C.R.O. card.

(e) Every list of positive checks sent from the C.R.O. to any Department or Authority is headed as follows: "The names in the attached list have been checked against the fingerprint records of Criminal Records Office. With the exception of those detailed hereunder with relevant particulars, the names are untraced. It is to be expressly understood that name checks are carried out by this Department on the distinct understanding that the persons selected with similar personal particulars to those listed are not necessarily one and the same person. In the absence of fingerprints positive identification cannot be established."

Furthermore, each page of such lists is overstamped in red with the following:

As fingerprints do not accompany your request, the Criminal Records Office cannot guarantee in any manner, that the information supplied herewith concerns the individual in whom you are interested.

3.5 The employer then decides whether the alleged criminal record is such that the person should not be employed. Before making any such decision some Departments/Authorities heed the Police warning about the absence of positive identification, and ask the person to confirm that the alleged record is his and whether he wishes to give any explanation for it. Some, however, assume that the alleged record is correct and reject the applicant without giving any explanation (at least unless he asks for one).

3.6 Until 1976 the Public Service Board had not asked applicants to verify or discuss an alleged record, but would inform them that this was the rejection reason, if asked. The Board, on the Committee's recommendation, is currently conducting a trial during which any applicant who may be rejected because of a criminal check is rung by (or asked to ring) the Board to discuss his application before a decision is made.

In July 1977 the Premier at the suggestion of the Board requested all Statutory Bodies to join the trial.

4.1 Rejection Procedure

It is very difficult to determine exactly what policies are applied by the various employers in deciding what convictions (or charges) are sufficiently relevant to particular positions to necessitate rejection of an application. None of the employers surveyed by the Committee had written guidelines for their recruitment staff to apply (with the exception of a very general statement of Government policy in the late 1960s. This statement of Government policy was contained in a press release by the then Premier, Sir Robert Askin (see Appendix 3 , page .) and followed a report by a Committee chaired by a member of the Public Service Board (now its Chairman) Sir Harold Dickinson. This report was then adopted at a conference of the Board, relevent Ministers and representatives of various Departments and Authorities.

Rather than specific written guidelines the employers preferred instead to rely on the discretion and experience of senior officers (who were invariably the only persons allowed to make rejection decisions on such grounds). When asked to state their policies, few could do so with any precision, and most said that matters had to be dealt with on a case-by-case basis.

4.2 Some indication of the types of offences considered relevant to various types of positions can be gained from a detailed study made by the Committee of those applicants refused positions by the Public Service Board during the 3 months period May-July 1976. Some of the details of the study are contained in the Committee's Report on Public Service Board Criminal Checks in Employment (Background Paper No. 27, November 1976).

These 3753 checks revealed 256 individuals with criminal records. 37 of these people, or 14%, were not employed because of the record. The Board, therefore, only rejects 1 person in 7 with a criminal record because of that record.

Of the 37 positions, 14 (39%) were nursing positions and 13 (92%) of these involved drug offences. 24 of the 36 applicants rejected, or 66%, had convictions for drug offences (5 of these also had other convictions.)

4.3 Details are given in Table 3 on the following page. The number of people who are refused employment because of their criminal records has not been determined by the Committee. From the Committee's study of the Public Service Board and discussions with other employers the Committee estimates that, with both the Board and other employers, no more than one applicant in seven who has a criminal record would be rejected because of that record. (At present, the Committee is investigating this question to establish a statistical base for the practice of all relevant public sector employers.) In 1976 over 40,000 names were checked in Police records for the 13 employers who have checks done, revealing 3,000 applicants with criminal records. This does not take into account where rejections are solely because of convictions disclosed as a result of questions on application forms. The 1976 figures are noted in Table 1 (page 2).

4.4 It would seem reasonable to conclude that some hundreds of applicants for employment are rejected each year for employment because of their criminal records, in the whole of the N.S.W. public sector.

5.1 Criminal Records During Employment

Once a person is employed by a public body there are few effective means used by which the employer can discover whether he is charged or convicted while an employee (unless, of course, the offence occurs in connection with his employment). In some cases there is a statutory requirement on the employee to advise the employer if he is charged or convicted. Clerks of Petty Sessions are required to advise the Public Service Board or the Education Department of any person who is charged or convicted and is known to be a public servant or teacher, respectively. This is not done for other public employers. The notification of such charges and convictions is kept by the Board and the Department whereas criminal record information extracted on application for employment is destroyed.

No public employer has Police record checks done on current employees on any periodic basis, or on promotion or transfer to another area of the public service (see para 3.1 above). There are, of course, informal means by which public employers become aware of convictions; press reports; disclosures by other employees or anonymous informants; or by the person's inability to otherwise explain his absence from work to attend Court.

The Committee has not made any real assessment of the extent to which such current convictions affect public employment, the policies applied by public employers or the number of dismissals and other forms of disciplinary action involved each year. However, from discussions with employers and unions and from the lack of complaints received by the Committee, the Committee believes that relatively small numbers of people must be affected.

5.2 An employee of a public body who is dismissed or has disciplinary action taken against him because of a conviction can usually, but not in all cases, appeal to the Crown Employees' Appeals Tribunal. An employment applicant who is rejected because of his conviction has no right of appeal at all. Neither could he complain to the Ombudsman on a matter relating to employment. (The Ombudsman Act, 1974, excludes the Ombudsman from considering matters related to employment.)

TABLE 2: Rejection of Employment Applicants by the Public Service Board because of Criminal Records (May-July 1976)

In this period 3,753 names were checked for the Board. This represents less than 3,753 individuals, as married women are checked under both married and maiden names. 256 individuals were found to have criminal records. 37(14%) were not employed as a result. Of these 37 people, 31 had applied for positions where the Board had delegated authority to employ to the Department or Authority, subject to a satisfactory criminal check. The remaining 6 had applied for positions where the Board has not delegated the authority to employ, 4 being positions with the Board itself.

These 37 cases are analysed below in terms of the position applied for and the offences concerned, using the Bureau of Crime Statistics and Research offence classifications (See Various types of property offences have been grouped.

Delegated employment

Position	Number	Offence
Nursing	14	13 Drug Offences (3 also had property offences of various types) 1 Sexual offence
Cleaners	3	1 Drug offence 1 Property offence of various types 1 offences against person
General Assistants	5	3 Drug offences 2 Property offences
Others	9	(see below)

- mechanical fitter (hospital): drug offences
- librarian: drug offences; unlawful possession of property
- alcoholism councillor: drink drive offences; driving offences; larceny; and many other offences
- teacher (tertiary): sexual offences; fraud; break enter and steal
- basement attendant: drug offences
- packer: break enter and steal
- gardener: fraud
- cook: sexual offences; fraud, larceny
- cook: drug offences; larceny

Non-delegated employment

Position	Number	Offence
Clerk (PSB)	1	Drug offence
Clerical Assistant (PSB)	1	Drug offence
" " "	1	Sexual Offences
" " "	1	Many property offences, drink drive offences
Housing Officer	1	Sexual offences
Monitor	1	Drug offences
TOTAL	37	

CHAPTER 3: THE USE OF CRIMINAL RECORDS IN OCCUPATIONAL LICENSING AND REGISTRATION, AND OTHER PUBLIC SECTOR USES

1.1 Most occupations in the private sector (whether as employee, employer or sole trader or practitioner) are unaffected by any statutory disabilities concerning convictions. Any defacto disabilities (i.e. discrimination) is neither sanctioned nor prohibited by law. However, there are an increasing number of private sector occupations which are coming under some degree of statutory control through licensing and registration legislation. This legislation often (in fact, usually) contains some provisions for possible exclusion of persons with criminal records from the occupation, whether by specific provisions concerning convictions, or by a general "character test" requirement (See Appendix 1 , page 84 paras A(4) to (9) and B(3) to (7) for a partial list.) The enforcement of these statutory disabilities is usually entrusted to a public body, usually either the Police Superintendent of Licensing, or a licensing or registration authority created by the statute imposing the disability, or (in a few cases) a Court.

1.2 No private employers are authorised by the Police Commissioner to have their employment applicants checked for criminal records (1). However, a criminal check is part of the licensing procedure in N.S.W. for the following occupations, among others: motor dealers, builders, auctioneers, real estate agents, travel agents, publicans, dealers in securities, taxi drivers, tow truck operators, debt collectors, money-lenders, private enquiry agents, and anyone required to carry firearms. (See Table 1, paras 13 to 24, pages 2 and 3.)

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(1) The N.S.W. Police Department does not conduct any pre-employment checks for private employers. The Committee has no evidence that any Police Officers have carried out such checks without authority.

However, no security system could totally rule out the possibility of this occurring. This is not to say that criminal records can have no effect on private sector employment. Some private employers ask for disclosure of criminal records during employment applications. Many people with convictions will admit them. Even if he denies any conviction, a person who has been in prison will find it difficult to fabricate a convincing employment history. The Security Sections of many large employers, often staffed by ex-policemen, have knowledge and contacts which enable them to identify people with criminal records. The Committee is aware of one publication which lists some people convicted in New Zealand convicted of dishonesty and which is presumably used by some employers.

The Committee is unable at this stage to assess the effect that these informal means of obtaining conviction information have on employment prospects in the private sector, but has no evidence that it is a major problem. Private sector uses of criminal records will be discussed in a later report by the Committee.

Occupational licensing can be seen then, as the method by which the N.S.W. Government has in the past recognised the need for criminal record checks in some areas of the private sector.

1.3 As well as licensing requirements, many employers obtain the appointment of their employees who work as caretakers, night watchmen, security guards, or in a similar capacity, as special constables. This appointment involves a criminal record check (See Table 1, page 2.)

There seems to be a fairly sharp distinction drawn between occupations which require licensing and those which require "professional registration" with an official registration body. No check of Police records is done on applicants for registration or admission as nurses, doctors, optometrists, dentists, solicitors or accountants. (If a registered person applies for employment in the public sector a check is, of course, likely to be done.)

Neither are checks done on all directors of companies applying for incorporation or all persons applying for registration of a business name.

The words "licence" and "licensing" are used throughout to refer to both licensing and registration procedures except where a distinction is clear from the context.

2.1 Questions on Application Forms

In many cases where Police record checks are not done, the licensing body has to rely on the applicant's answers to questions on the application form: this is so in most cases of professional registration, incorporation of companies and registration of business names, and in those occupational licences where criminal records can be considered but no Police record check is done (e.g. weigh-bridge operators, milk vendors (2)). We have seen no evidence that this causes a problem.

3.1 Police Checking of Criminal Record Information

Most licensing checks of Police records are carried out by the Police Department's Superintendent of Licensing. In some cases the Police are empowered to refuse to issue a license in the first instance. In other cases there is a licensing authority separate from the Police, and the Police simply provide this licensing authority with details of a person's criminal record and, in some cases, an objection to the grant of a licence. In some cases the licensing authority does its own criminal record checks directly.

3.2 "Police Reports"

Where the Superintendent of Licences is asked to report on a licence applicant his report is quite different from the resume provided by the C.R.O. to public employers. The usual procedure is:

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(2) The Committee does not know how many other licensing authorities may ask applicants questions concerning criminal records, and there is no convenient way to ascertain this.

(a) The application form is sent to the C.R.O., where a photocopy of the Court appearances section of the C.R.O. card is annexed to it (therefore including dismissed charges, etc.)

(b) The application and photocopy of the record are sent to the Licensing Officer stationed nearest to the applicant's address. He interviews the applicant and referees named by the applicant and prepares a report which may include:

(i) the applicant's confirmation that any alleged record disclosed by the C.R.O. check does refer to him and is accurate, and any explanation or extenuating circumstances he may offer;

(ii) whether the applicant is known favourably or adversely to the local Police (e.g. his associates; whether he is suspected of involvement in criminal activities);

(iii) comments by the referees as to the applicant's honesty, character, etc;

(iv) the Officer's opinion as to whether the applicant is a suitable person to hold the licence (some cases only);

The report is therefore a combination of fact and opinion, and may refer to matters other than the applicant's criminal record. (Such reports are referred to hereafter as "Police Reports".)

(c) If the Officer's report or the C.R.O. check contains adverse information they are returned to the Superintendent of Licensing for him to decide whether an objection should be lodged to the granting of the licence.

3.3 In some cases Police Officers prepare such reports directly for a licensing authority and forward them direct to the licensing body, or via the Superintendent of Licensing.

3.4 Some licences do not involve any such Police reports but only a C.R.O. "name check" (as described in Chapter 2, para 3.3). In some cases a C.R.O. check is not done on all applicants but only those who disclose a record on the application form, or who the licensing authority suspects may have a record. This is so in some areas of motor vehicle drivers licensing and the incorporation of companies and registration of business names.

3.5 Most licensing legislation where the licensing authority is not the Superintendent of Licensing provides for an applicant to be informed of the grounds for any objection which has been made to the issuing of a licence/registration and, in some cases, for an interview before rejection. This will usually mean that an applicant has an opportunity to confirm or deny any alleged criminal record, and to give any explanations or extenuating circumstances, either to a Licensing Officer, or to the licensing authority. However, there is usually no provision for the applicant to read the Police report concerning him, and this is usually not allowed.

3.6 Appeals

Licensing registration legislation invariably allows a right of appeal to a person refused a licence of registration, usually to a Court of Petty Sessions or to the District Court.

3.7 Checks on Licence Holders

Once a person has obtained a licence or been registered, procedures for further checks on any convictions they may incur while holding the licence/registration vary considerably. Some professional registration authorities are informed by Clerks of Petty Sessions of any registered persons known to have been convicted, but this is rare with licences (See Table 2, page 4.)

Where a licence administered by the Superintendent of Licensing has to be renewed annually a further C.R.O. check will usually be done, so there is effective annual checking in these cases. Other licences do not usually involve an annual check. Apart from these limited formal procedures, licensing bodies have to rely on informal means of discovering when licensees/registered persons are convicted, e.g. press reports; disclosures by anonymous informants, public complainants or Police Officers involved in the prosecutions.

The legislation almost invariably provides for a person to be informed of the grounds for any revocation of his licence and an opportunity for him to "show cause" why this should not occur. In most cases, only a Court can revoke a licence or registration.

3.8 Policies Applied to Licence Decisions

The effect of a particular type of conviction on the granting of a licence is rarely set out with any precision in the legislation, particularly where (as in most cases) a general "character test" disability exists (see Appendix I, paras A(4) to (9), page 84-86.) The licensing body is given considerable discretion as to what type of conviction will lead to refusal or revocation of a licence. As with public employers (see Chapter 2, para 4.1) few licensing authorities were able to state precisely the policies they applied, and usually said that matters had to be dealt with on a case-by-case basis.

The Committee has no estimates of the number of licences refused or revoked because of a person's convictions. As an objection to the granting of a licence may be made on a number of grounds, reliable figures would be difficult to obtain here.

3.9 Differences Between Licensing and Employment

The use of criminal records in occupational licensing/registration therefore differs from the use of these records in public employment in a number of ways:

(a) Licensing uses are usually for the enforcement of a statutory disability, whereas employment uses are not.

(b) Licensing is restricted to particular occupational categories where the public interest is thought to be at some risk, and is rarely extended to every person working in a particular industry or business. In contrast, some public sector bodies do criminal record checks on all employees, irrespective of their function or the degree to which they are capable of putting the public interest at risk.

(c) Licensing uses do not usually involve discriminating between applicants for competitive positions, whereas employment uses may do.

(d) Licensing procedures almost invariably involve a person being made aware that an alleged criminal record has affected his application, whereas some employment uses do not.

(e) Licensing legislation almost always involves a right of appeal to a Court, whereas employment uses do not.

4. Other Public Sector Uses

Few useful generalisations can be made about the use of criminal record information by public sector bodies in the supervision of the exercise of civil rights, liberties and offices (concerning voting, public office, jury service, Justices of the Peace and other matters) or the granting of various administrative benefits and approvals (concerning adoptions, charity trustees, criminal injuries compensation and other matters). Most concern the enforcement of a statutory disability which is likely to directly refer to convictions rather than some "character test" (see Appendix 1 , paras A(10) and B(8) to (11), page 85-85). These disabilities are enforced by various combinations of procedures previously described: Name checks of Police records - Chapter 2, para 3.2. ; Police reports (See Chapter 3, para 3.2, page 19,; and questions on application forms (see Appendix 2, paras 11 and 12, page 87. Rights of appeal are often provided.

CHAPTERS 4-8:

PART C.
SOURCES OF DISCLOSURE OF RELEVANT POLICIES.

This Part of the Report commences with a discussion of the types of criminal information provided on record for the use of public sector bodies. The Committee then considers the mechanisms available to Public Sector Users to extract this information. These include:

(a)	Questions Asked on Application	(chapt. 5)
(b)	Checking Police Records	(chapt. 6)
(c)	Reports on Benefit Holders	(chapt. 7)
(d)	Disclosure by Benefit Holders	(chapt. 8)

The present practices are examined and suggested policies are discussed.

CHAPTER 4:

WHAT CRIMINAL RECORD INFORMATION IS RELEVANT TO DECISIONS MADE BY PUBLIC SECTOR BODIES?

1. Introduction

Subsequent chapters of this report deal with what administrative procedures should be implemented to ensure that criminal records are used fairly. This chapter deals with the prior question of what information coming under the general description "criminal record" is relevant to employment, licensing and other decisions made by public bodies and should be used by them.

1.1 Records of the following types of occurrences, at least, need to be considered:

(a) arrests;

(b) pending charges and informations;

(c) charges where the defendant fails to appear and a recognizance is forfeited (but no warrant is issued);

(d) dismissed charges and other matters disposed of with no conviction (e.g. convictions successfully appealed against; charges withdrawn; committals where no bill is filed);

(e) offences dealt with under S 556A of the Crimes Act, so that the offence is found proven but no conviction is recorded;

(f) "Ninth Schedule" offences (i.e. indictable offences admitted and taken into account in sentencing for another indictable offence, under S 447B of the Crimes Act);

(g) convictions against which an appeal is pending;

(h) offences falling under S 579 of the Crimes Act after 15 years (so that they shall be "disregarded for all purposes whatsoever"); and

(i) juvenile offences.

In (a) to (e), and in (g),no conviction exists or yet exists. In (e), (i) and (j) measures designed to alleviate the consequences of certain types of offence have been enacted.

Each of these types of "criminal record" is considered below.

1.2 Once we decide which of these types of occurrences should properly be included in a person's "criminal record" for use in employment, licensing, etc. a further question arises:

should all offences in a person's criminal record be available for consideration, or only those of a particular degree of seriousness, or only those of a type particularly relevant to the particular employment, licence, etc. So the question of categorising offences by the type of offence or by the type of sentence has to be considered. This is not discussed in this chapter but is mentioned through subsequent chapters.

2. Prejudicial Information and Decisions

A basic approach taken by the Committee and repeated throughout this report is that where a decision-maker should not be influenced by a particular type of information it is preferable that he not be made aware that that information exists at all.

There are two reasons for this:

(i) To give a person information and then tell him to ignore it in reaching a decision is unrealistic. It is very difficult to ignore information, particularly when it is of the type as to infer that a person may have committed a criminal offence. It can even cause a decision-maker who is very conscious that he should not take such information into account to over-react and to treat the subject of such information more favourably than he otherwise would. The net result is that neither the decision-maker nor anyone else can have any confidence that the decision was unaffected by the information; and

(ii) If sensitive data about a person (such as criminal record information) is not relevant to a decision, it is an invasion of that person's privacy to disclose it to (or require it to be disclosed to) the decision-maker.

This chapter is therefore concerned with what information should be made available to decision-makers, as well as what information it is relevant for them to consider.

3. ARRESTS

Details of arrests per se (as distinct from charges resulting from arrests) do not appear to be used at all for any non-Police purposes. Questions on application forms do not require their disclosure, they are not disclosed on C.R.O. name-checks (although recorded on C.R.O. cards for internal Police purposes) (Chapter 2, para 3.3) They may sometimes be referred to in Police reports (Chapter 3, para 3.4) although the Committee is unaware of this occurring.

The Committee considers that details of arrests, which may not even result in a person being charged before a Court, should not be used for any purposes other than internal Police purposes. Disclosure is common in the U.S.A. but not in N.S.W.

4. PENDING CHARGES AND PENDING APPEALS

4.1 Details of charges currently pending against a person are often asked for in application forms. They are disclosed in C.R.O. name checks and in Police reports. They are sometimes required to be disclosed to employers, or reported by Clerks of Petty Sessions to employers and licensing or registration bodies.

4.2 The Committee considers that there are instances where users of criminal records should be made aware of pending charges, if the public interest is to be adequately protected. If the protection of the public interest requires the exclusion of people with certain convictions from certain types of employment, licences, positions, etc. then this protection will obviously be endangered if employers, licensing bodies, etc. are unaware that a person whom they are about to employ, license, etc. may soon be convicted of such an offence. The danger is even greater with current employees, licensees, etc. who are already in

a position to harm this interest. In such cases, for the employer, licensing body, etc. to be informed only upon conviction (even if there were effective methods for this to be done) could result in protective steps being taken too late.

Against this view is the argument that if a person is prejudiced in any way in his employment for his attainment or enjoyment of any other benefit because of a pending charge then the presumption of innocence until proven guilt has been diminished to that extent. While this is true, it also has to be recognised that the majority of persons charged with offences in New South Wales are convicted (1), so there is in this sense a statistical basis for regarding pending charges as relevant to employment licensing, etc. decisions, although such statistics are meaningless where applied to an individual who has been charged.

4.3 The Committee considers that these interests should be balanced by the following means:

(i) wherever a particular interest can be adequately protected by disclosure of convictions only, the disclosure of pending charges should not be required as a matter of routine,

(ii) if it is possible for an independent body, other than the employer, licensing body or other such decision makers, to determine whether, on a case-by-case basis, a particular pending charge should be disclosed, such a filter should be applied,

(iii) if possible, decisions of whether to grant or revoke benefits, should be deferred until the charge is determined or other action taken to reinstate a person prejudiced because of the pending charge, to his previous situation.

The general principle should be that pending charges should not be disclosed. However, if at the time of the person's initial appearance before a magistrate the prosecution feels that such disclosure is necessary to protect the public interest, he may make application for an order that the pending charge be disclosed. The magistrate may also make such an order of his own volition.

Where a party has a charge pending and he makes application for a benefit (e.g. employment, licence, registration, etc.) or such a charge arises in the intervening period between his application for a benefit and its resolution, he should also be able to apply to the magistrate (originally hearing the charge) to grant an order for "non disclosure" for that particular purpose. If this proposal is adopted then an appropriate note would have to be made to questions on application forms advising it is not necessary to disclose in these instances (see Chapter 5, para 2,)

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(1) For example, only 18.1% of persons appearing before N.S.W. Petty Sessions Courts in 1975 were found not guilty or had the charge withdrawn or dismissed. A further 6.5% forfeited recognizances. In the remaining 77.4% of cases the offence was found proven. (N.S.W. Bureau of Crime Statistics and Research Statistical Report 7, Series 2, Court Statistics 1975, p 22). See Table 4 for full details.

4.4 Pending appeals can be dealt with more easily. Where a person has been convicted but has appealed, then a conviction exists unless and until it is reversed on appeal. The Committee sees little reason for bodies using criminal records not to be informed of such convictions, provided they are also informed that the conviction is subject to an appeal. If the appeal succeeds the record should then be treated the same as a dismissed charge (see 5 below).

5. DISMISSED CHARGES AND SIMILAR MATTERS

5.1 The Committee considers that charges and informations which have been dismissed (whether on acquittal or because no evidence was offered) or withdrawn and not proceeded with, should, as a general rule, not be made available or considered in employment, licensing or similar decisions.

This also applies to committals where the Attorney General has decided not to file a bill, and to convictions which have been successfully appealed against.

To treat dismissed charges and similar matters as relevant to employment, licensing, etc. decisions is, in effect, to disregard the presumption that a person is innocent until proven guilty by the standards of a criminal trial. In some cases it may involve disregarding a judicial finding of "not guilty".

The reasons stated in para 2 above as to why information which should not be considered should not be made available at all to a decision-maker because of its likely prejudicial effect are of particular force in the case of dismissed charges and similar matters. It is very easy for a decision-maker to suspect or wonder if a charge was only dismissed because of a legal technicality or lack of evidence and to act prejudicially as a result.

5.2 The Committee has found that relatively few bodies consider dismissed charges and similar matters: some ask questions concerning them in application forms; C.R.O. resumes do not include them, but they are available to the small number of bodies having access to photocopies of C.R.O. cards (e.g. concerning T.A.B. employment (2), Police recruitment, and adoption applicants: some Police reports on licence applicants refer to them. The Scouting Association also has access to the C.R.O. card details.

Should there be an absolute rule that dismissed charges and similar matters should never be available for consideration? There are clearly some cases where a person is not convicted solely because of a legal technicality, or because of lack of evidence. It can also be argued that the rigorous standards of proof suitable for a criminal prosecution where a person's liberty is at stake are not suitable for a licensing or similar decision where the applicant's liberty is not at stake but only his entitlement to a benefit, and the protection of other interests must also be considered. (See Chapter 2, para 3.3.)

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(2) In the case of the TAB, a personnel officer peruses a photocopy of the court appearances side of the C.R.O. card at the C.R.O. In some instances a police officer will read from the C.R.O. card, in the presence of the officer from the TAB.

The Committee's view is there are exceptional situations which mean that an absolute rule cannot be adopted. It proposes the following guidelines to where exceptions should be made:

(i) Dismissed charges and unsuccessful appeals should never be simply asked for on application forms or made available as part of a routine C.R.O. check. If the interest to be protected is sufficiently important to call for disclosure of such matters then a full Police report giving full details of the circumstances surrounding the charge or appeal should be obtained.

(ii) Such reports should never be available unless there is an opportunity for judicial review of any decisions made. Only a subsequent Court should be entitled to make a final decision as to whether the decision of a lower court to dismiss a charge or upheld an appeal is not in fact a finding that there was no substance to the charge or conviction. No such right of judicial review currently exists in areas such as police recruitment, employment by the T.A.B. and appointment of scout masters. How such a right should be created is discussed in a later reference to appeal proceedures (Chapter 11, page 70)

6. OFFENCES DEALT WITH UNDER S556A OF THE CRIMES ACT

6.1 Section 556A of the Crimes Act 1900 provides that:

CONDITIONAL RELEASE OF OFFENDERS

Power to permit release of offenders. cf. 7 Edw. VII, c. 17, s. 1. New section added, Act No. 2, 1929, s. 18. Amended, Act No. 50, 1974, s. 12 (a) (ii), (iii).

556A. (1) Where any person is charged before any court with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, or to any other matter which the court thinks it proper to consider, it is inexpedient to inflict any punishment, or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either—

(a) dismissing the charge; or

(b) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.

New subsection added, ibid. s. 12 (a) (iii).

(1A) A recognizance mentioned in subsection (1) shall be conditioned upon and subject to such terms and conditions as the court shall order.

Therefore, a court applies s556A when it "thinks that the charge is proved", but makes an order "without proceeding to conviction".

6.2 The precise purpose which s556A was intended to fill is not clear from the Parliamentary debates or from its history. Nor is its legal effect entirely clear. However, from the words "without proceeding to conviction" and the reasons indicated in the section as to when it is proper for a Court to utilise it, it would seem clear that, in some way, s556A is intended as a means of alleviating some of the adverse consequences which may result from a conviction. Otherwise, what would be the point of the section?

Whatever their purpose in doing so, solicitors, their clients, and the Courts of New South Wales seem intent on applying s556A. Magistrates Courts in New South Wales apply s556A instead of proceeding to conviction in approximately 10% of all cases where an offence is proved. (3)

The Committee's experience in investigating complaints has indicated that many people assume that "a 556A" involves far less serious consequences than a conviction. Solicitors go to considerable pains to obtain "556As" for their clients. Magistrates, when making an order under s556A occasionally comment that they are doing so in order that the defendant will not be prejudiced in public sector employment, etc. or that, provided the defendant observes the conditions of a s556A recognizance he will "hear no more of the matter in future". It is certainly true that many people who have been dealt with under s556A gain the impression that they have been given a "clean slate" and that a "556A" cannot be "used against them" in future. Legislation has recently made s556A available to the higher criminal courts. (See Crimes and Other Acts (Amendment) Act 1974, s12.)

6.3 To what extent does a "556A" have less adverse consequences than a conviction?

(a) Where statutory disabilities are limited specifically to "convictions", a "556A" would not be sufficient for the disability to be imposed (See Appendix 1, part B). But where a disability is in the form of a "character test" provision (see Appendix 1, Part A), or where the disability is without a statutory basis, no such protection may exist.

(b) Some application forms only ask for "convictions" but many ask whether a person has been "charged" or had offences "proved against them" so as to require disclosure of "556As". The Committee is aware of cases where persons who answered "No" to such questions have been prosecuted for providing false information by failing to disclose a "556A".

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(3) In 1974 Magistrates Courts used s556A in 6.9% of cases before them whereas they convicted in 66% of cases. In 1975 s556A was used in 6.7% of cases and convictions in 68.7%. (N.S.W. Bureau of Crime Statistics and Research Court Statistics 1974, Table 2.6, p. 10, and Court Statistics 1975, Table 2.7, p. 22. The full figures are given in Table 4. Although s 556A has been available to the higher criminal courts since 1974, their statistics do not yet distinguish between s556A recognizances and other recognizances (see Court Statistics 1975, Table 8.1, p. 63).

(c) Police record checks and Police reports may not disclose "556As" in the same manner as convictions (see Appendix 1, Part B). Reports by Clerks of Petty Sessions do so disclose (see Table 2, page 4).

(d) The policy of the various departments and authorities using criminal records to "556As" is difficult to determine. In answer to the Committee's questionnaires on criminal record use none indicated a clear policy of disregarding "556As". From investigation of complaints and discussions with Departments, the Committee's conclusion is that most users of criminal records make no distinction at all between convictions and "556As", and some decision-makers do not even seem to be aware that such a distinction exists. It appears to the Committee that public employment is the area where "556As" most frequently lead to disabilities.

(e) "556As" are also made available to subsequent Courts for sentencing purposes. (This will be discussed in another report in this series.)

6.4 The Committee's view is that this confused situation should not be allowed to continue, and that the possible adverse consequences of a "556A" should be clearly limited and defined so that the difference between a conviction and a "556A" is clear and meaningful.

The Committee considers that Courts should have available some sentencing technique which enables them to limit the adverse consequences normally flowing from a conviction.

Such techniques, and support for them, is common in overseas legislation and literature (see Appendix 4A). Some members of the Committee do not consider that s556A is a satisfactory technique, as it virtually amounts to a "statutory deceit" of declaring that a conviction is not really a conviction (4). However, the Committee agrees that, in the absence of a satisfactory replacement for s556A, it is desirable that its practical effect be clear.

6.5 The Committee has considered the question that a s556A dismissal, and a s556A recognizance which has expired without the person being called up and convicted, should in general have no

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(4) They share the view of Darling J. that:

"The words are unscientific, thoroughly illogical, and are merely a concession to the modern passion for calling things what they are not; for finding people guilty and at the same time trying to declare them not guilty." Oaten v Auty (1919) 2K.B. 278 at p. 282, with reference to the United Kingdom predecessor to s556A.

To put it another way:

Cecily Cardew: "This is no time for wearing the shallow mask of manners. When I see a spade I call it a spade."

Gwendolen Fairfax: "I am glad to say that I have never seen a spade. It is obvious that our social spheres have been widely different."

(Oscar Wilde, The Importance of Being Earnest, Act II)

future adverse effect on the person. A s556A recognizance which has not yet expired should be able to have the same effect as a conviction until it has expired.

This policy should be implemented in the following way:

(i) application forms should not require disclosure of s556A dismissals or expired s556A recognizances;

(ii) Police record checks and Police reports should not include them;

(iii) Clerks of Petty Sessions should not report s556A dismissals;

(iv) benefit-holders should not be required to disclose s556A dismissals.

Magistrates and the Judiciary should be advised of the record keeping and use consequences of a "556A". Similarly, people who have been dealt with under s556A should be given a standard form by the Court explaining these consequences.

A subsequent report in this series will discuss the recording of s556A findings in Police records and the arguments for expungement from such records.

6.6 The Committee is not proposing an absolute rule against the use of s556A dismissals and expired s556A recognizances. It would seem illogical to do so when no such absolute rule has been proposed in the case of dismissed charges and similar matters (see para 5.2 above). In most cases where criminal records are used the Court's decision to give a s556A dismissal or a s556A recognizance which has now expired, should be taken as sufficient indication that the offence was not indicative of the person's character and therefore regarded as irrelevant. There may, however, be some extremely important public interests which should not be exposed to any avoidable risk, such that the disclosure of such "556As" should be allowed. Police recruitment might be one example, adoption applications another. In these cases the Committee proposes the same safeguards as with dismissed charges and similar matters:

(i) They should never simply be asked for on application forms or made available in a routine C.R.O. check, but only in a full Police report on the circumstances; and

(ii) There should always be an opportunity for review of any adverse decision.

(The Police practice is not to disclose s556A dismissals or s556A expired recognizances in response to general checking.)

7. OFFENCES FALLING UNDER S579 OF THE CRIMES ACT AFTER 15 YEARS

7.1 Section 579 basically provides that whenever a person is put on a recognizance (under s554 substituted sentence, s558 deferred sentence, or s556A) then, if 15 years have elapsed and he has not breached the recognizance or been convicted (or given a "556A") for any indictable offence or offence punishable by imprisonment, the conviction or finding shall be "disregarded for all purposes whatsoever" and "be inadmissible in any criminal, civil or other legal proceedings as being no longer of any legal force or effect" (including "any

application for a licence, registration, authority, permit or the like under any statute"). He is given a right to answer any questions in such proceedings concerning his criminal record as if such a conviction or "556A" had never taken place. There is an exception to this protection where a person makes an assertion denying the existence of such a conviction or "556A", other than in answer to such a question (s579(2)).

Although the provisions of s579 are mainly concerned with "legal proceedings" it should be noted that the sections provides that an offence falling under it shall "be disregarded for all purposes whatsoever". How a person would go about enforcing s579 in areas such as employment(both public and private sector) and other areas where disabilities arising from convictions do not have a statutory basis is not provided for in s579.

7.2 It should also be noted that, despite the generous wording of s579, its scope is limited. At most,only about 20% of people appearing before Courts in N.S.W. are given recognizances (5). S579 has no effect on offences dealt with by s556A dismissals, by a fine only (over 45% of all offences - see Table 4) or a sentence to "the rising of the Court" (about 1% of all offences, see Table 4). As offences which attract these penalities would very often be less serious than those attracting a recognizance, it cannot be said that s579 gives any uniform relief to minor offenders. Furthermore, the protection only arises after 15 years, and during that 15 year period it can be forfeited if the person is convicted of any other indictable offence or offence punishable by imprisonment (i.e. actual imprisonment is unnecessary).

It would be possible to extend the scope of s579 by making it apply to types of sentences other than recognizances, by reducing the 15 year period, or by limiting the subsequent offences which can defeat its protection. To do this would be to make s579 very similar to a sentence-based rehabilitation of offenders scheme such as the U.K. Rehabilitation of Offenders Act, 1974. At this stage the Committee does not intend to make such proposals, but will consider the matter further in a later report in this series on the general subject of rehabilitation of offenders. (It should be noted, however, that the question of protection for s556A dismissals has been considered in 6 above.) In this report the Committee is only concerned with whether current practices in the use of criminal records are consistent with the intend of the existing s579.

7.3 The Committee's research indicates that public bodies using criminal records would rarely prejudice a person because of an isolated 15 year old offence which only resulted in a recognizance. However, this is largely because of a common-sense approach to the relevance of such an offence, rather

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(5) The figure of 20% given recognizances is obtained by combining the Petty Sessions figures for "s556A recog./ dismissal" and "recog. w/w.o. probation, fine" figures together with the Higher Criminal Court figures for "recog. (and/or probation and/or fine). (See Table 4.) These figures give a slight over-estimate, as s556A dismissals are also included.

than any application of s579. In answers to the Committee's questionnaires, only the Police Department's Superintendent of Licensing indicated a specific policy of observing s579. The possibility of a person being prejudiced because of an offence despite it falling under s579 arises from the questions on application forms asking "have you ever been convicted" (See Appendix 2).

The Committee's view is that, given that s579 says that offences falling under s579 are to "be disregarded for all purposes whatsoever", questions on application forms should not require their disclosure (See Chapter 5). The C.R.O. does not disclose details of recognizances which are outside the 15 year period stipulated under s579 and where there has been no intervening offence. This is the policy whether the individual makes application to the Commissioner or not; the non disclosure is automatic.

8. "NINTH SCHEDULE" OFFENCES

Where a Court takes into account other admitted indictable offences when sentencing a person for an offence on indictment, in accordance with s447B of the Crimes Act, there is an admission of guilt by the offender (ss(1)), but there is not a conviction "for any purpose". Although such matters are not convictions, the Committee considers that, as there is an admission of guilt for an indictable offence, there is no reason why such matters should not be disclosed by Police or required to be disclosed by applicants as if they were convictions.

9. FORFEITED RECOGNIZANCES

Where a defendant fails to appear on a charge and consequently forfeits a recognizance, but no warrant for his arrest is subsequently issued, a curious situation develops. There is no conviction or finding of guilt, and neither has the matter been dismissed or a decision been made not to proceed because of lack of evidence. The Committee has been informed that it is not uncommon for Police not to request a warrant in minor matters where the amount of the recognizance forfeited is similar to the fine which the Court would probably impose if the person appeared and was convicted. In 1965, 6.5% of all cases before N.S.W. Courts of Petty Sessions resulted only in a forfeited recognizance (6).

It is the policy of the C.R.O. that if a notation of "Not before the Court - Recognizance forfeited" appears on record, it is treated as no conviction and is therefore not disclosed to users who receive resumes of criminal record information. This may not be the case however if a bench warrant has been issued as a result of the forfeiture.

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(6) See Table 4. This 6.5% apparently includes cases where warrants have been issued but the case has not been relisted for hearing at the time the statistics were compiled, as well as cases where no warrant was issued.

10. JUVENILE OFFENCES

Following the Child Welfare Legislation Review Committee Report of 1975 a new Child Welfare Act is currently being prepared by the Department of Youth and Community Services. This new Act may substantially affect the nature and recording of juvenile records in N.S.W. Because of this and because the Committee has not yet fully studied the six different record systems in the state which store details of juvenile offences (7), it does not intend to comment on the use of such information at this time. A later report will be primarily concerned with the problems of juvenile criminal records and will discuss the problems associated with their use.

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(7) The six main existing record systems recording offences by juveniles are:

(i) Each of the three main specialist Children's Courts (i.e. Albion St., Ashfield and Minda) maintain an index of juveniles appearing before it.

(ii) The Department of Youth and Community Services (YCS) Juvenile Court Index records all Court actions in any Court against a juvenile.

(iii) The Police Criminal Records Office (CRO) records, in the same record system as for adults, all Court proceedings against juveniles which involved fingerprinting (usually any charge if over 14 years).

(iv) The Police Juvenile Records Section (located at C.R.O.) records juvenile Court appearances where no fingerprints were taken (usually only if under 14 years) and offences where the juvenile was dealt with by a caution(i.e. no Court action).

(v) The Juvenile Shoplifters Index (located at C.R.O.) records those juveniles given warnings by department store security officers rather than charged (analogous to a caution).

(vi) The Department of Motor Transport's Traffic Convictions Record includes traffic and vehicle-related offences by juveniles.

TABLE 4

N.S.W. COURT STATISTICS 1974-75: PENALTIES

(a) N.S.W. Petty Sessions Statistics (Combined table taken from N.S.W. Bureau of Crime Statistics and Research Court Statistics 1974 Table 2.6 and Court Statistics 1975 Table 2.6)

	1974		1975	
	No.	%	No.	%
Withdrawn/dismissed	7,541	17.3	6,051	14.2
Recognizance Forfeited	2,163	4.9	2,765	6.5
Not guilty	2,179	4.9	1,662	3.9
S 556A recognizance/dismissed	3,021	6.9	2,846	6.7
Rising of the Court	335	0.8	643	1.5
Recognizance w/wo probation, fine	4,178	9.6	4,990	11.7
Fine	21,338	48.8	20,671	48.6
Prison	2,975	6.8	2,932	6.9
	43,730	100.0	42,560	100.0

(b) N.S.W. Higher Criminal Courts Statistics (N.S.W. Bureau of Crime Statistics and Research Court Statistics 1975 Table 8.1)

	1974		1975	
	No.	%	No.	%
Acquitted	222	5.5	301	10.1
Rising of Court	18	0.5	8	0.3
Committed to Child Welfare Institution	2	0.1	8	0.3
Recognizance (and/or probation and/or fine)	2,111	52.6	1,100	37.0
Fine	9	0.2	11	0.4
Governor's Pleasure	1	0.0	8	0.3
Periodic Detention	66	1.7	50	1.7
Imprisonment	1,587	39.4	1,488	49.9
	4,016	100.0	2,974	100.0

CHAPTER 5

Questions About Criminal Records Asked on Application

1. Introduction — When a person applies for a license, public employment or for some other position or benefit granted by a public body, he is likely to be asked to answer on the application form whether he has a criminal record. The variety and extent of such questions has been outlined in Chapter 1 (paras. 4.5 and 4.6) and Appendix 2, page 87 constraints on their development discussed, and various problems noted.

The principles which the Committee considers should be followed in framing such questions so as to best protect privacy are set out below.
(Applicant" is used to refer to applicants for employment licences, positions, etc., and to any other person who may be required to disclose his criminal record to a public body for any purpose).

2. A standard question concerning criminal records is recommended

VIZ "(a) Have you in the last ten years, in N.S.W. or elsewhere served any part of a sentence of imprisonment or being convicted of any offence?

(b) Are you now on a bond or recognizance in N.S.W. or elsewhere?

(c) Is there any charge against you now pending, in N.S.W. or elsewhere?

If the answer to any of these questions is "Yes", please provide details as below"

Adoption of this recommendation would result in alterations of many questions currently asked, including those asked by employers (T.A.B., Public Transport Commission, N.S.W. Ambulance Board, Board of Fire Commissioners, in licensing applications (Auctioneers and Agents, Motor dealers, securities industries, Health Commission registrations, travel agents, and liquor licensing) and elsewhere (Justice of the Peace and adoption applications). For details of questions asked see Appendix 2, page 87. Also note para 2.5.

2.1 This question does not require disclosure of dismissed charges and successful appeals. Disclosure of such matters should rarely, if ever, be required.

2.2 The use of "conviction" means that disclosure of s556A dismissals and expired s556A recognizances and most juvenile offences will not be required.

2.3 The procedure recommended in the case of pending charges was discussed in Chapter 4, para 4.

2.4 There is no objection to such details of the conviction as date, court, offence and penalty being required.

2.5 Questions about criminal records should generally have some time limit. The Committee considers that 10 years will, in most cases where questions are asked, be a reasonable period, but that shorter or longer periods could be reasonable in particular situations. By including the word "imprisonment" the period from conviction is effectively extended for serious offences. This suggestion of 10 years an interim one only and the Committee will further consider the question when it evaluates reaction to this suggestion and looks at the question of "rehabilitation" in a later report.

The adoption of a 10 year limit means that disclosure of recognizance falling under s579 is not required. The Committee considers that disclosure of such recognizances, which are to be disregarded for all purposes whatsoever after 15 years, should not be required (See Chapter 4).

In some sensitive areas it may be reasonable to go back beyond the 10 years for persons who answer the question "yes". In those instances the question should clearly indicate that possibility. People with 10 years "clean" would be protected.

2.6 Where a question is asked because of a statutory disability which is restricted to certain classes of offences (e.g. offences involving fraud or dishonesty: see Appendix 1, para B4), the recommended question will be too broad, as it requires disclosure of "any offence" and it should be modified accordingly.

3. QUESTIONS SHOULD NOT FORCE DISCLOSURE OF CRIMINAL RECORDS TO THIRD PARTIES

Application forms which require completion by more than one person (e.g. by spouses, partners, co-directors; or by the applicant and his employer, sponsor or referee) should generally not include questions concerning criminal records as this forces the applicant to disclose his record to these other persons. If practical, separate "personal particulars" forms should beprovided for each person. Alternatively, the combined form should clearly state that a "no" answer may be entered on the form and the correct details forwarded separately if disclosure to third parties is not desired. (This option could also be made available where application forms are handled by numerous office staff for processing.)

There should be an exception to this general rule where the offences required to be disclosed are clearly relevant to the application and are such that the third party should be entitled to know about them as a condition of joining in or sponsoring the application. Questions about "any offence" will rarely satisfy this condition.

4. NO OBJECTION TO QUESTIONS ABOUT CRIMINAL RECORDS WHERE A POLICE RECORD CHECK IS ALSO DONE.

The Committee rejects the argument that, where the Police records of applicants are checked, to also ask the applicant to disclose his record is merely an "honesty test" and therefore objectionable. A Police record check may fail to disclose some convictions which the applicant might himself reveal, e.g. some overseas and inter-state convictions or convictions recorded under another name. Neither does the Committee think that simply because a Police record check is done, the application form should always ask for the applicant himself to disclose his record. However, the applicant should be aware that a Police record check will be done (see 5 below).

Whether or not a question concerning criminal records is asked should be left to the public body concerned, but whenever a record check is made, this should be clearly stated.

5. STATEMENT ABOUT POLICE RECORD CHECKS TO BE INCLUDED ON APPLICATION FORMS.

The Committee considers that, where Police record of applicants are checked, applicants should be made aware of this by a statement on the application form. There are two reasons for this:

(a) accesses to normally confidential information should be publicly known; and

(b) to discourage dishonest answers to questions (and thereby avoid prosecutions or refusals of benefits for providing false information).

5.1 Four different situations arise, depending first on whether a question about criminal records is asked and, second on whether a Police record check is made:

(i) Question is asked, and Police check is always done:
"The Department (etc.) will check Police Department records to verify this statement".
(to immediately follow question on form)

(ii) Question is asked, and Police record check is sometimes done:

"The Department (etc.) reserves the right to check Police Department records to verify this statement" (To immediately follow question on form)

(iii) No question asked, but Police check is done:

"If you are selected for the position, your appointment will be subject to a satisfactory check of Police Department records" (Employment)

"Granting of a license/registration/application etc.) is subject to a satisfactory check of Police Department records"

(wording as appropriate to the specific application)

The statement should be at the end of the questions on the form.

(iv) Question is asked, but no Police check is done: no statement required. (Although such questions may tend to affect honest applicants who fail to disclose their convictions more than dishonest applicants who fail to disclose, the Committee cannot object to such questions if they reflect a statutory disability).

6. Statement about the effect of a criminal record to be included on application forms. Whenever either/a question about criminal records is asked, or a Police record check made (i.e. all of situations (i) - (iv) above), the form should contain the following statement immediately after the statement in (i) to (iii) above (or, in (iv), immediately after the question):

"A criminal record is one factor taken into account in assessing a persons suitability for employment (to hold a license; for appointment etc.). It does not usually disqualify an applicant except where necessary for the protection of the public interest. If rejection of your application because of a criminal record is considered, you will be given an opportunity to fully discuss the matter before a decision is made."

The above statement should be the minimum explanation given to applicants. Various public bodies may wish to include a more precise statement of the policies on the form.

6.1 Some public bodies which have criminal record checks on applicants done, but do not ask any questions about criminal records on application forms argue that to include such a question. or to include the statements recommended in 5 and 6 above, is lekely to be counterproductive in that it may deter some people with minor records from applying for jobs, licenses or other benefits and the mistaken assumption that their convictions will be a bar. This argument has some force. A number of studies have noted that the fear of having to disclose their conviction, and consequent fears of rejection, deter people with convictions from making such applications and the Committee has also observed this in its investigations of complaints.

However it seems to the Committee that most such people are not deterred from applying because of what they read on application forms, but by rumours and beliefs which deter them from even considering applying. Many complaints to the Committee have repeated the erroneous belief that "you can't get a job in the public service if you have a criminal record". The statement recommended in 6 above is one step which can be taken against these false beliefs, but the only effective answer is for public bodies to be far more open about just what consequences conviction for a particular offence is likely to involve, and for there to be a means by which people with convictions can obtain confidential, accuracte advice on these consequences (such as the Privacy Committee has already provided to many such people.)

7. <u>What personal particulars should be asked for</u>?

For a check of Police records to be accurately conducted, various public bodies ask for the following identifying information: date of birth; address; any previous name (particularly in the case of married women, but also where names have been changed otherwise); height; weight; and fingerprints.

The Committee's views here are:

(i) Fingerprints are rarely required at present (exceptions are Police and Prison Officers employment), some licences and visa certificate applicants). Provided proper safeguards against inaccurate identification are observed they seem an unnecessary invasion of privacy in most instances. (Discussed further in Chapter 6.)

(ii) Date and place of birth, address, and any previous names should be asked for on application.

(iii) There is no reason to ask for height and weight on application as it is only necessary to obtain these (or more usefully, fingerprints) if, on discussion with the applicant he disputes the accuracy of the record obtained).

(iv) Where the main reason for asking for such particulars is the criminal record check, they should be asked for following the statement in 5 above, under the heading: "Personal particulars (required for Police record check)."

CHAPTER 6:

CHECKING APPLICANTS AGAINST POLICE RECORDS AND POLICE REPORTS

1. INTRODUCTION

The growth of the practice of checking applicants against Police records was discussed in Chapter 1 (paras 4.1 - 4.10). The standard procedures for "name checks" at the Police Department's Criminal Records Office and for the preparation of "Police Reports" was described in Chapter 2 (para 3.1), Chapter 3 (para 3.2) respectively). A list of checks currently done is given in Table 1, page 2.

This chapter looks at such checks from the point of view of the Criminal Records Office and considers what information C.R.O. should disclose. It also considers what should be included in Police reports.

2. THE EXTENT OF POLICE RECORD CHECKS SHOULD BE PUBLICLY KNOWN

A list of all organisations who have approval from the Police Commissioner to have Criminal Records Office checks done, the purposes for which the checks are done, and the annual volume, of such checks, should be publicly available information.

The Committee's view is that where records are used for purposes other than which they are collected, such uses should not be made in secret. This is particularly so when the information is regarded as very sensitive by its subjects as criminal records are) and when it is normally kept confidential by the record-keeper (as criminal records are kept by the Police). Public confidence in the ability of organisations to respect privacy requires that any non-routine uses of such information be conducted openly. Only if such non-routine uses are subject to public scrutiny can there by public confidence that the invasion of privacy which they involve is justifiable in the public interest.

The Committee considers that this public notification should take the following form:

(i) When the Commissioner approves a check of Criminal Records Office records for a new purpose, the organisation for whom the check is to be done, and the purpose, should be gazetted. This should apply both to direct "name checks" for the organisation and to checks for Police reports.

(ii) The Police Department's Annual Report should list all organisations with current approval for checks to be done, the purpose of the checks, and the number of checks done in that year.

3. ONLY APPLICANTS SHOULD GENERALLY BE CHECKED OR REPORTED ON, AND NOT THEIR SPOUSES OR ASSOCIATES

In general it can be argued that one person should not be prejudiced by another person's criminal record, as this is a matter over which they have no control.

It cannot be argued that a person who associates with a person with a criminal record should be prejudiced simply because of this because, first, this assumes that they know of the record and, second, this denies the convicted person the opportunity of rehabilitation.

However, there must be some exceptions to this general rule. The most obvious is the case of joint applicants, whether they be directors of a company or a partnership applying for a licence, or spouses jointly applying to be adoptive parents.

The main problem which public bodies face here, is where the application (or applicants) are really only a "front" for those who will effectively control a business which is being licensed. They will often be employees of the business. In some cases application forms require disclosure of the identities of employees, or of those with a beneficial interest in the business, and name checks are done on these people. Such disclosure requirements can, however, be easily avoided. More often, however, the licensing authority relies on the Officer preparing a Police report to become aware if such a situation exists when preparing his report, and to then obtain details from Criminal Records Office. This problem is likely to arise in areas such as liquor or motor dealer licensing but is also possible in such areas as charities and even the appointment of agents by the T.A.B. where it is expected that the agent's spouse will assist in operating the agency.

A more difficult situation is presented by Police reports which comment on an applicant's past or current association with people with criminal records as a reflection on the applicant's character, rather than any suggestion that he is a "front" for such people.

The Committee's view is that such Criminal Records Office checks and comments in Police reports are in some cases justifiable and relevant. The following safeguards are proposed:

(a) <u>Regular Criminal Records Office checks on persons other than applicants</u>.

(i) The fact that checks are done on persons other than applicants ("third parties") should be publicly known (see para 1 above).

(ii) The third party should be made aware that a check will be done, if possible. This will include a statement on the application form (See Chapter 5, para 5.)

(iii) Procedures to avoid disclosure of the third party's record to the applicant should be adopted (see Chapter 5, para 3).

The Commissioner of Police has only agreed to regular Criminal Records Office checks on persons other than applicants in a few instances. The Committee considers that such approval should only be given in exceptional circumstances.

(b) Police reports mentioning persons other than applicants.

The Committee recommends to Police Officers writing reports on applicants that they exercise great caution in referring to the criminal records of third parties. Other than such caution, the only realistic safeguard, in the Committee's view, is for applicants to be able to know the details of Police reports affecting them. Where such reports refer to the criminal records of third parties, this policy presents considerable difficulties.

The procedure which should be followed is discussed in Chapter 10, para 9.

4. WHAT SHOULD NOT BE INCLUDED IN A C.R.O. CHECK?

4.1 In Chapter 2 (para 2.5) the standard method of "name checking" Police records was described. It was pointed out that C.R.O. usually provides the public body doing the check with a resume of the person's record, but in some cases provides a photocopy.

In Chapter 4, the question of what should be included in a person's criminal record for employment, licensing, etc. purposes was discussed. The Committee's view is that, in general, the following matters should not be used for these purposes:

(i) arrests;

(ii) dismissed charges and all charges not proceeded with;

(iii) s556A dismissals, and s556A recognizances which have expired;

(iv) juvenile offences where no conviction was recorded other current bonds s83(3);

(v) recognizances falling under s579 after 15 years.

At present, none of the above are included in resumes provided by the C.R.O.

Ten Year Limit: It is the Committee's proposal that where questions are asked as to a person's criminal record, rarely should information be required or disclosed of convictions more than ten years previous to the said request. Thus if an applicant has had no convictions for a period of ten years, he will not have to disclose any convictions beyond that time. If, however he does disclose convictions within the ten year limit of the question, further enquiries as to convictions outside that period, may be reasonable in certain instances.

The Committee's view is that there may be exceptional cases where the public interest to be protected is so important that disclosure of these matters to public employers, licensing authorities or others is justified. But, if so, they should not be made available merely as part of a routine C.R.O. check. If the interest to be protected is sufficiently important to justify disclosure of such matters, then a full Police report giving full details of the circumstances surrounding the matter should be obtained. Furthermore, there should be an opportunity for review of any decision made using information about such matters.

Routine C.R.O. checks should be limited to convictions, unexpired s556A recognizances, pending charges, and various matters which can be considered similar to convictions such as "9th Schedule" Offences.

Adoption of these policies would lead to the discontinuance of the provision of photocopies of criminal records by the C.R.O.

4.2 The provision of photocopies of the "Court Appearances" side of the C.R.O. record card or the practice of making the card or copy available for the perusal of public sector bodies, should be avoided as it necessarily involves the disclosure of dismissed charges, s556A dismissals and other matters listed above in (i) to (v). The C.R.O. states that a photostat copy of the record is only shown to following N.S.W. public sector bodies: the Department of Youth and Community Services (Adoptions Branch) and the T.A.B. (See Chapter 4, footnote 2).

Similarly if details of records are given verbally to any bodies, this would involve similar dangers and should be discontinued. The Committee is only aware of such a practice existing with information given to the Scouting Association. Despite the Committee's reservations on such information being given to other than strictly public sector bodies it is aware of the peculiar problems associated with the appointment of supervisors to such organisations and their onerous responsibilities in the supervision of their charges. If it is determined that such associations should receive criminal record information, it should be in the form of either resumes or full reports and subject to the guidelines proposed in this report.

5. SHOULD C.R.O. CHECKS BE LIMITED TO PARTICULAR CLASSES OF OFFENCES?

At present, a C.R.O. check involved disclosure of all offences in a person's record, irrespective of their relevance to the position, licence or benefit applied for. It would be desirable, from a privacy point of view, if C.R.O. resumes would be limited to include only offences relevant to the purpose for which the resume is provided. The Committee does not, however, believe that it is possible in most cases to neatly specify which offences are relevant. It would also considerably increase the administrative difficulties in the production of C.R.O. resumes.

6. SHOULD THE C.R.O. DISCLOSE PENDING CHARGES?

The C.R.O. is only required to disclose pending charges in response to requests made for checking of applicants for benefits or renewal of such benefits. Therefore unless otherwise ordered by a magistrate, pending charges should be disclosed by the C.R.O. (See Chapter 4, para 4.3).

CHAPTER 7:

REPORTS ON BENEFIT-HOLDERS BY CLERKS OF PETTY SESSIONS AND OTHERS

1. INTRODUCTION

As mentioned in Chapter 1, there are as yet few organised methods for public bodies to be informed when current benefit-holders (as distinct from applicants) are charged with or convicted of offences. The most important practice is clearly the requirement on Clerks of Petty Sessions to inform some public employers (the Public Service Board and the Education Department), some professional registration bodies (concerning accountants, lawyers, auctioneers and agents, nurses, doctors, physiotherapists and optometrists - See Table 2, p 3, and the Department of Motor Transport (concerning licensed two truck drivers) when any of "their" benefit-holders are convicted or (in most cases) charged.

The only other methods of surveillance of benefit-holders of any importance is that some licensees are re-checked against the Criminal Records Office files on annual renewal of their licence, and reports by the Department of Corrective Services to the Electoral Office concerning persons ineligible for inclusion on the electoral roll because of convictions. This chapter will not deal with these but the relevant schedules should be consulted.

2. REPORTS BY CLERKS OF PETTY SESSIONS

Appendix 1C, page lists all public bodies currently receiving such reports and what they receive. The main questions which have to be considered are:

(i) should reports be made at the charge stage or only on conviction?

(ii) should convictions be automatically reported or only at the Courts?

(iii) should s556A findings and juvenile offences be reported?

(iv) who should the report go to?

3. SHOULD PENDING CHARGES BE REPORTED?

Most public bodies receiving such reports are advised when the person is charged, rather than when he is convicted, including the two largest recipients, the Public Service Board and the Education Department. The Committee has not objected to details of pending charges being included in Police record checks on applicants unless otherwise ordered by a magistrate (see Chapter 4, para 4), but there are two differences to consider here (Chapter 6, para 6). First, it may come to the attention of his fellow workers; even if the charge is dismissed it will still be recorded in the employer's records, and he is likely to feel prejudiced in the eyes of his superior officers despite the dismissal.

Secondly, in the Police record check situation there is at present no suitable independent body to decide whether, on a case-by-case basis, the charge is for an offence so relevant to the person's particular employment, profession or licence, that the arguments against disclosure of pending charges are outweighed by the public interest in disclosure as the Criminal Records Office is not aware of the full circumstances of the charge.

Here, however, the Magistrate knows the details of the matter before the Court and is in a position to make case-by-case decisions. However the Magistrate might not be fully aware of the needs and requirements of the employer, licensing body or registration body of which the benefit-holder is associated. Such bodies could not be represented before the Magistrate to present their case for disclosure because, by necessity they would be made aware of the charge.

Despite this it is the Committee's proposal that charges should not automatically be reported, but only on the order of the magistrate hearing the matter.

A Magistrate should be empowered to make an order when a person is charged or committed, either on his own motion or that of the prosecution, that the employer/registration body, etc. is to be informed of the charge/committal. The defendant should be heard on the motion. In making such an order a Magistrate should consider:

(i) the position held by the person charged;

(ii) the seriousness of the offence of which the person is charged and its relevance to this position; and

(iii) the risk to the public or some section of the public if such a report is not made.

Where such a report is made at the charge stage, the Court should give the person charged a copy of the report which states that, if the charge is dismissed, he should ensure that the employer or registration body's records are noted to this effect or the notification destroyed as in the case with successful applicants for employment to Public Service Board who have a Police record.

As with convictions, the Committee has little evidence of actual harm being caused by such reports (Chapter 2, para 5.1).

4. SHOULD CONVICTIONS BE REPORTED?

The Committee does not object to automatic reporting of convictions because to insist on consideration of each matter by the Magistrate as to whether it should be reported would impose a considerable burden on Magistrates. The Committee considers that this could only be justifiable with pending charges because of the importance of the presumed principle of innocence until proven guilt, but no such principle is involved in the reporting of convictions.

5. "556As" AND JUVENILE OFFENCES

The Committee considers that s556A dismissals and juvenile offences which have not resulted in a conviction (or s556A recognizance) may not need to be automatically reported, and if practical a procedure similar to that set out in para 3 above for pending charges might apply. This will make effective the protection given to such offences. The Committee does not object to the automatic reporting of s556A recognizances or juvenile offences where a conviction (or current s556A recognizance) resulted. However, the individual who is the subject of such reporting should receive a copy of the notification in all instances.

6. WHO SHOULD THE REPORT GO TO?

The main danger of reports on public employees is that details of the charge or conviction will become known to fellow employees with whom the person works on a day-to-day basis, causing him considerable embarrassment. Except where a charge or conviction is such that a person's work is to be supervised, or disciplinary action taken against him, this should not occur, and steps to avoid it should be taken. Clerks of Petty Sessions currently make their reports direct to the Public Service Board and the Department of Education, rather than to the employee's supervising officer or headmaster, so that, provided the Board and the Department are careful in using the information, problems need not arise. This appears to be the case in all instances of which the Committee is aware.

CHAPTER 8:

REQUIREMENTS ON BENEFIT - HOLDERS TO DISCLOSE OFFENCES.

1. INTRODUCTION

Benefit-holders (employees, licencees, holders of public office etc.) are not usually required by law to inform their employer, licensing body or other public body when they are charged or convicted of offences. The main exception to this concerns employees coming under the Public Service Act, 1902 and the Teaching Service Act,1970.

Regulation 35(1) under the Public Service Act, provides that;

> "If any officer is charged before any Court with, or is convicted of any criminal or quasi-criminal offence, whether punishable by summary conviction or not, the fact shall be immediately reported --
>
> (a) by such officer; or
>
> (b) by his superior officer, where such superior officer has knowledge of such offence and has reason to believe that such offence has not been so reported;
>
> to the Permanent Head and by him to the Board."

Regulation 35(2) specifies those offences under the Motor Traffic Act, 1909, to which Regulation 35(1) applies.

Regulation 32 of the Teaching Service Act imposes a similar obligation to report to the Director-General of Education.

These Regulations require the officer himself to report when he is charged or convicted. Such a requirement might be ineffective if not for the fact that Clerks of Petty Sessions are also required to report public servants or teachers who have been charged or convicted to the Board or Director-General (as discussed in Chapter 7). So a public servant or teacher who decides not to disclose runs the risk that the charge or conviction will be reported anyway and that as well as any possible disciplinary action because of the charge or conviction itself, he may also face disciplinary action for breaching the Regulations in failing to disclose.

2. WHAT SHOULD AN OFFICER BE REQUIRED TO DISCLOSE?

The Regulations require an officer to disclose pending charges which have not yet been dealt with by the Court, charges which the Court has dealt with but has dismissed or where no evidence was offered, charges where the Court dismissed the matter under s. 556A, and juvenile offences where no conviction was recorded.

The Committee considers that the Regulations should be amended so that disclosure is not required in any of these cases.

2.1 Pending Charges. In Chapter 7 paragraph 3, the Committee argued that pending charges should not automatically be reported by Clerks of Petty Sessions to employers, but only where a Magistrate so ordered if he considered this necessary in the public interest. This suggestion would be defeated if officers were themselves required to disclose all pending charges.

2.2 Dismissed Charges. He should not have to report this (see Chapter 4 para 5).

2.3 S556A Dismissals and Juvenile Offences. As with pending charges, the Committee considers that the protection to be given to s556A dismissals and certain juvenile offences which do not result in a conviction or a recognizance can only be made effective if no automatic disclosure by officers of such matters is required, but disclosure is only on the order of a Magistrate. (See Chapter 7, para 5) The Committee does not object to the Regulations requiring disclosure of recognizances under s83(3) of the Child Welfare Act, s556A recognizances, or juvenile offences where a conviction (s556A recognizance) resulted.

3. WHO SHOULD THE DISCLOSURE BE MADE TO?

3.1 Regulation 35 requires a charge or conviction to be reported by the officer to his Permanent Head who, in terms of the Regulation, must report it to the Board. So in all instances the Head of the Department in which the person works is aware of the offence.

One problem with the Regulation is that it requires disclosure of "any criminal or quasi-criminal offence", irrespective of the seriousness of that offence or its relevance to the officer's position, because it is impossible to specify these matters with any precision for the multitude of different positions in the public service. Therefore the Regulation requires disclosure of many charges which are irrelevant to the person's position.

To require an officer to disclose such irrelevant charges to the Head of the Department in which he works raises a danger that the offence will become known to others in the Department with whom he works on a day-to-day basis, causing him unnecessary, but possibly severe, embarrassment. It may also unnecessarily prejudice his relationship with the Departmental Head, or cause the officer to think that this relationship has been prejudiced.

It can be argued that it would be preferable for the officer to be required to disclose the offence direct to the Public Service Board, with which he has less direct contact, thus minimising the likely embarrassment and the likelihood of disclosure to those with whom he works on a day-to-day basis.

3.2 The Board would then only disclose the offence to the Head of the Department in which he works if this is necessary for some further action to be taken and the Departmental Head should decide what disclosure is necessary to senior officers under whom he works. Disclosure to others with whom he works (e.g., clerical staff) is unnecessary and dangerous and should be avoided.

3.3 In practice, the officer appears to adopt the course most satisfactory to himself and accordingly we make no recommendation.

4. PENALTIES FOR FAILURE TO DISCLOSE

Because the Regulations are so broad they require officers to disclose offences irrelevant to their positions. Although it cannot be left to the officer to decide whether an offence is relevant or not, an officer's failure to disclose an offence which is, in fact, irrelevant, should not automatically result in severe penalties because of the failure to disclose.

CHAPTERS 9-11:

PART D.

DISABILITIES OF FAIR PRACTICES.

The Committee, in this Part of the Report, examines the disabilities which may arise from the disclosure of criminal record information. A structure of "Fair Practices" for the use of this information is proposed, in an effort to both rationalise and minimise the effects of these disabilities. In association with the suggested "Fair Practices", certain review procedures are proposed.

CHAPTER 9:

DISABILITIES ARISING FROM CONVICTIONS AND THEIR ENFORCEMENT

1. SENTENCE AND DISABILITIES

Conviction for a criminal offence results in adverse consequences for the convicted person. These consequences can usefully be divided into two types: Sentence and Disabilities.

1.1 The Sentence comprises those consequences explicitly imposed on the individual convicted, by the court, and can include imprisonment, probation, a fine or requirement to pay compensation. The sentence is completed when the fine or compensation is paid, or on the expiration of a set period during which the person's liberty of action is restricted.

1.2 Disabilities, in contrast are those adverse consequences to the convicted person which the court does not directly impose, but which result from the fact of conviction. Unlike the court's sentence, these disabilities may last throughout a convicted person's life. Disabilities are of two main types:

(i) Legal Disabilities.

There are statutory prohibitions on some convicted persons obtaining licences or registration necessary for certain occupation, serving on juries, holding public offices and many other areas. Some prohibitions are explicit, whereas others provide that only "fit and proper" persons are eligible. A convicted person may also be able to be cross-examined in court proceedings in ways other people cannot.

(ii) Social or Defacto Disabilities.

It is generally not illegal (or ultra vires) for employers (public and private), insurers, voluntary organisations (clubs, trade unions, etc.) and others providing social benefits to discriminate against people on the grounds of their convictions, and this often occurs. Fears of such discrimination, even if unjustified, may also lead convicted people not to apply for such benefits. Less tangible forms of discrimination may also result from friends and acquaintances becoming aware of the conviction, resulting in loss of social opportunities, friendships, or esteem for the convicted person.

Simple disclosure of the criminal record to another person may be regarded by the convicted person as a very adverse consequences, even if it results in no legal or social disabilities. The possibility of disclosure may lead some convicted people to avoid participation in many areas of life

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(1) The distinction is not completely clear-cut, e.g. a Court's suspension of a driver's licence may be the only sentence it imposes. But sentences and disabilities are usually quite distinct.

otherwise open to them. Similarly, the existence of an official record of conviction is in itself regarded as a stigma.

These two types of disabilities overlap somewhat: "The line between social and legal consequences is somewhat tenuous. Some disqualifications and disabilities may be contained in regulations of non-Government bodies and a pursuasive argument may be made that such regulations belong to the "Globus normativus" or formalised body of law." (2)

The table on the following page attempts to categorise The Principle Areas Where Disability May Arise From a Conviction. Both legal and social disabilities are present in many of the categories.

1.4 Benefits. The existence of a "disability" entails a restriction on a person doing or obtaining something he wishes to do or obtain. He may wish to obtain a particular type of employment, licence, insurance, social welfare benefit, bail, electoral office, approval as a charity trustee or adoptive parent, or a lighter sentence. In a negative sense he may wish to avoid increased police surveillance, impeachment of his credit as a witness, loss of his children, or the disapproval of his neighbours.

The attainment of items in the first group, and the avoidance of items in the second group, are referred to here as "benefits". People who are currently enjoying a benefit are referred to as "benefit-holders", and those who are not currently doing so but wish to are referred to as "applicants".

2. LEGAL DISABILITIES

2.1 Despite the somewhat tenuous nature of the distinction between the two aforementioned types of disabilities, it is necessary to discuss them in isolation, to a limited degree. Legal Disabilities have their basis in statutory provisions and therefore may require the employer or licensing body to take certain particulars of a criminal record into account and attach to such information differing degrees of disabilities. It may even be arguable that such provisions impose a duty on the instrumentality to make all reasonable efforts to obtain such criminal information as well as preclude it from considering other unspecified elements of a criminal record.

Legal Disabilities create either an obligatory or discretionary obligation on the instrumentality to examine criminal record information. Certain such disabilities are absolute in nature and effect.

2.2 "Legal Disability" is used to include both.

"Provisions concerning convictions":

(i) statutes which specifically refer to convictions in imposing a disability (see Appendix 1 , page 84)

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(2) Damask, M.R. "Adverse Legal Consequences of Conviction and their Removal, A Comparative Study" (1968) Jnl. Criminal Law. Criminology and Police Science Vol. 59 No. 3 at p. 347.

TABLE 5

THE PRINCIPAL AREAS WHERE DISABILITIES

MAY ARISE FROM A CONVICTION

(L) means usually legal disabilities; (S) means usually social disabilities; (L & S) means may be either.

A. Loss of Employment Opportunities

1. Public employment (L & S)
2. Occupational licensing and registration (L)
3. Private employment (S)
4. Membership of Trade Unions (L & S)

B. Exclusion from Social Activities (not occupational)

5. Membership of voluntary associations (e.g. sporting and social clubs) (S)
6. Positions of trust/responsibility in voluntary associations (e.g. governing bodies of charities; Scout or Police Boys Club Instructors) (L & S)
7. Non-occupational licences (e.g. motor vehicle drivers, firearms, radio transmitter licences) (L)

C. Political, Civil and Judicial Disabilities

8. Citizenship and naturalisation (L)
9. Voting rights (parliamentary and municipal) (L)
10. Holding public office (L)
11. (i) elected (parliamentary and municipal)
    (ii) appointed (members of statutory bodies and commisions; Justices of the Peace; Special Constables, etc.)
12. Capacity to litigate (L)
13. Capacity to execute judicially enforceable instruments (e.g. contracts, wills) (L)
14. Capacity to testify (L)
    (i) competence to testify
    (ii) impeachment as witness
    (iii) impeachment as defendant - witness
15. Effect on trial of subsequent offence (L)
    (i) proof of guilt ("similar facts evidence")
    (ii) denial of bail
    (iii) effect on sentence
16. Increased Police attention (e.g. surveillance, questioning concerning other crimes) (S)

D. Restrictions on Freedom of Movement and Association

17. Immigration; deportation; visas (L)
18. Consorting and habitual criminals

E. Loss of Property Rights

19. Forfeiture of property (L)
20. Inheritance (L)
21. Control of property (e.g. appointment of trustee to manage property) (L)

F. Loss of Financial Benefits and Opportunities

22. Insurance (e.g. motor vehicle, household, fidelity bond (S)
23. Management of companies; registration of business, etc. (L)
24. Social Services, pensions, workers compensation, etc. (L)
25. Legal aid, criminal injuries compensation, etc. (L)

G. Loss of Domestic Rights

26. Grounds for divorce (L)
27. Parental rights (L)
    (i) adoption/wardship of convicted person's children without consent
    (ii) eligibility to adopt children

H. Stigmatisation and Embarrassment

28. Disclosure of conviction to friends and acquaintances (e.g. by press reports, or by gossip)
29. Existence of official records of conviction (Police, Courts) (S)

(This categorisation is based on that used in the Vanderbilt Project ((1970) 23 Vanderbilt Law Review 929) but expanded to include social as well as legal consequences of conviction. In all of the areas listed there are, or have been until recently, disabilities arising from convictions in Australia.)

"Character Test Provisions":

(ii) statutes which do not specifically refer to convictions when imposing a disability, but require a person to be "of good character", "a fit and proper person", etc. (see Table 1, Part A, page 2)

2.3 Principles for Use in Considering Statute-based Disabilities

The Committee considers that a number of principles can be set out as a guide to deciding to what extent a statute-based disability is justifiable for the protection of the public interest and to what extent it imposes an unfair burden on a convicted person. These principles can be applied in deciding:

(i) whether to repeal or amend an existing statute-based disability; and

(ii) whether and how to create a new statute-based disability.

These principles are applied by way of example to some existing "statutory disabilities" as the principles outlined, but not all relevant disabilities are mentioned. Their application to these other disabilities can be seen in the Schedules to this report.

2.4 Disabilities should be Protective, Not Punitive

A statutory disability should not be intended as a punishment to the offender (or a deterrent to other offenders). It is the function of the sentencing Court to decide precisely those matters, and a double punishment should not be provided. The purpose of a disability should be to ensure the reasonably necessary protection of the public and its interests, by ensuring that the offender is barred from, or removed from, those positions where, by his conviction, he has shown himself to be a likely danger to the public and its interests, or to specific individuals and their interests which it is public policy to protect.

Purely punitive consequences such as fines by an employer or reduction of salary, which involve no element of public protection, should not be a possible consequence of a disability.

One slight exception to this is that, where the person's criminal conduct has also been to the direct detriment of the public body enforcing the disability (e.g. theft from a government department; drunkenness while on duty) it may be reasonable for disciplinary action to be taken by that public body (e.g. a fine, reduction of salary or demotion).

Few existing statutory disabilities could be considered to be punitive in intent (whether they are administered punitively is a separate question), but there are some exceptions.

The Transport Act, 1930, s 107, Government Railways (No. 2) act, 1912 s80, and Public Service Act 1902, s61(1) (see Appendix 1 , paragraphs B1, B2) should be repealed because they allow non-protective punishments or discipline to be imposed for offences unrelated to employment and are thus punitive in intent. They should be replaced by a provision which allows dismissal, demotion or re-assignment where a person has been convicted of any offence such that they are not a fit and proper person to hold their current position,

i.e. a general character test provision (offences committed during employment should still be subject to disciplinary proceedings such as reduction in pay).

2.5 Disabilities should be Capable of Flexible Application, and not Absolute Bars

Disabilities which constitute an absolute bar on persons with certain classes of offences, without any possibility of consideration of the seriousness of the particular offence, any extenuating circumstances, or the rehabilitation of the offender, should be avoided. As, with sentencing, disabilities should primarily have regard to the offender, not the offence.

For example, the Commercial Agents and Private Enquiry Agents Act s10(6) (Appendix 1, para B3) should be repealed as an unnecessary absolute bar. The general "character test" provisions in the Act are sufficient for public protection. The Industrial Arbitration Act, 1944, s144 (see Appendix 1, para B7) should be repealed as an unnecessary absolute bar in the case of three minor offences unrelated to the licence. The general "character test" provisions in the Act for repeal of a licence are sufficient. Absolute bars which are permanent and thereby deny an individual any opportunity at all to show that he has rehabilitated himself should be avoided. They are fortunately rare.

2.6 Disabilities should if possible be Restricted to Specific Classes of Relevant Offences

If it is possible for the class of offences relevant to a particular disability to be clearly defined, the disability should be limited to these offences. In some areas it may be feasible to limit the disability in this way (of the existing disabilities limited to offences "involving fraud" or dishonesty punishable on conviction for imprisonment for three months or more": see Appendix 1 , para B4. This will, however, rarely be possible. For many positions or functions it would be impossible to describe the relevant offences by general terms such as "fraud or dishonesty". Categorising all offences in terms of a set of general offence categories would also be difficult, but not impossible. It is similarly difficult to define the "seriousness" of an offence in terms of the type of sentence given.

This sentence based approach has, however, been taken in the Jury Act, 1977 and is the basis of the U.K. Rehabilitation of Offenders Act, 1974.

Deciding what statutory disabilities are necessary for the reasonable protection of public and private interests while attempting to place the minimum necessary obstacles in the path of a convicted person's attempts to rehabilitate himself is a complex and difficult problem. No attempt is made here to say whether all existing statutory disabilities are necessary in the public interest. In the Committee's view, most clearly are at the present time.

2.7 There is little value, however, in attempting to limit disabilities to extremely broad categories such as "indictable offences", "felonies", "misdemeanours" or "abominable crimes". While the meaning of such terms may be clear at law, they are broad and bear little relationship to the seriousness of the offence or to particular classes of offences, so that they are of little value as a limitation on the scope of a statutory disability. Their meaning is also unlikely to be clear to many offenders, making them unsure of their position without legal advice.

In these cases, it may be preferable to have a general "character test" disability within the statute and rely on the existence of relevent review procedure to ensure judicial supervision of its reasonable application.

2.8 "Character Test" Provisions and Legal Disabilities

The "character test" provisions in existing Acts (see Appendix 1 , part A, page 84) vary considerably in their wording. Wordings include:

- "not of good fame or character"
- "not a fit and proper person to hold a licence"
- "not of good character"
- "not in all respects a fit person to hold the (licence)"
- "not of drunken or dissolute habits or otherwise of bad repute"
- "not of good repute and ... a fit and proper person to fulfil the responsibilities of a parent".

2.9 These varieties in wording (and further variations in other jurisdictions) seem to have been sufficient to prevent a coherent body of law developing (from appeals against administrative interpretations of such provisions) to give judicial guidance as to what types of convictions are relevant to what licences, types of employment, and other benefits where a statutory disability applies, and what other factors should be taken into account. The reported cases seem to mainly concern admission to the legal profession. The Courts in cases which concern other disabilities have relied heavily on the cases concerning the legal profession, and this may involve a danger that unrealistic standards will be developed in occupations and other areas involving duties and responsibilities bearing little similarity with those of the legal profession.

In Sakellis, a 1968 case concerning the licensing of a commercial sub-agent, it was said that, although the expression "fit and proper person" admits of different standards of knowledge and ability for different occupations, there can be no different standards of honesty in different occupations: A man is either honest or he is not, and in my view if he is not he is unfit for any licence of the present type granted by the public" ((1968) 1 Wn(NSW) 541 at 548). It seems that "honesty" here refers to people who are "possessed" of a moral integrity and rectitude of character so that they may safely be accredited by the court to the public as fit, without further enquiry, to be trusted by that public with their most intimate and confidential affairs without fear that that trust will be abused" (Ex Parte Meagher (1919) 19S.R. (NSW) 433 at 442). The scope of "licence(s) of the present type" may only refer to licences which "are only to be granted, after a judicial proceeding in a court" (Sakellis p 543), in which case this places the Court "in a similar position to the Supreme Court in considering the readmission of barristers or solicitors".

Similarly, in Re Arnold (1932) 11 LVR 14 at 14) Pike J. said, when considering an Act which required an applicant to be registered as a land agent to satisfy the Court of his "good fame and character": "I think the same principles should be applied in an application by a person to be registered as a land agent as are applied by the Supreme Court when dealing with either applicants to be admitted as articled clerks or applications by solicitors, who have been struck off the roll, to be readmitted to the roll".

"Fit and proper person" and "good fame and character" are two of the most common expressions used in statutory disabilities. To the extent that there are some uniform principles developing, these cases indicate that, at least in some areas, courts are likely to impose very high standards in differing occupations and other areas.

2.9 Despite the variety of wordings of "character test" provisions the Committee does not consider that there is any need for greater uniformity in existing provisions. Two possible methods of achieving greater uniformity were considered and rejected:

(i) Repeal of all existing provisions and replacement with a standard form "character test" is not feasible. Most existing character tests are designed to allow the consideration of many matters other than criminal records, matters which vary considerably between provisions. Any such chance would involve detailed investigation of its likely effects in each particular context, and there is no justification for the amount of work this would involve.

(ii) Alternatively, an enactment could aim to uniformly alter the interpretation of existing provisions, insofar as criminal records are under consideration in the assessment of character, but without any alteration to the wording of existing sections. This was also considered unnecessary at the present time, as well as posing considerable drafting difficulties

2.10 The Committee considers that greater uniformity in the wording of "character test" disabilities should be sought in those provisions to be included in future legislation. The Committee prefers a wording such as "a fit and proper person to hold the position" (or "hold the licence" or "fulfil the responsibilities of a parent" or whatever words are more appropriate than "hold the position").

3. MECHANISMS OF ENFORCEMENT OF DISABILITIES

3.1 The effectiveness of both legal and social disabilities within a society depends on two things:

(i) Their voluntary observance by convicted persons, i.e. by convicted persons simply not applying for any positions or licences from which they are excluded, or not attempting to do anything from which they are disqualified; and

(ii) The enforcement of the disabilities by agencies of social control within the society when they are not voluntarily observed, i.e. by licensing bodies knowing to refuse licences to convicted persons who apply for them; by private employers knowing to reject job applicants; by the Electoral Office or the Sheriff knowing who to remove from an electoral or jury roll.

3.2 The principle requirement for an effective mechanism of enforcement of these disabilities is information: The relevant agency of social control (e.g. government department, licensing body, employer, insurer) must be able to know that its subject (employment, licence, adoption, or insurance applicant; public servant; juror, elector or licensee) is a person whose convictions make him subject to a disability.

3.3 There are three possible sources of this disclosure:

(a) by the subject himself to the agency;

(b) disclosure by some third party to the agency; and

(c) observation or foreknowledge by the agency itself, of the conviction.

The mechanisms involved in such disclosures has been discussed in Chapters 3 - 9 and certain policies have been suggested in relation to these practices.

The enforcement of disabilities is usually achieved by a combination of two or more of these mechanisms, e.g. a question on an application form, answers to which are verified by a check of Police records. The use of one mechanism may enhance the effectiveness of another mechanism, e.g. in the case given, if an applicant knows his answer is going to be checked he is likely to be more truthful and may reveal information which is not in fact in the Police records. So the enforcement of a disability is usually a three-way relationship between the agency of social control, the subject of the conviction, and a third-party source of information.

CHAPTER 10:

FAIR PROCEDURES FOR USE OF CRIMINAL RECORDS

1. INTRODUCTION

The previous nine chapters have discussed four means by which public bodies obtain information about people's criminal records: questions asked on application; Police record checks and Police reports on applicants; reports on benefit-holders by Clerks of Petty Sessions; and requirements on benefit-holders to disclose offences. These chapters have concentrated on what information can properly be obtained by these methods, and under what circumstances.

This chapter now turns to the question, given that criminal record information has been properly obtained, what procedures should public bodies observe to ensure fair use of the information? The Committee's view is that privacy is not only a question of what information about a person is disclosed: for privacy to be adequately protected, information which is by its nature prejudicial must only be used according to clear and fair procedures if injustice is to be avoided. Only if such fair procedures are adopted can the invasion of privacy involved in the disclosure of the information be justified.

The procedures recommended below are mainly concerned with Police record checks and Police reports, but are applicable to any use of criminal record information, no matter how the information was obtained.

2. AN APPLICANT'S CRIMINAL RECORD SHOULD NOT BE INITIALLY CONSIDERED

An applicant's criminal record should not be considered until a decision has been made as to whether he would otherwise be a successful applicant, so that it is clear whether or not the criminal record was the reason for refusal. If so, this should be noted on the application form. An explanation as to the effect of a criminal record, should be made on the application form (See Chapter 11, para 4.5).

Criminal record information is likely to prejudice a decision maker against a person. Given a choice between two applicants of otherwise similar qualifications, one of whom has a criminal record, it seems reasonable to assume that many decision-makers would be likely to prefer the applicant without a criminal record even though they might, given no other choice, be satisfied with the applicant with the criminal record. For people with criminal records to be given a reasonable chance to rehabilitate themselves, the Committee considers that it is important that they not be put in this position. If they are acceptable applicants despite their record, then another applicant should not be preferred over them unless their criminal record is clearly relevant.

In other words a criminal record not be used as prima facie evidence of merit, with which to discriminate between applicants, but rather only be taken note of where it acts as some form of bar to otherwise successful or selected applicants.

This problem can be avoided if the criminal records of applicants are simply not considered until one applicant has been selected as otherwise the most suitable applicant (in competitive applications) or as a suitable applicant (in non-competitive applications). Only then should the person's record be

considered, and only as to whether it is so serious that it makes him an unsuitable applicant (and not whether it makes some other applicant more suitable).

The greatest practical difficulty in doing this is in the area of employment. The Public Service Board's employment practice exemplifies that recommended by the Committee; there are no questions concerning criminal records on the application form or asked in interviews, and no criminal record checks are done until one applicant is selected as suitable for the position. So a criminal record only has any effect if it is so serious as to disqualify an otherwise suitable applicant.

The Public Transport Commission takes a different approach in relation to non-competitive positions which the Committee also supports: the application form does ask for disclosure of the applicant's criminal record, but Personnel Officers are instructed to first decide whether the applicant is suitable for the position without regard to his record, and only then to consider whether the record constitutes a bar. They are required to note on the application for whether or not the criminal record was the reason for their decision, and inform the applicant of this.

Another reason for this approach is that, if the applicant is to be given any opportunity for review of decisions based on their criminal records (see Chapter 11), it must be clear whether or not a decision has been made on this basis.

3. THE DANGER OF "NAME CHECKING" WITHOUT FINGERPRINTS

3.1 The Central Card Index at the Criminal Records Office (C.R.O.) of the Police Department, the only record system which is searched for pre-employment checks, is based on fingerprint verification, although the files are stored alphabetically under surnames. A file on a new person is only created if fingerprints were taken at the time the person was charged or convicted. No further charges or convictions are added to the file unless accompanied by further fingerprints and a Police Fingerprint Officer verifies that the two sets of prints are identical. Fingerprint verification is also generally used before any records are provided to courts for consideration in sentencing and in bail applications (at least for more serious offences). Because of fingerprint verification, the Criminal Records Office is able to maintain an extremely high degree of accuracy in its records, commensurate with the sensitivity of those records.

3.2 Most checks of applicants for public employment, licences, or other reasons, against C.R.O. records do not, however, involve fingerprint verification. They are only "name checks", the standard procedure for which has been described in Chapter 2 para 3.1. Generally, the only information provided for C.R.O. for the purpose of the check is the full name and date and place of birth of the applicant, although the applicant's current address and height and weight are also sometimes provided.

Fingerprints of the person to be checked are only provided for the applicants for employment in the Police Force and as Prison Warders. Fingerprint checking can only be done by highly trained specialists, who are in heavy demand for Police investigative work. Whereas a name check can be done in minutes for a relatively inexperienced clerk, a fingerprint

check could take a trained officer up to an hour. The cost of fingerprint checking, and the scarcity of police resources mean that it is impossible for fingerprint checks to be done for the volume of pre-employment checks currently conducted in N.S.W. It is also possible that some employers who have checks done would be reluctant to ask applicants to be fingerprinted.

3.3 The Committee sees three problems which can arise from "name-checking": incorrect identity; inaccurate records; and unexplained information.

(a) Incorrect Identity.

Problems of mistaken identity can arise from name-checking in three ways:

(i) There are a small but significant number of people who share identical names and dates of birth.

(ii) If the name and/or date of birth of the person checked is very similar but not identical to a person listed, the C.R.O. will advise that one "may be identical with" the other.

(iii) A person who is arrested may dishonestly give the Police a wrong name and address (criminals often use aliases and stolen identities). While this is not a real problem where any later checks are verified by fingerprint comparisons, it does raise real problems of possible mistaken identity when only name checks are done.

In each case, unless there is further verification of an apparently positive check, exclusion from employment or some other benefit will have to be made on an uncertain basis. The Police Department recognizes this and goes to some lengths to insist that name checking is not a positive means of identification by stamping warnings on all criminal records information they provide that "in the absence of fingerprints positive identification cannot be established" (as described in Chapter 2, para 3.3(e)).

The Committee's view is that there is only one possible way to overcome this problem: any person who is to be refused employment or some other benefit because of an apparent positive check should first be told that this is the case and asked to confirm that the record does in fact relate to him. If he confirms that it is, then the check has been verified. If he denies it then the employer can require him to produce such proof of identity as is necessary to resolve the matter including, if necessary, a fingerprint check.

(b) Inaccurate Records.

First, it is possible that, because of an administrative error, the C.R.O. record is inaccurate or incomplete. As an example, the Committee is aware of a case of a person dismissed from employment by a N.S.W. public authority because a criminal record check revealed in error that he had a conviction in another State. In fact he had successfully appealed against this conviction but the Police Force of the other State had failed to notify the N.S.W. C.R.O. of the appeal. Such errors will be rare, but in any system which involves the volume

of records (over 1 million) and the volume of enquiries per year (over 300,000 for police and non-police purposes) handled by the C.R.O., it would be unrealistic not to expect human beings to make some mistakes. The best way to ensure that the record obtained in a positive check is accurate and complete is to ask the person concerned.

(c) Unexplained Information.

Another problem can arise even if a record is accurate and does relate to the person concerned. A simple statement on a criminal record check that a person was convicted some years ago of, say, drunken driving, will fail to give any indication at all of that person's current character or the degree of risk he poses to the public interest if, in the intervening years, he has attended Alcoholics Anonymous and has not touched alcohol for two years. This problem of unexplained data is compounded by the brevity of the conviction details provided by the Police where only a 'resume' is given (See Chapter 2, para 3.3). Simple descriptions such as "stealing" or "assault" can contain within them offences varying enormously in degrees of seriousness. As details of sentences are not always given in such resumes the severity of the sentence cannot be used as a guide either. The problem is at its worst where (as in the checks conducted by the Public Service Board for departments and authorities with a delegated right to employ) the person doing the check has not interviewed the applicant, nor has the interview record to consult, and so has no context at all in which to consider the information.

The Committee considers that any person who may be refused employment because of his convictions should be given the opportunity to provide further information which may put those convictions in context. By this we do not mean that the employer should be obliged to listen to excuses such as allegations of Police fabrication of evidence which attempt to deny that the conviction was proper. Nor should he be obliged to debate employment policies with disgruntled applicants. But he should be willing - and, in fact, desirous - of obtaining the full details of the conviction and details of any changes in the person's circumstances since that time.

4. THE REMEDY: NO ADVERSE DECISION WITHOUT AN OPPORTUNITY FOR PRIOR DISCUSSION

4.1 Because of the problems of incorrect identity, inaccurate records and unexplained information, the Committee considers that a final decision to reject an application (or to take any other adverse action against a person because of his alleged record) should not be made until the person has been given adequate opportunity to discuss the record in order to:

(i) verify that the record relates to him;

(ii) check it for accuracy; and

(iii) explain the full detail of the occurrences and their relevance to his current character.

Where the information is obtained on a "name check", all three reasons apply. Where the record is disclosed by the applicant himself the third reason for discussion still applies: the full context of a conviction cannot often be set down in a few lines of an application form.

4.2 Adoption of such a policy of discussion would change the current practices of some public employers and other public sector users of criminal records. Some already use the procedures recommended by the Committee.

When the Committee surveyed the public employers conducting name checks on applicants in November-December 1976 it found that a number had a policy of refusing to inform applicants if an alleged criminal record was the reason their application was rejected (Department of Main Roads; Board of Fire Commissioners). Some were willing to tell the applicant if this was the reason if specifically requested to do so by him (Department of Education; Central District Ambulance; Metropolitan Water Sewerage and Drainage Board). Only the Totalisator Agency Board, the Public Transport Commission and the Sheriff had policies of always disclosing an alleged record to the applicant and discussing it with him. The Public Service Board, the largest non-Police user of criminal records, had followed a policy of only disclosing that a criminal record was the reason for rejection if specifically asked. In October 1976, following recommendations from the Committee, the Board adopted a policy of offering applicants so rejected the opportunity to discuss the refusal reason on a trial basis. The Premier, at the suggestion of the Board, has recently written to the various statutory bodies conducting name checks on applicants, suggesting that they might adopt a similar policy to the Board to extend the trial which appears to be working satisfactorily.

Checks done on licence applicants are usually discussed with the applicant if a record is revealed, either with the Police Officer preparing a report on the applicant, or with the licensing body. Disclosure of reasons for rejection of an application is usually required by statute.

Outside the licensing area, however, there are a considerable number of situations where public bodies either refuse to discuss alleged criminal records which affected their decisions, or will only do so if specifically asked, including in the following areas: selection of juries; appointment as a Justice of the Peace; members of governing bodies of charities; Scoutmasters; and applicants for visa certificates.

For full details see the relevant Schedules.

Adoption of the Committee's policy would require these bodies to change their practices. The disclosure procedure recommended by the Committee is set out in paras 5 to 8 below.

5. "AUTOMATIC DISCLOSURE"

The public body should initiate contact with the person to invite discussion, and should not only do so on request. The Committee's view is that disclosure of an alleged record to a person who may be refused employment or any other benefit because of it should be "automatic" in the sense that it should be initiated by the employer and should not depend on the applicant requesting reasons for refusal. There are two reasons why automatic disclosure is necessary.

First, an unsuccessful applicant is unlikely to assume that he has been refused a position because of a criminal record check. He will probably be unaware that criminal record checks are done. If he has been refused a competitive position he is likely to assume that a better qualified or otherwise more suitable applicant was preferred at the interview stage, not realising that he was the preferred applicant. Victims of identity errors who do not in fact

have a criminal record at all are, of course, most unlikely to think that an alleged criminal record could be a problem.

Secondly, many employers adopt a policy of not discussing reasons for refusal of employment with unsuccessful applicants. An applicant who knows of this policy is therefore likely to assume that it is a waste of time to ask for refusal reasons even if he suspects a criminal record check may be involved.

The Committee's view is that a policy of verifying and discussing alleged criminal records cannot be effective unless the employer initiates the disclosure.

6. CONTACTING THE APPLICANT.

Contacting the applicant should avoid disclosure to third parties. Care must be taken that an applicant's convictions are not inadvertently disclosed to others. Many people have concealed their past convictions from their spouses. It is also a fact of life that many spouses open each other's mail. Therefore it would not be appropriate to write to a person asking them to make an appointment to discuss "their criminal record" or to give details of such record.

If writing is preferred, the Committee considers that some form such as the following is appropriate:

> "Dear Mr. X: There has been a query in relation to your application for a position as a ---
> Would you please contact (Name of personnel office or other appropriate person) on (telephone No.) to arrange an interview before (suitable date) if you are still interested in the position."

It will often be more practical for the public body to ring the applicant direct and ask him to come in for an interview, or, in some cases, for an officer of the public body to call and interview him.

7. PERSONAL INTERVIEW PREFERRED TO TELEPHONE DISCUSSION

The Committee does not think that the alleged record should be discussed with the applicant by telephone, both because of the possibility of inadvertent disclosure, and because applicants are likely to feel inhibited from freely discussing the matter. An interview is preferred, unless he specifically requests telephone discussion.

8. METHOD OF DISCLOSURE TO THE APPLICANT

The Committee's view is that the full detail that has been received from the C.R.O. should be read out to the applicant. If he requests to see the written report the request should be granted. He can get a complete copy from the Police Department if he wants one.

An exception should be made in the case of visa certificates, a copy of which should be available to the applicant. As it is not possible to ensure that other countries' Consulates will disclose and discuss alleged criminal records included in visa certificates with applicants for visas, the applicant should be informed by letter from the Police Department that the copy of the report provided in his case will be retained at Police Headquarters for him to collect, if he wishes to do so, for 30 days.

9. COPIES OF POLICE CHARACTER REPORTS SHOULD USUALLY BE AVAILABLE TO A PERSON ADVERSELY AFFECTED

If an application is to be rejected (or other adverse action taken) because of disclosure of a criminal record as part of a discursive Police report (which also contains opinions about the applicant's character, honesty, activities, etc. or about other people) he should generally be given a copy of the report to read at the interview (if he requests an interview to discuss the reason for refusal). (For a description of Police Reports, see Chapter 3, para 3.1, page 19). The Committee has proposed very few limitations on what types of criminal record information Police Officers should be able to include in their Reports, and has argued that in some cases they should be able to refer to dismissed charges, s556A findings and other matters which should not generally be disclosed and which would not be included in any C.R.O. resume. Because Police Officers have such latitude as to what they can include in a report, it is vitally important that the applicant also be aware what has been included, so that he can give his views on the circumstances and relevance of these matters to the licensing or other decision-making body if he wishes to do so.

The Committee also considers that, if Police Officers preparing such reports did so in the knowledge that the Report was likely to be seen by the applicant and any opinions or alleged facts which could not be substantiated contested by him, then this would ensure that Officers took due care in preparing such Reports. This occurs to some degree at present because, if an unsuccessful applicant appeals against the refusal of a licence, the Police Report involved will usually be evidence in the appeals proceedings and therefore available to the applicant. The Committee does not think that the applicant's ability to see the Report should depend on his taking the costly step of appealing. In some cases disclosure of the contents of the Report at the point of refusal may convince the applicant of the futility of an appeal.

There may, however, be some cases where disclosure of a Police Report to the applicant would not be proper, because this would:

(a) disclose the identity of an informant;

(b) disclose information provided on a confidential basis;

(d) disclose Police intelligence information.

Such disclosure may not be in the interests of law enforcement and could cause unnecessary inhibition to be placed on certain sources of legitimate information. The Committee considers that in such cases the Police Commissioner should certify that it is not in the public interest for such a Report to be disclosed to the applicant. If the applicant does request an interview, the Report should be sent instead to the relevant appeals body, if such exists (see Chapter 11) or to some other designated independent party (possibly the Ombudsman, the Privacy Committee, or the Police Complaints Tribunal if it is established) to inspect on his behalf and disclose as much to him as is possible.

10. NOTIFICATION OF REVIEW PROCESS AND ALTERNATIVE OPPORTUNITIES

If the application is rejected (or other adverse action taken) the person should be notified of any review rights he has. (See Chapter 11) He should be told if there are any other similar positions, licences, etc. for which his record might

not be preclusive and after what period of time(if any) there would be some chance of a further application by him being considered.

11. PROCEDURE WHERE A CHARGE IS PENDING AGAINST AN APPLICANT

Where a charge is pending which, if a conviction, would result in refusal of an application then

(a) wherever possible, a decision should be deferred until the charge is heard; or

(b) wherever possible, the application should be approved (on probation, if possible) subject to appropriate supervision until the charge is heard.

12. NO RETENTION OF CRIMINAL RECORDS AFTER USE

The Committee seeks to ensure that information of a potentially prejudicial nature, such as criminal records, is not retained by organisations for longer than they have need to retain it.

(a) Unsuccessful applicants.

The Committee considers that there should generally be no need for public bodies to retain criminal records of unsuccessful applicants for longer than a few months. When an appeal against the decision can be made, retention for the period during which an appeal is possible will be necessary. In other cases retention for a few months may be necessary in order to answer any queries by those applicants who did not respond to the invitation to discuss the record before the decision to reject was made or to answer representations made on their behalf.

Some employers retain the criminal records of an unsuccessful applicant so that if a later application is received from the same person a C.R.O. check will be unnecessary. The Committee does not support this practice as it can result in criminal record information being retained by a government department which is likely to use very little of it ever again. Furthermore, when it is used again it will be out-of-date and may be incomplete or inaccurate (e.g. if a conviction has been successfully appealed against or a charge dismissed). In the Committee's view it is far better for criminal record information to be stored in one location only, the Criminal Records Office, wherever possible. A new check should be done each time a person applies.

The Public Service Board destroys its records on unsuccessful applicants within six months. The Public Transport Commission retains them in both its Security Service and in its employment section. The Committee considers that the Commission and other employers should adopt practices similar to the Board.

(b) Successful applicants.

Where an applicant is employed despite a criminal record the position is more complex. There may be some cases where a person has been employed despite his record but only on the basis that his work will be closely supervised because of it, or on the basis that certain transfers and/or promotions may not be available to him. In these cases the record will have to be retained, but otherwise the Committee is of the opinion that the record should be immediately destroyed. Generally, neither his immediate

superiors nor his fellow workers should be made aware of his record, and there is often some danger that this can occur if personnel files or other files containing criminal records, are accessible to office staff.

The Public Service Board's practice is to destroy the record within six months, and only to inform the Department in which the person is employed that he has a record at all in exceptional circumstances such as where supervision is necessary. Most of the other employers retain the record at least until the person ceases employment. The Committee's view is that the Board's practice is preferable.

An exception may need to be made where an application has generated a considerable amount of correspondence touching on the person's criminal record. It may be impossible to delete details of the criminal record without making this correspondence meaningless.

(c) During employment, licensing it would not only be in the interests of privacy to destroy all criminal record information after the decision on the application has been made, but it would avoid the reliance on out of date information if new checks were requested should the employer or licensing body consider this to be necessary at a later stage.

CHAPTER 11:

REVIEW OF DECISIONS WHERE CRIMINAL RECORD INFORMATION WAS A FACTOR

1. INTRODUCTION

Most disabilities arising from convictions are imposed at the discretion of a decision-maker, rather than as the result of strict application of a rule. The Committee has argued that discretionary disabilities are usually preferable to inflexible ones (see Chapter 9, para 2.7). These discretionary disabilities may be either statutory (as in licensing legislation with "character test" provisions) or non-statutory (as in employment decisions).

Most disabilities are initially imposed as an administrative, rather than a judicial decision. Rarely is a disability imposed by the sentencing Court (some driver's licence disqualifications are exceptions). Disabilities are usually imposed by an administrative or executive body, such as an employer, a licensing body, or a Minister. In licensing there is usually a right of review to Court against a refusal to licence a person because of his criminal record, or a revocation of his licence. There is often a right of review available to a current employee of a public body dismissed because of a conviction, but never in the case of unsuccessful employment applicants. Review rights exist against some administrative decisions involving criminal records (e.g. governing bodies of charities, adoptive parents) but not in other areas (e.g. appointment of Justices of the Peace).

2. REVIEW OF DECISIONS

There should be a review of the discretionary imposition of a disability because of person's criminal record. This may take many forms:

(a) an internal review at a higher level,

(b) another non-judicial body, or

(c) a judicial or quasi-judicial body.

The selection of the appropriate review procedure should be left to the individual body concerned. The Committee believes that the mere existence of a simple review procedure will minimise the number of occasions it is used in practice.

The Committee has not argued in this report that disabilities because of convictions, should only be imposed by a judicial body (whether the sentencing Court or otherwise). The report has accepted throughout that a large number of public bodies should be able to make decisions adverse to people on the basis of their criminal records.

The use of criminal records is a privilege available to some public bodies. The acceptance of a review procedure is the price that should be paid for this privilege.

3. EMPLOYMENT APPLICATIONS

Such an opportunity for review is a completely novel proposal only in the area of employment applications. Employment applicants have, as yet, been given few of the rights and protections available to employees.

If a quasi-judicial review was considered appropriate, the Crown Employees Appeal Board already has experience in dealing with the effect of criminal records on public employment in a number of areas (1).

This review would only influence the particular decision if there were no other suitable applicants or was no urgency to fill the position. If this was not the case another applicant may be chosen. This review would determine whether the person should be barred from that type of position in the future. The review body could also give any other relevant directions appropriate to the particular case.

4. CORPORATE AND JOINT APPLICANTS

A problem arises where the applicant is a corporate body, an unincorporated association, a partnership, or some other type of joint application. If the application is refused because of the criminal record of one of the directors, partners, etc., who should have the right of review?

If only the company, association or partnership as a whole is entitled to a review, it may choose not to exercise it but prefer instead to use its constitutional or contractual methods to remove the person with the criminal record and apply again. If this occurs then the individual who has been declared not to be a "fit and proper person" has no redress against this attack on his reputation despite the existence of a right of review.

But if the individual concerned was entitled to a review and utilizes it against the wishes of his fellow directors, partners, etc. he could seriously disrupt the operation of the company, club or partnership. It seems that the review should, therefore, remain an entitlement which has to be exercised jointly.

What is needed is some novel remedy, falling short of a right of a review, whereby the individual can seek a declaration from the appellate body that the decision that he was not a "fit and proper person" was wrong, without this altering the status quo.

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(1) See Crown Employees Appeal Board Act, 1944, second schedule.
e.g. The Board of Fire Commissioners
The Commissioner for Main Roads
The Commissioner of Police
The Grain Elevators Board
The N.S.W. Ambulance Board

CHAPTERS 12 AND 13

PART E

CONCLUSION

In concluding its report the Committee presents a brief summary of its policies regarding the fair use of criminal record information by Public Sector bodies. It also outlines the suggested procedures for the implementation of these policies.

CHAPTER 12:

A SUMMARY OF THE PRINCIPLES FOR FAIR DISCLOSURE AND FAIR USE OF CRIMINAL RECORDS

INTRODUCTION

This Chapter summarises the principles for fair disclosure and fair use of criminal records by public bodies set out in the preceding Chapters 4 to 11. These principles are not intended to apply to any use of criminal records directly for the enforcement or administration of the criminal law (including investigation, imprisonment, probation, parole, etc.).

These principles are built around four basic principles:

(1) No questions should be asked or information given relating to convictions or imprisonment beyond ten years.

(2) No criminal record checking should be carried out without the person's knowledge.

(3) No adverse decisions should be taken without the person having an opportunity for prior discussion.

(4) All adverse decisions should be subject to review.

1. WHAT CRIMINAL RECORD INFORMATION SHOULD BE DISCLOSED? (CHAPTER 4)

The word "disclosed" is used below to refer to all methods of disclosure of criminal records: questions on application forms; Police name-checks and Reports; reports by Clerks of Petty Sessions; and obligations on benefit-holders to disclose offences.

Principles marked with "*" are particularly for public discussion.

1.1 General Principle

Where a decision-maker should not be influenced by a particular type of criminal record information because it is irrelevant to the decision he is making, he should not be made aware that the information exists at all.

1.2 Pending Charges and Pending Appeals (Chapter 4, paras 4.1-4.4)

* (a) Pending charges, where a date has been fixed for hearing should be disclosed, if the public interest requires protection prior to the courts eventual determination of the charge.

(b) Charges adjourned sine die or nolle prosegui entered should not be disclosed.

(c) Convictions where appeals are pending should be disclosed the same as convictions.

(d) An applicant for a benefit should also be able to make application to a magistrate to have information as to the pending charge noted at the Criminal Records Office as not to be disclosed until the matter is determined. This "non disclosure" should only relate to the particular application for benefit in question. If a charge has been adjourned and a party makes application for a benefit, prior to the determination of the charge, he should be able to make a similar application for non-disclosure, to the original magistrate.

1.3 Dismissed Charges and Similar Matters (Chapter 4, paras 5.1-5.2)

(a) Charges and informations which have been dismissed (whether on acquittal or because no evidence was offered) or withdrawn or not proceeded with should generally not be disclosed. Similarly, for committals where the Attorney General has decided not to file a bill, and for convictions which have been successfully appealed against, no disclosure should be made.

(b) The only exceptions to 2.3(a) should be made where a full Police report is requested and not merely a Police "name check" or a question on an application form. Such disclosures would rely on the existence of a review proceedure.

1.4 S556A Crimes Act (Chapter 4, paras 6.1-6.6)

(a) Section 556A dismissals and s556A recognizances which have expired (without a conviction being entered) should generally not be disclosed. A s556A recognizance which is still current should be disclosed on the same basis as a conviction.

(b) Exceptions to 2.4(a) should be subject to the same conditions as those related to the disclosure of dismissed charges (2.3).

(c) People dealt with under s556A should be given a standard form explaining its effect.

1.5 S579 Crimes Act, 1900 (Chapter 4, paras 7.1-7.3)

Recognizances which satisfy the 15 year requirement of s579 and there are no subsequent conviction, must be "disregarded for all purposes whatsoever" and consequently should not be disclosed.

1.6 Miscellaneous Information (Chapter 4, paras 8-9)

(a) Offences dealt with under the Ninth Schedule of the Crimes Act 1900 should be disclosed as if convictions.

(b) Forfeited recognizances should not be disclosed.

2. DISABILITIES BECAUSE OF A CRIMINAL RECORD (CHAPTER 9)

2.1 Disabilities should be Protective, not Punitive (Chapter 9, para 2.4)

Disabilities should not be intended as a second punishment to the offender over and above that imposed by the Court in sentencing him, or as a deterrent to other offenders.

2.2 Disabilities should be Capable of Flexible Application and Not Absolute Bars (Chapter 9, para 2.5)

Disabilities which constitute an absolute bar on persons with certain classes of offences, without any possibility of consideration of the seriousness of the particular offence any extenuating circumstances, or the rehabilitation of the offender, should be avoided. As with sentencing, disabilities should primarily have regard to the offender, not the offence. Such flexibility requires the existence of a suitable body to consider individual cases on their merits.

2.3 The "Character Test" provision preferred by the Committee is "a fit and proper person to hold the position" (or whatever more precise words are more appropriate than "hold the position"). (Chapter 9, para 2.7)

2.4 Reference to Offences in Statutory Disabilities (Chapter 9, para 2.6)

Reference to offences, if necessary, should be specific and relevant to the disability created. The use of broad categories such as "indictable offences", or "felonies", should be avoided if reference to specific offences is not possible. In this situation the character test provisions should be preferred.

2.5 Statutory Disabilities should not Override the protection given to Special Classes of Offences.

Disabilities should generally exclude from their scope very old offences (including those falling under s579) and offences where no conviction was imposed (whether juvenile offences or s556A findings), and the other matters which should not be disclosed in terms of paras 1.2 to 1.7 above.

3. QUESTIONS ABOUT CRIMINAL RECORDS ASKED ON APPLICATION (CHAPTER 5)

("Applicant" is used to refer to applicants for employment, licences, positions, etc. and to any other person who may be required to disclose his criminal record to a public body for any purpose.)

3.1 A Standard Question Concerning Criminal Records is Recommended (Chapter 5, para 2.1 - 2.6)

Viz. "(a) Have you, in the last ten years, in N.S.W. or elsewhere, served any part of a sentence of imprisonment or been convicted of any offence?

(b) Are you now on a bond or recognizance in N.S.W. or elsewhere?

(c) Is there any charge against you now pending, in N.S.W. or elsewhere?

If the answer to any of these questions is "Yes", please provide details as below."

Note: This question does not require disclosure of:

(i) dismissed charges, convictions successfully appealed against, and similar matters;

(ii) s556A dismissals and expired s556A recognizances (other bonds and recognizances involve convictions and will still have to be disclosed);

(iii) juvenile offences where a conviction is not recorded (Current recognizances under s556A or s83(3) would be disclosed.)

(iv) offences over ten years old (provided the person's has not been in prison within that ten year period)

Note also

(v) This limited question is suggested as generally applicable but in some cases disclosure of some or all of the matters in (i) to (iv) may be justified;

(vi) Where a statutory disability is limited to specific classes of offences, the above question concerning "any offence" is too broad, and should be limited to reflect the statutory disability.

(vii) There is no objection to details of the conviction (e.g. date, Court, offence, penalty) being required on application.

3.2 Questions should not Force Disclosure of Criminal Records to Third Parties. (Chapter 5, para 3)

Application forms requiring completion by more than one person (e.g. by spouses, partners, co-directors, employer, sponsor, referee) should not contain questions about criminal records. Either a separate "personal particulars" sheet, or a statement on the form that a "no" answer accompanied by separate correct details is acceptable, should be included.

3.3 There is No Objection to Questions being asked about Criminal Records although a Police Record Check is also Made provided the applicant is aware of the check (Chapter 5, para 5)

3.4 Where Police Record Checks are Made, a statement to this effect should be included on application forms, e.g. "The Department reserves the right to check Police Department records to verify this statement" (following a question); or "Granting of a licence is subject to a satisfactory check of Police Department records" (where no question is asked).

3.5 A Statement about the effect of a criminal record should be included on application forms, wherever a criminal record question is asked or a Police check done. (Chapter 5, para 6)

The minimum type of explanation should be:

"A criminal record is one factor taken into account in assessing a person's suitability for employment (to hold a licence; for appointment, etc.). It does not usually disqualify an applicant except where necessary for the protection of the public interest. If rejection of your application because of a criminal record is considered, you will be given an opportunity to fully discuss the matter before any final decision is made."

3.6 Details Asked in Questions (Chapter 5, para 7)

Only those personal particulars needed for an accurate criminal record check should be required on application (date and place of birth, address, former names); other particulars used to resolve doubtful identities (height, weight, fingerprints), can be

obtained when needed. Particulars required only for a criminal record check should be headed: "Personal particulars (required for Police record check)".

4. CHECKING APPLICANTS AGAINST POLICE RECORDS, AND POLICE REPORTS (CHAPTER 6)

4.1 A list of all public bodies who have approval from the Police Commissioner to have applicants checked for criminal records should be publicly available. (Chapter 6, para 2)

New approvals should be gazetted. The Police Department's Annual Report should list how many checks were conducted that year by each public body.

4.2 Only applicants should generally be checked or reported on and not their spouses or associates. (Chapter 6, para 3)

4.3 What should be included in a Police record check? (Chapter 6, paras 4.1-4.2)

(a) Routine C.R.O. checks should be limited to convictions, unexpired s556A recognizances, pending charges (if adjourned to a set date) and matters similar to a conviction (e.g. "9th Schedule" offences).

(b) The following should not be included in routine C.R.O. checks:

(i) dismissed charges, convictions successfully appealed against, and other matters disposed of without conviction (including matters adjourned sine die, nolle prosgui entered, and forfeited recognizances);

(ii) s556A dismissals and expired s556A recognizances;

(iii) recognizances falling under s579 after 15 years;

(iv) juvenile offences, unless a conviction 83(3) or s556A recognizance was recorded.

To avoid disclosure of these matters, C.R.O. should only provide resumes of criminal records, and not photocopies.

(c) In any exceptional cases where the public interest justifies disclosure of these matters they should only be disclosed in a Police Report giving full details of the circumstances surrounding the matter, and only if there is a provision for review.

4.4 The Committee does not propose that Police record checks be limited to specific classes of offences relevant to particular positions, etc.

5. REPORTS ON BENEFIT-HOLDERS BY CLERKS OF PETTY SESSIONS (CHAPTER 7)

* Clerks of Petty Sessions are instructed to advise some public bodies when a person is charged or convicted. At present this is restricted to some public employers and some licensing/registration bodies.

5.1 Reports to a public body should only be made automatically when a person is convicted, and not when they are charged. (Chapter 7, para 3)

5.2 A Magistrate should be empowered to make an order when a person is charged or committed, either on his own motion or that of the prosecution that the employer/registration body, etc. is to be informed of the charge committal. (Chapter 7, para 3)

The defendant should be heard on the motion. In making such an order a Magistrate should consider:

(i) the position held by the person charged;

(ii) the seriousness of the offence of which the person is charged and its relevance to this position; and

(iii) the risk to the public or some section of the public if such a report is not made.

5.3 When a report is so made at the charge stage, the person concerned should be given a copy of the report. (Chapter 7, para 4)

5.4 Reports should not be made when a person is given a s556A dismissal (but may be in the case of s556A recognizances). (Chapter 7, para 5)

5.5 Reports should not be made on juveniles except where a conviction s83(3) or s556A recognizance results (Chapter 7, para 5)

6. REQUIREMENTS ON BENEFIT-HOLDERS TO DISCLOSE OFFENCES (CHAPTER 8)

(By "benefit holders" is meant employees, licensees, office holders, and anyone else holding a right, privilege or benefit which can be revoked by a public body.)

Some Acts and Regulations require benefit-holders to inform a public body when they are charged with or convicted of an offence. At present this is largely restricted to employees of various public bodies.

6.1 A person should only be required to make disclosures when convicted and not when charged. (Chapter 8, para 2.1)

* There should be provision for the Court itself to report pending charges if it considers this necessary (see

6.2 Benefit-holders should not be required to report the following: (Chapter 8, paras 2.1-2.3)

(i) pending charges, unless a magistrate orders disclosure (5.2) or the applicant gains an order that they should not be disclosed (1.2(d));

(ii) charges which have been dismissed;

(iii) s556A dismissals (there is no objection to a requirement to report current s556A recognizances);

(iv) juvenile offences, unless a conviction s83(3) or s556A recognizance was recorded.

6.3 An officer should be required to report offences to the Public Service Board or the Director-General of Education, who will then decide whether there is any need for the offence to be reported to the Department in which he works, or the headmaster of his school. Such reports should only occur if necessary for disciplinary action or supervision to be undertaken, and should avoid disclosure of the offence within the Department or school more than is necessary. (Chapter 8, para 3.1)

6.4 Failure to disclose as required should not automatically involve severe penalties, but should depend on the seriousness of the offence, and its relevance to his position. (Chapter 8, para 4)

7. FAIR PROCEDURES FOR USES OF CRIMINAL RECORDS (CHAPTER 10)

7.1 Applicant's criminal record not to be initially considered. (Chapter 10, para 2)
An applicant's criminal record should not be considered until a decision has been made as to whether he would otherwise be a successful applicant so that it is clear whether or not the criminal record was the reason for refusal. If so, this should be noted on the application form. (Exception: where the criminal record is an absolute bar.)

7.2 No final rejection without opportunity to discuss. (Chapter 10, para 4)

A final decision to reject an application (or to take any other adverse action against the person because of his record) should not be made until the person has been given adequate opportunity to discuss the record in order to:

(a) verify that it relates to him;

(b) check it for accuracy; and

(c) provide any details of extenuating circumstances or his subsequent conduct.

7.3 The public body should initiate contact with the person to invite discussion, and should not only do so on request. (Chapter 10, paras 6 and 8)

7.4 Contacting applicant should avoid disclosure to third parties. (Chapter 10, para 8)

To give the person adequate opportunity for discussion the public body should automatically contact the person and offer him a personal interview to discuss the matter. Personal contact (visit by officer, telephone call) is preferable, but if writing is necessary it should not specifically disclose the fact of conviction (thereby risking disclosure to third parties) but only indicate that a "query" has arisen in regard to the application, and offer an opportunity to discuss this "query".

7.5 The person's record should not be discussed with him on the telephone but only in a personal interview unless the person specifically requests telephone discussion. (Chapter 10, para 7)

7.6 At any interview the full details received from the C.R.O. should be read to, and on request shown to, the applicant. (If he wants a copy of his complete criminal record he can get one from the Police Department.)

7.7 Copies of Police character reports should usually be available to persons adversely affected. (Chapter 10, para 9)

(a) If an application is to be rejected (or other adverse action taken) because of disclosure of a criminal record as part of a discursive Police report (which also contains opinions about the applicant's character, honesty, activities, etc. or about other people) he should be given a copy of the report to read at the interview, if he requests an interview to discuss the refusal reasons.

(b) If the Police Commissioner certifies that it is not in the public interest for this disclosure to occur (on grounds such as disclosure of identity of informant, privacy of third parties referred to, Police Intelligence information, etc.), a copy should instead go on request to the relevant appeals body (see 8 below) or some other independent party to inspect on his behalf and disclose as much to him as is possible in the circumstances.

7.8 Notification of Availability of Review (Chapter 10, para 10)

If the application is rejected (or other adverse action taken) the person should be notified of any appeal rights he has. He should also be told if there are any other similar positions, licences, etc. for which his record might not be a bar, and after what period of time (if any) a further application by him might be reconsidered.

7.9 Procedure where a charge is pending against an applicant. (Chapter 10, para11)

Where a charge is pending which, if a conviction, would result in refusal of an application then:

(a) wherever possible, a decision should be deferred until the charge is heard; or

(b) wherever possible the application should be approved (on probation, if possible) subject to appropriate supervision until the charge is heard; or

* (c) if neither is possible then the public body concerned should give preference to an acquitted applicant (over equally qualified applicants) when a subsequent similar vacancy occurs, as he would have had the previous position if not for the unsuccessful charge.

7.10 No retention of criminal records after use. (Chapter 10, para 12)

Wherever a public body has obtained details of a person's criminal record it should destroy them after use. It will usually be sufficient to retain records for a number of months only after use to allow time for appeals and representations. If it is necessary to consider a person's criminal record on a later application, or to assess whether a later offence is part of a pattern of offences, details should be obtained again from Police records or the person. The only situation where the record should be retained is where a person's work is to be supervised or certain promotions denied to him because of it, and possibly in cases where an application has generated a significant amount of correspondence referring to the person's record, so that to delete details of the criminal record would make this correspondence meaningless.

8. RIGHT OF REVIEW (CHAPTER 11)

There should be an appropriate Review mechanism to reconsider a decision based on criminal record information.

CHAPTER 13:

IMPLEMENTATION OF THE COMMITTEE'S POLICIES.

1. THE COMMITTEE'S POLICIES

In this Report, the main policies put forward have concerned four main areas;

(iv) limiting the growth of criminal record use by public sector bodies to where it is necessary for the protection of the public interest;

(iii) the repeal or amendment of some unnecessarily restrictive statutoty disabilities (mainly in Chapter 9);

(i) the adoption by public bodies using criminal records of principles for fair disclosure (Chapters 4, 6, 7 and 8), and fair use (mainly Chapter 10);

(ii) the provision of an opportunity for review of adverse decisions made on the basis of a person's criminal record (Chapter 11).

Of these, the principles for fair disclosure and fair use are the most important.

2. METHODS OF IMPLEMENTATION

There are three main methods by which the Committee could have its policies implemented:

(a) Voluntary compliance with the policies by the public bodies storing and using criminal records;

(b) Legislation embodying the principles (and any exceptions to them). Such legislation would of necessity be very general to allow for the widely differing purposes for which criminal records are used and the differing bodies using them;

(c) Legislation empowering the responsible Minister to make detailed regulations appropriate to particular users of criminal records, with a framework of very broad principles in the legislation.

3. LEGISLATION

A few of the Committee's policies can only be implemented by legislation. The repeal or amendment of statutory disabilities and the provision of rights of appeal fall into this category.

4. VOLUNTARY COMPLIANCE

4.1 The principles of fair disclosure and fair use of criminal records are capable, however, of being implemented voluntarily by the public bodies concerned. They only require changes in administrative procedures, and in some cases, changes on the attitudes of administrators. Provisions for damages and penalties are not necessary.

Wherever possible the Privacy Committee aims to secure voluntary compliance with its policies rather than compulsory compliance

through legislation and sanctions. In the Committee's view changes voluntarily adopted are more likely to be properly implemented with goodwill and flexibility than changes forced by legislation. This is particularly so where complex administrative procedures are involved, as they are here.

4.2 For these reasons, the Committee intends to seek implementation of its policies for fair disclosure and fair use of criminal records in the public sector in the following way:

(i) by preparation of a report of each public body using criminal record information (i.e. the bodies listed on page 4), outlining that body's use of criminal records and applying the Committee's policies to its practices, in the form of the Schedules to this Report. Any changes necessary for the body to comply with the Committee's policies will then be discussed.

(ii) by discussion and negotiation with the Police Department and the Justice Department concerning Police record checks and reports, and reports by Clerks of Petty Sessions;

(iii) by preparation of a final version of this report, complete with all schedules, once the process of negotiation and discussion is complete.

The Committee is confident that this procedure will secure reasonably uniform fair disclosure and fair use policies throughout the public sector.

4.3 Although the Committee does not consider that it is necessary, to have these principles embodied in legislation or regulations, the Committee does consider that they should be given the stamp of statutory approval. If public bodies are aware that the principles are supported by Parliament they are more likely to conscientiously adopt and implement them and it will add to public confidence. The Committee considers that this "statutory approval" could best be achieved by inclusion in a Schedule to a Criminal Records (Fair Practices) Act which will include the legislative changes mentioned in paragraph 4 above and other changes in the collection, storage and use of criminal records which the Committee will be recommending in further reports in this series). The Schedule would be stated to be an expression of Parliament's approval of the principles contained therein, but would not be binding or enforceable in any way and no damages or penalties would result from breaches of it. Complaints would be dealt with by the Committee and experience to date shows this to be adequate. Furthermore, the Schedule could set out any exceptions to the principles which are necessary. The Committee anticipates that these will be very few.

5. The Private Sector.

This stand if taken by the Government and its instrumentalities will offer clear guidance to the private sector in its methods of asking questions relating to criminal records and acting on the information when received.

APPENDICES AND SCHEDULES

PART F

The Appendices and Schedules referred to in the report are annexed hereto.

Schedules - at this stage only a selection of the completed schedules are included in this report. They are as follows:

Employment:

C - Employment by the Public Transport Commission.
H - Employment by (and Agents for) the Totalizator Agency Board.

Licensing and Registration:

M - Licensing Under the Commercial Agents and Private Enquiry Agents Act, 1963.
P - Licensing under the Motor Dealers Act, 1974.

Civil Rights and Privileges:

DA - Appointment as a Justice of the Peace.
EA - Members of Governing Bodies of Charities.

The Committee is currently discussing its proposals with the Public Sector users listed, in an effort to gain some general acceptance of the policies and to evaluate them in the light any exceptions which may be presented.

TABLE 1: EXAMPLES OF STATUTORY DISQUALIFICATION.

A. "Character Test" Provisions.

EMPLOYMENT.

1. For a probationer's employment to be confirmed, the head of the branch in which he is employed must certify his "fitness". (Transport Act, 1930)

2. The Board may make regulations for "regulating and determining who are fit and proper persons to be employed in temporary employment ..." (Public Service Act, 1902, s20(1)(c)).

3. An officer is guilty of a breach of discipline if he "is guilty of any disgraceful or improper conduct". (Public Service Act, 1902. s56(2)(f)).

LICENSING/REGISTRATION.

4. - That an applicant "is not of good fame orcharacter" or "is not a fit and proper person to hold a licence" is grounds for refusal or revocation of a mercantile agents or private enquiry agents licence. (Commercial Agents and Private Enquiry Agents Act, 1963 s10(6)).

(Similar provisions: Auctioneers and Agents Act, 1941, s23(10); Travel Agents Act, 1973 s13; Builders Licensing Act, 1973 s12)

5. - An applicant to be a motor dealer must be a "fit person to hold the license applied for " (Motor Dealers Act, 1974, s18)

6. - A licence under the Securities Industries Act, 1970 may be refused or revoked if the applicant or holder is not "a fit and proper person to hold the licence" (s47).

(Similar provisions: Charitable Collections Act, 1934, s6

7. - Most registration Acts administered by the Health Commission allow registration to be revoked if a person is "not of good character". (Medical Practitioners Act, 1938, s27; Nurses Registration Act, 1953, s219 (1); Dentists Act 1934 s8; Opticians Act, 1930 s15; Optometrists Act, 1930 s15)

8. - An applicant for a private employment agents or theatrical agents licence must be "in all respects a fit person to hold the same" (Industrial Arbitration Act, 1940, s155).

9. - An applicant for a liquor licence must not be "of drunken or dissolute habits or otherwise of bad repute" (Liquor Act, 1912, s29)

ADMINISTRATIVE AND MISCELLANEOUS.

10. An applicant to become an adoptive parent must be "of good repute and ... a fit and proper person to fulfil the responsibilities of a parent." (Adoption of Children Act, 1965) .

TABLE 1: (Contd.)

B. PROVISIONS CONCERNING CONVICTIONS.

(NOTE: Provisions concerning convictions relating specifically to a person's employment, licence, registration, or benefit held are not included. Only provisions concerning convictions not specifically related to such matters are included.)

Employment.

1. - An officer of the Public Transport Commission who is "convicted of any felony or is sentenced to imprisonment for any term of or exceeding six months" may be dismissed or otherwise disciplined" (Transport Act, 1930, s107; Government Railways (No. 2) Act, 1912, s80).

2. - An officer who is"convicted of any felony or other infamous offence" may "according to the nature of the offence" be subject to disciplinary proceedings. (Public Service Act, 1902, s6J(1)).

LICENSING/REGISTRATION.

3. - A person who "has been convicted of an offence punishable on indictment" cannot be licensed as a mercantile agent or private enquiry agent (Commercial Agents and Private Enquiry Agents Act, 1963, s10(6))

4. - A motor dealer's license may be revoked if the holder is "convicted of an offence involving fraud or dishonesty punishable on conviction by imprisonment for three months or more"(Motor Dealers Act, 1974, s18).

(Similar provisions: Companies Act, 1961, s122; Business Names Act, 1962, s5A; Securities Industries Act, 1970 s46)

5. - A motor dealer may not, without permission, employ as a manager a person "who within the previous 10 years has been convicted of ... any offence involving fraud or dishonesty". (Motor Dealers Act, 1974, s57 and Regulation 6A(2), 1976 - No. 145).

6. - Most Registration Acts administered by the Health Commission provide that the registration Board may refuse to register, or revoke the registration of, a person "who has in New South Wales been convicted of a felony or misde meanour or elsewhere of an offence which if committed in New South Wales would have been a felony or misdemeanour." (e.g. Medical Practitioners Act, 1938, s17; Dentists Act, 1934, s10; Opticians Act, 1930, s15)

7. A private employment agent's or theatrical agent's licence must be cancelled "upon a third conviction within three years from the first conviction" (Industrial Arbitration Act, 1940, s144).

CIVIL RIGHTS AND LIBERTIES.

8. Schedule 1 of the Jury Act, 1977 disqualifies from jury service the following persons:

1. A person convicted in New South Wales or elsewhere of -

(a) treason;

(b) an offence carrying a penalty of imprisonment, or penal servitude, for life; or

TABLE 1: (Contd.)

(c) any offence and sentenced to imprisonment, or penal servitude, for a term exceeding 2 years.

2. A person who at any time within the last 10 years in New South Wales or elsewhere -

(a) has served any part of a sentence of imprisonment or penal servitude or has been onparole in respect of any such sentence; or

(b) has been detained in an institution for juvenile offenders.

3. A person who at any time within the last 5 years in New South Wales or elsewhere -

(a) has been convicted of any offence which may be punishable by imprisonment or penal servitude;

(b) has been bound by recognizance to be of good behaviour or to keep the peace;

(c) has been the subject ofa probation order made by any court;

(d) has been disqualified by order of a court from holding a licence to drive a motor vehicle or omnibus for a period in excess of 6 months.

9. Crimes Act, 1900, s466: "After the conviction of an offender for any felony, until he has endured the punishment to which he was sentenced, or the punishment, if any, substituted for the same, he shall be incapable of holding, or being elected or appointed to any office, or of exercising any electoral or municipal franchise".

10. Parliamentary Electorates and Elections Act, 1912, s21: "No person ... attainted of treason or who has been convicted and sentenced to a term of imprisonment of one year or longer and is in prison pursuant to such sentence shall be entitled to have his name placed on or retained on any roll of the electors for the Assembly or to vote at any election for the Assembly."

11. The Constitution Act, 1902 provides that if any Legislation Councillor or Member of the Legislative Assembly "is attainted of treason or convicted of felony or any infamous crime" "his seat in such Council (Assembly) shall thereby become vacant".

TABLE 2: Examples of Questions Asked in Application Forms and Interviews.

EMPLOYMENT.

1. "Have you ever been charged with or convicted of any offence including a criminal or gaming offence." (Totalisator Agency Board. The Board intends to alter this to: "Have you ever been convicted of or is there any charge pending against you for any offence including a criminal or gaming offence.")

2. "Have you ever been found guilty of any offence in any Court in New South Wales or elsewhere?" (Public Transport Commission).

3. "Convictions by a Court of Law" (N.S.W. Ambulance Board).

4. "Have you ever been before a police Court or any other Tribunal in connection with any offence or incident?" (Board of Fire Commissioners)

LICENSING/REGISTRATION.

5. Applicant must disclose whether he has, in N.S.W. or elsewhere"been convicted of any offence or had any offence proved against him" (Auctioneers and Agents Act licensing).

6. "Have you ... in the last ten years in New South Wales or elsewhere been charged with or convicted of any criminal, traffic, or other type of offence?" (Motor Dealers Act licensing).

7. Applicants must disclose whether they have, in the last 15 years "been convicted of any offence other than traffic offences in the State or elsewhere or are there any proceedings now pending which may lead to such a conviction?" (Securities Industries Act licensing).

8. Applicant must sign a statement that "I have not been convicted in New South Wales of a felony, misdemeanour, crime or offence or convicted elsewhere of an offence which if committed in New South Wales would be a felony, crime or offence...." (Registration administered by the Health Commission - doctors, dentists, nurses, optometrists, pharmacists etc.).

9. Applicant must disclose "particulars of any criminal offences proved against you under the laws of New South Wales or elsewhere punishable by imprisonment for a period in excess of six months" (Travel Agents Act licensing)

10. "Have you ever been convicted or appeared before any Court for any offence against the Liquor Act or any other Act?" (liquor licensing).

OTHERS.

11. "Have you ever been convicted or found guilty of any offence (including traffic offences)?" (appointment as a Justice of the Peace).

12. "Full details of all court convictions ..." (adoption applicants).

CONTINUED

1 OF 2

Press Statement - August 1969

The Premier, Mr. Askin, said today Cabinet had approved more liberal conditions covering employment in Government departments and instrumentalities of people with court records.

In particular, special consideration would be given to juveniles under 18 years of age who apply for government jobs, he said.

"In future, first offences by juveniles will, if at all possible, be disregarded," Mr. Askin said.

"Some offences committed during youth can be viewed in an entirely different light from the same offence committed by an older person," he said.

It is the explicit desire of the Government that the rejection of applications by first offenders who were under 18 at the time of the offence should be exceptional."

Mr. Askin said the Government recognised that it must accept a a good deal of responsibility for the rehabilitation of offenders by offering employment opportunities wherever possible.

"There has been a much greater degree of co-operation by Government authorities in the rehabilitation of ex-prisoners than is generally believed, but our complete review of policy will create even more employment opportunities in the future," he said.

Mr. Askin said the Government felt it should set an example to private employers in helping convicted persons rebuild their lives and become productive members of the community.

He said the Public Service Board had set up a Committee under the chairmanship of Mr. H.H. Dickinson, a Member of the Board, to examine the employment policies of the various departments and statutory bodies.

The Committee's review was followed by a conference between the Ministers for Transport and Justice, the Chairman of the Public Service Board, the Commissioner for Railways and the heads of other statutory authorities.

"It must be remembered there are numerous positions in the Government Service, as there are in private industry, where the nature of the work demands the highest standard of character and integrity," Mr. Askin said.

"There are other areas in which conviction for certain types of offences must automatically exclude applicants from jobs in mental hospitals, prisons, courts, child welfare establishments or other similar institutions," he said.

But there remains a wide field of employment in which convictions should not be a barrier - only the suitability of the applicant for the type of work should be considered.

"There are other fields where convictions should be taken into account along with other factors, but where convictions should not in themselves disqualify applicants."

This last category offered the most scope for expanding employment opportunities for people with court records.

"All Government authorities will consider each application on its merits and with an open mind," Mr. Askin said.

"Factors which will be considered include the nature of offences, their frequency, age at the time, lapse of time since the last offence, bond conditions, mitigating circumstances and general character."

SCHEDULES.

EMPLOYMENT (SCHEDULES A-M).

A. Employment under the Public Service Act, 1912.
B. Employment under the Teaching Service Act, 1970
C. Employment by the Public Transport Commission.
D. Employment by the Commissioner for Motor Transport.
E. Employment by the Commissioner of Main Roads.
F. Police Officers
G. Prison Officers
H. Employment by (and agents for) the Totalisatór Agency Board.
I. Employment by the Board of Fire Commissioners.
J. Employment by the Central District Ambulance.
K. Employment by the Grain Elevators Board.
L. Employment by the Metropolitan Water, Sewerage & Drainage Board.
M. Employment by the Sheriff.

LICENSING AND REGISTRATION. (SCHEDULES N-ZA).

N. Licensing under the Commercial Agents and Private Enquiry Agents Act, 1963.
O. Licensing under the Auctioneers and Agents Act, 1941.
P. Licensing under the Motor Dealers Act, 1974.
Q. Legislation administered by the Corporate Affairs Commission.
R. Licensing and Registration administered by the Health Commission of N.S.W.
S. Licensing of Private Employment Agents, Theatrical Agents and Theatrical Employers.
T. Licensing of Travel Agents.
U. Licensing of Builders.
V. Liquor Licensing
W. Firearms Licensing
X. Motor Vehicles Licensing.
Y. Licensing under the National Parks and Wildlife Act, 1967
Z. Miscellaneous Police Licensing.
ZA. Solicitors and Barristers.
YA. Registration as a Public Accountant.

CIVIL RIGHTS AND PRIVILEGES. SCHEDULES AA-DA)

AA. Entitlement to Vote.
BA. Entitlement to hold Public Office (Elected or Appointed).
CA. Selection of Juries.
DA. Appointment as a Justice of the Peace.

SCHEDULES (Cont'd)

ADMINISTRATIVE BENEFITS AND MISCELLANEOUS.

EA. Members of Governing Bodies of Charities.

FA. Adoptive Parents, Foster Parents, Guardians.

GA. Police Boys' Club Instructors.

HA. Scoutmasters.

IA. Special Constables.

JA. Authorised Controllers under the Summary Offences Act 1970

KA. Benefits Administered by the Department of the Attorney General and of Justice (Remissions; Legal aid; ex-gratia criminal injuries compensation).

LA. Visas.

SCHEDULE C.

EMPLOYMENT BY THE PUBLIC TRANSPORT COMMISSION.

A. General Employment (Other than in the Trading and Catering Services Branch).

APPOINTMENT.(1-7).

1. Statutory Provisions re Convictions.

The Transport Act, 1930 empowers the Commission to employ permanent and casual staff (ss 100,101). An appointment is initially on six months probation, after which it may be confirmed by the Commission (s102). For confirmation, the head of the branch in which the officer is employed must certify as to his "fitness". Probation may be terminated at any time if the head certifies as to the employee's "unfitness". "Fitness" is not defined.

The Government Railways(No. 2) Act 1912 makes similar provision concerning railway employees (ss 70 to 75).

2. Questions Asked of Applicants.

2.1 The Commission's Application for Employment Form, Q9, asks

"Have you ever been found guilty of any offence in any Court in New South Wales or elsewhere?" A "Yes" or "No" answer is required.

2.2 If the applicant answers "Yes", he is then asked to provide details by an interviewing officer. The procedure then followed is set out in paragraphs 1.1 to 1.4 of the annexed written instructions issued by the Personnel Administration Manager (as revised 1/10/1976).

3. Criminal Record Checks on Applicants.

3.1 The Police Deparyment's Criminal Records Office is requested to check the criminal records of all applicants considered otherwise suitable for employment, except for:

(a) senior appointments; and

(b) applicants for positions as bus drivers, conductors and conductresses. In these cases the check is done by the Department of Motor Transport when the licence necessary for these positions is applied for. (See Schedule P.)

3.2 Both applicants who admit to offences (but are employed notwithstanding) and applicants who claim they have no offences (and are employed) are checked. The check is done after employment commences, while the employee is on probation.

3.3 The standard name checking procedure is adopted. The information is obtained for the Employment Section by the Security Services Section of the Commission.

3.4 In 1975 6,785 applicants were checked and 1.698 (15.5%) were found to have criminal records.

3.5 The Commission believes that authority for the checks arises

from a verbal agreement between the then Commissioner for Railways and the Police Commissioner, in approximately 1940.

4. Disclosure to the Applicant.

The annexed instructions by the Personnel Administration Manager provide for the following:

(i) An applicant who discloses convictions at the initial interview and is to be rejected because of them is to be informed verbally by the interviewing officer that this is the reason for rejection. The interviewing officer is instructed to decide whether the applicant is otherwise suitable for the position before asking the applicant to disclose details of his convictions.

(ii) Where a probationer has not disclosed convictions which are revealed by the subsequent check, no decision to terminate his probation is made until the record has been discussed with him.

5. Appeals.

An applicant has no right of appeal because of a refusal to employ because of a criminal record. A probationer has no right of appeal against termination of his probation because of his record (which he had not disclosed in obtaining employment). In contrast, employees dismissed because of offences committed after employment do have a right of appeal (see para 11 below).

6. Policies.

6.1 Failure to disclose convictions at the initial interview is not automatic grounds for termination of probation (see annexed instructions by the Personnel Administration Manager).

6.2 Apart from paragraph 2.3.1 of the attached instructions by the Personnel Administration Manager, the policies applied by the Commission are not in writing.

7. Retention and Dissemination of Data Obtained.

7.1 The record details obtained from the C.R.O. are retained permanently in the files of the Employment Section and for about 15 years in the Security Services Section. They are checked if the person re-applies at a later date for employment by the Commission.

7.2 No third parties have access to the records.

DISMISSAL AND DISCIPLINE (8-11).

8. Statutory Provisions.

s107 of the Transport Act provides that an officer who is "convicted of any felony or is sentenced to imprisonment for any term of or exceeding six months" may be dismissed, suspended, demoted or reduced in pay by the head of his branch. (s80 of the Government Railways (No. 2) Act is of identical effect).

s109 of the Transport Act provides the same penalty where an officer "is guilty of misconduct or of breaking any rule or regulation". (s82 of the Government Railways (no. 2) Act is of identical effect).

9. Method of Obtaining Information.

9.1 Where an employee is charged with an offence involving Commission property, the Commission's Security Services Section is advised by the Police Officer concerned who prepares a report on the matter. The Security Services Section will often have brought the matter to Police attention.

9.2 Where employees are charged with matters unrelated to their employment the Security Services Section has no organised means of being informed of such charges. Where they become aware of such matters (e.g. through press reports or reports from superior officers) they obtain further details from the Clerk of Petty Sessions at the Court concerned, or the Clerk of the Peace. A report will be prepared either at the charge or conviction stage depending on when the offence comes to the Section's attention.

9.3 In either case a report on the matter is sent to the Personnel Manager of the branch in which the employee works, for him to consider whether to take disciplinary action.

10. Disclosure to Employee.

An employee is called in to discuss the offence before any disciplinary action is taken against him If such action is taken he must be advised in writing (Transport Act, ss107, 109; Government Railways (No. 2) Act, ss 80, 82)

11. Appeals.

There is a right of appeal against any disciplinary action or dismissal to an Appeals Board consisting of a Chairman (or Vice-Chairman) with the qualifications of a Magistrate or barrister or solicitor of five years standing, a representative of the Commission, and an elected officer from the employee's branch (Transport Act, s114; Government Railways (No. 2) Act s 87) There is a further right of appeal to the Commission (s 115F; s 89).

12. Policies.

No written policies are available.

13. Retention and Dissemination of Data Obtained.

13.1 The reports are retained in the Security Services Section for approximately 15 years, and on the employee's file in the personnel section permanently.

13.2 There is no third party access to these records.

PUBLIC TRANSPORT COMMISSION OF NEW SOUTH WALES.

1st October, [illegible]

To

Mr. G. R. Eastod,
ASSOCIATE MANAGER (EMPLOYMENT)

[illegible]

Telephone: 33.1871

Recruitment of Staff

As you are aware there has been considerable representation by the Privacy Committee on a number of matters, the most important being the question of acceptance or rejection of applicants who have police records. We already have a system operating which is acceptable but I think it is important that the complete procedure be laid down so that there will be no misunderstanding.

1. Applicants who admit to offences

1.1. The suitability of the applicant for employment should initially be determined by interview without any regard to offences.

1.2. Once suitability has been determined on a general basis the question of offences is to be taken into consideration.

1.3. The interviewing officer's comments in respect of 1.1. and 1.2. must be clearly shown on the back of the application form.

1.4. If the applicant is to be refused employment in respect of either 1.1. or 1.2. he is to be told the reason.

1.5. In the event of rejection for employment as a bus conductor/conductress or bus driver being because a licence would not be issued under the guide lines issued by the Department of Motor Transport, this fact is to be conveyed to the applicant who is to be informed that he may take the matter up with that Department. When this information is given to the applicant he must have been previously considered suitable.

2. Applicants who claim they have no offences

2.1. The interviewing procedure will be conducted as in 1.1. and 1.3. If the applicant is refused employment he is to be informed of the reasons.

2.2. Where previous records are held which disclose that the applicant has had offences, he is to be so advised and the matter discussed with him. Should his application be rejected he is to be informed of the reason.

2.3. Should an applicant be sent on for employment and subsequent advice is received that he has convictions the following procedure is to be adopted:-

2.3.1. If the offences are of such a nature either by:-

(a) number of offences, and/or

(b) type of offence as related to the position being filled, and/or

(c) length of time since the offence/s were committed, and/or

(d) age of the employee when the offence/s were committed,

as to be considered of a minor nature he should be interviewed by the controlling officer who is to submit a report as to what took place at the interview, what the employee's work record has been like since employment and a recommendation as to whether or not he should continue employment.

2.3.2. The controlling officer is NOT to be given details of the information received from the security service but is to be informed that certain information of an unfavourable nature has been received by the Commission.

2.3.3. Should the recommendation be to terminate the employee's service, it is to be clearly established that such recommendation is based on work, etc., facts and not on suspicion.

2.4. Offences of a serious nature

2.4.1. If the offences are of such a serious nature as to indicate that the employee's services should be terminated, he is to be called to the employment section for interview.

2.4.2. At the interview the employee is to be informed of the details of the offences recorded against him. Identity is to be clearly established and the employee allowed a full opportunity to make an explanation.

2.4.3. Should the final result be that the employee's services are to be terminated, he is to be told the reasons.

It is of extreme importance that details of offences held by the Commission be not made available to other than yourself, your officer who deals with such matters and the employee concerned. We have to ensure that such cases are discreetly dealt with and that the suitability or otherwise of the employee is clearly established on:-

(1) General grounds

(2) Offences

(3) A combination of both

Please ensure that the procedures are fully understood by your staff.

W.T. JACKSON,
Personnel Administration Manager

EMPLOYMENT BY THE PUBLIC TRANSPORT COMMISSION.

Points for Discussion.

The following discussion points concern areas in which the Committee's Draft Policies specifically relate to your present procedures. If a relevant Policy is not raised, this is because it is assumed to correspond with such procedures.

1) Statistics. How many applicants were rejected or employees dismissed on the basis of criminal record information, in 1975-76 and 1976-77 and if possible, state the general types of offences necessitating such action.

2) Questions asked on Application Forms. On its employment application forms, the Commission uses the question - Have you ever been found guilty of any offence in any Court in N.S.W. or elsewhere?

One such form requires the furnishing of particulars. Do you see any objections to the Commission's use of the standard question (or similar construction) referred to in Draft Policy 2.1? This question overcomes the requirement to disclose S.556A(1a) dismissals or expired bonds or recognizances under S.556A(1b) of the Crimes Act.

We consider that where Police record checks are made, a statement to this effect be included on the application form as well as some explanation of the effect that such a criminal record may have on the applicant's suitability for employment. This may avoid the problem of false certification as to the accuracy of the answer regarding the applicant's criminal record.

Your attention is directed to Draft Policies 2.1, 2.3, 2.4, 2.5 and 2.6.

3) Disclosure to the Applicant. The Committee appreciates the similarities between its Draft Policies on the "Fair Procedures for the Uses of Criminal Records" and the "Recruitment of Staff" memorandum, from the Commission's Personnel Administration Manager (1/10/76). However, no statement is made regarding the procedure, where a charge is pending against an applicant or employee and in this regard the Committee would ask for your comments on Draft Policy 6.8.

4) Retention of Criminal Records After Use. The Committee is aware of your desire to check the record of an applicant, should he re-apply for employment at some later time, however, we do not feel this is sufficient reason for the retention of criminal information. Except for the situations envisaged in Draft Policy 6.9 we recommend the destruction of all criminal record information, after immediate use. If you see this as impossible, please comment.

5) Dissemination of Criminal Record Information. If our abovementioned policy is acceptable, it would obviate any privacy problems arising from the retention of such records.

6) Dismissal and Discipline. - Methods of obtaining information.

We would appreciate clarification as to whether the Clerk of the Peace, or Police officers automatically report details of charges and/or convictions to the Commission, where an employee has not been charged with an offence against Commission property.

In respect of the reporting of charges we would be interested in your comments, Draft Policy 3.3 (N.B. this refers to the employee personally disclosing to his employer).

Draft Policy 5.2 states that reports made to a public body, ie., the Commission, should only be done automatically at the stage of

conviction. Having regard to the Committee's Draft Policy 5.3, would any problems be caused by such a recommendation? You may also comment on the suggestion that when such reports are made, the employee concerned should be given a copy for him to verify. (N.B. Dismissals under Section 556A of the Crimes Act are not classified by the Act as convictions - See Draft Policy 5.5 for comment).

7) Disclosure to Employee. - See Draft Policies on "Fair Procedures for the Use of Criminal Records".

8) Appeals. It is not specified as to whether the Commission notifies its employees of their rights of review and appeal at the time when the offence is discussed or when an adverse decision is taken against him (See Draft Policy 6.6).

9) Retention of Dissemination of Data Obtained. See Discussion points 4 and 5.

Is there any peculiar reason for wishing to maintain criminal record information on employees rather than applicants?

EMPLOYMENT BY AND AGENTS OF, THE TOTALIZATOR AGENCY BOARD.

APPOINTMENT (1-7)

1. Statutory Provisions re Convictions.

The Totalizator (Off-Course Betting) Act, 1964 empowers the Board to employ permanent and casual staff (S. 9 (1)). The Act makes no mention of probation or confirmation. Nor is there any "fit and proper person" provision in the Act.

2. Questions Asked of Applicants.

Applicants are asked to disclose crime data on application forms as follows:

" Have you in the last ten years been convicted of or is there a charge pending against you for any offence including a criminal or gaming offence? "

In addition, the matter is also raised again at interview (notwithstanding a previous negative answer on the application form) to re-affirm a "no" answer or to obtain details in the event of a "yes" answer.

3. Criminal Record Checks on Applicants.

3.1 The Police Department's Criminal Records Office is requested to check the criminal records of:-

(a) all successful applicants for employment;

(b) all successful applicants for appointment as agent;

(c) agents' staff including the spouse of agents; and

(d) cleaners whose work involves cleaning branches and agencies out of business hours.

3.2 Checks are made in respect to all personnel in view of the nature of the Board's business and because there can be a movement of staff between betting/cash handling work and administrative/service duties.

3.3 Almost without exception the check is done after selection and offer of appointment but may or may not be after the commencement of duty, depending upon the speed of advice from the Police Department.

3.4 The spouses of agents are checked because they almost invariably take part in the running of the agency and accordingly are regarded as potential employees of agents. In the event that an adverse report is furnished which necessitates action, the report is confirmed during a discreet and private discussion with the husband or wife of the agent without the release of such information by the Board's officers to the agent. This protects the confidentiality of the information between the Board and the agent's spouse.

3.5 Crime data is obtained by the Board upon standard specific request to the Police Department. The Board supplies the Police with details of the applicant as follows:-

(a) surname;

(b) given names;

(c) address;

(d) date of birth;

(e) height; and

(f) weight.

3.6 In response, the Police grant inspection of photocopy of selective, relevant parts of an applicant's record as follows:-

(a) Location of Court hearing.

(b) Court classification.

(c) Date of conviction.

(d) Offence and penalties imposed.

(e) Charges dealt with but dismissed or not proceeded with.

(f) Convictions which have been successfully appealed.

(g) Discharged cases under S. 556A of Crimes Act.

(h) Convictions of persons under 18 years of age.

3.7 The Board believes that the Police use some discretion in not supplying information in regard to isolated, minor matters which occurred many years ago.

These have been isolated reports provided which presumably were findings under the Child Welfare Act on matters such as uncontrollable child, etc.

3.8 Data was obtained on 2,376 applicants in the two year period 17/8/75 to 17/8/77. 99 or 4.17% of those checked had criminal records.

3.9 Authority for the checks arises from a personal arrangement between the General Manager of the Board and the Commissioner of Police in 1964 when the Board commenced operations.

4. Disclosure to the Applicant.

If any matter is sufficiently recent or serious enough to be relevant, it is discussed by a senior officer of the Board with the applicant, particularly if a decision adverse to the applicant is contemplated. All details of the crime data received are disclosed at this discussion. This procedure:

(a) obviates incorrect identification and confirms the crime report;

(b) provides background information to the matter and the opportunity for representations by the person to enable a better weighing of the facts in determining whether the appointment should be annulled.

5. Appeals.

There are no formal appeal procedures available to an applicant refused employment because of a criminal record.

6. Policies.

6.1 There is no written policy on these matters but the purpose is to ensure that the organisation is manned by people whose background and character fits into the Board's function of conducting legalised off-course betting facilities involving the handling of large volumes of cash in a gambling environment. The Board maintains that it is imperative to observe stringent selection procedures and accordingly, a recent history of dishonesty or disreputable behaviour must be taken into consideration.

6.2 However, the Board emphasises that because of the human factor involved, each case is considered on its merits, i.e., age at and length of time since conviction, seriousness of offence, relevance to specific duties, etc., is taken into account.

6.3 The Board considers that since decisions are handled at a sufficiently high level of management, deserving cases are not automatically barred by the existence of a criminal record. In fact, 89.9% of these cases are approved for continuance of appointment.

7. Retention and Dissemination of Data Obtained.

7.1 The record details obtained from the C.R.O. are retained permanently in a single, confidential file securely held by the Personnel Officer. Only those Board officers involved in the decision or implementation of the decision to continue or annul the appointment have access to these records.

7.2 No third parties have access to the records.

DISMISSAL AND DISCIPLINE (8-11)

8. Statutory Provisions.

S. 3(6)(e) of the Totalizator (Off-Course Betting) Act provides that the office of a member of the Board shall become vacant if he:-

> "is convicted in New South Wales of a felony or of a misdemeanour which is punishable by imprisonment for twelve months or upwards, or is convicted elsewhere than in New South Wales of an offence which if committed in New South Wales would be a felony or a misdemeanour which is punishable as aforesaid".

S. 18 specifies offences against the Act by managers, secretaries, officers, employees or agents of the Board, but is silent as to dismissal or internal discipline of offenders. The Act has no "fit and proper person" provision.

9. Method of Obtaining Information.

9.1 Where an employee or agent is involved in practices, whether negligent or criminal but which directly relate to the Board's activities, the Board is generally informed via internal channels. An employee or agent is in those circumstances disciplined internally (and often dismissed) before any criminal charges, if warranted, are brought against him. (See appended brochure entitled, "A Warning to Staff and Agents").

9.2 Where an employee or agent is charged with matters unrelated to his employment the Board has no organised means of being informed of such charges. A newspaper cut-out on an employee's recent conviction was once received by the Board, but this type of crime data flow is rare.

10. Disclosure to Employee.

An employee or agent is called in to discuss the offence before any disciplinary action is taken against him. (See appended brochure on warning policy).

11. Appeals.

There are no formal appeal procedures available to an employee disciplined or dismissed because of a criminal record.

12. Policies.

No written policies are available.

13. Retention and Dissemination of Data Obtained.

See 7 above.

TOTALIZATOR AGENCY BOARD N.S.W.

●

A WARNING TO STAFF AND AGENTS

RE ISSUED JUNE, 1976

●

THIS MESSAGE IS TO BE ISSUED TO ALL NEW PERMANENT STAFF AND AGENTS AND IS TO BE DISPLAYED ON BRANCH/AGENCY NOTICE BOARDS

A MESSAGE FROM THE GENERAL MANAGER TO ALL STAFF AND AGENTS

Set out in this pamphlet are the Board's policies regarding "Dishonesty, Fraud or Attempted Fraud" and "Betting by Staff or Agents." The pamphlet is specially issued so that all persons concerned are clearly aware of the matters mentioned.

In the past, a few dismissals of staff and terminations of Agency Deeds have taken place because of actions involving dishonesty, fraud or attempted fraud. In accordance with the Board's policy, Police investigations were invited and prosecution action supported when advised by the Police.

It is quite evident in some cases that the actions leading to the downfall of the person concerned included betting whilst on duty. Such actions invariably placed the person concerned in such a position that discovery of his misconduct was inevitable. It was also evident that the more desperate the situation, greater became the chance of further loss.

The policies which have been adopted are based on experience and should not be disregarded at any cost. It is my belief that employees and agents are fundamentally honest people, and it is not my wish that any member of staff or agent should act foolishly so as to invite the penalties referred to later in this pamphlet.

It is also of the utmost importance that Board or agency staff handling cash should not place their personal reputations into jeopardy by careless disregard of the instructions regarding cash control, such instructions having been devised, in part, for the protection of the employee or agent.

I appeal to all staff and agents to consider these matters as ones which merit close examination and justify strict adherence to the warnings issued.

J. Robertson,
General Manager.

JUNE, 1976

ACTIONS INVOLVING DISHONESTY, FRAUD OR ATTEMPTED FRAUD

It is the practice for a Senior Officer of the Board to address staff members and agents at the first available opportunity after their appointment. The address invariably includes a very strong reference to the Board's attitude towards dishonest actions, fraud or attempts at fraud, by staff or agents. In summary, the warning is given that in the event of dishonesty or fraud being attempted or practised by a member of the staff or agent, upon detection, the person concerned will be dismissed or have the Agency Deed terminated forthwith, as the case may be. Such action will be taken irrespective of the past record of the employee or agent concerned and under no circumstances will continuance of employment or of the Agency Deed be considered. In other words no further warning is issued.

In addition to the foregoing, it is the policy of the Board to institute proceedings for prosecution in all cases where evidence sustaining such prosecution exists. A strong liaison is maintained with the Police authorities and Police action is invited at the earliest possible stage.

This memorandum is issued to all new staff and agents as a clear and final notification as to the Board's attitude to dishonesty, fraud or attempted fraud.

The Board, through its Personnel or Agency Branches, is anxious to assist, wherever possible, by providing advice or referral to appropriate bodies to staff or agents facing financial adversity. The purpose in issuing this memorandum is to encourage the use of these facilities as well as to serve as a deterrent to impropriety.

BETTING BY STAFF OR AGENTS

The following instructions regarding betting by staff or agents apply:

1. (a) Permanent staff are prohibited from betting at all times in the branch in which they are employed, whether on or off duty. Agents are prohibited from betting in their respective agencies at any time.

   (b) Permanent staff may bet in other branches or agencies when rostered off duty. Agents may bet in agencies other than their own or in branches, but item 2 hereunder regarding possession of betting tickets is to be strictly observed.
   Whilst permitted to bet under the above conditions, staff and agents are not encouraged to bet.

2. Permanent staff, agents or casual employees of the Board or agents must not have betting tickets in their personal possession whilst at work.

3. Casual employees may not buy tickets or collect bets at the branch or agency in which they are employed on days on which they are rostered for duty. This includes betting or collecting on their own behalf or on behalf of other persons and includes collecting on tickets issued on previous days.

4. In addition to branch or agency personnel, the above restrictions apply to all Operational staff including:
   (a) Regional Controllers.
   (b) Group Managers.
   (c) Area Supervisors.
   (d) Control Centre Staff.
   (e) Telephone Betting Staff.
   (f) On-Course Representatives.

5. Telephone Betting Accounts may not be held by any employee (casual or permanent) of any Division of the Board, nor any agent, nor any staff member employed by an Agent

6. Any breach of this instruction either by betting, collecting bets or presenting tickets for payment or by holding or attempting to open a telephone betting account may result in the dismissal of the employee or the termination of the Agency Deed as the case may be, without notice.

EMPLOYMENT BY AND AGENTS OF, THE TOTALIZATOR AGENCY BOARD.

Points for Discussion.

The following discussion points concern areas in which the Committees Draft Policies specifically relate to your present procedures. If a relevant policy is not raised, this is because it is assumed to correspond with such procedures.

1. Statistics.

How many applicants were rejected or employees dismissed on the basis of criminal record information in 1975-76 and 1976-77? If possible indicate the general type of offences which were thought to necessitate such action.

2. Questions asked of Applicants.

The Board appears to utilize three employment application forms, one for general employment, a second for casual employment and the third for appointment as an agent. The first two forms ask the question, "Have you ever been charged with or convicted of any offence including a criminal or gaming offence"? This would require the disclosure of dismissed charges, charges dismissed or bonds expired under S. 556A of the Crimes Act, and convictions successfully appealed against. The latter form refers to convictions of a criminal or gaming offence.

Would there be objections to the adoption of the standard question (or similar construction) referred to in Draft Policy 2.1. This not only avoids the disclosure of dismissed charges and successful appeals, but includes a 10 year limitation as to the disclosure of offences.

We consider that where Police record checks are carried out a statement to this effect as well as an explanation of the possible effect that a criminal record may have on the application form. What are your comments in this regard?

3. Statutory Provisions re/Convictions.

The Totalizator (Off-course Betting) Act, 1964, makes no mention of a character test regarding employment, nor does it refer to specific offences, as forming statutory disabilities to such employment.

4. Criminal Record Checks on Applicants.

We commend the Board's policy of checking Police records, almost always only after selection and offer of appointment.

Despite the matters raised in paragraph 3.4 at the commencement of the schedule, it is the Committee's Draft Policy that only the applicants and not their spouses or associates should be the subjects of criminal records checking. Does the Board have other objections to this policy proposal?

Would you envisage problems if the criminal record information given to you by the Police, did not include data as to dismissed charges, matters dismissed under S. 556A of the Crimes Act and convictions successfully appealed against.

5. Disclosure to the Applicant.

The Board's procedures in this regard appear to fully comply with the Committee's relevant Draft Policies.

6. Retention and Dissemination of Records.

The Committee's Draft Policy in this regard is that all criminal information collected for use in the determination of an employment application, should be destroyed immediately after that purpose has been completed (Draft Policy 6.9). This obviates the risk of any privacy problems developing in relation to the retention and dissemination of such information.

Dismissal and Discipline.

7. Statutory Provisions.

The statutory prohibition created by S. 3(6)(e) of the Totalizator (Off-course Betting)Act, is very broad in its scope.

The Committee prefers such prohibitions to be based on a "character test" provision, which allows for flexible application (Draft Policy 1.3 and 1.4). If an offence based statutory disability is considered to be necessary it should be restricted to specific classes of relevant offences, where possible. (Draft Policy 1.2).

If the Act were amended in these ways, would you have any objection?

8. Method of Obtaining Information.

The Board does not receive external information of an organised nature, on charges or offences not directly related to its activities.

SCHEDULE N.

LICENSING UNDER THE COMMERCIAL AGENTS AND PRIVATE ENQUIRY AGENTS ACT, 1963.

1. Occupations Requiring Licensing. The Act requires commercial agents (basically, process servers, repossession agents, and debt collection agents) and private enquiry agents (basically, those whose business is to obtain information about the character, actions, business or occupation of others, to search for missing persons and to furnish or act as guards or watchmen) to be licensed as agents. Others who carry out these functions on behalf of an agent must be licensed as sub-agents.

   Insurance Assessors and credit bureaus are exempted. Those who carry out an agent's work for only one employer (e.g. a finance company or bank) or as an officer or employee of the Crown, or as a solicitor or public accountant are exempted.

2. Questions in Application Forms. The application forms for licenses under the Act are prescribed by the Act and Regulations (s10(1), Regulation 8 and First Schedule) and do not include any question concerning criminal records. However, the interviewing Police Officer questions the applicant verbally as to his criminal record.

3. Statutory Requirements re Convictions. s10(6) provides that Police can object to the granting or renewal of an application on the grounds that the applicant:

   "is not of good fame or character" (s10(6)(a)(i))

   "is not a fit and proper person to hold a license" (s10(6)(a)(ii)).

   "has been convicted of an offence punishable on indictment" (s10(6)(a)(vii)).

   s11 provides that a license may be cancelled on any of the grounds for which an application for a license may be refused.

   (As to the effect of s10(6) and s11, see paras 5.2 to 5.5 below)

4. Method of Checking. The Superintendent of Licensing conducts a name check of all applicants at the Criminal Records Office. A further check is conducted with each annual renewal of the license.

5. Licensing Procedure.

5.1 The Clerk of Petty Sessions of the Court where the application is lodged issues a license without necessity for a Court hearing unless a Police report objecting to the granting of license is received within one month of receipt of the application. (s10(8)).

5.2 s10(5)(c) provides that the officer in charge of Police "shall, if he has found any ground for objection" include in his report an objection. The matter is then set down for hearing before a stipendary magistrate sitting in open court (s10(10)).

s10(11) then provides that the Court "shall order that the application be refused" .. "if it is satisfied that the ground on which such an objection was made has been established".

The effect of this is that conviction for an indictable offence, one of the grounds for objection (see para 3 above) is an absolute bar to the granting or renewal of a license, as the Police have no discretion not to lodge an objection, and the Court then has no discretion not to reject the application. This will apply irrespective of the degree of seriousness of the indictable offence, and irrespective of how long ago it was committed.

5.3 Where a license has been granted or renewed the license holder may be called before a Court on the complaint of a Police Officer to show cause why his license should not be cancelled, on any of the grounds on which objection may be taken to the granting of a license under s10(6)). (s11(1)).

"Upon being satisfied of the truth of any such ground, the court may order "that his license be cancelled or that he temporarily or permanently be disqualified from holding a license. (s11(2)). (See para 5.5 below)
S12 further provides that any Court which convicts a license holder on an indictable offence, or before which a license holder gives evidence, may suspend his license for up to 28 days, during which time he is called before a Court to "show cause" under s11.

5.4 s13(2) alleviates the effect of a conviction for an indictable offence set out in paras 5.2 and 5.3 above in the case of sub-agents. The Court may grant, or decline to cancel, the license of a sub-agent who has been convicted of an indictable offence "if, in the opinion of the Court, the offence is such that, either from its nature or from the circumstances in which it was committed, it ought not, having regard to the public interest, to disqualify the applicant ..."

5.5 This specific provision with regard to sub-agents would seem to make it doubtful whether the use of "may" in s11(2) (see para 5.3 above) does in fact give the Court any discretion whether to cancel a license in the case of agents.

5.6 An appeal to the District Court against refusal or cancellation of a license is available (s14).

5.7 Where Police lodge an objection to a license, notice of the objection is given to the applicant and, in the case of a sub-agent's application, to the agent for whom he intends to work. The notice states the nature of the proposed objection (s10(9)).

6. Comments.

6.1 The Act has a potential to be unduly harsh on a person who has been convicted of an indictable offence.

It appears impossible for a person who hasbeen convicted of an indictable offence (including indictable offences tried summarily) to obtain a full agent's license, irrespective of the degree of seriousness of the offence, or how long ago the offence was committed. The anomoly

could arise that a person who was convicted and fined for an indictable offence could not be granted a license, whereas a person who had been dealt with for a more serious offence, but put on a recognisance under s556A of the Crimes Act (and therefore not convicted) could be licensed.

6.2 Although a sub-agent's license can be obtained despite an indictable offence(see para 5.4 above) considerable embarrassment to an applicant may still be caused because the Police are obliged to lodge an objection (see para 5.2 above) and the agent by whom the sub-agent is employed is notified of the objection (see para 5.7 above). Therefore the existence of the person's criminal record is disclosed in open Court and directly to the employer.

The Committee is aware of one case where an agent requested his employees to obtain sub-agent's licenses. One of his employees of 10 years standing who had a shoplifting conviction some 18 years previously was considering resigning from her position rather than have the employer made aware of the conviction. Fortunately, the conviction was not for an indictable offence and she was convinced to proceed with the application.

7. Draft Recommendations.

The Committee considers that the Act should be amended by the deletion of the specific grounds for objection of conviction for an indictable offence. The"fit and proper person" provision will provide adequate grounds for objection in appropriate cases. A subsidiary effect is that in cases of old or less serious indictable offences, where the Police feel an objection is unnecessary, an agent will not need to be made aware of his sub-agent's convictions.

Alternatively, if it is not desired to give Police the discretion to object in this case (unlike most other licensing legislation), sl3(2) should be amended to encompass agents as well as sub-agents. The Committee prefers the first alternative.

LICENSING UNDER THE COMMERCIAL AGENTS AND PRIVATE ENQUIRY AGENTS ACT, 1963.

Points for Discussion.

The following discussion points concern areas in which the Committee's Draft Policies specifically relate to your present proceedures. If a relevant policy is not raised, this is because it is assumed to correspond with such procedures.

1) Statistics. How many refusals to grant or renew licenses, based on criminal record information, have occurred in the period 1975-76 and 1976-77? If possible, indicate the general type of offences considered to necessitate such actions.

2) Questions on Application Forms. No questions are presently asked on the application form, regarding the applicant's criminal history. Would you object to the inclusion on the application form?

   i) a statement that Police record checks will be carried out and,

   ii) a statement where Police record checks are carried out, clearly explaining the effect of a criminal record, on the applicant's eligibility?

   (See Draft Policy 2.4 and 2.5).

3) Statutory Requirements re/Convictions. Police objections to the granting of a licence may be based on a "character test" provision as well as a general offence based bar (Section 10(6)). These grounds for objection also apply to refusals to renew licences.

   What would be your objections, if any, to the amendment of Section 10(6) of the Act so as to simply specify that the applicant will be refused a licence if he is "not a fit and proper person" to hold a licence? If it is considered necessary by you, the Act might also include a clause prohibiting the acquiring or retaining of a licence if certain relevant and specific offences were committed. If this is the case, what offences would you consider relevant?

   (See Draft Policies 1.1 - 1.5).

4) Methods of Checking. It would appear that no opportunity to discuss the objection, based on criminal record information, is given to the applicant, nor is a copy of the Police report given to the applicant, prior to the Court hearing.

   Assuming that the policy and procedure expressed in Draft Policy 6.7, was not objected to by the Police, would you have any reservations if this were the practice, prior to a Court hearing, at the time of the notice of objection being given to the applicant.

5) Licensing Procedure. If the recommendations regarding the amendment to the Act, proposed in the above point, were acceptable to you, the Police would have far greater discretion in deciding when to object to applications.

   We would suggest that the obligation on the Court to order the refusal of a licence if grounds for the objection are established (Section 10 (11)) should be altered to a discretion as exists in the cancellation of a licence by the Court (Section 11 (2)).

   If Section 10 (6)(a) vii) were to remain in the Act, would you object to an alleviation clause similar to that in Section 13 (2), being included in this Section. This may overcome the severity of the absolute bar in Section 10 (6)(a) vii). Alternately Section 13 (2) could be amended to encompass agents as well as sub agents.

Regarding the inquiries to be made by the Police prior to reporting to the Court (Section 10 (5) (a)) would you agree to the Act being amended so as to specify the nature of the inquiries to be made on the applicant, as they relate to third parties?

SCHEDULE P.

LICENSING UNDER THE MOTOR DEALERS ACT, 1974.

1. Occupations Requiring Licensing: motor dealers, motor vehicle wreckers and certain prescribed classes of persons dealing in used or reconstructed motor vehicles or their parts.

2. Questions on Application Forms. The following question is asked concerning sole proprietors, all partners, all directors and the secretary (in the case of a company applicant) and any person "concerned with the day to day management of the premises":

> "Have you ....during the last ten years in New South Wales or elsewhere been charged with or convicted of any criminal, traffic or other type of offence? If yes, state brief particulars including the full name under which you were charged or convicted."

S5 provides that the application form must be approved by the Minister.

STATUTORY REQUIREMENTS RE CONVICTIONS.

3.1 S11 provides that the Commissioner for Consumer Affairs may request the Police Commissioner to ascertain whether an applicant (including partners and directors and secretaries of companies) is "a fit person to hold a licence", and authorises the Commissioner to "cause such enquiries as he deems necessary to be made in order to ascertain that fact".

S11 does not seem to specifically authorise such reports on persons "concerned with the day to day management of the premises".

3.2 S13 provides that the Commissioner shall not grant a license unless he is satisfied that the applicant (including partners, and directors and secretaries of companies) is a "fit person to hold the licence applied for".

3.3 S18 provides, inter alia, that the Commissioner "may, after due inquiry" revoke a licence if the holder has

- made a statement in his application which he knew to be "false or misleading in a material particular"
- been "convicted of an offence involving fraud or dishonesty punishable on conviction by imprisonmnent for three months or more" or convicted of offences against the Act or s32 of the Consumer Protection Act, 1969.
- to the Commissioner's satisfaction "been guilty of fraudulent conduct or dishonesty in connection with his business as a dealer."

3.4 The Regulations under s57 provide that a licence holder "shall not, except with the approval in writing of the Commissioner and subject to the conditions, if any, attached to that approval, employ or continue to employ as a manager a person -

(a) who within the previous 10 years has been convicted of any offence under the Act or any offence involving fraud or dishonesty; or

(b) whose application for a licence has within that period been refused or whose licence has within that period been revoked" (Regulation 6A(2), 1976-No. 145)

"Manager" means "the person having the control or substantial control of the day-to-day conduct, at the place or places of business in respect of which a licence was granted, of the business to which the licence relates (Regulation 6A(2), 1976 - No. 145).

The existing Regulations only apply to "managers", but 257 allows regulations to be made "prohibiting or regulating" the employment by a licence-holder of any person who has been "convicted of offences under this Act or of offences involving fraud or dishonesty or other prescribed offences."

4. Method of Checking.

4.1 All applicants (including partners, and directors and secretaries of company applicants) and all "managers" are investigated as in 4.2 to 4.5 below.

4.2 The Police Department's Criminal Records Offices attaches the person's criminal record to the application and forwards it to the Officer-in Charge of Police in the area in which the applicant resides. (As to C.R.O. disclosure policy, see Chapter 2, para 3.4(c).)

4.3 The local Police conduct such interviews as they consider necessary with the applicant and third parties and submit a detailed discursive report (if necessary). Such reports may include the opinions of the reporting officer or of third parties as to the person's honesty, indebtedness, associates, and probable past, present and future involvement in crime whether involving convictions or not. The Officer's opinions as to the suitability of the person as a licence holder may be given.

Comments which have been included in such reports seen by the Committee have included:

"I contacted a Mr. (X) who was also nominated as a personal reference to obtain the loan. Mr. (X) is not a personal friend and merely purchased a car from (the applicant) and under no circumstances would vouch for (the applicant's) characater."

"He is a plausible liar, a mechanic by trade, and it is considered that he will continue to associate in the motor vehicle industry."

Another report is reproduced in full on the next page.

4.4 The report is submitted to the C.I.B's Motor Squad for comment as to their knowledge of the person and information available from Police intelligence records. An opinion as to the person's suitability as a licence holder will be given.

4.5 The reports are returned to Head Office for a recommendation as to the suitability of the person to be a licence holder to be given by an Assistant Commissioner of Police. All reports are then forwarded to Consumer Affairs.

5. Licensing Procedure.

5.1 If the Commissioner of Consumer Affairs refuses to grant, or revokes, a licence, the applicant or holder may appeal to a magistrate (s19). The magistrate may disallow the refusal or revocation if "in all of the circumstances of the case, he considers it fair and reasonable to do so" (s19(9)). No further appeal is allowed (s19(10)).

5.2 No specific provision is made for "managers" or other employees affected by the Commission's decision under Regulation 6A or other similar regulations (see para 3.4 above) to have a similar right of appeal. They may have to rely on their employer (the licence holder) being willing to have his licence revoked for employing them in breach of the Act before a Court hearing is possible. The Magistrate could then make "such other order in the circumstances as to him seem just" (s19(7)).

5.3 A notice of refusal or revocation "shall state the reasons" for the refusal or revocation (s13(6); s18(8)).

> "Before revoking a licence the Commissioner shall give the holder ... an opportunity of showing cause why the licence should not be revoked" (s18(5)).

No similar provision exists in the case of refusals. However, the Bureau's policy is to discuss any refusal on request, with the applicant. He is allowed to read, or have read to him, that part of a Police report which relates to him, but not to copy it. He is not allowed to read, or have read to him, comments relating to other people.

6. Policies Concerning Objections.

No written policies are available.

7. Information Provided to Applicants.

Applicants are informed that Police enquiries are conducted. The application form states that false statements may lead to revocation of a licence or a fine.

8. Retention, Dissemination and Storage of Data Obtained.

The crime data obtained remains on file while a licence is current. It is envisaged that it will be destroyed 6 years after a licence expires. There is no dissemination to third parties.

9. Comments.

9.1 The application form should not ask about charges which did not result in a conviction or finding of guilt. (see general recommendations on questions in application forms).

9.2 s57 allows regulations to prohibit a person from being an employee of a licence holder, or for his employment to be made subject to conditions if he has ever been convicted of fraud or ishonesty or any other prescribed offence. In principle the Regulations can be used to restrict the employment prospects within the motor industry of any person who has any criminal record. At present the exercise of this power has been limited to Regulation 6A (see para 3.4 abov). The Committee questions whether the power to exclude persons from employment should be contained in regulations other than the Act.

A further problem is the lack of an effective appeals mechanism for persons whose employment has been so effected, in contrast to the extensive appeal rights of licence-holders contained in s19. This is a further reason for bringing restrictions on such employees under the Act and, in particular, under s19.

LICENSING UNDER THE MOTOR DEALERS ACT, 1974.

Points for Discussion.

The following discussion points concern areas in which the Committee's Draft Policies specifically relate to your present procedures. If a relevant Policy is not raised, this is because it is assumed to correspond with such procedures.

1) Statistics. How many refusals to grant or renew licenses based on criminal record information have occurred since the commencement of the Motor Dealers Act? If possible, state the general type of offences considered to necessitate such actions.

2) Questions on Application Forms. The question presently appearing on the application form refers to being "charged or convicted of any criminal, traffic or other type of offence" and requests the provision of particulars if the answer is the affirmative. This would require the disclosure of all charges, no matter what the outcome. Do you see any objections to your adopting the standard question (or similar construction) as suggested in Draft Policy 2.1? This would overcome the need for the applicant to disclose charges that were dismissed under S.556A of the Crimes Act.

The Committee considers it necessary that where Police record checks are made, a statement to this effect should be included on the application form. In addition to this, would you have objection to the inclusion of a statement concerning the effect of such a criminal record on the granting of a licence.

(See Draft Policy 2.1, 2.4 and 2.5).

3) Statutory Requirements Re/Convictions. The application of the Statutory Disabilities in Section 13, 18 and 15 appears to be conditional on the Commissioner's discretion.

A "character test" provision is used in S. 13 whereas the revocation provision of S. 18 refers to specific offences.

What would be your reaction to an amendment of the Act which deleted any reference to general or specific offences as being a bar to the granting or holding of a licence and simply relied on a "character test" as used in S. 13 (see Draft Policy 1.3). This would avoid the difficulties of an absolute bar and provide for a more flexible application of the statutory disability.

4) Methods of Checking. The applicant is offered the opportunity to discuss his record with the interviewing Police officer. However, i) he is not made aware of the investigations carried out amongst third parties and ii) he is not shown a copy of the Police officer's report, nor later comments made by the C.I.B. Motor Squad, nor Head Office recommendations as to his suitability as a licence holder.

The applicant has the right to appeal to a Magistrate if his application is revoked , however, no such appeal exists for managers or employees effected by the Commissioner's decision under Regulation 6A or other similar regulations.

The reasons for the refusal or revocation of the licence are stated in the relevant notice to the applicant. An opportunity "to show cause why a licence should not be revoked" (S. 18 5) is given, but no similar provision exists in relation to refusals.

It is the Committees Draft Policy that no licence should ultimately be refused on the basis of the applicant's criminal record, without an opportunity for discussion, being given to him. We note that this is the present practice of the Department. At the time of such a discussion, the applicant should be made aware of his rights of appeal.

If an application is to be rejected (or other adverse action taken) because of disclosure of a criminal record as part of a discussive Police report (which also contains opinions about the applicant's character, honesty, activities, etc., or about other people) he should be given a copy of the report to read at the interview. If the Police Commissioner certifies that it is not in the public interest for this to occur (see Draft Policy 6.7) a copy should instead go on request to some independent third party to inspect on his behalf and disclose as much to him as possible in the circumstances. Your comments should be given on the presumption that the Police do not object to this procedure.

As to the voluntary disclosure of criminal record information to third parties, by Police officers, we would invite you to consider suggested policies which will appear in a later paper or the storage of criminal records by Police.

Would you have objection to a system where any criminal record information for the use of your Department, should only be given in the form of a resume, which would not include information of charges, dismissals, and convictions successfully appealed against? (Draft Policies 3.4, 6.2, 6.6 and 6.7).

5) Retention, Dissemination and Storage of Criminal Record Information.

Would you object to the recommendation that all criminal record information should be immediately destroyed after use in the Department's deliberations as to the granting or renewal of licenses?

SCHEDULE DA.

APPOINTMENT AS A JUSTICE OF THE PEACE.

Appointment as a Justice of the Peace is by the Governor on the advice of the Executive Council on the recommendation of the Minister of Justice. It is administered by the Department of the Attorney General and of Justice.

1. Statutory Provisions. Appointment is pursuant to the provisions of s29 of the Imperial Acts Application Act, 1969.

   Appointment is for life but may be revoked by the Governor for good cause.

2. Questions Asked of Applicants. The application form asks "Have you ever been convicted or found guilty of any offence (including traffic offences)? (If so, give details)". Drivers licence number and date of birth are required.

   The form must be signed by the Member of Parliament who nominates the applicant.

3. Method of Checking.

3.1 A photocopy of the criminal and traffic records of all applicants for appointment (approximately 5,500 p.a.) is obtained from the Criminal Records Office and the Department of Motor Transport.

3.2 If the record disclosed is sufficient to raise doubt as to the suitability of the applicant, the Department then requests the Officer in Charge of Police in the area in which the applicant lives to have the applicant interviewed for the purposes of:

   (i) admitting or disputing that the offences recorded relate to him (if disputed, the applicant is asked to agree to be fingerprinted for verification; any such fingerprints taken are subsequently destroyed);

   (ii) giving any explanation or mitigating circumstances;

   (iii) for the interviewing officer to prepare a report as to his character and whether he is considered a fit and proper person to be a Justice of the Peace (any adverse reports are returned to the Department via the Commissioner of Police, as are any reports on any applicants who are current or former Police Officers).

   Previously, all applicants were interviewed by Police Officers, but this is now considered unnecessary. The Department estimates that only about 2% of all applicants are now interviewed, and about half of these applicants are subsequently approved.

3.3 The Department has no systematic method of being informed when appointed Justices of the Peace are charged with or convicted of offences. It has to rely on third parties bringing such matters to its attention. When this occurs, the Department will then obtain details from the Police or Department of Motor Transport.

4. Appointment and Revocation.

4.1 The Minister decides whether to recommend an application on the basis of the criminal and traffic records obtained and the interviewing Police Officer's report on the applicant's character.

END