SOUTH AUSTRALIA

THIRTY-SECOND REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

—

RELATING TO THE PAST RECORDS OF OFFENDERS AND OTHER PERSONS

1974

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

B. R. COX, Q.C., S.-G.

R. G. MATHESON, Q.C.

J. F. KEELER.

K. T. GRIFFIN.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide, South Australia.

THIRTY-SECOND REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE PAST RECORDS OF OFFENDERS AND OTHER PERSONS

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

You have referred to us the report of a Committee set up by "Justice", the British section of the International Commission of Jurists, the Howard League for Penal Reform and the National Association for the Care and Resettlement of Offenders entitled "Living it Down—The Problem of Old Convictions" a Committee which reported last year under the chairmanship of the Right Honourable Lord Gardiner.

The problem as we see it falls into two parts, the first relating to persons with criminal convictions and the second those who have been found guilty of matrimonial offences under the present "fault" system. We shall deal with these separately. The second is not dealt with in the report to which you have referred us but is in practice a matter of some importance.

Turning first then to the problem of rehabilitating persons who have been convicted of criminal offences, the problem is so well stated in the "Justice" Report that we simply acknowledge the force of and repeat in this report paragraphs 7-20 of the English report with certain minor alterations to accord with Australian law or Australian conditions. The alterations appear in square brackets in this report.

When it comes to giving answers to the problems as will be seen later in this report, the Committee has frequently diverged from the views expressed in the "Justice" Report. We regret our inability to give unanimous answers to many of the questions posed but as will be seen, this stems from the divergent philosophies held by various members and is basic to their thinking.

Paragraphs 7-20 of that Report read as follows:—

"7. Much of the crime committed in this country is the work of a group of people, sometimes called 'recidivists', who spend most of their adult lives in and out of gaol, undeterred and unreformed. They present society with an apparently intractable problem, but they are not the people with whom we are concerned in this Report.

"8. We are concerned instead with a much larger number of people who offend once, or a few times, pay the penalty which the courts impose on them, and then settle down to become hard-working and respectable citizens. Often, their offences are committed during adolescence, which is a period of emotional instability in even the most normal people, and can sometimes be delayed if they are 'late developers'. There may have been a spate of thefts, breaking-in, driving away other people's motor-cars, street-corner violence, or hooliganism. When the phase is over, many of these people grow out of the need to behave delinquently. Mostly, they marry, find work and settle down, and never offend again. Others with whom

we are concerned may suddenly commit an isolated crime in later life, such as the trusted clerk who embezzles from his employer through a foolish entanglement with a fast woman or with slow horses. Here again, in the majority of cases such a person will not offend again after he has served his sentence.

"9. In this Report, we shall call these people 'rehabilitated persons'—meaning that they have done, over a number of years after their delinquent phase, all that society can reasonably expect from its respectable citizens. But for rehabilitation to be complete, society too has to accept that they *are* now respectable citizens, and no longer to hold their past against them. At present, this is not the case, for the rehabilitation person continues to be faced with great difficulties, especially in the fields of employment and insurance, and in the courts.

"10. However many years may have passed since he committed any offence, a rehabilitated person may still find it difficult to obtain many kinds of employment, to start a business, or to join a profession. If he does succeed, and if his employer later discovers his past (perhaps through the indiscretion of a police officer), he might be dismissed without being given any reason and could not risk referring a prospective new employer to the old one for a reference, thus leaving an unexplained gap in his career.

"11. If he needs certain kinds of insurance, either for himself, or for any company of which he is a director, he will probably not get it if he discloses his convictions, however old. If he does not disclose them, and a claim arises, the insurer can repudiate liability because the convictions were not disclosed. Many employers take out 'fidelity bond' insurance to cover themselves against dishonesty by their employees. Where this is of the 'block bonding' type, covering all the firm's employees regardless of their responsibilities for money or goods, no one with a criminal record, however old, can be employed, as the policy could otherwise be voided by the insurers.

"12. If a rehabilitated person finds himself involved in a lawsuit, whether as a party or even only as a witness, he will be deterred from giving evidence in case the old conviction is known to the other side, whose counsel might perfectly properly decide to cross-examine him about it in an attempt to discredit his evidence. If he does not admit it, it can be affirmatively proved against him. We know of many cases where counsel have advised that witnesses whose evidence might well have been crucial to the outcome of the proceedings should not be called at all for that reason.

"13. Matters may become even more difficult if, as sometimes happens, such a person is particularly successful in business or a profession and becomes something of a leader in his chosen community. His friends may try to persuade him to take an active part in public affairs, but he cannot afford to take the risk, lest a political opponent, or a newspaper, might discover about his past and use it to discredit him. In that kind of situation, the possibility of blackmail may also add its weight to the grave distortion of the life which he might otherwise lead. [It would appear that in some States of the Commonwealth, though not in South Australia the mere fact of a prior conviction for felony is a permanent disqualification for election to public office.]

"14. Whilst all this is true for the rehabilitated person who never offends again, it is doubly true for one who again comes into contact with the police. The most petty traffic offence can result in a decade-old record being read out in court and reported in the local newspaper. Although both the police and the courts normally exercise a degree of discretion in this respect, instances of this kind still happen too often, and can have tragic consequences.

"15. Once a man has a criminal conviction, his photograph and fingerprints will often be on record. Photographs of persons who have long since become rehabilitated may still be shown to witnesses of someone else's later offence in an attempt to help them identify the culprit. The "Justice" Report refers to a case where a man with a minor conviction at the age of eighteen, who had since become a respected television executive, was in this way 'identified' by a witness and, as a result, convicted of robbery in a neighbourhood which he had not visited for ten years. He was fortunate in eventually having his conviction quashed on appeal. Meanwhile, he had served nine months in prison. No compensation is available from public funds in cases of this kind.

"16. How many people are in this situation? Surprisingly, there is no official figure, nor are there any published statistics from which it could be reliably calculated. But the Home Office Research Unit has been doing some work in a closely allied field, and they have been able to provide an estimate. They think that there may be as many as a million people in England and Wales who have a criminal record, but who have been free of convictions for at least ten years. For these people, the chance that they will ever be convicted again is minimal.

"17. A state of affairs in which a million people are forced to live in fear because of an ancient skeleton in their cupboard plainly requires reform, and the provision of a remedy (if one can be found) which will give them relief without having undesirable consequences in other fields. That is what we have tried to do in this Report.

"18. The question is whether, when a man has demonstrably done all he can to rehabilitate himself, and enough time has passed to establish his sincerity, it is not in society's interest to accept him for what he now is and, so long as he does not offend again, to ensure that he is no longer liable to have his present pulled from under his feet by his past. In our view, both the interests of society and the requirements of common justice can for reform in this field.

"19. A further consideration lends support to the need for reform. We have reason to think that, for some recidivists at least, the fear of exposure if they do go straight operates as a substantial disincentive against rehabilitation. Many recidivists have told us how they tried to go straight until their employer discovered their past and gave them their cards, or until their landlady discovered it and put them on the street, whereupon they lost hope and reverted to crime. No doubt some of these tales are told more with the object of enlisting our sympathy than with a strict regard for the truth, but we are convinced that the possibility of full rehabilitation might make all the difference between reform and relapse to at least some recidivists at some stage in their career. That, surely, would be to society's advantage.

"20. There are a number of reasons why this problem is more acute today than it has been in the past. First, legislation over the past century has created hundreds of new offences never before known to the law. It is becoming increasingly difficult, even for the most respectable citizen, to go about his day-to-day life without infringing some law or regulation. Secondly, there has in recent years been a great expansion in the number of detective agencies and inquiry agents. Many of their staffs include retired police officers. Thirdly, more and more personal information is today stored in electronic data banks. These no doubt offer many benefits to society, but they are unique in that they can never forget, their records are virtually indestructable, and they are able to reproduce in a few seconds information which it might take weeks or months to find if it were stored on pieces of paper in manilla folders."

To these paragraphs in the English report we would add three comments. The first is that the great multiplicity of so-called 'status offences' under our present law makes the chance of disclosure of an offence or offences, for which there is no mens rea in the ordinary sense, much more likely today. Many such status offences carry terms of imprisonment.

The second is that the nature and gravity of the offence with which an accused person is charged not infrequently depends upon the discretion of the prosecution. Where the prosecutor is not a member of the Crown Prosecutor's Branch of the Crown Law Office, or some similar body in areas which have a Director of Public Prosecutions, it is not infrequent in our experience for an accused person to be charged with and convicted of a much more serious offence than that with which an experienced prosecutor would charge him. The fact is that the nature of the offence and sometimes the penalty imposed, depend partly upon the way in which a prosecutor exercises his discretion in a given case. This may operate quite unfairly to the detriment of one man as against another and this is an additional reason for considering mitigation of the kind which we recommend hereafter.

The third which is on the other side of the line is that so far as we can see there was no member of the "Justice" Committee who is a practising psychiatrist and we are not sure what evidence was before them as to the likelihood of people who have been convicted of certain offences offending again or of the appraisal of such evidence if it was given. We think that the sensitive areas in respect of this are sex offences committed against young children and the cases of persons with psychopathic personality. If it were not that this report is, as we believe, needed in the near future, we should have ourselves had evidence called before us on this point but in the circumstances we draw your attention to the matter and suggest for your consideration that your own advisers in psychiatry and psychology should consider the point and advise you as to what weight should be given to the point and what further evidence, if any, should be called in relation to it.

We agree with the reasons of the "Justice" Committee for thinking that a pardon as provided for in Canada is inappropriate and that an application by the person concerned to have his record expunged is in itself undesirable as entailing unwanted publicity. The suggested solution by the "Justice" Committee is to treat convictions of long standing as spent and irrelevant when an offender has to answer questions either in Court or to other persons having an interest in questioning him. It is supported in that view by the decision of Lawton

J. in *The Queen v. Sweet-Escott* (1970) 55 *Cr. App R.* 316 where the accused, whilst giving evidence for the Crown in 1970, had denied under crossexamination convictions between the years 1947 and 1950 which he afterwards had to admit, and was thereupon charged with perjury. It was held that convictions so long ago were not material to his credit and therefore the jury trying the perjury case were directed to acquit.

The general remedy proposed by the "Justice" Report is contained in their paragraph 32 which reads:—

> "32. In outline, therefore, the scheme which we recommend is that:
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> (1) certain persons who have been convicted of criminal offences should be classified as 'rehabilitated persons' if they have not been re-convicted for a number of years;
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> (2) 'rehabilitated persons' should be treated in law—with certain necessary exceptions—as if they had not been convicted, by making inadmissible any evidence tending to show that they have committed the relevant offence, or been charged with it, or convicted of it, or sentenced for it."

On this we make the general comment that as evidence in proof of the commission of an offence will in the circumstances set out above be inadmissible, employers will not be able to dismiss employees on finding of the offence without risking actions for wrongful dismissal; insurance companies will not be able to avoid policies on presently accepted grounds; justification cannot be proved in some cases where persons are defamed. In practice therefore there would be substantial changes in at least these fields of law and perhaps in others. Moreover, it encourages the dishonest answering of questions put by employers, insurers and others, and equally it penalises the honest answerer because he will not get the job, the insurance cover, or whatever else he might have applied for.

Their recommendations as to rehabilitation periods are contained in paragraph 35 of their report which reads as follows:—

> "35. These requirements are to some extent in conflict: to achieve perfect equity between different offenders there should be many different rehabilitation periods, each approprate to their different circumstances: to achieve perfect simplicity, there should perhaps be only one. Any solution will therefore be, to some extent, a compromise, and the one which we have adopted in our recommendations is to have three rehabilitation periods, all running from the date of conviction:
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> (*a*) five years, where no custodial sentence was imposed on the conviction;
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> (*b*) seven years, where a custodial sentence of not more than six months was imposed;
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> (*c*) ten years, where a custodial sentence of more than six months, but not more than two years, was imposed.

While this solution is neither perfectly equitable, nor perfectly simple, it appears to us to be the most practical." They further report that in the case of juvenile offenders the period should be one half of that fixed in their paragraph 35.

Our recommendations must, we feel, go further than the "Justice" Report. We must recognize that at any rate so far as contracts are concerned, the parties to proposed contracts must be prevented from asking certain kinds of questions.

We have already commented that the effects of the recommendations made in the "Justice" Report have certain undesirable features; and in our view many of them flow from the fact that the report expressly allows questions to be asked about the past records of persons wishing to enter into particular kinds of contracts, and concentrates instead on providing a certain protective mechanism to shield the applicant from some of the consequences of his reply. In our respectful opinion the Report is defective in its concentration on the answers rather than the questions. Merely relieving a person of the obligation to answer certain questions or prohibiting proceedings against him if he does not answer them or does not disclose his past in the answer is in our opinion an unsatisfactory way of tackling the problem. Our basic recommendation is that it is the asking of questions which ought to be prohibited, not relieving people from having to answer the questions or from the consequences of answering them without disclosing prior convictions in other cases. Provided the questions can be asked at all, the fact that the person with a past avails himself of his right not to answer is just as damning in getting employment and in various other situations, as if he had in fact disclosed his past. In our view what has to be prohibited is asking the questions, not saving the man from having to answer or from the consequences of his not answering. This seems to us to be basic to this reform and we tender our advice to you upon that basis. This in its turn raises difficulties with regard to a person framing a questionnaire. There ought to be some authority which has the power to scrutinize questionnaires at the request of those preparing them and if the questionnaire is approved by the scrutinizing authority that should of itself be a defence to any prosecution if the sanction provided by law is criminal prosecution and likewise to any action for wrongful dismissal. A majority of the Committee would further recommend as a supplement to this approach that the specific recommendation of the "Justice" Committee be adopted and that questions or evidence tending to show that a person has committed, been charged with, or convicted of an offence in respect of which the rehabilitation period has run should, with exceptions referred to later in this report, be inadmissible in Court proceedings.

This general approach to the topic gives rise, however, to certain practical problems; we comment on these later in this report. Subject to these comments we would recommend that should the Government take action it should do so on the lines sketched broadly above; but we would reiterate that we are not psychologists, psychiatrists or criminologists and have no opportunity to consult such people. We can only make very tentative recommendations in the absence of this information and evidence. The inclination of the majority it to recommend the enactment of legislation which, subject to the qualifications set out below, would prohibit the asking of questions which require the disclosure of past offences in respect of which a rehabilitation period has run, and would render inadmissible in Court proceedings any questions or evidence tending to show that a person has committed, been charged with, or been convicted of any offence in respect of which the rehabilitation has run.

We therefore raise for consideration the following points:—

1. In the case of juvenile offenders under sixteen years of age the policy of the law as laid down in the Juvenile Offences Act 1971 is clearly, leaving aside exceptional cases such as murder, to treat the offender without having recourse to Court proceedings at all. Accordingly possibly in all cases, and certainly in all cases other than very serious ones such as for example murder, arson, robbery and repeated breaking and entering offences, we would think that the record of a juvenile under sixteen should not be admissible against him for any purpose except in relation to punishment on subsequent conviction.

2. The Committee differed as to the length of custodial sentence outside which the rehabilitation period would not apply. Two members of the Committee would allow it where the custodial sentence was not more than five years, one member where the sentence was not more than three years and two members where the sentence was not more than two years which is the highest figure in the "Justice" Report. We all think that there should be one period of rehabilitation and not three as in the "Justice" Report. The difference between the views of the members of the Committee is this. The two members who supported a five year period did so because the longer period may be a perfectly proper sentence for a first major offence but it may be an offence of a kind which a man may never repeat, for example a young man may get carried away as part of a gang in a pack rape and receive a substantial sentence of imprisonment and that sentence may be fully justified as a deterrent to the rest of the community. On the other hand he may have had no previous convictions before and never have any again and that that lapse should continue to cloud his career for the rest of his life does not seem to those members to be reasonable. On the other hand a man may have ten convictions for breaking and entering or other offences of dishonesty, none of which gained him a sentence of more than two years and yet he would be in a far better position than the man who had offended once in a pack rape. The member who supported three years did so on the basis that most of the rehabilitation cases would be dishonesty cases and that it was only in cases of very serious defalcations or of robbery that a sentence of more than three years was imposed. The two who supported the two year period did so for much the same reasons as are set out in the "Justice" Report.

   We have not recommended how long the rehabilitation period should be. We regard this as a question of policy for the Government. However we point out that as our recommendation is that the period of rehabilitation should run from the date of release not the date of conviction, the periods specified in the "Justice" Report would need to be reappraised in any event.

3. We were all agreed that the period of rehabilitation should run from release rather than from conviction, whether that release be on parole, or on completion of the sentence less whatever periods are allowed off for good behaviour.

4. It may be necessary to exclude certain kinds of application from any rehabilitation process. This is a question of policy in each case.

It is however true that every exception involves to that extent a retreat from the overall policy recommended in this report and for that reason one member would wish that there be no exceptions; on the other hand other members feel that some areas are of particular delicacy and although each case raises its own questions of policy and discretion in general they support the following exceptions. In order to be placed on the roll of medical practitioners or dentists, in order to be admitted to practice as a barrister and solicitor, in order to be registered as a teacher under the Education Act, 1972, it is necessary in each case that the person should be a fit and proper person. Hitherto that has meant a disclosure of prior convictions. It may well be that in all of those three cases at least and possibly in some others, the public interest requires the full disclosure of all convictions to the registering body. It is unlikely for example that a Court in considering whether a person ought to be admitted as a solicitor and thereby have the control of substantial trust accounts would not take into account a conviction or convictions for dishonesty however remote. Similarly in the case of a doctor who will be treating women patients in their own home or a teacher dealing with children, convictions of sexual offences even at a period outside the rehabilitation periods which we have suggested, might well require to be considered by the body which registers an applicant or entitles him to practice. On the other hand the position might be quite different in the case of an application for a licence as a land broker under Section 271 of the Real Property Act or as an instructor under Section 98a (2a) of the Motor Vehicles Act to take two examples which appear to us to be on the opposite side of the line. Others would be closer to the line and then the decision made would have to be a matter of policy:—for example the licensing of persons under Section 16 (1) (*c*) of the Commercial and Private Agents Act 1972. The difficulty is that this argument may apply also to cashiers in banks and many other situations in which dishonesty convictions in particular are relevant. We can but pose the problem and leave it to the Government to say where the line should be drawn.

5. A further difficulty will no doubt arise with regard to applicants for the public service. It may well be that certain offences of a disqualifying nature should be specified in any application form to be filled in for appointment to the public service and which, if the applicant has been convicted of any of them, must be disclosed in the application or supporting documents. One member of the Committee would not make any special exception for the case of the public service.

6. The "Justice" Committee says that in the case of offenders who are discharged absolutely or placed on probation the rehabilitation period should, in the case of conditional discharges and probation orders, be equal to the period of the condition or probation and in the case of an absolute discharge take effect at the end of six months from the date of the absolute

discharge. Where the Court has not proceeded to conviction the matter is of course simple. There is no conviction to disclose. Where however the conviction has been recorded but no penalty imposed or the accused has been released on a bond or a suspended sentence then we think the rehabilitation period should commence immediately. The "Justice" Committee thinks that if that were to happen the proceedings could not safely be reported in the press the following day and in addition the offender might come up again a short time later and the Court should know about the previous occasions: see paragraph 58 of their Report. We think that reports in the law reports should not be subject to the "rehabilitation process" recommended in this report at all and that reports in the press if they are reported within say a week of the conviction (and very few convictions would be news after that time) should likewise be deemed to be outside the scope of this report and not within the proposals which we have suggested.

7. In relation to an offender coming before the Court again, we have stated earlier in this report that in our opinion the Court should always be appraised of the prior record of the accused and should be left to act, as it always does act, so as to disregard offences which have no real bearing on the offence then before the Court, and to take little notice of offences which took place years prior to the offence of which the accused is then being sentenced. We think however that the practice of courts of summary jurisdiction could well be modified in this respect. In the Supreme Court and in the Local and District Criminal Court, the police report containing the convictions of the accused is handed to the accused, or where he is defended by counsel to counsel, and to the Court, and the Court is simply informed that the convictions are admitted. It they are not admitted then evidence has to be called by the prosecutor to prove those which are not admitted. In practice if a conviction is not admitted it is rare in our experience for a prosecutor to prove the conviction unless the prior conviction has some obvious bearing on the sentence to be imposed, as for example where the law specifies a different penalty for a second or subsequent offence, or the Crown alleges that the offence for which the accused is then being tried was committed whilst he was out on parole or on a recognizance in relation to the conviction for the offence which the accused has not admitted. In courts of summary jurisdiction on the other hand the usual practice is for the police prosecutor to read out the convictions in open court. We think that this practice could with advantage be discontinued and the same practice be adopted as in the Supreme Court and the Local and District Criminal Court. If this alteration were made it would be necessary as an ancillary provision to provide that that portion of the court file should not be a public document and should not be accessible to the press.

8. We agree with the "Justice" recommendation that where an offender has become rehabilitated in connection with a conviction then with certain exceptions where Parliament prescribes a specific penalty for a second or subsequent offence, for example

a second conviction for a drunk driving offence, the accused should be treated as though he was a first offender. On the other hand we are agreed that where a disqualification period is imposed, for example disqualification from driving a motor vehicle or from holding firearms or similar purposes, the rehabilitation period should commence at the same time as the disqualification period expires unless the term of imprisonment which was imposed in relation to the offence is a longer period than the term of disqualification in which case the longer of the two periods should apply.

9. We also recommend that the Police Regulation Act should be amended so as to provide that the unauthorized disclosure to a person outside the Police Force of convictions recorded in police records should be an offence.

10. The "Justice" Report assumes that the scheme of rehabilitation should apply to multiple offenders. At least one member of our Committee is not persuaded that that is so. However assuming that it does apply in the case of persons who are multiple offenders it is then necessary to consider whether or not the commission of a subsequent offence, after the period of rehabilitation has ceased in relation to the earlier events, reopens the disclosure of the earlier offences. The Committee were agreed that they would have to be reopened in the case of perjury and where the proof of the previous offences was required to prove a system of behaviour by the person concerned, whether that system be in issue in civil or in criminal proceedings. A majority of the Committee would not go beyond those two exceptions. A minority thinks that the commission of the subsequent offence should start the period running again in relation to all offences.

11. We also draw attention to a matter which is not dealt with in the "Justice" Report, namely that the past of the offender may not come out from anything which he himself is asked but from questions asked of referess where it is a case of an application for appointment to employment or in similar cases in which it is customary to ask for reports from referees. We consider that whatever prohibitions are decided on, they should apply in relation to referees in the same way as to the applicant, otherwise his past would have to be disclosed by the referees for fear that they might afterwards be sued on what would otherwise be a false reference.

12. As far as the law of libel is concerned, the recommendation in Section 66 of the "Justice" Report is as follows:—

> "66. If our proposals were adopted, it would be necessary to ensure that all these protections remain in force where they are needed in the public interest, but cannot any longer be used to cover the deliberate raking up afresh of a past conviction against someone who has since become a rehabilitated person. We think that this end can best be achieved if the legislation which we propose includes the following provisions:
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> (*a*) all defences hitherto available in law to actions for libel will continue to be available for

(i) all reports (contemporaneous or otherwise) of criminal proceedings published before the legislation comes into force;

(ii) all reports of criminal proceedings published after the legislation comes into force but before the person subject to the proceedings has become a rehabilitated person;

(*b*) in the case of any reports of criminal proceedings published (or republished) after the legislation has come into force, and after the person subject to the proceedings has become rehabilitated, these defences should only remain available if either

(i) the report was contained in a *bona fide* textbook or article published for educational, scientific, or professional purposes; or

(ii) the report was an unintentional republication, in relation to the plaintiff, of a document first published either before the legislation came into force, or before he became a rehabilitated person."

The Chief Justice in his commentary on this part of the "Justice" Report says:—

"If I understand the recommendations correctly, it is proposed that after the expiry of the rehabilitation period truth, subject to the exceptions mentioned in the report, should no longer be a defence to an action for defamation based on a disclosure of the previous offences. Surely this is wrong. Libel and slander are torts. Damages are given for an injury to the reputation by the imputation of falsehoods. The award of damages for the disclosure of the truth seems to me to be utterly contrary to principle, and not only to the principles of the common law, but to those of abstract jurisprudence. Roman Law had the same provision as ours. A truthful imputation could not be an iniuria. I view with apprenhension any departure from this principle. If it is desired to prevent the publication of prior convictions, I would prefer this to be achieved by the creation of summary offences rather than by the award of damages to unmeritorious plaintiffs."

We agree that the proper sanction is by the creation of the apposite summary offence or offences. The Committee finds itself in respectful agreement with the view of the Chief Justice on this matter.

13. If the Government should decide that this prohibition against asking questions rather than safeguarding answers is impracticable in the law courts or for some other reason reject our recommendations, the Committee would hope that the recommendation mentioned in comment 7 be implemented and would endorse as an alternative approach a suggestion made by Sir Roderic Chamberlain, one of the commentators on the Report. Sir Roderic suggested that there should be an extension of the discretion given in the Evidence Act against unfair crossexamination to empower Courts to refuse to allow questions as to previous convictions unless satisfied that such crossexamination will really assist in the decision of the case together with a

power to prohibit publication of the questions or answers and a general provision against publication of convictions in any circumstances other than in current reports unless their publication is in the public interest, the onus of proof of which shall be on the publisher. By "really assist" we mean: is really pertinent to the credit of the witness and is not so remote, so unimportant or so peripheral as to be unfair. The Court in exercising this discretion will have to balance the competing needs of rehabilitation and of not shutting out something of real importance in the decision of the matter. Courts have to make such qualitative decisions in many areas of the law now.

14. The "Justice" Report also deals with application forms for immigration and work permits for other countries. This of course is a matter for Commonwealth law in our own country and therefore does not fall within the purview of this Committee and in so far as it relates to the requirements of foreign countries, it is a matter for the foreign country concerned. The question may also arise in connection with the employment questionnaires of another State Government or of other bodies in that State such as a university. Insofar as an agent of the foreign or interstate employer within South Australia might otherwise commit an offence there should be an exempting section inserted.

15. We now turn to a matter which is outside the scope of the "Justice" Report but which is, at least in this country, a problem and that is that in many applications for employment and in some applications to join various other bodies, matrimonial offences, in particular adultery and cruelty, have to be disclosed. It is true that there is a possibility of a "no-fault" system of divorce coming into force in Australia in the near future but that will not stop findings of adultery or cruelty in summary jurisdiction proceedings nor will it stop such findings if there are arguments over ancillary matters such as custody and property settlements in which it seems unlikely to us that questions of fault will ever be entirely eliminated. A majority of the Committee thinks that it would be proper that an applicant should not have to disclose the findings of a matrimonial offence at any time after say two years from the date of the finding.

    This is a purely arbitrary figure and we can only make it as a suggestion because in the last resort the Government will have to decide this matter as a question of policy. It is also a question of policy for the Government whether this prohibition should stop at disclosure of matrimonial offences, or whether it should today include questions aimed at disclosure of *de facto* relationships.

Summarising our views we are in sympathy with the recommendations of the "Justice" Report and the general attitude disclosed by it. Where we differ from it is not in the desirability of the reform but in the manner in which we think it should be carried out.

One member of our Committee, while sympathising with the aims of the "Justice" Report, is sceptical about the practicability of its general proposals, even in the light of the modifications we have recommended above. For instance, he sees the wisdom of making exceptions from the general rule of non-disclosure in the case of certain

employment applications, but he does not see how the line can reasonably be drawn between, say, lawyers, and house servants; yet to make an exception in the case of all positions of trust would go far towards undermining the whole scheme. The majority, however, consider that our recommendations provide the basis for legislation which would work satisfactorily.

We express our appreciation to the Honourable the Chief Justice, Dr. J. J. Bray, to the Honourable Sir Roderic Chamberlain, and to His Honour Judge Muirhead, Q.C., whose assistance to us by acting as commentators we gratefully acknowledge.

We have the honour to be

HOWARD ZELLING

B. R. COX

R. G. MATHESON

J. F. KEELER

K. T. GRIFFIN

Law Reform Committee of South Australia

Dated the 12th day of November, 1973.