

14 July 2016

Justice & Electoral Committee
Parliament Buildings
Wellington 6160

By email: je@parliament.govt.nz

Petition to amend the Criminal Records (Clean Slate) Act 2004

1. Thank you for inviting the New Zealand Law Society to provide the committee with a written submission regarding the petition of Eric Knight and 156 others, requesting that:

“the House amend the Criminal Records (Clean Slate) Act 2004 to apply to individuals who have been sentenced to a custodial sentence of 12 months or less, once a period of twenty years has passed since the date of last sentencing.”
2. The Law Society agrees that the Criminal Records (Clean Slate) Act 2004 should be amended as requested by the petition. It also considers that the petition highlights the need for a more comprehensive review of the Act, for the reasons set out in paragraphs 7 – 15 below.

The petition

3. In the Law Society’s view, the petition is consistent with the underlying intent of the legislation. Where a person has served a sentence and paid his or her debt to society, the ongoing penalty of discrimination or risk of disclosure of conviction should not continue to haunt the offender, unless there are sound public interest grounds for doing so.¹
4. The application of the Act does not expunge a conviction. Rather the Act provides a framework whereby the existence of the conviction is suppressed. This enables the convicted individual not to disclose the conviction and/or precludes particular individuals or entities from requiring or obtaining such disclosure.
5. As currently drafted, section 7 of the Act precludes an individual from being eligible under the clean slate scheme if a “custodial sentence has ever been imposed on him or her”, regardless of (a) how long ago the sentence was imposed, (b) whether a rehabilitation period has passed, and (c) the offender’s age at the time of conviction. In the Law Society’s view, this blanket exclusion for any custodial sentence makes for a very narrow application of the clean slate scheme and precludes persons, such as Mr Knight, from moving forward with their lives free of the enduring consequences of a mistake in their youth that they have learned from and not repeated.

¹ This was the New Zealand Law Society’s position in relation to the Criminal Records (Clean Slate) Bill [which became the Criminal Records (Clean Slate) Act 2004], as stated in its submission to select committee dated 23.9.2002, and continues to be its view.

6. However, the Law Society considers that section 7(1)(d) of the Act should still apply regardless of how much time has passed since the offending took place or what rehabilitation programmes have been completed. Therefore, if the conviction is for a “specified offence” (sexual offending) the offender will not be eligible for the clean slate scheme, in the interests of public safety. There could also be merit in exploring whether all serious violence offences (as defined in section 86A of the Sentencing Act 2002), together with offences of domestic violence and violence towards children, should be treated the same as the sexual violence “specified offences”.

A broader review

7. As noted in paragraph 2 above, this petition provides a useful opportunity to review the Act to determine whether its application should be broadened, particularly in light of developments in respect of similar legislation overseas. Analysis of the Act needs to be done in light of developments in comparable jurisdictions such as the United Kingdom, particularly with regard to providing a scaled, proportionate response to offending and rehabilitation.
8. In the UK, the Rehabilitation of Offenders Act 1974 (the “UK Act”) dictates when a conviction is “spent” (effectively ignored after a period of rehabilitation). Both the UK and the New Zealand legislation have the concept of a rehabilitation period. However, the UK Act has a sliding scale of rehabilitation periods depending on the seriousness of the crime.
9. The UK Act was amended in 2014. The 2014 amendments significantly reduced the rehabilitation periods that apply in that jurisdiction, enabling offenders to have a ‘clean slate’ much sooner than they could have prior to the amendments.
10. Below is a comparison of rehabilitation periods before and after the 2014 amendments to the UK Act:

UK Rehabilitation Periods for Custodial Sentences:

Sentence length	Pre-2014: rehabilitation period (applies from date of conviction)	Post-2014 amendments: rehabilitation period is period of sentence plus the ‘buffer’ period below which applies from end of sentence)
0 – 6 months	7 years	2 years
6 – 30 months	10 years	4 years
30 months - 4 years	Never spent	7 years
Over 4 years	Never spent	Never spent

UK Rehabilitation Periods for Non-Custodial Sentences:

Sentence	Pre-2014: rehabilitation period (applies from date of conviction)	Post-2014 amendments: Buffer period (will apply from end of sentence)
Community order (& Youth Rehabilitation Order)	5 years	1 year
Fine	5 years	1 year (from date of conviction)
Absolute discharge	6 months	None
Conditional discharge, referral order, reparation order, action plan order, supervision order, bind over order, hospital order	Various – mostly between one year and length of the order	Period of order

11. As with the previous scheme, the above periods are halved for persons under 18 at date of conviction (except for custodial sentences of up to 6 months, where the buffer period will be 18 months for persons under 18 at the date of conviction).
12. Section 5 of the UK Act outlines the issue of proportionality and includes tables setting out the rehabilitation period against length of sentence. The Law Society submits that a similar scaled proportionate response might prove effective in broadening the scope of the Act to allow persons in a similar position to Mr Knight to benefit from the clean slate scheme.
13. The limitations on the application of the Act for offences committed whilst a person is relatively young are a particular concern. There is ample evidence regarding young peoples' cognitive development and that full decision-making capability is not reached until the mid-20s. Studies into the offending patterns of young people have produced theories of offending trajectories that offer hope that social influences can lessen the risk of reoffending amongst some young people.² However, the Act does not allow young persons to be eligible if a custodial sentence has been imposed (regardless of the length of that sentence). The definition of "custodial sentence" specifically includes a sentence of corrective training and a [historical] sentence of borstal training.

Occupational regulation – lawyers

14. A broader review would also provide the opportunity to consider correcting an anomaly in relation to the position of candidates applying to become admitted to the High Court in New Zealand as a barrister and solicitor. There is no requirement for admission candidates in New Zealand to declare for the purpose of the "fit and proper" character test any convictions that have been "clean slated". In some Australian states (where there is relevant legislation) such

² How to turn a Child Offender into an Adult Criminal – In 10 Easy Steps. A paper by Judge Andrew Becroft: http://www.rethinking.org.nz/assets/young_people_and_crime/10_Easy_Steps.pdf

convictions must be disclosed when applying for admission as a lawyer.³ Lawyers who have been admitted in New Zealand can be admitted in Australia under the provisions of the Trans-Tasman Mutual Recognition Act 1997.

15. Exempting New Zealand admission candidates from the clean slate scheme would be consistent with exemptions already provided for in the Act for analogous occupational groups such as Judges, JPs, Community Magistrates and Police employees.⁴

Conclusion

16. Amending the Act as requested in the petition would go some way towards addressing the imbalance in proportionality between offending and the lasting consequences of a conviction, following a period of rehabilitation that is free of offending. However, the Law Society considers that a more comprehensive review of the Act is called for.

If you wish to discuss this submission further, please do not hesitate to contact the convenor of the Law Society's Criminal Law Committee, Steve Bonnar QC, through the committee secretary Karen Yates (04 463 2969, karen.yates@lawsociety.org.nz).

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized loop followed by a long horizontal stroke extending to the right.

Andrew Logan
Vice President

³ See for example clause 6 of the Criminal Records Regulation 2014 (NSW).

⁴ Criminal Records (Clean Slate) Act 2004, s 19(3)(d)(ii)-(iii).