



The law and the business of criminal record expungement in South Africa

By

Lukas Muntingh

Research report no. 18

© Community Law Centre, 2011

This publication was funded by the Open Society Foundation –South Africa (OSF-SA).

Copyright in this article is vested with the Community Law Centre, University of Western Cape. No part of this article may be reproduced in whole or in part without the express permission, in writing, of the Community Law Centre.

It should be noted that the content and/or any opinions expressed in this article are that of the author and not necessarily of CLC or CSPRI or any funder or sponsor of the aforementioned.

Civil Society Prison Reform Initiative (CSPRI)
c/o Community Law Centre
University of the Western Cape
Private Bag X17
7535
SOUTH AFRICA

The aim of CSPRI is to improve the human rights of prisoners through research-based lobbying and advocacy and collaborative efforts with civil society structures. The key areas that CSPRI examines are developing and strengthening the capacity of civil society and civilian institutions related to corrections; promoting improved prison governance; promoting the greater use of non-custodial sentencing as a mechanism for reducing overcrowding in prisons; and reducing the rate of recidivism through improved reintegration programmes. CSPRI supports these objectives by undertaking independent critical research; raising awareness of decision makers and the public; disseminating information and capacity building.

LM Muntingh
lmuntingh@uwc.ac.za

Contents

1. Introduction	4
2. The legal framework	6
2.1 Members of Parliament and the Constitution.....	7
2.2 Criminal Procedure Act	8
2.2.1 The ‘falling away’ provision.....	8
2.2.2. Expungement of ordinary criminal convictions	9
2.2.3 Apartheid era crimes.....	10
2.2.4 The procedure for having a record expunged	10
2.3 The Criminal Law (Sexual Offences and Related Matters) Amendment Act and the Children’s Act	11
2.3.1 Procedure for removal from the Sex Offenders Register	13
2.3.2 Procedure for removal from Part B of the National Child Protection Register	16
2.3.3 Expungement and the registers.....	17
2.4 Child Justice Act	18
2.5 Overview of the legislative provisions	21
3. The practice.....	23
3.1 Dept of Justice and Constitutional Development	23
3.2 The private sector and criminal records	23
4. Conclusions and recommendations.....	26
Appendix 1	30

The law and the business of criminal record expungement in South Africa

By

Lukas Muntingh¹

1. Introduction

Having a criminal record can have serious implications for an individual's prospects of finding employment² and much research has been done especially in the United States with its draconian laws excluding felons from a variety of resources, rights and types of employment.³ In South Africa the issue of criminal records was recently brought to the fore by an amendment to the Criminal Procedure Act (51 of 1977) through the Criminal Procedure Amendment Act (65 of 2008) which came into force on 6 May 2009.⁴ The amendment to section 271 created for the first time a statutory mechanism and clear procedure for the expungement of certain criminal convictions, including crimes created by apartheid era legislation. Prior to this no mechanism existed to expunge criminal convictions, save through a presidential pardon as provided for in the 1983 and 1996 Constitutions.⁵

While the Criminal Procedure Amendment Act (65 of 2008) created the mechanism for the expungement of certain criminal convictions, this has not been the only development on this front in recent years. What has emerged from various legislative interventions is a complex and often confusing set of yardsticks dealing with criminal records and their expungement. One is offence and age specific (i.e. the Child Justice Act 75 of 2008), whereas the second gives no recognition to the offence but only the sentence imposed and the time lapse from the date of conviction (i.e. Criminal

¹ Project Coordinator, Civil Society Prison Reform Initiative, Community Law Centre, University of the Western Cape.

² See Muntingh L. (2010) *Ex-prisoners' views on imprisonment and re-entry*, CSPRI Research Report, Bellville: Community Law Centre, p. 25 "A participant from one of the Cape Town groups explained that he was able to find employment but never disclosed his criminal record or time spent in prison to his employer: *I work at [name of large retail chain] but I keep quiet about prison; maybe they will find out. Maybe they know and will use it against me later.* A participant who used his time in prison well explained the application and interview processes as follows: *I went to school in prison and achieved a lot. I made many job applications but I can't say anything about a criminal record in these applications. It is only when you get to the interview that you try and convince them that you are able to do the job but they don't want to listen. As soon as the [criminal] record comes out, you know it is over."*

³ Olivares, K and Burton, V (1996) The collateral consequences of a felony conviction: a national study of state legal codes 10 years later, *Federal Probation*; Vol. 60 Issue 3, p10.

⁴ Proc. R36/GG32205/20090506.

⁵ Section 6(3)(d) Act 110 of 1983 and Section 84(j) Act 108 of 1996

Procedure Act 51 of 1977), and the third yardstick uses the sentence and the time lapse following the completion of the sentence (the Final Constitution, 1996 with reference to Members of Parliament). In addition to criminal convictions, there has been the establishment of three registers which are also relevant to the debate. The Sex Offenders Register established under the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007) and Part B of the National Child Protection Register in the Children's Act (38 of 2005) are both linked to criminal convictions and such convictions cannot be expunged unless the name of the offender has not first been removed from the relevant register. Lastly, the Child Justice Act (75 of 2008) created, oxymoronically, a register of children who have been diverted from the criminal justice system. While the diversion register is not specifically mentioned in relation to sentencing, it may be consulted in relation to a range of functions set out in several chapters of the Child Justice Act.

On a broader level, the question must be asked what purpose(s) the retention of criminal records aims to serve. Fundamental to the debate is the acknowledgment that having a criminal record can be severely detrimental to a person's access to employment and social status in general. Moreover, the effect of a criminal record is that the punishment for the crime committed lasts much longer than the sentence imposed by the court.⁶ It is this lasting effect that ex-offenders and ex-prisoners often experience as being exclusionary and marginalising. The effect of a criminal record is that it becomes a debt to society that cannot be re-paid.⁷ It is this debt that Van Zyl Smit calls a 'civil disability' – individuals are excluded from certain civil functions and types of employment because at some time in the past they had committed and were convicted of a crime.⁸ In the American literature this is also referred to as 'collateral disabilities'.⁹ As Van Zyl Smit observed in respect of prisoners in 2003: *'There has been no systematic effort to think through what the fundamental change to the constitutional order should mean for the legal disabilities imposed on former prisoners. Current disabilities are something of a neglected ragbag, typically relegated to a passing paragraph in the major legal textbooks dealing with their legal status generally.'*

Admittedly, criminal records also serve a protective function; they signify to society that a specific person is dishonest or poses a danger to children, or is violent. The protective value of criminal records in such instances have now also found expression in recently passed legislation providing for a sex offenders' register and a register of persons convicted for crimes against children. Criminal records are also used by courts when imposing sentences to assess the criminal history of the offender

⁶ Naude B (2002) Legislative expungement of criminal records, *SA Journal of Criminal Justice*, Vol 15, p. 287.

⁷ Love MC (2002) 'Starting over with a clean slate – in praise of a forgotten section of the model penal code' *Fordham Urban Law Journal*, Vol. 30 p. 1705

⁸ Van Zyl Smit D (2003) 'Civil disabilities of former prisoners in a constitutional democracy: building on the South African experience' *Acta Juridica*, pp. 221-237.

⁹ Love MC (2002) 'Starting over with a clean slate – in praise of a forgotten section of the model penal code' *Fordham Urban Law Journal*, Vol. 30 p. 1714

and previous convictions would normally count against the offender and result in a more severe penalty. There are, however, also different schools of thought on this issue.¹⁰

The retention or expungement of criminal records then centres on two issues: on the one hand, the duty to promote safety in society and protect citizens from dangerous and dishonest individuals and, on the other hand, the right to equality¹¹ and the constitutional duty on the state 'to free the potential of each person'.¹² Van Zyl Smit argues that discriminating against former prisoners based on their criminal pasts is not only counter-productive by undermining social reintegration, but that the state has a positive duty to fulfil in respect of social reintegration and to render support to former prisoners.¹³ Making information available to third parties about individuals' criminal histories would thus be to undermine this positive obligation.

2. The legal framework

The record of a criminal conviction is referred to and used in a number of different statutes and a selection will be described here. As will be shown, the same standards and criteria are not applied when reference is made to a previous criminal conviction and there are notable differences between the Constitution (with reference to Members of Parliament), the Criminal Procedure Act, the Children's Act (with reference to the Child Protection Register), the Sexual Offences Act (with reference to the Sex Offender Register), and the Child Justice Act. These differences have, in all likelihood, their origin in the particular context and history that shaped the particular statute. The expungement of a criminal conviction is provided for in the Criminal Procedure Act (as amended by Act 65 of 2008) and the Child Justice Act, and the procedures are described below.

¹⁰ Three approaches are discernable: (1) Flat rate sentencing only acknowledges the crime that is being punished now as the punishments for previous crimes have already been executed and it would be unfair to punish again for a crime that was already punished. (2) Cumulative sentencing argues that for each crime the punishment should be more severe in order to build on the deterrent value of the punishment. (3) The progressive loss of mitigation works from an upper ceiling downwards, giving maximum benefit to the first offender and least to the repeat offender up to him/her receiving the maximum specified penalty. [Ashworth A (2005) *Sentencing and Criminal Justice*, Cambridge University Press, pp. 184-187]

¹¹ Constitution s 7

¹² Constitution Preamble

¹³ Van Zyl Smit D (2003) 'Civil disabilities of former prisoners in a constitutional democracy: building on the South African experience' *Acta Juridica*, pp. 221-237.

2.1 Members of Parliament and the Constitution

Section 47 of the Constitution sets the criteria for membership of Parliament and section 47(1)(e) places a restriction in respect of persons convicted of criminal offences: *“anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.”*

The first issue here is that the requirement is not retrospective; in line with section 35(3)(l) of the Constitution. The sentence imposed must be more than 12 months imprisonment without the option of a fine. This raises the possibility that a Member of Parliament (MP) may in fact be a serving member whilst imprisoned if sentenced to less than 12 months. Even when an MP has thus been sentenced, but appeals the conviction and/or sentence, he or she would remain an MP at least until an appeal against the conviction or sentence has been finalised or the time for the appeal has expired.¹⁴ An important requirement here is that the exclusion from being an MP is that the disqualification remains in force for five years after the completion of the sentence. The completion of the sentence is understood to mean the full sentence and not only the part served in prison if released on, for example, parole or if sentenced under section 276(1)(h) or 276(1)(i) or conversion of the sentence to correctional supervision. The same would apply if part of the sentence was suspended for a period.

The key issues emerging here are, firstly, that the exclusion from membership of Parliament is sentence based (in excess of 12 months’ imprisonment without the option of a fine) and not offence based. Secondly, the exclusion remains in force for a period of five years after the completion of the sentence, thus clearly extending the punishment imposed by the court. Consequently, a person sentenced to life imprisonment even if released on parole will never be able to become a Member of Parliament as he remains on parole for the rest of his life and the sentence is completed only upon death.

¹⁴ Depending on which the trial court is, the period is either 14 or 15 days. See Criminal Procedure Act section 309B and 316(1) and Rule 49(1)(a) and (b) of the Rules of the Supreme Court.

2.2 Criminal Procedure Act

2.2.1 The 'falling away' provision

Section 271 A of the Criminal Procedure Act states that certain convictions 'fall away' after 10 years where a court has convicted a person of:

- Any offence where a term of imprisonment exceeding 6 months without the option of a fine may be imposed, but the passing of sentence was postponed in terms of section 297(1)(a)¹⁵ and the court discharged that person in terms of section 297(2)¹⁶ without passing sentence or has not called that person to appear before the court in terms of section 297(3).¹⁷
- Any other offence for which a sentence not exceeding six months without the option of a fine may be imposed

and that person has not, during the period of the postponement, been convicted of an offence for which a sentence of imprisonment exceeding six months without the option of a fine may be imposed.

For the layperson there may be some uncertainty as to what 'fall away' exactly means and whether an application for expungement (as discussed below) still needs to be made. According to Terblanche 'falling away' means that such convictions cannot not be taken into account for the purposes of sentencing at a later stage.¹⁸ However, the same author notes Van Heerden JA commenting that such convictions should in fact be removed from the SAP 69 (the record of previous convictions).¹⁹ This implies that, according to Van Heerden JA, the fall away provision is not sufficient to give the offender a true 'clean slate' again as the court (and third parties) still have access to the record of criminal convictions, even if these occurred more than ten years ago. Therefore, it must be understood that the offender who has been convicted and sentenced in a manner that meets the requirements of section 271A and that a period of ten years has lapsed, must not assume that the conviction has been removed from the criminal records data base; the record still exists but it may not be taken into account if there is a further conviction and sentence must be passed.

¹⁵ The passing of sentence is postponed for a period not exceeding 5 years and the person is released on one or more conditions that may include compensation, rendering a service to the aggrieved person some benefit or service in lieu of compensation or pecuniary loss; the performance of community service; placement under correctional supervision; submission to instruction or treatment; supervision by a probation officer; the compulsory attendance at a specified centre; good conduct, any other matter or unconditionally.

¹⁶ A court has postponed the passing of sentence under section 297(1)(a) and the court (same or differently constituted) is satisfied that the person is satisfied that there was compliance with the conditions of suspension, the court shall discharge his or her without passing sentence and such a discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

¹⁷ If a court has unconditionally postponed the passing of sentence in terms of section 297(1)(a)(ii) and the person has not by the end of the period of postponement been called to appear before the court, such person shall be deemed to have been discharged with a caution under section 297(1)(c).

¹⁸ Terblanche S (2007) *Guide to sentencing in South Africa* (2nd ed) Durban: Lexis Nexis, p. 84.

¹⁹ Terblanche S p. 84

A self-contradictory provision is also found in section 297(2) of the Criminal Procedure Act providing for an acquittal yet it is recorded as a conviction and would thus appear on the criminal record of the person.²⁰ It should similarly be noted and as will be elaborated on further below, that the record of criminal convictions is not only used by the courts for purposes of sentencing but that it is also used by, for example, prospective employers.

2.2.2. Expungement of ordinary criminal convictions

Following the amendment, Section 271B provides the list of sentences in respect of which an application may be made for the expungement of the record after a period of ten years has lapsed after the date of conviction and the person has not been sentenced to a period of imprisonment without the option of a fine. A person convicted and sentenced as set out below may apply for the expungement of their criminal record following the procedure described below. Persons who had received the following sentences are eligible:

- The postponement of the passing of sentence in terms of section 297(1)(a) where the persons was discharged in terms of 297(2) or the person was not called back to appear before the court in terms of section 297(3)
- A sentence discharging the person with a caution or reprimand provided for in section 297(1)(c)
- A fine only, but not exceeding R20 000
- A sentence of corporal punishment before corporal punishment was declared unconstitutional
- A sentence of imprisonment with the option of a fine but not exceeding R20 000
- Any sentence of imprisonment that was wholly suspended
- Correctional supervision as provided for in section 276(1)(h) or (i)²¹
- Periodical imprisonment.

Persons whose names have been included in the National Register of Sex Offenders²² and/or the National Child Protection Register²³ as a result of a conviction do not qualify to have the criminal

²⁰ 297(2) Where a court has under paragraph (a) (i) of subsection (1) postponed the passing of sentence and the court, whether differently constituted or not, is at the expiration of the relevant period satisfied that the person concerned has observed the conditions imposed under that paragraph, the court shall discharge him without passing sentence, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

²¹ Section 276(1)(h) provides for correctional supervision without a custodial component and section 276(1)(i) provides for a sentence of imprisonment from which the person can be placed under correctional supervision at the discretion of the National Commissioner of Correctional Services or the Correctional Supervision and Parole Board.

²² Section 50, Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.

²³ Section 120(1)(b), Children's Act 38 of 2005

record in question expunged unless their names have been removed from the register that they appear on. The requirements in respect of these registers are further discussed below.

2.2.3 Apartheid era crimes

Apartheid era legislation created a plethora of apartheid related crimes and these were recorded as criminal convictions for people convicted accordingly. Section 271C lists the relevant apartheid era laws in respect of which expungement are enabled.²⁴ A key difference here, compared to section 271B, is that the expungement is automatic in the sense that there are no additional requirements, such as the submission of an application, the issuance of a certificate of expungement and so forth. Moreover, the duty rests with the SAPS Criminal Records Centre to expunge such records without an application for expungement being made.

However, if the record of a person convicted of apartheid era crimes was not automatically expunged as required by section 271C(1), the record must be expunged upon the written request of the person subject to the procedure set out in section 271C(3) and section 271D.²⁵ In addition to the specific apartheid era laws listed in section 271C (1), provision is also made in section 271C(2) for any other act of Parliament, ordinance of a provincial council, municipal by-law, proclamation, decree or any other enactment having the force of law, enacted in South Africa, the TBVC states²⁶ and self governing territories “which created offences that were based on race or which created offences, which would not have been considered to be offences in an open and democratic society based on human dignity, equality and freedom, under the constitutional dispensation after 27 April 1994”.²⁷

2.2.4 The procedure for having a record expunged

²⁴ A contravention of section 1 of the Black Land Act, 1913 (Act No. 27 of 1913); section 12 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936); section 5(1), read with section 5(2), or section 6, read with section 6(2), of the Blacks (Urban Areas) Consolidation Act, 1945 (Act No. 25 of 1945); section 8(1), read with section 8(3), of the Coloured Persons Settlement Act, 1946 (Act No. 7 of 1946); section 2 or 4 of the Prohibition of Mixed Marriages Act, 1949 (Act No. 55 of 1949); section 11 of the Internal Security Act, 1950 (Act No. 44 of 1950); section 10(6) and (7), 11(4), 14, 15, 16, 20(1), 28(7), 29(1) or 30 of the Black Building Workers Act, 1951 (Act No. 27 of 1951); section 15 of the Blacks (Abolition of Passes and Co-ordination of Documents) Act, 1952 (Act No. 67 of 1952); section 2 of the Criminal Law Amendment Act, 1953 (Act No. 8 of 1953); section 2(2) of the Reservation of Separate Amenities Act, 1953 (Act No. 49 of 1953); section 16 of the Sexual Offences Act, 1957 (Act No. 23 of 1957); section 46 of the Group Areas Act, 1966 (Act No. 36 of 1966); section 2 or 3 of the Terrorism Act, 1967 (Act No. 83 of 1967); section 2 read with section 4(1), of the Prohibition of Foreign Financing of Political Parties Act, 1968 (Act No. 51 of 1968).

²⁵ Section 271C(2)(b)

²⁶ The former homelands of Transkei, Bophuthatswana, Venda and Ciskei

²⁷ Section 271C(2)(a)

The procedure for applying for an expungement of a criminal record is set out in section 271D of the Criminal Procedure Act and the regulations thereto.²⁸ Excluding apartheid era offences, the first step in the application for expungement is to obtain a ‘clearance certificate’ showing that a period of ten years has lapsed after the conviction(s) and sentencing. The clearance certificate can be applied for at a police station²⁹ and a fee of R59.00 is payable upon application for a clearance certificate.

Applications in respect of section 271B must use Form A. Applications in respect of section 271C(2)(a) (offences based on race) must use Form B. Applications in respect of section 271C(2)(a) (offences listed under apartheid era laws) must use Form C. Form C applies to those instances where the records should have been automatically expunged, but this did not happen. In respect of race-based offences and specific apartheid era law, there is no need to submit the SAPS certificate of clearance.

The full applications must be submitted to the Director General: Justice and Constitutional Development who, if the applicant meets the criteria for expungement, issue a certificate of expungement; Form D in the Regulations. The certificate of expungement must then be submitted by the Director General: Justice and Constitutional Development to the head of the Criminal Records Centre of SAPS.

Upon the receipt of the certificate of expungement, the Head of the Criminal Records Centre of SAPS (or such delegated official) must expunge the record as indicated. The Head of the Criminal Records Centre of SAPS will, however, not automatically inform the applicant of the expungement and will only do so upon the written request of the applicant.

In the event that there is a dispute or uncertainty whether an offence meets the requirements in section 271C(1) or section 271C(2), the matter must be referred to the Minister of Justice and Constitutional Development. If the Minister decides that it does meet the requirements in section 271C(1) or section 271C(2), the Minister may issue a certificate of expungement (Form E). It should be noted that in respect of applications made under section 271B(1), there is no dispute resolution mechanism.

2.3 The Criminal Law (Sexual Offences and Related Matters) Amendment Act and the Children’s Act

²⁸ Criminal Procedure Act Regulations, R. 513, No. 32205, 6 May 2009.

²⁹ It appears that not all police stations are capable of handling these applications and practice indicates that only police stations with a detective branch can process the application for a clearance certificate.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007) and the Children's Act (38 of 2005) created two registers that have an important bearing on the expungement of criminal records. If a person has been convicted of a sexual offence against a child or person who is mentally disabled, and his or her name has been included in the National Register for Sex Offenders, the person's criminal record may not be expunged unless his or her name has been removed from the National Register. Similarly, a person whose name has been included in Part B of the National Child Protection Register as a result of a conviction as provided for in section 120(1)(b) of the Children's Act (38 of 2005), must first have his or her name removed from the register before an application for expungement can be made. It should be noted here that while the Criminal Procedure Act refers, in section 271B(b)(ii), to a conviction as the requirement for a criminal record, the Children's Act provides for a far lower bar than a conviction for inclusion on Part B of the National Child Protection Register. Section 120(1) of the Children's Act (38 of 2005) provides that a finding that a person is unsuitable to work with children can be made by a children's court, any other court in any criminal or civil proceedings, or any forum established or recognised by law in any disciplinary proceedings.³⁰

Inclusion in the National Register for Sex Offenders casts a wide net and not only cover convictions following the coming into operation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007), but also covers all previous convictions for sexual offences against children and persons with mental disabilities, regardless of whether a custodial or non-custodial sentence was imposed.³¹ The implications of this retrospective mechanism are considerable, not only from a practical and logistical point of view, but also from a legal point of view. For example, a person convicted prior to 1994 of a sexual offence against a child or mentally disabled person did not enjoy the same constitutional and other procedural protections than a post-1994 conviction. If the person was convicted based on a confession obtained through coercion, if not torture, the process by which the conviction was obtained would be flawed under the current constitutional order.³² Prior to 1994 the courts were far less discerning as to where evidence came from and "generally admitted all evidence, irrespective of how it was obtained, if it was relevant."³³ This then presents a dilemma as it applies one standard to all, but ignoring that the 'rules of the game' have changed substantially. A further element is that a person who has been convicted pre-1994 and who has completed the sentence

³⁰ See Schedule 8 of the Labour Relations Act (66 of 1995). This would therefore cover any legitimate disciplinary procedure established and used in the work place.

³¹ Section 50(1)(a)(iii-iv) Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007)

³² The point of a flawed process is well made in *Mthembu v S* "To admit Ramseroop's testimony regarding the Hilux and metal box would require us to shut our eyes to the manner in which the police obtained this information from him. More seriously, it is tantamount to involving the judicial process in 'moral defilement'. This 'would compromise the integrity of the judicial process (and) dishonour the administration of justice'. In the long term, the admission of torture induced evidence can only have a corrosive effect on the criminal justice system. The public interest, in my view, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial." Para 36.

³³ *Mthembu v S* (64/2007) [2008] ZASCA 51 (10 April 2008) para 22, *S v Pillay* 2004 (2) SACR 419 (SCA) para 6.

imposed and who has no further convictions, will now be placed on the National Register for Sex Offenders without being informed of this prior to inclusion and given the opportunity to make representation to be excluded based on the criteria for removal as set out in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, as discussed below.

Part B of the National Child Protection Register also has a retrospective mechanism but this is limited to persons convicted of murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm against a child in the five years prior to the coming into operation of the relevant chapter in the Children’s Act, in this case 1 April 2010. Such persons are found automatically to be unsuitable to work with children.³⁴

Persons who are alleged to have committed a sexual offence against a child or person with a mental disability, must also be included in the National Register for Sex Offenders if the court has made a finding in respect of the person’s lack of capacity to stand trial or that the person is not criminally responsible due to mental illness or defect as provided for in sections 77(6) and 78(6) of the Criminal Procedure Act.³⁵

2.3.1 Procedure for removal from the Sex Offenders Register

Section 51 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act and the accompanying regulations³⁶ set out the requirements for removal from the Sex Offenders Register. Table 1 summarises the provisions of section 51.

Table 1

Offence	Category	Time lapse	Removable
Sexual offence against a child or mentally disabled person	Imprisonment, periodical imprisonment ³⁷ , correctional supervision and imprisonment under section 276(1)(i) without the option of a fine for a period exceeding 18 months, whether suspended or not.	Not applicable	No

³⁴ Section 120(5) Children’s Act (38 of 2005)

³⁵ Section 50 (1)(a)(ii) Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007)

³⁶ Government Gazette No. 31076, 22 May 2008, Regulation 19.

³⁷ It should be noted that section 285(1) of the Criminal Procedure Act specifies the maximum period for periodical imprisonment to be 2000 hours, or 83.3 days. It is therefore not possible to impose a sentence of periodical imprisonment that exceeds 18 months, unless reference is being made here to the total period over which the term of periodical imprisonment must be served. If so, then the law is not clear on this.

Offence	Category	Time lapse	Removable
	Two or more convictions of a sexual offence against a child or mentally disabled person	Not applicable	No
	Imprisonment, periodical imprisonment, correctional supervision and imprisonment under section 276(1)(i) without the option of a fine for a period of at least 6 months but not exceeding 18 months, whether suspended or not.	10 years after release from prison or the period of suspension has lapsed	Yes
	Imprisonment, periodical imprisonment, correctional supervision and imprisonment under section 276(1)(i) without the option of a fine for a period of at least 6 months or less, whether suspended or not.	7 years after release from prison or the period of suspension has lapsed	Yes
	Any lesser sentence or court order than the above	5 years after release from prison or the period of suspension has lapsed	Yes
	Court makes finding in respect of section 77(6) [capacity to understand proceedings] or 78(6) [mental illness] of the CPA	5 years after release from prison or the period of suspension has lapsed	Yes

If a person is eligible to apply for removal from the register, he/she must make such an application on Form 10 in Annexure B of the Regulations to the Criminal Law (Sexual and Related Matters) Amendment Act. The application must be accompanied by a full set of fingerprints. The form (Form 10) requires, in addition to the biographical details of the applicant, a motivation for the application as well as a declaration that there are no further pending cases against the applicant. The Registrar may then, if satisfied, issue a certificate (Form 11) that the person's name has been removed from the register. The same form can also be used to issue a certificate that a person's name has not been removed from the register. The Registrar may also remove a person's details from the register if satisfied that the inclusion of the person on the register was clearly done in error.

There are, however, a number of problem areas in relation to the procedure for removal. Firstly, the Criminal Law (Sexual Offences and Related Matters) Amendment Act introduces yet another yardstick for expungement, namely the date upon which the offender was “released from prison or the period of suspension has lapse”. The legislation does not clarify what “release from prison” means and whether that refers to the date of expiry of sentence or the date that the offender may be released on parole or placed under community corrections or, presumably, the actual date of actual release if on a date falling between the other two dates. It is this distinction that seized the Supreme Court of Appeal in *Price v Minister of Correctional Services* and the court declared that

“the ‘date of release’ referred to in s 276A(3)(a)(ii) of the Criminal Procedure Act 51 of 1977 means, for the purpose of a prisoner subject to the provisions of the Correctional Services Act 8 of 1959 relating to his or her placement under community corrections, the date on which such prisoner may be considered for placement on parole or the date upon which the prisoner may be released upon the expiration of his or her sentence, whichever occurs first.”³⁸

Section 73(6)(a) of the Correctional Services Act stipulates that a prisoner must serve the stipulated non-parole period or if no such period was stipulated, then half the sentence before being considered for release. It is then from this date of release, most likely halfway through the imposed sentence that the time period (five, seven or ten years) as stipulated in section 51 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, commences. It should furthermore be noted that the decision to release a person serving a sentence of less than 24 months rests not with the Correctional Supervision and Parole Board, but with the Head of the Correctional Centre.³⁹

Secondly, it is not clear how the legislature established the five, seven and ten year time periods set out in section 51 and how the risk the individual may pose to society upon release in respect of further offending was linked to the time lapse periods. Research elsewhere has found that 19% of sex offenders reoffended after two years, 28% after five years and 36% after ten years.⁴⁰ The same study found that sex offenders were also convicted of other violent and non-violent property offences. Evidently the longer the time period, the greater the chances of re-offending become, but despite extensive research in this regard, age together with a wide range of other variables rather than time lapse appear to be a stronger predictor of offending rates.⁴¹

³⁸ *Price v Minister of Correctional Services* Para 18 [2007] SCA 156 (RSA)

³⁹ Section 75(1) Correctional Services Act 111 of 1998

⁴⁰ Craig L, Browne K, Beech A & Stringer I (2006) Differences in personality and risk characteristics in sex, violent and general offenders, *Criminal Behaviour and Mental Health*, Vol 16, pp. 183–194.

⁴¹ See in general Muntingh L and Gould C (2010) *Towards an understanding of repeat violent offending - A review of the literature*, ISS Paper 213, Pretoria: Institute for Security Studies.

Lastly, the Criminal Law (Sexual Offences and Related Matters) Amendment Act predates the Child Justice Act by some two years⁴² and even though the Child Justice Act makes provision for a custodial sentence of up to five years in a child and youth care centre⁴³, this sentence option is not covered by the sentences defined in section 51 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act. It therefore follows that a child who is convicted of a sexual offence must be placed on the register, but can not be removed as a sentence to a child and youth care centre is not listed. This is a matter requiring redress through legislative amendments to harmonise the two pieces of legislation.

2.3.2 Procedure for removal from Part B of the National Child Protection Register

Section 128(1) of the Children's Act provides that a person may apply to have his or her name removed from Part B of the National Child Protection Register. An application on the ground that the person has been rehabilitated may only be made after a period of at least five years has lapsed since the entry was made and after consideration is given to the prescribed criteria.⁴⁴ Furthermore, the particulars of a person convicted of more than one offence regarding a child may not be removed from Part B of the National Child Protection Register. The description here will focus on the application for removal as it pertains to an application for expungement of a criminal record and thus relates to a conviction being the reason for inclusion of a person's name in Part B of the National Child Protection Register.

An application for removal from the register on the grounds that the person has been rehabilitated may be made to any court, including a children's court. Such an application must be accompanied by proof of the rehabilitation of the person as set out in regulation 45(2) and must include:

- a report from a registered psychologist, psychiatrist or social worker stating that the person has been rehabilitated and is unlikely to commit another act or offence similar to which has led to the inclusion of the person's name in part B of the register;
- an outline of the steps taken by the applicant to rehabilitate him or herself since inclusion in the register
- an official document from SAPS stating that the applicant has not been convicted of any offence relating to a child during the time that the applicant's name was included in the register

⁴² The Child Justice Bill was tabled in 2008 and adopted by Parliament in 2009, and came into operation on 1 April 2010.

⁴³ Section 76(2) Child Justice Act 75 of 2008.

⁴⁴ Children's Act (38 of 2005) section 128(3)

- an affidavit by the applicant that no proceedings in a court or administrative forum are pending against him or her involving the maltreatment, abuse, deliberate neglect or degradation of a child.

The Children's Act introduces even further requirements compared to the other procedures discussed above in relation to the Criminal Procedure Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act. Firstly, while the period to lapse is comparatively short (five years), proof of rehabilitation and proof of no further pending actions against the applicant, set difficult requirements to meet. The risk of re-offending is a variable not addressed in any of the other mechanisms and particularly not in respect of the Sex Offenders Register. Secondly, while the expungement procedure in respect of section 271B of the Criminal Procedure Act and the Child Justice Act (discussed below) is an administrative one handled by functionaries of the Department of Justice and SAPS, an application for removal from Part B of the Child Protection register requires an application to be made to a court, evidently a more onerous and costly process if legal representation is used.

2.3.3 Expungement and the registers

A number of comments are warranted in respect of the intersection between the two registers discussed in the above and the criminal record expungement provisions. In general, it can be said that the procedures explained are not user-friendly and require a familiarity with legal prescripts and administrative procedures. A summary diagram of the procedures is attached as Appendix 1. Firstly, removal from the registers is a pre-requisite for the expungement of a conviction relating to offences against children and sexual offences. The extent to which the state is able to cross check the registers for each application under section 271B of the Criminal Procedure Act is not known and this may result in a significant additional administrative load to ensure that records are not expunged while the name of the person concerned still appear on either of the registers.

Secondly, the provisions in section 271B of the Criminal Procedure Act sets the most severe sentence for which an expungement may be applied for as twelve months imprisonment with the option of a fine not exceeding R20 000.⁴⁵ The most severe sentence under the Criminal Law (Sexual Offences and Related Matters) Amendment Act for which an expungement may be applied for is 18 months imprisonment without the option of a fine.⁴⁶ This sets a significantly more accommodating ceiling compared to the twelve months imprisonment with the option of a fine not exceeding R20 000

⁴⁵ Section 271B(1)(a)(v)

⁴⁶ Section 51(1)(a)(i)

provided for in the section 271B of the Criminal Procedure Act. Whether it was intentional is unknown, but the consequence is that an offender listed on the Sex Offenders Register who had been sentenced to 18 months or less direct imprisonment without the option of a fine will be able to have his or her name removed from the register, but not have the record expunged.

Thirdly, section 271 B uses the date of conviction and the sentence imposed as the two key variables. The Criminal Law (Sexual Offences and Related Matters) Amendment Act uses the offence, the sentence and the date of release from prison as the key variables. If all other criteria are met, the application for expungement cannot commence at the earliest possible date, due to the different starting points of the two provisions: the date of conviction versus the date of release from prison. A likely explanation is that it is the behaviour of sex offenders once released that is important and whilst imprisoned they do not pose a threat to society. This reasoning has validity although it adds to the complexity of the expungement provisions.

Fourthly, removal from Part B of the National Child Protection Register fortunately does not bring the sentence imposed into the equation but rather emphasises the behaviour of the person as the key variable. However, if all requirements are met a person can have his or her name removed from Part B of the National Child Protection Register after five years after being convicted but must then wait a further five years to apply for an expungement under section 271B of the Criminal Procedure Act.

In summary, the registers have added to the complexity of the expungement provisions by, firstly, creating a two-step procedure for expungement of criminal records related to sexual offences and offences against children. Secondly, the registers have also increased the number of government departments involved as the Part B of the National Child Protection Register is maintained by the Director General of Social Development and the Sex Offender Register by the Department of Justice and Constitutional Development. Despite these complexities the narrow scope of who is eligible for expungement under section 271B of the Criminal Procedure Act places a severe limitation on any incentive for offenders to be law abiding citizens with the prospect of having their criminal records expunged in the future.

2.4 Child Justice Act

The Child Justice Act (75 of 2008) is primarily aimed at dealing with children (under the age of 18 years) coming into conflict with the law, but the Director of Public Prosecutions may, in accordance with directives issued by the National Director of Public Prosecutions, direct that a matter be dealt with in accordance with the Child Justice Act if the person was a child at the time of the alleged

commission of the offence, or was older than 18 but younger than 21 years when ordered or summoned to appear at a preliminary enquiry, or arrested.⁴⁷

The Child Justice Act also provides for the expungement of certain criminal records of persons convicted under this legislation.⁴⁸ The intention is clear in that the wrongful actions of children should not hang like an unpleasant reminder over them for the rest of their lives. The criteria for expungement of criminal records under the Child Justice Act are, however, fundamentally different from those used in the Criminal Procedure Act.

Whereas the Criminal Procedure Act defines the eligible categories based on the sentence that was imposed, the Child Justice Act uses the offence that was committed as per the three schedules attached to the Act. The offences listed in Schedule 1 are of a less serious nature such as theft involving less than R2500 and trespassing. Schedule 2 offences are more serious in nature and include theft with a value in excess of R2500 and housebreaking. Schedule 3 offences include murder, rape and kidnapping. Offences listed under Schedule 3 are excluded from the expungement provisions and only offences listed under Schedules 1 and 2 are eligible for expungement.

In the case of convictions for offences listed under Schedule 1 a period of five years must lapse after which the conviction will 'fall away' as a previous conviction and the record must be expunged upon application from the child, parent, appropriate adult or guardian, unless the child has been convicted of a 'similar of more serious offence' during that period.

In the case of Schedule 2 offences, the period is ten years. The decision on whether a further offence is similar or more serious than an earlier offence rests with the Minister of Justice and Constitutional Development. The application for expungement is made to the Director General: Justice and Constitutional Development who, if satisfied, will issue a certificate of expungement directing that the conviction and sentence of the child be expunged. The certificate of expungement is issued to the applicant who must in turn submit this in the prescribed manner to the SAPS Head of Criminal Records Centre. Upon the written request of the applicant, the SAPS Head of Criminal Records Centre must confirm in writing that the record had been expunged. The procedure here is thus identical to the procedure set out for the Criminal Procedure Act and is similarly described in the regulations to the Child Justice Act.⁴⁹ The procedure is described in some more detail in the Child Justice Act Regulations than in the Criminal Procedure Act Regulations, although this does not have a material impact on the overall application and expungement procedure.

⁴⁷ Section 4(2)

⁴⁸ Section 87. The Child Justice Act came into force on 1 April 2010.

⁴⁹ Regulation 49

The Child Justice Act does not only provide for the keeping of records of convictions and their expungement, but also records of children who have been diverted. The Director General of Social Development must keep and maintain a register of all children diverted and must ‘expunge’ all such records upon the child turning 21 years of age, unless the child has been convicted of a further offence or has failed to comply with the diversion order in question.⁵⁰ Neither the Child Justice Act nor the Regulations require an application process to have a diversion record expunged. However, the Director General for Social Development may “for the purposes of determining whether the criteria referred to in section 87(6) of the Act have been complied with, obtain information relating thereto from any person, organ of state or private body”.⁵¹

The purpose of keeping a register of diverted cases, especially if there is reference made to their expungement is not clear, as it is the overall purpose of diversion to avoid the child from having a criminal record and the potential prejudicial and negative consequences of having such a record. Section 60(2)(a) sets out the purposes of the diversion register relevant to this discussion⁵² and relates to securing the attendance of the child at court by the police⁵³; the release or detention of the child by the police⁵⁴; the assessment by the probation officer⁵⁵; diversion granted by the prosecutor⁵⁶; preliminary inquiry⁵⁷, and trial by a child justice court.⁵⁸

Upon assessing whether to detain a child in a prison awaiting trial, the presiding officer should take all the relevant information into account and, if it exists, the record of previous diversions, record of previous convictions and any pending charges against the child.⁵⁹ When assessing a child, the probation officer must also take into account the record of previous diversions, record of previous convictions and any pending charges against the child. If a prosecutor is considering diversion of a

⁵⁰ Section 87(6)

⁵¹ Regulation 52(1)

⁵² Child Justice act (75 of 2008) Section 60(2)(a)The purpose of the register is to keep a record of particulars referred to in subsection (1) in respect of children whose matters are diverted from the formal criminal justice system in terms of this Act—

(a) for access by (i) probation officers when assessing a child in terms of Chapter 5; (ii) police officials when performing functions in terms of Chapter 3 or 4; or (iii) presiding officers, members of the national prosecuting authority referred to in section 4 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), or other court officials, when considering diversion in terms of Chapter 6, at a preliminary inquiry in terms of Chapter 7, and during proceedings at a child justice court in terms of Chapter 9.

⁵³ Child Justice Act Chapter 3

⁵⁴ Child Justice Act Chapter 4

⁵⁵ Child Justice Act Chapter 5

⁵⁶ Child Justice Act Chapter 6

⁵⁷ Child Justice Act Chapter 7

⁵⁸ Child Justice Act Chapter 9

⁵⁹ Section 30(3)(c)

case, similar consideration should be given to the record of previous diversion⁶⁰ and the preliminary inquiry should also take account of the record of previous diversion.⁶¹

The problem that arises is that the Child Justice Act does not specify or provide guidance on how the record of previous diversion should be used by the various officials who have access to it. It leaves it open to interpretation. Since the Child Justice Act does not prescribe how such a record should be interpreted, it creates the very real possibility that it will be interpreted as if the previously diverted child poses an increased risk compared to a child who has not previously been diverted and already had his or her 'first chance' and that a more restrictive action or severe sanction is now a logical and deserved next step.

Moreover, the Act fails to distinguish between a record of a successful diversion where there was compliance with the diversion order and a record of failure to comply with the diversion order, as provided for in section 58 of the Act. It appears then that a record of a failed diversion will count as much or as little as a successful one.

The risk here, as has been found in other jurisdictions,⁶² is that a previous diversion may be held against the child in a subsequent case, even though there had been no conviction. The record of a previous diversion could therefore have a strong prejudicial effect similar to the effect of a previous criminal conviction if there is a further alleged offence and the official concerned with that particular stage in the criminal justice process requests the record of previous diversions.

Perhaps even more worrying about the diversion record is that it remains until the age of 21 years, as opposed to a conviction for a Schedule 1 offence that can be expunged after five years. In such cases the diversion record may end up having a longer prejudicial impact as it may still be taken into consideration up to age 21 years, whereas the Schedule 1 conviction falls away and may be expunged after five years.

2.5 Overview of the legislative provisions

The amendment to the Criminal Procedure Act created for the first time a mechanism for expungement of criminal records in addition to the powers of the president to grant pardons. This is

⁶⁰ Section 41(5)

⁶¹ Section 52(1)

⁶² Muntingh L. (1997) 'The Development of Diversion Options for Young Offenders' in Shaw M. & Camerer L. (eds) *Policing the Transformation: Further Issues in South Africa's Crime Debate*, Monograph No 12, Institute for Security Studies, Pretoria.

regarded as a positive development and reflecting the acknowledgment that at least some criminal convictions should not remain on record forever. However, the scope of section 271B of the Criminal Procedure Act is extremely narrow and the sentences listed as covering the scope of expungement are, in all likelihood, only imposed for very minor offences or offences where there were extensive mitigating circumstances. The most onerous sentence covered by section 271B of the Criminal Procedure Act is twelve months imprisonment with the option of a fine not exceeding R20 000. It must be assumed that the courts would use the fine as alternative to imprisonment option when the offender has the means to pay the fine and/or poses such limited risk to society that their imprisonment is in fact not an essential requirement to serve the interests of justice. It is regrettably the case that there are no sentencing statistics available on a national level to quantify the exclusivity of the section 271B provisions.

The Sex Offender Register and Part B of the National Child Protection Register added an additional layer to eligibility for expungement but do so with different interests in mind than the provisions of section 271B of the Criminal Procedure Act. The registers are clearly aimed at protecting society against certain individuals and thus introduce this purpose to maintaining a record of convictions. In respect of other offences not covered by these two registers, especially non-violent crimes, the aim and purpose of keeping an offender's criminal record for the rest of that person's life are not well defined and require further critical examination. What appears to have developed is a vague understanding that keeping records on people's criminal convictions may be useful for something, but that this something is not entirely clear.

The preceding discussion has shown that a series of different yardsticks are employed by the different legislative provisions. These are: the offence; the date of conviction; the date of release from prison; and the date of expiry of the sentence. Furthermore, the different legislative provisions use them in different combinations. For example, the Criminal Procedure Act refers to the date of conviction and then lists certain sentences, presumably indicative of the seriousness of the offence. The Criminal Law (Sexual Offences and Related Matters) Amendment Act also lists specified sentences, overlapping to some extent with the Criminal Procedure Act list, but relate that to the date of release from prison or expiry of the sentence. The unavoidable conclusion is that the drafters of the different laws formulated these provisions in isolation from one another, or that there are indeed very divergent opinions on how criminal records should be managed and what offences should be eligible for expungement. Ideally there should be uniformity in the yardsticks employed and this should be underpinned by scientific knowledge about reoffending and the implications of having a criminal record.

3. The practice

3.1 Dept of Justice and Constitutional Development

Since the Criminal Procedure Amendment Act (65 of 2008) came into force the Department of Justice has had to deal with a considerable number of applications, as shown in Table 2 below. From May 2009 to 2 February 2011 a total of 8687 applications were received of which 6593 were successful, or 76%.⁶³ It is unfortunately the case that the Department is not able to give a further breakdown of these figures in respect of age at time of offence, the sentence imposed and the offence itself. The total number of applications nonetheless indicates that there was indeed a need for such a mechanism and that the average number of applications per month has been climbing steadily.

Table 2

Period	Applications	Successful	Unsuccessful
May to Dec 2009	3212	2954	
Jan to Dec 2010	4973	3002	
Jan to 2 Feb 2011	502	637	
TOTAL	8687	6593	1170

3.2 The private sector and criminal records

As can be expected, the expungement procedure is being used for commercial gain by private companies, some of which are law firms. A few firms advertising this service on the internet were approached and the following was established. The Rustenburg-based law firm, *Walter Vermaak Attorneys*, charges between R2000 and R3000 per application, depending on the option chosen.⁶⁴ Another law firm, *S. Niselow Attorneys* in Johannesburg, charges R7500 for the application process.⁶⁵ A third company, *CSI Africa*, which focuses on forensic investigations, also handles expungement

⁶³ Figures supplied to the author by the Department of Justice and Constitutional Development.

⁶⁴ *Walter Vermaak Attorneys* describe the two options as follows: OPTION 1-Our total all inclusive fee, payable in advance, to apply to expunge your record is R2000 on condition that you apply personally for your clearance certificate. You'll have to go to your nearest police station, let your fingerprints be taken, apply then for your clearance certificate and follow it up yourself with them. Upon receipt of it, you must send it to us where after we'll lodge your application to expunge your record. OPTION 2-Our total all inclusive fee, payable in advance, to apply to for your clearance certificate as well as to apply thereafter to expunge your record is R3000. You'll only have to furnish us with 2 sets of fingerprints which will be taken at your nearest police station, send it to us, where after we'll do everything further on your behalf. (Correspondence dated 13 October 2010 on file with author.)

⁶⁵ Correspondence dated 22 March 2011 on file with author. <http://www.niselowlaw.co.za/>

applications and charges R2500 per application.⁶⁶ *Nevetec Police Clearance* charges R2850 for the application for expungement of a criminal record.⁶⁷

Apart from the initial costs involved to apply for the clearance certificate (R59.00), the Act does not provide for any other fees to be paid to apply for the expungement of a criminal record. Direct cost to the applicant, if he handles the process himself, are minimal and may involve a few phone calls and postage. Admittedly the process of having a criminal record expunged is not an easy one (see Figure 1) and may be confusing and intimidating to the lay person. At minimum the applicant has to interact with three entities: the police upon application for a clearance certificate; the Department of Justice and Constitutional Development, and the SAPS Criminal Record Centre (on two occasions). It is therefore not surprising that private companies are offering the service, but the costs involved may indeed put the expungement of the record beyond the reach of average South Africans. The commercial exploitation of the expungement procedure was, however, not a consequence considered by the legislature at the time the amendment was before Parliament and there is consequently no regulation around this.

Private sector involvement is also not limited to the expungement of criminal records and a number of companies conduct 'screening' of prospective employees which includes verifying if the job applicant has a criminal record.⁶⁸ Advice from an industry newsletter sketches an intimidating picture to employers:

Employers have become increasingly aware of the importance of knowing if an applicant has a criminal record. Employers have a legal duty to make reasonable inquiries about who they hire, and to provide a safe workplace. An employer who hires a person with a criminal record can be found liable for negligent hiring where the hiring decision results in harm, and it could have been avoided by a simple criminal record check. Checking criminal records demonstrates Due Diligence and is also an important preventative measure to protect against workplace violence.⁶⁹

One example is the company *MIE Background Screening*; a company owned by the US company *Kroll Background Screening* and the South African *Ideco Group*.⁷⁰ From the description on MIE's website it is clear that there is a close working relationship between the company and SAPS to the extent that SAPS-compatible and specialised computer hardware and software are now used for checking criminal records:

⁶⁶ Correspondence dated 11 April 2011 on file with author. <http://www.csinvestigate.co.za/>

⁶⁷ <http://www.nevetecpoliceclearance.co.za/remove.htm> Accessed 21 March 2011

⁶⁸ For example *Employers Mutual Protection Service* and *MIE Background Screening*

⁶⁹ Doing criminal record checks when hiring, BizCommunity, 10 April 2005, <http://www.bizcommunity.com/Article/196/22/6256.html> Accessed 21 March 2011.

⁷⁰ http://www.kroll.co.za/content/fservices/svc_crims.htm Accessed 21 March 2011.

A request for a Criminal Record check MUST then be accompanied by a full set of fingerprints. Importantly, these fingerprints may be in electronic format. This format for fingerprints has been determined, and can only be forwarded to the SAPS via specific biometric devices and predetermined transfer mechanisms. Electronic fingerprints must be captured on specific devices (manufactured by Sagem⁷¹) by authorized and trained operators, who themselves “connect” using their own fingerprints.⁷²

The problem with the accuracy of electronic versus manual (name and identity number) checking is highlighted in the 2010 EMPS Annual Screening Survey:

To-date 6200 applicants have been checked doing both a name/ID check and an AFIS (fingerprint) check. Our research picked up that 893 of the applicants had a criminal record via AFIS, while only 235 of those people were picked up on the name/ID check, highlighting the unreliability of name/ID searches. A difference as high as 10% exists, which means that 10 out of 100 applicants have a criminal record that would not be picked up using name/id, thus allowing this percentage into the working environment.⁷³

The same report reflects that in total 18% of persons screened had a criminal record. Of this group the majority of convictions were for theft (24%), ‘Road Traffic Act’ (23%), and assault (21%). The report also notes, with alarm, the identification of repeat offenders: ‘A staggering 17% of applicants who have a criminal record, are repeat offenders and have more than 1 conviction. A further 5% have 3 convictions and 3% have 4 convictions.’ In real numbers this amounts to 197 individuals or 3% of the total number screened; hardly a staggering proportion.

From the above description it is noted that the state freely shares information on people’s criminal records with third parties (i.e. the private sector) and unless a particular record has been expunged, as now provided for, a conviction from 20 or more years will show up when a company, such as *MIE Background Screening*, submits a query to the SAPS Criminal Record Centre. It is also evident that the existence of criminal records is being exploited for commercial gain, either through the screening process or through the expungement application process. It should also be borne in mind that the police clearance certificate request does not specify particular offences, or a particular time period, for example convictions for violent offences committed in the past ten years. The request is in fact a catch-all drag net that does not discriminate between different offences, the age of the offender or how long ago it happened. How this information is used is ultimately the discretion of the prospective employer, but a criminal conviction for even a minor offence committed some years ago will in most instances not count in favour of the job applicant. It remains an unanswered question if prospective employers make any link between the offence and the particular job function. In some instances it

⁷¹For a description of Sagem, a range of bio-metric security applications, see <http://www.acss.co.za/et-06-Sagem-Biometrics-Access-Control-Client.html> Accessed 21 March 2011.

⁷²http://www.kroll.co.za/content/fservices/svc_crims.htm Accessed 21 March 2011.

⁷³Employer Mutual protection Service (2011) *EMPS Annual Screening Report- 2010*. http://www.emps.co.za/cm_man/Portals/0/annual%20screening%20report%202010.pdf Accessed 21 March 2011.

may be obvious, for example the person convicted of fraud and applying for a position as a bookkeeper. In other instances it may be less than clear cut.

4. Conclusions and recommendations

The Criminal Procedure Amendment Act has created a mechanism for the expungement of criminal records in certain instances. In respect of apartheid era crimes this was long overdue, but the new mechanism has now also drawn attention to the broader issue of criminal records and how this is designed, managed and utilised. The description of the legal framework in the above has shown that there is no universal standard in South Africa; different statutes use different yardsticks. For example, the key variable may be the date of conviction, the date when the sentence expires or the date of release from prison.

On the one hand, presumably for law enforcement purposes the state collects information on and maintains a vast database on criminal convictions. This information appears to be accessible to third parties, especially the private sector, and then with limited if any restrictions.⁷⁴ On the other hand, the state has a positive obligation not to discriminate and to promote equal treatment for all.⁷⁵ The question then arises whether the current legislation and practice regarding criminal records and their expungement is in line with the spirit of this positive obligation. Reflecting on section 36⁷⁶ of the Correctional Services Act (111 of 1998) Van Zyl Smit concludes that the state has the obligation to render whatever post-release support realistically can be offered for the offender to lead socially responsible and crime free life in the future.⁷⁷ Even if this only applies to former prisoners, the question can rightly be asked if the current law and practice around criminal records are aligned to this objective: is the state in fact striking the right balance between promoting social reintegration of offenders on the one hand, and on the other hand, promoting public safety through the use of criminal records? If finding employment is affected by discrimination based purely on having a criminal record, this may result in the violation of other rights (e.g. dignity), the limitation of this right needs to be measured against the standard set in section 36 of the Constitution, the limitations clause.

It is against this background that a number of recommendations can be made in respect the current legal framework and practice.

⁷⁴ Presumably the consent of the person in question is necessary when a police clearance certificate is requested.

⁷⁵ Section 9 Constitution

⁷⁶ Section 36. With due regard to the fact that the deprivation of liberty serves the purposes of punishment, the implementation of a sentence of imprisonment has the objective of enabling the sentenced prisoner to lead a socially responsible and crime-free life in the future.

⁷⁷ Van Zyl Smit D (2003) Civil Disabilities of former prisoners in a constitutional democracy: building on the South African experience, *Acta Juridica*, p. 236

It needs to apply rules universally with minimum exceptions, striking a balance between the protection of public safety and Constitutional obligations. From this it follows that the provisions relating to offender registers, as noted above, as well as other legislation dealing with the expungement of criminal records need to be aligned and harmonised. In the case of the latter reference is made to the Child Justice Act (an offence based system) and the provisions of the Criminal Procedure Act (a sentence based system). The Sex Offender Register uses the date of release from prison whereas the Constitution (in respect of Members of Parliament) refers to the expiration of the sentence as the key date.

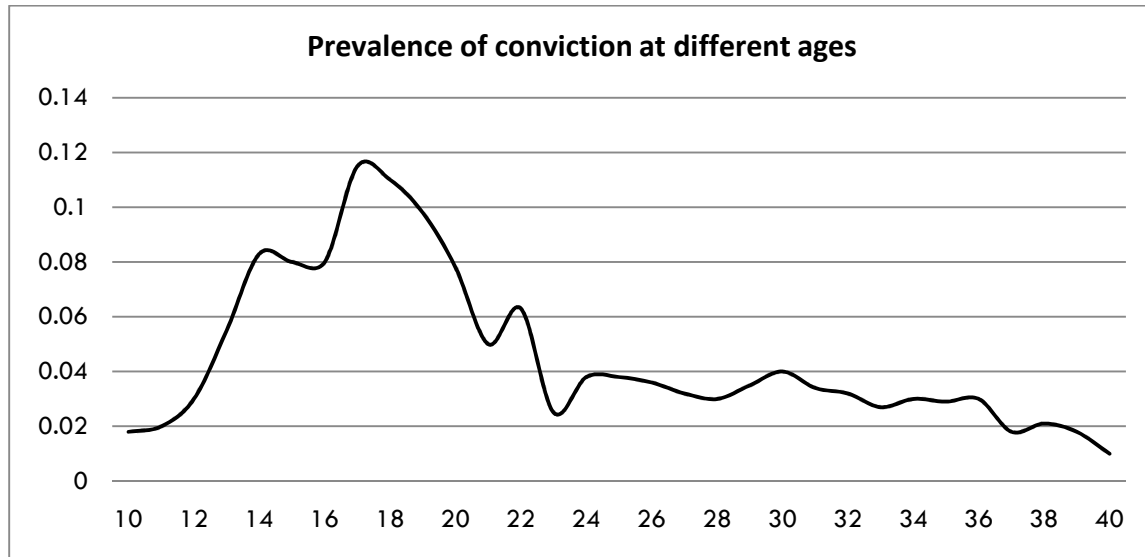
A system of expungement needs to be understandable to lay persons and those who would stand to benefit from it. The provisions for the expungement of criminal records are complex since different provisions apply to different cases and in some instances these are connected to the registers that have their own criteria for removal. Whether officials at court level and police station level would be able to provide the correct advice and guidance is unknown. For the lay person the wording of section 271A of the Criminal Procedure Act is by no means accessible.

The possibility of expungement should create a real incentive for a broad range of convicted offenders to refrain from committing further offences. The expungement of a criminal record should be an attainable reward achieved through good behaviour over a reasonable time period. It should also not be so exclusive that it becomes meaningless for the majority or even a large proportion of offenders. Fundamentally this recommendation speaks to what the state wants to achieve with the recording of criminal records and their expungement and how this can be utilised to promote law abiding behaviour on a more general scale as opposed to creating an opportunity for a select few.

A system of records-expungement must be based on knowledge and informed by evidence. Developing policy and legislation for the expungement of criminal records should be based on reliable information describing offending and re-offending patterns. Many persons convicted of a first criminal offence will never commit further offences, while a small percentage of offenders will continue to commit crimes for a large part of their adult lives. The former category may indeed have a committed one or several offences at a young age and will then desist from committing further offences. For the remainder of their lives they will not pose a threat to society and should not be punished for the rest of their lives for the crimes committed when they were young. Research from the UK indicates that offending behaviour builds up from age 10-years to a peak at age 18-years after

which it declines sharply to age 24 and then maintain a stable level to age 35 and then declines even further, as shown in Chart 1.⁷⁸

Chart 1⁷⁹



While such research is not yet available for South Africa and it is therefore unknown how age and offending converge as well as what the re-offending patterns are. However, it alludes to the inherent dangers in using a criminal conviction at an early stage as a predictor of long-term behaviour. It is, however, universally the case that most offences are committed by young men in their late teens to early twenties.

The retention of criminal records should be selective and purposeful. There is a small group of offenders who will continue to pose a risk to society and/or who have committed such heinous crimes that the expungement of the conviction(s) is not morally justifiable or would pose a substantial risk in managing re-offending. The question of expungement can also be turned on its head: Why should a particular offender's conviction not be expunged? Retaining and disclosing the record of a previous conviction must serve a defined and specific purpose that is in the interest of public safety. The aim should be to define these categories of offenders as narrowly as possible with the purpose to protect public safety, rather than the blanket categorisations that have been the basis for the existing legislation on the expungement of criminal records. The two offender registers, despite their other problems, are closer approximation of such a defined purpose as they are specific and their

⁷⁸ Piquero AR, Farrington DP, and Blumstein A (2007) *Key Issues in Criminal Career Research*, Cambridge University Press, London, p. 49.

⁷⁹ Please note that the chart is an approximation of Figure 4.1 in the cited work as access to the raw data for the purposes of recreating the graph was not possible. It nonetheless reflects the overall pattern found by the researchers.

application is forward-looking and not merely an extension of the punishment for the sake of punishment.

Appendix 1

