Working for better outcomes: An inquiry into the Rehabilitation and Reintegration of ex-offenders through integration in the labour market as a part of the Criminal Justice process

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ABSTRACT

This thesis examines the place of rehabilitation and reintegration in the criminal justice system. The aim of the research was to ascertain whether current law, policy and practice are conducive to the rehabilitation and reintegration of offenders and the reduction of recidivist offending.

As research shows that offenders who are able to obtain and retain employment are less likely to reoffend, the degree to which current measures facilitate ex-offender employment were examined in particular. In this context, barriers faced by ex-offenders in obtaining and retaining employment were examined.

The research methodology is primarily qualitative, using both primary and secondary information sources, formal and informal. The research is also informed by a small scale survey of employer attitudes and direct observation by the writer of a community-based employment initiative.

The research suggests that viewing criminal offending through a “human needs” lens, whereby offender behaviours are seen as directed at the meeting of fundamental needs, provides an appropriate means of understanding and addressing criminal offending.

The research concludes that current criminal justice policy lacks the types of measures necessary to rehabilitate and reintegrate ex-offenders. Specifically, it is argued that there is need for “throughcare” (that is, continued support and assistance provided to ex-offenders upon sentence expiry) to be viewed as an integral part of the criminal justice system.
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Table 8 - relating to questions 2, 3 & 4  
Table 9 - relating to question 6  
Table 10 - relating to questions 7 and 8  
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In the absence of measures to ensure criminal offenders are permanently removed from society, the rehabilitation and reintegration of offenders must be addressed. Sustainable employment for ex-offenders is a key factor in their successful rehabilitation and reintegration. Employment issues are far more important to the reintegration of offenders than is currently accepted in both theoretical writing about criminal justice and in criminal justice policy. A conceptual shift is required whereby the criminal justice system encompasses not only the enforcement of the criminal law and the imposition and management of sentences, but also the period during which ex-offenders are most at risk of reoffending: that is, post-sentence expiry.

In New Zealand there is a great deal of public concern in respect of criminal offending and a perception that criminal offenders are treated too leniently. Increasingly, over the past twenty or so years, the public has called for tougher sentencing of offenders. In spite of research showing that tougher sentences do not reduce recidivism – and in fact may increase both the incidence and severity of repeat offending - the use of imprisonment has increased. Offenders have become increasingly marginalised from society both through sentencing practices and through other mechanisms such as “name and shame” practices.

Whilst a desire for retribution against offenders is entirely understandable, there is also a need to consider the wider picture. That is, unless we are prepared as a society to ensure all offenders never again walk the streets (a proposition as unworkable as it is unethical) the question of offender reintegration and rehabilitation must be addressed. Recidivist offenders are, by definition, those who have been unable to successfully integrate/reintegrate into society. Thus, if we are to address recidivism, we must reintegrate offenders. Pursuing a “justice” policy that increasingly ostracizes offenders is incompatible with an aim of reducing recidivist offending.

A key premise of this thesis is that offenders have the same needs as other members of society and integration/reintegration and habilitation/rehabilitation should be approached from this premise. From this perspective, barriers to ex-offender participation in the labour market are chosen as a point of focus. Labour market participation by ex-offenders, it is argued, is a

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1 Whilst it is accepted that, at the extreme end of the offender spectrum, there may be those who should never re-enter society, this thesis is concerned with the vast majority who will return to the community.
critical factor in reducing recidivist offending. Currently, there is a significant gap between accepted knowledge in this area and reintegration and rehabilitation practice.

The thesis begins by examining current criminal justice law, policy and practice from the standpoint of the reintegration and rehabilitation of offenders. The historical position is canvassed, covering the period from the inception of this country’s penal system through to the most recent legislative developments. The Report of the Penal Policy Review Committee 1981 is employed as a reference point for the opportunity to pursue an enlightened criminal justice policy. The ensuing legislation – the Criminal Justice Act 1985 – is tracked through various amendments, through to the Sentencing Act 2002, to demonstrate that, whilst the 1985 Act contained some progressive elements, criminal justice law and policy rapidly followed an increasingly punitive path thereafter.

The research then turns to current criminal justice policy and practice. In particular, the Integrated Offender Management system (IOMS) employed by the Department of Corrections is discussed, as are the “effective interventions” initiatives that followed the 2007 legislative amendments enacted as part of the implementation of the Criminal Justice Reform Bill 2006. The availability of rehabilitative and reintegrative initiatives within New Zealand prisons, including in-prison employment and “release to work” is also examined.

From here, the research considers residential rehabilitative programmes in the community, namely Community Residential Centres, against the background of recommendations for habilitation centres in a review of the prison service conducted by (the late) Sir Clinton Roper in 1989, entitled Te Ara Hou (“The New Way”). The chapter also draws on research into habilitation centres by Bruce Dyer, to identify features common to successful habilitative programmes.

The research then critically evaluates the criminal justice system, beginning with a discussion of the Ombudsman’s Review of the Criminal Justice Sector. This is followed by consideration of the role of punishment in the criminal justice system, barriers to rehabilitation and reintegration, and rehabilitation and reintegration beyond sentence expiry.

The second part of the thesis contains the results and analysis of a survey of Christchurch employers conducted as part of this research. The aim of this part is to explore the attitudes and practices of employers that are relevant to the employment of ex-offenders, and to provide an indication as to where the most significant barriers to employment may lie.
Continuing with a consideration of barriers to ex-offender integration in the labour market, part three of the thesis looks specifically at barriers to labour force participation by ex-offenders, drawing on overseas studies into the same. Both “supply side” and “demand side” barriers to employment are explored. The consideration of supply side barriers – those barriers relating to characteristics shown as common to ex-offenders - refers back to the results of the employer survey and also to overseas research. Demand side barriers stemming from supply side barriers are then discussed. These pertain to employer attitudes to an applicant with a criminal record, and in particular, the inferences employers may draw from the existence of a criminal record in light of the attributes they look for when making hiring decisions. It is argued in this part that, although employment is of key importance to offender rehabilitation and reintegration, there are significant barriers that must be addressed before labour force integration by ex-offenders can be adequately achieved.

Demand side barriers stemming from legal considerations are then explored. In this regard, existing anti-discrimination legislation relevant to criminal record (specifically, human rights and “spent convictions” legislation) is canvassed, covering the position in New Zealand, Australia, Canada and the United Kingdom. This part of the research also evaluates the (limited) New Zealand academic writing and practitioner commentary on the same. The considerations for New Zealand employers in the context of hiring ex-offenders, specifically considering employment-related legislation, insurance considerations and civil liability issues, are discussed.

Part Four of the thesis explores community-based initiatives assisting the employment of ex-offenders in order to show what is already in existence, what works, and where further resources may best be directed. The research canvasses the various government and non-governmental initiatives aimed at facilitating the employment of ex-offenders. Key elements of successful programmes are discussed and, as an example of a successful community based initiative, the work of Genesis Trust, an employment initiative based in Palmerston North, is explored. The remainder of this part of the thesis focuses primarily on the challenges pertaining to integrating community initiatives for ex-offender employment into the criminal justice system.

The final part of the thesis proposes an alternative perspective from which to view criminal offending and criminal justice. Drawing on the example of “human development”, and in particular the work of Manfred Max-Neef on human needs, the thesis proposes a humanistic lens for criminal justice. Max-Neef’s needs analysis provides a basis for arguing the
importance of employment in offender rehabilitation and reintegration and the need to view offenders’ basic needs as the same as those of non-offenders.

The research concludes by asserting that the criminal justice system lacks the ability to effectively reduce recidivism due to a lack of commitment to rehabilitative and reintegrative assistance to ex-offenders living in the community and suggestions are made for change.
PART 1 – REHABILITATION AND REINTEGRATION IN THE CRIMINAL JUSTICE SYSTEM: THE CURRENT POSITION
I Penal Policy 1854 – 1981

At various times throughout the history of New Zealand’s criminal justice system, rehabilitation has been a policy objective. Equally, and in contrast, rehabilitation has been condemned as a failed liberal experiment by many: a criticism that continues in the context of the current climate of calls for tougher, longer sentences for criminal offenders.

Until the introduction of the Secondary Punishments Act 1854, New Zealand had no penal institutions other than a handful of small gaols, and prisoners were transported to Tasmania to serve their sentences. The Secondary Punishments Act introduced the sentence of penal servitude in New Zealand, with the aim of replicating the conditions of prisoners abroad, and thus the sentences were labour based. Captain Arthur Hume, appointed Inspector-General of Prisons in 1880, believed prisons should be austere and generally unpleasant places, so as to act as a deterrent, but also places where men could be reformed through hard labour. Hume had visited, and was much impressed by, Milbank Penitentiary in London, with its trade training programmes, and intended to model New Zealand prisons in this image. However, Hume’s vision met with strong opposition from trade unions, who saw prison labour as being unacceptable competition in the depressed economy. Thus, prison labour was constrained to effecting public works such as roadworks and the construction of prisons and military fortifications, as well as performing tasks that catered for needs within the prisons themselves, such as boot making and tailoring. Later on in Hume’s tenure, tree planting camps were established. Hume retired as Inspector-General on 1 April 1909 and was replaced by Sir James Findlay. Findlay introduced policies that were reformative in nature, based on the methods employed by the Elmira Reformatory in New York. The Elmira philosophy focused on changing behaviour by reward rather than by

2 From 1840 there was a gaol operating at a site at what was then called Official Bay, Auckland, with a further gaol being built in Queen Street a year later.
3 Then known as Van Diemen’s Land.
6 Ibid para 17.
punishment, and on teaching inmates to live a crime-free life through education and individualised treatment, as opposed to the austere religious view of spiritual reform that had previously prevailed.  

Findlay’s policies were short lived, with the rise to power of William (“Farmer Bill”) Massey’s conservative Reform party in 1912 and the appointment of Charles Matthews as Controller-General of Prisons. Both Massey and Matthews were very much men of the land who believed in the reformatory capabilities of work outdoors, and by 1919 over half the country’s prisoners were working on farms. But, as with Hume’s work policies, Matthews’ attempts to find outlets for prison goods, both from farming and manufacturing, also met with strong opposition from trade unions, especially in the manufacturing sector. Perhaps the most notable aspects of Matthews’ period as Controller-General stemmed from his belief in the humane treatment of inmates and the importance of reform. This led to such developments as attempts to find non-custodial sentencing options, the expansion of the probation service, and wages for married inmates.

The conservative public servant and accountant Bert Dallard took over as Controller-General of Prisons in 1925, remaining in office until 1949. During this time, which encompassed the depression and the Second World War, the penal system underwent little in the way of change. Newbold notes that Dallard’s selection as Controller-General may have been influenced by a backlash against Matthews’s perceived “mollycoddling” of criminals and the fact that some of Matthews’s initiatives were “expensive failures”. Dallard did however develop some of Matthews’s initiatives, such as appointing the first full time probation officers and retaining and developing the agricultural programme within prisons, with prisons producing 40 per cent of their food needs. Overall however, Dallard’s reign was notable for its “austerity, conservatism and uneventfulness”.

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10 See Newbold, above n 3, p 40 for a discussion of Dallard and his time as Controller-General of Prisons.


12 Newbold, above, n3, p 40.

13 Newbold, above, n3, p 41.
industries became increasingly inward focused, with the exception that during the WWII years prison industry served the needs of the armed forces.\textsuperscript{14}

In 1949, Samuel Barnett became Secretary for Justice and brought a new perspective to the prison service. Barnett saw that prisons were largely ineffective in reforming inmates and was therefore firmly of the view that incarceration should be a last resort, and increased emphasis was therefore placed on developing the range and availability of non-custodial sentencing options.\textsuperscript{15} Professional probation officers were introduced, and education and trade training for inmates was made a priority.\textsuperscript{16} Barnett saw a need for inmates to maintain links with the community, and he supported the development of the Prisoners’ Aid and Rehabilitation Society (PARS) into a national network, NZPARS.\textsuperscript{17} Barnett, in contrast with those who went before him, also met with the Howard League for Penal Reform on numerous occasions and was credited with making “courageous changes”.\textsuperscript{18} Barnett believed all prison sentences should be reformative,\textsuperscript{19} and that this was the key to the protection of society.\textsuperscript{20} Under then Minister of Justice Clif Webb, working together with Barnett,\textsuperscript{21} the Criminal Justice Act 1954 was drafted and introduced, and a range of age-determined sentences set in place: Detention Centres for young offenders (designed to provide a “short, sharp shock”), Borstal Training for offenders aged 17 to 20 years of age,\textsuperscript{22} the indeterminate sentence of Corrective Training for offenders aged 21 to 30 years of age (or 35 in some cases).\textsuperscript{23} For serious recidivist offenders, and the indeterminate sentence of preventative detention was introduced, allowing incarceration for up to 14 years (or life in the case of child sex offenders), with lifelong probation upon release.\textsuperscript{24} Prisoners serving determinate sentences became subject to a mandatory 12 months of probation following release. In keeping with Barnett’s reformative focus, a range of new services were introduced into prisons, including psychological and chaplaincy services. Further, Barnett

\textsuperscript{15} Ibid para 24.
\textsuperscript{16} Ibid paras 24 and 25.
\textsuperscript{17} NZPARS History, available online at http://www.pars.org.nz/ (last accessed 12 September 2008).
\textsuperscript{18} Howard League for Penal Reform Factsheet 20, available online at http://www.howardleague.co.nz/factsheets/factsheet_20.html (last accessed 23 June 2008).
\textsuperscript{19} Newbold, above, n3, p 49.
\textsuperscript{21} Both men were lawyers. For a detailed account of this era see Newbold, above, n3, p 47-51.
\textsuperscript{22} Borstal training has existed previously, however the age for entry was raised from 15 years to 17 years. See Newbold, above, n3, p50.
\textsuperscript{23} Newbold, above, n3, p 50.
\textsuperscript{24} Newbold, above, n3, p 50.
developed an educational policy for prisons, along with trade training to equip prisoners with skills more transferable to the urban labour market than those acquired through Hume and Massey’s farm based work.\textsuperscript{25}

Towards the close of the 1950s, offending by young people (so called “hooliganism and larrakinism”)\textsuperscript{26} became a subject of considerable public concern, and justice policies began to focus more intensely upon the young offender and offender rehabilitation generally.\textsuperscript{27} Thus, the 1960s was an era during which a strong emphasis was placed on rehabilitation, spurred on by growing evidence that prison was not an appropriate vehicle for attempting to reform or rehabilitate offenders, as it often resulted in increased or more serious offending by ex-inmates. The situation in New Zealand was consistent with a general trend to rehabilitative measures in the penal policies of western countries throughout the 1960s and 1970s.

Rehabilitative measures employed included, but were not limited to, probation, a less restrictive prison environment, non-institutional rehabilitation settings, intensive supervision of parolees, outright discharge in lieu of parole, individual counselling, group counselling, various medical therapies, and variations in the length of prison sentences.\textsuperscript{28}

However, increasing crime rates and prison populations led many to question the validity of rehabilitative aims\textsuperscript{29} and call for a more punitive focus. The catch cry “nothing works” was heard widely both within New Zealand and overseas during the 1970s and beyond.\textsuperscript{30} One of the most influential commentators of the time, New York sociologist Robert Martinson, performed a survey of rehabilitative programmes between 1945 and 1967 and reached the conclusion that “[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism”.\textsuperscript{31} Martinson’s conclusions,

\begin{itemize}
  \item \textsuperscript{26}Ibid para 31.
  \item \textsuperscript{27}Ibid paras 30 – 36.
  \item \textsuperscript{30}See, for example, the influential work of New York sociologist Robert Martinson: Robert Martinson, (1974). What works? Questions and answers about prison reform. The Public Interest, 10 , 22- 54. In the United States, the U S Supreme Court in \textit{Mistretta v. United States} 488 U S 361 (1989) held that the Sentencing Reform Act 1984, which created the U S Sentencing Commission and removed rehabilitation as a sentencing aim, was a constitutional delegation of powers.
  \item \textsuperscript{31}R Martinson. above, n 29.
\end{itemize}
and those of other commentators who similarly adopted the “nothing works” doctrine, did not go unchallenged. The argument that ensued became known as the “What works?” debate.

In the face of the dilemma as to what direction justice policy should take, the government commissioned a committee to review penal policy in New Zealand and make recommendations as to the way forward.

II PENAL POLICY REVIEW 1981

A comprehensive review of penal policy in New Zealand was undertaken in 1981 by the Penal Policy Review Committee. The Minister of Justice set the terms of reference for the review committee, which were as follows:

i. To examine the existing means of dealing with offenders and to make recommendations as to penal policy and measures for the future;

ii. To consider the means by which the incidence of imprisonment can be reduced to the greatest degree consistent with the maintaining of public safety;

iii. To clearly establish the criteria for placing offenders in prison or other forms of full time custody, and to define the nature and characteristics of the forms of detention recommended;

iv. To investigate means of increasing the availability of sanctions that keep the offender in the community;

v. To consider the extent to which there should be flexibility of movement of inmates between custodial and non-custodial sentences and the means by which this may be achieved;

vi. To ensure that all penal programmes take account of the need to integrate offenders into society and make the greatest use of society’s existing organisations and activities;

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vii. In light of the cultural diversity existing in New Zealand, to consider the desirability and practicality of making appropriate provision for offenders from different cultural groups and the nature of any such provision; and

viii. To consider the place in the criminal justice system of victims and to make recommendations as to a policy in respect of victims.  

The Terms of Reference also set out a number of particular tasks, within the general aims set out above. The tasks of the Committee can be summarised as being:

a. Considering the sentencing measures available to the courts and an evaluation of the same in light of their effectiveness from the perspectives of deterrence, punishment, incapacitation, rehabilitation and cost;

b. Recommending changes to the existing range of sentencing options and any new sentencing options that may be desirable. Where new disposition options were recommended, the formulation of objectives for the options in light of particular offences and/or characteristics of offenders;

c. Considering and recommending the type of prisons and other facilities that may be needed;

d. Recommending programmes for offenders dealt with by way of non-custodial sentences and the way in which the public/community could participate in the same;

e. Recommending a means by which it could be determined which type of facility would be most appropriate for offenders sentenced to imprisonment;

f. Recommending policies relating to parole, probation and remission;

g. Recommending what rights and privileges should be enjoyed by prison inmates, with particular reference to release to work, home leave and other forms of temporary release from custody;

h. Recommending policies pertaining to employment within prisons and payment for such work, and to clearly determine the objectives of the prison industry scheme;

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i. Examining and recommending policies pertaining to the provision, by way of reports, of social, psychiatric and medical information to the courts, parole boards, institutions and agencies dealing with offenders, and rules relating to the availability of the same;

j. Examining and recommending the need for policies relating to the provision of medical, educational, social and other services for persons coming before the courts, including post-release;

k. Recommending measures pertaining to reparation and assistance to victims of crime as part of the prosecution and sentencing process;

l. Considering the principle of expunging criminal records after a period of time; and

m. Recommending a means for a continuous evaluation of penal policies and their operation.\textsuperscript{34}

The Committee noted that the Review was directed purely at the sentencing and post-sentencing phase of the criminal justice process, and was therefore not concerned with such things as pre-trial diversion, bail or remand.\textsuperscript{35} The Review was directed at the adult criminal justice system and thus did not focus on child or youth offenders.\textsuperscript{36}

Amongst the aims for penal policy identified by the Committee were public confidence in and acceptance of penal policy, regard for victims of crime, the least possible intervention in the lives and rights of offenders, the least possible social dislocation so as to strengthen ties to positive community influences, and the use of community organisations and activities (rather than the establishment of parallel services).\textsuperscript{37}

The Committee recognised that the majority of criminal offenders will either remain in the community during the period of their sentence or will return to it after serving a period of imprisonment. Recommendations were therefore consistent with promoting a state of affairs conducive to providing offenders with the best possible opportunity for successful reintegration. The Committee considered a variety of sentencing options and made recommendations as to how sentencing of offenders can best achieve the identified aims of penal policy. The Committee advocated the use of community based sentences where at all possible and advocated a cautious approach to imprisonment.

\textsuperscript{34} Ibid para 8.
\textsuperscript{35} Ibid para 9.
\textsuperscript{36} Ibid para 9.
\textsuperscript{37} Ibid paras 94 – 104.
A  *Imprisonment*

At face value it may seem obvious that being deprived of one’s freedom would constitute a punishment and that experiencing the same should deter a person from engaging in the behaviours which resulted in the imprisonment. Likewise, it would seem that if persons are able to be held in custody for prolonged periods, it may be possible to impose interventions which would work to address negative behaviours. To this end, the belief that prisoners could be “treated” in custody was present throughout the first half of the 20th century, peaking during the 1970’s and declining thereafter. Central to this belief was the principle that if prisoners could be somehow treated in prison, sentences needed to be long enough to allow time for that to occur. Thus, this provided a rationale for lengthy sentences of imprisonment or even indeterminate sentences. The Committee noted that such beliefs have “always been an important objective of [New Zealand’s] penal policy”. In New Zealand, the concept of Borstal Training, with its indeterminate sentences, was based on that theory.

The Committee made a number of important observations pertaining to imprisonment, making the case for a major review of the purposes for which a sentence of imprisonment is imposed and in relation to its duration.

1  *Purposes of imprisonment*

The primary reasons behind imposing a sentence of imprisonment are to punish offenders, deter offending (general deterrence) and reoffending (specific deterrence), to incapacitate offenders and thereby protect the public, to denounce criminal conduct, to maintain public confidence in the criminal justice system and (controversially) to rehabilitate offenders.

In its report, the Committee made important observations which challenged accepted beliefs regarding the punitive, deterrent, and rehabilitative effects of imprisonment.

(a)  *Denunciation*

The Committee found that imprisonment had an important role to play in denouncing criminal conduct and that in certain cases lengthy sentences would be justified on this basis (serious drug dealing was given as an example). However, the Review Committee also recognised that the entire criminal justice process from arrest through sentencing

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39 These purposes are set out in Report of the Penal Policy Review Committee 1981 at para 121 and are contained in the current Sentencing Act 2002.

40 Ibid para 120.
emphasised the community’s disapproval of the behaviour and that in many cases this process coupled with an appropriate community based sentence would be sufficient from a punitive perspective.\textsuperscript{41} Where imprisonment was imposed, it would rarely need to be for a lengthy term.\textsuperscript{42}

\textit{(b) Punishment and deterrence}

When considering the punitive effect of prisons, the Committee found that the first six months of a prison sentence (for those not already institutionalised) was the most traumatic, and that after this point, the punitive and deterrent effects of imprisonment remained the same, regardless of the length of sentence.\textsuperscript{43} Thus, the Committee concluded that for persons not institutionalised, short sentences of six months or less would be likely to have a “significant, and often a sufficient punitive effect” whilst for those already institutionalised, the punitive effect of a prison sentence is significantly diminished, and a longer sentence may not have any greater punitive effect than a short sentence.\textsuperscript{44} Unsurprisingly, the recommendations of the Committee included reducing the length of sentences of imprisonment, increased use of community based sentences and placing a heavy emphasis upon maintaining offender links with community, with a focus on reintegration.

\textit{(c) Rehabilitation}

In respect of the rehabilitative capacity of penal measures generally, the Committee concluded that such measures “taken at the end of the road when family, community and schools have failed” are very unlikely to successfully rehabilitate.\textsuperscript{45} Specifically, the Committee found that “prisons have little or no rehabilitative effect, nor do they seem to have any marked ability to deter those offenders who have experienced the system. They are voracious of resources, and commonsense suggests they be used only for essential cases”.\textsuperscript{46}

The Committee observed that rehabilitation cannot be forced upon offenders (for example, by making completion of a rehabilitation course a condition of parole) but that for those offenders who want to change, rehabilitation can be successful if the appropriate facilities and support are in place. In this regard, the Committee made comprehensive

\textsuperscript{41} Ibid para 118.
\textsuperscript{42} Ibid para 118.
\textsuperscript{43} Ibid para 115.
\textsuperscript{44} Ibid para 115.
\textsuperscript{45} Ibid para 116.
\textsuperscript{46} Ibid para 111.
recommendations involving ongoing interventions and support for promoting rehabilitation and reintegration which it termed “Throughcare” (discussed below).

(d) Incapacitation

The Committee observed that it is common sense that community protection will be assured during the period an offender is incarcerated. The more difficult question, the Committee acknowledged, is determining the length of the period for which an offender should be incarcerated to achieve this purpose.47

It is possible to determine a sentence commensurate with a purely retributive purpose. As such purpose is backward-looking, a period of imprisonment commensurate with the gravity of the offending would be appropriate. Incapacitation of the offender during that period of time would be a side benefit of the sentence but not part of the purpose. If the purpose is, however, to protect the public from future offending, this necessarily requires a prediction of future offending behaviour. This is of course very difficult, if not impossible, to do accurately and raises serious questions in respect of imposing punishment for crimes not yet committed.48

Perhaps as a form of compromise, the Committee suggested that a past record of similar offending would justify a harsher sentence being imposed.49 Philosophically, this approach could get around the difficult question of prediction by taking a retributive approach which holds that very serious offending or repeat offending of a similar type justifies a more severe penalty, and that, again, incapacitation is a by-product rather than the purpose of the sentence.

(e) Maintaining public confidence in the criminal justice system

Finally, the Committee noted that society had become conditioned to believing that imprisonment is the appropriate response to crime and to regard any lesser or alternative response as the offender having been “let off”.50 As public confidence in the justice system is integral to its ability to function effectively, the Committee observed that unless and until public attitudes to imprisonment change, imposing sentences of imprisonment – and lengthy ones in some cases - will continue to serve an important purpose in maintaining public

48 Ibid para 117.
49 Ibid para 117.
50 Ibid para 119.
confidence in the criminal justice system. This would indicate that if rehabilitation is to remain a goal of sentencing, there must be increased, positive, public education about its benefits.

B *The Throughcare concept*

Building on its recommendation of small, community based prisons, the Committee recommended the development of “throughcare”. The term “throughcare” described the process of reintegration of offenders into the community in a supported manner. Put simply, the concept centred around the idea that prisons would engage with and would make a positive contribution to the local community (for example, by prisoners being released to work on community projects), thereby fostering links between the community and the prison which would lead to a greater acceptance of inmates into the community upon release. The Committee stated that the Throughcare concept avoided many of the complex administrative problems inherent in other types of reintegrative systems, such as split or multi-stage prison sentences. Of this the Committee states:

[The Throughcare concept] is far more flexible in its operation, relying heavily on the support and assistance of individuals and voluntary organisations. Fundamental to it is a concern to preserve and foster the association between an inmate and his community. It calls for a greater involvement of welfare and other agencies in the social, educational, and recreational services available in prisons, located in communities, with which the inmate can identify, and a programme for development throughout his term aimed at integrating him back into that community on release. This involves preparation well before that date and the ability to enlist the help of community agencies during the later parts of his sentence under the supervision of officers of the Department of Justice. Their activities might include programmes such as the current release to work, training service or supervised reparation.

III *CRIMINAL JUSTICE ACT 1985*

The Criminal Justice Act 1985 implemented a number of the recommendations of the Penal Policy Review Committee. For the purposes of this paper, the most significant aspect of the Criminal Justice Act was that, despite the mandate for imprisonment upon conviction of violent offences carrying a minimum of at least five years imprisonment, it contained a presumption against imprisonment for property offenders. Following its enactment in

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51 Ibid para 119.
52 Where a sentence could be served partly in prison and partly in the community (see Report of the Penal Policy Review Committee 1981 para 167).
53 Ibid para 168.
54 See Newbold, above, n3, p86 for further discussion.
September 1985, and March 1986, there was a “sudden exodus from prisons” with approximately one third of the total prison muster (roughly 1000 inmates) being released under its provisions.\textsuperscript{55} Newbold notes Former Deputy Secretary for Justice Charlotte Williams’s comments that it marked a high point in the liberal, rehabilitative school of thinking and had probably already been overtaken by retributive public opinion by the time of its passing.\textsuperscript{56} Newbold notes that “the fact that it was extensively amended in 1987, 1993 and 2002 certainly supports this view”.\textsuperscript{57} Indeed the Criminal Justice Act 1985 was amended 15 times between 1987 and 1999.

The Criminal Justice Amendment Act 1987 increased the number and length of sentences of imprisonment by the introduction of mandatory sentences of imprisonment for violent offences and extended non-parole periods. In March 1987, the Report of the Ministerial Inquiry into Violence by Sir Clinton Roper (the Roper Report 1987), ordered by then-Minister of Justice Geoffrey Palmer, was released, the Inquiry having been commenced in response to public concern about the sentencing of violent offenders. Following recommendations made in the Roper Report 1987, two additional amendments\textsuperscript{58} further targeted violent offenders by requiring them to serve at least two thirds of their sentence, lowering the age of eligibility for preventative detention from 25 to 21, and making it a sentencing option for a wider range of serious violent offences in addition to sexual offences. Despite this, research completed by Susan Kettles in 1989 suggested that the increase in custodial sentences for violent offenders was minimal.\textsuperscript{59} In a further paper of the same year, Kettles predicted that the enactment of the Criminal Justice Amendment (No.3) Act 1987(which amended section 93 of the Criminal Justice Act 1985 by removing parole eligibility for serious violent offenders\textsuperscript{60} and increased the minimum period to be served prior to parole eligibility from seven to ten years for those sentenced to life imprisonment or preventative detention) would impact upon the size of the prison muster from 1989 onwards.\textsuperscript{61} Newbold notes that between 1987 and 1993 “the likelihood of a convicted

\textsuperscript{55} Ibid.
\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid.
\textsuperscript{58} Amendments No.2 and No. 3.
\textsuperscript{59} See Susan Kettles, \textit{The violent offences legislation Part 2: the imprisonment of offenders who used serious violence}, Wellington: Department of Justice, October 1989 – Kettles identified “an insignificant increase in the proportion of custodial sentences resulting from violent offences with a maximum sentence of imprisonment for two to five years (23.0 per cent to 23.9 per cent) and a slight increase for offences with a maximum sentence of imprisonment for five years or more (62.6 per cent to 64 per cent).”
\textsuperscript{60} Although ineligible for parole, these offenders were nevertheless subject to statutory release at two thirds of sentence.
\textsuperscript{61} Susan Kettles, \textit{The violent offences legislation Part 3: the eligibility of violent offenders for parole}, Wellington: Department of Justice, October 1989
violent offender being sentenced to imprisonment remained about the same – 25 per cent – but the number imprisoned grew by 45 per cent". During the same period convictions for violent crime rose by 50 per cent, with convictions for other crime rising by only 11 per cent. Newbold states that “as before, the biggest hikes were in the area specifically targeted by the new law: serious violence".

IV  SENTENCING AND PAROLE: 2000 – 2007

In the late 1990s another significant review of sentencing and parole was undertaken in response to public demand for the government to get tough on criminal offenders. The Criminal Justice Referendum 1999, initiated by Christchurch man, and current Christchurch City Council Deputy Mayor, Norm Withers (whose elderly mother was severely beaten whilst minding his Christchurch shop) evidenced strong public support (nearly 92 per cent) for harsher penalties.

The Sentencing Act 2002 and the Parole Act 2002 replaced the Criminal Justice Act 1985 and made a number of changes in response to the Referendum. A new sentencing structure for murder was introduced which saw the imposition of life sentences with minimum 10 year non-parole periods in most cases (with judicial discretion to extend) and 17 year minimum non-parole period for the most serious cases (for example, where more than one person was murdered). Preventative detention was made available for a wider range of offences and offenders, and for those sentenced to preventative detention or life, release on parole became dependant the Parole Board being satisfied the person would not pose an undue risk to the community or specific persons, and parole lasts indefinitely. Legislative direction was also given to the courts to impose harsher sentences for offending deemed to be the most serious of its kind.

62 Newbold, above, n3, p89.
63 Ibid p89.
64 Ibid pp89-90.
65 The referendum question was worded as follows “Should there be reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them, and imposing minimum and hard labour for all serious offences?" The Ombudsman’s Review of the Criminal Justice Sector notes at page 126 that, given the “unfortunate wording” it is surprising the percentage wasn’t higher. This is a good example of an attempt to simplify criminal justice issues and produce results which are essentially meaningless but nevertheless can prove politically irresistible.
66 Section 103 Sentencing Act 2002.
67 Section 104 Sentencing Act 2002.
68 Section 87 Sentencing Act 2002.
69 Section 8(c) Sentencing Act 2002.
However, building on the conferencing provisions in the youth jurisdiction, for the first time, statutory recognition was given to restorative justice, with courts being required to take account of the outcomes of any victim-offender agreement reached. This step followed the release in 1995 of a Ministry of Justice discussion paper on restorative justice programmes within the adult criminal justice system. Whilst most submissions received in response to the paper were positive, there was considerable opposition, including strident criticism by the Business Round Table. The Act also gave greater authority to the courts to impose sentences of reparation.

Sections 7 and 8 Sentencing Act 2002 set out the purposes and principles of sentencing. The key aims of sentencing are, in essence, the protection of society, retribution, denunciation, deterrence, incapacitation, rehabilitation of offenders and reparation.

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70 The practice of Family Group Conferences having been introduced with the enactment of the Children, Young Persons and Their Families Act 1989.
71 Section 10 Sentencing Act 2002. Other sections in current legislation with a “restorative” element arguably include s 7(1) (a), (b) & (c), ss8 (i) & (j), s9(2)(f), 25, 26, 27, 32, 62, 110 and 111; s 6 Corrections Act 2004; ss9 & 10 Victims’ Rights Act 2002; ss7, 35, 36 & 43 Parole Ac 2002.
72 “One of the hallmarks of a civilised society is a criminal legal system which is fair, reasonable, predictable and dispassionate. Restorative justice abandons all those aims in favour of a system which would be inconsistent, capricious and emotional. Far from being “new” this would be a giant leap backwards.” (NZ Business Roundtable, 45). The public submissions and discussion, published by the Ministry of Justice in June 1998, are available online at: http://www.justice.govt.nz/pubs/reports/1998/restorative_justice/index.html (last accessed 3 September 2008).

73 7 Purposes of sentencing or otherwise dealing with offenders

(1) The purposes for which a court may sentence or otherwise deal with an offender are—

(a) to hold the offender accountable for harm done to the victim and the community by the offending; or
(b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
(c) to provide for the interests of the victim of the offence; or
(d) to provide reparation for harm done by the offending; or
(e) to denounce the conduct in which the offender was involved; or
(f) to deter the offender or other persons from committing the same or a similar offence; or
(g) to protect the community from the offender; or
(h) to assist in the offender’s rehabilitation and reintegration; or
(i) a combination of 2 or more of the purposes in paragraphs (a) to (h).

(2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

74 8 Principles of sentencing or otherwise dealing with offenders

In sentencing or otherwise dealing with an offender the court—

(a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
(b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
Section 7 sets out the purposes for which a sentence may be imposed. It reflects the philosophical purposes of sentencing. Punishment, although not one of the specifically enunciated purposes in the exhaustive list, is nevertheless considered inherent in other provisions. Sections 7(1)(a) and (e) particularly, are the provisions in which punishment is widely considered inherent. Holding the offender accountable and denouncing the conduct is generally interpreted as a requirement to punish. In *R v Tuita* the Court of Appeal said that, “among the factors underlying sentencing policy are the requirements of punishment, deterrence and denunciation; albeit the first of the three does not receive explicit mention in the Sentencing Act”.

Section 8 contains the principles the court must apply when sentencing. The list is not exhaustive, and thus does not appear to preclude other considerations. Section 31 requires the court to give reasons when sentencing, but the level of detail is discretionary. In this regard, section 31(4) states that a failure to refer to a particular sentencing principle is not in itself grounds for appeal.

Section 8 essentially codifies the principles that judges traditionally applied in sentencing prior to the Act and arguably added nothing “new” to the law. In the case of *R v Iona* the Court of Appeal said it was “not persuaded that the new legislation is other than legislative

(c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

(d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

(e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and

(f) must take into account any information provided to the court concerning the effect of the offending on the victim; and

(g) must impose the least restrictive outcome that is appropriate in the circumstances[, in accordance with the hierarchy of sentences and orders set out in section 10A]; and

(h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and

(i) must take into account the offender’s personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and

(j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

NB: Section 8 (c) and (d) are to be repealed by s6(1) Sentencing Amendment Act 2007 at a date to be set by the Governor-General by Order in Council.

75 CA 312/02, 27 November 2002 [2003] BCL 84 at para [13], Anderson, Williams and Baragwanath JJ.

76 CA 416/02, 27 March 2003, 26 TCL 12/7, Keith, Robertson and Doogue JJ.
enactment of the sort of factors which Judges have traditionally taken into account in
determining appropriate sentences”.

Despite the recommendations of the Penal Policy Review Committee to impose imprisonment
as a last resort, imprisonment has been increasingly used. In the early 1980s, financial
penalty was employed in the vast majority of cases, with both imprisonment and community
based sentences being used sparingly. In 1980, 84.56 per cent of successful prosecutions
resulted in a financial penalty, 5.9 per cent in a community based sentence, and only 3.1 per
cent in a sentence of imprisonment.77 In 1981, the figures were 85.6 per cent, 5.85 per cent
and 2.97 per cent respectively.78 Between 1981 and 1983, the use of both imprisonment and
community based sentences more than doubled.79 Between that time and 1990, imprisonment
levels remained relatively stable, with imprisonment being imposed in an average of 5.8 per
cent of cases.80 The use of community based sentences, on the other hand, increased steadily
throughout that period, from 13.46 per cent in 1984 to 19.98 per cent in 1989.81

Throughout the period 1989 to 1999, the use of imprisonment increased from 5.2 per cent in
1989 to 8.3 per cent in 1999.82 The use of community based sentences continued to increase
during the same period, peaking at over 35 per cent in both 1993 and 1998.83 Between 2000
and 2006 imprisonment use increased from 8.26 per cent to 9.3 per cent and the use of
community based sentences decreased to pre-1990 levels.84 From 1990 to 2006, the use of
financial penalties remained relatively consistent, being imposed in roughly 50 per cent of
cases throughout the period.85

77 Statistics New Zealand, convicted cases: available online at
cent20Cases (last accessed 5 September 2008).
78 Statistics New Zealand, convicted cases: available online at
cent20Cases (last accessed 5 September 2008).
79 Imprisonment accounted for over 5 per cent of sentences in 1982, and 6.15 per cent in 1983, and community based
sentences accounted for 10.18 per cent in 1982 and 13 per cent in 1983. Statistics New Zealand, convicted cases:
available online at http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx?ReportName=Justice/Convicted per
cent20Cases (last accessed 5 September 2008).
80 Ibid.
81 Ibid.
82 Ibid.
83 Ibid.
84 Ibid.
85 Ibid.
2007 Amendments

The most significant recent developments in sentencing law arose from the Criminal Justice Reform Bill 2006 (“the Bill”). The Bill was introduced as having the aims of increasing certainty in sentencing, reducing criminal offending, and addressing the rising prison population.

The Bill comprised two parts. The first part of the Bill provided for the establishment of a sentencing council. The Sentencing Council will be an independent statutory body with the task of establishing sentencing and parole guidelines. The second part of the Bill dealt with the introduction of a clear hierarchy of sentences and the establishment of three new non-custodial sentences: home detention as a sentence in its own right, intensive supervision and community detention (an electronically-monitored curfew). This part also included changes to parole eligibility. The provisions of the Bill were introduced into law as part of five new Acts: Sentencing Amendment Act 2007, Parole Amendment Act 2007, Bail Amendment Act 2007, Prisoners’ and Victims’ Claims Act 2007 and Sentencing Council Act 2007.

The Sentencing Amendment Act 2007 introduced new community based sentences. Home detention became a sentence in its own right, rather than a way of serving a sentence of imprisonment. Intensive supervision was introduced, being a more comprehensive version of the supervision sentence, which can impose a range of rehabilitative measures and special conditions including attending targeted programmes, reporting, oversight of living conditions, employment and associations. The sentence is targeted at offenders with complex needs and a higher risk of re-offending. The sentence of community detention was also introduced.

Currently, parole is available for offenders serving “long term sentences” of over two years, once they have served one third of their sentence. Those serving “short term sentences” of two years or less are automatically released halfway through their sentence on standard release conditions. The 2007 amendments to the Parole Act make significant changes. A change of immediate effect relates to so-called “back-end home detention”. This had allowed inmates to apply, five months before their Parole Eligibility Date (PED), to serve the remainder of their sentence on home detention, from as early as three months before their PED. From the enactment of the legislation on 1 October 2007, back-end home detention was abolished. At present, all inmates must serve at least one third of their sentences in prison. The other significant changes will not come into effect until the yet-to-be-established Sentencing Council has produced “sentencing guidelines”. Once the guidelines are in place, “short term sentences” will be sentences of one year or less, and will have to be served in their entirety. Further, parole eligibility will come at two thirds of a sentence, rather than one third, and non-

Section 86(1) Parole Act 2002.
parole periods will be abolished. These measures are in line with public demands for, and a Law Commission Report\textsuperscript{87} recommending, “truth in sentencing”.\textsuperscript{88} At the time of writing this thesis it is too soon to gauge the effect of the new legislation.

V CONCLUSION

Whilst some of the Penal Policy Review Committee’s recommendations were given legislative effect in the Criminal Justice Act 1985, overall it would seem that the fundamental messages of the Committee have been lost: the use of imprisonment continues to rise. Indeed, targeting of specific offending with harsher penalties has seen an increase in convictions for that type of offending.

In respect of the use of imprisonment, if the Committee’s assessment of the effect of short term sentences of imprisonment is accurate, it provides strong grounds for ensuring that sentences of imprisonment are kept short unless the protection of the public absolutely requires a longer sentence, so as not to negate the punitive effect of any future sentence of imprisonment by allowing inmates to become institutionalised.

Whilst the Throughcare concept the Committee recommended to ameliorate the destructive effects of imprisonment on an inmate’s ability to reintegrate and rehabilitate was “alive and well throughout the early 1980s”, with many prisoners routinely participating in release to work,\textsuperscript{89} this is not the case today. Increasing prison musters, with prisoners often located away from their communities, coupled with public intolerance for prisoners working in the community has led to an attitude whereby “[p]risons and prisoners should be out of sight and out of mind, and attempts to reintroduce ex-inmates to society through the establishment of community programmes are likely to meet a hostile reaction”.\textsuperscript{90} It is this idea of maintaining or fostering links with the community and ensuring adequate, ongoing supports are in place to facilitate rehabilitation and reintegration which is central to this thesis and, the writer believes, to a criminal justice system which is effective in reducing offending.

\textsuperscript{87} Sentencing Guidelines and Parole Reform (NZLC R94).


\textsuperscript{89} PARS Reintegration Paper, April 26 2007 by John D Whitty, National Director NZPARS, p1.

\textsuperscript{90} Ibid p2.
Chapter 3

REHABILITATION AND REINTEGRATION IN NEW ZEALAND’S CRIMINAL JUSTICE SYSTEM - CURRENT POLICY AND PRACTICE

I THE INTEGRATED OFFENDER MANAGEMENT SYSTEM

The focus of the law and order debate to date has been on the first goal [keeping the public safe] by addressing the public's call to toughen up on criminal behaviour. Today is an important opportunity to shift the focus to the other goal set for the Department [reducing reoffending]. It has been proven that what happens to inmates once they are released has a huge impact on whether they return to prison. Making sure they have a place to live, job prospects and the right support makes the transition from prison to the community smoother and more successful... There is lots of good work being done in the community and by the government but we need to do better if we are going to have a serious impact on re-offending rates. These are frankly not good enough.  

-Hon Paul Swain, 2004, on the opening of the Reintegration Unit at Rimutaka Prison

In 2000, the Department of Corrections implemented the Integrated Offender Management system (IOMS). IOMS is an approach to the management of prison inmates based on what is known as a risk – needs – responsivity (RNR) model. The RNR model pertains to an approach to sentence management which provides integrated, targeted interventions according to international best practice standards to reduce recidivism. In 2002, the Department of Corrections published a paper entitled “Managing Offenders in the Department of Corrections”, setting out its conceptualisation of RNR to be implemented through IOMS. The heart of the concept is stated to be the identification and implementation of services that had been proven to be most effective at reducing the rate of future re-offending. In arriving at the model for New Zealand, Corrections studied an array of literature and research spanning “jurisdictions that have what could be called a "liberal" approach to managing offenders, through to those (such as some in the United States) that have a "tough" approach.” Corrections specifically rejected the “lock them up and throw away the key” approach, recognizing that a harsh approach to offender management has

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92 Referred to in “A Backgrounder to the Department of Corrections Rehabilitation Consultation Workshop 12-13 June 2008, Rehabilitation Group, Department of Corrections May 2008” and available from the Department of Corrections website www.corrections.govt.nz.

93 Ibid.
been shown to increase recidivism. However, it was also recognized that there are many examples of rehabilitative programmes that have failed to reduce recidivism and in some cases have actually led to an increase in offending.94 Taking this into account, and recognising that “one size does not fit all”, Corrections chose to pursue a practice of delivering interventions tailored, as far as practicable, to the individual’s specific criminogenic and rehabilitative needs. The importance of “good support from community, friends and family for maintaining their new behaviours once their sentence has ended” was recognized as a key aspect of rehabilitation.95

A recent Corrections document96 states:

In general, positive overall results in reducing re-offending come from being able to identify:

- people who are highly likely to re-offend upon release from their current sentence (that is, have a high “risk”)
- the factors, such as attitudes, thought processes, habits and addictions, that relate to the offending
- a person's level of willingness and ability to benefit from a therapeutic programme • the right type of intensive, structured and long-running programme - real change is never easy or quick, even when the person is willing
- the right time for a programme to occur.

The IOMS system was developed with the above principles in mind. IOMS processes span “the initial assessments made of an offender's risk of re-offending, the factors underlying the offending, and their "responsivity", or willingness and ability to change, to the types of rehabilitative programmes available, the way offenders are supervised by staff, and support for offenders in the community.”97 The broad aim of IOMS may be expressed as “maintain[ing] the safe, secure and humane containment of offenders while continuing to reduce re-offending.”98

Crucially, the IOMS concept recognised that true reintegration and rehabilitation is not something which can be achieved within the prison environment, as offenders moving back into the community require ongoing support and assistance to make durable changes. As such, there was recognition of the need for effective reintegrative planning which targeted

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94 Ibid.
95 Ibid.
96 Ibid.
97 Ibid.
98 Ibid.
key areas of need – accommodation, employment, finance, relationships, community support, health, and victim-related issues.\textsuperscript{99}

II  EFFECTIVE INTERVENTIONS

Aligned with the 2007 legislative reforms, a package of policy initiatives designed to improve the criminal justice system were rolled out. Known as the “Effective Interventions” package, and described as being about “staying tough but being smarter about crime and imprisonment”,\textsuperscript{100} the initiatives are aimed at giving practical effect to the legislative changes, and continuing to implement the IOMS system. As such, the measures relate to the implementation of the new community sentencing measures of intensive supervision and community detention, administering home detention as a standalone sentence, and expanding rehabilitation and reintegration options.

As part of the latter, Corrections responsibility included increasing inmate employment, establishing two new drug and alcohol treatment units and establishing more treatment courses in the community, the establishment of two new criminogenic units in prisons to deliver rehabilitative programmes to high risk offenders, implementing driver training courses for offenders, providing greater access to education for prisoners and providing access to training in life skills and job-related skills for offenders in the community (via conversion of community work hours).\textsuperscript{101}

To further Corrections’ rehabilitative and reintegrative goals, a dedicated Rehabilitation Group was established in 2007. Whilst direct responsibility for the rehabilitation and reintegration of offenders is the primary responsibility of Prison Services (PS) and Community Probation & Psychological Services (CPPS), the Rehabilitation Group supports these services, and is specifically tasked with “responsibility for facilitating the identification and delivery of best practice rehabilitative and reintegrative services and ensuring a seamless approach to the rehabilitation of prisoners and offenders and their reintegration into the community.”\textsuperscript{102}

The scope of the activities of the Rehabilitation Group encompasses both rehabilitation and reintegration, in keeping with the RNR model, to assist in creating a prison environment more conducive to rehabilitation.\textsuperscript{103} Although

\begin{itemize}
\item \textsuperscript{99} Ibid.
\item \textsuperscript{100} For a detailed description of the package see \url{http://www.justice.govt.nz/effective_interventions/home.asp} (last accessed 7 September 2008).
\item \textsuperscript{101} For further detail see \url{http://www.corrections.govt.nz/about-us/fact-sheets/managing-offenders/effective-interventions-corrections-and-justice-sector-reforms.html} (last accessed 7 September 2008).
\item \textsuperscript{102} Backgrounder document, above n92.
\item \textsuperscript{103} In a footnote to a discussion paper released in May 2008, the Department states: “In the context of developing the new strategic plan, the Department’s Executive Management Team has decided to use the term ”rehabilitation” in
Corrections did not have a reintegration policy until 2004, it now has dedicated reintegration teams throughout the country, with fourteen reintegration case workers working in Regional Reintegration Teams, along with social workers and reintegration workers from the Maori Focus Units. Dedicated reintegration units now operate at Rimutaka and Mt Eden prisons, with a focus on release to work (release to work is discussed below).

III CURRENT REHABILITATIVE AND REINTEGRATIVE PROGRAMMES IN NEW ZEALAND PRISONS

Re-offending is not reduced simply by the harshness of their sentence, but is assisted by well-designed rehabilitation and reintegration programmes delivered to offenders in the community and in prisons.

A range of rehabilitative programmes now operate in prisons. Such programmes currently in operation include the Kia Marama and Te Piriti programmes for sex offenders, the Focus programme for prisoners in Youth Units, the Kowhiritanga programme for adult female offenders, the Medium Intensity Rehabilitation Programme (MIRP), Saili Matagi for Pacific offenders with violent offending backgrounds or tendencies, the Short Motivational programme, Short Rehabilitation Programmes for men (SRP-M) and women (SRP-W), along with various other targeted courses (including literacy, numeracy, and parenting courses). Pilot programmes for sex offenders against adults (Adult Sex Offenders’ Treatment Programme - ASOTP) and psychopaths (High Risk Personality Programme) are also operating. In addition, Special Treatment Units, delivering high intensity, generic interventions are being opened.

A Access to programmes

Eligibility to programmes is determined by sentence planners with reference to IOMS. Soon after arrival in prison, inmates are assessed in order that a Sentence Plan can be prepared. The Sentence Plan must take into account the inmate’s rehabilitative and reintegrative needs. An IOMS tool known as “RoC/Roi” (Risk of Re-conviction/re-imprisonment) is used to determine the nature of such needs. Inmates with a low RoC/Roi score are deemed

its more generic sense, to encompass all our interventions designed to promote the rehabilitation and reintegration of offenders. While distinctions between reintegrative, motivational, cognitive-behavioural, educational, employment and other initiatives remain valid for analytical and developmental reasons, the differences can be confusing for the public and for our partners. In keeping with this decision, the new Rehabilitation and Reintegration entity is now known as the "Rehabilitation Group (RG)".

104 Backgrounder document, above n 92.
106 Backgrounder document, above, n 92
to require “maintenance” whereas those with a high RoC/RoI are deemed to require intervention and motivation. Offenders’ specific rehabilitative needs are assessed, as is the need for treatment for addictions.

1 Criminogenic programmes

Access to criminogenic programmes – that is, programmes specifically designed to target offending behaviours - is determined according to an assessment of the prisoner’s particular needs. There are four categories of “need”, determined by the category of offending: driving, violent, substance or “generic”. The MIRP course and the “Short Motivational Programme” are used across the board. These programmes look at such things as relationships, handling emotions, examining thinking patterns, substance abuse and developing safety plans. The MIRP course, which was implemented in September 2006, is designed for offenders at a medium risk of reoffending, and is a group course of approximately 140 hours in length. MIRP courses are run both in prisons and in the community. The Short Motivational Programme is designed for short serving inmates. A 300 hour high intensity course for high risk offenders has not yet been implemented. Sex offenders are generally directed to undertake specifically targeted interventions at the Kia Marama or Te Piriti programmes. Substance abusers and violent offenders may be involved in a Drug Treatment Unit (DTU), an Alcohol Treatment Unit (ATU), or a Violence Prevention Unit (VPU).

The availability of treatment programmes varies throughout New Zealand prisons, with a specific focus on sexual offending and drug and alcohol treatment. Recently, specialised treatment units have been opened at Rimutaka and Waikeria prisons to prisons to deal with violent offenders.


109 Kia Marama is a treatment unit for sex offenders at Rolleston Prison, Christchurch, Te Piriti is likewise a sex offenders’ treatment unit, located at Auckland Prison.

110 Specialised full time drug and alcohol treatment programmes operate at Waikeria and Arohata prisons, however a 100 hour substance abuse programme is also available to inmates assessed as having addiction issues. There are also a range of “drug free” units in prisons, which require inmates to sign an agreement to stay drug free. Random drug testing is also carried out. For more information on Corrections approach to drug and alcohol issues see http://www.corrections.govt.nz/about-us/fact-sheets/managing-offenders/reducing-drug-and-alcohol-use.html (last accessed 7 September 2008).

111 At Waikeria prison, a “Special Treatment Unit” is set to provide high intensity treatment for up to 120 inmates per year. “The Special Treatment Unit offers a new programme which will ensure high risk and violent offenders who
2 Other in-prison programmes

In addition to criminogenic programmes, and depending on availability, inmates may have the opportunity to be involved in such things as parenting courses, literacy and numeracy courses, driver licencing, computer training, and employment related courses such as trade training. Prisoners may also, in some cases, undertake education by correspondence at universities and polytechnics, however tertiary study is not funded by Corrections.

B In-Prison Employment and Employment-related Training

Corrections’ proposal for the Effective Interventions package included the goal of having 60 per cent of inmates participating in employment or employment related activities. The aim was to increase prisoner employment in existing industries and establish new industries, as well as increasing the number of prisoners involved in such things as release to work and the obtaining of NZQA qualifications, and finally by linking inmates with Work and Income in advance of their release. The responsibility for implementing these measures is the domain of Corrections Inmate Employment (CIE). As part of its work in this area, CIE establishes partnerships with employers, some of whom are now conducting training in prisons (Canon, Housing New Zealand, Habitat for Humanity), and these occasionally lead to jobs with those companies for prisoners on release. CIE also works with employers to access release to work activity for inmates.

Under the heading “employment-related training” can be grouped a variety of educational courses. These include basic numeracy and literacy courses, unit standards towards the national Certificate in Employment Skills (NCES) qualification and other NZQA registered courses, secondary education, tertiary education, and vocational training.

In-prison inmate employment is available in all prisons. The nature of employment available varies from prison to prison depending on such things as the facilities available at

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113 Correspondence with Kim Workman, Director of Rethinking Crime and Punishment.

114 Tertiary courses such as polytechnic or university degree courses must be paid for by the prisoner themselves, although they can apply to have their fees and course related costs paid for by student loan, which they must then repay.
particular prisons (for example, some prisons have farms or forestry blocks), regional labour market shortages, the security classification of the prisoner and their deemed suitability for particular types of work both in prison and upon release, and also market demand for prison products and services.\textsuperscript{115} Those inmates who work 30 or more hours per week are considered to be in full time employment (anything less could be considered ‘part time’). As at October 2007, 44.4 per cent or 3755 out of a total muster of 8457 prisoners were involved in either employment (full time and part time) or employment related training. Prisoners participating in in-prison employment are not paid a wage, however they receive an “incentive allowance”,\textsuperscript{116} which ranges between 9 cents and 60 cents per hour\textsuperscript{117} which they may choose to save or use to purchase personal and grocery items.

Prisoners on the lowest security classification (“AA”) nearing the end of their sentences may, in certain circumstances and after vetting of employers, be considered for “Release to Work”, whereby they are permitted to work outside the prison, returning at the end of the working day. Release to work has been operating in New Zealand’s prisons since 1961.\textsuperscript{118} The obvious benefit of this initiative is that prisoners are able to establish a work history before they are released and, in some cases, retain this employment upon release. Prisoners on release to work must receive at least the minimum legal wage, and are then required to pay “board” to the Department of Corrections in the amount of 30 per cent of their wages. A sum to cover outstanding fines, reparation, child support, and Work and Income debts is also deducted, with any remaining monies going to the prisoner’s trust account to save for their release.

The number of prisoners participating in Release to Work is not high, although it is a significant improvement on the past decade or so. Over the period of January to February 2008 an average of 166 prisoners were participating in Release to Work, with approximately

\begin{itemize}
  \item \textsuperscript{115} Department of Corrections, Rehabilitation and Reintegration, taken from a February 2008 response to an Official Information Act request by the author.
  \item \textsuperscript{116} For further information on the payment of prisoners and its compatibility with international labour standards, see \url{http://www.corrections.govt.nz/policy-and-legislation/inmate-employment-contents/section-e-other-issues.html} (last accessed 7 September 2008).
  \item \textsuperscript{117} The remuneration prisoners receive is determined by category. The categories range from zero through to five. Category zero encompasses those inmates who are unable to work, refuse to work or are removed from work: they receive no incentive allowance. Category one is for those inmates who are willing to work but who are unable to do so due to, for example, illness or a lack of suitable work being available: these inmates receive $2.70 per week or 9 cents per hour worked up to 30 hours. Category two is the entry level allowance for prisoners whose work habits have not been assessed or who’s assessment is less than positive: they receive 20 cents per hour worked. Category three is for prisoners assessed as having reasonable work practices: payment is 30 cents per hour worked. Category four is for prisoners with very good work practices who are paid 40 cents per hour worked. Category five, the highest level, is for prisoners working within Corrections Inmate Employment industries who demonstrate exemplary work practices, behavior, qualifications, attitude and skill: they are paid 60 cents per hour worked.
  \item \textsuperscript{118} See \url{http://www.corrections.govt.nz/public/aboutus/factsheets/managingoffendersinprison/release-to-work.html} (Last accessed 21 July 2008).
\end{itemize}
two thirds of those being from North Island prisons.\textsuperscript{119} Between 1 January 2007 and 18 January 2008, 234 prisoners released from prison had come directly from Release to Work, with 100 of those (42 per cent) retaining the employment immediately upon release.\textsuperscript{120}

Reintegrative assistance is the domain of the Regional Reintegration Teams (referred to above), working in co-operation with Corrections Inmate Employment and Work and Income. Their role is to develop a reintegration plan for those serving longer sentences (more than two years). A significant part of their role includes helping inmates to find employment for release. The Regional Reintegration Teams work in consultation with Case Officers and social workers within the prisons. There are five reintegration teams throughout the country, each comprised of 5 to 9 members. In addition, there are a small number of Work and Income case managers and work brokers (employed by the Ministry of Social Development) based within prisons who liaise with the Reintegration Teams and Corrections Inmate Employment to assist inmates access income assistance and employment prior to release.

IV E\textsuperscript{VALUATION}

Eight years on from the implementation of IOMS, some significant steps have been taken towards the development and implementation of rehabilitative and reintegrative initiatives. Some innovative steps – such as the recent establishment of the Rehabilitation Development Team and liason with employers such as Canon and Habitat for Humanity for release to work options – have been taken by the Rehabilitation Group, and specifically Corrections Inmate Employment, in spite of the difficult political climate in which it operates.

At a recent hui entitled “Reintegration 2008 and Beyond”\textsuperscript{121} Corrections hosted Professor Tony Ward, School of Psychology, Victoria University of Wellington, who spoke about the “Good Lives Model”, which is premised on the assumption that offenders have the same basic needs as other members of the community “and are naturally predisposed to seek certain goals, or primary human goods (activities, experiences, states of mind etc).”\textsuperscript{122} The Good Lives Model (GLM) seeks to identify offenders’ strengths and utilise these to enable the offender to contribute to the community. This type of model was seen as a compliment to the addressing of criminogenic needs. A similar type of approach is discussed in chapter

\textsuperscript{119} January 2008 – 151 prisoners on Release to work, increasing to 181 in February 2008. Figures obtained from a February 2008 response to an Official Information Act request by the author.

\textsuperscript{120} Figures obtained from a February 2008 response to an Official Information Act request by the writer.

\textsuperscript{121} 12 – 13 June 2008, Corrections Head Office, Wellington.

\textsuperscript{122} Workshop Notes from the Reintegration 2008 and Beyond” Hui 12 – 13 June 2008, Corrections Head Office, Wellington.
14, where the concept of Human Needs development is proposed as being of relevance as an alternative lens through which criminal justice issues can be viewed. The Human Needs theory of development advocates a transdisciplinary approach, and thus models developed in the psychological field, such as the GLM, are in keeping with such an approach.

Arising out of all of the above, is a recognition of the need for appropriate follow through on release from prison and beyond and the importance of linking with community initiatives. Unfortunately, there is currently little or no follow through from the Reintegration Teams, and thus the goal of supporting prisoners into such things as sustainable employment is rarely achieved. This failing cannot fairly be laid at the feet of the Rehabilitation Group, as it appears to be working at capacity within the confines of its role and resources. Continued and concerted efforts to engage with the community, particularly community groups who support rehabilitation and reintegration, and local employers would therefore seem to be a continued area of focus for the Group, and an important area for targeting of Corrections’ funding. Ultimately however, it is the community which will play the most critical role in rehabilitation and reintegration. Grassroots initiatives – especially those working to provide housing and employment for ex-offenders – are discussed in chapter 13.

Finally, it should be noted that as it is currently not possible to track the employment paths of released inmates, there is no data available to determine how many inmates are able to find or sustain employment and what difficulties they encounter in that respect. Likewise with housing. As most prisoners released will be subject to release conditions,\textsuperscript{123} and it would seem theoretically possible to obtain data in respect of the employment path of inmates for a period of time post release. The Department of Corrections does not have such reporting systems in place. The Privacy Act 1993 would prevent Corrections tracking prisoners after that time without their consent. Given the effort being devoted to in-prison work and Release to Work, and given Corrections’ acknowledgement that employment plays a significant role in reducing recidivism, it would seem sensible for Corrections to investigate ways to track the employment path of prisoners post-release (possibly by agreement and anonymously) in order to acquire information as to what factors tell against their remaining in work. Whilst any “tracking” would need to be approached with

\textsuperscript{123} The court may impose standard or special release conditions upon offenders sentences to 12 month imprisonment or less. Where offenders are sentenced to between 12 and 24 months imprisonment, the court must impose standard release conditions and may impose special conditions. These court-imposed conditions must not extend beyond the prisoner’s statutory release date. Where prisoners are serving longer sentences (over 24 months), the Parole Board must impose standard release conditions for a period of at least six months and may require they extend up to six months beyond the prisoner’s statutory release date. Special release conditions can be imposed for the same duration. See \url{http://www.corrections.govt.nz/public/policyandlegislation/ppm/sections/c04/c0401r2.html} (last accessed 22 July 2008).
significant caution so as not to be unreasonably intrusive, exploration of a manner in which such information could be obtained appears to be a path worth exploring.
Chapter 4

TE ARA HOU AND HABILITATION CENTRES

In 1989, a review of the prison service was conducted by Sir Clinton Roper under the name “Te Ara Hou (The New Way). Te Ara Hou was highly critical of New Zealand’s prison system, arguing that prisons have failed both as a deterrent and as a method of reform and that other methods of addressing offending should be adopted.\footnote{See Prison Review, Te Ara Hou: The New Way, p4, 1989.} Whilst Roper acknowledged there remained an important role for prisons in light of their ability to keep dangerous prisoners out of circulation, he argued for the establishment of residential habilitation centres as the most appropriate and successful manner by which to address the complex causes of offending behaviours. It was naive, he argued, to expect prisons to do this. Roper’s recommendations found no traction with the government of the day and adherence to the (increasing) use of imprisonment continued. Indeed between 1989 and 1990 the use of imprisonment in sentencing rose from 5.2 per cent to 7.3 per cent and has continued to climb since.\footnote{In 2005, approximately 9.8 per cent of all convicted cases (10,553) led to imprisonment. Source: Statistics New Zealand, accessible online at \url{http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx?ReportName=Justice/Convicted per cent20Cases} (last accessed 7 September 2008).}

I COMMUNITY RESIDENTIAL CENTRES

Habilitation centres, now known as “Community Residential Centres” (“CRCs”), are residential programmes for high risk offenders coming from prison on parole or at the end of their sentence. There are a handful of such centres in New Zealand, including Montgomery House, Salisbury Street Foundation, Te Ihi Tu and Moana House. The programmes are aimed at rehabilitation and reintegration of high risk offenders. Offenders with active, non treated, addictions or serious mental or behavioural issues are generally not accepted into CRCs.

Montgomery House, based in Hamilton, is a residential community-based programme for violent offenders which offers 10 week long courses four times per year. An evaluative study of Montgomery House found that those who completed the programme had a 20 per cent lower recidivism rate for violent offending than the control group, suggesting that
Montgomery House is effective at reducing the rate of violent recidivism and that the treatment effect remains stable even after an extended period of time at liberty.\textsuperscript{126}

The Salisbury Street Foundation in Christchurch, which accepts high risk offenders across the board, offers programmes of varying lengths, up to a maximum of two years duration. The programme focuses on life and social skills and provides support to residents seeking employment.

Moana House in suburban Dunedin, established in 1987, is run by a charitable trust, the Downie Stewart Foundation. Moana House is a therapeutic community for high risk male offenders, catering for up to 11 residents at a time. Moana House is based upon a similar model to the Delancey Street Foundation in San Francisco (the Delancey Street Foundation is discussed further below). Moana House operates independently, and thus is not included in the Review data discussed below.

Te Ihi Tu, in Taranaki, provides a 13 week residential programme for high risk offenders which offers a range of rehabilitative and reiterative interventions within a tikanga Maori framework. Whilst the other CRCs accept certain sex offenders,\textsuperscript{127} Te Ihi Tu does not.\textsuperscript{128}

A recent review of Te Ihi Tu suggested the programme was effective in reducing reoffending. The Review referred to a 1999 review which found, of 21 residents, 17 were described as “improved”, with four rated as showing no improvement. The reoffending rate was 19 per cent, although it was acknowledged that the follow up time period was too short “to obtain a realistic assessment of reoffending”.\textsuperscript{129} Given the over-representation of Maori in recidivism statistics,\textsuperscript{130} it would seem sensible to pursue options, such as Te Ihi Tu, which show positive results.


\textsuperscript{127} Moana House does not accept persons who have offended sexually against minors.

\textsuperscript{128} See Ministerial Review of Corrections’ Te Ihi Tu Community Residential Centre (CRC).

\textsuperscript{129} Ibid Appendix 7, p 12.

\textsuperscript{130} Department of Corrections statistics (see 2007 Department of Corrections Annual Report, p22) show Maori offenders have higher recidivism rates than non-Maori. Corrections’ figures from 2004/5 show that within two years of release from prison, Maori offenders had a 61.1 per cent reconviction rate (51.7 for “European” offenders) and a 41.6 per cent re-imprisonment rate. Within two years of starting a community based sentence Maori offenders’ reconviction rate was 45.6 per cent (37.7 per cent for European offenders) and their imprisonment rate was 14.2 per cent (10.1 per cent for European offenders).\textsuperscript{130} Figures from 2005/6, based on a 12 month follow up, show a 47.6 per cent reconviction rate for Maori offenders released from prison (compared with 38.2 per cent, 30.5 per cent and 22.7 per cent for European, Pacific and “other” offenders respectively). Recidivism rates for the same period for Maori offenders who served community based sentences are 36 per cent (reconvicted) and 10.4 per cent (imprisoned). For non-Maori the figures were 29.7 per cent, 24.8 per cent and 19.9 per cent respectively for European, Pacific and “other” (reconvicted) and 7.5 per cent, 6.8 per cent and 3.5 per cent respectively.
The Review also noted that evaluations of Montgomery House (in 1998) and Salisbury Street Foundation (in 1999) indicated they also had “a degree of success in reducing re-offending” but cautioned that “given the low numbers completing these programmes, caution needed to be used when interpreting [the] figures”.

Clearly, the handful of CRCs in New Zealand cannot hope to cater for more than a small number of released prisoners at any one time, and thus it will always be a challenge to produce results that can be said to be sufficiently statistically significant to advance the case for further CRCs. However, it would appear there is a case to be made for expansion of such services. Recently, Judge David Carruthers, Chairman of the New Zealand Parole Board, invited the media to attend an Extended Parole Board Hearing to enable the difficulties faced in finding appropriate accommodation for long term inmates to be seen.

In the most recent Annual Report of the Parole Board, Judge Carruthers expressed support for “halfway houses”, based on the success of the same in Canada. Commenting to the media, Community Probation acting general manager Astrid Kalders stated that whilst probation knew of the success of halfway houses in Canada, “our experience suggests it would be a significant undertaking to try and establish such houses in the New Zealand context”. Notably, it was reported that “Canadian research had shown those paroled to halfway houses were two to three times less likely to reoffend than other parolees, and five times less likely to reoffend than those not paroled at all”, with Judge Carruthers stating in the Report that “[t]he considerable success of these institutions in Canada speak for themselves and that success awaits us here.” It was further reported that “Corrections is funding 56 beds in supported accommodation, provided by contractors, where offenders with high-level needs can live for three months”, which can cater for up to 240 inmates per year.

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130 The figures as cited do not account for other variables such as age, length of sentence, type of offence or type of release (i.e. Home Detention, Parole, standard post release conditions). However, it is apparent that Maori have the highest reconviction and imprisonment rates of any ethnic group.

131 Ministerial Review of Corrections’ Te Ihi Tu Community Residential Centre.

132 Ibid.

133 Halfway houses sought for sex crims, By Emily Watt, The Dominion Post, Saturday, 06 September 2008.

134 Report for 12 months to 30 June 2008

135 Watt, above, n133.

136 Report for 12 months to 30 June 2008.

137 Watt, above, n133.
In 1994, Bruce Dyer conducted research into habilitation centres in which he travelled to a number of such programmes throughout the United States, Canada and the United Kingdom. Dyer argued in favour of such centres not only being effective in addressing recidivism, but also for them being cost-effective. Indeed some examples were entirely self-supporting. Dyer refers to a New Zealand Department of Justice report in 1989 which concluded that the cost per inmate of attendance at a residential habilitation programme would be no more, and probably less, than maintaining an inmate in prison. Dyer also refers to overseas studies which provided very positive indications in terms of the effectiveness and cost-effectiveness of habilitation programmes.

A Elements of successful programmes

Dyer identifies a number of elements common to those habilitative programmes which are considered successful. Ideally, interventions should be made available from the start of a sentence (or at least as early as possible) and residents who graduate should move from the programme to the community, without spending further time in prison, as the effectiveness of the programme could be “undermined by subsequent exposure to more negative and punitive prison conditions.”

Programme design should approach the habilitation of residents in a holistic way, “by balancing theory and practice, work inside and out and developing an awareness of the physical mental and the spiritual”. Further, having staff who are positive role models and to whom the residents can relate is highly important (the study indicates that having ex-residents as staff can be very successful in this regard). A familial environment should exist within the programme in order that residents will be challenged within an environment

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139 “Habilitat” in Hawaii is a therapeutic community for substance abusers. Habilitat began in 1971 with government funding, however it developed business enterprises, run by residents and supported by a Trust Board comprising persons with business experience, which allowed it to be 100 per cent self supporting. Residents pay an enrolment fee and board from their wages. Residents are supported through four phases – induction, treatment, re-entry and post re-entry. The first two phases are very structured, with the structure gradually reduced during the third and final phases, to allow residents to become independent and able to function successfully in society. During the post re-entry phase, residents are supported as they gradually integrate into the community. See http://www.habilitat.org/ (last accessed 20 June 2008).
142 Dyer, above, n138, 1994, p 25
143 Dyer, above, n138, p 64
144 Dyer, above, n138, p 12.
where they feel safe, and measures to promote the support and understanding of residents’ own families should be encouraged. Finally, a critical element of a successful programme is having appropriate re-entry follow up. Some programmes incorporated the re-entry/follow up into the programme itself, making compliance with this phase a pre-requisite to graduation. It would seem that without appropriate re-entry support and assistance residents may quickly regress.\textsuperscript{145}

1 \textit{Role Models}

\textbf{Role modelling}

All employees play an important part in reducing re-offending. Your working relationships with other employees and with offenders must be based upon the principles of courtesy and respect for the dignity of others.

You must also acknowledge that your actions, attitudes and behaviours will influence offenders and it is your job, therefore, to ensure that influence is a positive one”

Department of Corrections Code of Conduct, Second Principle\textsuperscript{146}

From at least the time of Aristotle, the importance of role models in moulding or changing behaviour has been recognised.\textsuperscript{147} Role models are important in all walks of life\textsuperscript{148} as they provide a standard of morality and conduct against which a person may measure their own behaviour and values. A role model can encourage positive behaviour or equally, encourage negative or antisocial behaviour, therefore it is important where a person is placed in a position of being a role model for others, that their behaviour is such that it would be desirable for others to emulate.

In an institutional environment such as a prison, staff members are – whether they like it or not – in positions where their behaviours will be observed and judged by inmates. Staff who perform their work competently and professionally, and whose conduct is ethical and

\textsuperscript{145} Dyer notes that staff at the Ontario Correctional Institute, which has no re-entry support or follow up, observed how rapidly the residents regressed and returned to offending behaviours upon completion of the programme, (above, n138, p 66).


respectful, provide a positive role model for inmates and are well-placed to gain their respect. Conversely, staff whose behaviour is unethical, who display unprofessional attitudes to their work such as resentment to or boredom with tasks, or antagonism, contempt or favouritism towards inmates, make very poor role models for inmates and may even endanger their colleagues by creating a tense or hostile atmosphere within the prison.

In New Zealand, the importance of staff acting as positive role models is a key aspect of prison policy. The idea that prison officers are no more than “turn-keys” has long been rejected as an acceptable view of their role. Indeed the concept of prison officers being role models has long been a central theme in Corrections’ policy and recruitment advertising.149

Whilst prison policy does not exclude those with criminal convictions from employment as a Corrections’ Officer, those with convictions for such things as violence, dishonesty, drugs or sexual offending, or those who have ever received a custodial sentence or supervision are unlikely to be employed.150 Whilst there is certainly a good reason for this policy within the prison environment, Dyer’s research, in the context of habilitation centres, makes the case for role models who have “been there”, that is, ex-offenders who have graduated from the programme becoming staff. Dyer states the importance of recruiting staff who have a positive attitude to rehabilitation and the ability be effective role models for residents. He notes that the reason many habilitation centres have a practice of employing programme graduates is their special ability to establish rapport with residents (“If I can do it so can you”) and their ability to “recognise the inevitable bullshit”.151

2 Length of Programme and Post Release Follow up and Support

The type and length of programmes, and the availability of re-entry and follow up support, varied between the programmes researched by Dyer. Some programmes were treatment-based, whilst others were more in the nature of educational programmes teaching life, social and employment skills to ex-offenders. Some were based within prisons (Kia Marama for example), with prison staff being involved as trainers, whilst others took place in a

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149 “One thing potential prison officers will have in common is the ability to act as positive role models for prisoners. They will be working in a facility designed to encourage self responsibility and prepare prisoners for their release back into the community”. Department of Corrections, Corrections News 2006 http://www.corrections.govt.nz/public/news/magazines-newsletters/correctionsnews/2006-news-back-issues/08-august-2006/06-orcf-recruitment-campaign-begins.html (last accessed 10 August 2008); see, also, for example, advertisements for prison officers online at http://www.jobs.govt.nz/vacancies/viewjob.aspx?opportunityID=17496 and http://www.shef.co.nz/htdocs/jobs_doc.htm (last accessed 10 August 2008).


151 Dyer, above, n138, p 68.
community setting. Some programmes were heavily treatment based and generally of medium duration (a typical programme length is 18 months - two years, although some are shorter), whilst other programmes were less “programmes” than they were supported lifestyles, and lasted years.

The Cornerstone Programme for chemically dependent recidivist offenders and the Delancey Street Foundation are discussed below as examples, respectively, of these different approaches. Whilst there is evidence to suggest both approaches are considerably more effective than imprisonment in reducing recidivism, it would seem probable that the holistic “lifestyle” approach, by which ex-offenders are supported long term to gain educational and work-related qualifications, and then go on to be financially self-sustaining, will produce the most durable results. There are examples of this type of approach being implemented in a manner such that there is no financial cost to the government or the community beyond initial start-up costs, and indeed such programmes can make a profit which can then be reinvested in the community.

(a) The Cornerstone Programme - USA

The Cornerstone Programme, run within the grounds of the Oregon state Hospital, USA, targeted long-term chemically dependent recidivist offenders of both sexes (averaging 13 prior convictions and seven years imprisonment prior to entering the programme). The programme consisted of an intensive 6 to 12 month treatment phase, followed by a 4 to 8 month work release “transition” phase, followed by a six month follow up period. An evaluation of the programme, three years post-completion, showed only a 26 per cent reimprisonment rate amongst those who had graduated from the programme. Those who had not graduated but who had completed at least six months of the course had a 63 per cent reimprisonment rate, with those who spent less than two months in the programme having an 85 per cent reimprisonment rate.\(^{152}\) As Alexis Durham notes,\(^{153}\) it is possible that the correlation between time spent in the programme and “community survival time” may have nothing to do with the programme: it could be that the offenders who stayed longest were

\(^{152}\) These figures are taken from Alexis M Durham, *Crisis and Reform: Current Issues in American Punishment*, Little, Brown and Company, USA, 1994 pp158-159. Statistics cited by Bruce Dyer are similar. The three year reimprisonment rate for graduates is put at 29.2 per cent. However the tree year statistics for a control group (i.e. untreated offenders) show that approximately half are reimprisoned. The characteristics of the control group are not stated, however the figure is in line with figures from the United States and New Zealand. The significantly higher reimprisonment rate for those who completed less than two months of the Cornerstone programme (85 per cent) is likewise unexplained, but could be a reflection of the fact that those accepted onto the programme are perhaps at a higher risk of imprisonment than the “average” prisoner, given their significant histories of substance abuse, offending and prior imprisonment. From this perspective, a 26 per cent reimprisonment rate in such a programme which translates to approximately a 20 per cent improvement when compared with the general prison population, may be all the more impressive.

\(^{153}\) Ibid.
simply the most motivated to change their behaviour and would have done so irrespective of
the programme. This is something which is difficult or impossible to test, however given
the significant criminal and substance abuse histories of all offenders accepted into the
programme, reoffending statistics tend suggest the programme is instrumental in the
rehabilitation of Cornerstone residents. There are many other examples of residential
treatment programmes for offenders.\textsuperscript{154} In New Zealand, Montgomery House for violent
offenders is an example of such a programme.

(b)\textbf{ The Delancey Street Foundation - USA}

The Delancey Street Foundation in California is a residential centre – more specifically, a
“therapeutic community” - that assists persons released from prison, as well as substance
abusers and homeless persons, to obtain employment and become financially
independent.\textsuperscript{155} The programme lasts a minimum of two years, with an average stay of four
years. Whilst in the programme, residents obtain educational and employment related
qualifications. The Delancey website claims that:

After an average of 4 years, our residents gain academic education, 3 marketable skills,
accountability and responsibility, dignity, decency and integrity. We have successfully
graduated over 14,000 people from America’s underclass into society as successful, taxpaying
citizens leading decent, legitimate and productive lives.

A key feature of this programme is that it is entirely run by ex-residents and is not only self-
sustaining through its business enterprises but also returns a profit to the community.
Delancey has been in operation since 1971 and now houses up to 1000 residents at any one
time, in its five facilities located in New Mexico, New York, North Carolina, Los Angeles,
and San Francisco.\textsuperscript{156}

4 \textbf{Lack of Political Support for Habilitation Centres}

There is an obvious and acute lack of residential habilitative programmes offering anything
approaching the necessary programme length and follow up to make such a programme

\textsuperscript{154} For example, Daytop in New York, Habilitat in Florida, and Stay’N Out in New York, all being “therapeutic
communities” for substance abusers.

\textsuperscript{155} Delancey Street Foundation, Phone: (415) 957-9800 Fax: (415) 512-5186 , 600 Embarcadero, San Francisco , CA
94107, http://delanceystreetfoundation.org/. For summary of this programme see also, the Reentry Policy Council,
a project of the Justice Centre, Council of State Governments (USA online at:
http://reentrypolicy.org/program_examples/delancy_street_foundation (last accessed 14 July 2008). Delancey
Street Foundation, Phone: (415) 957-9800 Fax: (415) 512-5186 , 600 Embarcadero, San Francisco , CA 94107,
http://delanceystreetfoundation.org/

\textsuperscript{156} From the Reentry Policy Council, a project of the Justice Centre, Council of State Governments (USA online at:
successful in reducing recidivism long term. The potential of habilitation initiatives remains unexplored. The use of intensive residential habilitation centres and services has been encouraged by minor political parties, such as the Green Party and the Maori Party, and also by various iwi and community organisations, but has never become a significant part of overall justice policy. Despite current Corrections’ policy having a strong rehabilitation and reintegration component, there is very little follow through and only a small number of inmates are able to be paroled to habilitation centres. As stated above, there are only three such centres in New Zealand contracted by the Department of Corrections – Te Ihi Tu in Taranaki, Montgomery House in Hamilton and the Salisbury Street Foundation in Christchurch. As stated above, Te Ihi Tu offers a 10 week programme for offenders (excluding sexual offenders) and Montgomery House offers a 13 week programme for violent offenders. Neither programme has a community follow up component. Only Salisbury Street Foundation offers reintegrative support, such as budgeting and employment assistance.

III EVALUATION

Recent Department of Corrections’ research shows that roughly one out of two offenders released from prison will be reimprisoned within four years of release.\textsuperscript{157} Of the 49 per cent reimprisoned, over half (26 per cent) will return to prison within the first year following release, with 11, 7 and 5 per cent of released prisoners returning to prison in the second, third and fourth years respectively. The research suggests that a further 3 percent will be reimprisoned in the fifth year following release, with a very small percentage being imprisoned after that point. These figures relate of course, to reimprisonment only, not reoffending generally, but as this data is concerned with the more serious end of the offending continuum, it is a useful benchmark for a discussion on timeframes for follow up support and assistance. Recidivism rates appear to correlate positively with the severity of the sentence imposed: that is to say, that the more severe the sentence, the higher the rate of recidivism. Clearly, the “community survival time” of persons released from prison is poor, with over half returning to prison within five years.

Research shows that the younger a person is when they are first imprisoned, the more likely it is that they will be re-imprisoned. As an example, of the 2002/3 release cohort, 75 per cent had been first imprisoned by the age of 24 (and of that group 75 per cent and 91 per

cent had received their first conviction by age 20 and 24 respectively).\textsuperscript{158} It would seem eminently sensible that if there is a tangible way in which intervention can begin early, and imprisonment avoided for all but the most serious offences, such an option should be explored. Even if the cost of doing so is more expensive to administer than imprisonment or standard community-based sentences (and there is evidence to show that it is not), the potential long term benefits – both financial\textsuperscript{159} and social – makes it a worthwhile option to explore with genuine commitment.

Habilitation centres appear to be effective in changing behaviour for the better and thereby reducing reoffending, provided their programmes are long term and have adequate re-entry support and community follow up. Whilst insufficiently motivated offenders will fail to complete the programme (and arguably should then be returned to serve the remainder of their sentence until such time as they are sufficiently motivated to re-enter the programme), for those that do complete, their “community survival time” is greatly extended, perhaps indefinitely.

In any event, appropriate residential habilitation programmes have the potential to address recidivism far more effectively than either imprisonment or programmes with no re-entry support or follow up. This follow up and support would, in many cases, be entirely voluntary on the part of the offender (in some cases a resident may still be on parole/release conditions upon completion of the programme, but in many cases, depending upon the length of the programme completed, the period of control or oversight will have passed). Making re-entry a phase of the programme and postponing “graduation” until after this phase would seem a possible approach. However, where residents feel they are genuinely benefiting from the programme, continued engagement with the programme may not be difficult to achieve.

Further, given recidivism risk is highest when first released into the community (tapering off to a negligible risk level after five years), habilitation centres should also be available to ex-offenders who are not currently serving a sentence, but who are motivated to attend. At present, support for ex-offenders not subject to any sentence is fragmented and incomplete. Habilitation centres have the advantage of assisting ex-offenders in a holistic way,

\textsuperscript{158} Ibid.

\textsuperscript{159} Corrections’ data shows that for high-risk recidivist offenders, the “all-up” cost of their offending is likely to be between $450,000 (if imprisoned) and $600,000 (on community based sentences) over the five year period following conviction. \textit{“About Time: Turning people away from a life of crime and reducing re-offending”:} Hon. Matt Robson, (then) Minister of Corrections, 2001, [http://executive.govt.nz/minister/robson/time/rehab.htm](http://executive.govt.nz/minister/robson/time/rehab.htm) (last accessed 15 July 2008).
addressing such things as housing, education, employment, social skills and relationship skills and are thus preferable to a fragmented network of social services for those ex-offenders with multiple needs. This concept of ongoing availability of such programmes is not part of New Zealand’s justice policy.

The traditional conception of the justice system is that once a sentence is served (including any release conditions or parole period) ex-offenders are on their own. The fact that we no longer accept the concept of indeterminate sentences should not limit our ability to imagine an extension to the concept of “justice system” that includes ongoing support and assistance aimed at reducing recidivism. Without this extended view, even the best initiatives within the current system will fail to bring about a tangible reduction in recidivism.

The Delancey Street Foundation (discussed above) appears to be a good example of the type of programme where ongoing engagement with the programme is secured not by the threat of sanctions or withholding of benefits, but rather because residents take ownership of their own learning and achievements, are supported by other residents in doing so, and are thus able to draw support as they require it, for as long as they require it. Delancey is not limited to ex-offenders, taking applications from anyone who has “hit bottom” whether that be from prison or from the community. The Salisbury Street Foundation in Christchurch and Moana House in Dunedin, which each have eleven beds, is the closest New Zealand has to such a model, although the Salisbury Street Fundation programme is limited to persons coming from prison or within a specified period of time of completing their sentence.

It is somewhat unrealistic to expect behaviours developed over a lifetime to somehow be “cured” by participation in a programme that is anything less than appropriate and relevant to the participant, of sufficiently long term duration, and - importantly – undertaken by choice. Changing attitudes and behaviours is not something which can be achieved either by imposing demands in a top-down fashion nor in a short period of time. Rather, what is required is time and ongoing support and encouragement over years rather than months for those with serious and substantial criminal histories. Only those motivated to change will do so, but the experience of successful habilitation programmes suggests that given the opportunity and appropriate support, many will take the opportunity. If rehabilitation and reintegration is to be a genuine aim of justice policy, habilitation centres – with long duration programmes and re-entry support – should be available to a far greater amount of offenders. To the writer’s knowledge, the Salisbury Street Foundation is the only habilitation centre of the three that contract with Corrections, which offers programmes of greater than 18 weeks duration.
If the success of a programme is defined objectively by the results it produces, that is, in terms of the recidivism rate of its graduates, prison must surely rank as the least successful. However, prisons have not been required to justify their continued existence by showing they can change behaviour for the better. The bottom line is that so long as they successfully contain inmates - fulfilling the sentencing purposes of deterrence, denunciation and incapacitation - they will suffer little criticism from the public. Even in the face of their failure to rehabilitate, prisons are effective in fulfilling the desire for retribution against criminals. Although rehabilitation remains an integral part of Corrections’ policy, there can be no real expectation that prisons will reduce reoffending. Indeed public intolerance of offending and offenders has meant that the only times prisons are criticised is when there is a perception that they are insufficiently austere. Blame for re-offending on release from prison is laid at the feet of sentencing policy for not imprisoning soon enough or for long enough, rather than directed at prisons for failing to rehabilitate.

Unlike prisons, habilitation centres do not have the purposes of punishment and deterrence and therefore must demonstrate their ability to do more than merely act as a holding pen by changing the behaviour of long term offenders for the better: an onerous task. Accordingly, the success of habilitation initiatives will continue to be judged in terms of recidivism rates of their graduates. Whilst attrition rates will also be viewed by some as evidence of failure, this is somewhat unfair, given the difficulty inherent in assessing which offenders are sufficiently and properly motivated to attend such programmes. A failure to complete a habilitation programme should not be seen as a failure of the programme, but rather an example of a successful “weeding out” of insufficiently motivated offenders. For an offender to graduate from an habilitation programme, he or she should have demonstrated sufficient willingness to change. A well run habilitation programme will be a challenging experience for offenders, such that those who graduate have demonstrated the motivation to change their lives.

Issues of crime and justice are highly politicised, with constant calls for tougher sentencing, and it may well be politically unsalable to be seen to be diverting funding into habilitation centres, even in light by evidence to show their effectiveness in reducing reoffending. This is a reflection of the strong desire in society – as portrayed in the media at least - for retribution. An approach which is seen as insufficiently punitive is bound to be rubbished and dismissed as a product of idealists and “bleeding heart liberals”. In the absence of a conscious decision to de-politicise crime and justice (as has been done in Finland), or at the very least to engage in long term public education on such issues, it is difficult to see any
government paying more than lip service to intensive habilitation services playing a key role within the justice system. Ombudsman Mel Smith’s report (discussed in chapter 5) suggests New Zealand is unfortunately not yet ready to take such an enlightened and sensible step.

The hope that remains is that community initiatives aimed at rehabilitation and reintegration will receive sufficient support to enable changes to be driven from grassroots level.
Chapter 5

THE DIRECTION OF CRIMINAL JUSTICE PHILOSOPHY - ANALYSIS AND CRITIQUE

I OMBUDSMAN’S REVIEW OF THE CRIMINAL JUSTICE SECTOR

In November 2007, following a reference from the Prime Minister under section 13(5) Ombudsman Act 1975, then-Ombudsman, Mel Smith, released the results of his investigation into New Zealand’s criminal justice sector.\(^{160}\) At the outset, the Review document notes that New Zealand has a high and increasing incarceration rate compared with other developed counties, a prison muster which is growing at a faster rate than population growth and faster than forecast, a trend that is showing more use of imprisonment, more remands in custody and less use of community based sentences.\(^{161}\) Further, the Review document specifically notes the tendency of the media to devote extensive coverage to criminal justice matters, often seeking “with minimal investigation, to ascribe culpability on to an aspect of the system”.\(^{162}\) Put simply, matters of crime and justice have become “highly politicised and often the subject of uninformed and superficial public and media comment”.\(^{163}\) The Review document stresses that matters of criminal justice are highly complex and no “magic bullet” exists.

The Review document discusses the tension between the competing philosophies in criminal justice – “penal populism” on the one hand, and “soft liberalism” on the other, both descriptive terms being a product of their opponent’s vocabulary. “Penal populism”\(^{164}\) describes the manipulation of the criminal justice system by “political firebrands” and their lobby groups who use the media to sensationalise and enhance public outrage towards violent offending and sympathy for victims, in order to advance their own political agenda.\(^{165}\) Such lobby groups align with politicians known to favour a “get tough” approach to criminal justice. The danger of this, argue opponents, is that, in the wake of the resulting hysteria, the criminal justice system becomes skewed to an approach which is highly risk adverse, leading to increased use of imprisonment, longer sentences and ultimately a

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161 At September 2007 the prison muster was at levels that had been forecast for 2011. Ombudsman’s Review, Ibid.

162 Ibid.


165 Ombudsman’s Review of the Criminal Justice Sector, above, n160, p 126.
growing prison population. Proponents of this approach deride any initiatives aimed at rehabilitation and reintegration – or indeed any approach which does not align with a “get tough” stance - as examples of “soft liberalism”. “Soft liberalism” they say, favours offenders over victims and must be countered. The “penal populist” message is both simplistic and highly engaging, as it feeds on fears and the high emotions and desire for retribution that offending often engenders. Its simplistic and compelling nature makes the “penal populist” message ideally suited to sound bite duration and short, shocking media coverage. Put simply, “penal populism” is the philosophy of the angry man or woman on the street.

“Soft liberalism” on the other hand, is seen as the philosophy of criminal justice promoted by academics and high ranking civil servants. It is to be abhorred, say penal populists, because it puts criminals’ needs ahead of the needs of victims. The result of “soft liberalist” policies is, critics contend, increasing offending due to lack of respect for the criminal justice system. 166

The Review document acknowledges that whilst such a summary of the two philosophies is simplistic, given the tendency of both sides to highlight the most extreme aspects of the other, and whilst neither approach has completely dominated criminal justice policy, elements of both philosophies can be found in New Zealand’s criminal justice policy and legislation over the past decade. For example, the Bail Act 2000 made it more difficult for recidivist offenders and those charged with serious crimes to get bail, whilst ostensibly making it easier for first offenders to get bail. Likewise, the Sentencing Act 2002 and the Parole Act 2002 contained “get tough” elements (harsher penalties) with “soft options” (such as home detention and parole eligibility at one third rather than two thirds of sentence). 167

The Review document acknowledges that criminal justice policy and practice is too complex to be encapsulated in slogans, and that it is a mistake to try to do so. Moreover, the interaction between policy and legislation can mean that legislation viewed as an example of “soft liberalism” may not have such effect in practice.

The Review document provides the example of parole eligibility beginning at one third of sentence rather than two thirds, noting that Department of Corrections’ practice is to not have prison inmates who have committed serious offences begin their criminogenic programmes until they had served two thirds of their sentence. As completion of such programmes is often a prerequisite to parole, and as, in any event, parole boards appear increasingly cautious, offenders imprisoned for serious crimes will seldom be paroled at one

166 Ombudsman’s Review, above n160, p 127.
third of sentence. A parole system, states Mr Smith, is essential in any criminal justice system and a risk-adverse approach to granting parole, for fear of adverse media attention, “will condemn some prisoners, who would pose very little risk to the community, to longer terms in institutions...[lessening] the potential for rehabilitation”.

Noting that the effects of the legislation over the past decade that have resulted in an increase in the prison muster are “neither unexpected nor unintended” some changes in policy and practice have been “undesirable”. Mr Smith states:

The increase in the prison muster is undesirable both in view of the impact of prison on offenders and their families, and in view of its increased demand for increased government expenditure on new prisons and their operations. Moreover, it has been “undesirable” as there is little evidence that the changes have made us feel safer, or increased our confidence in the criminal justice system.

The notion that imprisonment is a last resort and is the place only for those who engage in the most serious acts and cannot be dealt with in the community is our traditional approach and, I believe, must be restored as the fundamental sentencing doctrine today.

Mr Smith emphasises the paradox that confidence in the criminal justice system has decreased in proportion to the rate at which the rate of imprisonment has increased, and cites with approval the statement in the Effective Interventions overview that “[p]rison is not the most effective or efficient approach to reducing crime”. Mr Smith concludes that - save for the extremely rare example - prison does not rehabilitate and makes offenders

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168 Ombudsman’s Review, above, n160, p 128. The Review document notes that the Parole Amendment Act 2007, which returns parole eligibility to two thirds of sentence, is not yet in effect no comment of its effect is possible. Likewise, it is too early to assess the impact of the Sentencing Amendment Act 2007, which abolished “back end home detention” and made home detention a sentence in its own right, and which also brought in the community based sentences of community detention and intensive supervision. Further, the Sentencing Council Act 2007 introduced a new Sentencing Council tasked with developing guidelines for sentencing and parole, however the Sentencing Council has yet to be established, and thus the effects of the legislation on prison numbers can only be speculative.


170 Ibid p 130.

171 Ibid p 130.

172 Ibid pp 130,131.

173 Ibid pp 133.

174 Ibid pp 133.


more likely to re-offend on release. It is necessary, he argues, that politicians challenge the view that more imprisonment is necessary, in spite of the opposition they will face from the ‘tough on crime’ sector, suggesting that such a stance is likely to receive far wider support than the media headlines would lead us to believe.

The Review document concludes by expressing the view that the goals of protecting the public and rehabilitating offenders can both be achieved, despite the argument that they are in conflict with one another. The Review document recommends as the way forward, the establishment of a “Commission of experienced and suitably qualified people to investigate not only the operations of the entire criminal justice system, but put forward explicitly the philosophies and values which should guide its policies and practices into the future.

In April 2008 it was announced that a Criminal Justice Advisory Board has indeed been established in response to the Ombudsman’s recommendation. It is to:

• Help develop greater public consensus on what issues are important in terms of bolstering confidence in the criminal justice system;
• Give justice sector ministers high level informal advice about issues facing the criminal justice system;
• Bring a range of perspectives on further improvements to the criminal justice system;
• Provide a sounding board for justice sector ministers to have an ongoing discussion about criminal justice priorities; and
• Help facilitate constructive community dialogue about criminal justice issues and solutions.

What recommendations will be made, and whether they will be acted upon, is yet to be seen.

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179 Ibid pp 137.
II THE ROLE OF PUNISHMENT IN CRIMINAL JUSTICE

Certainly, defining the philosophy which guides the criminal justice system is imperative. The presence of competing philosophies in legislation and policy creates a tension, and arguably results in a “mushy” criminal justice system which fails to achieve results and thus fails to please either side of the debate.

The concept of punishment is central to most criminal justice systems, including our own. In order to be clear about the philosophy underpinning our criminal justice system it is necessary to define the role of punishment. We must understand precisely the reasons for employing punishment and what we hope to achieve by doing so. For example, do we employ punishment for its own sake to exact retribution? Or do we use it as a means of achieving some other goal, such as deterrence, or perhaps rehabilitation? If we use punishment for its own sake, how do we reduce offending? If we use punishment to reduce offending, do we have evidence that this works, by deterring or rehabilitating? We must also be clear as to what method of punishment we will use. Once we have defined why we will punish and how we will punish, the way is clear, only then, to address other criminal justice goals such as rehabilitation.

It would appear from current legislation and policy that New Zealand has not clearly defined the role of punishment within its criminal justice system. As discussed in chapter 2, the Sentencing Act 2002 provides a range of purposes for which the court may sentence offenders, and punishment, although not mentioned, is considered to be implicit in the purposes of denunciation, deterrence, and accountability. However, we should then be asking how these purposes can be achieved and whether currently available measures fulfil the desired purpose. For example, if we seek to deter (though punishment) this will necessarily involve imposing a punitive sentence such as home detention, imprisonment or a financial penalty. A valid question therefore is, does punishment in the form of imprisonment/home detention/a fine deter? Clearly in some cases it may, such as where an offender feels they have something to lose and where offending is premeditated such that there is a conscious risk/benefit analysis by the offender. However, for spur of the moment offending, or in the case of someone who feels they have nothing to lose, the risk of punishment will have little or no deterrent effect.

Unfortunately, the latter type of offending/offender is likely to be the recidivist, and therefore the offender most likely to cause future problems. For this type of offender, punishment will often only be of value to denounce the offending to the community, to temporarily incapacitate the offender, and to exact retribution on the offender. Thus, we should be quite honest about the reason for which we are punishing such offenders and
accept that once the punishment has run its course the offender, in the absence of some form of non-prison based intervention, will more than likely reoffend.

Holding offenders in prison indefinitely will not always be consistent with retributive philosophy, which demands proportional punishment (“an eye for an eye”). Therefore unless there is sufficient reason to permanently or indefinitely incapacitate the offender, or unless it is viewed as an acceptable policy outcome that most offenders released from prison will reoffend and over half will return to prison, the question of their rehabilitation must be addressed.

In most cases a combination of purposes are present during sentencing. For example, the court may determine that a serious offender must be held accountable, the conduct must be denounced, the offender incapacitated, but also that the offender should be rehabilitated. The Sentencing Act of course provides for such multi-purpose sentences. However, for more serious offending, what tends to happen is that a sentence of imprisonment is imposed and that is the end of the matter. Incapacitation has occurred for the duration of the imprisonment and the conduct has been denounced, but one must question whether true accountability has occurred and whether the sentence makes it more or less likely the person will reoffend.

What is perhaps preferable, is for offenders to be sentenced in a more precise and forthright manner. For example, an appropriate portion of a sentence may be imposed for entirely punitive purposes and/or for the utilitarian purposes of denunciation, incapacitation or deterrence. Where an offender is likely to respond to deterrent sentencing or where a punitive sentence may be of value for the purpose of general deterrence, this may also be expressed as a utilitarian purpose of a punitive sentence. Where a rehabilitative component is deemed necessary, there should be a specific plan as to how and when that will occur (coming, of course, after the punitive portion of the sentence). Options for sentencing judges are lacking in this regard.

A The punitive effect of the internet?

As something of an aside, but relevant to the concept of punishment, it is worth questioning whether the punitive and condemnatory nature of the arrest through sentencing process has increased due to the internet. Whereas twenty five, or even ten years ago, a person’s name and perhaps photograph may appear in the newspaper, or on radio or television, today they will often also appear on the internet news websites and on any number of websites, some of which may be nothing more than a “blog” containing information of dubious accuracy. Whilst a newspaper generally ends up in the next day’s rubbish, internet news articles and
websites carrying the information may remain for months or years so that the information
remains able to be accessed via a simple Google search. One wonders at the impact this
increased and prolonged stigmatisation may have on the rehabilitation process. Further
examination of the impact of today’s technology on the punitive and condemnatory aspect
of the criminal justice process is beyond the scope of this research but is something that
deserves further attention. Arguably, the punitive effects of this process should perhaps be
a factor taken into consideration during the sentencing process. Perhaps of more relevance
for the purpose of this paper is the potential impact of the internet upon reintegration and
rehabilitation. With it being a simple matter to both place information on and retrieve it
from the internet, it is far easier for prospective landlords, employers and indeed anyone to
access information about a person’s offending history. The question of when, if ever,
offending history becomes private information is a difficult one, especially in light of
legislation such as the Clean Slate Act 2004 and the readily accessible and enduring nature
of information published on the internet.

Recently, in a move which was met with strident criticism, District Court Judge David
Harvey ordered that internet websites were prohibited from publishing the names of two
men accused of murder.  

Whilst a discussion of the issues pertaining to internet
publication and suppression orders is beyond the scope of this paper, certainly the step taken
by Judge Harvey indicates some judicial concern over internet publication, albeit in relation
to a possible prejudicial effect on accused persons’ right to a fair hearing rather than in the
context of punishment.

Internet publication of the identity of an accused, who is later acquitted, may nevertheless
have a significant punitive effect. Later internet searches of that persons name may well
bring up information pertaining to the accusation but not the acquittal. However, it is
difficult to see how this can be overcome, other than with blanket suppression orders and/or
closed courts, both of which fly in the face of free speech and open justice.

B  The role of the victim

The role of the victim has not been discussed in this paper, but should be mentioned in
relation to two principles. First, “big picture” criminal justice goals such as reducing
recidivism, should not be compromised by allowing individual victims to influence
sentencing. This is not to say that victims do not have a role to play in conveying to the

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181 See for example, “Judge: I welcome debate on online suppression”, New Zealand Herald, Friday August 29, 2008,
By Eveline Jenkin  [http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10529661] (last accessed 8
September 2008); “Judge's suppression order mocked online, By John Hartevelt - The Press, Tuesday, 26 August
2008. This order was subsequently lifted.

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court and the offender the impact of the offending. Second, and following on from this, true accountability for offenders is never achieved in the absence of their having to hear first hand the effect of their offending on their victim(s) and their loved ones. In this regard, restorative justice is seen as the most effective manner of holding offenders accountable and should be promoted far more than is the case at present.

III TERMINOLOGY

“Reintegration” and “rehabilitation” are words used frequently to describe the process by which criminal offenders are transformed into law abiding citizens living within the community. “Rehabilitate” is defined variously as “to restore to a former capacity”, 182 “to restore or bring to a condition of health or useful and constructive activity”, 183 and “to return someone or something to a good or healthy condition, state or way of living”. 184 “Reintegrate” is defined as “to integrate again into an entity: restore to unity”. 185

Both of the above terms suggest a process of bringing about a state of affairs that has existed some time previously but has, for whatever reason, been lost. For many offenders, a state of unity, healthy living, a state of living in a good and constructive way, has never existed. Therefore, for many offenders, the process of living without offending will be an attempt to “habilitate” (“to make fit or capable”) 186 and “integrate” (“to unite with something else” or “to end the segregation of and bring into equal membership in society or an organization”). 187 This too is perhaps oversimplifying the process that must occur, for ex-offenders are not starting from scratch. They are not coming to the world with a clean slate but with (often substantial) baggage, much of which may be difficult for them to deal with and also highly unpalatable to the community into which they enter.

Whilst many offenders have a minimal offending history and have sufficient ability to overcome any hurdles their convictions may pose, for others, their convictions are, in reality, the least of their worries in terms of their ability to live without offending. Recidivist offenders often have numerous issues contributing to their offending that serve as barriers to a fulfilled and law abiding life. 188 Of course there will always be those offenders who are quite content with their lifestyle and who have no motivation to change it.

183 Ibid.
184 Cambridge Advanced Learners online dictionary ttp://dictionary.cambridge.org (last accessed 22 August 2008).
185 Merriam-Webster , above n 182.
186 Ibid.
187 Ibid.
188 This aspect is discussed in Chapter 11.
However, one must wonder whether this is because such people genuinely enjoy their offending lifestyle, or because they simply do not see any other way they can meet their needs. If the latter is the case, there is hope.

It would seem that there are three primary things that must occur for an offender to begin the habilitation/rehabilitation, integration/reintegration process. First, they must have sufficient belief that an alternative path is possible and desirable. Second, they must have sufficient motivation to take the steps necessary to pursue a different path and, third, they must be given the opportunity and assistance needed to do so.

The first two steps are the domain of those who understand human motivation and self esteem. As such, this paper will not attempt to address them other than superficially and will focus on the third stage. This stage is concerned with addressing barriers to reintegration and providing opportunity and support to those motivated to change their way of living (something which requires a trans or multi disciplinary approach).

First it must be acknowledged that there are likely to be a number of points in most offenders’ lives when they are ready and willing to try a different path: when they are tired of the path they are on and have sufficient hope that it a different future is possible to allow them to take the first step in that direction. This moment may come at any time: upon entry to prison, at the conclusion of an in-prison programme, during a church service, or as a result of a conversation with a stranger. The danger is that unless there is a clear (and supported) route as to how to get to where they would like to be, the moment of hope will fade and be replaced with cynicism and resignation to ones perceived lot in life. This is where the law can assist by setting in place structures, policies and – if necessary – laws, to provide concrete means by which offenders can pursue alternative, more positive, ways of meeting their individual needs.

IV BARRIERS TO REHABILITATION AND REINTEGRATION

Currently, New Zealand’s criminal justice system lacks commitment to the rehabilitation and reintegration of offenders beyond sentence expiry. This is primarily for two reasons. First, the muddy waters of penal philosophy tend to allow political manipulation of the system by lobby groups, and thus the growing calls for politicians to “get tough” has led to a culture in which rehabilitative measures (despite the fact the aim of such measures is a reduction in recidivist offending) are derided as examples of favouring offenders over victims and as “soft liberalism”. Logic aside, this culture has become politically irresistible and so although rehabilitation and, more recently, reintegration are stated as criminal justice goals, the types of measures necessary for them to occur are not given sufficient...
commitment or resources. Secondly, rehabilitation and reintegration are processes that extend well beyond the expiry of both sentence and parole/release conditions and thus continue beyond the point at which, under the traditional view of the criminal justice system, official involvement terminates.

Except for the case of offenders serving indefinite sentences, the maximum period of time the Parole Board can impose conditions is six months,\(^{189}\) therefore, for community-based programmes extending beyond that time, attendance would be entirely voluntary. The inability to compel compliance provides both challenges and opportunities. If one accepts that rehabilitation is not something that can be “done to” a person, but rather something a person must choose willingly, the lack of ability to compel compliance is appropriate to this phase of the criminal justice system.

The first step to achieving policy that is appropriate to achieving criminal justice goals (including “big picture goals such as community safety and offender rehabilitation and reintegration) is achieving clarity as to the philosophy underpinning the criminal justice system. If punishment is to be the overriding philosophy, rising crime rates and the need to build more prisons must be accepted. If reducing recidivism through rehabilitation and reintegration is to be the ultimate objective, punitive options must nevertheless be available for defined purposes, but without allowing punitive thinking to remain a barrier to rehabilitative and reintegrative aims.

The second step requires thinking somewhat outside the traditional criminal justice box. Rather than offenders disappearing from criminal justice policy considerations when their sentences expire, and waiting for the often inevitable return to the system (at an average rate of around 60 per cent within two years for those released from prison),\(^{190}\) measures must be implemented that facilitate rehabilitation and reintegration beyond sentence expiry. For recidivist offenders particularly, research shows that what is often needed are long term interventions, measured in years, which and provide support on re-entry into the community and assist offenders through a rehabilitation process. New Zealand’s penal policy is sorely lacking in this regard. The current practice of any support terminating upon expiry of parole/release conditions is simply not working. The question then becomes, what does work? Corrections’ current thinking on this has been discussed in chapter 3.

\(^{189}\) Parole Act 2002, ss 18

In a recent book entitled “The Problem of Prisons”, Greg Newbold canvasses the various barriers to offender rehabilitation. These include the possession of social values aligned to a criminal subculture, psychological damage sustained during formative years, the fact that, for recidivist offenders, many key needs are met in the prison environment, and difficulties coping with and avoiding the temptations of “life outside”. Of the latter Newbold states:

It may be very well, through programmes such as anger management, Straight Thinking, Alcoholics Anonymous and so on to get a commitment from prisoners to control their anger, think carefully and drink sensibly. In the sterile and controlled atmosphere of maximum security, such resolutions may be made with absolute sincerity and resolve. On the outside, things are different. Here the therapist or social worker is not the primary influence. There is the added problem of peer pressure and the temptations of alcohol, drugs, sex and consumer advertising. And, of course, food has to be brought and bills have to be paid. When a person who has been ‘reformed’ in prison is cast back into the same impoverished, crime-dominated world they came from, where drugs and drink are easy temptations, resolutions made in another world at another time can easily lose their relevance.

Whilst Newbold’s analysis of the difficulties of reforming criminal offenders does not discuss the possibility of post-release interventions, the above statement nevertheless alludes to the possibility that positive and appropriate support ‘on the outside’ may help to counter negative influences.

As it is beyond the scope of this paper to examine all aspects of rehabilitation and reintegration (such as housing, and family reintegration), the focus of Part 2 and 3 of this thesis is upon labour market participation by ex offenders. Employment is chosen because it is a key satisfier of a number of key needs and is generally seen as an important factor in addressing the problem of re-offending.

It is necessary to stress however, that employment is only one aspect, albeit an important one, of an appropriate approach to rehabilitation and reintegration, and the focus therein on

\[191\] Newbold, above, n3.
\[192\] Ibid pp 303 - 316.
\[193\] Ibid p 306.
\[194\] Ibid pp 307-308.
\[196\] Ibid pp 308 – 309.
\[197\] Ibid p 309.
\[198\] A Human Needs analysis of criminal offending and the role of employment in meeting human needs is contained in chapter 14.
employment should not be taken as suggesting that employment assistance alone will achieve reduced recidivism rates. A holistic approach in a community setting is likely to deliver the most effective and durable results.199

V REHABILITATION AND REINTEGRATION BEYOND SENTENCE EXPIRY

Chapter 3 looked at rehabilitation and reintegration initiatives within the criminal justice system. That is, those measures which exist within the context of the finite period of time in which an offender is under the control of the criminal justice system. The provision of rehabilitation and training programmes in prisons, and also to some offenders on community based sentences, is an important part of the rehabilitation and reintegration process. Newbold states that such programmes, although they do not prevent re-offending, are nevertheless valuable for a number of reasons, including ‘humanising’ offenders and teaching skills that offenders may later make use of. 200

The critique contained in this thesis relates not to the current programmes but, rather, to the way in which we currently conceptualise the criminal justice system itself. Specifically, it is submitted, the problem lies in the inability of the current “criminal justice system”, as we understand it, to adequately implement the (accepted) knowledge that rehabilitation and reintegration necessarily extend well beyond sentence expiry. This therefore hampers robust support of initiatives that continue on from the point at which the traditional criminal justice system ends. In order to work towards a remedy, two significant conceptual issues must be addressed.

First, as discussed above, there must be clarity around the principles guiding the criminal justice system. As identified by the (then) Ombudsman Mel Smith in his Report on the Criminal Justice Sector,201 a key problem the criminal justice system faces is that its philosophical basis is unclear. On the one hand, the philosophy of punishment is deeply entrenched in the criminal justice system. On the other, it is recognised that reducing recidivism is effected by rehabilitating and reintegration offenders. Ultimately, one must take precedence in legislation for effective policy to follow. When justice policy “fence-sits”, it pays lip service to both philosophies but achieves neither properly.

200 Newbold, above, n3, pp 310 - 312.
Second, the notion of what exactly the “criminal justice system” encompasses must be re-defined. Currently, and seemingly by definition, the “criminal justice system” conceptualised as a system designed to deal with the criminal law and its enforcement, ends upon sentence expiry. Ex-offenders only come to the attention of the system again once they re-offend. Thus, there is a considerable variance between rehabilitation goals and practice – seen most acutely in relation to released prisoners - in that, whilst it is recognised that rehabilitation is a lengthy and complex process, offenders are left to their own devices at the end of a sentence. On its face, this problem appears to relate to the principle of proportionality and determinate sentencing, and the fact that measures cannot be imposed upon sentence expiry. However, if one accepts that rehabilitation cannot be imposed but must, rather, be a self-motivated process, imposing measures from the top down is neither desirable nor likely to be effective. What this means, is that to truly give effect to rehabilitation and reintegration as criminal justice goals, the “criminal justice system” must be reconceptualised and implemented as a system which can encompass both enforced and voluntary measures, where the latter extend beyond sentence expiry.

To a degree, this is already accepted in theory. The Department of Corrections acknowledges that rehabilitation and reintegration cannot be achieved within the traditional criminal justice system and that an offender’s post-sentence path is critical to the question of whether they reoffend. The problem lies in practice, specifically, in a lack of commitment to supporting those community based initiatives which work with offenders at grassroots level.

VI SUMMARY

In sum, there needs to be greater clarity surrounding the philosophies guiding the criminal justice system and the means of achieving sentencing aims. If punishment is to be a purpose of sentencing (which arguably it must), this should be made explicit, as should the purposes for which punishment is imposed. Likewise, if rehabilitation is a genuine aim of the criminal justice system, there will need to be a far greater commitment to post release support and assistance. Currently, rehabilitation and reducing recidivism are stated as being key criminal justice goals, but the types of resources needed to achieve them are lacking.

Experience tells us that a continuing spiral into tougher sentencing in response to public pressure is a mistake. However, when imprisonment fails to reduce recidivism and indeed makes it more likely, rather than recognise there is a problem with the model we use, we reapply the model more fervently by imposing imprisonment more frequently and for longer.
PART 2

DO NEW ZEALAND EMPLOYERS DISCRIMINATE ON THE BASIS OF CRIMINAL RECORD AND, IF SO, WHY AND HOW?

SURVEY OF CHRISTCHURCH EMPLOYERS: RESULTS AND ANALYSIS
A small survey of employers’ attitudes and practices relating to the employment of ex-offenders was conducted for the purpose of informing this research.

A  Sample size

A “questionnaire pack” containing two questionnaires (one for employers who would consider employing a person with one or more criminal convictions and one for those who would not), an explanatory letter, and a post paid return envelope, was sent to 200 employers. Employers to whom questionnaire packs were sent were selected at random from across 23 industries within the Christchurch area. No incentive was offered to complete and return the questionnaire. Forty-five completed questionnaires were received back.

The survey was never intended to be statistically significant. What was intended was to achieve as wide an industry and geographical spread (within Christchurch) as possible and to use the responses to inform the research and possibly to indicate whether a larger, more scientific survey would be desirable. Although the survey was not intended to be statistically significant, the results have been collated numerically and represented in chart form for ease of assessment. It is possible that even this small, non-scientific sample may indicate trends worthy of further investigation.

B  Number of questions

The questionnaires were kept short (19 questions in the “would consider” questionnaire, 16 questions in the “would not consider” questionnaire) so as to be able to be completed within 15-20 minutes. It was felt that, in the absence of an incentive, employers would be more likely to complete a short questionnaire than a longer one.

C  Nature of the questions

The questionnaire for those employers who would consider employing a person with one or more criminal convictions was designed to find out:

a. Whether employers asked job applicants about criminal history (those who did not ask applicants about criminal history were asked to explain why this was and were not required to complete the remainder of the questionnaire).
b. At what point in the hiring process they asked about criminal history

c. What level of proof they required of the same

d. What criminal history factors were relevant to their decision making

e. What level of inquiry they would make into disclosed criminal convictions

f. The level of importance they placed on listed attributes

g. Whether there were specific categories of offending which would rule out an applicant and why (for example, whether on the basis of a particular personal dislike for that type of offending or on the basis that the type of offending was incompatible with the work role)

h. Whether any specific legal, insurance or occupational factors were relevant to the hiring of a person with criminal convictions

i. What they would do if they learned that an otherwise satisfactory employee had failed to disclose disclosable convictions

j. Whether they had previously (knowingly) hired a person with one or more criminal convictions and how satisfactory the person was as an employee

k. Whether there were any incentives that could be offered to make them more likely to hire a person with criminal history and, if so, what they were

l. Whether they or someone close to them had been a victim of crime and whether they felt this had influenced their attitude to hiring someone with convictions

m. Whether they had anyone close to them with a history of criminal offending and, if so, whether and whether they felt this had influenced their attitude to hiring someone with convictions

The aim of the questionnaire for those employers who would not consider employing a person with one or more criminal convictions was to find out:

a. Whether employers ask job applicants about criminal history (those who did not ask about criminal history were asked to explain why that was but were not required to complete the rest of the questionnaire)

b. At what point in the hiring process they asked about criminal history

c. What level of proof they required of the same
d. Why they would not consider hiring a person with a criminal history

e. The level of importance they placed on listed attributes

f. Whether there were any specific legal, insurance related or occupational reasons why they would not consider hiring someone with a criminal history

g. What they would do if they learned that an otherwise satisfactory employee had failed to disclose disclosable convictions

h. Whether they had previously (knowingly) hired a person with one or more criminal convictions and how satisfactory the person was as an employee

i. Whether there were any incentives that could be offered to make them consider hiring a person with criminal history and, if so, what they were

j. Whether they or someone close to them had been a victim of crime and whether they felt this had influenced their attitude to hiring someone with convictions whether they had anyone close to them with a history of criminal offending and, if so, whether and whether they felt this had influenced their attitude to hiring someone with convictions

D Limitations

Obvious limitations include the small sample size and the fact that the writer does not have particular expertise in questionnaire design, sampling, or data analysis. This research itself is small scale and has been conducted on a very minimal budget. A larger sample, coupled with expert input into the questionnaire formation and analysis would produce results that would be statistically significant.

Further, if the level of detail in the questionnaire were increased this would have the effect of eliciting more data and increasing the validity of the conclusions drawn. Follow-up interviews with respondents would also be useful in that regard.

It is also always a factor in surveys as to whether respondents have answered honestly and accurately. All respondents were completely anonymous, other than those who volunteered their contact details for the purpose of follow-up questions, and thus there would be no reason to suspect they were not being honest. However, as some of the questions related to attitudes rather than actual hiring practice, it is highly possible there may well be a discrepancy between attitudes and practice.

Despite the above limitations, the author is of the belief that the questionnaires produced interesting results which suggest a need for further, more detailed, research in this area.
What follows chapters 7 through 9 are the collated results from both survey groups and an analysis of the same.
Chapter 7

SURVEY OF CHRISTCHURCH EMPLOYERS - EMPLOYERS WHO WOULD CONSIDER HIRING AN EX-OFFENDER

I  RESPONDENTS BY INDUSTRY

Twenty four valid surveys were returned by employers who stated they “would consider hiring a person with one or more criminal convictions”. The industry spread was as follows:

<table>
<thead>
<tr>
<th>Industry</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Banking finance, insurance</td>
<td>1 respondent</td>
</tr>
<tr>
<td>Construction &amp; architecture</td>
<td>2 respondents</td>
</tr>
<tr>
<td>Healthcare</td>
<td>1 respondent</td>
</tr>
<tr>
<td>Hospitality &amp; tourism</td>
<td>5 respondents</td>
</tr>
<tr>
<td>HR &amp; Recruitment</td>
<td>1 respondent</td>
</tr>
<tr>
<td>Labour Hire</td>
<td>1 respondent</td>
</tr>
<tr>
<td>Legal</td>
<td>1 respondent</td>
</tr>
<tr>
<td>Manufacturing &amp; Operations</td>
<td>1 respondent</td>
</tr>
<tr>
<td>Office &amp; Administration</td>
<td>1 respondent</td>
</tr>
<tr>
<td>Retail</td>
<td>4 respondents</td>
</tr>
<tr>
<td>Sales</td>
<td>2 respondents</td>
</tr>
<tr>
<td>Security</td>
<td>1 respondent</td>
</tr>
<tr>
<td>Trades &amp; Services</td>
<td>1 respondent</td>
</tr>
<tr>
<td>Transport &amp; Logistics</td>
<td>1 respondent</td>
</tr>
<tr>
<td>Wholesale distribution</td>
<td>1 respondent</td>
</tr>
</tbody>
</table>
A Question 2: Do you ask job applicants about their criminal history?

Twenty-two employer respondents answered this question in the affirmative, with only two respondents reporting they did not ask about criminal history.

The two respondents that did not ask about criminal history gave their reasons for not doing so as follows:

“Good point. I have a small business (with two) staff and have employed by referral from other people in the industry. I give staff a trial period of 3 months so hopefully within this time I can ascertain that they are competent for the task, pleasant to work with, reliable and honest. If convictions are what I call minor driving related, possession of marijuana etc. then this would not affect my decision to employ someone. More serious convictions definitely not employ someone (sic).” (Construction and architecture)

“We do talk to their previous employers about their work in the past. Our work environment suits women with children who are looking for 3 – 4 hours per day.” (Hospitality)

Thus, most employers did ask job applicants about their criminal record. The two that did not ask were not required to complete the remainder of the questionnaire, as the aim was to gain some understanding of the concerns and considerations of those employers who did ask about applicants’ criminal record.

Knowing that most employers asked about criminal history does not necessarily mean that most employers discriminate on the basis on criminal record, and more information is needed to find out what employers do with the information they receive.

B Question 3: At which stage do you first ask about an applicant’s criminal history?

1 Job application form

All four hospitality respondents who asked about criminal record did so in a job application form, as did respondents from HR & Recruitment, Labour hire, Manufacturing & Operations, Office & Administration, Trades & Services, Transport & Logistics, and Retail. (11 out of 22 respondents).
It is interesting, although not necessarily significant, that the half of the total respondents indicated an application procedure involving an application form, and further, that they are (with the possible exception of HR & recruitment) from industries which are likely to attract unskilled workers. A large proportion of persons leaving prison have little or nothing in the way of work skills or work history or will be precluded due to their convictions from entering certain types of employment. This same problem will undoubtedly also be faced by many persons with criminal convictions who have not been in prison. Thus, those positions which have minimal skill and work history requirements will often be those that are perceived to be the most accessible to persons with a criminal history. If applicants for these types of jobs are required to disclose criminal history on a pre-interview application form this may have the effect of discouraging persons with a criminal history from applying or it may lead to such persons not declaring their convictions out of fear they will be discounted for the positions.

The above observation is, of course, a huge generalisation which may not be justified, especially as the exact nature of the employment is not known. However, if the observation were to prove accurate, there would be a cause for real concern that persons with a criminal history were being, to a large degree, excluded from that part of the workforce in which they would otherwise stand the greatest chance of being employed. A survey into the use of pre-interview application forms would seem to be an important part of a more in depth study into the employment prospects and needs of persons with criminal convictions.

The scope of this research did not allow for a survey of ex-offender job applicants to enable an assessment to be made as to how such applicants responded to criminal history questions in job application forms. It would be highly useful to know whether prospective applicants who encounter this question in an application form enter their criminal history, omit their criminal history, or cease the application process. If such questions deter those with criminal records from making applications, it may be that those employers without this pre-interview screening procedure are more likely to encounter persons with a criminal history. It may also be the case however that those who are not honest as to criminal history on the application form are not asked the question again.

Five respondents first asked about criminal history at the first interview. There were respondents from Healthcare, Retail, Sales, and Security. The latter commented that “some convictions bar the applicant for a security clearance so we get this sorted out first”. Whilst a “paper applicant” with criminal convictions may be easily discarded, it is possible that an

\[202\] See Part 3.
applicant with criminal convictions who presents well at an interview may have a greater chance of employment than if the same applicant had disclosed their convictions on a pre-interview application form.

A further five respondents stated they asked about criminal history at a subsequent interview. They were respondents from Banking & finance, insurance, Construction & architecture, Retail and Wholesale Distribution.

By the time a person has progressed to a second or subsequent interview they will have already made a favourable impression on the employer. It may be the case that employers would be more willing to hire in spite of criminal convictions at this stage than had the convictions had been disclosed at an earlier stage, assuming there are no legal or occupational reasons precluding this.

Under the heading “other”, came two responses. The Legal respondent, who was referring to volunteers only, stated they asked about criminal history “when signing confidentiality agreement to volunteer at the workplace”. The Retail respondent stated that when they asked “depends on the person”.

C  Question 4: Do you ask to view job applicant’s official criminal history?

Respondents were asked whether they required an official criminal history document from the applicant or whether they simply relied on applicants’ responses. They were also given the option of “other” and asked to explain their response if they chose this option.

Only four respondents required an official document (Banking & finance, Legal, Security and Retail). In respect of the respondents from the Legal and Security industries this is likely due to legal or occupational requirements.

The majority of respondents (15) stated they took applicants at their word (Construction & architecture, Healthcare, Hospitality & tourism, Manufacturing & Operations, Office & Administration, Retail, Sales, Trades & Services, Transport & Logistics, Wholesale distribution).

It is interesting, particularly in light of answers to the rest of the questionnaire, that so many of the respondents were willing to take job applicants at their word.

The three respondents who selected “other” stated as follows:

“Negotiable on the position and client’s requirements” (HR & Recruitment)
“We ask if they consent to a police check being conducted” (Labour hire)

“I would do my own inquiries and check out the background” (Sales)

Table 1 - representing questions 2, 3 & 4

D Question 5 – Significance of criminal convictions

Question 5 asked respondents to select, from a list, which factors would influence their hiring decision in respect of criminal history (they were asked to select as many as were relevant). The factors given were type of conviction, number of previous convictions, length of time since the last conviction, particular circumstances of the offending, and whether the person had served time in prison. Respondents were also given “other” as a response and were asked to explain if they chose this response.

The type of conviction was seen as a relevant factor by all respondents. The number of previous convictions was seen as relevant by 15 out of 22 respondents (Hospitality & tourism, HR & Recruitment, Labour hire, Legal, Manufacturing & Operations, Office & Administration, Retail, Sales, Security, Trades & Services, and Transport & Logistics). Likewise, 15 respondents viewed the length of time since the last conviction as relevant (Construction & architecture, Hospitality & tourism, HR & Recruitment, Labour hire, Legal, Office & Administration, Retail, Sales, Security, Trades & Services, and Transport & Logistics).
The particular circumstances of the offending were seen as relevant by 10 respondents (Hospitality & tourism, HR & Recruitment, Labour hire, Legal, Manufacturing & Operations, Retail, Sales, Trades & Services, and Transport & Logistics).

Eight respondents saw as relevant whether the person had served a term of imprisonment (Healthcare, Hospitality & tourism, HR & Recruitment, Labour hire, Office & Administration, Retail, and Security).

Four respondents made comments under the “Other”. These were:

“I would not consider someone with any dishonesty or violence type offences” (Hospitality & tourism)

“[It would depend upon] the [t]ype of position they were applying for, and the results of the reference checks” (HR & Recruitment)

“Any personal/medical condition that may have contributed to the offending and any subsequent counselling/treatment [would be relevant]” (Legal)

“If the applicant has been completely honest with my questions [that would weigh in their favour]. I definitely would not employ someone who has reoffended for the same crime” (Sales)

Clearly, the nature of the conviction was seen as the most relevant factor, followed by the number of previous convictions and the length of time since the last conviction. Less than half of the 22 respondents were interested in the particular circumstances of the offending, with only eight stating they viewed whether the person had previously been imprisoned as relevant.

E Question 6 – level of inquiry into criminal convictions

In question six respondents were asked to state the level of inquiry they would make in respect of criminal convictions, with an instruction that they could select more than one answer.

Six respondents stated that simply knowing about the conviction was sufficient and they would not enquire further (Banking finance, insurance, Construction & architecture, Hospitality & Tourism, Retail, Trades & Services, and Labour hire, with the latter stating the this depended on the role for which the person was being employed).

Ten respondents stated they would want to know something about the circumstances of the offending, why they committed the offence, whether they felt remorse, and whether they had
moved on in some way (HR & Recruitment, Legal, Manufacturing & Operations, Office & Administration, Retail, Sales, Wholesale distribution, and Labour hire, with the latter stating again that the level of enquiry would be dependent on role they were recruiting for and environment in which the candidate will be working).

Four respondents stated they would require some further documentary evidence relating to the conviction, such as sentencing notes or a summary of facts, with the respondent from Healthcare, Hospitality & Tourism, stating “If it was a more serious conviction I would ask for documentation but probably would be hesitant to hire them anyway”. The Legal respondent said they would ask for “Summary of Facts at least”, and the Retail respondent stated that it “whether I ask for evidence or a history check from the Waikato (sic) computer depends on the conviction and the length of time since convicted”.

Five respondents replied under “other”, stating as follows:

“Depends on offence – would ask what offence was, when it occurred, if they were convicted” (Hospitality & Tourism)

“Depending on the type of offending would motivate my selection of the above. Violence of any kind I wouldn’t even finish interview”. (Hospitality & Tourism)

“Behind the scenes inquiries” (Sales)

“Submit an application to the Private Investigators and Security Guards Act Office. The applicant also has to have a sworn application stating his previous history.” (Security)

“It would depend on the nature and circumstances of the conviction.” (Transport & Logistics)

Whilst six respondents stated that knowing what the person had been convicted for would be sufficient and they would not make further enquiry, most respondents stated they would wish to know more about the offending, with four stating they would want some form of documentary evidence relating to the conviction.

This question was attempting to elicit whether respondents would want to see any documentary evidence relating to a convictions disclosed by an applicant (the example of sentencing notes was given in the question). Some confusion was evident from at least one response. The respondent in question spoke of obtaining information from the “Waikato computer”, presumably referring to the obtaining of an official criminal history and therefore not understanding the question. However, it appeared respondents generally understood the question, with a central theme being that whether they would want to know
more or whether they would require some form of documentary evidence would depend on the nature (type, seriousness) of the conviction.

Table 2 - representing questions 5 & 6

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Pre-employment application form</th>
<th>First interview</th>
<th>Subsequent interview</th>
<th>Other</th>
<th>No, I take applicants at their word</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you ask about criminal history</td>
<td>25</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>At what stage do you ask?</td>
<td>15</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Do you ask to view official document?</td>
<td>10</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

F  Question 7- Desirable employee attributes

This Question asked respondents to rate employee attributes on a scale of important from “not important” through to “essential”.

1  Appearance

Overall, appearance was ranked highly, with all respondents considering appearance at least moderately important and with 12 of the respondents considering appearance either very important or essential.

2  Social skills

Social skills were ranked slightly higher than appearance, with 15 rating this attribute as either very important or essential. No respondents said social skills were unimportant and seven selected “moderately important”.

3  Qualifications

Qualifications were ranked less highly than appearance and social skills, with four respondents stating qualifications were not important and only eight ranking qualifications as very important or essential.
Work skills

Work skills were highly ranked, with 15 applicants stating they were either very important or essential. No respondents said work skills were unimportant and eight said they were moderately important.

Work history

Work history received a somewhat mixed response. Whilst eleven respondents ranked the applicant’s work history as either very important or essential, two stated that it was not important. A person’s work history is often a good indication of their reliability and capabilities. Both respondents who said work history was not important went on to rank reliability highly, suggesting perhaps a willingness to train a person who possessed other desirable attributes but who did not have a relevant work history.

Reliability

Reliability ranked very highly, with all respondents selecting either very important or essential. Reliability elicited the highest number of “essential” rankings (15). This is perhaps unsurprising, as, one cannot imagine many employers who would not place a premium on this attribute.

Honesty

Unsurprisingly, and as for reliability, all respondents ranked honesty as either very important (9) or essential (13). The fact that reliability drew two more “essential” rankings than honesty may reflect the fact that some roles will involve a higher degree of trust than others, and thus the opportunity for and impact of dishonesty would be higher in some roles more than others, whereas unreliability will almost always have a detrimental impact regardless of the role.

No Criminal Record

Interestingly, having no criminal record drew the most responses of “not important” (5) out of all the attributes listed and was the only category not to draw any responses of “essential”. Three employers ranked a clean criminal record as very important, with the majority (14) stating a clean criminal record was moderately important.
The importance of having a clean drivers licence received a mixed response. A clean drivers licence was “not important” to three respondents, moderately important to eight, very important to seven and essential to two. Comments suggested the importance of a clean drivers licence depended on whether the role involved driving rather than on any notion that a driving conviction is a criminal conviction.

Summary

Clearly, for respondents reliability and honesty were by far the most essential requirements in an employee. A clean criminal record per se ranked comparatively lower on required employee attributes, although employer perceptions of a person with a criminal record may be relevant as to whether the employer will view the applicant with the criminal record as being less likely to possess the other required attributes.

Several respondents comments that the requirement of a clean drivers licence would be “role dependant” and that “DIC ok so long as not regular”, indicating traffic offences may not be seen as a “criminal offence” in the same way that other offences are.

Table 3 - representing question 7

![Employee Attributes](image)
G  Question 8 - “unacceptable” criminal convictions

Respondents were asked to indicate whether convictions for any of a specified set of offence types would mean they would definitely not hire a person. No distinction as to severity or the specific nature of the offending was made.

1  Violent

Thirteen respondents stated they would not hire persons with violence convictions (Banking finance, insurance, Hospitality & tourism, Manufacturing & Operations, Office & Administration, Retail, Sales, Security, Wholesale distribution). Comments included:

“Our business is very customer-oriented and we would not want people who could possibly get angry at customers and staff” (Hospitality & Tourism)

“We work in big teams with diverse age groups and lot of contact with customers and sometimes work under pressure. Past history of violence is not something we want our team and customers exposed to.” (Retail)

“We have] guards in family homes dealing with children” (Security)

2  Sexual

Sexual offending received the highest response rate (other than dishonesty/white collar combined) with fifteen respondents stating they would not hire someone with sexual offences in their criminal history (Banking finance, insurance, Construction & architecture, Hospitality & tourism, HR & Recruitment, Manufacturing & Operations, Office & Administration, Retail, Sales, Security, Wholesale distribution). Comments included:

“our business has many school kids employed. We must ensure a safe atmosphere.” (Hospitality & Tourism)

“Perhaps a personal bias for this choice” (HR & Recruitment)

“I would not hire Pedophiles (sic)” (Retail)

 “[We have] guards in family homes dealing with children” (Security)

“In all cases concern for safety of working associates [is paramount]” (Wholesale distribution)

“Violent/sexual offending – definite no no” (Office & Administration)
3 Property

Only one respondent (Hospitality & tourism) selected this offending type as precluding employment.

4 Dishonesty

Dishonesty offending was broken into “dishonesty” and “white collar”. Eleven respondents selected “dishonesty” (Construction & architecture, Hospitality & tourism, HR & Recruitment, Office & Administration, Retail, Sales, Security, Trades and Services). Comments made were:

“We must trust our staff with money etc.” (Hospitality & Tourism)

“Depending on severity [of the offending]” (HR & Recruitment)

“Easy access to cash and product” (Retail)

“Self explanatory” (Sales)

“[We have] guards in family homes” (Security)

5 White collar (i.e. corporate fraud)

Eight respondents cited this as offence type which would lead to them not hiring (Banking finance, insurance, Construction & architecture, Hospitality & tourism, HR & Recruitment, Office & Administration, Retail, Trades & Services). Comments were:

“Depending on severity” (HR & Recruitment)

“Any convictions for fraud are relevant to the workplace – can they be trusted in employment – I would not take the risk.” (Office & Administration)

 “[I would not hire a person with a history of] this type of offending but would consider other offences on case by case basis” (Trades & Services)

6 Traffic

Only one respondent selected traffic (Hospitality & Tourism) and then qualified this by stating that the disqualification would apply only “if hired as a driver – must have clean driver’s licence for our insurance purposes”.

87
Health & Safety offending attracted three responses (Hospitality & tourism, Transport & Logistics). Comments were as follows:

“No drugs ...Would consider minor drug related historic only conviction, but anything recent or more serious i.e. dealing class A, B – would not consider outright” (Hospitality & Tourism)

“Although I believe everybody deserves an opportunity (ies) to redeem themselves I would not hire anybody who has violence of any nature in their criminal record, nor would I hire anybody who would put or has put others at risk.” (Hospitality & Tourism)

“We have a drug & alcohol free workplace policy. Anyone with drug convictions would be looked at closely.” (Transport & Logistics)

Six respondents did not select any type of offending as disqualifying a potential employee outright but rather, stated they would assess on a case by case basis (Legal, Healthcare, Labour Hire, Retail, Sales, Transport & Logistics). Comments were:

“Would also depend on what I was hiring the person to do. i.e. wouldn’t employ accounts clerk with a history of corporate fraud.” (Healthcare)

“Would definitely not consider someone who had been involved in child sexual/pornography/violence” (Labour hire)

“The assessment would have to be on a case-by-case basis – the offending will be linked to the individual’s personal; circumstances and this will differ from person to person – the WHOLE needs to be considered.” (Legal)

“At the time of interview and after inquiries I would make an assessment on case by case basis” (Sales)

Respondents who identified a particular type or types of offending in question 8 were asked to state whether their choice was because of a personal dislike for the type of offending or because the type of offending would be incompatible with the type of employment.

Eleven respondents stated they made the choices they did because they strongly disagree with a that type of offending in principle (Construction & architecture, Hospitality &
tourism, HR & Recruitment, Labour hire, Office & Administration, Retail, Sales, Security, Wholesale distribution). Comments were:

“Scum” [sex offenders] (Retail)

“Socially a danger” [sex offenders] (Sales)

“For sexual offending” (HR & Recruitment)

Twelve respondents stated they selected the choice they did because the type of offending is incompatible with the nature of the employment (Banking finance, insurance, Hospitality & tourism, HR & Recruitment, Manufacturing & Operations, Retail, Sales, Security, Trades & Services, Transport & Logistics). Comments included:

“One once employed it is difficult to get rid of employees if problems arise – too high risk to consider employing” (Hospitality & tourism)

“For dishonesty & white collar” (HR & Recruitment)
**Question 10 - Specific legal or other relevant factors influencing decision**

Respondents were asked whether there were any specific legal, insurance related or occupational factors that would make them concerned about employing a person with one or more convictions.

Eleven respondents answered in the affirmative. A selection of responses are as follows:

"**Insurance, exposure to clients**" (Banking finance, insurance)

"**Need to be able to trust the person with confidential information – Privacy Act, Protection of data base, stealing personal belongings, access to other offices after hours.**" (Healthcare)

"**Health & Safety, security of staff/clients**" (Hospitality & tourism)

"**Driving convictions can affect our insurance premiums**" (Hospitality & tourism)
“[public liability] My staff visit homes where trust is paramount. I would weigh my decision on the facts before gut feeling” (Hospitality & tourism)

“Dishonesty offending relates to legal/insurance risk assessment” (Legal)

“We recruit a lot of insurance/banking positions. If anyone has a criminal convictions we would not use them – driving convictions maybe. Our clients do not want us to present candidates with criminal convictions to them” (Office & Administration)

“[We must abide by] the provisions of the Private Investigators and Security Guards Act” (Security)

“Occupational factors: we work in customer’s homes, so honesty is essential.” (Trades & Services).

Eleven respondents answered in the negative (Construction & architecture, Hospitality & tourism, HR & Recruitment, Labour hire, Manufacturing & Operations, Retail, Sales, and Transport & Logistics).

1. Question 11 - reaction to nondisclosure of offending history

Respondents were asked what their response would be if they learned that an otherwise satisfactory employee had concealed disclosable criminal convictions at the application stage. They were given four options: Dismiss for misrepresentation, dismiss due to occupational requirement of good character (in this regard the examples of accountant and solicitor were given), or do nothing provided the person was a good employee, and “other”.

The responses indicate that most employers (15) would not dismiss outright, but would talk with the person and consider their reasons for non-disclosure in light of their performance as an employee.

Five respondents said they would dismiss for misrepresentation (Banking finance, insurance, Office & Administration, Retail, Security).

Three said they would dismiss due to occupational requirement of good character (Security, Retail and Office & Administration, the latter stating they would “Dismiss them through the appropriate channels to protect us legally”).

203 In this regard, respondents were given the following explanatory footnote: “The Criminal Records (Clean Slate) Act 2004 allows - with some exceptions - individuals with less serious convictions, who have never been to prison, and who have been conviction-free for at least seven years to conceal their criminal history. Further information on the “Clean Slate” Act can be found at http://www.justice.govt.nz/privacy/clean-slate.html.”
Five said they would do nothing, provided they were a good employee (Hospitality & tourism, Retail, Trades & Services, Wholesale distribution).

The remaining nine chose “other” and their comments are as follows:

“Talk to them – ask them for an explanation, Take appropriate action after this”. (Healthcare)

“Discuss with employee concerned. Similar to failing to disclose health issues.” (Hospitality & tourism)

“Would depend on the conviction and if it would affect our staff working with them. If it wouldn’t I would do nothing, if it would I would dismiss them for misrepresentation.” (Hospitality & tourism)

“I would speak to the employee and we’d discuss the reasons for the misrepresentation and I would make my final decision on that conversation.” (Hospitality & tourism)

“Have a meeting to find reason behind not disclosing and make decision from there.” (HR & Recruitment)

“If they were “otherwise satisfactory” we would talk to them about the concealment and discuss action dependent upon the reasons for the concealment.” (Labour hire)

“Discuss with employee and seek reason why not disclosed. I would need to know whether question was specifically asked – that would be relevant to discussion and my response”. (Legal)

“If the employee was a good worker I would meet with them and explain the fact that certain important information had not been disclosed and ask for an explanation from the employee.” (Manufacturing & Operations)

“Case by case basis.” (Transport & Logistics)
K  Question 12- Whether previously hired ex-offender

This question asked respondents whether they had previously knowingly hired a person with one or more criminal convictions. Sixteen respondents answered that they had (Banking finance, insurance, Construction & architecture, Hospitality & tourism, HR & Recruitment, Labour hire, Legal, Manufacturing & Operations, Retail, Sales, Security, Transport & Logistics). Six respondents said they had not (Healthcare, Hospitality & tourism, Office & Administration, Sales, Trades & Services, Wholesale distribution).

L  Question 13 – Experience of hiring ex-offender

Those respondents who had answered in the affirmative to the previous question were then asked to indicate how satisfactory that person was as an employee.

Seven responded “excellent” (Hospitality & tourism, Retail, Sales, Security, and HR & Recruitment, with the latter commenting “We hired them knowing they had a conviction and they were an excellent employee”).

Four said the employee was “good”. Their comments are as follows:
“Produced good sales figures and a great amount of repeat business which indicated client acceptance – steady reliable, honest, basically a good choice” (Banking finance, insurance)

“The person was honest in my employment did the job well but was not given lock up or open duties” (Hospitality & tourism)

“He was a convicted murderer, being let loose back into society and I offered him a chance to have employment and be part of a team. He was a very good, diligent worker and moved on and became a [highly skilled expert]” (Manufacturing & Operations)

“Good. Previous convictions had been historic as a youth” (Retail)

Four respondents said the person was “satisfactory (Labour hire, Transport & Logistics, Construction & architecture, with the latter saying the person “ works ok but not a team player”, and Legal stating that there was no reason to doubt the person was performing satisfactorily).

No respondents selected “poor”.

One respondent selected “extremely unsatisfactory” (Hospitality & Tourism, citing attitude and work ethic as the reasons for this in question 14).

M Question 15 - Incentives

Respondents were asked whether there were any incentives that could be offered by the government that would make them more likely to hire a person with one or more criminal convictions. Most respondents (17) said there were not. Comments included:

“Shouldn’t come into it” (Sales)

“Our credibility is on the line here as a company so political influence wouldn’t matter toss” (Security)

Five respondents made suggestions as to incentives:

“Compensation if additional work is required in training and supervision. A support person for the person being hired.” (Healthcare)

“90 day trial as per National” (Hospitality & tourism)

“A subsidised wage and if he/she did not turn out to be a satisfactory employee or the fit was not suited, then we could get rid of him/her without any employment comeback.” (Manufacturing & Operations)
Employers will undoubtedly feel very uncomfortable about any measures designed to force them to employ people with criminal convictions. There would likely be a very high rate of opposition amongst employers to measures such as including criminal history as a ground of non-discrimination in human rights legislation. Whilst doing so would give many ex-offenders an opportunity to apply for jobs without the burden of deciding whether or not to disclose their criminal record, it may have undesirable side effects and may, in a country such as New Zealand where many employers are operating small businesses, place an undue burden on employers.

The fact that, it seems, most New Zealand employers ask job applicants about criminal convictions suggests that criminal history is a factor most employers will take into consideration in their hiring decisions. The results of this small survey indicate that an employer’s interest in an applicant’s criminal convictions may be to assist in assessing whether the person will be suitable for the role and for their business environment/culture. The results indicate that a criminal record *per se* will, for many employers, not disqualify a person from employment, with their decision being more heavily influenced by whether the person possesses other desirable attributes.

As a result, it appears preferable, rather than hiding convictions, to place a great deal more emphasis upon providing support for offenders going into employment and for employers employing such persons. Clearly, staffing decisions are very important decisions for employers, especially for small business who can often ill afford the time and expense involved in dismissing an unsatisfactory employee. Responses indicate a desire to be able to trial an employee at no risk prior to accepting them as a permanent employee.

Finally, the idea of a subsidy to assist in compensating employers for the extra time that may sometimes be involved in training, supervising or monitoring a person with a history of criminal offending has been raised. Interestingly, employers made no mention of existing subsidies that are available through Work and Income (as discussed in chapter 13).
N Question 16

Respondents were asked whether they or someone close to them had ever been a victim of crime.

Eighteen respondents answered in the affirmative, four in the negative.

O Question 17

Respondents were asked whether they had anyone close to them who has a history of criminal offending. Only two answered in the affirmative.

P Question 18

Those respondents who had answered in the affirmative to questions 16 or 17 were asked whether they believed their experience had influenced their attitude towards employing persons with one or more criminal convictions. Four said they thought it had. Comments included:

“Everyone makes mistakes so really only the severity changes. If the punishment is done, the person learns their lesson that’s “usually” good enough for me not to discriminate/prejudice the applicant any longer – all the above previous factors considered; type of crimes, types of job etc.” (HR & Recruitment)
“Yes and no. I believe that everyone deserves a second chance but if their offending is serious then the reality is that few NZ’ers will be willing to give them that chance. Criminals don’t think about the ongoing consequences of their actions on victims so why should they be given a “break” and the same opportunities as law abiding citizens” (Office & Administration)

“Depends on the crime – minor and the time is done - so be it.” (Sales)

“Learnt their lesson” (Retail)

Eighteen respondents said they did not think their experience had influenced their hiring decisions. Their comments are as follows:

“I employ a person if I think he or she could do the job and would be good at it” (Construction & architecture)

“Media coverage, life experience and work history have influenced my attitude, not people close to me.” (Hospitality & tourism)

“Company policy dictates our actions removing the emotion from the decisions” (Labour hire)

“I have not allowed my experience as a victim to influence my answers – I am not suffering any ongoing trauma as a result of the crime (house burglary)” (Legal)

“I believe everyone needs a second chance and without these opportunities our jails would be overflowing” (Manufacturing & Operations)

“As an employer I am very conscious of my responsibility to protect my business and my employees, but I also believe people need a second chance” (Retail)

“I was a police officer for [many] years and have a son in prison. This does prejudice my thinking but the conditions of the workforce and applicant calibre has softened my approach and prejudice somewhat” (Security)

“The offending was not so serious as to leave legacy of fear or bitterness” (Wholesale distribution).
Q   Further comments

At the end of the questionnaire, respondents were given the opportunity to add anything they felt may be relevant. Comments are as follows:

“I strongly believe that the introduction of a 90 day trial period, as per National’s bill, would allow employers (including ourselves) to give people who are marginal applicants an opportunity to demonstrate they are good employees – the current employment legislation makes “taking a risk” with employment not worth it. In my opinion each person and crime should be assessed differently and for each situation. Where I would employ some people I wouldn’t employ others even if it were for the same crime and same job. I would and have hired people who have been honest in their revealing of crime and have found that “temptation” applies to all persons not just a person with a criminal conviction.” (Hospitality & tourism)

“There should be a scheme for persons with criminal convictions to obtain employment e.g. a professional body whose object it is to be a “refuge” for persons with convictions to approach and to approach employers to obtain jobs. The issue of disclosure would then be upfront from the start – Both employer and employee would be aware of the issue of convictions.” (Legal)

“I think if the government was going to intervene in these situations and force employers to give people with convictions a job then that is an absolute cop out. Spend the money on
crime prevention and paying to rehabilitate/house these prisoners for longer.” (Office & Administration)

“Done the time to suit the crime. Good worker – honest, reliable, hard worker then ok” (Sales)
Chapter 8

SURVEY OF CHRISTCHURCH EMPLOYERS: - EMPLOYERS WHO WOULD NOT CONSIDER HIRING AN EX-OFFENDER

I  RESPONDENTS BY INDUSTRY

Twenty completed and valid questionnaires were returned by employers who “would not consider hiring a person with one or more criminal convictions”. The industry spread was as follows:

Banking, finance & insurance: 1 respondent
Construction & architecture: 2 respondents
Education: 1 respondent
Customer Service: 1 respondent
Healthcare: 1 respondent
Hospitality & tourism: 3 respondents
Marketing, media & communications: 2 respondents
Retail: 2 respondents
Sales: 2 respondents
Security: 2 respondents
Trades & services: 2 respondents
General contracting: 1 respondent

II  THE QUESTIONS

A  Question 2

Respondents were asked whether they ask job applicants about their criminal history. Eighteen replied in the affirmative (Banking, finance & insurance, Construction & architecture, Education, Customer Service, Healthcare, Hospitality & tourism, Marketing, media & communications, Retail, Sales, Security, Trades & services, General contracting).
The two respondents that did not ask about criminal history were asked to explain why this was. They were not required to answer further questions. Their reasons for not asking about criminal history were:

“Because in my business you can determine if they have been in trouble and have a criminal conviction and also the industry that I work in is very clicky (sic) and you can find out what the person is like to work with very easily.” (Customer Service)

“I have not considered asking this question at any stage, I would have thought it to be a sensitive subject and one that required advice from employment law personnel.” (Hospitality & tourism)

One respondent (Hospitality & tourism) stated they did not ask causal/temporary employees about criminal history but they did ask persons applying for permanent positions. This respondent took part in the full questionnaire.

B Question 3

Respondents were asked at which stage they first ask about a job applicant’s criminal history.

Nine selected the option “pre-employment application form” (Banking, finance & insurance, Hospitality & tourism, Marketing, media & communications, Retail, Security, Trades & services, General contracting)

Eight stated they asked about criminal history at the first interview (Construction & architecture, Healthcare, Hospitality & tourism, Retail, Sales, Security, Trades & services)

One stated they asked at a subsequent interview (Sales)

Two selected the option “other”, which also asked for their reasons. The answers are as follows:

“All prospective employees have to give approval for a police vet to be carried out” (Education)

“Also in advertising the job [we state they have to] get a Security Licence, being a COA [Certificate of Approval]. [To obtain a COA] the person cannot have had a criminal conviction in the past 5 years.” (Security)
C  Question 4

Respondents were then asked whether they asked to view an applicant’s official criminal history. Seven out of 18 stated they asked for an official document. Comments included

“I explain a police vet is essential to them being employed. The person reads the form – fills it in, I add my details, pay the required charge and send it off. It is confidential between the person and myself.” (Education)

“For management positions” (Hospitality & tourism)

“We get police check on person and check it against what they have told us.” (Marketing, media & communications)

“A police check is done before the COA is granted by the Auckland District Court” (Security)

Twelve respondents relied solely on the applicant’s honesty in answering the question (Banking, finance & insurance, Construction & architecture, Hospitality & tourism “for non managerial roles”, Healthcare - “Has not occurred as to date, no applicants have had a criminal history. I ask the question and rely on their honesty”, Retail, Sales, Trades & services, General contracting).

Table 8 - relating to questions 2, 3 & 4
D  Question 5

Respondents were asked to explain briefly why they would not hire a person with one or more criminal convictions. The main reason cited for not wishing to employ a person with criminal convictions related to the need to be able to trust employees around people and property. Occupational reasons were also cited. Comments included:

“It would not be appropriate for our type of business which is finance.” (Banking, finance & insurance)

“Family business, vital to have experienced, honest and committed people” (Construction & architecture)

“Would not trust them” (Construction & architecture)

“Early childhood centres are required to have police vets carried out before employment and then for anyone employed who is not a registered teacher every three years (It’s a continuous hassle)” (Education)

“My business relies on a HIGH degree of trust in my employees’ ethics and integrity as they have access to drugs that are desirable by abusers and staff handle money and drugs daily. There are also patient confidentiality issues. I am legally and financially responsible for all actions of my staff as I am sole shareholder and carry the responsibility of control (even when I am on holiday and have a locum acting). I need to have absolute faith in the personal integrity of my staff — a criminal conviction would make that very difficult.” (Healthcare)

“Working around people, stock and money” (Hospitality & tourism)

“Because we deal with property and money from guests. In saying that though we would look at the convictions and make a judgment based on what the convictions were for.” (Hospitality & tourism)

“Generally we do not hire anyone with theft/dishonesty convictions. Our industry has the ability for all staff to access computer system and put credits on customers’ accounts.” (Marketing, media & communications)

“Dependant on position and whether they will hold a position of trust. In some cases one conviction may be overlooked if it was a minor role that does not have high risk. More than one conviction demonstrates potential flaws in character, common sense or decision making, ability and trustworthiness.” (Marketing, media & communications)
“We are a retail shop. At certain times staff can be left on their own. Honesty and reliability is paramount. If I know that one of the staff had a criminal conviction I would always be rechecking work, till balancing and I believe it wouldn’t be a nice work environment for anyone.” (Retail)

“The retail industry relies on honesty, there are occasions when temptation is in front of them so that is why. Also for sex crimes we have children, young people working around store at times unsupervised.” (Retail)

“Because team harmony and culture is very difficult to develop, trust is very important and is something we have to guard. [A conviction] may not interfere with employment depending on nature of crime. But drink driving, theft, or abuse would be employment deterrents.”(Sales)

“Trust” (Sales)

“Can’t have criminal convictions in the line of work we are in” (Security)

“If I was to employ a person with one or more criminal convictions it would mean I was working a staff member without their COA as it would not have been granted by the Court knowing of such convictions.” (Security)

“To minimise the risk of theft to the business” (Trades & services)

“As a tradesperson you are in a position of trust, often alone in a house” (Trades & services)

“We do not need the risk of any problems. There are other employees available” (General contracting)

E Question 6

Respondents were asked to rate the level of importance they place on each of the following attributes when choosing an employee.

(a) Appearance

An employee’s appearance ranked relatively highly, with 12 respondents selecting very important or essential. Five respondents said appearance was moderately important and one respondent ranked appearance at “not important” (Marketing, media & communications).
(b) Social skills

Social skills ranked very highly, with 15 respondents stating social skills were either very important or essential. The remaining three respondents indicated social skills were moderately important.

(c) Qualifications

One respondent ranked qualifications as unimportant (Hospitality & Tourism). Eight respondents ranked qualifications as moderately important, seven considered them to be very important, with the remaining two respondents stating qualifications were essential (Banking, finance & insurance, Education).

(d) Work skills

Work skills ranked highly amongst respondents, with 16 stating they were either very important or essential. The remaining two ranked work skills as moderately important.

No respondents said work skills were “not important”.

(e) Work history

Work history was not important to one respondent (Education). The majority of respondents considered work history was very important (11). Of the remainder, two said work history was essential and three said that it was moderately important.

(f) Reliability

Unsurprisingly, reliability was ranked very important by seven respondents and essential by 11.

(g) Honesty

Honesty was ranked the highest out of all the attributes, with 14 respondents stating honesty was essential and the remaining four stating honesty is very important.

(h) No Criminal Record

For an employee to have no criminal record ranked highly, with seventeen respondents selecting either very important (8) or essential (9). One respondent selected “moderately important” (Hospitality & tourism).
(i) **Clean Drivers Licence**

For two respondents, an employee having a clean drivers licence was not important. Eight respondents said a clean drivers licence was moderately important, three stated it was very important, and four said it was essential. One commented that it would be role dependant.

**Table 9 - relating to question 6**

<table>
<thead>
<tr>
<th>Employee Attributes</th>
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</thead>
<tbody>
<tr>
<td>Appearance</td>
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<tr>
<td>Social Skills</td>
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<tr>
<td>Qualifications</td>
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<tr>
<td>Work Skills</td>
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<tr>
<td>Work History</td>
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<tr>
<td>Reliability</td>
</tr>
<tr>
<td>Honesty</td>
</tr>
<tr>
<td>No Criminal Record</td>
</tr>
<tr>
<td>Clean Drivers Licence</td>
</tr>
</tbody>
</table>

**F Question 7**

Respondents were asked whether there were any specific legal, insurance related or occupational reasons why they would not consider hiring a person with one or more convictions.

Nine responded in the affirmative and gave their reasons as:

“*In the money lending business or investment business honesty is essential.*” (Banking, finance & insurance)

“*Early childhood requirements that all persons who have contact with children must have a police vet. (parent helpers do not fall into this as they are not paid).*” (Education)

“*...I have been the victim of armed hold-ups and many burglaries. If an employee is associating with criminals or drug addicts the information about our security arrangements or lay-out puts us at greater risk. There is also a risk to that employee for demands by friends and intimidation.*” (Healthcare)
“HSE obligations. Liquor licencing requirements.” (Hospitality & tourism)

“If fraud related would not hire a person to manage finances, stock because of risk”. (Marketing, media & communications)

“High probability person would be left alone in shop for periods of time i.e. access to till, checkbooks etc.” (Retail)

“Nothing legal but we are under a lot of extra work to comply with OSH and extra workload with ACC prone employees. We cannot afford to employ an “at risk” employee.” (Sales)

“Can’t be a licenced security guard with criminal convictions” (Security)

“As explained, all employees who work in the security industry must have a COA.” (Security)

The remaining eight respondents answered in the negative.

G Question 7

Respondents were asked what they would do if they became aware that an otherwise satisfactory employee had concealed disclosable criminal convictions at the application stage.

Ten respondents said they would “dismiss them for misrepresentation” (Banking, finance & insurance, Healthcare, Hospitality & tourism – “If this was signed off in their IEA and agreed to”, Marketing, media & communications, Retail, Sales, Security, Trades & services).

Three said they would “dismiss them due to occupational requirement of good character” (Construction & architecture, Education, Retail).

Two stated they would do “nothing, provided they were a good employee” (Construction & architecture, General contracting – “And would monitor the employee”).

Three gave their response as “other” and stated:

“Investigate why, assess their performance to date, interview them. Honesty affects all areas of life. If you lie in an interview you will often be dishonest in other areas.” (Sales)

“Would depend on how long ago the conviction was and for what. Their licence (COA) would have checked back 5 years, but on our application it asks of any convictions further back than the 5 year period. If the conviction was minor and many years ago, probably
nothing, but if it was a serious conviction in the past 5 years I’d take legal advice first.”  
(Security)

“Depends what convictions withheld Minor/Major” (Trades & services)

Table 10 - relating to questions 7 and 8

<table>
<thead>
<tr>
<th>Any specific legal, insurance related or occupational factors of concern?</th>
<th>Response to non-disclosure of disclosable convictions</th>
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<tbody>
<tr>
<td>Yes</td>
<td>Dismiss for misrepresentation</td>
</tr>
<tr>
<td>No</td>
<td>Dismiss - occupational requirement of good character</td>
</tr>
<tr>
<td>Nothing if good employee</td>
<td>Other</td>
</tr>
</tbody>
</table>

H  Question 9

Respondents were asked whether they had previously knowingly hired a person with one or more criminal convictions. Only five respondents said they had, with thirteen reporting they had not.

I  Question 10

Those respondents who had previously knowingly hired a person with one or more criminal convictions were asked to indicate how satisfactory that person was as an employee.

Four respondents said the person had been a good employee, with one commenting “Convictions related to drink driving – did not impact on job – person showed great remorse for their conviction”

One respondent said the person had been a poor employee, giving the reason as “poor social skills, didn’t fit in, poor time keeping, poor attitude”.

108
J  Question 11

Respondents were asked whether there were incentives that could be offered by the government that would make them willing to consider hiring a person with one or more criminal convictions. Fifteen said there were not. The two who answered in the affirmative stated:

“Maybe a financial subsidy for the employer who is taking a risk or potential risk to the organisation.” (Hospitality & tourism)

“Some sort of compensation that would alleviate OSH pressure if they were involved in an accident and protection that they wouldn’t affect our ACC levies if continually off work.” (Sales)

Table 11 - relating to questions 9, 10 and 11

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Excellent</th>
<th>Good</th>
<th>Satisfactory</th>
<th>Poor</th>
<th>Extremely Unsatisfactory</th>
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</thead>
<tbody>
<tr>
<td>Ever knowingly hired a person with one or more criminal convictions?</td>
<td>16</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If, yes, how satisfactory as employee?</td>
<td>14</td>
<td>12</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Any incentive(s) that could make you more willing to hire person with one or more criminal convictions?</td>
<td>12</td>
<td>10</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

K  Question 12

Respondents were asked whether they or someone close to them had ever been a victim of crime. Twelve answered in the affirmative with five answering in the negative.

L  Question 13

Respondents were asked whether they had anyone close to them who has a history of criminal offending. Six said they did and 12 said they did not.
Those respondents who answered “yes” to question 13 and/or 14 were asked whether they believed that experience had influenced their attitude towards employing persons with one or more criminal convictions.

Four said they thought it had and gave their answers variously as:

“Understand more about devious and dishonest behaviour” (Hospitality & tourism)

“Dishonesty offences cannot be tolerated in our industry – it is hard for persons to reform.” (Marketing, media & communications)

“Yes, they seem to reoffend, definitely not trustworthy and my attitude towards them has definitely changed even though they weren’t friends, they are sons of a friend.” (Security)

Six said stated they thought their experience had not affected their attitude towards employing a person with criminal convictions. Answers included:

“This is a personal view owing to our type of business. It is best we look after our clients as best we can.” (Banking, finance & insurance)

“I believe in giving persons who offended as a young person a second chance. BUT I deal with families with young children, they are anxious about adults who have contact with their children, and also staff feel that their possessions are vulnerable and need to be assured that everyone is honest.” (Education)

“I determine each person in an individual, impartial and objective manner each and every time. Sometimes errors in judgment have occurred when someone is young i.e. DIC or disorderly behaviour – as long as it wouldn’t impact on their role and they were qualified for position then we might hire them.” (Marketing, media & communications)

“I believe honesty is crucial and if people are tempted once to steal or deceive or hurt then it is a lesser jump to do it again.” (Retail)

“I have forgiven the person who committed the crime against us but I am not convinced that a criminal can or has change their ways without a complete change of heart, change of mind, change of thinking patterns and habits of life.” (Sales)

Finally, respondents were given the opportunity to add any additional comments they felt may be relevant to the research. Their further comments are as follows:
“I have been asked by the probation service (or similar) to have young women in the preschool on community service/work. But this does not meet our requirements. I discussed the request at a staff meeting (to ensure I was not ‘out of touch’). I found that staff were strongly opposed to having anyone who may be dishonest/aggressive/or a participant in drugs. They felt that they needed to feel their possessions, centre material and children were secure. They felt they were busy enough without taking responsibility for someone – an adult.” (Education)

“Casual – don’t ask, permanent – do ask” (Hospitality & tourism)

“Honesty from our employees is critical. Being able to trust each other and for our customers to have faith in our company is critical to our continued success as an organisation. This cannot be compromised at all.” (Marketing, media & communications)
Chapter 9

AN ANALYSIS OF THE SURVEY DATA

I LEVEL OF INTEREST IN KNOWING ABOUT CRIMINAL CONVICTIONS

Both respondent groups showed high level of interest in knowing job applicants’ criminal history. The respondent group who would not consider hiring a person with criminal convictions (Group A) were more likely than the respondent group who would consider hiring a person with criminal convictions (Group B) to require an official criminal record document. However, even amongst group A, more than half of the respondents were willing to take applicants on their word. In both groups there were employers who, for legal or occupational reasons, would ask to view an official document. On the whole, employers appeared to be relatively trusting in this respect and/or confident in their ability to make sound character judgments.

II CONCERNS & CONSIDERATIONS REGARDING HIRING PERSON WITH CRIMINAL RECORD

Group A were primarily opposed to employing a person with criminal convictions either for legal/occupational reasons or for the reason that they felt they would not be able to trust such a person and were concerned about the impact such a person might have upon the ability of other staff to feel safe and secure, and also upon their clients and customers. Comments from some respondents in this group indicated minor convictions may be overlooked, depending on how the person rated overall. Comments also suggested traffic offences were generally not seen as “truly criminal” offences and were more readily overlooked so long as they did not impact upon the employment. Group B respondents made similar comments.

In deciding whether to hire a person with a conviction or convictions, Group B respondents signalled that the type of conviction, number of previous convictions and length of time since the last conviction were the most important factors informing their decision making. Clearly and unsurprisingly, the more serious the offence and/or the greater number of prior offences and/or and the more recent the conviction(s), the more wary employers will be about employing a person. Less than half of the respondents (10/22) were interested in knowing the particular circumstances of the offending and even less (8/22) were concerned whether the person had served time in prison. The comments overall suggested that, other than those employers who, for legal or occupational reasons would be precluded from hiring a person with criminal convictions, most employers were more concerned about the ability
of the person to be trustworthy, reliable and able to do the job than with whether they had criminal convictions. Of course criminal convictions were seen as evidence of bad character, so it may be merely academic to draw such a distinction. Numerous, serious or recent convictions indicate to employers that a person may be untrustworthy, unreliable, unsafe and generally an undesirable employee.

Whilst this is hardly an earth shattering revelation, it does indicate that if a person with criminal convictions were able to establish a track record whereby they can be said to have been honest, reliable and competent, the fact that they have a criminal record or that they had spent time in prison in the past may not necessarily be an insurmountable barrier to gaining employment.

A  Compliance with Employment-related Laws

Further, employers in Group B expressed difficulty and expense complying with legislative requirements as it was and did not wish to employ anyone who may make compliance more difficult. Likewise, they did not want to employ someone who may increase liability and/or or insurance premiums. So, although in principle they were not opposed to the possibility of an employee with criminal convictions, practical considerations may in some cases tell against actually doing so in practice.

And further in this regard, Group B respondents strongly expressed the opinion that current employment laws make it very difficult to get rid of unsatisfactory employees and therefore would be very wary of employing someone who seemed to be an obvious risk. Some respondents indicated that if there was an ability to “hire for trial”, perhaps coupled with some form of subsidy to compensate for extra training/ supervision of an “at risk” employee, and perhaps also a limitation on their legal liability in respect of such person, they would be more willing to “take a chance” on an employee who was potentially “a risk”. This completely understandable fear is one of the most significant barriers to ex-offenders gaining employment. If there are other applicants without a criminal record (as evidence of bad character), in the absence of the employee having particularly desirable attributes that outweigh the character concerns, most employers will naturally prefer the applicant without a history of offending.

B  Other Legal/Insurance/Occupational Considerations

Within both groups were respondents who, for legal, occupational and/or insurance related reasons, would not hire a person with certain criminal convictions. For example, sections 17 and 33 of the Private Investigators and Security Guards Act 1974 create a presumption
against granting a license (s17) or a Certificate of Approval (s33) to persons with convictions for dishonesty or specified offences within the past five years. 204 All persons teaching in New Zealand must satisfy the NZ Teaching council that they are a fit and proper person to be a teacher. 205 A criminal conviction does not necessarily mean a person will be declined registration as a teacher, as each case will be considered on its merits. 206 The Education Act 1989 also requires that other categories of employees within schools and early childhood centres are police vetted. The vet will not only look at criminal record resulting in convictions, but also any violent or sexual behaviour of concern. If police have concern in this regard, a response may be “red stamped” with the recommendation that the individual “does not have unsupervised access to children, young people, or more vulnerable members of society”. The onus is then upon the employer to employ sensibly as a result of the information received.

Insurers may want to know whether a person who will be driving company vehicles have criminal convictions. An employee’s prior criminal convictions may also be relevant to specific indemnity cover relating to employees. Even where such information is not specifically asked for, the general obligations of disclosure of information which may be material to the policy leaves it open to insurers to claim such information was material. For example, if an employer had knowingly hired a person with a history of dishonesty convictions but had not disclosed the same to the insurer (even if the policy did not specifically ask for this information) the insurer may potentially decline cover in the event of a claim relating to that employee causing theft or loss. Insurance-related considerations will be discussed further in chapter 12.

The above are but a few examples of the types of considerations which, whilst perhaps not currently of widespread concern in New Zealand, may become of more concern in the future.

C Importance of Particular Employee Attributes

In terms of employee attributes, the responses were similar amongst the two groups, with the only significant difference being in relation to the importance of having a clean criminal record. Whereas all but one of the Group A respondents considered a clean criminal record to be either very important or essential, amongst Group B respondents the majority

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204 Applicants with such convictions may still apply to the Registrar of Private Investigators and Security Guards for registration.

205 Section 122 Education Act 1989.

206 Mrs C v Teacher Registration Board [2000] DCR 80.
considered a clean criminal record as moderately important, with a quarter considering it to be unimportant. What this suggests is that Group B respondents desired the same qualities and standards in their employees as the Group A respondents, and were willing to consider a person with one or more criminal convictions provided they possessed such attributes.

D **Non disclosure of disclosable criminal record**

When asked what they would do if they discovered an otherwise satisfactory employee had failed to disclose a disclosable conviction, it was not surprising to find that the Group B respondents were less likely to dismiss the employee. A small number of Group A respondents would consider continuing to employ the person, depending on such things as the nature and extent of the offending and the reason for non-disclosure.

E **Previous experience of hiring ex-offender**

A number of Group B respondents had previously knowingly hired a person with a criminal history (16 out of 22). In comparison, only five Group A respondents had done so. Most of those who had previously employed a person with a criminal history had found them to be at least satisfactory as an employee. A positive hiring experience in spite of criminal history may have made Group B employees more willing to do the same in the future. It is unclear why the Group A respondents who had had a positive hiring experience in spite of convictions nevertheless elected to complete Questionnaire A. From the comments of the relevant respondents, it would appear that, whilst their general policy or attitude may be against hiring persons with criminal convictions, in some circumstances they may be willing to overlook minor or irrelevant convictions.

F **Relevance of personal experience of employer**

More Group B respondents had either been a victim of crime themselves or had someone close to them who had been a victim of crime than Group A respondents (81 per cent and 66 per cent respectively). Conversely, more Group A than Group B respondents had someone close to them with a history of criminal offending (33 per cent and 9 per cent respectively).

The results may suggest that persons with experience of being a victim of crime are more willing to become involved in giving offenders a opportunity to participate in the workforce but that the experience of having someone close to a person offend makes people less sympathetic. This outcome is perhaps the opposite of what one might expect. Due to the small sample size and the fact that the questionnaires do not adequately reveal the respondents reasoning no conclusions can be drawn in this regard. The reasons provided (as set out above) do reveal a tendency, in both groups but more so in Group B, to be willing
to forgive youthful, minor or historic offending as a “mistake” that is has been paid for and which should not serve as a permanent barrier to moving forward. The more serious, frequent, recent the offending, the more of a barrier it will pose to obtaining employment if disclosed. Given the low rate at which employers actually verify criminal history information provided by job applicants, it is quite possible that employers may never become aware of criminal convictions that are not disclosed. However, due to problems or behaviours that led to the offending and depending on how recent the offending was, employment problems may well arise. Further, deliberate non-disclosure of criminal convictions breaches the mutual good faith obligation between employer and employee and may prove harmful to the employee who will live with the burden of potentially being found out. Even where the employee is not dismissed as a result, the trust between the parties will be damaged.

III CONCLUSION

What this all tentatively suggests is that persons with criminal convictions who have managed to rehabilitate and establish a satisfactory work history may have a more difficult time than someone without criminal convictions, but that a significant portion of New Zealand employers would be willing to employ such persons. Ex-offenders who have numerous and/or recent and/or serious convictions will probably find obtaining employment very difficult. The type of employment available to such persons is likely to be very limited and probably low paid, however availability of this “first rung” employment is critical in allowing those with more serious offending backgrounds to enter the workforce and begin to build a work history. Due to the often complex personal barriers to obtaining and maintaining employment more serious offenders will face, this is an area which deserves significant attention. Ex-offenders who want to work need to be able to access assistance and support which is both appropriate to their needs, and available for as long as they feel is necessary. Likewise, employers willing to employ such persons should be given every support and encouragement to do so. A high degree of openness in the employment relationship as regards criminal history would seem preferable, at least in the early stages where persons with recent/frequent/serious offending behaviours are attempting to enter the workforce and establish a work history, to a situation where convictions are either not disclosed or are a ground of non-discrimination in human rights law.
PART 3

BARRIERS TO EX-OFFENDER PARTICIPATION IN THE LABOUR MARKET
BARRIERS TO THE EMPLOYMENT OF EX-OFFENDERS: INTRODUCTION

I   THE IMPORTANCE OF EMPLOYMENT IN OFFENDER REINTEGRATION AND REHABILITATION

There is much research to suggest that ex-offenders who are able to access suitable employment are less likely to reoffend.\(^{207}\) In any event, employment is surely at least as necessary to ex-offenders as it is to the rest of the population. As, in most cases, government income support provides little more than a subsistence income, labour market integration and the ability to earn anything more than the lowest of wages, is a key factor in the ability to meet one’s needs.\(^{208}\) The argument is made in chapter 14 that offender and ex-offender’s needs are fundamentally no different to that of any other person.

Employment meets a range of needs beyond the purely financial. For example, it meets needs relating to participation in society and, in a society where a person’s self image is often intimately connected with their work, it contributes significantly to a sense of identity. Thus it follows that for those ex-offenders able and willing to work, and wishing to earn a legitimate income, securing and retaining employment is not only a key factor in their meeting of subsistence needs but also important to their general rehabilitation and reintegration. Whilst receiving income support provides financial relief to a degree, it does not meet the range of associated needs – such as participation in society and identity - that employment does.\(^{209}\)

The fact that many offenders in our justice system are recidivist offenders\(^ {210}\) suggests a large percentage of ex-offenders experience difficulties in integrating, or reintegrating, into

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208 A discussion of human needs occurs in chapter 14.

209 Discussed in Chapter 14.

210 Only a quarter of persons convicted in 1995 were first time offenders and 30 per cent of people convicted in that year had more than 10 previous convictions (See Recidivism Patterns for People Convicted in 1995, Philip Spier,
society. As figures indicate less than half of those entering prison came directly from paid employment\(^{211}\) (including both full and part time employment), unemployment and underemployment is one common denominator in serious and repeat offending. It seems likely that low wages compound this problem. \(^{212}\)

## II DATA AND RESEARCH

Numerous overseas studies have examined barriers to labour force participation by ex-offenders, finding problems common across a variety of jurisdictions. The barriers relate to an actual or perceived disparity between the attributes employers seek in employees and the attributes possessed by ex-offender applicants.

There is a significant dearth of available data tracking the employment path of ex-offenders. This is a significant barrier to attaining any level of precision in terms of identifying the numbers of ex-offenders who face various barriers to employment and the nature of the barriers they face. Recidivism studies provide some information, by indicating the number of ex-offenders who re-enter the criminal justice system, and in some cases their educational

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\(^{211}\) Figures from 1993 show that only 21.7 per cent of male prisoners and 14.5 per cent of female prisoners were in full time employment prior to entering prison. A small number (11.1 per cent female, 9.8 per cent male) were in part time employment. Most (67.5 per cent female, 42.4 per cent male) were not in paid employment (see Census of Prison Inmates 1993 [http://www.justice.govt.nz/pubs/reports/1995/census/chapter-5.html](http://www.justice.govt.nz/pubs/reports/1995/census/chapter-5.html)).

level and employment status prior to entering prison. As such studies are generally confined
to ex-prisoners, there is even less available data relating to those ex-offenders who have
never been imprisoned.

Overseas studies appear to face similar problems in terms of availability of data pertaining
to the actual experiences of ex-offenders. As a result, most studies on labour force
participation by ex-offenders tend to focus on employers (using data gleaned from surveys
of employer attitudes and, in some cases, practices, towards employing ex-offenders) and
upon the existence of factors within the offender population known to reduce employability
and labour market success (such as health problems and lack of work force experience).
There is a significant lack of research based on actual evidence from the ex-offender
population.

In any event, it is clear that, at the least, ex-prisoners are not advantaged in the job market as
a result of their imprisonment. Freeman states:

Ex-offenders do not do well in the job market. As far as we can tell from micro-surveys and administrative
data, they have relatively low employment rates and earn less than other workers with comparable
demographic characteristics... Since offenders also did less well in the job market prior to incarceration, it is
less clear whether incarceration per se reduces their employment and earnings prospects. Micro-survey data
suggests that it does, but administrative data is equivocal. In either case, there is no indication that incarceration
improves employment opportunities. 213

Offenders, particularly recidivist offenders and those who have been in prison, often have
multiple challenges to securing and sustaining employment. Borrowing the terminology of
Holzer, Raphael and Stoll in their discussion paper “Employment Barriers Facing Ex-
Offenders”, 214 ex-offenders face “supply side” barriers and “demand side” barriers to
employment.

Supply side barriers are those barriers that relate to the offenders specific characteristics and
attitudes. Supply side barriers pertaining to offenders are many and varied and relate to such
things as addictions, lack of social skills, patchy or absent work history, lack of a sound
work ethic, poor attitude, mental health/personality/behavioural disorders, and lack of basic
life and educational skills. These types of barriers will be the same as those faced by many
non-offenders, such as the long term unemployed and those with mental illnesses or

213  R Freeman, Can We Close the Revolving Door?: Recidivism vs. Employment of Ex-Offenders in the U.S., Employment
Dimensions of Reentry: Understanding the Nexus between Prisoner Reentry and Work, Urban Institute Re-Entry

214  Holzer and Stoll, above, n 212.
disabilities, but may be compounded by the fact of a criminal record and time spent in prison.

Demand side barriers are those barriers imposed by employers, whether as a result of legal considerations or their own particular views, fears, and prejudices in respect of employing ex-offenders. Demand side barriers also arise due to legal considerations, which are discussed in Chapter 12. Demand side barriers, other than those pertaining to legal considerations, may relate directly to supply barriers (for example, the perceptions and prejudices held by employers as to what characteristics an ex-offender may possess or lack, and the practical difficulties involved in employing ex-offenders due to supply side barriers). Thus, it seems, the fact of a criminal record is more relevant to legal considerations, whereas inferences employers may draw from the existence of a criminal record is the factor most likely to cause the most significant barriers to ex-offenders obtaining employment.

Even if it is not accepted that a prison record per se reduces a person’s labour market prospects, we are faced with a group that is on the whole significantly more disadvantaged in the employment context than the general population. The presence of a criminal record cannot enhance their prospects.
Chapter 11

“SUPPLY SIDE” (AND RELATED “DEMAND SIDE”) BARRIERS TO LABOUR MARKET PARTICIPATION BY EX-OFFENDERS

I ATTRIBUTES EMPLOYERS SEEK IN JOB APPLICANTS

The exact skills and qualities an employer seeks in an employee will depend in large part upon the particular role for which they are recruiting. However, there are a number of general qualities that will be common to most industries and positions. The Employer Survey, discussed in Part 2, sought to ascertain the importance employers placed upon a number of general attributes when making hiring decisions. The survey asked employers from a range of different industries to rate the qualities an employee might be expected to have, in order of importance. Amongst those employers who stated they would consider hiring a person with one or more criminal convictions, reliability was ranked very highly by all respondents, closely followed by honesty. Work skills, social skills and appearance followed in order of importance. Work history, qualifications and a clean driver’s licence were essential or very important to some but not important to others. Absence of criminal record was not stated as essential to any employers from this group, and drew the greatest amount of “not important” responses of any attribute.

Both the group which stated they would not consider hiring a person with one or more criminal convictions and the “would consider hiring” group, ranked reliability and honesty the highest. The “would not consider” group then ranked the absence of a criminal record, work skills, and social skills next in order of importance, followed by work history, qualifications and appearance. The requirement of a clean driver’s licence drew the most mixed response from this group.

So, apart from criminal record, both groups responded similarly in term of the attributes that were most important to them. However, the group that would not consider hiring an ex-offender tended to select the options “essential” and “very important” more often than the “would consider” group, which tended to more moderate responses.

II DIFFICULTIES EX-OFFENDERS FACE IN “MEASURING UP” TO EMPLOYER DEMANDS

Whilst ex-offenders, like the general population, are often possessed with special and highly developed skills or attributes (for example, artistic ability and specific technical ability) many factors may impact upon ex-offenders’ ability to fulfil or demonstrate attributes such as reliability, honesty, work and social skills.
Holzer, Raphael and Stoll\textsuperscript{215} found that ex-offenders in the United States were disadvantaged in the labour market by factors other than their criminal record. Low education levels,\textsuperscript{216} low levels of pre-incarceration employment compared with the general population, time absent from the workforce whilst incarcerated, illiteracy,\textsuperscript{217} substance abuse,\textsuperscript{218} health problems such as hepatitis C\textsuperscript{219} and HIV/AIDS,\textsuperscript{220} depression and sexual abuse issues\textsuperscript{221} were identified as factors disadvantaging ex-offenders in the job market. Freeman identified physical and mental health issues as a significant barrier to labour market participation by ex-offenders in the United States, stating that 21 per cent of (US) prisoners have a medical condition impairing their ability to work, compared with 11 per cent of the general population.\textsuperscript{222} More specifically, Freeman reports that between 10 per cent and 16 per cent of inmates have been diagnosed (or have self reported) as mentally ill\textsuperscript{223}, as compared with 2 per cent of the general population,\textsuperscript{224} almost one third suffer a learning disability (over three times the rate amongst the general population, and 12 per cent suffer from some form of hearing or vision impairment.\textsuperscript{225} Freeman also reports that 12 per cent of state inmates with medical problems were homeless at the time of arrest.\textsuperscript{226} Finally, substance abuse affects a substantial number of inmates. In New Zealand, a 2006 Cabinet Paper reported that between 50 per cent and 60 per cent of inmates were affected by drugs and/or alcohol at

\textsuperscript{215} Holzer and Stoll, above, n 212.


\textsuperscript{217} A problem faced by at least 50 per cent of ex-offenders according to one study - Holzer, Raphael and Stoll \textsuperscript{ibid} citing Hirsch, Amy; Sharon Dietrich, Rue Landau, Peter Schneider, Irv Ackelsberg, Judith Bernstein-Baker, and Joseph Hohenstein. \textit{Every Door Closed: Barriers Facing Parents With Criminal Records}, Washington, D.C.: Center for Law and Social Policy and Community Legal Services. Also see R Freeman, above, n 213.

\textsuperscript{218} 75 per cent Holzer, Raphael and Stoll \textsuperscript{ibid} citing Hirsch et al and Travis et al, p5.

\textsuperscript{219} 18 per cent Holzer, Raphael and Stoll \textsuperscript{ibid} citing Hirsch et al and Travis et al.

\textsuperscript{220} 2-3 per cent Holzer, Raphael and Stoll \textsuperscript{ibid} citing Hirsch et al and Travis et al.

\textsuperscript{221} Holzer, Raphael and Stoll \textsuperscript{ibid} citing Hirsch et al.

\textsuperscript{222} R Freeman, above, n 213, pp 10 – 11.

\textsuperscript{223} Forensic psychiatrist, head of the Canterbury Regional Forensic Service and visiting psychiatrist to the Christchurch Women’s Prison Dr Mark Earthrowl estimates that in New Zealand up to one quarter of prison inmates have serious and undiagnosed mental illnesses, although only 5 per cent have been identified as mentally ill, due to lack of funding for sufficient mental health screening. (The writer has attended two talks given by Dr Earthrowl – at the AGM of the Howard League for Penal Reform and the AGM of the Community Law Canterbury – where this figure was cited. Also see an article entitled “Inmates affected by mental illness”, the Press, 6 June 2008, which discusses Dr Earthrowl’s concerns and cites the same figure: available online at \url{http://www.stuff.co.nz/4573878a11.html} (last accessed 28 September 2008).

\textsuperscript{224} Ibid p10.

\textsuperscript{225} Ibid p11.

\textsuperscript{226} Ibid p19.
the time of their offending, with up to 89 per cent being identified as having used drugs and/or alcohol in the period preceding the offending.

Holzer, Raphael and Stoll recognise that in addition to the barriers outlined above, over which ex-offenders “presumably have little control”, an ex-offender’s labour force success may be limited by the offenders’ own attitudes and choices. They state:

...[I]t is likely that a large number of these men might be able to find some kind of work if they search long enough, but at jobs that pay very low wages and provide few benefits or chances for upward mobility. In these circumstances, many ex-offenders may simply choose to forego these employment options, in favor of illegal opportunities or more casual work. Alternatively, they may accept these jobs temporarily, but may not retain them for very long. Their attachments to the legitimate labor market might be quite tenuous over the longer term—both as a result of these relatively unappealing options, or perhaps because of their own estrangement over several years from the world of work. This implies that labor supply among these young men is relatively elastic, or sensitive to the market wage; and that reservation wages (i.e., the lowest market wages acceptable) of these men are higher than what they are offered in the labor market in many cases, perhaps because illegal earnings provide an appealing alternative. Thus, the limited employment outcomes that ex-offenders experience will at least partly reflect “barriers,” perhaps compounded by their own attitudes towards and responses to these circumstances.

A real or perceived inability to either obtain or retain meaningful employment may then result in lack of hope and motivation, lack of confidence and self esteem issues. Leaving the “security” of income support (for example, an unemployment or sickness benefit) may be a frightening prospect for those who are long term unemployed. In addition, lack of work experience may mean that many ex-offenders lack appropriate mechanisms for coping with conflict and criticism, workplace-appropriate social and communication skills, time management skills, and a work ethic generally.

Practical challenges may also serve as barriers to employment. For example, absence of work history, references, and an inability to explain periods absent from workforce may

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229 Holzer and Stoll, above, n 212, p6.

dissuade a person from applying for work or tell against their being granted an interview. Lack of transport may limit the range of jobs for which one can apply. An inability to access safe and stable accommodation may affect a person’s ability to retain work they have secured by affecting their personal security and their ability to meet their day to day needs. Financial problems and debt, for which repayments increase with earnings (such as child support/WINZ debt/fines/reparation), may make leaving the “security” of government income support into the relative insecurity of the labour market an unattractive prospect. 231

III RELATED “DEMAND SIDE” BARRIERS

A Requiring disclosure of criminal record

International research indicates that employers discriminate against ex-offenders on the basis of their criminal record and that this discrimination serves to make it very difficult for ex-offenders to obtain employment. Research in New Zealand in this area is sparse, but the literature available suggests that a high percentage of New Zealand employers require job applicants to disclose their criminal history. Whilst it cannot necessarily be inferred that requiring criminal history information inevitably leads to discrimination, the research to date suggests that an applicant’s criminal record is of interest to the majority of New Zealand employers. We must then attempt to ascertain what employers do with the information they receive and how this information impacts upon their hiring decisions.

If employers do in fact discriminate against those with a criminal record it must be asked whether this is because of the fact of the criminal record or because the criminal record indicates that the person will be an unsatisfactory employee because of the type of “supply side” barriers identified above. This is an important question. Discrimination due to the fact or stigma of a criminal record may unduly discriminate against those who would otherwise be good employees, such as those who had not offended in many years, those whose offending was youthful and now outgrown. This may well found a case for some form of anti-discrimination measures such as are discussed in chapter 12. However, if it is the case that employers are not unduly bothered by a criminal record per se, but are more concerned with whether employees have the requisite qualities for the job, it may be counterproductive to attempt to hide criminal record in the employment context. Whilst perhaps more ex-offenders would initially gain employment if they did not have to disclose

231 The fact that a “stand down” period of 13 weeks applies to persons who have left or been dismissed from employment is likely to compound this problem. (Persons who are able to show they are likely to succeed in a personal grievance action against their former employer may be granted dispensation).
their criminal history, if the behaviours that led to their offending are not addressed the employment may well be short lived.

An important point to make at this stage is that although most employers surveyed asked applicants about criminal history, few employers required proof of the response given.232 This suggests that it ex-offenders who choose to lie in response to such a question would have a good chance of getting away with it – at least initially. Of course they then run the risk of being found out, and possibly having their employment terminated as a result.233

B Inferences drawn from criminal record

The results of the Employer Surveys suggest approximately half of all employers are willing to consider hiring a person with a criminal record, thus, applicants who are honest have a 50/50 chance of their application being dismissed at that point.234 Of those employers potentially amenable to considering hiring an ex-offender, approximately two thirds indicated that certain types of offending background would rule out an applicant. Dishonesty offending (including white collar) attracted the most responses in this regard, followed by sexual and violent offending, with traffic and property offences being of least concern. The remaining one third indicated they would make a decision on a case by case basis. Of the employers for whom the nature of certain offending would automatically pose a bar to employment, half indicated this was because of their personal disapproval for the type of offending and half indicated it was because the offending type would be incompatible with the employment. The line between the reasoning is somewhat blurred, as a personal bias against, for example, sex offenders could often be justified in an employment context by citing risk to clients or other employees.

A key message conveyed by the employers surveyed was their need to be able to trust their employees, to maintain a safe environment for other employees, customers and clients, and for employees to be reliable. Therefore, a criminal history indicating a person cannot be

232 Amongst the group of employers who said they would consider hiring a person with one or more criminal conviction, 22 out of 24 reported asking applicants about their criminal history, but only four required proof of the response. Of the group who said they would not consider hiring a person with one or more criminal convictions, 18 out of 20 reported asking applicants about their criminal history, but less than half of this number required formal proof.

233 Of those employers who stated they would consider hiring an ex-offender, the majority indicated that, if they later learned an employee had lied about their criminal history, they would discuss this with the employee before making a decision whether to terminate the employment.

234 Although not assessed by the survey, it seems likely that the mode of disclosing the conviction may have a bearing on whether the application is progressed, as it is far easier to dismiss a paper applicant than an applicant who discloses in person. An experiment which tested actual employer practice (perhaps by the use of actors, as was the case in an experiment conducted by Devah Pager and reported in a paper entitled “The Mark of a Criminal Record”, American Journal of Sociology, Volume 108 Number 5 (March 2003): 937–75).
trusted will pose a significant barrier to employment. Whilst employers indicated that one or two relatively minor convictions, especially those that occurred in a person’s youth, would often be overlooked, a more substantial or serious criminal history is indicative of more deep seated problems and more likely to prove a barrier to employment.

IV OVERCOMING BARRIERS

A Formal measures

Most of the employers surveyed indicated that there was little that could be offered to them in the way of incentives that would change their hiring practices or attitudes in respect of ex-offenders. Employers clearly felt a high degree of personal responsibility in respect of ensuring the safety of employees and clients/customers and were unimpressed by the prospect of any political interference in their hiring discretion. A small number of employers indicated they may be more willing to hire an ex-offender if they were adequately compensated for any additional training or supervision needed. The same employers also indicated they would want to be able to dismiss the person on a “no questions asked” basis if the person proved unsatisfactory.

The demand barriers identified in the survey indicate that any measures that seek to limit their ability to hire as they see fit, to increase their exposure to risk or to increase their compliance obligations will be met with strong opposition. It is probable, then, that including criminal record as a ground of non-discrimination in human rights legislation, applicable to employment, will not only be opposed, but would likely be ignored in practice. In any event, given the many adverse inferences which may be drawn from criminal history (particularly when of a serious or repetitive nature) and the various “visible” supply-side barriers that may be present (such as patchy work history, lack of references, a low level of education and poor social skills), it would not seem to be overly difficult for employers to discriminate under the guise of legitimate hiring decision making.

V EVALUATION

On the basis of the material discussed above it is clear that ex-offenders may find it difficult to convince employers they should be preferred over another applicant without a criminal record. Even where the criminal record per se does not disqualify a person from employment, the inferences that employers may draw from an offending background may well be a turn-off for employers. Although a number of employers surveyed expressed a belief in giving a person a “second chance”, the responses indicated serious or repeat offenders who are honest about their criminal history will still face significant barriers to gaining employment. Introducing measures that attempt either to force employers to hire ex-
offenders or that remove their right to ask about criminal history are likely to be opposed and ultimately fail. Although the employers surveyed were not asked about their views on the “Clean Slate” legislation, their concern with recent, serious and repetitive offending suggests the offending covered by the Act would not be of undue concern. Overall, the employers gave the impression of being relatively fair and pragmatic, and more concerned about whether a person would be a safe, trustworthy and reliable employee than with whether they had a criminal record \textit{per se}.

A skilled employee with qualifications and a good appearance will be of little use if they are unable to be reliable and trusted. Reliability and honesty are perhaps also the most difficult attributes to acquire when they are absent. Whilst work skill and social skills can be taught and learned, reliability and honesty are more fundamental to a person’s core values and take time both to develop and demonstrate. There would seem to be little point in training and employment programmes that are purely skills based, unless they also address the development of a work ethic encompassing the ability to be a reliable employee who is able to be trusted. Development of a work ethic and the ability to prove reliability and trustworthiness takes time, and thus for those people unable to demonstrate these things based on past experience, short courses seem unlikely to provide a solution. Measures which encourage an open relationship between employer and employee and which provide ex-offenders and employers with appropriate support are preferred over measures which seek to prevent either criminal record discrimination or criminal record disclosure, at least in terms of ex-offenders within, for example, five years of conviction or release from prison (which ever is the latter). Measures that would allow ex-offenders to demonstrate an appropriate work ethic in a supported “on the job” setting are especially favoured.
Chapter 12

“DEMAND SIDE” BARRIERS TO LABOUR FORCE PARTICIPATION BY EX-OFFENDERS: LEGAL CONSIDERATIONS

I HUMAN RIGHTS LAW IN THE CONTEXT OF EMPLOYMENT

A New Zealand

1 Human Rights Act 1993

In New Zealand, employment law and the hiring practices of employers are subject to the Human Rights Act 1993, particularly Part 2 of the Act which deals with ‘unlawful discrimination’. Section 21 of the Human Rights Act makes it unlawful to discriminate, in any area of public life, against a person on the basis of sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status and sexual orientation. Further, section 19(1) of the New Zealand Bill of Rights Act 1990 provides that everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

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235 Including access to public places, vehicles and facilities, education, employment, industrial and professional associations, qualifying bodies and vocational training bodies, partnerships, provision of goods and services, housing and accommodation, http://www.hrc.co.nz/index.php?p=403 (last accessed 8 August 2008).
238 Section 21(1)(c).
240 Section 21(1)(e).
241 Section 21(1)(f).
242 Section 21(1)(g) - includes nationality and citizenship, http://www.hrc.co.nz/index.php?p=403.
243 Section 21(1)(h) - Physical disability or impairment, Physical illness, Psychiatric illness, Intellectual or psychological disability or impairment, Any other loss or abnormality of psychological, physiological, or anatomical structure or function, Reliance on a guide dog, wheelchair, or other remedial means, The presence in the body of organisms capable of causing illness.
244 Section 21(1)(i) - from age 16 years, http://www.hrc.co.nz/index.php?p=403
245 Section 21(1)(j) - including having no political opinion, http://www.hrc.co.nz/index.php?p=403
246 Section 21(1)(k) - unemployed or a recipient of benefit/compensation, http://www.hrc.co.nz/index.php?p=403
247 Section 21(1)(l) - having dependants, not having dependants, being in a relationship in the nature of a marriage with a particular person or being a relative of a particular person, http://www.hrc.co.nz/index.php?p=403 [includes cases where discrimination based on relative’s criminal record (Director of Human Rights Proceedings v NZ Thoroughbred Racing Inc [2003] 3 NZLR 333)]
Although the Human Rights Act contains no definition of “discrimination”, prohibited discrimination is interpreted to pertain to one of the prohibited grounds where, as a result, the person suffers a detriment.\(^{249}\) In *Quilter v Attorney-General*\(^{250}\) the Court of Appeal (per Thomas J) recognized that “discrimination is a nebulous and complex concept”\(^{251}\) and that the key question “is not whether there is a distinction but whether the distinction which exists is based on the personal characteristics of the individual or group and has the effect of imposing burdens, obligations, or disadvantages on that individual or group which are not imposed on others.”\(^{252}\)

Sections 22 make it unlawful to discriminate against job applicants or employees, by way of refusing to hire, providing less favourable conditions, or terminating employment, on the basis of any of the prohibited grounds contained in section 21. Section 23 renders it unlawful for employers to ask job applicants questions relating to the prohibited grounds of discrimination if to do so could evince an intention to discriminate on that basis. However, sections 24 to 34 provide exceptions in relation to certain types of employment or employment duties, where restrictions or distinctions on the basis of prohibited grounds are necessary for the performance of duties related to the employment or otherwise by virtue of the nature of the employment.

In New Zealand, criminal history is not a prohibited ground of discrimination.\(^{253}\) Thus, whilst it is unlawful to discriminate against persons with criminal records on the basis of any

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\(^{250}\) [1998] 1 NZLR 523 (CA).

\(^{251}\) At 531.

\(^{252}\) At 533. It should be noted however that, although the Court was unanimous as to result, Richardson P and Keith and Gault JJ differed in that they were not persuaded that the right contained in s19 NZBORA required “equal legislative recognition of heterosexual and same-sex marriages” (per Richardson P at 527). Gault J took the view that “community values” may justify discrimination, stating (at 528) “…to differentiate is not necessarily to discriminate. It is necessary to distinguish between permissible differentiation and impermissible differentiation amounting to discrimination. This is a definitional question and is to be considered before any issue of the possible application of s 5 of the Bill of Rights Act arises. Discrimination generally is understood to involve differentiation by reference to a particular characteristic (classification) which characteristic does not justify the difference. Justification for differences frequently will be found in social policy resting on community values.” For further analysis in this regard *Air New Zealand v McAlister* (Court of Appeal, 30 July 2008, Arnold, Panckhurst and Keane JJ, CA 216/07, [2008] NZCA 264.

\(^{253}\) During the passage through Parliament of the Criminal Records (Clean Slate) Bill 2001 (eventually enacted as the Criminal Records (Clean Slate) Act 2004) the select committee rejected both submissions in favour of including disclosable criminal record as a ground of non-discrimination in the Human Rights Act and submissions in favour of extending the Clean Slate Bill itself to include non-discrimination provisions. For a discussion of the policy issues surrounding such a step see Mark Harcourt and Sondra Harcourt, “The importance of full legal protection from discrimination on the basis of criminal record” (2003) 6 Human Rights Law and Practice 210. For a general background to the introduction of the Clean Slate Act 2004 see Mazengarb’s Employment Law, para [CRAINTRO.4] Discrimination.
of the prohibited grounds in cases where no exception applies, it is not unlawful to ask about criminal record or to discriminate specifically on the basis of disclosable\textsuperscript{254} criminal history.

2 \textit{Human Rights Legislation in other jurisdictions}

There are a number of jurisdictions that include criminal record as a ground of non-discrimination in human rights legislation.

(a) \textit{Australia}

Following Australia becoming a signatory of a number of key international human rights conventions\textsuperscript{255} Australia enacted, at the federal level, the Human Rights and Equal Opportunity Commission Act 1986, establishing the body of the same name (“HREOC”). The HREOC is empowered, amongst other things, to receive and act on complaints of human rights breaches. The HREOC Act draws a distinction between discrimination and “unlawful discrimination”. Binding determinations can only be made in relation to the latter, although the HREOC is able to make recommendations for compensation in relation to the former.\textsuperscript{256} Regulation 4 of the Human Rights and Equal Opportunity Commission Regulations 1986 defines “discrimination” (as set out in section3(1)(b)(ii) of the Act) as including discrimination on the basis of criminal record in the context of employment.\textsuperscript{257} Thus discrimination on the basis of criminal record, whilst discriminatory and therefore grounds for complaint, is not unlawful at the federal level.

Section 3 of the HREOC Act contains an “inherent requirement” exception to discrimination, whereby a practice that would otherwise be discriminatory is permitted where the exclusion or preference is necessary due to the inherent requirements of the employment. Thus, it is open to an employer against whom a complaint of discrimination on the basis of criminal record has been made, to attempt to satisfy HREOC that the criminal record was a barrier to the fulfilment of an inherent requirement of the employment.

\begin{footnotesize}
\textsuperscript{254} That is, criminal history not concealable by virtue of the provisions of the Criminal Records (Clean Slate) Act 2004.
\textsuperscript{255} International Covenant on Civil and Political Rights, Declaration on the Rights of the Child, Declaration on the Rights of Mentally Retarded Persons, Declaration on the Rights of Disabled Persons and the International Labour Organisation’s Convention 111 (concerning discrimination in employment and occupation) and Convention 156 (concerning workers with family responsibilities).
\textsuperscript{256} “When a complaint cannot be resolved by conciliation, or where conciliation is inappropriate, and HREOC finds that there has been a breach of human rights or that workplace discrimination has occurred, it may prepare a report for the federal Attorney-General which must be tabled in Parliament.” http://www.hreoc.gov.au/human_rights/criminalrecord/ (Last accessed 30 July 2008).
\textsuperscript{257} “Employment” has been interpreted by the HREOC to include a wide range of employment-related matters including recruitment, job conditions, transfer, promotion, and dismissal.
\end{footnotesize}
HREOC reports\(^{258}\) that between July 2006 and June 2007, 34 per cent of all complaints made to it under the HREOC Act were on the basis on criminal record discrimination.\(^{259}\)

It is only in Tasmania and the Northern Territory where discrimination on the basis of criminal record is unlawful. Under state laws in both jurisdictions, this protection extends beyond the employment context to other areas of public life. Both the Northern Territory Anti-Discrimination Act 1996 (NT) and Tasmania Anti-Discrimination Act 1998 (TAS) employ the concept of “irrelevant criminal record”.\(^{260}\) In both statutes, “irrelevant criminal record” means criminal history not resulting in a conviction or where a person was discharged or pardoned, as well as situations where the “circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which the discrimination arises”.\(^{261}\) The Northern Territory legislation also includes “spent records” as defined in the Criminal Records (Spent Convictions) Act 2002 (referred to below) as part of an “irrelevant criminal record.”\(^{262}\) Both pieces of legislation contain an exception allowing discrimination on the basis of criminal record in certain cases. The Tasmanian legislation allows for discrimination on this basis where the position involves working closely with children “if it is reasonably necessary to do so in order to protect the physical, psychological or emotional wellbeing of children having regard to the relevant circumstances.”\(^{263}\) The exception under the Northern Territory legislation is of broader effect, allowing discrimination on the basis of criminal record where the work involves working with “vulnerable persons” (such as children, the elderly and persons with a disability or illness) in circumstances where “discrimination is reasonably necessary to protect the physical, psychological or emotional well-being of those vulnerable persons, having regard to all of the relevant circumstances of the case including the person’s actions.”\(^{264}\)


\(^{260}\) Section 19(q) Northern Territory Anti-Discrimination Act 1996 (NT) and section 16(q) Tasmania Anti-Discrimination Act 1998 (TAS).

\(^{261}\) Section 4(ix) Northern Territory Anti-Discrimination Act 1996 (NT) and section 3(i) Tasmania Anti-Discrimination Act 1998 (TAS).

\(^{262}\) Section 4(a) Northern Territory Anti-Discrimination Act 1996 (NT)

\(^{263}\) Section 50 Division 7 Tasmania Anti-Discrimination Act 1998 (TAS).

\(^{264}\) Section 37 Northern Territory Anti-Discrimination Act 1996 (NT).
In contrast to the HREOC Act, Tasmanian\textsuperscript{265} and Northern Territory\textsuperscript{266} human rights legislation have “teeth” in that the Anti-Discrimination Commissioner (appointed under each Act) has the power to make a variety of Orders in cases of discrimination on the basis of criminal record, where such discrimination occurs in any area public life, including employment.

\textit{(b) Canada}

The Canadian Human Rights Act, passed into law in 1977, prohibits discrimination in relation to key aspects of public life, including employment, on the basis of a criminal conviction for which a pardon has been granted. The Canadian Human Rights Commission provides dispute resolution and conciliation services to assist resolution without the need to file a complaint, but can also investigate complaints and may refer complaints to the Canadian Human Rights Tribunal which has the power to make binding rulings and impose monetary penalties.\textsuperscript{267} In addition, subject to some qualifications,\textsuperscript{268} the Employment Equity Act (1995) requires employers to be proactive in identifying aspects of their practice that act as a barrier to certain groups of persons and to take steps to ensure their workforce contains a mix of persons representative of the Canadian workforce generally or the segment of the workforce from which the employer would reasonably be expected to employ.\textsuperscript{269} The Employment Equity Act provides for an Employment Equity Review Tribunal (to be assembled from members of the Canadian Human Rights Tribunal) to hear disputes.

\textit{(c) United Kingdom}

As is the case in New Zealand, UK human rights law does not include criminal record as a ground of non-discrimination.\textsuperscript{270}

II “\textsc{Spent Convictions}” Legislation

In a number of jurisdictions there exists legislation pursuant to which criminal convictions become “spent” or “irrelevant” after a period of time, either automatically when certain conditions are met, or upon application to a designated

\begin{itemize}
\item\textsuperscript{265} Tasmania Anti-Discrimination Act 1998 (TAS).Chapter 6, Part 1, clause 3.
\item\textsuperscript{266} Section 88 Northern Territory Anti-Discrimination Act 1996 (NT), section 89 Tasmania Anti-Discrimination Act 1998 (TAS).
\item\textsuperscript{267} Canadian Human Rights Commission \url{http://www.chrc-ccdp.ca} (Last accessed 30 July 2008).
\item\textsuperscript{268} Employment Equity Act, Part 1, section 6.
\item\textsuperscript{269} Employment Equity Act, Part 1, section 5.
\item\textsuperscript{270} Human Rights Act 1998 (UK).
\end{itemize}
authority. The policy behind this practice is to allow those who have criminal convictions in their past to move forward without the stigma of a criminal record.

The manner in which this general policy has been enacted varies between jurisdictions. The approach favoured by jurisdictions such as the United Kingdom is to allow eligible individuals to state they have no criminal convictions if directly asked. This approach has been criticised as creating a “statutory lie”. An alternative approach, as suggested by the Penal Policy Review Committee 1981, is to put the onus on employers by restricting the type of questions they can ask. However, to be effective there must be a penalty for those who breach the provisions. The approach in New Zealand (discussed below) combines both of the above approaches.

A Criminal Records (Clean Slate) Act 2004 (New Zealand)

New Zealand’s Criminal Records (Clean Slate) Act 2004 started life as a bill introduced to the House of Representatives in 2001 by Green Party Justice spokesperson Nandor Tanczos. In his Bill, Tanczos recommended the enactment of legislation whereby criminal convictions, including those that attract a sentence of imprisonment of up to six months, would become spent after 7 years. Tanczos’ bill made it an offence for someone to attempt to force another to reveal spent convictions and to discriminate on the basis of spent convictions. Tanczos’ bill was significantly watered down in the House, with the resulting legislation being the Criminal Records (Clean Slate) Act 2004.

The “Clean Slate” Act provides for “eligible” persons to conceal their prior convictions in certain circumstances. Section 7 defines who is eligible under the scheme. Persons are eligible if a period of seven years has elapsed since their last conviction and all fines and reparation have been paid in full or remitted. However, the scheme does not apply to people who have, at any time, received a custodial sentence (including a suspended sentence of imprisonment, borstal or corrective training), detained in a hospital due to a mental condition instead of being sentenced, convicted of a specified offence (being a sexual offence as defined in section 4 of the Act), or disqualified from driving indefinitely. Application of the scheme is automatic, as is loss of its benefits upon reconviction.

The Act allows eligible individuals to answer in the negative if asked by an employer whether they have any criminal convictions. However, the exceptions contained in

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271 Note that only fines, not reparation, can be remitted.
272 Criminal Records (Clean Slate) Act 2004, s 8.
section 19 of the Act provide that the scheme does not apply in certain circumstances\textsuperscript{274} or when applying for specified employment.\textsuperscript{275} It is an offence punishable by a fine of up to $10,000 for an employer, in the absence of any of the exceptions applying, to require a person to reveal convictions they are entitled to conceal.\textsuperscript{276}

B \textit{“Spent Convictions” legislation in other jurisdictions}

1 \textit{Australia}

In its 1987 report entitled \textit{“Spent Convictions”}\textsuperscript{277} the Australian Law Commission examined the difficulties faced by ex-offenders arising out of their criminal records. The Commission recognised the need to formulate a response which adequately balanced the needs of the offender in their reintegration against the public interest in the prevention and detection of crime. The Commission concluded that the difficulties offenders faced due to their criminal records could be addressed or eliminated in the following ways:

\begin{enumerate}
  \item minimising the negative consequences that attach to old (spent) convictions;
  \item making it unlawful to unreasonably discriminate against a person on the basis of his or her criminal record; and
  \item establishing controls on the collection, storage and dissemination of criminal record information by the police and other record keepers.\textsuperscript{278}
\end{enumerate}

The Report focussed on the first two measures and made recommendations in respect of the same.

The Commission recommended that \textit{“spent convictions”} legislation be enacted whereby spent convictions should not – with limited and specific exceptions - be taken into account \textit{“when interpreting statutes and when assessing the rights, entitlements or liabilities of a

\textsuperscript{274} Including if required for law enforcement purposes, within the context of the function of the justice system, for the purpose of the Security Intelligence Service carrying out its functions, to determine whether an applicant for a firearms licence is a fit and proper person to hold such licence, and where a person is applying for a role that involves caring for children or as a foster parent.

\textsuperscript{275} Disclosure required for employment as a Judge, Justice of the Peace or Community Magistrate, as a police, prison, security or probation officer, or any position involving matters of national security.

\textsuperscript{276} For publications dealing with the impact of the Clean Slate Act upon the employment relationship see, for example, Mazengarb’s Employment Law paras [CRAINTRO] (1 – 6), Brookers Employment Law (for example, Editorial, Criminal Records (Clean Slate) Act 2004: what employers need to know (February 2005), C1 Common Law Duties of Employer and Employee).


former offender”. A conviction would become “spent” following a suitable period of good behaviour during which no serious convictions were incurred. The recommended “waiting time” for juveniles was 2 years, and 10 years for adults.

The Commission further recommended that legislation be enacted making it unlawful to discriminate on the basis of criminal record in respect of employment, provision of goods and services and the availability of facilities. It was recommended that the Human Rights and Equal Opportunities Commission have jurisdiction over discrimination on the basis of criminal record.

In 1989, the Federal Parliament passed the Crimes Legislation Amendment Act 1989 to prevent discrimination against those with old or less serious criminal convictions.

Today in Australia (but excluding South Australia and Victoria) legislation is in force prohibiting inquiries into “spent” convictions and disclosure by government agencies of the same. The Australian legislation excludes certain offending from becoming “spent”, including offending resulting in prison sentences longer than six months (Northern Territory, Western Australia, Tasmania, and New South Wales) or 30 months (Commonwealth, Queensland). In addition, certain occupations are exempt from compliance with the legislation (such as in relation to the employment of Judges, Security Officers, Police Officers and Prison Officers) as are those employing persons to work with children and/or vulnerable persons.

Other than in situations where exceptions apply, persons with spent/annulled convictions are able to lawfully conceal their convictions in the employment context.

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280 Although it is SA police policy to transfer certain convictions are transferred to an “inactive file” after a period of five to ten years http://www.hreoc.gov.au/HUMAN_RIGHTS/criminalrecord/submissions/sub28_ignatius.html (Last accessed 30 July 2008).

281 Criminal Records (Spent Convictions) Act 2002.


283 Although the Annulled Convictions Bill 2003.


285 Section 85ZM, Crimes Act 1914.

The Rehabilitation of Offenders Act 1974 provides for convictions to become spent following the passing of specified “rehabilitation periods” which are based upon the sentence imposed by the court. The statutory rehabilitation periods range from six months for an absolute discharge, through to ten years for disgraceful dismissal from the armed forces and a sentence of imprisonment of more than six months but less than two and a half years. Persons who have been sentenced to more than two and a half years imprisonment do not benefit from the legislation.

The Act also provides for three different levels of criminal record checks for employment purposes. The “basic” level check discloses only unspent convictions and is suitable for general job applications. The “intermediate” level check is appropriate for pre-employment checks for certain professional occupations (such as lawyer, nurse, and police officer) and also where the employment involves contact with young or otherwise vulnerable persons. This check will disclose all convictions – spent and unspent – as well as other criminal history matters such as cautions and reprimands. The highest level check is for those seeking to work directly with young or otherwise vulnerable people, seeking gaming or lottery licences or judicial appointments and will include all criminal history but also may include other information police have deemed relevant to the particular employment sought.

One common criticism of the UK spent convictions regime is that it offers very little in the way of protection from employer discrimination. The Act allows job applicants to “hide” spent convictions when asked about criminal record and provides that spent convictions are not sufficient grounds for refusing employment or dismissal. However the Act does not provide any means of redress for a person denied employment or dismissed from employment on the basis of a spent conviction with the exception that employees with more than one year of continuous service with a single employer who are then dismissed on the basis of a spent conviction may bring an action for unfair dismissal.

The spent convictions regime also applies to applications for policies of insurance, even where the spent conviction may be relevant to the level of risk the insurer is being asked to underwrite.

In Canada, the Criminal Records Act 1985 allows criminal offenders to apply to the National Parole Board for a pardon. Before a pardon can be sought, a conviction free period (between three and five years depending on the seriousness of the offence) must have elapsed. The legislation applies to all sentences, including those that resulted in imprisonment. Before persons convicted of indictable offences may be pardoned, the Board must be satisfied that not only have the person been conviction free for five years, but also that they are of good character. The Board may revoke a pardon if the person is subsequently convicted. Once a pardon has been granted, the record of the conviction must be kept separate from other records. Employers, including government employers (such as the Canadian Armed Forces), may not ask job applicants whether they have received a pardon. Should a government employer do so the applicant may make a complaint to the Canadian Human Rights Commission.

III  NEW ZEALAND RESEARCH

A  Mark Harcourt and Helen Lam

In a paper published in 2001 entitled “The Importance of Full Legal Protection from Discrimination on the Basis of a Criminal Record: Britain and New Zealand”, New Zealand academic Mark Harcourt examines the position of discrimination against persons with criminal records, noting that there has been very little research in this area in New Zealand.

This paper was published pre-Clean Slate legislation coming into force. The purpose of the Harcourt research was to show the extent to which questions about criminal history are commonplace on job application forms, to show the extent to which such questions are limited to the previous five or ten year period, and to determine the extent to which questions regarding criminal background would qualify for an exemption under the then-Bill. Harcourt makes the following key points:

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289 Ibid section 4.1.
290 Ibid section 7.
291 Ibid section 8.
1. One in four New Zealand males have a criminal conviction by age 25 (one in three in Britain by age 30).\(^{293}\)
2. Most offenders eventually rehabilitate and so pose little or no threat to people or property.
3. Most offending behaviour ceases by late 20s/early 30s.\(^{294}\)
4. Employers discriminate against persons with convictions and consequently ex-offenders are more likely to earn low wages and have little job security.\(^{295}\)
5. Ex-offenders who are not integrated into society through the labour market generally take longer to stop offending.\(^{296}\)
6. It is not a reasonable option for ex-offenders to simply conceal their past, as dismissal can result if past convictions are discovered. Refusals to answer pre-employment questions relating to convictions are taken as an admission to having a conviction and discrimination follows.\(^{297}\)

Harcourt found that in New Zealand, questions about criminal background are commonplace (66 per cent)\(^{298}\) compared with 38 per cent and 20 per cent in the US\(^{299}\) and Canadian\(^{300}\) studies respectively and these findings suggest discrimination against ex-offenders is likely to be a greater barrier to employment in New Zealand than in the US or Canada.\(^{301}\)

The research suggested that there was a need for legal protection against discrimination on the basis of criminal record, particularly where such record held little or no relevance to the employment.

Since Harcourt’s research was published the “Clean Slate” legislation came into force. As the legal protections afforded only apply to those who have been conviction-free for at least seven years, and do not apply to a number of offences, nor to persons who have ever been imprisoned, the Act cannot be said to have any “rehabilitative” element. Whilst it is no doubt beneficial to the 500,000 or so persons to which it applies,\(^{302}\) allowing them to conceal
old convictions which may cause embarrassment, such persons are already considered “rehabilitated” and the Act is unlikely to be, in practice, preventing any significant discrimination in the employment context.

Following on from Harcourt’s 2001 paper, in 2003 Mark Harcourt and Helen Lam published a paper entitled “The Use of Criminal Records in Employment Decisions: The Rights of Ex-Offenders, Employers and the Public”. Harcourt and Lam examined, with reference to the legal protection afforded to ex-offenders in Australia, whether there was a need for legal protection of ex-offenders by limiting employers’ access to, and use of, information on criminal background. In this regard the authors considered the place of both “spent convictions” legislation and possible human rights protections.

In comparing human rights and spent convictions legislation, Harcourt and Lam stated that whilst spent conviction legislation reduces the chances of hiring discrimination by prohibiting employers from asking applicants about spent convictions, it fails to protect against discrimination that may arise if an employee’s criminal background becomes known in the course of employment. Thus, there is no prohibition on employers using employees’ criminal record when making promotion, transfer or redundancy decisions. This is where, the authors argue, human rights protections have an important role to play.

Harcourt and Lam point out that, as human rights legislation applies more generally (and therefore would apply not only to hiring situations but also to employment situations more generally) it extends into other areas as well and thus would impact upon such things as education, accommodation and the provision of goods, services and facilities.

After an examination of the competing rights of employers, ex-offenders and the public, Harcourt and Lam advocate legislative changes to combine the two approaches – “spent convictions” and human rights - into one, so as to simplify their administration. The authors recommend including the words “criminal record” in all human rights legislation, and for the definition of “criminal record” to encompass more than simply spent convictions. Further, they recommend that employers should only take criminal record

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305 This is accurate so far as it goes, however the Employment Relations Act 2000 would provide a range of remedies – notably a disadvantage grievance under s 103 - if an employer used a criminal record in an irrelevant way when making such decisions.(This observation was made by Mr John Hughes).
306 Harcourt and Lam, above, n304, p247.
308 Ibid p248.
into account (including but not limited to spent convictions) where there is a valid reason for doing so, such as a bona fide occupational requirement.\textsuperscript{309}

B \quad \textbf{Philippa Wells and Jacquelin MacKinnon}

In 2001, Philippa Wells and Jacquelin MacKinnon published a paper entitled "Criminal records and employment: a case for legislative change; the acceptable face of the employer's freedom of choice, or society on the horns of a dilemma?"\textsuperscript{310}

Wells and MacKinnon canvass the theoretical background of discrimination in the context of the workplace and explore the treatment of criminal records in this context in the United States, Australia, and the United Kingdom.\textsuperscript{311} The authors argue that the question was not whether New Zealand should address discrimination on the basis of criminal record, but how it should be done.\textsuperscript{312} Acknowledging a tension between giving ex-offenders a “second chance” and protection of society, the authors argued that “being 'tough on crime' need not mean a life-long vulnerability to discrimination in employment”.\textsuperscript{313} The authors did not go so far as Harcourt and Lam and advocate for criminal record to become a ground of non-discrimination in human rights law.

C \quad \textbf{Practitioner Commentary}

There has been some commentary from New Zealand legal practitioners in respect of anti-discrimination legislation pertaining to criminal record in the employment context. Unlike the academic comment discussed above, practitioner comment has tended to oppose measures that remove the freedom of employers to ask job applicants about their criminal record. In 1986 Bevan Greenslade\textsuperscript{314} published an article in the New Zealand Law Journal entitled “Eyes open” policy: Employment of a person with a criminal record”.\textsuperscript{315} Commenting on a 1985 Discussion Paper released by the Law Reform Division of the (then) Justice Department entitled “Living down a Criminal Record” in which an argument was made for statutory concealment of criminal record, Greenslade is highly critical of the premise upon which the argument was based. The crux of Greenslade’s argument is that “real rehabilitation requires an individual to be able to face, not conceal, past errors, and that

\begin{itemize}
\item \textsuperscript{309} Ibid.
\item \textsuperscript{310} New Zealand Universities Law Review 19.3 (June 2001): 177-196.
\item \textsuperscript{311} Ibid pp291 – 297.
\item \textsuperscript{312} Ibid p 303.
\item \textsuperscript{313} Ibid p 308.
\item \textsuperscript{314} At the time of writing the article Greenslade was a Legal Officer with the New Zealand Employers Federation
\item \textsuperscript{315} [1986] NZLJ 386.
\end{itemize}
the community needs to offer an informed tolerance of past errors where these are not longer being repeated.”

Greenslade opposes criminal record becoming a ground of non-discrimination in human rights law. Greenslade states that “traditional” grounds of non-discrimination have been accepted either because a characteristic is involuntary (such as sex, colour, race or ethnicity) and as such it would be unjust to discriminate against a person for a characteristic over which they have no control, or because the qualities are voluntary but are regarded as universally good (such as religion or ethics) or are a private matter (such as marital status). Criminal record, Greenslade argues, falls into none of the above categories, being “voluntarily risked”. As such, criminal record has no place in human rights law.

Greenslade argued there was no need for any legislation in New Zealand to address discrimination in the employment context on the grounds of criminal record, however, he argued, that if legislation was to be introduced it should not be such that criminal record could be concealed. Greenslade proposed, as an alternative:

1. A voluntary, supervised, and counselled, rehabilitation employment programme; or
2. An opportunity for the criminal to demonstrate rehabilitation, to be acknowledged with a “pardon”

According to Greenslade, any employer participating in employment/supervision of an ex-offender should have full knowledge of the persons criminal history in order to be able to put in place appropriate supervision and risk management systems. This, argued Greenslade, would be in keeping with the fundamental principle that the employment relationship is one of trust.

A pardon, as opposed to concealment, would be considered on a case-by-case basis and would acknowledge rehabilitation in a manner that does not involve deceit.

In 2004 an article entitled “The Criminal Records (Concealment) Act” by lawyer Peter Tritt was published in the New Zealand Law Journal. Like Greenslade, Tritt is highly critical of the concept of concealment of criminal records, as had been enacted in the

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316 Ibid 386, 387.
317 Ibid 388.
318 Ibid.
319 Ibid.
320 Ibid.
321 Employers and Manufacturers Association.
Criminal Records (Clean Slate) Act 2004. Employers, Tritt argues, should be entitled to ask about criminal record so as to make an informed hiring decision. Tritt further argues that there is no principled basis for the exceptions contained in the Act. Tritt states that if concealment is needed (which, he argues, it is not), the “only valid test should have been the past conviction’s relevance. If a job applicant’s past offending is relevant to a position, then all employers (not just a favoured few) should be able to obtain the applicant’s consent to access the relevant records”.

In an article published in the Employment Law Bulletin in 2005, entitled “Trans-tasman job applicants and criminal record checks” Guido Ballara canvasses the problems that arise due to the jurisdictional limitations of the Clean Slate Act, in the context of New Zealand’s relationship with Australia. Ballara raises the possibility of the New Zealand Australia Closer Economic Relations Trade Agreement (CER) being amended to allow a synergy between their respective “spent convictions” laws so that “Australian applicants for positions in New Zealand (and vice versa) are treated equally”. Such a step, Ballara argues, would also provide additional certainty for employers when dealing with applicants from across the Tasman.

IV EVALUATION

New Zealand’s “Clean Slate” Act may not go far enough to alleviate the concerns outlined in the Harcourt, and Harcourt and Lam, papers referred to above. Certainly it does nothing to assist those offenders most likely to face discrimination, that is, those who have committed more serious crimes in the past and those who have been in prison. If a person has remained conviction free for a seven year period, statistically, their likelihood of reoffending is very low, especially taking into account their increase in age. Arguably then, there is little in the way of principled reasons for excluding older persons, for example, those over 30 years of age, who have been in prison but who have not been re-convicted in the previous seven years, from the benefits of the Act. Again, however, although this

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323 Pertaining to “specified offences” (s4) and certain types of employment for which criminal records cannot be concealed (s19(5)(d)).


326 At the time of writing the article Ballara was a solicitor at Broadmore Barnett.

327 The risk of re-conviction is at its highest point in the two years following release from prison, declining steeply thereafter. There are no seven year follow-up figures available, however based on an 86 per cent “general population” reconviction rate after five years, the likelihood of reconviction after five years is approximately 14 per cent. As reoffending decreases with increasing age, the reconviction rate for those aged, for example, over the age of 30, who have not been reconvicted within seven years is likely to be very small indeed.
would be no doubt welcomed by those who would benefit, they would be considered to have already been rehabilitated and thus the Act would again not have rehabilitative effect.

There is perhaps a possibility that knowing that a seven year conviction free period would entitle one to a “clean slate”, regardless of the fact of previous imprisonment, may be an incentive to some recidivist offenders, as it may provide hope of their being able to make a clean break from their past. As things stand, some ex-inmates may feel they have very little to lose by reconviction. This is of course speculative, and depends upon their being a degree of forward thinking, however it is not improbable that such an incentive may prove effective for some. In this regard, when more serious offending is in issue, a pardon rather than concealment may be preferable, as it would allow employers to make an informed hiring decision whilst providing official recognition of a person having rehabilitated.

In respect of criminal record as a ground of non-discrimination in human rights law, again, the effect would be unlikely to be rehabilitative, given the definition of criminal record would be highly unlikely – judging by overseas examples – to offer protections to ex-offenders during the period at which they are at the greatest risk of reconviction. Human rights law that includes criminal record tends to restrict the definition of “criminal record” to spent or pardoned convictions already covered by other legislation and in some cases to “irrelevant criminal record” such as discharges and acquittals. Human rights law, whilst generally having less in the way of “teeth” to sanction breaches, does go further than spent convictions laws by extending protection against discrimination into the wider employment context (including promotion, transfer, and redundancy) and to other areas of public life. As with spent convictions protections, persons that would benefit from the protections are those deemed “rehabilitated”.

Whilst such steps may be beneficial to “rehabilitated” offenders, they would be irrelevant to addressing the “demand” barriers to employment faced by ex-offenders at most in need of rehabilitative assistance. This is perhaps as it should be. Any greater employment or human rights protections of this nature to “at risk” ex-offenders would not only place employers in the unfair position of having to accept undue risk, but it is also unlikely to be of assistance to “at risk” ex-offenders. Simply securing employment is often the least significant problem for such persons, with retaining employment often proving far more difficult. It is unrealistic and unfair to expect employers to be forced to alone bear the risk and cost associated with rehabilitation of ex-offenders, especially if forced to do so blindly. Far better, it would seem, to ensure sufficient support and assistance is in place to facilitate an open and voluntary employment relationship between employers and ex-offenders.
Thus, it is argued that many arguments advanced for and against anti-discrimination legislation in the context of criminal record and employment miss some critical points. These are, in sum, that in general, any such legislation will be conservative and therefore will not benefit those most in need of rehabilitative assistance, as a considerable number of years “conviction-free” suggests successful rehabilitation. As such, employers are unlikely to be prejudiced by employing a person without the knowledge of a concealed conviction, especially bearing in mind that any serious offending is unlikely to be covered by such a scheme. On the other hand, those who are most in need of rehabilitative assistance (recidivist/serious offenders) will not benefit from the scheme and thus employers are not in the position of having a job applicant who has, for example, served a term of imprisonment, legally entitled to conceal their criminal record or benefit from anti-discrimination laws.

V LEGAL CONSIDERATIONS FOR NEW ZEALAND EMPLOYERS

As well as the Clean Slate legislation, there is a raft of legislation governing employment relationships in New Zealand. Whilst the Department of Labour Employment Relations Service provides detailed information and assistance to help employers understand their employment obligations, for many employers, particularly small employers, compliance can appear very complex and difficult. Understandably, employers may be unwilling to voluntarily take steps that they perceive as potentially adding to their burdens, such as employing an ex-offender.

New Zealand’s employment law applies to all employees equally, and therefore no provisions relate specifically to those applicants or employees with a criminal record. However, some aspects of the legislation will be of particular relevance to employers’ decisions as to whether to hire an ex-offender in terms of their ability and willingness to accept and manage risk. Risk, from an employer’s perspective, relates to a number of factors. First, there is the risk an employer assumes in the hiring process. Taking on new employees can be costly in terms of resources devoted to induction and training and loss of productivity whilst getting a new employee “up to speed”. Where employees fail to perform or integrate as desired, employers expend time and resources in attempting to address these issues and, if this is unsuccessful, in terminating the employment relationship.

Most employers are very aware of the potential for personal grievance action by employees, and thus selection of the applicant most likely to perform well and least likely to be problematic is generally very important. Second, and depending on the work environment, there may be risk associated with direct financial loss to the business through employee dishonesty. Thirdly, employers are likely to be concerned with the actual and perceived safety of other employees of the business, as well as the safety of customers and clients. Finally, employers will be mindful of the reputation of their business and will wish to employ those who will not damage it either through their actions or their reputation.

Employing an ex-offender may be a prospect that is unattractive to an employer by virtue of a perceived increased level of risk. In some cases this perception may be quite unjustified and may operate to unfairly discriminate against an otherwise suitable applicant. In other cases the perception may be quite correct. Even where the nature of the criminal convictions themselves does not relate directly to the nature of the employment (for example, an applicant with convictions for paedophilia offences applying to work as an engineer), an offending history may indicate the presence of traits generally considered undesirable, such as poor impulse control or lack of reliability or trustworthiness. This, coupled with the fact that employers are human beings with their own particular prejudices and preconceptions, will mean that many employers will often have reservations about employing persons with anything more than a very minor criminal history. The employer survey conducted for the purpose of this research bears this out. However, experience has shown that there are steps that can be taken to increase both the willingness of employers to hire ex-offenders and the likelihood the experience will be a successful one for both the employer and the employee.329

The remainder of this chapter looks at aspects of New Zealand law relevant to employers from the perspective of risk management in their “hiring and firing” decisions.

A Employment Relations Act 2000

The Employment Relations Act 2000 (“ERA”) is the primary piece of legislation governing the employment relationship. The Employer Survey results indicate particular aspects of the legislation are considered by employers as factors of concern in their hiring considerations and influence their attitudes to hiring ex-offenders.

329 Discussed in chapter 13.
Underpinning the employment relationship is the obligation of the parties to act in good faith toward one another. Much case law has grown out of this provision, helping to clarify each party’s obligations towards one another. What is clear is that when problems arise in the employment context, a process of consultation and genuine attempts to remedy the problem is expected. Thus, there are established guidelines as to the processes to be followed where an employee’s conduct or performance is deemed to be unsatisfactory.

1 **Personal Grievances**

Under the ERA, employees can bring a personal grievance action for alleged unfair disadvantage, discrimination, harassment and unjustified dismissal. This is a concern to employers, as even where they consider they have followed a proper process in dealing with employment issues, a personal grievance may nevertheless result. Even a groundless or unsuccessful grievance action can result in the employer expending time and resources defending the action. Therefore, employers attempt to minimise their risk by attempting to hire persons most likely to be satisfactory employees. Hiring a person with a criminal history that indicates they may not be a good employee is therefore counterintuitive to most employers.

2 **Trial Periods**

In line with the above, some employers surveyed expressed the view that it is difficult to dismiss employees, and that they might be more willing to take on someone with a troubling history if they could do so on a trial basis, with the ability to dismiss without the spectre of a personal grievance. Under current employment law, employers may hire employees for a “probationary period” (provided the employee agrees), however this does not mean that the employer can summarily terminate the employment at the end of that period or that the employer is free from the usual employment obligations of consultation and good faith. Probationary employees have access to the personal grievance process in the same was as

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332 Employment Relations Act 2000, Section 103.


334 Ibid section 67.
other employees (however the standard differs, in that it is easier for the employer to justify dismissal).\textsuperscript{335}

It is notable that several employers in the Employer Survey (in Part 2) were in favour of the National Party’s promised 90 day probationary period, stating it may make them more amenable to hiring employees with a criminal record (indeed this was one of the stated purposes of the proposed legislation).\textsuperscript{336} The Employers and Manufacturers Association and Business New Zealand have come out strongly in support of such a move.\textsuperscript{337}

3 \textit{Health and Safety in Employment Act 1992}

Whilst not making direct reference to legislation, a number of employers surveyed demonstrated awareness of the need to take steps to maintain a safe workplace for their employees, as well as other persons coming into contact with their employees. For this reason, employers expressed concern about hiring persons with certain types of convictions, including those for sexual, violent, drug and alcohol offences.

The Health and Safety in Employment Act (“HSE Act”) imposes upon employers the obligation to “take all practicable steps” to keep their staff safe whilst at work.\textsuperscript{338} In addition, employers must “take all practicable steps to ensure that no action or inaction of any employee while at work harms any other person”.\textsuperscript{339} Employers who fail in this duty may be prosecuted.\textsuperscript{340} In HSE cases, prosecutions are generally brought by the Department of Labour, although occasionally police will bring such prosecutions under the Crimes Act 1961. The HSE Act does provide however, for an interested party to seek the leave of the

\textsuperscript{335} For commentary on section 67 Employment Relations Act see Mazengarb’s Employment Law para [ERA 103.21], and [ERA67] (1 – 4) and Brookers Employment Law. See also Cunningham v Accent Commercial Interiors Ltd 14/8/02, R A Monaghan (member), AA237/02; Pegram v Heritage Productions Ltd 12/4/07, P Cheyne (member), CA43/07.

\textsuperscript{336} The National Party’s policy applies to employers with fewer than 20 staff and allows, during the trial period, either party to terminate the employment relationship for performance, without a personal grievance claim being brought. National Party Industrial Relations spokesperson Kate Wilkinson states that "[The] personal grievance provisions would still apply for matters not related to performance. Good-faith provisions will apply, as will rights to sick leave, holidays, and health and safety provisions. Rules of natural justice and human rights legislation will be enforced and mediation will be available in disputes...New Zealand is almost the only country in the OECD that does not have a probationary period for new employees, which employers might consider risky at first glance...This is an effort by National to give opportunities to people who might not otherwise be given a chance to get on the employment ladder. Clearly the EPMU thinks probationary periods are useful, otherwise they wouldn’t be using them.


\textsuperscript{339} Ibid section 15.

\textsuperscript{340} Ibid ss 49, 50.
court to consider whether to prosecute, in situations where no enforcement action has been taken, therefore in theory it would be possible for an employee to prosecute their employer under the HSE Act. There have been no New Zealand cases where an employee has done so. In this respect however, it is open to question as to whether an employer could be successfully prosecuted for knowingly hiring a person likely to be dangerous to other employees (for example, by virtue of their having a considerable history of violent offending). As the legal test is whether an employer had taken “all reasonable steps” to ensure employee safety, it is likely such a case would turn upon whether – in light of the employer’s knowledge of the history of violence – they had done all that was reasonably practicable to manage that risk. Although there is no case law directly on this point, employers have been successfully held liable in civil proceedings, for instance, for introducing persons with a background of violence into employment situations and not protecting employees against foreseeable injury by customers, relying on the HSE provisions as an aspect of the contractual implied term requiring a safe workplace. In principle, the same would apply in a prosecution although the burden and standard of proof would clearly differ.

4 Profession-specific legal considerations

Some employers surveyed came from sectors in which there are legal requirements as to the criminal history of employees. For example, legislation governing such things as liquor licensing, security guards, taxi drivers and childcare workers imposes certain restrictions on the employment of persons with criminal convictions and/ or require police vetting. Most professions, including teaching, legal practice and medicine, require applicants seeking admission to the profession to be a “fit and proper person” to work within the profession. Whilst criminal convictions per se do not necessarily disqualify admission to the profession, it is unlikely that a person with a conviction or convictions that is relevant to the work (for example a lawyer with fraud convictions) or with multiple or serious convictions would be admitted.

5 Civil Liability

In the United States, allegations of “negligent hiring” form the basis of a growing area of civil liability. Such suits are being brought, with increasing frequency, by employees who are in some way injured as a result of the actions of another employee, where that employee

341 Ibid section 54C.
342 Communication with Mr John Hughes, University of Canterbury.
has a history of the injurious behaviour and this was known to the employer when they hired that person.

As the Accident Compensation legislation in New Zealand344 prevents actions for compensatory damages arising out of personal injury covered by the legislation, personal injury litigation in New Zealand is negligible (except where the injury is purely mental and outside the scope of the legislation). Although the IPRC Act does not prevent actions for exemplary damages, the combined effect of the relatively low level of awards in New Zealand (compared with the often very large sums awarded in the United States), the high costs of funding litigation, and the high legal threshold to found an award of exemplary damages results in very little litigation of this type.

Therefore, it appears very unlikely this type of litigation will develop a foothold in New Zealand in the same way as it has in the United States.345

6 Insurance considerations

Whilst not strictly a legal consideration, the impact of hiring ex-offenders on the businesses insurance cover was a factor of concern for some employers. Thus, where driving is a requirement of the employment, employers may be unwilling to hire any person whose driving history (such as criminal convictions for driving offences) would increase the insurance premiums on company vehicles.

Perusal of a sample of public liability insurance policies from major New Zealand insurers indicates insurers do not explicitly require employers to disclose any details pertaining to the criminal histories of their employees.

345 This is not to say that it does not occur however (see, for example, the recent case of Couch v Attorney-General [2008] NZSC 45).
Chapter 13

COMMUNITY BASED INITIATIVES TO ASSIST EX-OFFENDERS INTO EMPLOYMENT

I  GOVERNMENT-RUN COMMUNITY-BASED INITIATIVES

A  Ministry of Social Development: Work and Income

Work and Income is one of the government departments managed by the Ministry of Social Development (MSD). Work and Income is tasked with administering the income support scheme, assisting clients to seek work, and providing in-work support to clients. Work and Income provides some assistance specific to prisoners in the form of a small contingent of Work and Income case staff being based within prisons and discussing income support and employment options with prisoners prior to their release. Upon release from prison, or a remand period of 31 days or longer, ex-offenders may qualify for a special needs grant known as ‘Steps to Freedom’ of up to $350, to help them meet immediate costs such as accommodation, food, clothing, or other essential items or services. However, for people leaving prison, there is a one week stand down period for obtaining income support, and then a further week of waiting as the benefit payment is made one week in arrears, which effectively means $350 must provide for all their needs for a two week period.

Beyond this, with one exception (being the “Fresh Start” initiative discussed below), the job search and assistance services available to ex-offenders are the same as those available to any other Work and Income client.

1  General Services

Like any other member of the community, ex-offenders are entitled to access the range of Work and Income Services for which they qualify. Ex-offenders may qualify for income


347 For example, a person held in custody awaiting trial who is then acquitted or who is found guilty but receives a non–custodial sentence, would generally be eligible for Steps to Freedom.


support such as unemployment, sickness or invalid’s benefits, as well as additional assistance such as an accommodation or disability benefit.

If seeking work, ex-offenders are entitled to enrol as a job seeker with Work and Income, which begins with an interview with a Work and Income staff member and allows them to access various forms of assistance and opportunities. The process may involve entering into a Job Seeker Agreement pursuant to which job seekers may be required to attend training or interviews. Special financial assistance is available to all eligible job seekers (including ex-offenders) for such things as purchasing clothing or paying for transport to job interviews or, for those who secure employment, to help them financially until they receive their first amount of wages. Work and Income can also refer job seekers to specialist agencies such as Career Services Rapuara and Workbridge (employment assistance for persons with physical and/or mental disabilities), and assist job seekers to enrol in a variety of training or motivational courses. In terms of job search assistance, job seekers may search and apply for jobs listed on Work and Income’s “job bank”. A variety of online and printed resources provide information on such things as preparing a curriculum vitae (CV), job hunting and attending interviews. For job seekers with little or no employment history, Work and Income may be able to refer them to an employer for Work Experience, which can last for up to four weeks without employers having to meet the usual expenses such as wages, ACC levies and holiday pay. Work and Income assists employers in other ways such as paying a Skills Investment Subsidy of up to $16,900 for


- physical disability or impairment (e.g. respiratory conditions)
- physical illness
- psychiatric illness (e.g. depression or schizophrenia)
- intellectual or psychological disability or impairment (e.g. learning disorders)
- any other loss or abnormality of psychological, physiological or anatomical structure or function (e.g. arthritis or amputation)
- reliance on a guide dog, wheelchair or other remedial means
- the presence in the body of organisms capable of causing illness (e.g. HIV/AIDS or hepatitis).”


one year to assist with training a new employee,\textsuperscript{356} or by subsidising wages for approved community or environmental projects for up to 26 weeks.\textsuperscript{357} In some cases Work and Income will pay an Enterprise Allowance to persons having difficulty finding work but who want to start their own business.\textsuperscript{358} In certain cases, ongoing financial assistance to meet things such as housing, disability or emergency costs may continue to be available to eligible persons after they start work. Finally, In-Work assistance is available to those starting work, to give them information on such things as employment law, time management, and resolving employment problems.

2 \textit{Start Over}

MSD and the Department of Corrections jointly operate a community-based initiative known as “Start Over” which is managed by MSD and has the aim of assisting ex-offenders into employment. The premise on which the initiative is founded is twofold: first, ex-offenders who are able to find and maintain employment are less likely to reoffend, and second, that everyone can play a role in promoting safer communities.\textsuperscript{359}

Start Over operates on the basis that employers who are willing to consider employing an ex-offender (people recently released from prison, long term unemployed who have spent time in prison, and people who have served or who are serving community sentences) register their vacancy with Work and Income. Ex-offender job seekers registered with Work and Income are then referred to interview for vacancies for which they may be suitable. Both employers and employees may be eligible for the wage subsidies and other assistance, referred to above. Employers who register with Start Over are not obliged to employ only ex-offenders, and will have other job applicants referred to them if no suitable ex-offender is available.\textsuperscript{360}


\textsuperscript{357} This initiative is known as Taskforce Green, and is aimed at proving work for persons who are disadvantaged in the workforce and at risk of long term benefit dependency. For further information see \url{http://www.workandincome.govt.nz/manuals-and-procedures/employment_and_training/programmes_and_services/taskforce_green/taskforce_green-30.htm} (Last accessed 24 July 2008).

\textsuperscript{358} For further information see \url{http://www.workandincome.govt.nz/find-a-job/enterprise-allowance.html} (Last accessed 24 July 2008).

\textsuperscript{359} \url{http://www.workandincome.govt.nz/employers-industry/start-over.html} (last accessed 23 July 2008).

\textsuperscript{360} See Start Over Factsheet \url{http://www.workandincome.govt.nz/documents/brochures/start-over-factsheet.pdf} or (Last accessed 24 July 2008)
In the six years between the time Start Over began in May 2002 and March 2008, 154 ex-offenders obtained work with a Start Over employer.\textsuperscript{361} No information is available in respect of whether these persons retained their employment.\textsuperscript{362}

3 \textit{Feedback from Work and Income clients}

Whilst it is encouraging that there is an initiative specifically targeted at ex-offenders, it is important to remember that ex-offenders may find the job seeking process difficult, confusing and onerous. Many will not have been in the labour market for a number of years and will find it difficult doing things such as putting together a curriculum vitae because they will be unable to offer recent work history or work references. Even providing suitable character references may be problematic. In addition, many will face multiple barriers to employment such as addictions, lack of work ethic and social skills, and their criminal convictions.

A recent research project undertaken by the Salvation Army’s Social Policy and Parliamentary Unit entitled “Forgotten People: Men on their Own”\textsuperscript{363} released in late 2006, contains feedback on Work and Income (or “WINZ” as it was referred to) from the men surveyed. Whilst not all of the men were ex-offenders, many were, and all presented with the types of problems common to ex-offenders such as mental health issues, isolation, lack of support, lack of finances, and addictions.\textsuperscript{364}

Regarding their dealings with Work and Income for the purpose of obtaining income support, the men expressed the view that they found dealing with “WINZ” difficult. They stated that the case managers were not proactive in informing them of their benefit entitlements, and that they found out about their entitlements from community agencies or by word of mouth.\textsuperscript{365} One man, however, credited a prison-based Work and Income staff member with proving this information.\textsuperscript{366} A few expressed the option that the service was acceptable, and that the quality of the caseworker determined the quality of the service.\textsuperscript{367}

\textsuperscript{361} Figure obtained from the Chief Executive of the Ministry of Social Development on 4 March 2008 as a result of an Official Information Act request by the author.
\textsuperscript{362} Ibid.
\textsuperscript{363} Forgotten People: Men on their Own, above, n349.
\textsuperscript{364} A discussion of such barriers faced by ex-offenders is discussed in chapter 11.
\textsuperscript{365} Forgotten People: Men on their Own, above, n349.
\textsuperscript{366} Ibid.
\textsuperscript{367} Ibid.
Feedback from men wanting to find work was generally negative. Most reported obtaining work through daily labour hire firms, although some reported having obtained subsidised employment through “WINZ”. The research reported men having been dismissed once the subsidy ended. Men who enrolled with “WINZ” reported feeling dissatisfied with the attitude of “WINZ” staff to people with a history of imprisonment or addictions. Men reported feeling pushed into work that was unsuitable or overlooked for the better jobs.\(^{368}\)

4  **Summary**

Ex-offenders, particularly those who have been imprisoned, often face significant barriers to obtaining and retaining employment. They may find it difficult and confusing to access the types of services aimed at the general job-seeking population. Indeed, standard steps such as being able to compile a curriculum vitae that may be attractive to employers or providing references may be difficult if not impossible with patchy work histories and significant criminal records. Ex-offenders who have never been imprisoned may feel more comfortable accessing mainstream services, however their criminal record may still cause them to feel isolated from opportunities. Offender-specific initiatives appear necessary, but must be administered by staff with the appropriate training and disposition needed to work with ex-offenders. Obtaining feedback from ex-offender Work and Income clients and tracking their employment path over a period of, for example, five years, would provide valuable evidence as to the appropriateness of the various services, and it could show whether employment was retained and if not, the reasons for that. Currently there is no data held by Work and Income, Corrections, or indeed any Crown agency, which provides this type of information.

II  **INITIATIVES OPERATED BY NATIONAL NON-GOVERNMENTAL ORGANISATIONS**

A  **Large National Organisations**

1  **New Zealand Prisoners’ Aid and Rehabilitation Society Inc.**

The New Zealand Prisoners’ Aid and Rehabilitation Society Inc. (NZPARS) is a national organisation with twenty local societies throughout New Zealand. NZPARS has approximately 40 paid employees and 500 volunteer workers. NZPARS has contracted with the Department of Corrections to provide reintegration services to offenders and assistance to their families and receives the majority of its funding from Corrections. Due to its level of government funding, it is perhaps not entirely accurate to speak of NZPARS as an

\(^{368}\) Ibid.
“NGO”, although certainly NZPARS is a social service agency which also relies to a large
degree on volunteer workers and thus is not a government agency in the usual sense.

One of the key tasks for NZPARS is assisting ex-offenders to obtain employment.369 As
part of this, local societies work to build relationships with local employers willing to
employ ex-offenders. NZPARS also refers ex-offenders to local agencies providing
specific employment training and assistance.

It would appear therefore, that PARS’ role in this respect is primarily one of liaison and
referral, and that the extent to which PARS’ is able to help ex-offenders find employment is
largely dependent upon the resources each society devotes to networking with employers
and developing awareness of training and employment opportunities. Anecdotally, this
varies considerably between the different societies.

2  Prison Fellowship New Zealand

Prison Fellowship New Zealand (PFNZ) one of 120 prison ministries affiliated by charter to
Prison Fellowship International.370 PFNZ is a faith-based organisation staffed by a core
group of paid employees supported by volunteers with 17 committees across New Zealand,
and derives its funding from local sources. PFNZ provides programmes designed to make
a positive difference in the lives of offenders, their families and victims of crime.

The most recent PFNZ reintegration initiative is Operation Jericho. Operation Jericho was
established in July 2003, as the reintegration arm of the faith based unit that opened at
Rimutaka Prison on 16 October 2003. Operation Jericho was initially funded by the Tindall
Foundation and a Lottery community grant. By 2005 Operation Jericho was contracted by
the Ministry of Social Development and Corrections which each contributes equally to its
funding. Operation Jericho is described as:

“a community-based programme for prisoners and ex-prisoners at risk of re-offending. The
programme encourages, trains and supports local churches in building their capacity to more
effectively minister to prisoners, ex-prisoners and their families. This is accomplished by
facilitating a relationship between churches, ex- prisoners, the Department of Corrections, and
other community organisations in order to reduce the societal, resource and personal barriers
ex-prisoners often face in attempting to make a successful transition back into society. The
programme also seeks to increase the ex-prisoners’ level of attachment to social institutions in
the community, thereby reducing the likelihood of their resorting to anti-social behaviour.

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369 See Department of Corrections, Support Organisations
370 PFNZ’s website can be found at http://www.pfnz.org.nz.
Ex inmates often have significant personal issues that need to be addressed before they are ready for employment. For many, the key to moving towards work can be discovering or reaffirming their identity and self-respect. Work and Income wishes to purchase services that will recognise specific needs and although the service will have a clear employment focus, it will also need to take into account the spiritual and physical well being of the participants. It is for this reason that the Department of Corrections and the Ministry wishes to contract with Prison Fellowship of New Zealand for the purchase and delivery of specific services for ex-inmates.**371**

Operation Jericho has strict criteria for selecting prisoners for the program who were not already in the Faith Based Unit, and only a “select group”**372** of inmates met the criteria.

46.0 Selection Criteria for the Operation Jericho Programme**373**

46.1 All FBU inmates are eligible for the Operation Jericho Programme, subject to the provisions of Section 49.

46.2 All Work and Income and other referrals are considered in terms of whether the client is likely to:

a) Reduce offending behaviour as a result of being on the program;

b) Actively seek opportunities to engage in productive and sustainable work as a result of being involved in the program

c) Address other reintegrative needs with the support of OJ

d) Respond to the opportunity to work with a mentor;

e) Take advantage of the spiritual guidance offered through OJ staff;

f) Respond to support offered by OJ staff in the long term;

g) Comply with the conditions of the program;

46.4 Following the client’s PFNZ Reintegrative Needs assessment, (Refer Section 49.9), and ‘Coping Release’ interview, (Refer Section 49.15.) the Field Officer and Manager, Reintegrative Services Manager, shall review the case, to determine the client’s suitability for the program.

46.5 Where a referred client demonstrates a clear unwillingness to comply with the conditions of the OJ Programme, or on the evidence, is unlikely to address their

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371 Extract taken from recent correspondence between PFNZ and Corrections.
372 Ibid.
373 From the Operation Jericho Operations Manual.
offending behaviour or seek productive work, the OJ Manager, Reintegrative Services should consider exiting them from the program. In that case, OJ staff will complete an ‘End of Programme’ report. (Appendix Twelve)

Operation Jericho is therefore directed at assisting inmates who are motivated to address their offending. Under this initiative, church-based mentors assist prisoners and ex-prisoners to build links to their community, and assist them to meet fundamental needs, including obtaining accommodation, employment, health care and managing finances, as well as developing life and relationship skills. The duration of the mentor-offender/ex-offender relationship was conceived as lasting between six months and two years.

According to a source within PFNZ, Operation Jericho worked well until the introduction of the Reintegration Teams\textsuperscript{374} in early 2007. From that point onwards, the Reintegration Teams reportedly began referring to Operation Jericho inmates who did not meet its criteria, having allocated to Corrections and Work and Income the inmates outside of the “high risk/high needs” criteria, leaving the balance to PFNZ and PARS.\textsuperscript{375} Whilst open to high risk / high needs inmates, increasingly, those refereed to Operation Jericho were solely this type of inmate, many of whom did not fulfill the fundamental Operation Jericho criteria of willingness to change their behavior. This practice reportedly placed extreme stress on Operation Jericho staff, and by the end of 2007 it became clear to PFNZ that the practice was unsustainable and could not continue.\textsuperscript{376} As a result, PFNZ began a process of considering the future of Operation Jericho.

Currently it is understood Corrections are in the process of conducting a substantial review of prisoner reintegration over the 2008 – 2009 period, part of which is necessarily a funding proposal to government. Operation Jericho’s funding appears to be uncertain.

To compound matters, Operation Jericho’s other significant funder, Ministry of Social Development/Work and Income, adopted a policy whereby all contracts would be managed at the national level, and that as part of this, its funding for Operation Jericho would be re-tendered. Reportedly, the successful tenderer would be expected to place 42 released prisoners into employment each year.\textsuperscript{377}

\textsuperscript{374} Referred to in chapter 3.

\textsuperscript{375} From recent correspondence between PFNZ and Corrections.

\textsuperscript{376} Ibid.

\textsuperscript{377} Ibid.
Given the current uncertainty surrounding prisoner reintegration policy and funding, the future of Operation Jericho is uncertain.\textsuperscript{378}

B “Grassroots” Initiatives

Grassroots initiatives play a highly significant role in ex-offender employment. Being a part of the local community and in touch with local people and employers, they are well placed to assist ex-offenders to find employment. Some of these, such as local NZPARS societies, do this by linking in with local employers and supporting ex-offender to find work. Others operate a model whereby they employ ex-offenders (and often other disadvantaged groups such as long term unemployed as well) to work in their own industries and assist them to move to other employment where appropriate. It is to these types of organisations that other organisations, such as NZPARS, may refer ex-offender clients. Demand for such organisations appears to well exceed supply, and anecdotal evidence suggests that these types of initiatives are effective both in assisting ex-offenders to develop sufficient skills and work ethic to remain in employment, and in reducing reoffending.

Community based organizations draw their funding from a variety of sources, such as government and local government, philanthropic entities, statutory trusts, local trusts, and service organizations. As funding grants must be applied for periodically, with no guarantee of repeat funding, there is often a high degree of financial uncertainty within community organizations, which may affect their ability to plan ahead and attract and retain staff.

1 Genesis Trust\textsuperscript{379}

Genesis Trust is an example of a community initiative that appears to address both the “supply” and “demand” side barriers to the employment of ex-offenders (as discussed in chapters 11 and 12). Genesis Trust\textsuperscript{380} is a not-for-profit organisation operating out of Palmerston North that works to provide rehabilitation and reintegration services to ex-offenders and the long-term unemployed.

(a) Background

Genesis Trust is the brainchild of Dr Glen Haddon. Dr Haddon’s tertiary qualifications include a law degree, a postgraduate diploma in social science and Masters and Doctoral degrees in psychology. The Trust is now in its eleventh year of providing services to those

\textsuperscript{378} Ibid.

\textsuperscript{379} The following information has been gathered during a site visit by the author, which included discussions with key staff and the viewing of relevant documentation.

\textsuperscript{380} The Genesis Trust website can be accessed at \url{www.genesistrust.org.nz}. (last accessed 28 September 2008).
who face significant barriers in the labour market, and over 400 men and women have taken part in the programme to date.

The Trust owns a 700 acre farm in nearby Wairarapa and a firewood yard in Palmerston North. The Trust produces a range of firewood and landscaping materials and also provides a range of services to the public which include property maintenance, tree planting and removal, and counselling.

(b) The philosophy

The programme’s philosophy can be summarized as follows:

[T]he issues and barriers to employment faced by the target group are broadly attitudinal, behavioural, competency and training related. …[T]he will to work and be employed is a critical factor but [the Trust recognizes that] this is strongly interrelated with attitudes towards authority and society, and with the individual’s own life experience, competencies and capacities…[A] holistic approach is crucial in addressing the often quite complex barriers faced by the target group.\(^{381}\)

The sole purpose of the Trust is to “integrate the target group into permanent employment”\(^{382}\) which the Trust recognises as a key component in successful reintegration to the community.

(c) Staff

Genesis Trust staff come from a variety of backgrounds, bringing a variety of relevant expertise to their respective roles, including educational, management, and trade qualifications and experience.

(d) Participants/Employees

Genesis Trust caters for persons who are particularly disadvantaged in the labour market. Whilst ex-offenders make up a large proportion of employees/participants, the Trust also accepts long term unemployed and those with physical or mental disabilities. From all accounts this mix works well and indeed, for those concerned, reflects the reality of living and working in the community. Rather than exerting a negative influence on the non-offenders, the experience of the Trust is that the ex-offenders develop considerable empathy for, and become very protective of, those with disabilities - a positive outcome for both parties.

\(^{381}\) Genesis Trust Programme document.

\(^{382}\) Ibid.
Participants generally come to the Trust in receipt of a benefit from Work and Income, however they gradually move to the status of employees. Once participants have demonstrated they are ready to move on to other work in the community the Trust facilitates this move. A key aspect of the programme’s philosophy is to ensure participants are fully supported in their employment and only move on to employment outside the programme when they are deemed to be ready for such a move.

The Trust accepts all who wish to participate in the programme and, to date, has been able to keep up with the demand for employment.

The Trust also works in with the Department of Corrections by acting as a community work provider. Where those on community work sentences wish to remain with the Trust, they are able to do so.

(e) The Genesis Trust Programme Model

Participants work within the “Trust’s enterprise in a 40 hour week employment context”. During the time participants are on the programme, they “are exposed to the full range of interventions, assistance, support and training that the Trust provides…including employment placement and in-work support.”

The work itself is quite physically demanding, but for many will also be challenging due to the new skills they must learn. Moreover, a team environment exists which requires participants to work co-operatively with others, and thus social skills are gained, along with work skills.

Perhaps a key aspect of the programme’s success is the length of the programme. Unlike many other employment initiatives and rehabilitation programmes, programme length is not static, but depends upon individual participants requirements for ongoing learning and support. Whilst a typical length of involvement with the programme is between three and eighteen months, participants remain as long as they require. In one case a participant moved into other employment after six years with the Trust. This practice recognizes the damage that can be done - both to a person’s self esteem and to employer willingness to accept employees from the target group - by placing a person into the labour market before they are ready.

(i) The curriculum

383 Ibid.
384 Ibid.
The programme consists of both classroom-based and workplace-based components. In the classroom, participants are involved in a variety of activities, including discussion and debate, role playing, task completion and problem solving exercises, personal reflection and group discussion, and the use of computers and other multi-media facilities. In the workplace, participants undertake “‘hands on’ activity, teambuilding exercises, leadership exercises, machinery and systems fault finding and remedying exercises, [and] tutor/supervisor demonstrations”. The Genesis Trust model is premised on the belief that “learning/training is most effectively achieved when delivered within the context of the job”. Thus, classroom work is followed by monitored tasks in the workplace, with the aim of immediately reinforcing prior learning and providing staff with the opportunity to assess where further work is required. The Trust states that:

> [a]cross the whole process, we are able to identify cognitive impairment, interpersonal and other social problems, learning difficulties such as literacy, numeracy, comprehension etc and, importantly, motivation and attitudinal problems. Typically, we will then provide one to one tuition and counseling type intervention as required to address areas needing further attention.385

Specifically, the programme consists of four modules: Life skills, employment skills, general workplace skills and vocational/work experience skills.

The life skills module involves such things as developing literacy and numeracy skills, time management, finance and budgeting, understanding the expectations of the community and developing a feeling of belonging to a group. The employment skills module includes developing communication and problem solving skills, understanding employee and employer rights and obligations, developing an appreciation of the meaning of work and work ethics, and managing relationships with authority. The general workplace skills module covers such things as health and safety in the workplace and basic computer skills. Finally, the vocational skills/work experience module introduces participants to specific training dependent upon their particular interest and abilities. Where the resources needed fall outside the Trust’s realm of expertise and resources the Trust arranges placement within a local business.

(f) Relationship with the community

A critical part of the programme’s success relates to the Trust’s relationship with the community. The Trust takes great care in ensuring programme participants do not pose a risk to the community by exercising caution in respect of the types of work activities

385 Ibid.
participants are permitted to engage in, for example, by allowing only trusted employees to have direct contact with the public whilst at work. The Trust has cultivated positive community relationships and is now recognized as a provider of valued staff to local employers.

The Trust continues to provide ongoing support, both by way of telephone support and site visits, to both employees and their community based employers once a participant leaves the programme. Whilst the period of support is three months, it is Trust policy to be available to former participants indefinitely, and reportedly many former participants remain in contact with the Trust years after exiting the programme.\textsuperscript{386}

The Director and developer of Genesis Trust is critical of initiatives which simply place ex-offenders into the labour market straight from prison, often with little or inadequate support. This practice, Dr Haddon states, simply sets ex-offenders up to fail, and a negative experience of employing an ex-offender may also dissuade employers from employing ex-offenders in the future.

(g) Results

Based on its own records, the Trust estimates it achieves a success rate of approximately 90 per cent. Success is defined by a participant completing the programme and moving into community employment without re-offending. Given the length of the programme and the criteria for moving on to other employment (that is, when the person is deemed to be ready to do so), ex-offenders will generally be with the Trust during the period in which they are at the highest risk of re-offending. It stands to reason then, that successful completion of the programme is a good indicator of continued success upon completion. The Trust reports that:

Over the last year we have seen 29 individuals removed from benefit dependency representing between them approximately 135 years of benefit dependency and 44 years prison time. Along with the outcome of employment, however, our outcomes are measured in terms of reduction in criminal reoffending, improved family relationships, and skill and qualification acquisition. For example, in the last twelve months we have progressed five to Learner Driver’s Licence, two are progressing towards Restricted Driver’s Licence, one has obtained his Full Driver’s Licence and another is in progress.

\textsuperscript{386} Ibid.
(h) Accommodation

Whilst most participants must have their own accommodation, the Trust owns a property known as “Fellowship House” which provides accommodation for up to five programme participants at a time. Whilst there are strict rules attaching to residence in the house (such as no alcohol, no drugs no tobacco indoors), in all other respects residents live in a normal “flatting” situation just as they would in any other rented accommodation. Residents pay board and are responsible for their own meals and care. Fellowship House is for those programme participants who have no other accommodation available and who are committed to changing their lives in a positive way.

(i) Summary

The model employed by Genesis Trust encompasses the elements overseas research suggests are necessary for achieving sustainable employment and reducing recidivism. Key factors of success contained in the Genesis Trust programme are as follows:

1. Programme design which takes into account both the supply and demand sides of the employment equation;
2. Staff with appropriate expertise and experience to address the complex and manifold barriers to employment ex-offenders face;
3. A programme which provides actual employment, coupled with other measures such as training and counselling specific to the requirements of individual attendees;
4. Flexible programme length so as to permit attendees to remain until they are ready to move into other employment;
5. The cultivation of a positive relationship with the community and with employers; and
6. The provision of ongoing support to participants following programme completion and to their employers.

III SOME FURTHER CHALLENGES FOR DEVELOPING AND INTEGRATING COMMUNITY INITIATIVES IN THE CRIMINAL JUSTICE SYSTEM

One of the main problems identified in relation to developing and growing community initiatives is that successful programmes may not be able to be replicated elsewhere. Programmes which operate successfully in one locality may not successfully transplant to another. Certain areas may be more conducive to establishing the types of services which
are both suitable for ex-offender employment and respond to local demand. Community reaction to such programmes and community resources may vary from locality to locality, requiring a tailored approach and to a large degree the success of a programme will depend on the organisation developing strong relationships with the community. Further, a key factor in the success of community organisations is finding the right people to operate as key staff. As Bruce Dyer found in his study of habilitation centres, the quality and attitude of staff can make or break a programme.\textsuperscript{387}

Unlike a government or corporate organisation, which can attract key staff by way of attractive and competitive employment packages, community organisations cannot generally employ money as a means of attracting or retaining staff. Community organisations attempting to operate on meagre budgets often demand an enormous commitment on the part of key staff; often well beyond that for which they are remunerated. For this reason, community organisations require people who are extremely passionate about their work and for whom their work is more than simply a means of generating an income (to the degree that they will accept remuneration at a level often far below that which they could receive in non-community organisation employment). Such people are not always easy to find. Staffing of community programmes providing employment support to ex-offenders, being challenging, demanding and often draining work, would therefore need to be approached with a considerable degree of care to ensure the selection of appropriate staff.

Another challenge pertains to the interaction between government departments and organisations which are in many ways the antithesis of government. The striated, hierarchical operational and managerial approach employed in the governmental setting is often far removed from the approach used within community organisations, which often operate on a far more egalitarian basis, with a much flatter hierarchy, and where consultation with all staff often precedes key decision making. Thus, there is some challenge on the part of both governmental departments and community organisations to maintain an effective working relationship. However, the examples of community law centres and NZPARS demonstrate that such partnership can be successful.

\section*{A The Case for Government Recognition and Support of Community-Based Initiatives}

Corrections works co-operatively with the Ministry of Social Development to help ex-offenders locate work on release.\textsuperscript{388} Whilst it is encouraging to see this practical recognition of the importance of employment in the rehabilitation and reintegration process,

\textsuperscript{387} Dyer, above, n138, pp 68 – 69.

\textsuperscript{388} Discussed above.
a fundamental step is missing. It is argued there is a need for an intermediary step during which ex-offenders are prepared for successful labour force participation. Many ex-offenders, particularly those released from prison, are, for a number of reasons, not ready to enter employment. Many will have spent a number of years in an environment where a work ethic was not demanded, something which is in stark contrast to the demands of the labour market. The demands of working a full week and of interacting with employers and fellow employees may be too great initially. In addition, there will generally be other issues, such as untreated addictions, mental health challenges, social interaction difficulties and self esteem problems, which make retaining employment difficult. Thus, being put into employment only to lose it is likely to be destructive and compound a sense of failure.

An intermediate step is required for those offenders motivated to move out of an offending lifestyle. This step requires an acceptance that actively facilitating community support of offenders is a crucial part of the criminal justice system. An unfounded hope or unrealistic expectation that ex-offenders will somehow integrate and habituate in the absence of support would appear to be a poor foundation for such a critical time in the rehabilitative and reintegrative process. Stated like this, it hardly seems groundbreaking, as, after all, it is uncontroversial that support in the community is necessary for successful rehabilitation and reintegration to occur. However, the fact that the community organisations that provide such support struggle for funding and operate largely on the goodwill and commitment of staff and volunteers suggests community support is still not taken sufficiently seriously in criminal justice policy.

1 The Yellow Ribbon Project (Singapore)

Gaining the support of the public for measures that require expenditure to be directed at offenders or ex-offenders can be difficult. In an area as highly politicised as criminal justice such support is essential. The Yellow Ribbon Project\(^389\) in Singapore provides an example of the way in which social marketing can successfully turn something unpopular (employing ex-offenders) into a “badge of honour”.

Launched in 2004 by the CARE Network (Community Action for the Rehabilitation of Ex-Offenders), the Yellow Ribbon Project has the goal of providing “effective, seamless 'throughcare' for ex-offenders”.\(^390\) The Yellow Ribbon Project

\[O\]rganises public awareness programmes aimed at creating awareness of the need to give second chances to ex-offenders. It inspires corporations, grassroots organisations and


government bodies to support the rehabilitation and reintegration of ex-offenders and to raise funds for the Yellow Ribbon Fund. The Fund supports rehabilitative and aftercare services to ex-offenders, and social support services for their families.  

Supporting ex-offenders and their families is marketed as both socially responsible and laudable.

The CARE Network which runs the project was established specifically to “mobilize and facilitate the community to take action towards rendering appropriate support services to help ex-offenders and their families to reintegrate into the society”. The CARE Network is made up of a variety of governmental and non-governmental agencies, including the Ministry of Home Affairs, Ministry of Community Development, Youth & Sports, Singapore Prison Service, Singapore Corporation of Rehabilitative Enterprises, National Council of Social Service, Industrial & Services Co-operative Society Ltd, Singapore After-Care Association and Singapore Anti-Narcotics Association.

The Yellow Ribbon Project is but one example of how community attitudes can be altered through marketing and public education.

IV EMPLOYMENT INITIATIVES FOR EX-OFFENDERS: WHAT WORKS?

A  The Problem...

On the basis of the information discussed in Part 2 of this thesis, it is clear that ex-offenders may find it difficult to convince employers they should be preferred over another applicant without a criminal record. Even where the criminal record per se does not disqualify a person from employment, the inferences that employers may draw from an offending background may well be a turn-off for employers. Although a number of employers surveyed expressed a belief in giving a person a “second chance”, the responses indicated serious or repeat offenders who are honest about their criminal history will face significant barriers to gaining employment. Introducing measures that attempt either to force employers to hire ex-offenders or that remove their right to ask about criminal history are likely to be opposed and ultimately fail. Although the employers surveyed were not asked about their views on the “Clean Slate” legislation, their concern with recent, serious and repetitive offending suggests the offending covered by the Act would not be of undue concern. Overall, the employers gave the impression of being relatively fair and pragmatic, and more

391 Ibid.

concerned about whether a person would be a safe, trustworthy and reliable employee than with whether they had a criminal record *per se*.

A skilled employee with qualifications and a good appearance will be of little use if they are unable to be reliable and trusted. Reliability and honesty are perhaps also the most difficult attributes to acquire when they are absent. Whilst work skill and social skills can be taught and learned, reliability and honesty are more fundamental to a person’s core values and take time both to develop and demonstrate. There would seem to be little point in training and employment programmes that are purely skills based, unless they also address the development of a work ethic encompassing the ability to be a reliable employee who is able to be trusted. Development of a work ethic and the ability to prove reliability and trustworthiness takes time, and thus for those people unable to demonstrate these things based on past experience, short courses seem unlikely to provide a solution. Measures which encourage an open relationship between employer and employee and which provide ex-offenders and employers with appropriate support are preferred over measures which seek to prevent either criminal record discrimination or criminal record disclosure, at least in terms of ex-offenders within, for example, five years of conviction or release from prison (which ever is the latter). Measures that would allow ex-offenders to demonstrate an appropriate work ethic prior are especially favoured.

The presence of desirable traits and skills can be demonstrated to a potential employer in a number of ways, such as by providing positive references or referees (preferably from an employment context although not necessarily) and by demonstrating a solid work history. A sporadic or very limited work history is likely to act as a red flag to employers, in the absence of a suitable explanation.

B  ...*requires a commitment to pursuing a viable solution*

As stated in chapter 10, there is a considerable amount of research supporting the notion that, for ex-offenders, securing and sustaining employment is one of the key elements in reducing recidivism. However, on the surface there appears to be something of a paradox in that many studies into the effectiveness of various models of community-based ex-offender employment initiatives conclude that many such initiatives are largely ineffective. For example, studies by Frederick Englander,\(^{393}\) and more recently, Visher, Winterfield and

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Coggeshall\textsuperscript{394} examine a number of interventions – including in-work support and financial incentives – and conclude that on the whole, participants return to offending at the same rate as the general ex-offender population. However, such studies have tended to focus on historic initiatives due to lack of availability of data in respect of more recent interventions. Of their findings Visher, Winterfield and Coggeshall state that “the experimental design research on this question is small and does not include some of the promising community employment programs that have emerged in the last decade.” Conversely, there are numerous examples of programmes and initiatives which claim to be effective in assisting ex-offenders to remain in employment and in reducing recidivism.

The answer to this apparent paradox seems to lie, generally, with the fact that much of the research in this area is now out of date, and there is insufficient research in respect of recent initiatives to be able to contact the type of meta-analysis necessary to identify trends and commonalities in respect of what factors tell for and against a successful program. In New Zealand, there are/have been very few employment programmes for ex-offenders, and thus little or no attention has been devoted to evaluating them. Indeed no New Zealand examples of studies into ex-offender employment initiatives were able to be located to inform this paper. This problem is not unique to New Zealand.

The majority of the research into the effectiveness of in-prison vocational training originates from the United States, however research into post-release employment initiatives is lacking. In 2006, Visher, Winterfield and Coggeshall recognised that, whilst review literature pertaining to in-prison rehabilitative programs had been the subject of a quantitative synthesis,\textsuperscript{395} there had been no corresponding review of the literature on employment services programs for those with a recent criminal record who were not in custody.\textsuperscript{396} In research published in 2006, they assessed the effects of programs “designed to increase employment through job training and/or job placement among formerly incarcerated persons (i.e., those recently released), aimed at improving employment and reducing recidivism.”\textsuperscript{397} Finding an insufficient number of studies into such initiatives, they


\textsuperscript{397} Ibid.
broadened their criteria to include programs for persons over the age of 16 years who at any time had been arrested, convicted or imprisoned. Eight studies encompassing over 6000 persons were identified which met the research criteria, with arrest within the follow up period (generally 12 months) being the outcome measure.\(^{398}\)

Whilst concluding that the employment focused interventions for which data was available did not reduce recidivism, Visher, Winterfield and Coggeshall acknowledged that those studies were largely out of date and, as a result the characteristics of programme participants were not reflective of a “typical released prisoner in the 21\(^{st}\) Century”. Thus, the results should not be generalised to prisoners enrolled in current employment programs following release.\(^{399}\) The authors noted that many new employment-based initiatives are in existence, but have not, as yet, been the subject of study.

The situation in the United Kingdom is much the same. In a recent and significant (government funded) UK study into barriers to employment faced by ex-offenders,\(^{400}\) it was noted there were few examples of studies into community employment initiatives for ex-offenders that include criteria for measuring the effectiveness of policy initiatives aimed at assisting ex-offenders with such things as skills training and job search assistance, particularly those that considered the quality of the employment obtained.\(^{401}\) Reasons for this dearth of research included lack of realistic funding, and difficulties with developing realistic evaluation criteria.\(^{402}\) Rolfe states, “[a]lthough problematic, good quality evaluation is necessary, to see that funding is spent effectively and to ensure that offenders and ex-offenders are improving their employment prospects and are not wasting their time.”\(^{403}\) Of the studies that do exist, Rolfe notes that all address “supply side” barriers to ex-offenders obtaining and retaining employment (that is, characteristics of the offenders themselves) but fail to address the “demand side” barriers that include legislative and policy barriers, and the practices of employers themselves.

Rolfe refers to a comprehensive study of community initiatives which stresses this point. The Rainer Foundation and the Centre for Voluntary Sector Studies (1996) conducted

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\(^{398}\) Ibid p 2.

\(^{399}\) Ibid p 3.

\(^{400}\) Department for Work and Pensions, Research Report NO 155, Barriers to employment for offenders and ex-offenders, Part One: Barriers to employment for offenders and ex-offenders, By Hilary Metcalf, Tracy Anderson and Heather Rolfe, Part Two - A review of the literature, Heather Rolfe.

\(^{401}\) Department for Work and Pensions, Research Report NO 155, Barriers to employment for offenders and ex-offenders, Part Two - A review of the literature, Heather Rolfe, p 270

\(^{402}\) Ibid.

\(^{403}\) Ibid.
research on the role of the ‘third sector’ (voluntary organisations) in tackling employment among offenders and ex-offenders in selected European member states.\textsuperscript{404} Rolfe notes that this research is critical of the emphasis given to supply-side barriers in research of this nature, as amongst other things, such an approach misses the opportunity to develop initiatives that address employer’s concerns and therefore take an integrated approach to addressing barriers faced by offenders to labour force participation.\textsuperscript{405}

V DISCUSSION

As discussed in Part 2, barriers faced by ex-offenders to obtaining and retaining meaningful employment are two-fold. “Supply side” barriers relate to those characteristics of individual ex-offenders that may make them unattractive to employers. This may include such things as a non-existent or limited work history and lack of recent employment, active addictions, mental health issues, poor work ethic, a low level of reliability, as well as the nature and frequency of their particular criminal convictions. “Demand side” barriers relate to legislation and policy barriers to employment, as well as employer practices. Certain vocations will be unavailable to persons by virtue of their having criminal convictions, or due to the nature of those convictions. Employer prejudices and practices, such as pre-employment screening out of ex-offenders, come within this group of barriers.

Community initiatives aimed at reintegrating ex-offenders into the labour market should be cognisant of both categories of barriers, and work to address them where possible. Most initiatives, available research suggests, target the supply side barriers only. If such initiatives also focused upon developing a dialogue with local employers and working with them to address their concerns, and needs, better outcomes may be achieved. The Rainer Foundation research, for example, stresses the importance of targeting employment training to meet real market demands and suggests that allowing local employers input into developing programmes teaching the skills they require may increase their willingness to hire ex-offenders.\textsuperscript{406}

Whilst some of the needs of ex-offenders, such as literacy, numeracy and technical work skills, can be addressed by way of a structured course, the majority are complex problems, with complex roots and complex solutions. Thus, if the goal is to assist ex-offenders into employment, it must be recognised that this is a process and not something that can be

\textsuperscript{404} Ibid p 273 - 274.  
\textsuperscript{405} Ibid p 275.  
\textsuperscript{406} Ibid p 274.
taught as a course or short term programme. Indeed some problems may never be overcome, and will need to be managed over time rather than eliminated.

Work experience with employers can be useful, but should be approached with caution, especially in situations where ex-offenders have been unsuccessful in retaining work previously. The ability to be reliable and honest can be demonstrated through the employer observing the employee directly over a period of time, as for example, during work experience with the potential employer. However, care should be taken to avoid placing persons in situations in which they are at a high risk of failure, as the result may be a negative experience for both employer and the person on work experience. Thus there may need to be an intermediary step of supported work for some ex-offenders, particularly those who have served one or more prison sentences or who have minimal work history.

The model employed by the Genesis Trust (discussed above) appears to provide a very good model for preparing for the workforce those who face the most significant supply side barriers. By ensuring that their attendees and employees are not assisted into further employment until they have demonstrated not only technical competence but also a sound work ethic encompassing the ability to be a reliable and trusted employee, the likelihood that either a future employer or the person themselves will be disappointed is markedly lessened. Genesis Trust accepts that this process of developing a work ethic and the ability to interact successfully with other employees and with employers takes time. The Trust reports many persons remaining with them for over a year, with one person recently departing after six years with the Trust. This acceptance of the process of taking an ex-offender to a work ready stage being measured in years rather than weeks or months underpins the success of the model.

It makes eminent sense to take this approach rather than to put ex-offenders into the labour market too early and risk failure. A negative experience when hiring an ex-offender is destructive not only to the parties directly involved, but also to offender rehabilitation and reintegration generally, as employers may well be deterred from again “taking a chance” on an ex-offender.

Six key points emerge from an investigation of community initiatives assisting ex-offenders into employment. First, there needs to be clarity in terms of the philosophy guiding criminal justice. At present, rehabilitative aims are operating in competition with punitive aims, such that the place of neither is completely clear and thus not able to be pursued successfully in policy. Being clear about the role of each within the criminal justice system would pave the way for a more lucid criminal justice policy.
Second, the concept of exactly what constitutes a “criminal justice system” should be reviewed to include local community rehabilitative and reintegrative initiatives. To do so would give recognition to the fact that reintegration and rehabilitation are processes to be measured in years, and thus extend well beyond sentence expiry. Approaching criminal justice from this perspective would encourage government to be more amenable to, and supportive of, grassroots initiatives. Further, it would encourage a view of criminal justice in which it is made clear that the community has a critical role to play and cannot expect solutions to crime to be implemented solely from governmental level.

Third, in New Zealand there is a considerable void in Corrections’ practice between the time ex-offenders leave prison and their entry into the labour market. Despite the implementation of “reintegration teams”, the recent presence of Work and Income in prisons, and the availability of Work and Income services in the community, there remains the unaddressed problem that many ex-offenders are ill-equipped to enter into employment without some form of intermediary measures. Putting such persons into employment for which they are not ready not only sets them up for failure, but also has the potential to prejudice employers initially willing to employ an ex-offender against doing the same again. This is where grassroots initiatives have an important role to play, yet few exist and those that do face significant financial challenges, at least in the initial stages.

Fourth, it is important that grassroots initiatives are of a type that is able to produce positive results. Initiatives that are poorly conceptualised and/or poorly run may be destructive both to the ex-offender and their employer. The following, although undoubtedly not exhaustive, are factors telling in favour of a successful initiative include:

- Programme design which takes into account both the supply and demand sides of the employment equation;
- Staff to whom attendees can relate, including the employment of “graduates” as staff members;
- Initiatives which provide actual employment, coupled with other measures such as training and counselling specific to the requirements of individual attendees;
- Initiatives that permit attendees to remain until they are ready to move into other employment. In this regard, programme duration should be measured in years rather than months;
- Initiatives which cultivate a positive relationship with the community and local employers;
- Initiatives that recognise the strengths and talents of attendees, and which work to cultivate the same;
• Initiatives that actively assist attendees to address issues such as obtaining accommodation, transport, clothing, and health care; and
• Initiatives which allow attendees to progress to positions of greater pay and more responsibility.

Finally, caution must be exercised when attempting to replicate a successful programme in another locality, as all aspects may not translate well without modification. The expertise and knowledge of those involved in successful programmes can however be utilised, in conjunction with consultation with local community groups, to seed local initiatives in other areas.
PART 5

A HUMANISTIC LENS FOR CRIMINAL JUSTICE
Chapter 14

A HUMAN NEEDS APPROACH TO CRIMINAL JUSTICE

Human development...is a process of enhancing human capabilities—to expand choices and opportunities so that each person can lead a life of respect and value.

UNDP Human Development Report 2000

I “HUMAN” DEVELOPMENT

The field of development seeks – in the most simplistic terms - to address the issues faced by developing countries. Development as a discipline has its roots in economic theories (“development economics”), later incorporating politics, and from there a variety of other disciplines, such that the field of development is now a multi-disciplinary branch of the social sciences.

Over the past two or so decades, the development field has become increasingly focused on human security, and on understanding the links between security issues and development. This branch of development studies, often called “Human Development”, examines how inequality and security problems in developing countries affect other states. Whilst primarily concerned with the issues faced by third world countries and with related security issues between states, this field of development has relevance beyond its traditional sphere. That is to say, the learning pertaining to development and security issues at a human scale is of relevance to security issues within human societies across the board; not only on a state scale and not only in relation to third world countries. In particular, this field of study – pertaining as it does to those factors within societies that create insecurity and conflict and involving the balancing of competing considerations - has much to offer in terms of its relevance to understanding crime and developing justice policies.

The broad field of criminal justice requires consideration not only of how to punish crime, but of how initial criminal offending can be lessened and how recidivist offending is to be addressed. This requires a convergence of uneasy bedfellows – enforcement and punishment on the one hand and offender rehabilitation and reintegration, and more broadly social justice and human rights generally, on the other.

The field of Human Development provides an example of the convergence of human rights discourse with the discourse of development, providing an example of how divergent strategies can be reconciled. The UNDP Human Development Report 2000 states:
Until the last decade human development and human rights followed parallel paths in both concept and action—the one largely dominated by economists, social scientists and policy-makers, the other by political activists, lawyers and philosophers. They promoted divergent strategies of analysis and action—economic and social progress on the one hand, political pressure, legal reform and ethical questioning on the other. But today, as the two converge in both concept and action, the divide between the human development agenda and the human rights agenda is narrowing. There is growing political support for each of them—and there are new opportunities for partnerships and alliances.407

In many ways, a similar observation could be made of the area of criminal justice: the pursuit of two different agendas, with neither influencing the other to any appreciable degree. The processes of enforcement and punishment of crime, and the management of offenders has largely proceeded without an overarching (or, at least, obvious) philosophical rationale. Certainly various philosophical themes have dominated at different times in New Zealand; however there has never been a truly integrated criminal justice philosophy which has provided a clear vision towards which law, policy and practice have been aimed. Criminal justice, involving as it does people and societies, requires a level of analysis which takes account not only of offenders and victims, but also society and social justice more generally. Criminal justice is as much about poverty, inequality and social isolation as it is about responses to criminal offending. As such, a transdisciplinary approach is required, which takes account of the social, economic and philosophical, as well as the legal, political and psychological factors pertinent to criminal justice drawn broadly. A narrow, offender-focused approach fails to see the wood for the trees. Criminal offenders do not spring forth into the world fully formed: they are created, and, whether we like it or not, remain part of society.

Perhaps then, rather than speaking of parallel paths, it is more helpful to speak of micro and macro perspectives, with the former describing the legislative, policy and political focus on the enforcement and punishment of crime and the management of offenders, and the latter relating to overarching philosophies of punishment, justice and social development. The micro has proceeded without a clear articulation of the macro, and with little or no clear articulation of how the two fit together. Whilst measures on the micro level should be focused upon achieving the macro goals, what has tended to happen is that micro measures have followed the path of least resistance, being directed by short term forces such as political “vision” and emotion rather than by overarching philosophical goals identified according to a process of robust, rational and informed debate. This may be due in large part to our political processes, in particular the fact that every three years our politicians are

seeking re-election. Even if we as a nation are not yet ready to de-politicise criminal justice issues, identifying criminal justice philosophies will be a useful tool in guiding us toward sound law and policy.

Whilst a simplistic (and no doubt initially effective from an incapacitation perspective) response is to “lock ‘em up and throw away the key”, this approach fails to adequately address crime prevention and is highly questionable both from an economic and a human rights perspective. Firstly, the inevitable building of increasing numbers of penal institutions and the housing of inmates long term is extremely expensive. Secondly, in light of significant evidence that prisons do not rehabilitate and that for a great many offenders the threat of significant prison terms do not deter offending, such an approach not only fails to tackle first offending, it also produces even more high-risk offenders upon eventual release.

The field of human development provides an alternative model for identifying causes of crime and formulating justice policies that go beyond punishment and in-prison “rehabilitation” to incorporate measures which address the causes of crime in a much broader way than traditional “Justice” policy tends to do. Where traditional Justice interventions end upon sentence expiry, a human development perspective for Justice opens the way to a recognition that, to be truly effective, Justice policy must extend beyond its traditional confines and into such areas as proper ex-offender support and official recognition of community rehabilitative and reintegrative initiatives, and even more broadly into coherence between Justice policy, social justice and equality generally. It must be said that there is limited support from Justice agencies for social agencies geared towards offender rehabilitation and reintegration, however it is submitted that the vast majority of criminal offenders are not having their rehabilitative needs met in the intensive or long terms way that many of them require.

Where there are limited resources, there is naturally a tension between what is perceived as “offenders rights” and the rights of society generally. The tension manifests itself in public outrages when offenders are seen to be receiving services or products to which they are seen as undeserving of. Put more broadly, there is a perceived conflict between competing rights. This, it is argued, is misconceived, as reducing recidivism naturally enhances community safety.

II  HUMAN SCALE DEVELOPMENT AND HUMAN NEEDS

Within the field of Human Development evolved, during the 1980s and 1990s, the idea of viewing development from the most fundamental level of human needs. Where previously
the field had been dominated by mechanistic social and economic theories and aggregate indicators, a sub-field of Human Needs or “Human Scale Development” emerged which works at the micro social scale by seeking to identify and satisfy basic human needs.

Economist and environmentalist Manfred Max-Neef, speaking in the development context, acknowledged the importance of the (vast) human needs literature and its influence in the psychological, philosophical, sociological, political and economic spheres. He states that “[n]owadays, it is accepted almost as commonplace that development and human needs are irreducible components of a single equation”. A Human Needs approach is a “new way of conceptualizing development” and means “acknowledging that the social and economic theories, which have sustained and directed the processes of development, are not only incomplete but also inadequate”.

Max-Neef argues that a transdisciplinary approach is critical, for whilst analysis of a problem at a micro scale may be the domain of one discipline (for example, a human being with a disease being a medical problem), the same problem on a large scale (an epidemic) requires the expertise of other disciplines. This logic applies equally to criminal justice – whilst an individual offender’s behaviour may be the domain of an appropriate medical specialist, the causes of crime and responses to it require the input of a host of other disciplines. Criminal justice is not solely the realm of those concerned with the enforcement, punishment and treatment of offenders, but requires understanding of the broader social and economic factors that erode human security generally.

A fundamental tenet of Human Scale Development, states Max-Neef, is that development is about people and not about objects. Max-Neef states that the best development process is “that which allows for the greatest improvement in people’s quality of life”.

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408 An “aggregate indicator” combines a collection of data into a single figure. For example, the Gross Domestic Product (GDP) is the standard measure of the value of the goods and services produced by a country during a specified period, and provides a broad indicator of economic living standards. Aggregate indicators therefore are very much a blunt instrument, particularly in instances where there is a great deal of variation across the data.


410 Also see Vern Redekop’s “Human Identity Needs Theory”, in which he discusses “need categories of meaning, action, connectedness, security, recognition, and being [or self-worth]” which, if unmet, result in conflict both within an individual and in respect of the individual’s interaction with others. V. Neufeld Redekop, (2002). From Violence to Blessing: How an understanding of deep-rooted conflict can open paths to reconciliation. Toronto, Ontario: Novalis.

411 Max-Neef, above, n 409, p14.

412 Ibid.

413 Ibid.

414 Ibid p16.

415 Ibid.
determines people’s quality of life is their ability to adequately satisfy their fundamental needs.\(^{416}\) Thus, Max-Neef stresses the importance of distinguishing between *needs* and *satisfiers* of those needs.\(^{417}\) According to Max-Neef, human beings’ “fundamental needs” include the needs of subsistence, protection, affection, understanding, participation, leisure, creation, identify and freedom. The way in which humans meet those needs are termed “satisfiers”. For example, food and shelter, according to Max-Neef are not “needs”, but rather satisfiers of the need for subsistence. Likewise, education is a satisfier of the need for understanding. As satisfiers and needs are interrelated, a single satisfier can meet a number of needs. For example, work meets the needs of subsistence, protection, participation, creation and identity.

### III Poverties and Pathologies

At the heart of Max-Neef’s analysis is the idea that where human poverties exist (“poverty” being employed in a sense beyond the purely economic to mean a need that is inadequately satisfied) pathologies will also exist. Max-Neef argues that, for example, long term unemployment creates pathologies, not only in individuals, but “collective pathologies of frustration”.\(^{418}\) Social isolation, marginalization and frustration of life projects create pathologies of fear.\(^{419}\) If traditional and orthodox approaches are maintained poverties will continue. Pathologies will therefore always exist and “new collective pathologies” will be generated within the short and long term. *There is no sense in healing an individual who is then expected to go back and live in a sick environment.*\(^{420}\)

A Human Needs approach to development therefore seeks to address social issues by approaching them from a perspective which views human beings as a whole,\(^{421}\) that is, by taking an approach that is “genuinely humanistic” and recognises the “constant tension between deprivation and potential that is so peculiar to human beings”.\(^{422}\) Such an approach not recognises what is lacking but also views needs as a resource to engage and motivate

\(^{416}\) Ibid, p16.  
\(^{417}\) Ibid.  
\(^{418}\) Ibid p19.  
\(^{419}\) Ibid.  
\(^{420}\) (The writer’s emphasis) Ibid p23.  
\(^{421}\) Ibid.  
\(^{422}\) Ibid.
Max-Neef argues that approaching human beings through needs “enables us to build a bridge between a philosophical anthropology and a political option”.\textsuperscript{424}

Approaching development in this way requires the engagement of communities and support for local initiatives. Max-Neef states that a human needs approach “cannot, by definition, be structured from the top downwards” or imposed by law.\textsuperscript{425} Rather, “it can only emanate directly from the actions, expectations and creative and critical awareness of the protagonists themselves”, with people taking the leading role and “horizontal networks” being developed.\textsuperscript{426} The role of the state is one of identifying, encouraging and reinforcing action by people and communities and of accepting “the coexistence of different styles of regional development within the same country, instead of insisting that ‘national styles’ should prevail”.\textsuperscript{427}

**IV WHAT CAN THE HUMAN DEVELOPMENT FIELD OFFER THE CRIMINAL JUSTICE FIELD?**

It is argued that the Human Needs model of development provides an alternative model for approaching criminal justice by providing a lens through which the complex social issues of crime and justice can be viewed and addressed. Rather than starting from a perspective that views offenders as somehow fundamentally different from the population at large, a needs-based approach recognises that there are fundamental needs common to all humans and then examines the means by which those needs are met. Offenders, to varying degrees, are meeting their needs in ways which are contrary to those accepted by society. Whilst a well-adjusted person may meet their need for identity, creation, leisure and participation by being a member of a sports team, or participating in a music group, one who is disaffected and feeling alienated from mainstream society may meet those same needs by, for example, “tagging” property.\textsuperscript{428} Placing a “tag” can be a means of defining territory, affirming one’s place in a group, providing excitement, attaining status, passing time and giving a person a sense of pride at seeing their “work” in public.\textsuperscript{429} Likewise, whilst one may work to buy a new car (which, for some, may meet their need for status and identity, as well as transport), another person may steal in order to obtain the car.

\textsuperscript{421} Ibid p24.
\textsuperscript{422} Ibid.\textsuperscript{p24.}
\textsuperscript{423} Ibid p38.
\textsuperscript{424} Ibid pp38, 67.
\textsuperscript{425} Ibid pp38, 63.
\textsuperscript{426} Placing graffiti.
Of course it may be true that not all crime is needs-based and almost certainly true that not all those who find it difficult to meet their needs resort to crime. However, it is argued that the majority of offending can be linked either to an inability or an unwillingness to meet fundamental needs through legitimate means. Providing hope that needs can be met legitimately, and perhaps even more completely by pursuing a legitimate path (for example, by allowing needs to be met in a manner absent negative or stressful aspects of offending such as the fear of detection, shame or social stigma), may encourage offenders to explore such options, should they be available. By then assisting those offenders motivated to meet their needs in a legitimate manner, far more will be achieved than ever will by pursuing an approach to offending that views offenders as somehow fundamentally different to non-offenders, or even as less than human, without the same needs as the rest of society.

An approach that views offenders as fundamentally different from the rest of society leads to quite extraordinary consequences. After all, what parent with an obnoxious teenager would send them to live with a gang to learn manners? And, yet, as a society we do this every day as part of our justice policy. Do we genuinely expect that this should somehow teach the young person a lesson and produce a better person? It seems extraordinary then, that we are collectively outraged when that same person leaves prison and re-offends, using it as yet another example of why we need “tougher” sentencing. And so the spiral continues.

If we truly wish to address offending and reoffending we must, at some point, accept that a different approach is needed. An escalation of punishment simply serves to escalate re-offending and intergenerational dysfunction and criminality. Max-Neef makes a criticism of dogmatic adherence to preconceived solutions driven by an irrational belief in the same, which makes any effective solution impossible. He states:

> We live and work within models of society that overlook the growing complexity of the real society in which we are immersed. Therefore, we watch the feverish and obsessive doings of the technocrats who design solutions before having identified where the real problems lie. We seek the justification of the models in the models themselves, so that when the solutions fail, it is not due to a failure of the model but to entrapments set up by reality. That reality, the presence of which is strongly felt, is not perceived as a challenge to be faced, but rather as a problem to be brought under control by re-applying the model with greater tenacity.

One cannot help but draw an analogy with justice policy and the increasing use of, and demand for the use of, imprisonment. Without a clear guiding philosophy, we will continue

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430 It is beyond the scope of this paper to conduct the level of analysis necessary to draw any conclusions in this regard.

431 Max-Neef, above, n409, p12.
to justify the use of imprisonment by its failure, and “reapply the model with greater
tenacity”. Thus, the tail continues to wag the dog.

Viewing offending and recidivism from the context of human needs provides a rational
platform for finding solutions that are both philosophically defensible and durable. It
recognises the complexity of offending, the links between criminal justice and social justice,
and the fact that a solution is not something that can simply be demanded of the powers that
be. Such an approach emphasises the role of family and community and thereby is
participatory in nature. Those who want the benefits of a safe society without any sacrifice
will find it easier to dogmatically endorse and demand an increasingly retributive path.
Even though the retributive cycle demands escalation to sustain its momentum, and although
it is doomed to failure, the perverse “feel good” factor of exacting retribution will be
sufficient to sustain the mantra.

Generally speaking, it is argued that a needs-based approach is preferable to a treatment-
based approach to habilitation/rehabilitation, although in some circumstances a combination
of the two may be appropriate. By assisting a motivated offender to meet their needs in an
acceptable manner, they are given the tools to continue to progress and build self esteem
through their own efforts and barriers to this process occurring will be identified and
addressed at a number of levels. Even initially unmotivated offenders may be encouraged to
adopt a new perspective. Whilst treatment is undeniably necessary for genuine illnesses
(such as addictions or mental illness), approaching offending *per se* as being “treatable” has
been shown to be ineffective. Not only does a treatment-based approach fail to address the
complexity of the offending, but by viewing the person as “sick” or in some way less than a
full human being, it serves to diminish rather than empower. Further, by focusing squarely
on individual offenders, such an approach to criminal offending neglects to address
causation and response at the community level, the policy level and the legislative level.
Max-Neef advocates a transdisciplinary approach to human development so as to tackle the
“web of complex issues that cannot be resolved through the application of conventional
policies founded on reductionist disciplines”.432 Such an approach is just as vital in the
context of criminal justice, where causation touches on all levels and areas of human life.

V THE IMPORTANCE OF WORK IN THE HABILITATION AND REHABILITATION OF CRIMINAL
OFFENDERS

Work features prominently in Max-Neef’s list of human needs. Subsistence, which is
necessary for physical and mental health, is achieved by having sufficient food and shelter.

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432 Ibid p15.
These things are achieved in an immediate sense by housing, feeding and clothing oneself, which in turn may be achieved by working. Protection is the ability to care for oneself and others, and to have control over one’s situation, and is achieved by having access to health care, social security and work. Participation in society, which, amongst other things, provides a sense of belonging and encourages receptiveness to new ideas, is achieved by having rights, duties and obligations, and employment. Creation, which is the ability to be inventive, curious and creative, is achieved by learning new skills, developing abilities and working. Identity, which provides a sense of belonging, stability and self esteem, is achieved through being involved in such things as work, cultural practices, customs, and religion which teach accepted values and norms.

Pathologies within society can limit the ability of people to meet their needs. A significant pathology identified by Max-Neef is unemployment. Extended unemployment, he states, causes a person to undergo an “emotional rollercoaster” wherein they experience shock, optimism, pessimism and, finally, fatalism/apathy wherein self esteem is at its lowest point. Max-Neef states:

> It is quite evident that extended unemployment will totally upset a person’s fundamental needs system. Due to subsistence problems, the person will feel increasingly unprotected, crisis in the family and guilt feelings may destroy affections, lack of participation will give way to feelings of isolation and marginalisation and declining self-esteem may very well generate an identity crisis...Extended unemployment generates pathologies.

In a society which provides government assistance to the unemployed, subsistence and protection needs may well be met without the need to work. However, in the absence of alternative activities, other needs that work satisfies – such as the needs of participation, creation and identity - may remain unmet, providing fertile ground for the erosion of self esteem, sense of identity and belonging, as well as for the development of deviant beliefs and lifestyles. The effect of intergenerational unemployment, although beyond the scope of this paper, is likely to result in a compounding of the worst of the unemployment-generated pathologies.

It is acknowledged that some fairly sweeping statements have been made. In broad terms however, for most people, obtaining and sustaining employment is likely to be a significant factor in maintaining an acceptable quality of life. If work is of such significance to people in general, there is no reason to believe that work would not serve exactly the same purposes

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433 Other pathologies include fear, violence and marginalisation.
434 Max-Neef, above, n409, p19.
for ex-offenders. However, obtaining and maintaining employment is, generally speaking, likely to be more difficult for ex-offenders than for the rest of the population.435

Of course there are those who have not offended who face significant barriers to employment. Physical or mental disability and illness, lack of work history, education and social skills is not by any means the domain of ex-offenders alone. However, ex-offenders face additional barriers by reason of their criminal history and the associated social stigma and, in some cases, legal barriers to employment that come with that. Therefore, all things otherwise being equal, an ex-offender is likely to face greater barriers to finding and keeping employment than a non-offender. Unfortunately, ex-offenders may be poorly equipped to overcome their barriers. For recidivist offenders particularly, the barriers are likely to be significant both in terms of their personal characteristics and motivations and in terms of the willingness of the labour market to absorb them.

The ability to obtain and sustain employment will be determined by such things as the extent and quality of a person’s work history, their level of education and/or relevant training, their interpersonal skills and, at the most basic level, their ability and willingness to be a reliable employee. For ex-offenders with little or no positive work history and/or education, securing and retaining employment can be difficult. For those ex-offenders whose problems are compounded by such things as poor physical or mental health, addiction issues, and lack of positive social skills, the task is that much harder.436 Unemployment amongst ex-offenders is a very real concern as it is widely accepted that employment is a key factor in addressing recidivism. The Department of Corrections has recognised “the link between employment, employment related training, and reduced recidivism”.437

Due to a lack of data in relation to ex-offenders who have served community sentences, the focus in relation to recidivism has been in relation to those who have served a term of imprisonment. Even then, there is no data available in relation to the numbers of released prisoners who obtain employment post release and whether they have been able to retain their employment.438

435 Barriers to ex-offenders obtaining and retaining employment are discussed in Part 3.


437 Ibid.

438 “The Department of Corrections does not have the reporting mechanisms in place to track the employment path of prisoners...[and] [u]nder the Privacy Act [1993], the Department cannot track the post-release employment path of prisoners.” Response from Corrections in response to request from the author for such data pursuant to the Official Information Act 1982 (February 2008). Such data collection would be possible with the consent of individuals and would provide valuable information in relation to such things as the numbers of prisoners who
From the available data, it is clear that those sentenced to imprisonment have a higher level of unemployment than the general population. In the 2003 prison census, only 4 per cent of prison inmates were reported as being in employment prior to entering prison. Slightly less than 30 per cent of inmates had been on a government benefit (20.1 per cent having received an unemployment benefit, 6.9 per cent having come from either a sickness or invalids benefit, and 2.4 per cent having come from a Domestic Purposes benefit). Three per cent are stated as having lived off the proceeds of crime. The income source for remaining 2 per cent is stated as “unknown”. At around the same time, the official unemployment rate for the general population of New Zealand was 4.7 per cent. It is of note that persons in the general population aged between 17 and 24 years tend to be over-represented in unemployment statistics (23.6 per cent in June 1993 compared with a national average of 9.7 per cent, and 17 per cent in March 2000 compared with an 11 per cent national average) and this same demographic, spanning only seven years, makes up approximately 36 per cent of the prison population. This is also the age group most likely to reoffend on release from prison.

In terms of educational qualifications of inmates, over half had no educational qualification, 13.3 per cent had a high school qualification, 1 per cent had a vocational qualification, and 0.3 per cent had a bachelors degree or higher.

Therefore, for many inmates – even without taking their criminal history into account - lack of educational qualifications coupled with a patchy or non-existent work history has the
potential to make obtaining employment problematic. When offenders with a poor work history do find work, retaining that employment may be difficult.

As international research demonstrates a strong positive link between employment and the reintegration and rehabilitation of ex-offenders, this is an area requiring far more attention than it currently receives in New Zealand.447

This brings us back to the importance of offenders being able to view a life without offending as a life in which their needs will be met. It may be difficult to persuade a person earning significant sums of money from crime that a menial job paying minimum wage will meet their needs (especially in light of the fact that a legal income will mean paying tax, along with other obligations such as outstanding child support, Work and Income debts, fines and reparation),448 however if there is a realistic prospect of being able to live on the wage and progressing beyond it to a higher income bracket, the choice may well become more attractive. Furthermore, it is not only income that comes with employment. There is a sense of pride and achievement of earning a living and providing for oneself and one’s family. Positive feedback in the work environment likewise helps to build self esteem. Obtaining work therefore must be seen as an achievable goal to offenders, as must moving beyond an entry level wage. Further, financial pressures which serve to make work uneconomic must be addressed so that offenders who want to work can afford to do so. Just as within the community there are those who persistently resist entering into employment, so too will there be those ex-offenders who are completely unmotivated to work. However, for those who genuinely wish to work but face significant barriers, appropriate and sufficient assistance is needed.

VI COMMUNITY INITIATIVES

Perhaps one of the most important aspects of Max-Neef’s work in terms of its application to criminal justice is the importance placed upon horizontal networks and grassroots initiatives. In New Zealand there are examples of local initiatives which are producing very encouraging results in terms of their ability to reintegrate and rehabilitate criminal offenders.449 These initiatives have developed in the context of the community in which they operate, and as stated previously, it will may be the case that there will be difficulty in

447 In-prison training and employment opportunities and employment assistance available to ex-offenders generally, and their employers, have been discussed in chapters 3 and 4.

448 The Salvation Army research project “Forgotten People: Men on their own” (above, n 212) which examines the situation of men living alone, highlights the problem of debts to government agencies and court ordered debts being a significant barrier to moving into employment due to the fact that the more they earned, the more money was then taken off them to repay such debts.

449 Discussed in chapter 13.
replicating them in other places. Such initiatives often are successful because of the particular people involved and their relationship with the local community. Whilst a direct “transplant” may not be appropriate or workable, the models they use may well be. Where government can be of assistance is not in attempting to standardise or corporatize these models, but rather in supporting the “seeding” of other local initiatives and the development of horizontal networks. A good example of a successful model is that employed by Genesis Trust (discussed in chapter 13). Whilst its success is undoubtedly due in large part to its particular director and staff, the expertise that exists within the Trust could be utilised to train and support other local initiatives using the same fundamental model and philosophy.

VII CONCLUSION

Viewing criminal justice through a Human Needs lens provides the type of “big picture” perspective needed to develop truly effective criminal justice philosophy and policy which addresses not only the effects but also the causes of offending. From such a perspective, “criminal justice” as a concept moves beyond the traditional aspects of enforcement, punishment and sentence management, by the inclusion of wider social justice issues generally. This is, it is argued, a way forward to achieving a more effective, just and robust criminal justice system.
Chapter 15

CONCLUSION

This thesis has examined the place of rehabilitation and reintegration in the criminal justice system with a specific focus on the ability of ex-offenders to engage in the labour market. The results of this study show that New Zealand’s criminal justice system fails to provide sufficient and appropriate rehabilitative and reintegrative services to ex-offenders. Specifically, there is an acute lack of follow through support and assistance upon release from prison or sentence expiry (for those who have been paroled), and for those on community based sentences. Whilst available research shows that appropriate, targeted assistance (such as that provided through intensive employment support, habilitation centres, and therapeutic communities) is effective in reducing recidivism, such measures play only a minor role in criminal justice policy. If reducing recidivism is a genuine criminal justice goal this must change.

The first part of this thesis examined and critically evaluated current criminal justice law, policy and practice from the standpoint of the reintegration and rehabilitation of offenders. It was demonstrated that criminal justice policy has become increasingly punitive over the past two decades and that this has had no effect upon reducing recidivism rates. It was argued that current measures within the criminal justice system aimed at rehabilitation and reintegration, whilst in line with international best practice standards in terms of their implementation within the Corrections system, are inadequate in that there is little or no “throughcare” beyond sentence expiry. Stated as being one of Corrections’ two main goals, offender rehabilitation and reintegration is being subverted by political accession to the “tough on crime” lobby. As a result, criminal justice policy is politically driven, as opposed to being guided in a principled manner, and lacks a clear guiding philosophy.

The second and third parts of the thesis examined barriers to ex-offenders being able to integrate into the labour market. First, a survey of a small group of Christchurch employers examined their attitudes in relation to employing an ex-offender. Most of the employers surveyed said they asked applicants whether they had a criminal history, but only a minority asked for formal proof of the response given, taking applicants at their word. It was found that whilst roughly half of the employers surveyed were willing to hire an ex-offender, ex-offenders who had committed more serious offences, or who had a history of repeat offending, would likely struggle to gain employment if they disclosed their criminal history.
Secondly, the research then explored “supply” and “demand” barriers to labour force participation by ex-offenders. The literature and experience demonstrates that ex-offenders, particularly those who have an extensive offending history, are likely to be significantly disadvantaged in the labour market both in terms of their (real or perceived) particular characteristics and in some cases by legal exclusions to employment in certain sectors. A significant “demand side” barrier identified related to employer unwillingness to hire a person who they felt posed an increased risk or who would require additional resources or supervision. Related to this was employer concern in respect of the process through which they must go to dismiss an unsatisfactory employee, and the risk of a personal grievance process being brought against them as a result. Thus, employment laws aimed at the protection of employees may have the effect of acting as a barrier to employment for persons most disadvantaged in the labour market.

The fourth part of the thesis explored the range of community-based initiatives assisting the employment of ex-offenders. It was argued, *inter alia*, that measures aimed at assisting ex-offenders into employment may in fact be counterproductive if they place ex-offenders into employment before they are ready. It was argued that a critical step is missing in current Corrections/Work and Income practice, that is, adequately supported community-based preparation for, and entry into, employment. The model employed by community based training and employment provider Genesis Trust was suggested as being exemplary in that regard, and the case was made for government support for the “seeding” of other similar community-based initiatives.

Finally, the research suggested an alternative perspective from which to view criminal justice, namely, through a “human needs” lens. Offenders and ex-offenders, it was argued, have the same needs as other members of the community, and their ability to adequately meet their needs in a legitimate manner is a critical aspect of their rehabilitation. It was argued that, whilst income support is available to meet subsistence needs, employment fulfills a number of other important needs (such as those pertaining to participation in society and a sense of identity) that are not met by receiving a benefit.

A human needs analysis of criminal justice demands the inclusion of the post sentence expiry phase into the conceptualization of the “criminal justice system”. The most critical phase in offender rehabilitation for those who have been imprisoned is that which occurs post release, as this is the period during which released inmates will be again attempting to meet their needs on their own, in the community. For those on community-based sentences,
their needs must be met immediately and therefore the relevance of the type of support discussed above is not limited to ex-inmates.

Whilst it has been argued that ex-offenders should be understood as having the same needs as the general population, it does not follow that these needs can be met without additional, targeted assistance. Being able to adequately target such assistance requires an understanding of individual offenders, something the “one size fits all” approach of large organisations struggles to deliver. Community organisations are the most appropriate vehicle for delivery of such services.

In sum, this thesis has demonstrated that a vital factor in successful rehabilitation/reintegration is adequate and appropriate support during the period where an ex-offender is most at risk of reoffending, and that this will often need to be measured in years rather than weeks or months. It has further been demonstrated that sustainable employment for ex-offenders is a key factor in their successful rehabilitation and reintegration, and that employment issues are far more important to the reintegration of offenders than is currently accepted in both theoretical writing about criminal justice and in criminal justice policy.

As a result, it has been argued that a conceptual shift is required whereby the criminal justice system encompasses not only the enforcement of the criminal law and the imposition and management of sentences, but also the period during which ex-offenders are most at risk of reoffending. The time is well overdue for this to be recognised and given effect.

Whilst this may be politically difficult, overseas experience, as discussed in chapter 13, demonstrates that targeted social marketing and education can foster public support for measures that aim to rehabilitate and reintegrate ex-offenders. As reducing recidivism is consistent with the protection of society, Corrections’ twin goals are not incompatible with one another and it is argued both are best achieved by putting in place appropriate “throughcare”.

In the employment context, support and assistance of offenders, where employers are aware of their criminal history, is preferable to legislative intervention to conceal criminal history or including it as a ground of non-discrimination in human rights law.

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Discussion with various persons subject to the criminal justice system, and their families.