ORDER PROHIBITING PUBLICATION OF D'S NAME AND ANY PARTICULARS LEADING TO HIS IDENTIFICATION.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2018-404-000237
[2018] NZHC 3349

UNDER	Section 12(1) of the Criminal Records (Clean Slate) Act 2004
BETWEEN	D Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing:	1 October 2018
Counsel:	RD Mulgan for Appellant RMA McCoubrey for Respondent
Judgment:	17 December 2018

JUDGMENT OF DOWNS J

This judgment was delivered by me on Monday, 17 December 2018 at 4 pm.

~~*Registrar*~~*/Deputy Registrar*

J. A Wells
Deputy Registrar
High Court

Solicitors/Counsel:
PH Surridge, Porirua.
Crown Solicitor, Auckland.
RD Mulgan, Upper Hutt.

A novel issue

[1] The Criminal Records (Clean Slate) Act 2004[1] enables a Court to conceal, in confined circumstances, an applicant's criminal record. On such an application, the Court must balance "the interests of individuals in concealing their criminal records against the wider public interest in the safety of the community (recognising ... an awareness of an individual's previous convictions is appropriate in certain cases)".[2]

[2] In 1986 and 1987, D committed sexual offences against a boy.[3] He pleaded guilty and received a non-custodial sentence. D has not been convicted of any criminal offence since. In 2018, D applied to the District Court for an order concealing his criminal record. Judge L I Hinton declined the application.[4] D appeals. This appears to be the first case of its type to reach the High Court.

The Act

[3] The Act deems an individual with a criminal record not to have one—and hence have a clean slate—if he or she meets the Act's eligibility criteria.[5] Consequently, the individual may lawfully tell a prospective employer—and others—he or she has no criminal record.[6] Application is not required; the Act's effect is automatic. But obviously, the individual must meet the Act's eligibility criteria.[7] These are multi-faceted. The three most significant aspects require the individual:

(a) *Never* to have been sentenced to a custodial sentence, the most obvious example being any term of imprisonment.[8]

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1 The Act.
2 The Act, s 10(5).
3 Crimes Act 1961, ss 140(1) and 140A(1). Indecency with a boy under 12 and indecency with a boy between 12 and 16. These offences were repealed by the Crimes Amendment Act 2005.
4 *D v Police* [2018] NZDC 13070.
5 The Act, s 3(2)(a).
6 Section 14(2).
7 Section 7.
8 Section 7(1)(b). An exception exists in relation to a conviction that attracted a custodial sentence if the offence has subsequently been abolished and not replaced; see s 10(1). A suspended sentence that did not take effect was not a sentence of imprisonment under the Criminal Justice Act 1985 (see s 2(1) of that Act), the enactment governing D's sentence.

(b) To have completed a rehabilitation period, meaning he or she has been conviction-free for the last seven years.[9]

(c) Never to have been convicted of a specified offence.[10]

[4] The Act defines specified offence by listing a series of sexual offences, largely against the young or vulnerable.[11] Which leads to the important exception at the heart of this case: a person with a conviction for a specified offence who otherwise meets the Act's eligibility criteria may apply to the District Court for an order that conviction "be disregarded" as a barrier to eligibility.[12] If the Court grants an order, the applicant is treated as if he or she meets the eligibility criteria. And so, deemed to have a clean slate. On such an application, the Court:[13]

> ... must balance the interests of individuals in concealing their criminal records against the wider public interest in the safety of the community (recognising that an awareness of an individual's previous convictions is appropriate in certain cases).

For ease of reference, I call this the balancing test.

[5] An unsuccessful applicant may appeal to the High Court, and if still unsuccessful, the Court of Appeal.[14] These appeals are rehearings.[15]

[6] Unsurprisingly, the Act creates exceptions to its regime. For example, if someone has applied to act in a role predominantly involving the care and protection of a child or young person, he or she must disclose any criminal record.[16] So too someone applying for a firearms licence.[17] Other exceptions also exist.[18]

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9 The Act, s 7(1)(a).
10 Section 7(1)(d).
11 Section 4.
12 Section 10(3).
13 Section 10(5).
14 Section 12(1) and (2).
15 Section 12(4). So, *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 applies. See also the discussion in *Taipeti v R* [2018] NZCA 56, [2018] 3 NZLR 308 at [41]–[65].
16 Section 19(3)(e).
17 Section 19(3)(c).
18 Section 19.

[7] An individual who enjoys the benefit of a clean slate loses it if he or she is convicted of any offence: their criminal record is again visible.[19] But, if that person later completes the rehabilitation period and otherwise meets the eligibility criteria, their slate is again deemed clean.[20]

[8] This is a broad overview only.

Background

[9] In 1986, D volunteered at a children's camp. D was then about 25 years old. He befriended one of the attendants—a young boy. D committed offences against this boy after the camp. The victim was then 11–12 years old. The offence dates on D's criminal record are 31 May and 5 October 1986. But, the summary of facts describes the offending as occurring from 1986 into 1987, and identifies a pattern of conduct.

[10] D repeatedly kissed and masturbated the victim. D also made him undress, rubbed his penis against him, and forced him to touch D's penis. On one occasion, D rubbed his erect penis between the boy's legs. On another, D undressed and made the victim do likewise. D then masturbated him, lay on top of him, and simulated intercourse. On another occasion, D "applied" an electric shaver to the victim's penis while both were naked, and after having masturbated, naked, in front of the victim.

[11] The victim occasionally tried to resist. D assured him "what they were doing was entirely natural and … were not doing anything wrong".

[12] The summary concludes:

> When spoken to by Police, the defendant admitted that he had formed a relationship with the victim but stated that it was limited to kissing the victim on the mouth and touching his body. He further admitted having a fascination with "man-boy" love relationships.

[13] Like many victims of sexual abuse, the boy did not make a Police complaint. Rather, D told his flatmate what he had done, who later told her mother. The mother went to the Police in 1997 or 1998, after learning D was teaching. D was charged in

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19 The Act, s 8(1).
20 Section 8(2).

1998. He promptly pleaded guilty. D was given a suspended sentence of 18 months' imprisonment, and a term of community service. The suspended sentence expired after two years. Unfortunately, the sentencing notes are not available.

[14] D was not convicted of any offence within this period, and has not been convicted of any since.[21]

[15] Australian Police were involved in the mix above. D lived in Australia until the mid-1990s, and says his flatmate went to the Australian Police. They searched his flat in 1995. D says he told the Australian Police the name of the victim, but they could not find him, with the result nothing happened until his flatmate's mother later complained to the Police in New Zealand. Competing accounts emerge at this point.

[16] The Australian Police report refers to D admitting a sexual relationship with the victim, and the victim's identity, but also says D acknowledged "oral sex" with him, and D possessed "a large quantity of information pertaining to paedophilia", including "letters describing ... sexual relationships with [other] young boys". D says he surrendered the alleged material voluntarily, little of it warranted this description, and the alleged letters did not exist. Dispute also arises about an alleged reference to anal intercourse. Judge Hinton made no factual findings about any of this. I make none either. The parties did not invite findings, and no oral evidence was given at the appeal. Or below.[22]

[17] D was a school teacher. Conviction resulted in a lifetime bar. Since then, D has been an adult language teacher, both here and abroad. D now wants to work as a caregiver for the elderly. D says he was inspired by caring for his parents, both of whom are now in a facility for the elderly. D considered he was unlikely to obtain employment in this field because of his criminal record, hence his application to the District Court to disregard the specified offences.

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21 Interpol holds no record of any offending by D overseas.

22 The New Zealand Police invite attention to the fact D has travelled to Thailand twice. However, D has travelled extensively. No obvious pattern emerges.

Evidence of risk

[18] Dr Caleb Armstrong, a psychiatrist, examined D. Dr Armstrong considers D poses a low risk of further offending. Dr Armstrong also considers work in an aged care facility would be a low-risk environment for D. The Police expert essentially agrees.[23] Detective Margaret-Anne Laws, a registered psychologist with postgraduate qualifications in psychology and forensic psychiatry, considers D presents no greater risk than "the average non-sexual offender":

> [D] presents no more of a risk committing a sexual offence than the risk of the average non-sexual offender (e.g. someone previously convicted of burglary, assault, etc) committing a spontaneous sexual offence, which current international research places at approximately one to two per cent after five years.

Other evidence

[19] Dr J, a psychiatrist, knows D personally. Dr J says he has always found D kind and friendly. Dr J says D is well suited to a role in aged care, and he has no concerns about D working in such an environment.

[20] In the District Court, D adduced letters from three employers in the aged care industry. All were overbroad: each merely said she or he would not employ someone with a conviction for a sexual offence or historical sexual offence. On appeal, I invited focussed evidence. I later received, without objection, affidavits from four employers, each of whom had read the redacted reports of Dr Armstrong and Detective Laws.[24] All said they would not employ D because of his convictions, irrespective of the expert opinion.

The District Court decision in brief

[21] Judge Hinton reviewed the Act, expert evidence and other evidence then available. The Judge was mindful D has not been convicted of any other offence, but

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23 Albeit Detective Laws did not interview D, and has some concerns about Dr Armstrong's methodology.

24 I adjourned the appeal, part-heard, for this reason; see my Minute of 1 October 2018.

considered "low risk is not no risk".[25] The Judge reasoned aged care providers—not Courts—should be making decisions about employment in their industry:[26]

> It would be a giant leap for the Judge, in the present circumstances, to hurdle the legitimate concerns and province of an aged care industry provider and substitute my own employment decision for the provider.

[22] The Judge considered curial reluctance to second-guess employers in the context of ss 106 and 107 of the Sentencing Act 2002 provided support for this view. His Honour concluded:[27]

> I believe the chosen employers here must be able to choose for themselves. That does not preclude other employment opportunities for [D]. There may well be smaller such providers where [D] may secure employment with disclosure of his position and his support.
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> I have concluded that an awareness of [D's] previous convictions is appropriate in the public interest, and that this application must be declined.

The rival contentions, and how these have been overtaken by the evidence

[23] D contends the Judge erred by failing to give adequate weight to expert opinion; by relying on discharge without conviction case law; and treating employers' interests as paramount. Police submit the Judge correctly balanced the competing interests.

[24] As will be apparent, the evidence has changed since the District Court hearing. That before Judge Hinton implied D had some prospect of employment in the industry, because it was framed at an unhelpful level of generality (without reference to D's circumstances or the offending). The evidence now reveals that prospect as largely illusory, and the choice stark: either D's record is concealed or, in all likelihood, he will not be able to work in the aged care industry. For this reason, it is necessary to consider D's application afresh.

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25 *D v Police*, above n 4, at [33].
26 At [38].
27 At [41]–[42].

Legislative history

[25] Legislative history reveals little about the balancing test, at least directly. Its language remains unchanged from the Bill introduced to the House, the Criminal Records (Clean Slate) Bill 2001.[28] Parliamentary debates refer to the existence of an application process for those with a conviction for a specified offence, but go no further. No relevant Law Commission report exists.

[26] However, legislative history reveals why those with a conviction for a specified offence must apply for relief even after they have been conviction-free for the requisite period (assuming, of course, they have never been sent to prison). At the Bill's first reading, Hon Paul Swain, the Acting Minister of Justice, said:[29]

> The safety of vulnerable members of society warrants more stringent safeguards being put in place. While evidence demonstrates that being 10 years [the original rehabilitation period] free of conviction is a reliable indicator of rehabilitation in most circumstances, unfortunately that is not the case with sexual offending against children.

[27] The Justice and Electoral Committee recorded:[30]

> We are advised that in some instances a period without convictions is not necessarily a good indicator that offending is not continuing. Sexual offending against the young or mentally subnormal is one type of offending which the literature supports as being latent. In addition, individuals are not always successfully prosecuted for further offending due to the victim's age or mental capabilities. The lack of convictions during a rehabilitation period does not necessarily mean the individual has been rehabilitated, or has ceased to offend or pose a risk to the community at large.

[28] Legislative history is also informative of the Act's purpose. Executive government considered, in some circumstances, employers should not know about historical convictions, largely because they may react disproportionately to them. At the Bill's first reading, the acting Minister of Justice said:[31]

> This bill creates a clean slate scheme to allow minor criminal convictions that did not result in a prison sentence to be concealed after a 10-year period [the original rehabilitation period] without further offending. It will enable

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28 Criminal Records (Clean Slate) Bill 2001 (183-1), cl 8(3).
29 (2 May 2002) 600 NZPD 15970.
30 Criminal Records (Clean Slate) Bill 2001 (183-2) (select committee report) at 15.
31 (2 May 2002) 600 NZPD 15970–15971.

> citizens who are now law-abiding to live free from the adverse effects and stigma of minor convictions incurred many years ago.
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> ...
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> Old convictions that continue to hamper people in their choice of legitimate work and activities is an unjustified ongoing punishment.
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> ...
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> Access to a full criminal record for employment vetting purposes is considered necessary only in limited situations. Where significant coercive powers of the State are being exercised, or individuals are regularly working with children or young people, full scrutiny of the applicant's criminal record is in the public interest. Employment vetting exemptions are provided for positions involving the national security of New Zealand, or for a judge, a member of the police, or a prison or probation officer. Full criminal record information will be available for individuals seeking employment in the education sector, or for roles involving the care and protection of children and young persons.

[29] The explanatory note also identified related problems, including admission "to a profession, obtaining credit or insurance, and obtaining entry visas for overseas travel".[32] Similar concerns were advanced at the Bill's second reading:[33]

> The lack of such a scheme here has been the cause of extreme, and in my view totally unnecessary, anxiety and suffering for many ordinary hard-working and law-abiding New Zealanders who are haunted by the legacy of a very minor mistake they may have made many, many years ago. Because they have had to disclose a criminal record, they find themselves constantly being discriminated against by prospective employers, by landlords, and so on—despite having lived blameless lives for years, or even decades, since that offence. The punishment they experience for their entire lives is utterly disproportionate to the crime.

[30] The Bill was also seen as an instrument to protect privacy, albeit this appears to have been a subsidiary concern. The explanatory note recognised "there is a point at which a convicted person's interest in privacy outweighs the public interest in disclosure of the past record".[34] Which leads back to the balancing test, reproduced below:

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32 Criminal Records (Clean Slate) Bill 2001 (183-1) (explanatory note) at 8.
33 (2 Dec 2003) 614 NZPD 10336.
34 Criminal Records (Clean Slate) Bill 2001 (183-1) (explanatory note) at 8.

> **10 Individual may apply to District Court for order that rehabilitation period need not be completed or conviction be disregarded**
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> ...
>
> (5) In considering an application under this section, a court must balance the interests of individuals in concealing their criminal records against the wider public interest in the safety of the community (recognising that an awareness of an individual's previous convictions is appropriate in certain cases).

The balancing test

[31] The balancing test's breadth may be thought incompatible with gloss and complexity. History is replete with examples of broad statutory tests being afflicted by both, only for appellate Courts to sweep everything away in the hope of restoring legislative purpose. That said, some observations about the balancing test may be helpful.

[32] First, the test appears to contemplate identification of the applicant's interests; it is difficult to balance interests if it is not clear what is being weighed. So, a useful starting point may be to identify why the application has been brought, and what interests it seeks to protect. Is the applicant's concern related to employment, or something else? Is the application founded on more general concerns about privacy? Is an identifiable objective in mind? Is the applicant likely to suffer tangible disadvantage if the application is not granted? To be clear, these questions are offered as a means of elucidating the applicant's interests, not more.

[33] Second, the balancing test refers to the interests of *individuals* in concealing *their* criminal records. This implies the legislative concern is potentially broader than the interests of the individual applicant, presumably because there is a public interest in the protection of privacy and allied concerns, for example, autonomy. Consequently, a next step might involve identification of the broader interest or interests at play.

[34] Third, the wider public interest in the safety of the community must then be articulated, and balanced against the interests of the applicant and any broader ones, as discussed above. The balancing test is silent on *how* this is to be done. The Act

appears to contemplate a risk assessment exercise, hence the balancing test's reference to "public safety". Legislative history supports this view; see [26]–[27].

[35] Fourth, the mere fact the applicant has not been convicted of another offence will not be decisive. The Act acknowledges sexual offending can continue undetected, which is one reason the enactment requires a person with a conviction for a specified offence to apply for concealment of that conviction even though he or she has been conviction-free for seven years.

[36] Fifth, the circumstances of the offending in relation to the specified conviction will obviously be relevant to the risk assessment exercise. So too victim impact; the applicant's response to the offending; passage of time since the offence (beyond the seven-year datum); the applicant's personal circumstances; expert opinion in relation to risk, if any; consideration of those who may be affected by concealment of the applicant's criminal record, and attendant risk. Or in short, totality of circumstance.

[37] Further discussion of the balancing test is undesirable for the reasons expressed earlier, save for this point. Doubt attaches to the applicability of discharge without conviction jurisprudence for the simple reason the Act contemplates, and provides for, concealment of a criminal record from those who might otherwise have a legitimate interest in that record, including potential employers and professional bodies.

Application of the balancing test

[38] D's application is focussed on the prospect of specific employment. It is highly likely D will not be able to work in the aged care sector unless his criminal record is concealed. D appears otherwise suitable for this type of work. But, D has meaningful employment, and has had so for many years.[35] The broader interest is confined to privacy. The wider public interest in the safety of the community is informed by context. It involves residents of rest homes and visiting friends and family, most obviously, grandchildren.

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35 D fears existing work may diminish because of a market downturn.

[39] D's offending occurred in 1986 and 1987. D has not been convicted of any offence since. This period is significant, but indecisive for the reasons expressed earlier. It should not be overlooked D's prosecution came about because someone other than the victim complained to Police years later.

[40] The offending was repeated. And serious. D appears to have been fortunate to have received a suspended sentence of imprisonment. The record is silent on victim impact. It is reasonable to assume the victim suffered at least psychological harm. D promptly pleaded guilty, which may explain why his prison sentence was suspended (again, the sentencing notes are unavailable). D says he "deeply regrets" his offending, and has spent the last 30 years regretting it.

[41] D's affidavits describe a series of relationships with adult women beginning 1990. D has an adult daughter. He has taught languages both here and abroad, seemingly without incident. D is well educated. And, intelligent. The experts agree D presents a low risk of re-offending. There is no suggestion D presents risk to the elderly. Concern rests with visiting children.

[42] The case is on the cusp. D already has fulfilling employment. Offence seriousness tells against concealment. The non-custodial sentence appears to have been lenient. As against all this, a privacy interest attaches to (non-custodial) offending 30 years old. It is highly likely D will not be able to work in the aged care sector unless his criminal record is concealed. Contact with children in that sector is likely to be limited, and even more likely to be in the company of others. Offence opportunity is therefore low. This aspect, remorse, and the consensus of expert opinion in relation to D's low risk of re-offending tip the balance in his favour. D's interests prevail.

Conclusion

[43] The appeal is allowed.

[44] D's 1986 convictions must be disregarded for the purposes of s 7(1)(d) of the Criminal Records (Clean Slate) Act 2004.

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Downs J