

Discussion paper on the expungement of criminal records

The South African Law Reform Commission (SALRC) has completed its discussion paper on the review of the law relating to the expungement of certain criminal records. The request for the investigation of the expungement of previous convictions follows from the enactment of the Criminal Procedure Amendment Act 65 of 2009. The Act, *inter alia*, deals with the expungement of certain minor criminal records. The Portfolio Committee concluded that the expungement of criminal records is a complex matter that requires a balance between the rights of citizens to be protected against criminals and the recognition that having a criminal record can cause undue hardship for an individual.

According to the commission, the Justice Minister, Michael Masutha, requested it to conduct research on the different systems followed in the keeping of criminal records and the expungement of such records. He requested that the research must draw, among others, on international best practices and must include consultation with the relevant stakeholders and the public.

The commission's analysis of the relevant legislative provisions included the legislative provisions specifically dealing with expungement, namely expungement in terms of the Child Justice Act 75 of 2008 (CJA) and the Criminal Procedure Act 51 of 1977 (CPA).

It includes an analysis of specific legislation directly impacting on expungement in that the provisions of these Acts are included in the expungement legislative scheme in that it is a conditional requirement for an approval of an expungement that the names of applicants included in the National Child Protection Register and the National Sex Offender Register be removed from these registers.

The paper contains an evaluation of other relevant provisions in national legislation creating disqualifications with regard to employment opportunities following a conviction and sentence and how these disqualifications impact on the approval of expungements. The discussion paper also includes an evaluation of expungement of criminal records in foreign jurisdictions and lessons to be learned from these legislative schemes.

The discussion paper looks at the right of the community to be protected versus the rights of applicants applying for the expungement of criminal records to equality and dignity.

In the press release the commission said it concluded that the justification for the legislation enabling expungement of criminal records centres on two issues. On the one hand, the state's duty to promote safety in society and protect citizens from dangerous and dishonest individuals and, on the other hand, an individual's right to equality and the constitutional duty on the state to free the potential of each person. These constitutional issues guided the content of the commission's provisional recommendations in the discussion paper.

After looking at all the provisions, the SALRC concluded that:

- The provisions in the CPA and the CJA dealing with expungement, are not aligned, and use different qualifying criteria for the approval of the expungement of criminal records. The expungement of convictions based on the sentence imposed and the lapsing of a time frame of ten years for adult offenders, according to the CPA, and expungement of convictions based on lists of offences combined with a time frame of five and ten years depending on the schedules containing the listed offence for juvenile offenders as per the CJA. In practice, the different criteria make expungements in terms of the CJA more limited for juveniles than expungements for adults in terms of the CPA.
- The justification for legislation enabling the expungement of previous convictions is the same for juvenile and adult offenders and does not justify the application of different qualifying criteria.

- Both the CPA and the CJA provides for the mandatory expungement of the criminal records concerned once the criteria set out in the Acts have been, are, and do not provide for a discretion to the approving authority.
- Both the CPA and the CJA provide for an administrative application process for the approval of expungements based on the qualifying criteria listed in the legislation.
- Applying the relevant constitutional principles to the enabling legislation for expungements, the commission concluded that the provisions in the existing legislation, in both the CPA and CJA are overbroad in respect of both the prescribed process and the listed qualifying criteria, therefore rendering the provisions unconstitutional.

The commission concluded that the constitutionality of the enabling legislation needs to be considered against the right of the community to be protected against crime versus the right of an individual to equality and not to be unfairly discriminated and the extent to which a limitation of the right to equality could be justified having due regard to the state's duties and responsibilities as outlined in the Constitution and other legislation.

In applying the above constitutional principles to the relevant legislation, the SALRC proposes that:

- The provisions in the CJA and the CPA dealing with the qualifying criteria and process in expungements should be aligned where justified.
- The existing prescribed administrative application process should be replaced by a motivated motion application process to a court having jurisdiction.
- The qualifying criteria for an expungement in respect of both adult and juvenile offenders should be broadened to include additional criteria, namely –
 - participation and input by the prosecution in the process, consideration of the relevant constitutional rights, consideration of national legislation, which inhibits employment opportunities (disqualifications imposed by national legislation);
 - the extent to which an applicant has rehabilitated;
 - an application for expungement should only be viable after serving of the sentences concerned; and
 - a limitation to the number of times an application for expungement could be made.
- Providing for an application for expungement to be viable after a period of five and ten years in respect of both juvenile and adult offenders.
- The legislation should provide for the inclusion of a provision outlining the consequences resulting from an approval of an expungement.

The full discussion paper is available at www.doj.gov.za/salrc/index.htm and the public is welcome to make comments or suggestions to the SALRC. The closing date for comment is 31 August 2015.

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