

Review of the *Expungement of Historical Offences Act 2017*

Submission to Independent Reviewer

31 August 2020

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the independent review of the *Expungement of Historical Offences Act 2017* ('the Act').
2. This Submission responds to the issue of improvements and law reform (item 4 in the Review terms of reference).

Opportunity for reform of the Act

3. The Act should be extended so that drug possession and use offences and disorderly conduct offences (e.g. drunk in a public place; public annoyance and other petty disorder offences under the *Police Offences Act 1935*) are able to be expunged from a person's criminal record in Tasmania after a period of 10 years has elapsed.
4. The stigma and difficulties attached to having a drug possession and use offence recorded on a person's criminal record are well documented. As one study observed:

For all drug offenders, however, having a criminal record for drug-related offences may have several severe but unintended effects.²

5. These collateral consequences include discrimination in future employment, license applications, visa applications, social interactions, housing. American University law professor Jenny Roberts, argues, rightly: 'there's certainly an economic incentive for allowing people to move beyond their criminal record.'³
6. There is increasing recognition in the Tasmanian, and Australian, community that drug use and possession is a health issue, not one suited to the criminal justice system. This is particularly the case in relation to cannabis use where there is an inevitable tide moving

² Bretteville-Jensen, Anne Line and Mikulic, Sania and Bem, Pavel and Papamalis, Fivos and Harel-Fisch, Yossi and Sieroslawski, Janusz and Trigueiros, Fatima and Piscociu, Laura and Tsarev, Sergey and Altan, Peyman and Costa Storti, Claudia (2017) Costs and unintended consequences of drug control policies (Strasbourg: Council of Europe, Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs), 42.

³ NPR (2019) Scrubbing The Past To Give Those With A Criminal Record A Second Chance, 19 February <https://www.npr.org/2019/02/19/692322738/scrubbing-the-past-to-give-those-with-a-criminal-record-a-second-chance> And Colgate Love, Margaret and Roberts, Jenny and Klingele, Cecelia M., Collateral Consequences of Criminal Convictions: Law, Policy and Practice (2013) American University, WCL Research Paper No. 2014-48.

towards full decriminalisation and legislation across the world, including in the United States. If a person has drug possession and use offences on her/his criminal record in Tasmania which are more than 10 years ago, then there is a compelling argument for expungement if they have not subsequently committed any drug offences.

7. In relation to disorderly conduct offences the same argument can be made. These offences are minor but can have collateral consequences for individuals which far outweigh the gravity of offending. We note that in New Jersey the legislature has recently passed legislation to allow for the expunging of drug and disorderly conduct offences. The law works in this way:

The statute further provides that a party can have a disorderly person's (misdemeanor) offense expunged after a five-year waiting period. This statute has recently been amended to permit an expungement of a disorderly person's offense within three years. Further, the statute provides that up to three disorderly person's offenses can be expunged at the same time. With regard to township ordinances, the statute has a two-year waiting period from the date of conviction in order to have an expungement.⁴

8. There are other sections of the expungement statute which provide for shorter periods of time, such as if a party is a youthful drug offender, which shortens the time period to get an expungement. Also, if a party completes a pre-trial diversion program the waiting period is only six months. The most important take away from this blog, however, is that once the expungement is granted that the offenses are deemed to have not occurred. This is extremely powerful, as the party may respond on any employment application or other application that the offenses never happened. Imagine that, a statute which permits you to lie. For these reasons, the expungement statute is powerful.
9. The idea of a clean slate and a second chance for persons who are socially and economically disadvantaged, and in Tasmania this is a large swathe of the population, is potent and effective. The New Jersey initiative provides a sense of how much more useful and ambitious the current Tasmanian legislation could be if it was broadened to include expungement for a wider category of offences.

⁴ National Law Review (2020) Vol X No 240 Erasing your Mistake, 2 January 2020.

Conclusion

10. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide these comments to the review of the *Expungement of Historical Offences Act 2017*. The ALA is available for further consultation in relation to the issues raised in this submission.

A handwritten signature in blue ink, appearing to be 'S Buscemi', written in a cursive style.

Sebastian Buscemi

Tasmanian President and State Director

Australian Lawyers Alliance