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MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION CONCERNING ITS INVESTIGATION INTO THE REVIEW OF THE EXPUNGEMENT OF CRIMINAL RECORDS (PROJECT 137) DISCUSSION PAPER ON EXPUNGEMENT OF CRIMINAL RECORDS

1. The South African Law Reform Commission has completed its Discussion Paper on the review of the law relating to the expungement of certain criminal records. The request for investigation of the expungement of previous convictions follows from the enactment of the Criminal Procedure Amendment Bill, which was approved by Parliament in 2008 and assented to by the President during February 2009. The Bill (now Act 65 of 2009), *inter alia*, deals with the expungement of certain minor criminal records. The Minister explained that during the deliberations on the Bill a number of stakeholders submitted inputs to the Portfolio Committee on a wide range of matters related to the expungement of 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.

2. The Minister requested the Commission to conduct research on the different systems followed in the keeping of criminal records and the expungement of such records. The research must draw, among others, on international best practices and must include consultation with the relevant stakeholders and the public on a broad basis.

3. The Commission's analysis of the relevant legislative provisions includes the legislative provisions specifically dealing with expungement, namely expungement in terms of the Child Justice Act, 32 of 2008 and the Criminal Procedure Act, 51 of 1977. It also 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 registers established in terms the Children's Act (National Child Protection Register) and the register established in terms the Criminal Law (Sexual Offences and Related Matters) Amendment Act (National Sex Offender Register) be removed from these registers. It also includes 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.

4. The discussion paper includes a consideration of the rationale for the legislation enabling expungement which stems from the rights contained in the Constitution. These include two competing rights namely, the right of the community to be protected versus the rights of applicants applying for the expungement of criminal records to equality and dignity. The discussion paper evaluates the constitutional implications with reference to the existing legislative provisions dealing with expungement and how the principle of the expungement of criminal records should be interpreted having due regard to the constitutional dispensation, in particular having regard to the contents of the competing rights and the principle of limitation of rights as provided for in the Constitution and expanded by the Courts.

5. The Commission 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. The consideration of these constitutional issues guided the content of the Commission's provisional recommendations in the Discussion Paper.

6. Having due regard to the relevant provisions of the national legislation enabling the expungement of criminal records and the constitutional dispensation within which these provisions operate, the SALRC concluded that:

- (i) The provisions in the Criminal Procedure Act 51 of 1977 (CPA) and the Child Justice Act 75 of 2008 (CJA) dealing with expungement, are not aligned, and use different qualifying criteria for the approval of the expungement of criminal records, ie expungement of convictions based on the sentence imposed and the lapsing of a time frame of 10 years for adult offenders (CPA) and expungement of convictions based on lists of offences combined with a time frame of 5 and 10 years depending on the schedules containing the listed offence for juvenile offenders (CJA);
- (ii) In practice, the different criteria make expungements in terms of the Child Justice Act more limited for juveniles than expungements for adults in terms of the Criminal Procedure Act.
- (iii) 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.
- (iv) Both the Criminal Procedure Act and the Child Justice Act 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.

- (v) Both the Criminal Procedure Act and the Child Justice Act provide for an administrative application process for approval of expungements based on the qualifying criteria listed in the legislation.
- (vi) Applying the relevant constitutional principles to the enabling legislation for expungements, as applied and interpreted by our courts the Commission concluded that the provisions in the existing legislation, in both the Criminal Procedure Act and the Child Justice Act are overbroad in respect of both the prescribed process and the listed qualifying criteria, therefore rendering the provisions unconstitutional.

7. The Commission concluded that the constitutionality of the enabling legislation needs to be considered against the State's duties and responsibilities in respect of both rights, namely 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, national legislation and relevant International Instruments endorsed by the State.

8. Applying the above constitutional principles to the relevant legislation, the Commission proposes that:

- (i) In so far as the provisions in the Child Justice Act and the Criminal Procedure Act dealing with expungements contain differences in the qualifying criteria and process these should be aligned where justified;
- (ii) The existing prescribed administrative application process should be replaced by a motivated motion application process to a court having jurisdiction;
- (iii) 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;

- (iv) Providing for an application for expungement to be viable after a period of 5 years and 10 years in respect of both juvenile and adult offenders; and
- (v) The legislation should provide for the inclusion of a provision outlining the consequences resulting from an approval of an expungement.

9. The discussion paper is published in full so as to provide persons and bodies who wish to comment or make suggestions for the reform of this branch of the law with sufficient background information to enable them to place focused submissions before the Commission. The closing date for comment is 31 August 2015.

10. The Discussion Paper will be made available on the Internet at the following site:
<http://www.doj.gov.za/salrc/index.htm>

11. The contact particulars for more information are:
e-mail: advanvuuren@justice.gov.za

Telephone: (012) 622-6313 (Mr W van Vuuren)

The Project leader for the investigation is Judge J Kollapen.

ISSUED BY THE SECRETARY, SA LAW REFORM COMMISSION, PRETORIA

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