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Convictions and Good Character Issues:

Clean Slate and Immigration Consequences

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Introduction

1. Section 14(1) Criminal Records (Clean Slate) Act 2004:

> "If an individual is an eligible individual, he or she is deemed to have no criminal record for the purposes of any question asked of him or her *about his or her criminal record*."

2. In the April 2017 amendments (Amendment Circular No 2017/05) instructions were added to the Operational Manual at R5.95.10 prohibiting the use of information covered by the Clean Slate scheme when assessing a supporting partner's character requirements under R5.95(a).

3. Another point to note is that INZ's forms no longer ask the question: "Have you ever been charged etc" but now ask only questions about the present: "are you currently…"

4. Questions about the past, however can come up in oral interviews or in PPI letters. Further, does the duty of candour to be truthful require a visa applicant to answer historical questions. Are the following, questions *about* a person's criminal record and are they prohibited by the Clean Slate scheme?

    i. Have you ever *committed* a crime?

    ii. Have you ever been arrested?

iii. Have you ever been charged?

iv. Have you ever been investigated?

5. The interesting question therefore is whether these questions can be asked orally (see discussion below), without breaching the Clean Slate scheme.

Overview

6. There are a number of ways in which convictions and conviction expungement interact with immigration processes. The following are some of the questions:

i. When an overseas offence is "expunged" must it be declared in our immigration system? Does the expungement mean that the person has not been convicted? The forms are now explicit about this.

ii. Is the obligation to tell the truth cancelled because of an overseas expungement (when answering questions orally)? Note visa-free entrants if interviewed at entry can face such questions.

iii. Other issues arise other than the fact of the "conviction" (can one also deny the question of the "investigation" (or as in the US the fact of the "arrest"). What about the question of whether the person has "committed" an offence, as opposed to being convicted of an offence.

iv. When an offence is expunged in New Zealand does that then mean it does not need to be declared in other jurisdictions? What about forms for other countries being filled in here.

Conflict of laws, or the "reach" of the law from one jurisdiction into another

7. The prima facie rule is that the effect of a law only applies to the country in which it is passed. The same applies to expungement of criminal records as between countries. The duty to be truthful in one country does not change because another country deletes a criminal record.

See: s 14(3) Criminal Records (Clean Slate) Act: answering forms for other countries

8. Nothing in subsection (1) or subsection (2)(b) "…authorises an individual to answer a question … if the question is asked."

i. under the jurisdiction of the law of a foreign country while an eligible individual is outside New Zealand; or

ii. when he or he is in New Zealand but relates to a matter dealt with by the law of a foreign country (by example, a question asked on an application form by the immigration or customs agency of a foreign country).

9. Where "clean-slated" an eligible individual is entitled to state "I have no criminal record." Anywhere *in* New Zealand. Does that also mean he can say that he has not *committed* an offence, was not arrested and was never investigated?

10. Are border or immigration agencies in other countries able to require Kiwis arriving at the border to declare their expunged (NZ) records, as per s 14(3)(b)(i).

11. Do the Clean Slate provisions entitle a person to lie in other ways when the question is not about the existence of a criminal record?

12. The question of the interplay between two jurisdictions and truthfulness arises also in other contexts. Recently it became apparent that a New Zealander has declared a qualification from a university that is incorrect because his home country (China) required him to keep the name of his institution of tertiary education a secret (as it would reveal he was involved in work in secret security services). Does the obligation imposed on an individual in one country to keep a matter secret, entitle that person to fill out forms in another country (whether a residence or citizenship application) with false information?

13. Providing false or misleading information on an immigration application is an office: s 342(1)(a). Aiding and abetting a person for filling out a form incorrectly is also an offence (s 343(1)(c)). These offences are now regarded as serious and attract maximum penalties of 7 years and fines of $100k.

14. In addition the whole application can be refused. In a recent decision in the High Court it was held that falsity renders the whole of an administrative process a nullity: see *Refugee and Protection Officer v YL* [2017] NZAR 534, where it was held "fraud unravels everything." [1] See also *Sidhu (Amandeep) v Chief Executive MBIE* NZHC 2841 [2014] NZAR 1371 (Moore J), and the date of candour to provide information relevant but not necessarily asked.

[1] See headnote: "The common law principle that "fraud unravels everything" applies to dealings by a person with the State and is always relevant at any stage of a statutory process or discretion. All statutory powers capable of exercise on threshold facts or by way of discretion presuppose that any participant seeking a statutory benefit is honest in dealings with the decision-maker."

15. The Clean Slate provisions in New Zealand apply only after seven years from the date of last sentence (or an order in relation to an offence). Generally it does not apply to offending of a sexual nature or where a custodial sentence is imposed. This includes home detention and community detention.

16. Where a new offence is committed during the seven-year period, the rehabilitation period starts over: section 8.

Effect of Clean Slate on government departments

17. The Clean Slate provisions operate so as to "deem" the eligible individual (in New Zealand) as a person with no criminal record. It requires insurance companies, the courts and (unless an exception applies) immigration officials to deem the person as having no criminal record. The effect of the Clean Slate Act also applies to circumstances where the agency knows about the conviction, for example, where it is on its old records etc. It must give effect to the "deeming." In fact if the official concerned passes on the information (to a partner for example) then an offence may have been committed (sections 17 and 18). See note now to R5.95.10.

Partnership sponsorships

18. There are two areas of concern:

    i. Partner sponsorship requirements.

    ii. Where a former partner has been granted residence under the domestic violence category.

19. A New Zealand partner's eligibility is defined in F2.10.10 and includes the character requirements in R5.95. The April 2017 amendments to the Operational Manual correctly give effect to ss 17-18 of the Criminal Records (Clean Slate) Act 2004. If there was for example a conviction of Man Assaults Female on an old file, now more than seven years old – such information that is held cannot be used and the individual is deemed to be conviction free.

20. If he or she is asked whether he has ever *committed* such an offence the 2004 Act allows him to respond that he has no criminal record (but see above in relation to other questions asked orally or in correspondence/emails).

Records must be suppressed

21. More importantly s 15 requires Immigration New Zealand as a law enforcement agency to:

    i. Conceal the record when information is requested.

    ii. Not use the requested information.

22. In particular it is arguable that such records should be taken off AMS (as this will otherwise be passed to new officers or to customs). The Privacy Act can be used to insist on records being corrected.

Domestic Violence Residence

23. There are of course four routes towards residence for the victim of domestic violence:

    1) A Protection Order alleging violence (even where entered into by consent).

2) A conviction.

3) A letter from the Police.

4) Statutory declaration of applicant supported by the declaration of two social workers that violence has occurred.

24. It is noted that the ban against a future sponsor for the alleged perpetrator is no longer confined to seven years but has recently been made permanent. [2]

25. Where the act of violence leading to residence is supported by (2) above, a conviction and where the offence is clean-slatable (e.g. man assaults female as opposed to non-clean-slatable offences, such as a sexual offence) then effectively at the seven-year period, the person who is the perpetrator of what could be a minor matter (an assault can be as minor as a push) will now never be able to recover his (or her) position, and become an eligible sponsor. Arguably the extension of the sponsorship ban indefinitely is inconsistent with the intention behind the Criminal Records (Clean Slate) Act 2004. The Operational Manual needs to be clarified. Discussions involving what is intended in the Amendment Circulars are hard to access and unsatisfactory.

Good Character

26. The provisions in the manual indicate that if the individual admits to his or her having *committed* an offence (in a letter or in an email) then the information can

[2] Also Amendment Circular 2017/05. The introductory comments in the Amendment Circular indicate that New Zealand based convictions are subject to the Criminal Records (Clean Slate) Act 2004, however this is not mentioned in the new versions of the Operational Manual: see F2.10.10(a)(iii).

be used against him or her adversely. [3] Clients therefore potentially lose their right to maintain they have "no record" if they blurt out the truth, without being asked, or where they do not stick to the permissible response: "I have no record."

Questions of fairness

27. What then of the other questions no longer in forms, but that can be asked orally or by email etc, about the past. The statute does *not* in fact authorise falsehoods. It only permits an answer "I have no criminal record." The fact remains that effectively this is not a falsehood because the record has gone. Can other falsehoods, not about the criminal record however, be uttered.

28. If the question however is "have you ever *committed* an offence" then the question is whether a negative answer to that question is a falsehood. If it is a falsehood as it is about a "committing" rather than a "record," then effectively the Clean Slate legislation is of little use because the government agency can extract the information by asking questions about "committing" rather than about "records."

29. The writer's view is that the Act authorises a "no" to the question about "committing" because that is in essence about the person's criminal record. I engage with s 5 of the Interpretation Act to reach a "purposive" understanding here. However, as seen above the Act does *not* authorise falsehoods in oral or written responses under the laws of other countries, or in response to questions that are in truth not about a conviction record (in relation to New Zealand matters). However, where an offence or conviction is admitted, the sponsor becomes subject to the character requirements (as seen above).

[3] See paragraph R5.95.10. Note: "…If the supporting partner voluntarily declares criminal convictions that are subject to the Clean Slate scheme, this information can be used to assess whether the supporting partner meets the character requirements of R5.95(a).

Discussion

30. For discussion: How then should a client who has been cleaned-slated, answer oral questions about a prior New Zealand investigation/arrest/charge at an oral interview. Can he make use of the US-style "I claim the 5th amendment" and refrain from answering the question? What about the duty of candour in *Sidhu*?

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