**Research:**

**Relief from Collateral Consequences of Prostitution-Related Convictions**

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**Overview**

In the context of the recent *Broadfoot Case[[1]](#footnote-1)* declaring that the requirement to disclose certain criminal convictions for some forms of employment and other activities has an unfair impact on survivors holding prostitution (“soliciting”) convictions, thus contravening Human Rights Principles. This is because of the complex circumstances of those selling sex, particularly the fact that their involvement in prostitution has often arisen out of vulnerability and abuse. In fact, policing of these issues has changed so that many of these convictions would no longer be considered offences but are nevertheless still classified as sexual offences.

The overriding consideration is the detrimental impact on survivors, many of whom experience retraumatisation and stigma when forced to disclose convictions related to a time in their lives that they have worked hard to leave behind and recover from. In light of the court’s acknowledgement of this, the question arises as to how to move forward in remedying the negative impact of holding a criminal record for survivors.

The subject of the research was to explore:

Q1a) What if, any, expungement-type remedies are available for those previously convicted of prostitution-related offenses?

Q1b) In relation to above, in particular what happens in countries that have decriminalised the sale of sex?

Q2a) What legal and policy schemes might be developed to effectively address this issue?

Q2b) Are there strategies used for other issues that could be transferred to the context of prostitution related offences?

In summary, the preliminary answers are:

(A1) While some jurisdictions have legal schemes in place that enable individual survivors to apply for expungement and/or expungement-type remedies, no legal systems provide blanket amnesty for those previously convicted of prostitution-related offenses, even in jurisdictions that have adopted the Nordic Model. In general in decriminalised contexts (whether Nordic Model or otherwise), protection is focussed on avoiding future convictions with little in place to consider the impact of previous convictions.

(A2) While every jurisdiction’s legal system will require a distinct approach, it seems that the most effective approach in most jurisdictions will involve legislation providing either expungement-type remedies on an individual basis, or better yet, blanket amnesty for prostituted-people previously convicted of prostitution-related offenses.

**Background**

The key rationales articulated by the High Court are summarized herein as follows:

1. Requiring applicants to disclose solicitation convictions when applying for employment in caring professions (and permitting discrimination by employers based on these convictions) is “arbitrary in the sense that [these laws] bear no, or very little, relationship to the aim of safeguarding children and vulnerable adults.”[[2]](#footnote-2)
2. Requiring applicants to disclose solicitation convictions when applying for employment in caring professions “without reference to their personal circumstances or their present situation… would exclude some applicants whose ability to empathise with and assist those for whom they seek to care has in fact been enhanced by their experience of having graduated from a school of very hard knocks.” [[3]](#footnote-3)
3. Requiring applicants to disclose solicitation convictions when applying for employment in caring professions “without reference to their personal circumstances or their present situation… would…[make] it harder for [such] persons…to obtain employment, [and thus might cause] some to remain in prostitution when they wish to leave it.” [[4]](#footnote-4)
4. The “mere fact of disclosure of past convictions for soliciting carries with it embarrassment and stigma which cannot be undone, whatever the outcome of the job application. Even if the job application is successful, the person concerned will be working in the knowledge that one or more persons in her employer's organisation is aware of highly personal details about her which have been no impediment to her employment.”[[5]](#footnote-5)

Although the courts found that requiring the disclosure of criminal convictions for soliciting is unlawful, it recognized that “it is not for the court to devise a scheme” to replace it.[[6]](#footnote-6) Rather, as the Court observed, “it should be and is possible for Parliament to devise a scheme which more fairly balances the public interest with the rights of an individual applicant for employment in relevant areas of work.”

While the High Court in the *Broadfoot Case* ruled that the current scheme regarding collateral consequences of conviction for prostitution-related offenses is unlawful, the ruling is narrow and the Court provided no remedy. The ruling is narrow insofar as it concerns only those collateral consequences that involve discrimination in employment. (Indeed, one plausible reading suggests that the ruling is limited only to employment discrimination in the caring professions.) Given the Court’s lack of authority to devise an alternate scheme, the next step toward alleviating these collateral consequences in the United Kingdom would be for Parliament to enact a statutory remedy.

Further, while the *Broadfoot Case* concerned discrimination in employment, it is important to note that collateral consequences of conviction impact people in myriad ways. Typical categories of rights and privileges that are impacted by collateral consequences flowing from criminal convictions include: (1) citizenship, (2) military activity, (3) restriction on freedom/movement, (4) social and legal standing in the community, (5) running for political office and voting rights, (6) occupation and employment, (7) property, contracts, inheritance, family, and lawsuits.[[7]](#footnote-7)

**Countries that have decriminalised prostitution**

In order to investigate possible remedies for the effects of criminalisation, countries with one of the following legal regimes were investigated: countries that have legalised the sale of sex, countries that have decriminalised the sale of sex, and those countries that have adopted the Nordic model. These were:

Legalization countries: (1) Senegal (1969),[[8]](#footnote-8) (2) Victoria, Australia (1994),[[9]](#footnote-9) (4) Queensland, Australia (1999),[[10]](#footnote-10) (5) The Netherlands (2000),[[11]](#footnote-11) (6) Germany (2002),[[12]](#footnote-12) and (7) Nevada, U.S.[[13]](#footnote-13)

Decriminalization countries: (8) New South Wales, Australia (1995)[[14]](#footnote-14) and (9) New Zealand (2003).[[15]](#footnote-15)

Countries that have adopted the Nordic Model: (10) Sweden (1999),[[16]](#footnote-16) (11) Norway (2009),[[17]](#footnote-17) (12) Northern Ireland (2012),[[18]](#footnote-18) (13)

None of these countries addressed the specific barrier of holding a criminal record from offences prior to the change in law. From a legal perspective, this is unproblematic as crimes committed before laws change are still crimes at the time they are committed and continue to be treated as such within the context of a legal system.

However, regardless of whether there is a sex worker rights or violence against women paradigm adopted, there is strong advocacy for women involved in prostitution within these regimes, including protecting women from future convictions. It is therefore surprising that the impact of previous convictions has not been addressed formally within changing legal frameworks. This represents a glaring gap in provision for both women and men convicted of selling sex and an opportunity to develop strong solutions.

That said, there are several jurisdictions in the United States where victims of human trafficking have the opportunity, on an individual basis, to seek expungement or vacation of their previous convictions.[[19]](#footnote-19) Jurisdictions scattered across the U.S. have adopted expungement practices.

**Expungement-Type Remedies for Other Types of Offenses**

Some lessons can be learned from jurisdictions where historically criminalized conduct has recently been decriminalized. For example, in jurisdictions that have recently decriminalized homosexual sodomy and recreational marijuana usage - have these jurisdictions implemented a process for granting amnesty or other expungement-type remedies to those who labour under previous convictions for what is now fully legal conduct?

The answer is mixed. In England and Wales (and Northern Ireland), those convicted of homosexual acts which are no longer illegal are entitled to have their convictions “disregarded” or pardoned upon application to the Home Office.[[20]](#footnote-20)

With respect to recreational marijuana, however, the answer remains “no.”[[21]](#footnote-21) Canada has recently discussed a pardoning mechanism in response to the country’s recent legalization of recreational marijuana.[[22]](#footnote-22) If the a scheme is implemented, Canadians who were previously convicted of mere possession of small amounts of marijuana (which is now fully legal) will qualify for the pardon. However, the individual’s criminal record will not be entirely erased, but will rather “be kept separate from other criminal records.”[[23]](#footnote-23) Furthermore, the person will still have to check the “convicted of a criminal offense” option on a housing or employment application.[[24]](#footnote-24) As such, even the proposed Canadian scheme seems to offer little relief to those with previous convictions for what is now regarded as fully legal conduct.

**Remedies and Moving Forward**

In order to fashion effective legislative remedies granting expungement-type remedies for those previously convicted of prostitution-related offenses, it is necessary to understand the purpose and methods of keeping of criminal records in the relevant jurisdictions at issue.[[25]](#footnote-25) Issues to consider surrounding criminal records include: (1) the creation of the record, (2) the type of record, (3) the agencies that keep the information, (4) where the information kept, (5) who has access to the record, (6) how is the record distributed, (7) and, finally, how to amend/seal/or expunge the record. Depending on the particular system, a framework for expungement – or an expungement-type effect – can be developed.

In addition to addressing the specific legal processes for recording and disclosing criminal records, there are associated issues that could be remedied – for example, advocacy with employers and recruitment services in order to lessen the impact of disclosure, as well as other arenas such as the schools that women’s children attend and volunteer opportunities. Other possibilities include specialist recruitment support for this group of women, peer support, and therapeutic intervention in later life.

Moving forward it is proposed that a toolkit be developed that can be used as a model for addressing this issue within specific jurisdictions, to be adopted by interested influencers and activists internationally.

Next steps include:

1) Identify key language, policies, and legal instruments that could be adopted

2) Explore other systems of intervention

3) Identify those who could a) further the implementation of such interventions in their jurisdiction of interest and b) have the authority to authorize changes in policy, law, and practice

4) Conducting a more thorough, UK specific, analysis of the possibility for legal intervention

As a first point of action, we suggest consulting with our networks to identify:

1) Whether they are aware of any activities, law, policy, or practice that mitigates against the effect of holding a criminal record

2) Ideas for implementing change within their jurisdiction

3) Key decision makers and persons of influence

In addition, we suggest liaising with legal experts within the UK to analyse the possibilities for legal intervention and determine a plan for implementing such changes. This would include analysing at which points in the system changes can be made, whether blanket amnesty can be implemented or a system of individual applications, and identifying key decision makers to influence.

**Summary**

At present, there is no legal framework for expungement of criminal records, aside from some provision for trafficking victims to apply on an individual basis within several states within the United States. In addition to the need for changes in the law, it is also necessary to have other systems of support to mitigate against the impact of holding a criminal record.

It is proposed that a toolkit is developed for international use as well as identifying how to effect legal change within the UK specifically.

Initial points of action would be firstly, to consult with international networks on possible systems of intervention and secondly, to develop an action plan for within the UK.

1. R (QSA) v. Sec’y of St. for the Home Dept. [2018] EWHC (Admin) 407, [2018] WLR(D) 135 [↑](#footnote-ref-1)
2. *Broadfoot Case* at ¶ 58. [↑](#footnote-ref-2)
3. *Broadfoot Case* at ¶ 59. [↑](#footnote-ref-3)
4. *Broadfoot Case* at ¶ 59. The High Court further noted the overbreadth of the multiple convictions rule, insofar as it “require[es] disclosure in circumstances where no reasonable employer could possibly regard the previous convictions collectively, or the previous conviction(s) for soliciting in particular, as having any relevance at all to the assessment of present risk in the employment concerned,” and undermines subsections 1(2A) and 1(2B) of the Sexual Offenses Act 1959, which aims to “support[] those who wish to leave prostitution.” *Broadfoot Case* at ¶ 60. [↑](#footnote-ref-4)
5. *Broadfoot Case* at ¶ 61. [↑](#footnote-ref-5)
6. *Broadfoot Case* at ¶ 62. [↑](#footnote-ref-6)
7. Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. Crim. L. Criminology & Police Sci. 347 (1968), available at: [https://scholarlycommons.law.northwestern.edu
/cgi/viewcontent.cgi?article=5530&context=jclc](https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5530&context=jclc). [↑](#footnote-ref-7)
8. Loi no. 66-20 of Feb. 1, 1966, Journal Officiel de la République du Sénégal [Official Gazette of Senegal], Feb. 5, 1966. [↑](#footnote-ref-8)
9. *Sex Worker Act 1994* (Vict.) pt I div 1 (Austl.), available at: [http://www.legislation.vic.gov.au/Domino/Web\_
Notes/LDMS/LTObject\_Store/LTObjSt5.nsf/DDE300B846EED9C7CA257616000A3571/998B3217B6D8FFEFCA257810001351B3/$FILE/94-102aa070%20authorised.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/LTObjSt5.nsf/DDE300B846EED9C7CA257616000A3571/998B3217B6D8FFEFCA257810001351B3/%24FILE/94-102aa070%20authorised.pdf). [↑](#footnote-ref-9)
10. *Prostitution Act 1999* (Queensl.) pt 1 dv 3 (Austl.), available at: [https://www.legislation.qld.gov.au/view/pdf/
2017-06-30/act-1999-073](https://www.legislation.qld.gov.au/view/pdf/2017-06-30/act-1999-073). [↑](#footnote-ref-10)
11. Artikel 1:18 lid 274f Sr (oud), available at: [http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie
/WetboekvanStrafrecht\_ENG\_PV.pdf](http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf). [↑](#footnote-ref-11)
12. Strafgesetzbuch [stop] [Penal Code], §§ 180a, 181a, 184e (Ger.), available at: <https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html>; [↑](#footnote-ref-12)
13. According to Nevada state law, “it is unlawful for any person to engage in prostitution or solicitation therefor, except in a licensed house of prostitution.” Nev. Rev. Stat. Ann. § 201.345(1) (LexisNexis 2017). Note that brothels are not permitted in a county whose population is greater than 700,000 is legal in Nevada counties. Nev. Rev. Stat. Ann. § 244.245(1)(b) (LexisNexis 2017); Churchill Cty., Nev., Code tit. 5, ch. 5.20; Elko Cty., Nev., Code tit. 7, ch. 1.6; Esmeralda Cty., Nev., Code Ordinance 154; Humboldt Cty., Nev., Code tit. 5, ch. 5.08; Lander Cty., Nev., Code tit. 5, ch. 5.16; Lyon Cty., Nev., Code tit. 5, ch. 3; Mineral Cty., Nev., Code Tit. 5, ch. 5; Nye Cty., Nev., Code tit. 9, ch. 9.20; Storey Cty., Nev., Code tit. 5, ch. 5.16; White Pine Cty., Nev., Code tit. 10, ch. 10.36. [↑](#footnote-ref-13)
14. *Summary Offences Act 1988, Restricted Premises Act 1943* (N.S.W.) pt I-IV (Austl.), available at: <https://legislation.nsw.gov.au/#/view/act/1943/6/full>. [↑](#footnote-ref-14)
15. Prostitution Reform Act 2003, s 2 (N.Z.), available at: [http://www.legislation.govt.nz/act/public/2003/0028
/latest/DLM197815.html](http://www.legislation.govt.nz/act/public/2003/0028/latest/DLM197815.html). [↑](#footnote-ref-15)
16. 6 ch. 1-15 § Brottsbalken [Brb] [Penal Code] (Svensk Författnings-sampling [SFS] 2018:1005) (Swed.), available at: <https://www.government.se/4a95e7/contentassets/602a1b5a8d65426496402d99e19325d5/chapter-6-of-the-swedish-penal-code-unoffical-translation-20181005>. [↑](#footnote-ref-16)
17. Lov om endringer I straffeloven 20. Mai 2005 [Act on amendments to the Criminal Code, 20 May 2005 No. 28 mv.] nr. 28, §§ 291-320 (Nor.), available at: [https://lovdata.no/dokument/NL/lov/2005-05-20-28/KAPITTEL\_2-11#KAPITTEL\_2-11](https://lovdata.no/dokument/NL/lov/2005-05-20-28/KAPITTEL_2-11%22%20%5Cl%20%22KAPITTEL_2-11). [↑](#footnote-ref-17)
18. Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 c. 2, available at: <http://www.legislation.gov.uk/nia/2015/2/contents/enacted>. [↑](#footnote-ref-18)
19. Janelle Cammenga, *Rauner Signs Bill Removing Barriers for Human Trafficking Survivors*, Illinois Policy, Sept. 4, 2018, <https://www.illinoispolicy.org/rauner-signs-bill-removing-barriers-for-human-trafficking-survivors/>; H.B. 5494, 100th Gen. Assemb., Reg. Sess. (Ill. 2018), available at: [http://www.ilga.gov/legislation/BillStatus.asp?
DocTypeID=HB&DocNum=5494&GAID=14&SessionID=91&LegID=111434](http://www.ilga.gov/legislation/BillStatus.asp?DocTypeID=HB&DocNum=5494&GAID=14&SessionID=91&LegID=111434); Aaron Ball, *The Battle Against Human Trafficking: Florida’s New Expungement Law is a Step in the Right Direction*, Nova L. Rev. 122 (2013), available at <https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1017&context=nlr>; Carrie N. Baker, *The Influence of International Human Trafficking on United States Prostitution Laws: The Ease of Expungement Laws*, 62 Syracuse L. Rev. 171 (2012), available at: <http://lawreview.syr.edu/wp-content/uploads/2013/03/K-Baker.pdf>. [↑](#footnote-ref-19)
20. Protection of Freedoms Act 2012 (establishing “disregarding” scheme); Policing and Crime Act 2017, §164-172 (establishing the pardoning scheme). *Alan Turing Law’: Thousands of Gay Men to be Pardoned*, BBC News, Oct. 20, 2016, <https://www.bbc.com/news/uk-37711518>. [↑](#footnote-ref-20)
21. Douglas A. Berman, *Leveraging Marijuana Reform to Enhance Expungement Practices*, 30 Fed. Sent’g Rep. \_\_ (2018); Margaret Colgate Love, *Starting over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 Fordham Urb. L.J. 1705 (2003), available at [https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?
article=1880&context=ulj](https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1880&context=ulj). [↑](#footnote-ref-21)
22. Rob Gillies & Gene Johnson, *Canada to Pardon Pot Possession As It Legalizes Marijuana*, Associated Press, Oct. 16, 2018, <https://apnews.com/3a31d93c09074bd69721328725befb3c>. [↑](#footnote-ref-22)
23. Newsbeat, *Canabis in Canada: pardoning People for Possession Isn’t Enough*, BBC (Oct. 20, 2018), <https://www.bbc.com/news/newsbeat-45913521>. [↑](#footnote-ref-23)
24. Cannabis Amnesty, <https://www.cannabisamnesty.ca/> (last visited Nov. 7, 208). [↑](#footnote-ref-24)
25. Marjan R. Damaska, Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study (Part 2), 59 J. Crim. L. Criminology & Police Sci. 542, at 545(1968), available at: [https://scholarlycommons.law.
northwestern.edu/cgi/viewcontent.cgi?article=5551&context=jclc](https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5551&context=jclc). [↑](#footnote-ref-25)