

## ***The Blemish on the Clean Slate Act: Is There a Right to Be Forgotten in New Zealand?***

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*The Criminal Records (Clean Slate) Act 2004 allows individuals with historical criminal convictions to leave these convictions in the past. The machinery used to achieve this goal is based on the pre-digital world. The advent of the search engine has rendered the ability not to disclose a criminal record almost worthless. This article explores the “right to be forgotten” as applied by courts in the United Kingdom and discusses whether the Harmful Digital Communications Act 2015 could be used for a similar purpose in New Zealand. It examines the free speech implications of concealing historical criminal convictions, as well as other conceptual arguments for and against concealment. The conclusions drawn are used to propose and specify reform of the Criminal Records (Clean Slate) Act to ensure it can still achieve its purpose in the digital age.*

### I INTRODUCTION

The Moving Finger writes; and, having writ,  
Moves on: nor all your Piety and Wit  
Shall lure it back to cancel half a Line,  
Nor all your Tears wash out a Word of it.

—Omar Khayyám<sup>1</sup>

Despite the futility of attempting to rewrite or escape the past, humans have long attempted to mitigate the negative effects of their past on their future. The advent of the search engine has made this far more difficult. Online archives of an individual’s actions cast a long digital shadow, which has proven difficult to escape. However, this article considers situations in which individuals with historical criminal convictions may rightfully have a claim to leave their past behind.

First, this article outlines the Criminal Records (Clean Slate) Act 2004 (Clean Slate Act), under which those with historical criminal convictions can

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1 Omar Khayyám “Rubáiyát of Omar Khayyám of Naishápúr: Third Edition (1872)” in Edward Fitzgerald (ed) *Rubáiyát of Omar Khayyám: the Astronomer-Poet of Persia* (Thomas Y Crowell, New York, 1921) 87 at [LXXI].

refuse to disclose such convictions. I argue that the qualities of digital information and the advent of the search engine significantly undermine this scheme.

The next two parts discuss legal frameworks developed to respond to the qualities of digital information. Part III examines the European Union “right to be forgotten” in the case of a request to de-index historical criminal convictions. It concludes that this regime is too wide in scope and gives insufficient weight to freedom of expression. Part IV discusses the Harmful Digital Communications Act 2015 (HDCA) and whether the remedies contained within it are appropriate as a “right to be forgotten”. It concludes that using the HDCA to de-index historical criminal convictions would be an improper limit on freedom of expression.

The final two parts discuss whether to and how to address the problem posed by the Clean Slate Act. Part V discusses the appropriateness of “forgetting” historical criminal convictions. It argues that such information cannot be properly considered private. However, it argues that in certain situations, “forgetting” historical criminal convictions is still desirable to promote effective rehabilitation. The part concludes with a discussion of cognitive development as a response to prejudice from continuing disclosure of historical criminal convictions.

Part VI considers reform. It uses the conclusions from the previous parts to propose a scheme for the “forgetting” of historical criminal convictions. It proposes amending the Clean Slate Act, building on the advantages and disadvantages identified in the frameworks discussed.

## II THE CLEAN SLATE ACT AND SEARCH ENGINES

This part examines the Clean Slate Act and discusses how its purpose is undermined by the prominence of search engines and the qualities of digital information.

The purpose of the Clean Slate Act is to establish a scheme limiting the effect of a past conviction, provided the individual is eligible.<sup>2</sup> The relevant eligibility criteria are set out within s 7, and capture non-serious offending. The Act pursues its rehabilitative goal by deeming an eligible individual to have “no criminal record for the purposes of any question asked of him or her about his or her criminal record”.<sup>3</sup> The eligible individual may respond to such a question “by stating that he or she has no criminal record”.<sup>4</sup> The scheme represents parliamentary acknowledgement that people are capable of change and ought to be able to put minor offences behind them. It reflects the importance of effective rehabilitation to a functioning criminal

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2 Section 3.

3 Section 14(1). But see s 19 exceptions.

4 Section 14(2).

justice system. However, the scheme is premised on an outdated understanding of how people access information.

The advent of the Internet search engine has made information significantly more accessible. Information is “practically obscure” when it “is not indexed on key words or key concepts but generally is indexed on the basis of individual files”.<sup>5</sup> Information is “partially obscure” when, despite once being public, it has passed into obscurity.<sup>6</sup> Before widespread use of the Internet, criminal convictions were both practically and partially obscure. Upon entering a criminal conviction in open court, a conviction would be reported in a local newspaper if it was of public interest. Minor convictions would often be overlooked. The newspapers would distribute that information to a local audience. The newspaper would then be archived at a local library. The information on the conviction would then fade from the memory of all but those closest to the event. In that environment, a scheme such as the Clean Slate Act is effective for rehabilitation because the only way to acquire information on a potential employee or acquaintance’s criminal record required a thorough inquiry. The prominence of search engines and the qualities of digital information have drastically changed the way society interacts with information, including historical criminal convictions.<sup>7</sup>

Retaining digital information is cheaper and easier than storing pre-digital information.<sup>8</sup> Where a newspaper would be confined to “all the news that’s fit to print”,<sup>9</sup> today there is almost no limit to what can be published.<sup>10</sup> There is no longer a need to filter stories deemed mundane, as they may appeal to some audiences. This drives advertising revenue. Some news websites have algorithms giving increased prominence to stories that get more clicks.<sup>11</sup> News websites are therefore economically incentivised to post “all the news” rather than “all the news that’s fit to print”. This means that even a mundane offence that may never have been published in the past is likely to be reported online, and therefore within the scope of the indexing search engine.

The Internet has changed the way users access information. In the past, those interested in finding information on an historical criminal conviction reported in a newspaper would be faced with the daunting task of physically trawling through newspaper archives to find the exact paper required. Effectively, a person could not have used this method to get information on a person they had just met. They would need to have known details about the offending already to find the publication date, for example.<sup>12</sup>

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5 David Harvey *Collisions in the Digital Paradigm: Law and Rule-making in the Internet Age* (Hart Publishing, Oxford, 2017) at 279.

6 At 279.

7 Harvey, above n 5, at 41.

8 See generally Viktor Mayer-Schönberger *delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, Princeton, 2009) at ch II.

9 W Joseph Campbell “Story of the most famous seven words in US journalism” (10 February 2012) BBC News <[www.bbc.com](http://www.bbc.com)>.

10 Harvey, above n 5, at 30–31.

11 Jihii Jolly “How algorithms decide the news you see” *Columbia Journalism Review* (online ed, New York, 20 May 2014).

12 Harvey, above n 5, at 279.

Search engines and digital information have drastically changed this dynamic. Information is now constantly available, searchable and retrievable.<sup>13</sup> Unlike a library archive, the Internet is always open; the main impediment to accessing historical criminal convictions is when the website has been removed. Newspapers today are economically incentivised to preserve old stories as digital storage is cheap and these stories can continue to generate advertising revenue. A search engine indexes webpages using keywords, allowing a precise text search to locate almost any article. While those with a more common name may be more difficult to find, qualifiers such as location can be added to ensure only relevant articles are retrieved. Importantly, the information flows directly to the user. A user need only have recourse to a library if they do not have any other available Internet connection.

Online information is virtually permanent.<sup>14</sup> Again, news websites are economically incentivised to retain old news articles. Even if they do remove such articles, the existence of web archival sites ensures that the information remains retrievable. Further, the intermediary (the search engine) is driven to provide the most relevant and accurate indexing product. While the library archive was also theoretically permanent, the effect of the permanence of digital information is amplified by qualities of availability, searchability and retrievability. The criminal conviction will remain online far beyond the date at which an individual becomes eligible under the Clean Slate Act.

Online information, particularly criminal convictions, can be taken out of context. First, most people do not do anything newsworthy within their lifetime. Therefore, a minor, yet reported, criminal conviction is likely to occupy a prominent position on their Google profile. Secondly, the information available will only be what was reported. At most, this would include an outline of the offence. If the offending is interesting enough, remarks from the sentencing judge and prosecuting and defending counsel may be included. Any mitigating factors of the offence and offender, which would contextualise the event, are unlikely to be included. What is almost never included is what the offender has done after the offending. This may reflect their character more accurately in the present day. In short, a historical criminal conviction can have more prominence than it deserves in an individual's Google profile.

It follows that the potential for prejudice is more than just theoretical. There is now widespread use of search engines (the verb "to google" is now included in dictionaries).<sup>15</sup> Online queries made through search engines are common in the employment context. Seventy-five per cent of American recruiters and human resource professionals are required to do online research about their candidates, and 70 per cent have rejected a candidate based on what they have found.<sup>16</sup> Since the search engine became widely used,

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13 At 35–36.

14 Harvey, above n 5, at 28–29.

15 See "google" Lexico <[www.lexico.com](http://www.lexico.com)>; and "Google" Dictionary.com <[www.dictionary.com](http://www.dictionary.com)>.

16 Jeffrey Rosen "The Web Means the End of Forgetting" *The New York Times Magazine* (online ed, New York, 21 July 2010).

individuals can now google potential romantic partners.<sup>17</sup> A reported criminal conviction can prejudice an individual long after they become legally entitled to withhold it.

The Internet typically lacks territorial constraints and is universally accessible.<sup>18</sup> Historically, an individual whose reputation had been harmed by publicised information to the point where they no longer wanted to wait for the benefits of practical or partial obscurity could relocate. In a large city, moving neighbourhoods would be sufficient to escape the damage to reputation.<sup>19</sup> The Internet has rendered worthless this self-help remedy. With a sufficiently precise search query, a curious individual can find information posted online about another. This does not change upon relocating.

The impact of these realities on the Clean Slate Act is clear. While an eligible individual can withhold information relating their criminal record if asked, any curious person with an Internet connection can discover further information themselves. This undermines the very purpose of the Clean Slate Act. Successful relationships and gainful employment are important to effective rehabilitation and, accordingly, to the functioning of the criminal justice system.

A potential response to this undermining is an order requiring de-indexing of the information. When an article is de-indexed, it is removed from search engine queries for a particular term from either a specific geographical region or Internet domain.<sup>20</sup> The information at the source is unaffected. This has become known colloquially as the “right to be forgotten”. De-indexing effectively restores practical and partial obscurity.<sup>21</sup> The following two parts discuss the approach taken under European Union law in the United Kingdom to de-indexing historical criminal convictions, followed by the potential of this to remedy the inadequacy of the law under the HDCA.

### III DE-INDEXING IN THE UNITED KINGDOM

In April 2018, Warby J released his judgment in *NTI v Google LLC (Information Commissioner intervening)*.<sup>22</sup> This part considers the framework under which the decision was made, the scope of this “right to be forgotten” and the associated disadvantages. Consideration of the regime is limited to the extent relevant to historical convictions.<sup>23</sup> This part concludes that the

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17 Kelly Derby, David Knox and Beth Easterling “Snooping in Romantic Relationships” (2012) 46 *College Student Journal* 333 at 339.

18 This may be false if a regional “right to be forgotten” is used. The dangers of this are beyond the scope of this article, particularly as the type of conviction that would be subject to “forgetting” is unlikely to be reported overseas.

19 Mayer-Schönberger, above n 8, at 99–100.

20 *NTI v Google LLC (Information Commissioner intervening)* [2018] EWHC 799 (QB), [2019] QB 344 at [38].

21 Harvey, above n 5, at 288.

22 *NTI*, above n 20.

23 Contrast Case C-131/12 *Google Spain SL v Agencia Española de Protección de Datos (AEPD)* ECLI:EU:C:2014:317 [*Google Spain*], where the regime outlined is far wider and allows de-indexing

approach taken is too wide in scope and improperly allocates the responsibility to balance freedom of expression against competing interests to the Internet search engine operator.

The legal context of the decision is outlined fully by Warby J.<sup>24</sup> Domestic law in the United Kingdom is subject to European Union law as contained in their Directives.<sup>25</sup> In October 1995, the Data Protection directive (DP directive) was enacted.<sup>26</sup> This directive outlined the protection of individuals in relation to the processing of their personal data. To comply with that directive, the United Kingdom Parliament passed the Data Protection Act 1998.<sup>27</sup> The Act is required to be interpreted consistently with the DP directive. In interpreting the DP directive, United Kingdom courts must give effect to the rulings of the Court of Justice of the European Union (CJEU).<sup>28</sup>

In May 2014, the CJEU released its decision in *Google Spain*.<sup>29</sup> The CJEU interpreted the DP directive, as well as the Charter of Fundamental Rights of the European Union, as creating a “right to be forgotten”. It held that search engines are a data processor for the purposes of the DP directive and, therefore, must process data only in accordance with data protection principles.<sup>30</sup> The CJEU applied the right to respect for private and family life, along with the right to protection of personal data. It found that the DP directive entitles European Union citizens to request de-indexing of information about themselves.<sup>31</sup> This right accrues regardless of the truth of the information, or the original lawfulness of the processing.<sup>32</sup> In particular, the CJEU upheld the de-indexing request because the webpage link provided:<sup>33</sup>

... appear[ed], having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine ...

The CJEU decided the de-indexing request was to be determined by striking a fair balance between “the legitimate interest of Internet users potentially interested in having access to [the] information” and the rights of the data subjects guaranteed by arts 7 and 8 of the Charter.<sup>34</sup> In striking this balance, it

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of a variety of personal information for a variety of other reasons. See also Anna Fraser “Should There be a Right to be Forgotten (The Right to Make Search Engines Hide Information About You) in New Zealand? An analysis of *Google v Spain*” (LLB (Hons) Dissertation, Victoria University of Wellington, 2015).

24 *NTI*, above n 20, at [13]–[50].

25 See generally Koen Lenaerts and Piet van Nuffel *European Union Law* (3rd ed, Sweet & Maxwell, London, 2011) at 896.

26 Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 [DP directive].

27 Data Protection Act 1998 (UK).

28 European Communities Act 1972 (UK), s 3.

29 *Google Spain*, above n 23.

30 At [28]–[38].

31 At [94]–[96].

32 At [81].

33 At [94].

34 At [81].

observed that usually data subject's rights would defeat the economic interests of the search engine and the general public interest in having access to that information.<sup>35</sup>

In 1974, the United Kingdom passed the equivalent of New Zealand's Clean Slate Act, the Rehabilitation of Offenders Act.<sup>36</sup> This Act provides that an individual whose conviction is "spent" is to be treated for "all purposes in law" as if the offending had not been committed.<sup>37</sup> A conviction becomes spent after a rehabilitative period of time, determined by both the age of the offender and the duration of the sentence.<sup>38</sup> No adjustment is made for the type of offence. That convictions are "spent" is not determinative of de-indexing.<sup>39</sup>

NT1 and NT2 were businessmen. Each made separate applications arising out of separate circumstances for the de-indexing of their historical criminal convictions. Their claims were against Google, as their convictions appeared prominently on their Google profiles. Two grounds for de-indexing were particularly relevant. First, that the information posted was incorrect. Secondly, that the information posted was no longer relevant.<sup>40</sup>

The first ground may seem unlikely to succeed, as a conviction is generally considered conclusive evidence of the offence. Despite this, NT2 succeeded in arguing that some of the articles suggested a greater degree of criminality than that for which he was in fact responsible.<sup>41</sup> While seemingly unobjectionable, this is problematic as it creates the potential for many de-indexing claims. When a criminal conviction of moderate public interest is reported, the conviction itself is not the focus of the article. Instead, the reporter will include remarks from the trial judge, the prosecution and defence counsel. Often, these remarks will be out of context, or given improper prominence. If misstating criminality is a proper ground for de-indexing, historical criminal convictions will become a very fertile ground for de-indexing applications. However, it is worth noting that this has the potential to encourage proper reporting of criminal affairs, as reports that overstate the criminality of the offending may not remain indexed. This would make proper reporting more profitable, as those webpages would remain available for longer.

Most of the Court's analysis in *NT1* focused on the continued relevance of the *Google Spain* decision.<sup>42</sup> In assessing relevance, the Court considered the non-binding Working Party Guidelines.<sup>43</sup> It examined whether the applicant was a public figure, noting that public figures are less likely to have a successful de-indexing claim.<sup>44</sup> While harm is expressly unnecessary,

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35 At [97].

36 Rehabilitation of Offenders Act 1974 (UK).

37 Section 4. See, however, s 7.

38 Sections 5–7.

39 *NT1*, above n 20, at [166].

40 At [2].

41 At [187]–[190].

42 *NT1*, above n 20.

43 At [135].

44 At [137].

an applicant who has suffered harm is more likely to succeed.<sup>45</sup> The harm must be from improper data processing, as opposed to the normal consequences of a criminal conviction.<sup>46</sup> This reflects the policy of the United Kingdom Rehabilitation of Offenders Act, where a criminal conviction published in good faith will generally have been properly processed.<sup>47</sup>

The criteria set out in the Working Party Guidelines expressly contemplate that member states will determine the continued public availability of historical criminal convictions in their own manner.<sup>48</sup> The Court noted that whether a conviction is “spent” in accordance with the Rehabilitation of Offenders Act is relevant, but not determinative of the public availability of this information.<sup>49</sup> Those with more severe sentences are less likely to succeed in a de-indexing claim.<sup>50</sup>

Regarding freedom of expression, the Court considered it important that anybody with a legitimate interest in the conviction had already been able to access information.<sup>51</sup>

The approach taken by the United Kingdom courts has too great a scope. The United Kingdom Rehabilitation of Offenders Act is broad. It allows a conviction to become “spent” solely based on the passage of time. As an important factor in determining de-indexing, this could produce improper results. Some offending will always reflect on character, and so the public will always have a strong interest in knowing about such offending.<sup>52</sup> Further, de-indexing based on relevance ignores the risks associated with relevance being too dynamic. Despite not having offended for years, a de-indexed conviction would undoubtedly become relevant after subsequent offending.<sup>53</sup> Similarly, such information may again become relevant if that individual runs for public office after de-indexing.

However, the more serious issues with this approach are not within the judgment, but the overall framework. The concerns arise out of the expectation that the Internet search engine operator is the body to determine complaints at first instance. At the heart of this problem is that these are private bodies, primarily motivated by profit; they lack independence and will improperly restrict freedom of expression.

First, I consider the lack of independence. The CJEU’s interpretation of the DP directive makes Internet search engine operators the “judge, jury and executioner” of de-indexing requests.<sup>54</sup> This is problematic as they are financially motivated. If a party appears litigious, it is financially expedient to simply allow their de-indexing request.<sup>55</sup> This concern is intensified by the

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45 At [147].

46 At [151].

47 At [166].

48 At [161].

49 At [166].

50 At [167].

51 At [169].

52 See Part IV for discussion of the impact on freedom of expression.

53 Harvey, above n 5, at 301.

54 At 303.

55 At 303–304.



availability of compensation under the DP directive and associated procedures.<sup>56</sup> In a “myth-busting” information sheet following the *Google Spain* decision, the European Union claimed that sufficient independence is maintained through the existence of an oversight body.<sup>57</sup> I disagree. Obviously, a successful de-indexing request will not generate a complaint from the requesting individual. It is also unlikely to generate a complaint from the Internet search engine operator if it was the one that approved the request. Fortunately, as a matter of policy, Google notifies webmasters whose pages are de-indexed.<sup>58</sup> However, there is no requirement to do this and the webmaster has no right to challenge Google’s decision.<sup>59</sup> Proper, independent oversight would require mandatory reporting of de-indexing, alongside justification and review by an independent body tasked with protecting freedom of expression.

As well as this lack of independence, placing the burden at first instance on the Internet search engine operator constitutes an improper restriction on freedom of expression. In that same “myth-busting” information sheet, the European Union argue that the restriction on freedom of expression is limited because the Internet search engine operator is required to balance competing interests.<sup>60</sup> However, it is *because* the private entity is required to balance these interests that freedom of expression is improperly restricted. Ultimately, the private entity is motivated by profit. When faced with defending a borderline de-indexing claim, it is likely to prefer self-censorship.<sup>61</sup> Perhaps this is already happening. In Google’s transparency report on the right to be forgotten, one of the most commonly removed items was a criminal conviction.<sup>62</sup> Ironically, the course of action designed to incentivise freedom of expression — privatisation — is the very method that restricts it.

#### IV THE HARMFUL DIGITAL COMMUNICATIONS ACT 2015

In 2015, Parliament enacted the HDCA. This part discusses the potential for the HDCA to be used to fill the gap in the Clean Slate Act. It explores what must be considered under the HDCA in creating a right to be forgotten, including the impact of the mandatory consideration of freedom of expression. I conclude that the HDCA is poorly suited for effecting a “right to be forgotten” for historical criminal convictions.

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56 Data Protection Act 2018 (UK), ss 168–169.

57 European Commission *Myth-Busting: The Court of Justice of the EU and the ‘Right to be Forgotten’* (Factsheet, September 2014) at 5.

58 Google “European privacy requests Search removals FAQs” Google Help <support.google.com>.

59 Google, above n 58. The webmaster may request Google re-review the decision.

60 European Commission, above n 57, at 4.

61 Harvey, above n 5, at 304.

62 Google “Search removals under European privacy law” Transparency Report <transparencyreport.google.com>.

The stated purpose of the HDCA is to prevent and mitigate harm caused to individuals as a result of digital communications<sup>63</sup> and to provide those individuals with quick and efficient redress.<sup>64</sup> The HDCA was enacted to respond to concerns over cyberbullying, as well as a study by the Law Commission.<sup>65</sup> This context and purpose must be given effect to in interpreting the HDCA.<sup>66</sup>

There has been at least one attempt to use the HDCA to remove a historical criminal conviction.<sup>67</sup> It was unsuccessful.<sup>68</sup> This claim requested that a news website remove its content.<sup>69</sup> For the purposes of this part, I will assume that the defendant in any proceeding will instead be an Internet search engine operator, responding to a claim for a de-indexing order. Judge Spear, in declining the application, remarked on the purpose of the legislation:<sup>70</sup>

... the Harmful Digital Communications Act 2015 was surely never designed or intended to provide an effective, albeit de facto, means to restrict access to news media reports on Court proceedings no matter how long ago they occurred.

Despite Judge Spear's comments, this part discusses the potential for the HDCA to be used to do just that.

The HDCA applies to digital communications. A digital communication is "any form of electronic communication; and includes any text message, writing, photograph, picture, recording, or other matter that is communicated electronically".<sup>71</sup> A person has posted a digital communication when they transfer, send, post, publish, disseminate or otherwise communicate "by means of a digital communication — any information, whether truthful or untruthful, about [a] victim".<sup>72</sup> This definition is broad, encompassing both the news website posting the news article and the Internet search engine operator that disseminates links.

The HDCA outlines communication principles in s 6. The principle relevant to restricting the disclosure of historical criminal convictions is Principle 1, which states that "[a] digital communication should not disclose sensitive personal facts about an individual."<sup>73</sup> In exercising any function under the HDCA, the court must take into account the communication principles<sup>74</sup> and act in a manner consistent with the rights and freedoms within the New Zealand Bill of Rights Act 1990.<sup>75</sup>

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63 Section 3(a).

64 Section 3(b).

65 Rosemary Tobin and David Harvey *New Zealand Media and Entertainment Law* (Thomson Reuters New Zealand, Wellington, 2017) at 282–283.

66 Interpretation Act 1999, s 5(1).

67 *Wensor v "Stuff"* — *Fairfax Media* [2017] NZDC 979.

68 At [13].

69 At [1] and [3].

70 *Wensor*, above n 67, at [12].

71 Section 4.

72 Section 4.

73 Section 6(1).

74 Section 6(2)(a).

75 Section 6(2)(b).

Before making an application for an order under s 19, an applicant must make a complaint to the approved agency attempting to resolve the issue.<sup>76</sup> The approved agency is currently Netsafe.<sup>77</sup> One of the functions of the approved agency is “to receive and assess complaints about harm caused ... by digital communications”, “to investigate [those] complaints” and attempt to resolve them.<sup>78</sup> The agency is effectively a mediator, without the ability to require removal of material. Here, the nature of the desired remedy makes resolution by the approved agency unlikely. Without the threat of litigation, Internet search engine operators are unlikely to reduce the accuracy of their product voluntarily, and a news agency is even less likely to self-censor. An application to the approved agency will be little more than a formality here.

Section 19 gives the District Court a variety of remedial orders. The court may make an order requiring a defendant “to take down or disable material”;<sup>79</sup> to cease or refrain from specific conduct;<sup>80</sup> not to encourage others to engage in certain conduct;<sup>81</sup> to publish a correction;<sup>82</sup> or to publish an apology.<sup>83</sup> Against an online content host, the court can order that the host publishes a correction,<sup>84</sup> or give a right of reply to an affected individual.<sup>85</sup>

Before making an order under s 19, the court must be satisfied that there has been a breach of a communication principle and the breach either has, or is likely to, cause harm.<sup>86</sup> Harm is defined in the HDCA as “serious emotional distress”.<sup>87</sup> The Law Commission report — from which the HDCA draws heavily — provides guidance on determining the type of harm that will support a s 19 order.<sup>88</sup> The Law Commission considered that “harm” included a range of negative consequences, including physical fear, humiliation, mental distress and emotional distress.<sup>89</sup>

Downs J discussed harm under the HDCA, albeit in the criminal context, in *New Zealand Police v B*.<sup>90</sup> There, the victim reported feeling scared and anxious that her ex-partner would post compromising pictures of her online.<sup>91</sup> In determining whether a victim has suffered harm, the Court stated that the Act is concerned only with serious emotional harm.<sup>92</sup> Trifling emotional harm is excluded, although an applicant need not show mental

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76 Section 12(1).

77 Harmful Digital Communications (Appointment of Approved Agency) Order 2016, cl 3.

78 Harmful Digital Communications Act, s 8(1).

79 Section 19(1)(a).

80 Subsection (1)(b).

81 Subsection (1)(c).

82 Subsection (1)(d).

83 Subsection (1)(f).

84 Subsection (2)(c).

85 Subsection (2)(d).

86 Section 12(2).

87 Harmful Digital Communications Act, s 4.

88 Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MB3, 2012).

89 At 25.

90 *New Zealand Police v B* [2017] NZHC 526, [2017] 3 NZLR 203.

91 At [5].

92 At [21].

injury or identifiable psychological or psychiatric conditions.<sup>93</sup> Some of the obvious factors the court should have regard to are the duration, manifestation and context of the harm, as well as whether a reasonable person would have suffered harm in those circumstances.<sup>94</sup>

The HDCA only allows a remedy when the communication has caused, or is likely to cause harm.<sup>95</sup> It is possible to imagine then, a situation like that of NT1, who was ostracised as a result of his conviction. In that case, the harm was not caused by the availability of the information. Rather, it was a natural consequence of his offending. This distinction may not be relevant. The HDCA is concerned with harm unique to the digital world, resulting from increased availability of information, as discussed in Part I. To attribute the harm to the underlying offence, rather than the continued availability of information about that offence, seems to subvert that purpose.

Plainly, the HDCA is not concerned with reputational or financial harm. This means that a typical de-indexing claim would be unable to show harm for the purposes of the Act. Whether a communication has caused harm is mostly fact specific. The definition of harm does not consider the intent of the person making the communication. Rather, it is entirely based on how the recipient feels about the communication.<sup>96</sup> Therefore, some individuals may be so distressed over the ongoing prominence and availability of information on their historical criminal conviction, that this falls within the definition of harm.

To grant a s 19 order, the court must also be convinced that the digital communication breaches a communication principle.<sup>97</sup> As identified earlier, the relevant communication principle is that a digital communication should not disclose sensitive personal facts about an individual.<sup>98</sup> Therefore, to support a de-indexing request, a historical criminal conviction must be capable of being classified as a sensitive personal fact. This subpart is concerned with what a court is *likely to* decide, not what a court *ought to* decide. Discussion of whether historical criminal convictions should be subject to privacy protection laws is reserved for Part V.

The HDCA provides no assistance in determining whether something is a sensitive personal fact. Writing in 1989, Raymond Wacks suggests as good a definition as any:<sup>99</sup>

“Personal information” consists of those facts, communications, or opinions which relate to the individual and which it would be reasonable to expect him to regard as intimate or sensitive and therefore to want to withhold or at least to restrict their collection, use, or circulation.

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93 At [22].

94 At [24].

95 Harmful Digital Communications Act, s 12(2)(b).

96 Tobin and Harvey, above n 65, at 289.

97 Harmful Digital Communications Act, s 12(2)(a).

98 Section 6(1).

99 Raymond Wacks *Personal Information: Privacy and the Law* (2nd ed, Oxford University Press, Oxford, 1993) at 26.

At a glance, it is difficult to suggest it reasonable to withhold the entering of a conviction. Open justice is a fundamental principle of our criminal justice system. Information regarding criminal convictions rightfully belongs to the public and its use should not be restricted. However, the balance of judicial opinion in New Zealand and England resists this viewpoint and supports the proposition that criminal convictions may eventually become sensitive personal facts.

The well-known case of *Tucker v News Media Ownership* is often cited for the proposition that a criminal conviction may rightfully be considered private with the passage of time.<sup>100</sup> Mr Tucker was convicted of sexual offences and served his sentence. Years later, he needed a heart transplant. At the time, the operation was only partially covered by government funding, so he sought donations from the public. In the course of his campaign, information about his prior convictions surfaced in a local newspaper. The newspaper approached him for comment. Mr Tucker was awaiting surgery in Australia, and gave evidence that he was suffering severe emotional distress as a result of the continued publicity, which could impact his future operation. Mr Tucker sought an injunction, and was originally successful.<sup>101</sup> Word of the conviction spread to other news outlets not covered by the injunction, who subsequently published the information. The injunction against the first outlets was dissolved; the information had already been distributed to the public.<sup>102</sup> The case recognises that a conviction might eventually become private.<sup>103</sup> It illustrates that when balancing values, the interest in continued dissemination of a conviction tends to give way to the interest in protecting an individual from serious harm.

In developing the tort of breach of privacy, New Zealand courts have drawn upon decisions of the Broadcasting Standards Authority (BSA). These decisions illuminated examples of when an individual in New Zealand might have a reasonable expectation of privacy.<sup>104</sup> In *Steadman v Television New Zealand*, the BSA considered a situation in which publicity was given to a historical overseas criminal conviction.<sup>105</sup> There, the BSA was presented with a complaint over a broadcast detailing the criminal past of a recent immigrant to New Zealand. The complainant adduced evidence that his wife's business was suffering<sup>106</sup> and that he feared for his life due to alleged threats arising from disclosure of his location.<sup>107</sup> Among his complaints, he claimed that the broadcasting of this information amounted to a breach of his privacy.<sup>108</sup> Importantly, the free-to-air television code included this privacy principle:<sup>109</sup>

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100 *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC).

101 At 716.

102 At 735–736.

103 At 735.

104 Tobin and Harvey, above n 65, at 255.

105 *Steadman v Television New Zealand Ltd* BSA Decision No 2004-189, 11 June 2005 at [1].

106 At [26].

107 At [27].

108 At [2].

109 At [12].

- ii) The protection of privacy also protects against the public disclosure of some kinds of public facts. The “public” facts contemplated concern events (such as criminal behaviour) which have, in effect, become private again, for example through the passage of time.

Nevertheless, the BSA rejected the privacy complaint as this information was sufficiently serious and readily available on public record that it had failed to regain privacy.<sup>110</sup> However, the very existence of the standard supports the proposition that a criminal conviction may be claimed as private information with the passage of time.

English courts have been more enthusiastic about classifying historical criminal convictions as private. In *Regina v Commissioner of Police for the Metropolis*, Lord Hope SCJ remarked:<sup>111</sup>

[Criminal convictions] collected and stored in central records can fall within the scope of private life ... with the result that it will interfere with the applicant’s private life when it is released. ... As [the conviction] recedes into the past, it becomes a part of the person’s private life which must be respected.

With these authorities in mind, it seems likely that a court may classify a historical criminal conviction as falling within the definition of a “sensitive personal fact”, despite it being public information.

Before making an order under s 19, the court must consider the following factors within subs 5, as well as the impact on freedom of expression:<sup>112</sup>

- (a) the content of the communication and the level of harm caused or likely to be caused by it:
- (b) the purpose of the communicator, in particular whether the communication was intended to cause harm:
- (c) the occasion, context, and subject matter of the communication:
- (d) the extent to which the communication has spread beyond the original parties to the communication:
- (e) the age and vulnerability of the affected individual:
- (f) the truth or falsity of the statement:
- (g) whether the communication is in the public interest:
- (h) the conduct of the defendant, including any attempt by the defendant to minimise the harm caused:
- (i) the conduct of the affected individual or complainant:
- (j) the technical and operational practicalities, and the costs, of an order:

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110 At [74].

111 *Regina (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, [2010] 1 AC 410 at [27]. See also *Gaughran v Chief Constable for the Police Service of Northern Ireland* [2015] UKSC 29 [2016] AC 345; and *Regina (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35, [2015] AC 49.

112 Harmful Digital Communications Act, s 19(6).

- (k) the appropriate individual or other person who should be subject to the order.

An applicant who can show significant harm, as defined above, is more likely to succeed in an application. It is difficult to imagine a situation that would provide a compelling case for de-indexing. One such situation might be that of Mr Tucker, discussed above. Support for such an application would involve considering the age and vulnerability of the applicant. A person whose life is in danger has a strong moral claim to restricting speech that may endanger them.

Conduct of the affected individual can also support an application. Presumably, an individual who has not offended for years can adduce evidence of their current record to strengthen their de-indexing claim. This would also be relevant to the context of the communication. One of the stronger arguments in favour of open justice is that it informs individuals about those convicted of dangerous offences and allows them to protect themselves, perhaps by avoiding or limiting contact with past offenders who they consider dangerous or unsavoury. This consideration loses significance if the individual is reformed and, therefore, less likely to pose a threat to the community.

The court must also consider the technical and operational practicalities of an order. This will be relevant only in rare situations. An example would be the case of Mr Tucker, whose conviction had already been disseminated widely. As maintaining his injunction was improper, so too would have been an order under the HDCA. Such an order would also be impractical where a conviction goes “viral”, despite being associated with a lower level of public interest associated.<sup>113</sup>

Most notably, any request for de-indexing will be met with concerns about the truth of the conviction, or concerns that the information’s availability may be in the public interest. Truth, however, is not a defence to a claim under the HDCA; it is only a factor.<sup>114</sup> Rosemary Tobin and David Harvey suggest that when an individual is seeking relief for what might be considered as reputational harm, the court ought to lean towards truth as a justification for refusing an order.<sup>115</sup> The extent of the public interest engaged is discussed in the freedom of expression part below.

The largest hurdle in seeking a remedy is the mandatory consideration of freedom of expression. New Zealand’s commitment to freedom of expression is found in the New Zealand Bill of Rights Act, as well as several international instruments. Freedom of expression includes “the freedom to seek, receive and impart information”.<sup>116</sup> This freedom is engaged strongly when attempting to restrict access to information on criminal convictions.

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113 Michelle Cheng “Councillor accused of indecently assaulting a woman is asked to measure his penis as prosecution try to prove it was him after ‘victim felt a five-inch object press against her hip”” *Daily Mail* (online ed, London, 22 May 2018).

114 Section 19(5)(f).

115 Tobin and Harvey, above n 65, at 304.

116 New Zealand Bill of Rights Act 1990, s 14.

Protecting freedom of expression can be seen as protecting the interests of the speaker, the interests of the audience, or the interests of society.<sup>117</sup> Restricting the availability of historical criminal convictions involves all three.

The speaker has an interest in distributing their ideas and propositions to the wider public. For example, Martin Redish argues that the foundational principle of the right to freedom of expression is self-realisation. It is through self-realisation that we achieve dignity and autonomy.<sup>118</sup> There are a variety of speaker interests engaged in disseminating information about historical criminal convictions. The media have an interest in providing information of value to the public. The search engine has a legitimate business interest in providing an accurate and relevant indexing and retrieval service. Although these bodies are motivated by profit, this does not reduce the value of their speech, nor the need to protect it.<sup>119</sup>

There are two main audience interests in receiving information. One can be described as the interest in relevant information. The other is the interest in having probative information.

The first audience interest arises from a desire to have all available information to make an informed decision.<sup>120</sup> This argument is concerned with the relevance of information, as opposed to the probative value of that information. This is the strongest argument against an order under the HDCA. Undoubtedly, the information on a historical criminal conviction is both true and relevant. Entering a criminal offence amounts to societal condemnation of conduct. The gravity of this matter is reflected in the requirement that offences be proven beyond reasonable doubt. To say that this information may not be relevant in determining whether and how one wishes to interact with another seems untenable. That the information is historical, and therefore less important, does not significantly weaken this argument. The interest here is not in ensuring the individual makes the correct decision, but that they make an autonomous decision. As Eric Barendt, building on Thomas Scanlon, writes:<sup>121</sup>

A person is only autonomous if he is free to weigh for himself the arguments for various courses of action that others wish to put before him. The government ... is therefore not entitled to suppress speech on the grounds either that its audience will form harmful beliefs or that it may commit harmful acts as a result of those beliefs.

However, any argument based on societal autonomy remains open to criticism. A society of autonomous individuals may agree collectively that information such as historical criminal convictions is not capable of being

117 Eric Barendt *Freedom of Speech* (2nd ed, Oxford University Press, Oxford, 2005) at 23.

118 Martin H Redish "The Value of Free Speech" (1982) 130 U Pa L Rev 591 at 594–595.

119 Where the competing interest is privacy, the Court is hesitant to distinguish between commercial and non-commercial speech: *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [135]. See also *First National Bank of Boston v Bellotti* 435 US 765 (1978) at 777, where the United States Supreme Court remarked: "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."

120 Barendt, above n 117, at 16.

121 At 16 citing Thomas Scanlon "A Theory of Freedom of Expression" (1972) 1 Phil & Pub Aff 204.



weighed appropriately. Therefore, the society restricts access to that information.<sup>122</sup> Such criticism, while cogent, lacks strength in the case of law that is not expressly designed to suppress information. Therefore, for this argument to have value, Parliament must expressly approve a scheme designed to conceal historical criminal convictions.

There is a second audience interest in the disclosure of historical criminal convictions. This interest arises from the probative value of information, rather than its relevance. Here, the audience has an interest for the purposes of making a correct decision (as opposed to an autonomous decision). This argument is admittedly weak. Due to its historical nature, the probative value of a past conviction is low. Yet, in certain circumstances its value may remain. For example, a minor theft by a young person is unlikely to have significant probative value on its own as to the character of that person 20 years later. In contrast, a dishonesty offence committed by an adult may still reflect their character. The greater the probative value of a conviction, the stronger the audience interest.

There is a wider societal interest in the continued disclosure of historical criminal convictions — the societal benefit of open justice. This is difficult, but not impossible, to separate from audience interest. Open justice is promoted through the continued availability of criminal convictions. It is important to the proper functioning of the criminal justice system. Open justice achieves a deterrent effect through societal condemnation of certain conduct and the negative effects that result from that conduct.

This would be a strong argument against concealing historical criminal convictions, if such claims were directed against the media. Allowing the information to remain on the original website achieves the purposes of informing the public and condemning the conduct. As well as this, the search result is available for a prolonged period before de-indexing occurs. It is difficult to say that allowing a curious individual to discover information on a person impacts much on their perception of the justice system. Rather, it merely satisfies their curiosity.

Cherri-Ann Beckles, an archivist from the University of West Indies, suggests that the societal interest in the availability of such information is in preserving the individual and collective memory of society.<sup>123</sup> At a glance, the threat against societal memory may not seem so great. De-indexing requires only that a specific link is removed from a specific search query. The original article remains intact. However, de-indexing prevents retention of an accurate record of a particular individual. In particular, there is a real threat of rendering the Internet as no more than a collection of “sanitised ‘authorised biographies’”.<sup>124</sup>

That the original information remains online after a de-indexing request does not significantly reduce the impact on freedom of expression.

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122 At 17.

123 Cherri-Ann Beckles “Will the Right To Be Forgotten Lead to a Society That Was Forgotten?” (14 May 2013) IAPP <iapp.org>.

124 Sumit Paul-Choudhury “Digital legacy: The fate of your online soul” *New Scientist* (online ed, London, 19 April 2011).

The individual making a search engine request is specifically seeking information on a particular person. Here, the infringement on freedom of expression is that the individual is merely placed back in a situation akin to a public library; the information is practically obscure and virtually inaccessible without prior knowledge of the whereabouts of the information. In fact, some may even assume if the information is not available online, it simply does not exist. Removing an essential link in the chain of access to a piece of information is as serious of an infringement on freedom of expression as removing the information itself.

The court is expressly required to consider the abovementioned factors, as well as freedom of expression, in deciding whether to make an order and which order to make. The severe impact on freedom of expression means that an order against a media outlet itself is unjustifiable. However, a de-indexing order against a search engine is within the possible range of remedies for a successful applicant.

In contrast with the approach required of the United Kingdom courts, the HDCA is ineffective in concealing historical criminal convictions. The factors considered by the court do not accurately capture the strongest arguments for removing access to information on convictions. Further, the requirement of harm would eliminate all but the strongest cases for concealing historical criminal convictions. It places emphasis not on whether the conviction should be concealed, but on the effect of disclosure on the individual. Finally, the mandatory requirement of consideration of freedom of expression creates a very high threshold for the courts. Any court making such an order would need to be convinced strongly of the necessity of the removal. In extraordinary circumstances like those of Mr Tucker, an order might be made. However, the HDCA is an improper tool for restricting access to historical criminal convictions.

The following two parts discuss whether reform is desirable at all, and if so, how it may best be done in light of this infringement on freedom of expression.

## **V THE DESIRABILITY OF “FORGETTING” HISTORICAL CRIMINAL CONVICTIONS**

The previous part argued that concealing historical criminal convictions is a significant limit on freedom of expression. This part discusses conceptual arguments for and against concealing historical criminal convictions, despite this restriction on freedom of expression. The part begins with privacy. While Part III has argued that a court is likely to consider a historical criminal conviction a sensitive personal fact, this part argues that in the case of a historical criminal conviction, privacy is not truly the interest infringed. It argues that while privacy protection might rightfully conceal embarrassing photos from the past, the same underlying rationale cannot apply to a historical criminal conviction. Therefore, another rationale is needed to justify the

limitation on freedom of expression. The part argues that effective rehabilitation provides that justification. Finally, this part addresses arguments against a right to be forgotten, within the context of historical criminal convictions. It concludes that it is worth addressing the problems the digital paradigm causes in relation to the Clean Slate scheme.

Privacy is notoriously difficult to define. Equally difficult to determine is whether a concept is rightfully entitled to privacy protection. First, I argue that while the disclosure of an embarrassing Facebook post may be covered by the umbrella of privacy, the historical criminal conviction is left out in the rain.

At the outset, I note the opinion that the “right to be forgotten” in the form of a de-indexing claim sits in tension with privacy rights. Traditionally, privacy protection is about limiting public access to private information, whereas de-indexing is about limiting access to public information.<sup>125</sup>

As part of a 2008 report, the New Zealand Law Commission conducted an inquiry into privacy literature.<sup>126</sup> The Commission concluded that there are two dimensions to privacy: informational and spatial.<sup>127</sup> It is possible to distinguish a difference between two potential privacy infringements within the broader concept of the right to be forgotten. First, the person who unknowingly takes private pictures and places them online. The spatial privacy of the subjects of those pictures has been infringed. Such subjects are entitled to different considerations than both the person who has made an embarrassing Facebook post or the individual who has had their conviction posted online. The subject is also well within the protections of privacy law and their claim to a “right to be forgotten” can be justified as such. The remaining claim is the person whose embarrassing personal information is online. This claim is intended to capture both the person who has made an embarrassing Facebook post and the subject of the post. In a sense, they both seek absolution from their digital sins. I argue their claims are distinguishable. The person seeking the removal of an embarrassing post may be entitled to call that information private, but the person seeking removal of a historical criminal conviction cannot.

Daniel Solove explores the conceptual scope of privacy protection with reference to the harms from which it protects.<sup>128</sup> He divides the possible harms into seven categories.<sup>129</sup> Three are relevant for the purposes of deciphering the differences between the individual with an embarrassing Facebook post and the individual with a historical criminal conviction: disclosure, exposure and increased accessibility.

Disclosure, Solove writes, is the protection of reputation from true information.<sup>130</sup> When the disclosure is highly offensive to the reasonable

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125 Harvey, above n 5, at 296.

126 Law Commission *Privacy Concepts and Issues: Review of the Law of Privacy Stage 1* (Study Paper 19, January 2008).

127 At 10.

128 Daniel J Solove “A Taxonomy of Privacy” (2006) 154 U Pa L Rev 477.

129 At 525.

130 At 531.

person and not of interest to the public, then privacy protection is justified.<sup>131</sup> He notes that this protection only rightfully extends to information which is kept secret.<sup>132</sup> Such protection is justifiable to protect autonomy. Without disclosure protection, people are prevented from engaging in activities that further their own self-development.<sup>133</sup> This protection is already found in New Zealand in the tort of invasion of privacy.<sup>134</sup> Such protection justifies the removal of personal information which inadvertently finds its way online and becomes searchable. An example is personal information of a witness disclosed within a reported case. That information would be rightfully protected by privacy rights and a de-indexing claim based on such would be sound. Justification is lacking, however, for protecting the embarrassing Facebook post or the historical criminal conviction. The former is not highly offensive and occurred on the Internet; a public place. The latter is of public interest and occurred in a public place: the courtroom.

Exposure protection is protection of true information that is not used to make meaningful judgements of character.<sup>135</sup> Such protection is designed to conceal certain physical and emotional attributes about a person, such as grief and nudity.<sup>136</sup> Protection is justified to protect dignity.<sup>137</sup> This protection is recognised in New Zealand through both the torts of invasion of privacy and intrusion into seclusion,<sup>138</sup> as well as an assortment of criminal offences.<sup>139</sup> Protection here justifies privacy protection over the spatial aspect of privacy mentioned above. It provides no justification for protection of either the embarrassing Facebook post or the historical criminal conviction.

The third relevant category is increased accessibility. This privacy protection is concerned with reducing the harm of increased access to already public information.<sup>140</sup> The potential for harm arises when the information can be used for purposes other than those for which it was originally disclosed. To Solove, prior publicity does not remove the justification for privacy protection.<sup>141</sup> This category provides further justification for protecting the person whose information is inadvertently disclosed in a court proceeding. That individual might rightfully claim a right to be forgotten under the umbrella of privacy protection. Further, to draw an example from Viktor Mayer-Schönberger, this form of protection might cover the situation of a teacher declined their licence due to a picture of them consuming alcohol.<sup>142</sup> The image was not intended to reflect their character. But this category still fails to justify concealing a historical criminal conviction. Undoubtedly,

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131 At 530–535.

132 At 534.

133 Daniel J Solove “The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure” (2003) 53 Duke LJ 967 at 991.

134 *Hosking v Runting*, above n 119.

135 Solove, above n 128, at 536.

136 At 536.

137 At 537.

138 *Hosking v Runting*, above n 119; and *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.

139 Crimes Act 1961, pt 9A.

140 Solove, above n 128, at 539–540.

141 At 540.

142 Mayer-Schönberger, above n 8, at 1–2.

increased access is the harm in question. However, the information is not being used for an improper purpose. Instead, the information is used for its intended purpose: informing the public. That the purpose harms the convicted individual is incidental and a natural outcome of disclosure.

Another compelling justification for protecting information is the control theory. Allan Westin describes privacy as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”.<sup>143</sup> When entering a conviction in open court, an individual cannot reasonably expect to retain control over that information. Therefore, under this theory, whether an individual can claim for a historical criminal conviction will depend on the passage of time and whether, and to what extent, it has impacted upon the reasonableness of their claim to control over the information. However, this theory is equally unhelpful to the individual seeking de-indexing of an embarrassing Facebook post. Westin supposes that voluntarily relinquishing control ends any reasonable basis for claiming that information is private.<sup>144</sup>

This is not to say that information ought not be concealed. In fact, the historical criminal conviction has a strong claim to concealment. However, that claim is found in the societal and personal interest in rehabilitation rather than in privacy.

As discussed in Part II, effective rehabilitation is an important part of a functioning criminal justice system. The existence of regimes around the world, such as the Clean Slate Act, demonstrate this. After a certain point, an offender ought to be able to put their offending in the past. This benefits the offender, who is then able to legally disavow their criminal record. It benefits society, as the offender is more likely to be reintegrated into society if they are employed. The threats posed to these schemes are outlined fully in Part II. It is unnecessary to try and fit the idea of concealing historical criminal convictions under privacy law.<sup>145</sup> The true justification is in allowing the offender to escape the continued consequences of their historical offending.

The strongest arguments against concealing historical criminal convictions concern freedom of expression once again (discussed in Part IV). Those arguments remain relevant, but are not repeated in this section.

Richard Posner argues against protection from disclosing true information where that information might be relevant to judging character.<sup>146</sup> He distinguishes between secrecy and seclusion. Secrecy, he says, is the concealment of information.<sup>147</sup> Seclusion, however, is the right to “a reduction

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143 Alan F Westin *Privacy and Freedom* (Atheneum, New York, 1967) at 7.

144 At 52.

145 In *NTI*, above n 20, at [166], Warby J described the “right to rehabilitation” as an “aspect of ... personal privacy”. With respect, this seems to me to be an attempt to bring the desirable consideration of rehabilitation into an area where it does not fit. Rehabilitation is not a right, but a goal, and it is much less as aspect of privacy. The two seem entirely separate to me.

146 Richard A Posner “Privacy, Secrecy, and Reputation” (1979) 28 *Buff L Rev* 1 at 16.

147 At 5.

in the number of social interactions".<sup>148</sup> He argues that the person seeking secrecy has a far weaker claim to privacy protection.<sup>149</sup>

[People] have sought to appropriate the favorable connotations that privacy enjoys in the expression "a very private person" to support the right to conceal one's criminal record from an employer.

It goes without saying that he would oppose a "right to be forgotten" for historical criminal convictions. Posner goes on to acknowledge the risk of the public giving undue weight to certain information, but considers this risk will correct itself naturally.<sup>150</sup>

It may be objected that many of the facts that people conceal (homosexuality, ethnic origins, aversions, sympathy towards Communism or fascism, minor mental illnesses, early scrapes with the law, marital discord, nose picking, or whatever) would if revealed provoke "irrational" reactions by prospective employers, friends, creditors, lovers, and so on. But this objection overlooks the opportunity costs of shunning people for stupid reasons, or, stated otherwise, the gains to be had from dealing with someone whom others shun irrationally. If ex-convicts are good workers but most employers do not know this, employers who do know it will be able to hire them at a below-average wage because of their depressed job opportunities and will thereby obtain a competitive advantage over the bigots. In a diverse, decentralized, and competitive society such as ours, one can expect irrational shunning to be weeded out over time.

He argues the same analysis can be applied to romantic relationships and friendships, citing from sources that he says establish that people do not behave differently in social situations than they do in free market situations.<sup>151</sup> In short, if the historical conviction is material, people should know. If it is immaterial, but creates undue prejudice, the irrational decisions flowing from that prejudice will be eliminated by the competitive advantages granted to those who enjoy the benefits of a relationship with the individual at below market value.

However, Posner's argument overlooks the possibility that this is an area where market intervention is useful. It may not be true that ex-convicts are better employees. It may even be false. Concealing historical criminal convictions may be, as he suggests, akin to deception. However, this does not make it wrong. There may be a societal benefit in allowing a particular group to misrepresent their employment worth. Specifically, the rehabilitative interest. This argument rests on the premise that those with gainful employment are less likely to re-offend, and therefore intervention is justifiable in the interests of preventing re-offending.

Posner's argument has since resurfaced in an updated format. Michael Douglas argues against any form of right to be forgotten.<sup>152</sup> He argues that the

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148 At 4.

149 At 5.

150 At 12.

151 At 14.

152 Michael Douglas "Questioning the Right to be Forgotten" (2015) 40 *Alt LJ* 109.

values of self-determination and autonomy are only preserved when we are free to make choices.<sup>153</sup> He considers that forgiving, rather than forgetting, is one such choice.<sup>154</sup> His paper argues that forcing society to forget “will cost us the opportunity to improve our values in pace with improvements in our technology”.<sup>155</sup>

Both arguments echo Marshall McLuhan’s sentiment that we shape our tools and thereafter our tools shape us.<sup>156</sup> McLuhan’s proposition suggests that the way people access information informs the way they perceive information. This is relevant when considering the qualities of digital information, as currently there is an overabundance of information, some of which embarrassing. In short, eventually people will give insignificant but inconvenient information the weight it deserves.

Mayer-Schönberger addresses these concerns within his discussion of cognitive adjustment.<sup>157</sup> He acknowledges arguments that people will develop coping mechanisms for the abundance of personal information, but suggests that this will take a long time. He writes that he is “not that interested in what will exist a few hundred years from now ... [and] remain[s] worried about how humans will cope with the decades of painful ... adaptation in between.”<sup>158</sup>

On one hand, it is intuitively undesirable to stifle the development of values in favour of an immediate response to a problem arising from progress. On the other, the potential development of values (or “market correction”) is uncertain. Another path seems more appropriate. This argument relies on rejecting a broad right to be forgotten. In the absence of law, people more often turn to self-help. Here, rather than a slow change of values in giving information the proper weight, the focus would change to the responsible disclosure of data. This is already happening.<sup>159</sup> Data-awareness is actively encouraged, with people being advised against posting information online that they might not want to be seen publicly. This response is described by Mayer-Schönberger as digital abstinence.<sup>160</sup> This result does nothing for the person with the historical criminal conviction. Their personal information is not voluntarily disclosed. It therefore seems that this is a unique problem and requires a solution of its own, rather than forced alignment with arguments regarding other kinds of information. In the absence of a broad right to be forgotten, it is both necessary and desirable to recognise a selective right to be forgotten for the historical criminal conviction.

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153 At 112.

154 At 112.

155 At 112.

156 See generally Marshall McLuhan *Understanding Media: The Extensions of Man* (London, Sphere Books, 1967) at xxi.

157 Mayer-Schönberger, above n 8, at 154–157.

158 At 156–157.

159 See generally Netsafe “Are You a Sharenter?” (7 March 2018) <[www.netsafe.org.nz](http://www.netsafe.org.nz)>.

160 Mayer-Schönberger, above n 8, at 128–134.

## VI POLISHING THE CLEAN SLATE ACT

Part I of this article discussed the challenges the age of digital communications poses to the Clean Slate scheme. The following two parts discussed potential approaches to this problem. The preceding part argued that this is a problem worth addressing. In the final part, this article recommends reform of the Clean Slate Act and suggests an effective solution for de-indexing historical criminal convictions.

As discussed above, the greatest problem with the de-indexing result, following *Google Spain* and *NTI*, is that the decision is made by a private entity. Such allocation improperly restricts freedom of expression, as the economically efficient solution is often self-censorship. Potential reform should be developed with this in mind.

The proper body to undergo this balancing act is a court. My proposed amendment begins with an application to the District Court. The court is experienced in balancing freedom of expression against competing interests and has the requisite independence to ensure impartial decision-making. De-indexing historical criminal convictions is not urgent and any benefit from an Internet search engine operator making a decision promptly is outweighed by the loss of freedom of expression.

It has been suggested that the point at which one becomes an eligible individual under the Act is the point at which they ought to become eligible for de-indexing.<sup>161</sup> In my view, this would be improper. Warby J in *NTI* was correct in stating that such an approach would be inconsistent with freedom of expression.<sup>162</sup> A de-indexing request, as discussed above, is a significant restriction on freedom of expression. An order for de-indexing is effectively an endorsement that the information on the historical criminal conviction is of such low value that the unfair prejudice generated outweighs any probative value in deciding on how to interact with that person. This is partially reflected in the decision in *NTI*. Warby J considered the public still ought to have access to the information on NT1's conviction, whereas NT2's conviction was no longer relevant. The granting of an order should be done based on a confined exercise of discretion balancing the public interest, the relevance of the conviction, and freedom of expression.

In considering freedom of expression and public interest, the court would conduct an analysis akin to that done in *NTI*. Importantly, public figures and those who have committed serious offences would likely be unable to argue there was no public interest in their conviction, so would be unsuccessful in most cases. The continued need to "warn the public" would be central.

In considering relevance, the court would consider whether the offending remains an accurate representation of the offender. The evidence needed here would likely be offence-specific. For certain convictions,

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161 See generally *Google Spain*, above n 23.

162 *NTI*, above n 20, at [165].



particularly minor ones and those committed during formative years, evidence of a clean record alone would likely be enough. It is common practice to require completion of certain rehabilitative courses during sentencing. Evidence of completion of an anger management course for a violent offence or an alcohol management course for an alcohol-related offence would likely be strong indications of the low relevance of a previous conviction. Some convictions would be difficult to ever successfully claim as irrelevant, such as dishonesty offences committed outside of formative years.

The Court ought to consider the risk of serious physical or mental harm to the claimant. This captures the hard case of Mr Tucker. In my view, regardless of the public interest in knowing of his conviction, the court is justified in restricting freedom of expression in such a case. The societal benefits in disclosing criminal convictions will almost always be outweighed by the risk of actual harm to a person from continued disclosure. Such cases ought to warrant concealment, at least until the risk has passed.

The primary remedy ought to be de-indexing. This is because taking down the source material constitutes a far greater interference with freedom of expression interests. De-indexing reduces access to an article whilst still allowing people to seek out information on that particular person and protecting publisher's business interests. Removing the source information goes beyond that, removing access even for those who seek the article despite practical and partial obscurity, and those who would trawl through old newspapers. Very little is gained in terms of rehabilitation for an offender in preferring the second approach to the first. The actual likelihood of searching through old articles hoping to stumble upon a conviction of an acquaintance is improbable.

A further potential remedy is the one provided within the HDCA of allowing a right of reply.<sup>163</sup> Harvey and Mayer-Schönberger have similar ideas in this respect. Harvey refers to it as a "right to update".<sup>164</sup> Mayer-Schönberger refers to it as full contextualisation.<sup>165</sup> Effectively, each suggests contextualising the information. This enables the dynamic nature of digital information use to offset the potential for that information to be taken out of context. Unlike de-indexing, this remedy would be against the news website itself.

A right of reply is particularly attractive in the context of a historical conviction. While still infringing freedom of expression by requiring the publication of certain speech, the infringement is far less than in a de-indexing case. A right of reply is not susceptible to criticism for failing to satisfy audience interests in relevant and probative information; in fact, a right of reply provides the audience with more information. Further, there would be public interest in knowing that people can turn their lives around. Such additional information would promote confidence in the criminal justice

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163 Harmful Digital Communications Act, ss 19(1)(e) and 19(2)(d).

164 Harvey, above n 5, at 305.

165 Mayer-Schönberger, above n 8, at ch 5.

system by showing that rehabilitation is possible. This is valuable to the news website, as public interest is often converted into advertising revenue.

## VII CONCLUSION

Widespread use of the Internet has revolutionised the way information is accessed. Information is accessible at all times, on almost any topic. However, the law has not kept pace. No longer is the ability to withhold information regarding one's criminal record an effective way to restrict access to that information. Yet, this is the entire purpose of Clean Slate schemes.

This article has discussed regulatory responses to the problem within these schemes. The European-qualified "right to be forgotten" has been examined in the context of historical criminal convictions. Ultimately, the criminal conviction strongly engages freedom of expression; a private entity is not the proper body to protect that right. The article turned then to the HDCA, which theoretically permits de-indexing harmful communications. Plainly, the Act is not designed for this purpose; the availability of the conviction does not cause the harm from which the Act protects.

However, restricting access to historical criminal convictions remains a goal worth pursuing. An offender who has lived a rehabilitated life ought to have a chance to put a conviction in the past. The very enactment of the Clean Slate Act acknowledges this. This article has argued for reform, building upon the strengths of the United Kingdom and New Zealand approaches and arguing conclusively for amendment of the Clean Slate Act.