

31 May 2017

Attorney-General

**Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill (PCO20373/1.17) – Consistency with the New Zealand Bill of Rights Act 1990**  
**Our Ref: ATT395/268**

1. We have considered the Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill for consistency with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”), scheduled for consideration by Cabinet Legislation Committee on 7 June 2017.
2. We have considered the **attached** version 1.17 of the Bill. We do not expect further amendments, if made, to change this advice.
3. In our opinion the Bill is consistent with the Bill of Rights Act.

**Outline of the Bill**

4. The purpose of the Bill is to address the stigma and prejudice faced by people with historical convictions for specific homosexual offences, a stigma and prejudice no longer considered fair in light of the decriminalisation of homosexual sex accomplished by the Homosexual Law Reform Act 1986. The Bill if enacted will allow persons with relevant convictions for those offences to apply for expungement of those convictions. The relevant repealed sections of the Crimes Acts 1908 and 1961 are set out in the Bill (cl 5(2)).
5. The Secretary for Justice will have responsibility for determining applications for expungement in a relatively simple administrative process. The test for expungement is that “the conduct constituting the offence, if engaged in when the application was made, would not constitute an offence under the laws of New Zealand” (cl 8(2)).
6. The consequence of expungement will be that a convicted person is not required to disclose information concerning the criminal record for the expunged conviction to any person for any purpose. The Act imposes administrative obligations on departments and agencies that hold criminal records, and protects the concealment of information about expunged convictions by creating an offence provision for non-compliance.
7. We have assessed the Bill for its consistency with the Bill of Rights Act under the following headings:
  - 7.1 *Determination of applications:* Clauses 14 to 19 concerning the process for applications raise issues concerning the right to natural justice in s 27(1);

- 7.2 *Effect of expungement:* Clauses 11 to 13, dealing with the prohibition of disclosure of expunged convictions, raise issues concerning freedom of expression in s 14;
- 7.3 *Reverse onus:* Clause 16, dealing with a person's failure to provide the Secretary with documentation or information which the Secretary believes on reasonable grounds to be relevant to making the decision on expungement, raises an issue concerning criminal procedure under s 25; and
- 7.4 *No entitlement to compensation:* Clause 21, removing any entitlement to compensation, raises an issue concerning the right to justice under s 27(3).

#### **Determination of applications – Consistency with s 27(1) – Right to justice**

8. Under s 27(1) of the Bill of Rights Act every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law. The right to natural justice is inherently flexible and context specific. Its requirements depend heavily on the statutory framework and nature of the power being exercised.
9. The Bill vests in the Secretary for Justice the power to decide each application. The Secretary must make a written decision whether the conviction meets the test for expungement (cl 17(1)). If the conviction does not meet the test for expungement, the Secretary must provide written reasons (cl 17(2)).
10. When making a decision, the Secretary:
- 10.1 may receive any statement, document, information, or matter, whether or not admissible in a court of law, that in the Secretary's discretion may help the Secretary to make a decision (cl 19(a));
- 10.2 must act independently (cl 19(b)); and
- 10.3 must decide on the papers unless the Secretary considers there are exceptional circumstances which make it appropriate in the interests of justice to convene an oral hearing (cl 19(c)).
11. The Bill provides also for an iterative process in the collection of information. The Secretary:
- 11.1 may on his or her initiative ask for further documents or information from a person (cl 16); and
- 11.2 may reconsider a decision if, for example, further relevant information has become available or it is necessary or desirable to reconsider the decision (cl 18).
12. Finally, the Bill protects against bias in decision making by providing for the possibility that an independent reviewer may be necessary to assist with a reconsideration (cl 18).
13. We consider the Bill provides for a process that will observe the principles of natural justice. First, the process for information gathering is appropriately tailored. The Secretary may receive any evidence that, in the Secretary's opinion, may help in

making the decision, whether or not it would be admissible in a court of law (cl 19). Secondly, for the average application, the default position (that applications be determined on the papers) is reasonable in the interests of administrative efficiency. The possibility of an oral hearing is expressly preserved for those cases where there are exceptional circumstances and a hearing is considered appropriate in the interests of justice. That serves to ensure consistency with s 27(1).

14. The right to natural justice guaranteed by s 27(1) may in some cases require that a litigant be allowed legal representation.<sup>1</sup> The Bill provides for an eligible person to make an application for expungement (or for a representative to do so after the eligible person's death (cl 14)). These provisions would not be read to exclude the right of an eligible person or representative to have legal assistance for the purposes of their application, whether that be in relation to the normal application on the papers or, in those exceptional cases where the interests of justice require a hearing, at that hearing.
15. As to the power under cl 16, whereunder the Secretary may by written notice seek from any person access to documents or things, or information including written evidence, the principles of natural justice will operate in their usual manner, as appropriate to that context.

**Effect of expungement - concealment and non-disclosure of criminal records of an expunged conviction and the creation of an offence – whether s 14 at issue – Freedom of expression**

16. Clause 11 requires the Chief Executive of a government department or law enforcement agency holding, or with access to, criminal records, to take all reasonable steps to ensure that expunged convictions are generally concealed when requests are made (other than by the convicted person) and are otherwise made available only for authorised purposes. This raises no freedom of expression issues for any individual person, and the department or agency has no separate right to freedom of expression.
17. Clause 12 precludes any department, agency, employee or contractor from disclosing an expunged conviction (other than to a convicted person in relation to that person's own convictions, or for an authorised purpose). Clause 13 creates a new offence for "a person who has access to criminal records" to disclose the criminal record, or information about the criminal record, of an expunged conviction, knowing that he or she does not have lawful authority or is reckless as to the same. This is punishable by a fine of up to \$20,000.
18. To the extent clauses 12 and 13 limit the freedom of expression of any body or person they are no more than a reasonable limit on the right. Their purpose is to ensure official criminal records are used only in a manner that does not perpetuate the stigma of a conviction for a historical homosexual offence – a stigma now considered unfair and inappropriate. The proposed restrictions on expression are rationally related to that objective. Further, they are proportionate to that objective. There is no social utility in perpetuating records of these offences on individual criminal conviction histories when Parliament has determined it no longer considers these matters to merit criminal sanction. Employees and contractors of government departments and law enforcement agencies are appropriately restricted in their freedom of expression in relation to these matters. Further, although the penalty for

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<sup>1</sup> *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

unlawful disclosure is potentially considerable, the offence provision emphasises the importance of the public record being maintained so as to conceal expunged offences save for the limited exceptions provided. The limitation is therefore demonstrably justified under s 5 of the Bill of Rights Act.

### Reverse onus – whether s 25(c) at issue – right to be presumed innocent

19. A further offence provision has been created by clause 16. A person – likely to be a person other than the applicant – commits an offence if, without reasonable excuse, they fail or refuse to comply with the Secretary’s written request for further documentation or information (which the Secretary believes on reasonable grounds to be relevant to making the decision on expungement). The effect of the former s 67(8) of the Summary Proceedings Act 1957 used to be that ‘without reasonable excuse’ provisions generally reverse the onus of proof (at least where the defendant is proceeded against summarily), thereby limiting a defendant’s right to be presumed innocent until proved guilty. However, following the repeal of s 67(8), the Bill’s offence provision will be interpreted consistently with the presumption of innocence.<sup>2</sup>

### No entitlement to compensation – whether s 27(3) at issue – Right to justice

20. Clause 21 provides that a person whose convictions are expunged has no entitlement to compensation of any kind on account of the expungement. This clause does not limit s 27(3) of the Bill of Rights Act (the right to bring civil proceedings against the Crown and to have those heard according to law in the same way as civil proceedings between individuals). This is because cl 21 affects the substantive law. It does not fall within the ambit of s 27(3) which protects procedural rights.<sup>3</sup>
21. This advice has been peer reviewed by Paul Rishworth QC, Senior Crown Counsel.

Debra Harris  
Crown Counsel

Noted/

Hon Christopher Finlayson

Attorney-General  
31 / 5 / 2017

<sup>2</sup> Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2<sup>nd</sup> ed, Lexis Nexis, Wellington, 2015), at [23.4.32].

<sup>3</sup> *Westco Lagan Ltd v Attorney-General*, above n 1 at [63]: “Section 27(3) ... cannot restrict the power of the legislature to determine what substantive rights the Crown is to have. Section 27(3) merely directs that the Crown shall have no procedural advantage in any proceeding to enforce rights if such rights exist.”

It is also relevant to the limitation of the substantive right that the Bill does not propose to limit or affect the application of the Royal prerogative of mercy in respect of the convicted person (cl 10).

**IN CONFIDENCE**

## **Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill**

Government Bill

### **Explanatory note**

#### **General policy statement**

##### *Purpose and overview*

This Bill provides an expungement scheme to reduce prejudice, stigma, and all other negative effects, arising from a conviction for a historical homosexual offence by—

- enabling an application for expungement of the conviction to be made to the Secretary for Justice by an eligible person or a representative; and
- expunging the conviction if the Secretary's decision on the application is that, on the balance of probabilities, the conviction meets the test for expungement.

The test for expungement is that the conduct constituting the offence, if engaged in when the application was made, would not constitute an offence under the laws of New Zealand.

##### *General policy sought to be achieved*

The Homosexual Law Reform Act 1986 decriminalised sexual conduct between consenting males aged 16 years and older. The right to be free from discrimination on the grounds of homosexual orientation was later recognised in the Human Rights Act 1993. Allowing historical convictions for homosexual offences to remain on a person's criminal history perpetuates the stigma that those convictions carry. A person can be further disadvantaged if the person is required to disclose the person's conviction or it appears on a criminal history check. A conviction can limit opportunities to obtain employment. Other jurisdictions, including in the United Kingdom and Australia, have responded to this issue by introducing schemes to allow people to have their convictions expunged.

This Bill addresses the stigma and prejudice faced by people with historical convictions for specific homosexual offences by providing a statutory scheme to allow them to apply to have their convictions expunged. If a person's application is approved under the scheme, the person's criminal record will be amended to ensure the conviction does not appear on a criminal history check for any purpose in New Zealand and the person will be entitled to declare the person has no conviction. While an official record of the expunged conviction will have to be retained as a matter of fact and social history, for practical purposes within New Zealand it would be treated as if the person had not been convicted.

This Bill excludes any entitlement to compensation for the effects of the conviction. Compensation of that kind would go beyond the purpose of the expungement scheme, which is to prevent further stigma, or other negative effects, of a conviction. There is no general principle that a person who is convicted of a repealed offence is entitled to compensation on the repeal of the offence. If a person has been wrongfully convicted, there are existing avenues to seek compensation. In this instance, there is no suggestion that the convictions in question were wrongfully imposed as they were in accordance with the law at the time. Other jurisdictions that have introduced expungement schemes, for example in Australia, also specifically exclude compensation.

The expungement scheme will apply only to specified repealed offences. The test will be that the conduct would not constitute an offence if engaged in when the application was made. The primary issues will be whether each person involved in the conduct consented to that conduct and that all participants were aged 16 years or older. The scheme will not apply to people convicted of public order offences that may have involved consensual homosexual conduct (as other offending may have been involved). Including a broader range of offences in the scheme would make it considerably more complex and resource intensive, and is not appropriate at this time.

The Bill provides that the Secretary for Justice will have responsibility for determining applications for the expungement of specified convictions. The primary obligation to provide information in support of an application will fall on the applicant, and the Secretary will be able to obtain further information the Secretary considers necessary to be able to make a proper assessment of the application. The Secretary does not have any other functions or interests which impair the Secretary's ability to assess independently and properly these applications. The application process will be relatively simple and will take place on the papers, without the need for an oral hearing. Similar overseas jurisdictions have also designated senior public servants with responsibility for these types of decisions.

#### *Comparable overseas legislation*

A number of overseas jurisdictions have legislated, or are in the process of legislating, to reduce negative effects of convictions for historical homosexual offences. *See*, for example, the following proposed or enacted legislation:

- Australian Capital Territory—Part 3A (Extinguishing historical homosexual offence convictions) of the Spent Convictions Act 2000 (ACT), as inserted on

7 November 2015 by the Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Act 2015 (ACT) — [http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/act/consol\\_act/sca2000222/index.html](http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/act/consol_act/sca2000222/index.html)

- New South Wales—Part 4A (Extinguishing convictions for historical homosexual offences) of the Criminal Records Act 1991, as inserted on 24 November 2014 by the Criminal Records Amendment (Historical Homosexual Offences) Act 2014 (NSW) — [http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/nsw/consol\\_act/cra1991167/index.html](http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/nsw/consol_act/cra1991167/index.html)
- South Australia—Section 8A (spent conviction for an eligible sex offence) of the Spent Convictions Act 2009, as inserted by the Spent Convictions (Decriminalised Offences) Amendment Act 2013 (South Australia) — [http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/sa/num\\_act/scoaa201388o2013524/index.html](http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/sa/num_act/scoaa201388o2013524/index.html)
- Tasmania—Historical Homosexual Convictions Bill 2016 (Tas) — exposure draft (consultation closed 26 July 2016) at [http://www.justice.tas.gov.au/community-consultation/inactive/historical\\_homosexual\\_convictions\\_bill\\_2016](http://www.justice.tas.gov.au/community-consultation/inactive/historical_homosexual_convictions_bill_2016) and Expungement of Historical Offences Bill (17 OF 2017) — <http://www.austlii.edu.au/au/legis/tas/bill/eohob17o2017371/> and [http://www.parliament.tas.gov.au/bills/pdf/17\\_of\\_2017.pdf](http://www.parliament.tas.gov.au/bills/pdf/17_of_2017.pdf)
- United Kingdom—Chapter 4 (Disregarding certain convictions for buggery etc) of the Protection of Freedoms Act 2012 (UK) — <http://www.legislation.gov.uk/ukpga/2012/9/contents> — and sections 164 to 172 (pardons for certain abolished offences etc) of the Policing and Crime Act 2017 — <http://www.legislation.gov.uk/ukpga/2017/3/contents/enacted>
- Victoria—Part 8 (Historical homosexual convictions) of the Sentencing Act 1991 (Vict), as inserted on 1 September 2015 by the Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 (Vict) — [http://www.austlii.edu.au/au/legis/vic/consol\\_act/sa1991121/index.html](http://www.austlii.edu.au/au/legis/vic/consol_act/sa1991121/index.html)

### Departmental disclosure statement

The Ministry of Justice is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at [PPU to insert URL and link] (if it has been provided for publication).

### Regulatory impact statement

The Ministry of Justice produced a regulatory impact statement on 8 December 2016 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact statement can be found at—

- [Insert URL link(s) to the RIS on the agency's/agencies' Internet site(s)]
- <http://www.treasury.govt.nz/publications/informationreleases/ris>

### Clause by clause analysis

*Clause 1* is the Title clause.

*Clause 2* relates to commencement. The Act is to come into force on the day after the date of Royal assent.

## Part 1 General provisions

*Clause 3* states the purpose of the Act.

*Clause 4* is the interpretation clause. Key terms defined are—

- criminal record (*see also clauses 11 to 13*);
- eligible person (*see also clauses 14 and 15*);
- expunged conviction (*see also clauses 14 to 20*);
- historical homosexual offence or historical offence (*see clause 5*);
- representative (*see also clauses 14 and 15*);
- Secretary (however, the Secretary may, under section 41 of the State Sector Act 1988, delegate all or any of the Secretary's functions or powers imposed or conferred by the Bill).

*Clause 5* defines the historical offences convictions for which can be expunged.

*Clause 6* relates to transitional, savings, and related provisions (which are set out in *Schedule 1*).

*Clause 7* ensures that the Act binds the Crown.

## Part 2 Expungement of convictions

### *Test for, and effects of, expungement*

*Clause 8* states the test for expungement. The test is that the conduct constituting the offence, if engaged in when the application was made, would not constitute an offence under the laws of New Zealand. In particular, in considering whether a conviction for a historical offence meets the test, the Secretary must (if relevant) have regard to—

- whether each person involved in the conduct constituting the offence consented to that conduct; and



- the age, at the time of the conduct constituting the offence, of each person involved in that conduct.

*Clause 9* makes clear the general effects of expungement. They include the convicted person not being required to disclose to any other person for any purpose (including when giving evidence on oath or affirmation in a legal proceeding) information concerning any criminal record of the expunged conviction. *Clause 9* follows closely section 105J of the Sentencing Act 1991 (Vict), inserted by the Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 (Vict). Expungement is for the purposes only of the laws of New Zealand. This is similar to the clean slate regime. Section 14(3)(b) of the Criminal Records (Clean Slate) Act 2004 makes it clear that section 14(1) or (2) of that Act does not authorise an eligible individual to answer a question asked of the individual about the individual's criminal record by stating that the individual has no criminal record if the question is asked—

- under the jurisdiction of the law of a foreign country while the individual is outside New Zealand; or
- while the individual is in New Zealand and in respect of a matter dealt with by the law of a foreign country (for example, a question asked on an application form by the immigration or customs agency of a foreign country).

*Clause 10* is about the Act's relationship with other laws. The Act does not limit or affect the application to the convicted person of, or that person's rights under,—

- the Criminal Records (Clean Slate) Act 2004; or
- the Royal prerogative of mercy; or
- any enactment under which the convicted person may request information about, or a copy of, the convicted person's own criminal record.

*Clause 11* indicates what must be done by departments and agencies that hold criminal records. *Clause 11* applies to the chief executive of a government department or law enforcement agency that holds, or has access to, criminal records. *Clause 11* requires the chief executive to take all reasonable steps to ensure that the department or agency, and any employee or contractor of the department or agency,—

- conceals criminal records of an expunged conviction when requests are made (other than by the convicted person) for their disclosure; and
- does not use criminal records of convicted persons other than for a purpose authorised under the Act.

The reasonable steps include the development of policies and procedures. *Clause 11* is based on, and imposes duties the same in substance as those imposed by, section 15 of the Criminal Records (Clean Slate) Act 2004.

*Clause 12* indicates how expungement affects requests to disclose, and use of, criminal records. *Clause 12* is based on, and imposes duties the same in substance as those imposed by, section 16 of the Criminal Records (Clean Slate) Act 2004.

*Clause 13* makes it an offence for a person who has access to criminal records to disclose unlawfully information required to be concealed. The offence is punishable, on conviction, by a fine not exceeding \$20,000. The offence, and penalty, are consistent with those under section 17 of the Criminal Records (Clean Slate) Act 2004. However, *clause 13(2) and (3)* state exceptions particular to this Bill.

#### *Process for making and deciding application*

*Clause 14* relates to an application for expungement.

*Clause 15* relates to requests for a decision that a person can represent a deceased convicted person for an application for expungement of a conviction. A request will be made only by a person who wishes to be a representative under *paragraph (d)* of the definition of that term in *clause 4* (because the person is not a representative under *paragraph (a), (b), or (c)* of that definition). The Secretary's decision must be based on whether the representation concerned would be in the interests of the deceased convicted person.

*Clause 16* enables the Secretary, before making a decision under *clause 15, 17, or 18*, to seek from a person, by written notice, any further document, thing, or information, that is or may be relevant to the decision. A person commits an offence if the person, without reasonable excuse, fails or refuses to comply with the notice to the extent that the person is capable of doing so.

*Clause 17(1)* requires the Secretary to decide an application for expungement by making, in accordance with *clause 8*, a written decision whether the conviction meets the test for expungement. *Clause 17(2)* requires the decision to be copied promptly to the eligible person or representative and, if it is to the effect that the conviction does not meet the test for expungement, to include written reasons for that decision.

*Clause 18* enables the Secretary to reconsider a decision made under *clause 15 or 17*. The power to reconsider may be used on all or any of the following grounds:

- further relevant information has become available to the Secretary since the decision was made:
- the decision was made on an application that included, or was supported by, all or any of the following:
  - false or misleading information:
  - documents that are false or misleading:
- any other grounds that the Secretary is satisfied do, or may, make it necessary or desirable to reconsider the decision.

*Clause 19* is about evidence, independence, and process. *Clause 19* ensures that, in making a decision under *clause 15, 17, or 18*, the Secretary—

- may receive as evidence any statement, document, information, or matter that, in the Secretary's opinion, may help the Secretary to decide the application, whether or not it would be admissible in a court of law; and
- must act independently; and

- must decide on the papers, unless the Secretary considers that an oral hearing should be conducted because there are exceptional circumstances and it is appropriate to do so in the interests of justice.

*Clause 20* ensures that no person who provides information in, or in support of, an application or request under the Act is criminally or civilly liable for the action of providing the information if that action—

- was taken in good faith; and
- was reasonable in the circumstances.

*No entitlement to compensation*

*Clause 21* makes it clear that expungement of a conviction gives rise to no entitlement to compensation.

*Hon Amy Adams*

## **Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill**

Government Bill

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**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act **2017**.

**2 Commencement**

This Act comes into force on the day after the date on which it receives the Royal assent.

**Part 1**

**General provisions**

**3 Purpose of this Act**

The purpose of this Act is to reduce prejudice, stigma, and all other negative effects, arising from a conviction for a historical homosexual offence by—

- (a) enabling an application for expungement of the conviction to be made under this Act by an eligible person or a representative; and
- (b) expunging the conviction if the Secretary's decision on the application is that, on the balance of probabilities, the conviction meets the test for expungement.

**4 Interpretation**

In this Act, unless the context otherwise requires,—

**convicted person**, in relation to a conviction, means the person against whom the conviction is entered

**criminal record**, of a conviction for a historical offence, means any official record (including an electronic record) that is kept by, or on behalf of, the Crown (including by a government department or law enforcement agency) of—

- (a) charges that result in the conviction; and

- (b) the conviction as entered (including any item on a list of previous convictions); and
- (c) sentences imposed or other dispositions of the case (including any item on a list of previous sentences); and
- (d) orders that, as a result of the conviction, are imposed on, or made in respect of, the convicted person or any other offender

**eligible person**, for a conviction for a historical offence, means the convicted person

**expunged conviction** means a conviction that—

- (a) has been expunged under **section 8**; and
- (b) has not ceased to be an expunged conviction under **section 18**

**government department** means a department named in Schedule 1 of the State Sector Act 1988

**historical homosexual offence** or **historical offence** has the meaning given to it by **section 5**

**including** means including without limitation (to the matters specified)

**law enforcement agency** means—

- (a) an agency that holds, or has access to, information described in Schedule 5 of the Privacy Act 1993; and
- (b) the Ministry of Business, Innovation, and Employment, the Inland Revenue Department, and the New Zealand Customs Service

**legal proceeding** means—

- (a) a proceeding conducted by a court, or by a person acting judicially; and
- (b) any interlocutory or other application to a court, or to a person acting judicially, and connected with that proceeding

**representative**, for a conviction for a historical offence, after the convicted person's death, means any of the following:

- (a) the executor, administrator, or trustee of, acting on behalf of, the estate of the convicted person;
- (b) a spouse, civil union partner, or de facto partner, of the convicted person;
- (c) a parent, sibling, or child, of the convicted person;
- (d) a person who the Secretary has decided under **section 15** can represent the convicted person for an application for expungement of the conviction (and *see also* **section 14(2)**)

**Secretary** means the Secretary for Justice.

**5 Historical homosexual offence defined**

- (1) In this Act, unless the context otherwise requires, **historical homosexual offence** or **historical offence** means (whenever the plea or finding of guilt, or conviction, was made or entered) an offence against, or involving, any of the relevant repealed sections as in force at any time—
- (a) on or after 4 August 1908 (which is the date on which the Crimes Act 1908 came into operation); and
  - (b) before 8 August 1986 (which is the date on which the Homosexual Law Reform Act 1986 came into force).
- (2) The relevant repealed sections are—
- (a) section 141 (indecenty between males) of the Crimes Act 1961:
  - (b) section 142 (sodomy) of the Crimes Act 1961:
  - (c) section 146 (keeping place of resort for homosexual acts) of the Crimes Act 1961:
  - (d) section 153 (unnatural offence) of the Crimes Act 1908, but only to the extent that the section covers committing buggery with any other male human being:
  - (e) section 154 (attempt to commit unnatural offence) of the Crimes Act 1908, but only to the extent that the section covers attempting to commit buggery with any other male human being, assault with intent to commit buggery with any other male human being, and indecently assaulting any other male human being.
- (3) The definition in **subsection (1)** applies regardless of whether the offence was committed in all or any of the following ways (if applicable):
- (a) as any, or the only, principal offender for the offence, or as a party to the offence:
  - (b) as an attempt to commit the offence (unless the offence is itself specified as, or provides it may be completed on, an attempt):
  - (c) by way of a conspiracy to commit the offence (alone, or with 1 or more other offences):
  - (d) by being an accessory after the fact in relation to the offence.

**6 Transitional, savings, and related provisions**

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

**7 Act binds the Crown**

This Act binds the Crown.

## Part 2

### Expungement of convictions

#### *Test for, and effects of, expungement*

#### **8 Test for expungement**

- (1) A conviction for a historical offence is expunged if—
  - (a) an application for expungement of the conviction is made under this Act by an eligible person or a representative (*see sections 14 and 15*); and
  - (b) the Secretary's decision on the application is that, on the balance of probabilities, the conviction meets the test for expungement (*see section 17*).
- (2) The test is that the conduct constituting the offence, if engaged in when the application was made, would not constitute an offence under the laws of New Zealand.

#### **9 General effects of expungement**

- (1) If a conviction for a historical offence is an expunged conviction, its expungement has, for the purposes only of the laws of New Zealand, the effects set out in this section.
- (2) A question about the convicted person's criminal history (including one put in a legal proceeding and required to be answered under oath or affirmation) is to be taken not to refer to any criminal record of the expunged conviction, but to refer only to any criminal record of any conviction that the person has that is not expunged.
- (3) The convicted person is not required to disclose to any other person for any purpose (including when giving evidence on oath or affirmation in a legal proceeding) information concerning any criminal record of the expunged conviction.
- (4) In the application to the convicted person of an enactment or arrangement (including an agreement, contract, deed, or trust),—
  - (a) a reference to a conviction, however expressed, is to be taken not to refer to any criminal record of the expunged conviction; and
  - (b) a reference to the convicted person's character or fitness, however expressed, is not to be taken as allowing or requiring account to be taken of any criminal record of the expunged conviction.
- (5) Any criminal record of the expunged conviction, or the non-disclosure of any criminal record of the expunged conviction, is not a proper ground for—
  - (a) refusing the convicted person any appointment, post, status, or privilege;  
or



- (b) revoking any appointment, status, or privilege held by the convicted person, or dismissing the convicted person from any post.
- (6) The fact that a refusal, revocation, or dismissal of that kind occurred, solely on account of any criminal record of that conviction, before the conviction became an expunged conviction is not a proper ground for a refusal, revocation, or dismissal, solely on account of any criminal record of that conviction, occurring after the expungement.

Compare: Sentencing Act 1991 s 105J (Vict)

#### **10 Relationship with other laws**

- (1) This Act does not limit or affect the application to the convicted person of the Criminal Records (Clean Slate) Act 2004.
- (2) This Act does not limit or affect the application to the convicted person of the Royal prerogative of mercy.
- (3) This Act does not limit or affect the convicted person's rights under any enactment to request information about, or a copy of, the convicted person's own criminal record.

Compare: 2002 No 9 s 144; 2004 No 36 s 21(3)

#### **11 Duties of departments and agencies that hold criminal records**

- (1) This section applies to the chief executive of a government department or law enforcement agency that holds, or has access to, criminal records.
- (2) The chief executive must take all reasonable steps to ensure that the department or agency, and any employee or contractor of the department or agency,—
  - (a) conceals criminal records of an expunged conviction when requests are made (other than by the convicted person) for their disclosure; and
  - (b) does not use criminal records of convicted persons other than for a purpose authorised under this Act.
- (3) The reasonable steps include the development of policies and procedures.

Compare: 2004 No 36 s 15

#### **12 Effect of expungement on requests to disclose, and use of, criminal records**

- (1) This section applies to a government department or law enforcement agency, or an employee or contractor of a government department or law enforcement agency, that holds, or has access to, criminal records.
- (2) The department, agency, employee, or contractor, in responding to a request for the disclosure of a convicted person's criminal record or any information about a convicted person's criminal record (other than a request from the convicted person to whom the request relates), must not disclose the criminal record of an expunged conviction.

- (3) The department, agency, employee, or contractor is not entitled to use criminal records of an expunged conviction other than for a purpose authorised under this Act.

Compare: 2004 No 36 s 16

**13 Offence to disclose unlawfully information required to be concealed**

- (1) A person who has access to criminal records commits an offence if the person—

- (a) discloses to any person, body, or agency the criminal record, or information about the criminal record, of an expunged conviction that is required to be concealed; and
- (b) discloses that record or that information knowing that the person does not have, or being reckless as to whether or not the person has, lawful authority under this Act.

- (2) **Subsection (1)** does not apply if—

- (a) written consent to the disclosure has been given by, or by a person who is authorised by law to give written consent on behalf of, the convicted person; or
- (b) the disclosure is otherwise authorised by law.

- (3) **Subsection (1)** does not prevent the following (each of which is, for the purposes of **subsection (2)(b)**, authorised by law):

- (a) any research, or publication, that relates to historical offences, expunged convictions, or both, and that is anonymised (because it does not identify, and is not likely to lead to the identification of, any person who has an expunged conviction);
- (b) any disclosure or communication necessary or desirable for the administration of this Act (including for recording in criminal records that a conviction has become an expunged conviction).

- (4) A person who commits an offence against **subsection (1)** is liable on conviction to a fine not exceeding \$20,000.

Compare: 2004 No 36 s 17; Sentencing Act 1991 s 105K(6)–(8) (Vict)

*Process for making and deciding application*

**14 Application for expungement**

- (1) An application for expungement of a conviction for a historical offence may be made by—

- (a) an eligible person (before that person's death); or
- (b) a representative (after the eligible person's death).

- (2) A **representative**, in this section, includes a person who makes, and includes in the application, a request under **section 15**.

- (3) The application—
  - (a) must be made in the form and manner (if any) approved by the Secretary; and
  - (b) may include a request under **section 15** (*see subsection (2)*); and
  - (c) must include any supporting information, and supporting submissions, the eligible person or representative wishes the Secretary to consider.
- (4) Nothing in this Act prevents a person (including an agent, a donee of an enduring power of attorney, or a welfare guardian) from acting under this Act on behalf of an eligible person or a representative.

#### **15 Request to represent deceased convicted person**

- (1) This section applies to a conviction for a historical offence if the convicted person has died and a person wishes to make an application for expungement of the conviction as a representative under **paragraph (d)** of the definition of that term in **section 4**.
- (2) The person may, by a written request made to the Secretary, ask the Secretary to decide that the person can represent the convicted person for an application for expungement of the conviction.
- (3) If a person makes a request under this section, the Secretary must decide as soon as is reasonably practicable whether the person can represent the convicted person for an application for expungement of the conviction.
- (4) The Secretary's decision must be based on whether the representation concerned would be in the interests of the deceased convicted person.
- (5) The decision must be in writing copied promptly to the requester.

#### **16 Further documents, things, or information**

- (1) This section applies if, in making a decision under **section 15, 17, or 18**, the Secretary believes on reasonable grounds that any document, thing, or information—
  - (a) is, or may be, relevant to, or to particular aspects of, the decision; and
  - (b) is not available to the Secretary, but is, or may be, in the possession of, under the control of, or available from, a person; and
  - (c) is unlikely to be able to be obtained by the Secretary through any means other than a notice under this section.
- (2) The Secretary may, by written notice given to the person, seek from the person all or any of the following:
  - (a) access to, or a copy, duplicate, or reproduction of, or extract from, any document or thing that is or may be relevant to, or to specified aspects of, the decision:

- (b) information or further information (including written evidence given on oath or affirmation and by affidavit) that is or may be relevant to, or to specified aspects of, the decision.
- (3) A person (other than one specified in **subsection (4)**) commits an offence if the person, without reasonable excuse,—
  - (a) fails to produce, or to allow access to, or copying, duplication, or reproduction of, or the taking of extracts from, any document or thing, as required by a notice under this section, to the extent that the person is capable of doing so:
  - (b) refuses to give information, or further information, or to be sworn or to affirm and give evidence, as required by a notice under this section, to the extent that the person is capable of doing so.
- (4) **Subsection (3)** does not apply to the eligible person or representative, or to the chief executive, or any employee or contractor, of a government department, or law enforcement agency, that holds, or has access to, criminal records.
- (5) Every person who commits an offence against **subsection (3)(a) or (b)** is liable, on conviction, to a fine not exceeding \$1,000.

Compare: 1999 No 10 s 8; 2013 No 60 ss 29(1)(b), (c), 30

#### 17 Secretary decides application

- (1) The Secretary must decide an application for expungement by making, in accordance with **section 8**, a written decision whether the conviction meets the test for expungement.
- (2) The decision must be copied promptly to the eligible person or representative and, if it is to the effect that the conviction does not meet the test for expungement, must include written reasons for that decision.

Compare: 2011 No 4 s 71(2)

#### 18 Reconsideration of decisions

- (1) The Secretary may reconsider a decision made under **section 15 or 17**.
- (2) The power to reconsider may be used on all or any of the following grounds:
  - (a) further relevant information has become available to the Secretary since the decision was made:
  - (b) the decision was made on an application that included, or was supported by, all or any of the following:
    - (i) false or misleading information:
    - (ii) documents that are false or misleading:
  - (c) any other grounds that the Secretary is satisfied do, or may, make it necessary or desirable to reconsider the decision.
- (3) The Secretary may appoint an independent reviewer to assist with a reconsideration.

- (4) The Secretary may, as a result of the reconsideration, confirm, reverse, or modify the decision (and **section 17(2)** applies, with all necessary modifications, to the reconsideration decision).
- (5) A conviction that, as a result of a reconsideration decision, is no longer an expunged conviction ceases to be an expunged conviction on and from the date of the reconsideration decision.

Compare: Spent Convictions Act 2000 s 19G (ACT); Criminal Records Act 1991 s 19I (NSW)

## 19 Evidence, independence, and process

In making a decision under **section 15, 17, or 18**, the Secretary—

- (a) may receive as evidence any statement, document, information, or matter that, in the Secretary's opinion, may help the Secretary to make the decision, whether or not it would be admissible in a court of law; and
- (b) must act independently; and
- (c) must decide on the papers, unless the Secretary considers that an oral hearing should be conducted because there are exceptional circumstances and it is appropriate to do so in the interests of justice.

Compare: 2011 No 4 s 71(2); 2013 No 60 s 19(a); 2016 No 48 s 169(5)

## 20 Protection for person providing information

No person who provides information in, or in support of, an application or request under this Act is criminally or civilly liable for the action of providing the information if that action—

- (a) was taken in good faith; and
- (b) was reasonable in the circumstances.

Compare: 2009 No 35 s 77

### *No entitlement to compensation*

## 21 No entitlement to compensation

- (1) A person who has an expunged conviction is not entitled to compensation of any kind, on account of that conviction becoming an expunged conviction, in respect of the fact that the person—
  - (a) was charged with, or prosecuted for, the offence; or
  - (b) admitted committing or pleaded guilty to, or was found to have committed, was convicted of, was sentenced for, or had an order or a direction made against the person for, the offence; or
  - (c) served a sentence for, or complied with an order or a direction made against the person because of committing, the offence; or
  - (d) was required to pay a fine or other money (including costs or any amount by way of restitution or compensation) on account of committing, or being convicted of, or sentenced for, the offence; or

- (e) incurred any loss, or suffered any consequence (including being sentenced, or otherwise dealt with, as an offender, or as a repeat offender, of any kind), as a result of any circumstance referred to in **paragraph (a), (b), (c), or (d)**; or
  - (f) has an expunged conviction.
- (2) Nothing in **subsection (1)** prevents a person being entitled to compensation in respect of anything that occurred while the person was serving a sentence or complying with an order or a direction.

Compare: Sentencing Act 1991 s 105S (Vict)

**Schedule 1**  
**Transitional, savings, and related provisions**

s 6

**Part 1**  
**Provisions relating to this Act as enacted**

**1 Effect on legal proceedings**

- (1) This Act does not prevent—
  - (a) the completion of legal proceedings commenced before the commencement of this Act; or
  - (b) the commencing of legal proceedings on or after the commencement of this Act.
- (2) However, proceedings in **subclause (1)(a) or (b)** decided (at first instance, or on any appeal) on or after the commencement of this Act must be decided subject to this Act (including **section 21** (no entitlement to compensation)).
- (3) This clause applies even if, and to the extent that, the proceedings concerned are amended before, on, or after the commencement of this Act.