

Regulatory Impact Statement

Expungement scheme for historical homosexual convictions

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Justice.

It provides an analysis of options to address the negative effects of historical convictions for homosexual offences that have been decriminalised.

A constraint in carrying out the analysis was uncertainty about the existence of relevant official records, and the level of information contained in those records, that may be necessary to identify whether any aspects of the offending would still constitute a criminal offence under current law. There are some practical challenges in getting accurate information about the circumstances surrounding convictions from many decades ago. In light of this, it is possible that the anticipated benefits of the options may not eventuate for all individuals who may be eligible. The analysis assumes that the necessary records will be able to be obtained in respect of a significant proportion of the applications considered and that if they cannot, the information can be obtained from the applicant or other parties such as witnesses to the offence.

There is also uncertainty about how many of the potential pool of people who are affected by historical convictions will choose to take advantage of the option to address the negative effects of their conviction. The cost of administering the regime as set out in the preferred option has been calculated on the basis that half of potentially eligible individuals will make an application, ie 500 out of a pool of approximately 1000 people.

The impact on government agencies has not been fully quantified as assessment of the costs associated with locating and amending official records could not be completed within the timeframe. The Ministry will continue to work with agencies to assess these costs before Cabinet approval to introduce draft legislation is sought.

There has been no public consultation as it is assumed that there will be sufficient general support for providing a remedy to affected individuals on the grounds that both the law and society's standards have changed. A petition is currently being considered by the Justice and Electoral Committee which received 2,111 signatures. Submissions are on Parliament's website and have been taken into account.

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Executive summary

1. An historical conviction for an offence that has been decriminalised can have a lasting social and psychological impact on individuals. People with convictions can be disadvantaged in employment or other purposes due to being declined, or unwilling to seek, opportunities because of the need to undergo a criminal history check. Where the conviction was for a homosexual offence, there is a risk they could experience discrimination on the basis of their sexuality.
2. The preferred option is to provide individuals with an opportunity to apply to the Secretary for Justice to have their conviction 'expunged'. This would mean the conviction does not appear in criminal record checks and the person would be permitted to declare they do not have a conviction for any purpose in New Zealand.
3. This approach was preferred over other options because it is simple to administer (which assists in ensuring it can be implemented effectively and efficiently) and allows for case by case consideration to ensure the offending leading to the conviction did not involve any conduct that still would be criminal under current law. Other options considered either do not adequately provide for this safeguard or the additional potential benefits to individuals do not justify the level of resources required to administer it.

Status quo and problem definition

4. Convictions for homosexual offences that have been repealed remain on a person's criminal record. They must declare they have a conviction (eg, to a prospective employer) and it will appear in criminal history checks.
5. The stigma experienced by people with criminal convictions can have a lasting social and psychological effect. A person can be disadvantaged or discriminated against if they are required to disclose their conviction or it appears on a criminal history check. This can have an impact on opportunities such as employment, travel or appointment to governance roles on committees.
6. An analysis of Department of Statistics records indicates that between 1965 and 1986, 985 people were convicted of indecency between males, the offence used in most cases where men were charged for consensual sexual activity.
7. Many of those people will be automatically eligible to conceal those convictions under the Criminal Records (Clean Slate) Act 2004 ('Clean Slate Act'), which provides a mechanism for people convicted of less serious offences to conceal those convictions if they have remained conviction free for seven years. The conviction remains on a person's criminal record and there are exceptions to when it can be concealed, for example, if it is relevant to future court proceedings or the person seeks employment in specific professions.
8. People who received a custodial sentence or were convicted of certain serious offences such as sexual offences are not automatically eligible to conceal their conviction under the Clean Slate Act, but can apply to the District Court to do so.
9. Some people will have been convicted under the repealed offences but their conduct remains criminal today under other offences, for example because one of the parties did not consent to the sexual activity or was under 16 years of age. Without closely examining the records, it is not certain in how many instances this would arise.

Objective

10. The objective is to address the negative effects to individuals with historical convictions for homosexual offences that have been decriminalised.
11. The mechanism chosen to achieve this needs to provide safeguards to ensure that any conduct that remains criminal under current law is not excused as a result. It is also necessary to take into account that because the convictions were imposed over 30 years ago, relevant official records may either no longer exist or contain insufficient information to assess the circumstances of the offending.

Options and impact analysis

Criteria

12. The following criteria were used to assess the options against the objective:
 - Safe** - minimises the risk that conduct constituting a criminal offence under current law is excused or disregarded
 - Accessible** - maximises the number of affected individuals who are eligible for the proposed remedy and minimises barriers to accessing it
 - Effective** - addresses the negative effects of a conviction by providing a meaningful outcome for affected individuals
 - Efficient** - simple to administer and cost effective
13. All criteria were given equal weighting for the purposes of scoring the options. Options with the same or similar scores were then compared and ranked taking into account other policy or operational considerations.

Options

14. The following legislative options were considered:
 - Option 1 - Statutory expungement scheme (preferred option)
 - Option 1A (variation of Option 1) - broader range of offences eligible for expungement
 - Option 2 – Proactive expungement process
 - Option 3 - Extend Clean Slate Act regime
15. The following non-legislative options were considered:
 - Option 4 - Extend current use of the Royal prerogative of mercy
 - Option 5 - Promote awareness of existing mechanism in Clean Slate Act (similar to status quo)
16. None of the proposed remedies under these options would have legal effect outside New Zealand, as New Zealand law cannot bind the law of another country. This means that, regardless of which option is chosen, people with historical convictions

will still need to take care when answering questions from overseas authorities about their criminal history. The law in other jurisdictions may be framed broadly to require disclosure of the fact the person was arrested and convicted of an expunged matter.

17. Each option is described below and assessed against the criteria. A breakdown of the scores for each option are presented in the table following Option 5.

Option 1 – statutory expungement scheme (preferred option)

Description

18. This option is to introduce a scheme, set out in legislation, to allow people to apply, free of charge, to have their convictions expunged. People who were convicted of specific offences that were repealed under the Homosexual Law Reform Act 1986 and their predecessors would be eligible. Applications could be made on the person's behalf if they are deceased. The Secretary for Justice would be responsible for determining applications on the papers, with the ability to seek information and written submissions from the applicant and other relevant parties. There would be no oral hearings or requirements to give evidence. However, the Secretary would have the ability to require people to provide relevant information on request if necessary in order to make a decision on the application.
19. The threshold for granting an application would be satisfaction on the balance of probabilities that the conduct in question no longer constitutes a criminal offence (for example, the sexual act in question was consensual and both parties were over 16 years of age). This standard of proof is appropriate for a simple, administrative scheme of this nature and is consistent with similar schemes in overseas jurisdictions. It provides a good balance between ensuring safety, efficiency and effectiveness.
20. Under the proposed scheme, if a person's application is approved, their conviction would be 'expunged' and that expungement noted on official records. This means the person would be entitled to declare that they have no conviction, and their conviction would not appear on any official criminal record check for the purposes of New Zealand law. Unlike a conviction that is concealed under the clean slate regime (which still requires the conviction to be disclosed in some instances such as employment in a role involving the care of children), expungement of a conviction would have effect for all purposes in New Zealand.

Impact on affected individuals, society and government

21. There would be a cost and resourcing impact on the Ministry of Justice, which would be responsible for publicising the scheme, processing applications and preparing files for consideration by the Secretary for Justice. The scheme is expected to cost \$200,000 per annum to administer, assuming 500 out of the potential pool of 1000 people with relevant convictions choose to apply. There would also be resourcing costs for other government agencies that hold information relating to the person's conviction such as NZ Police and Archives NZ. These costs have not been quantified.
22. To benefit from the scheme, individuals would have to make an application. It is expected that the time and cost associated with this would be minimal. Applications would be free of charge. The applicant would have to complete a form and provide basic information such as the date of their conviction. In some situations they may

have to respond to requests from the Secretary for Justice to provide further information.

23. There will be a significant positive benefit to successful applicants by helping to prevent any further negative effects of a historical conviction and providing formal recognition that they would not have committed an offence under current law. Other members of the public will benefit from living in a country that they perceive respects human rights and promotes equity and diversity.
24. Unsuccessful applicants or people who are ineligible to apply may experience a decrease in wellbeing due to feeling disadvantaged compared to successful applicants. The negative effects of their conviction may be aggravated as a result of raised expectations that do not result in a desirable outcome. This includes individuals who are ineligible under the scheme because they were not convicted of one of the repealed offences (but were convicted of another offence and consider they were charged because of its homosexual context), or whose application is unsuccessful (because the necessary official records cannot be found or the Secretary for Justice is not satisfied no criminal conduct was involved).
25. We considered including an appeal process to mitigate this. However, there is likely to be little benefit in doing so as the parameters of the decision are narrow and the process to be followed is to be prescribed by statute. Applications are more likely to be declined due to difficulties obtaining information rather than on a point of law. The ability to make a complaint to an Ombudsman and seek judicial review of any decision provides sufficient safeguards to ensure that decisions are made lawfully.
26. Instead, the impact on unsuccessful applicants would be addressed by clearly informing them of the process and this possible outcome before they apply. The Secretary would also be expected to conduct an exhaustive search of official records for information and would have the ability to obtain additional information if necessary.

Summary of assessment against criteria

27. This option scored well across all criteria, equal highest with Option 4 (Royal prerogative of mercy). Option 4 scored higher in effectiveness because a formal pardon could send a stronger signal that the person would not have been convicted under current law, but lower in efficiency because the Governor-General would have to make a final decision on individual cases on the advice of the Minister of Justice. Option 1 is preferred over Option 4 because the Royal prerogative of mercy is better reserved for miscarriages of justice in accordance with current convention. Extending the prerogative would create a precedent for Executive consideration of convictions for other offences that have been decriminalised. This could weaken the significance of a pardon for those cases where a miscarriage of justice has occurred.
28. One variation of the preferred option was considered:

Option 1A - greater range of offences eligible for expungement (variation on Option 1)

Description

29. This option is a variation of Option 1. Under this option, the eligibility criteria would cover a broader range of offences than those repealed under the Homosexual Law Reform Act 1986. The scheme would allow applications from people who were convicted of a generic offence that has not been repealed, even though the conduct

in question was similar. For example, they could have been charged with a public order offence such as disorderly behaviour that can cover a wide range of conduct, including consensual sexual conduct in a public place.

Impact on affected individuals, society and government

30. The impacts would be similar to Option 1, but a larger pool of individuals could potentially benefit from the opportunity to have their conviction expunged. There is no available data on how many people may fall into this category. Costs for government would be higher because of the potential increase in applications to consider and increased reliance on file information to assess whether the offending involved any conduct that would be criminal under current law. The additional costs have not been quantified.

Summary of assessment against criteria

31. This option met all criteria. It scored higher than other options, including the preferred option, on accessibility due to the larger number of people who could potentially benefit. However, this option was not preferred when balanced against efficiency (due to increased reliance on examination of official records) and safety (due to decisions relying more on the decision-makers' subjective assessment of whether conduct is criminal than a scheme that applies only to specific offences set out in legislation).

Option 2 - Proactive expungement process

Description

32. Under this option, the onus would be on the government to identify affected individuals and assess their eligibility for expungement instead of requiring individuals to make an application. In all other respects, this Option is the same as Option 1.

Impact on affected individuals, society and government

33. Individuals who wish to have their conviction expunged would not have to take the step of applying. This reduces costs on those individuals in terms of time and effort and may provide a more meaningful outcome because the government is proactively taking steps to provide a remedy. There would be a small negative impact on people who prefer not to pursue the option of having their conviction expunged, as they may receive unwanted contact by government to discuss the matter and possibly a request to provide information. This option would be resource intensive for government as all relevant convictions would have to be considered.

Summary of assessment against criteria

34. This option met all criteria except efficiency. This option is not preferred because the additional benefits to individuals arising from not having to make an application would not justify the more resource intensive process of a proactive process.

Option 3 - Extend Clean Slate regime

Description

35. This option would involve amending the Clean Slate Act to extend its application to offences that were repealed by the Homosexual Law Reform Act 1986.

Impact on affected individuals, society and government

36. Individuals not currently eligible to conceal their conviction under the Clean Slate Act would automatically be able to do so without the need to make an application, provide information or have their individual situation assessed. People with historical convictions who are currently eligible under the clean slate regime (the majority) would receive no benefit from this option. Costs for government would be minimal under this option, as the Act would apply automatically without the need to search for files and consider applications against the criteria. There could potentially be small savings due to removing the need for people to apply to the District Court under an existing mechanism in the Act to conceal their conviction on the grounds that the offence they were convicted of has been decriminalised.

Summary of assessment against criteria

37. This option is not preferred because it did not meet the safety criteria. This approach does not allow for an independent decision maker to consider each case individually to determine whether the conduct in question is no longer criminal. While the most cost effective of the options, it would allow people to conceal their conviction even if there is information on the file to suggest that the sexual act was not consensual or one of the parties was under 16.

Option 4 - Royal prerogative of mercy

Description

38. This option would involve developing a process within the existing framework for the Royal prerogative of mercy to provide for pardoning people in situations other than where the conviction may have been wrongful under the law at the time. The prerogative is currently limited by convention to addressing miscarriages of justice.

Impact on affected individuals, society and government

39. The impact of this option on individuals with convictions is similar to Option 1. However, the involvement of the Governor-General and the outcome of a formal pardon may send a stronger signal that the person would not have been convicted under current law. The cost to government would be more significant because of the involvement of the Minister of Justice and Governor-General in addition to the Ministry of Justice in processing applications and providing advice.

Summary of assessment against criteria

40. This option scored well across all criteria, equal highest with Option 1. As noted in the assessment of Option 1, this option scored higher in effectiveness because a formal pardon could provide stronger recognition that the person would not have been convicted under current law, but lower in efficiency because all cases would have to be considered individually by the Governor-General on the advice of the Minister of Justice. These cases would be significantly less complex than the types of cases usually considered by the Governor-General under the convention and would not justify that level of Executive involvement.
41. Option 2 is not preferred because the proposed expungement process would be better suited to consideration by an independent decision-maker within a clearly defined legislative process. The Royal prerogative of mercy is better reserved for cases where there may have been a miscarriage of justice, in accordance with

current convention. Extending the prerogative would create a precedent for consideration of convictions for other offences that have been decriminalised, which is beyond the scope of the current proposals. It would also weaken the significance of a pardon for those cases where a miscarriage of justice has occurred.

Option 5 - Promote use of existing mechanism in Clean Slate Act

Description

42. This option would involve promoting the use of an existing mechanism in the Act whereby an application can be made to the District Court to conceal a conviction for an offence that has been decriminalised.

Impact on affected individuals, society and government

43. The impact of this option on individuals is similar to that of the status quo. However, there may be a small additional benefit in that investing in raising public awareness and encouraging use of this mechanism would provide some recognition that convictions for offences that have been repealed should be disregarded. There would be an impact on the court system if this approach resulted in an increase in applications. This has not been quantified.

Summary of assessment against criteria

44. This option is not preferred because it did not meet the criteria of accessibility. Making an application to the District Court would be time consuming and expensive for individuals. While promoting awareness of the availability of this mechanism would be low cost, this would be outweighed by the additional cost on the court system.

Table of options and scores

Option (and description/key features)	Criteria			
	Safe - minimises the risk that conduct constituting a criminal offence under current law is excused or disregarded	Accessible - maximises the number of affected individuals who are eligible for the proposed remedy and minimises barriers to accessing it	Effective - addresses the negative effects of a conviction by providing a meaningful outcome for affected individuals	Efficient - simple to administer and cost effective
<p>Option 1 – Expungement scheme (preferred option)</p> <ul style="list-style-type: none"> Secretary for Justice considers applications Convictions for specific offences decriminalised under Homosexual Law Reform Act Decided on balance of probabilities that conduct not criminal under current law If successful, conviction will not show on criminal record and applicant can declare no conviction <p>Score: 6 </p>				

Option (and description/key features)	Criteria			
<p>1A – broader range of offences</p> <ul style="list-style-type: none"> accept applications from people charged with offences that have not been decriminalised, if a homosexual act was the reason for being charged with that offence <p>Score: 5 ✓ ✓ ✓ ✓ ✓ ✓</p>	✓	✓ ✓	✓	✓
<p>Option 2 – Proactive expungement process</p> <ul style="list-style-type: none"> No application required – government identifies affected individuals Otherwise same as Option 1 <p>Score: 5 ✓ ✓ ✓ ✓ ✓ ✓</p>	✓ ✓	✓ ✓	✓	✗
<p>Option 3 – Extend Clean Slate regime</p> <ul style="list-style-type: none"> Amend Clean Slate Act so that all convictions for offences decriminalised under 	✗	✓	✓	✓ ✓

Option (and description/key features)	Criteria			
<p>Homosexual Law Reform Act can be concealed (even if person is currently ineligible because they were imprisoned for the offence)</p> <p>Score: 4 ✓✓✓✓ ✓</p>				
<p>Option 4 – Royal prerogative of mercy</p> <ul style="list-style-type: none"> Person with conviction can apply to Governor-General for a pardon, even if conviction was lawfully imposed at the time <p>Score: 6 ✓✓✓✓ ✓✓✓</p>	<p>✓✓</p>	<p>✓</p>	<p>✓✓</p>	<p>✓</p>
<p>Option 5 – promote use of existing mechanism in Clean Slate Act</p> <ul style="list-style-type: none"> Similar to status quo – can apply to District Court under Clean Slate Act to conceal a conviction for offence that has been decriminalised 	<p>✓✓</p>	<p>✗</p>	<p>✓</p>	<p>✓</p>

Option (and description/key features)	Criteria			
<ul style="list-style-type: none"> Promote awareness of this mechanism so that people not automatically eligible under clean slate regime can consider this option <p>Score: 4 ✓ ✓ ✓ ✓</p>				

Consultation

45. NZ Police, Archives NZ, State Services Commission, Crown Law Office, Ministry for Social Development, Department of Corrections and Parliamentary Counsel Office were given the opportunity to comment on the proposal. DPMC and the Treasury were informed.
46. Agencies were generally supportive of the proposal, but raised some issues relating to implementing the scheme that will need working through. NZ Police, Crown Law Office and Archives NZ raised concerns that relevant official records might not still exist and that the information contained in those records may be insufficient to enable the Secretary to make decisions on applications. These concerns are mitigated by providing a process for the Secretary for Justice to obtain information from other sources, such as obtaining further information from the applicant or undertaking historical research.
47. The costs for NZ Police associated with locating and amending official records could not be quantified within the consultation timeframe. The Ministry of Justice will work with NZ Police to assess these costs before Cabinet approval to introduce legislation is sought.
48. There was no public consultation. However, there is a petition currently being considered by the Justice and Electoral Committee which received 2,111 signatures and generated 22 submissions. Submissions are on Parliament's website and have been taken into account.

Conclusions and recommendations

49. The preferred option is to introduce an application scheme for people to have their convictions independently assessed and expunged.

50. Options 1 and 4 received similar scores when assessed against the criteria. However, Option 1 was preferred because the Royal prerogative of mercy is more appropriately reserved for complex cases where there may have been a miscarriage of justice. In contrast, convictions for offences that have since been decriminalised were correctly imposed according to the law at the time and consideration of applications for expungement would not require the same individual consideration.
51. Extending the Royal prerogative of mercy would risk creating a precedent for Executive consideration of convictions for other offences that have been decriminalised. Extending the scope of the convention in this way could weaken the significance of a pardon for those cases where a miscarriage of justice has occurred.

Implementation plan

52. The Ministry of Justice will be responsible for administering the scheme. Other government agencies such as NZ Police and Archives NZ will be required to provide information requested by the Secretary for Justice in order to assess and determine applications.
53. The Ministry will publicise the scheme to ensure people are aware of the opportunity to make an application. This will include making information available on its website and approaching interested members of the public (such as people who made submissions to the petition being considered by Parliament) and representatives of the homosexual community.

Monitoring, evaluation and review

54. The Ministry will monitor the implementation of the scheme and the number of applications being received in order to assess whether additional publicity is required.
55. The proportion of applications approved and declined, and the reasons for the Secretary's decisions, will also be monitored in order to assess whether the scheme is operating as intended.
56. The scheme will be evaluated against the objective of addressing the negative effects of a historical conviction by monitoring feedback from applicants (eg, correspondence to the Secretary for Justice) and media coverage about the scheme, in particular public comments from key stakeholders such as representatives of the gay, lesbian bisexual and transgender community.