

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

Government Bill

As reported from the Justice Committee

Commentary

Recommendation

The Justice Committee has examined the Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill and recommends that it be passed with the amendments shown.

Introduction

This bill seeks to reduce prejudice, stigma, and all other negative effects arising from a conviction for a historical homosexual offence.

If enacted, the bill would allow a person convicted of a homosexual offence, or their representative, to apply to have the conviction expunged. A successful application for expungement would entitle the convicted person to declare that they have no such conviction under New Zealand law, and the conviction would no longer appear on a criminal history check.

Petition 2014/69 of Wiremu Demchick and 2,111 others

The Petition of Wiremu Demchick and 2,111 others was presented to the House on 6 July 2016. It requests: “That, in the matter of those who were convicted of consensual homosexual acts prior to the Homosexual Law Reform Act 1986, the House, (a) promptly issue an official apology to those convicted, and (b) pass legislation which sets out a process for reversing the convictions of those convicted, both living and deceased, in a manner which upholds the mana and dignity of those convicted.”

The Justice and Electoral Committee of the 51st Parliament was still considering the petition on 28 June 2017 when the bill was introduced to the House. On 6 July 2017, the Government issued a formal apology to all those convicted and referred the bill to

the committee. Because the bill addresses the same subject matter as the petition, the committee decided to continue its consideration of the petition alongside the bill. This report is therefore also a report on the petition.

Background to the bill and the petition

Sexual conduct between consenting males aged 16 years and older was not decriminalised until the enactment of the Homosexual Law Reform Act 1986.¹ The Human Rights Act 1993 later established the right to be free from discrimination on the basis of homosexual orientation.

There is limited information about how homosexual offences were enforced and prosecuted before 1986. However, records from the Department of Statistics show that between 1965 and 1986 nearly 1,000 men were convicted of indecency between males. Of these men, 138 received a sentence of imprisonment, while others were subject to fines or community-based sentences.

Convictions for an offence that is later decriminalised remain in place. The stigma of a criminal conviction can have lasting social and psychological effects, even where the conviction is concealed under the Criminal Records (Clean Slate) Act 2004. This is particularly the case when a person applies for a job that requires a criminal history check.

Compensation

Clause 22 of the bill stipulates that there would be no entitlement to compensation for those whose convictions were expunged. Several submitters considered that the men convicted should receive compensation for the harm they suffered as a result of their convictions. However, other submitters agreed with the position in the bill.

We are aware that the men convicted of these offences suffered real harm as a result of their convictions, and we acknowledge the concerns raised by submitters. However, compensation goes beyond the purpose of the bill, which is to prevent further negative effects from the stigma of a conviction.

Nothing in the bill 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 direction.

Recommended amendments

The rest of this commentary covers the main amendments we recommend to the bill. It does not cover minor or technical amendments.

¹ The Homosexual Law Reform Act repealed sections 140, 141, 142, and 146 of the Crimes Act 1961.

Examples illustrating the operation of the bill

As an appendix to this commentary, we have included examples to illustrate how the bill would work in particular circumstances.

Interpretation

Criminal record

Clause 4 is the interpretation clause. It defines “criminal record” as any official record relating to the conviction that is kept by or on behalf of the Crown about the charges, the conviction, the sentences imposed or other dispositions of the case, and the orders imposed.

We recommend amending this definition to replace “official record” with “public record”. This would align the definition with section 4 of the Public Records Act 2005. We are satisfied that this change would not affect the scope or operation of the bill. Clause 23 and Schedule 2 make similar related amendments to the Clean Slate Act.

Expunged conviction

We recommend amending the definition of “expunged conviction” so that it includes “in section 9, any criminal record of a conviction of that kind”. This would complement the suggested amendment to clause 9, as discussed below.

General effects of expungement

The general effects of expungement for overseas jurisdictions

We considered whether an expunged conviction would have to be disclosed when travelling to overseas jurisdictions. Ideally, a conviction expunged under New Zealand law should no longer exist for any purpose other than official recordkeeping, and therefore should not have to be disclosed to an overseas jurisdiction.

We were advised that the requirement for disclosure to overseas jurisdictions would depend on the wording of the request. For example, if an official or a convicted person was asked to provide a criminal history record, the expunged conviction would not be included in that record.

The general effects of expungement in New Zealand

Clause 9 sets out the general effects of expungement, which include that the person with the expunged conviction does not have to disclose the expunged conviction. The conviction will be removed from their criminal history check for any purpose in New Zealand.

We are recommending the following amendments to clause 9 to clarify the general effects of expungement:

- Removing the word “only” from the phrase “for the purposes only of the laws of New Zealand” in clause 9(1) because it suggests that New Zealand expungement cannot be recognised in overseas countries.

- Adding sub-headings to explicitly state the general effects of expungement.
- Explicitly stating that expungement of a conviction does not authorise or require the destruction of any criminal records of the expunged conviction.
- Replacing “any criminal record of expunged conviction” with “any expunged conviction” to better reflect that expunged convictions should not be taken into account when considering a person for employment.

Duties of departments and agencies that hold criminal records

We recommend amending clause 11 to make clear that the duties imposed would only apply to the chief executive of the “controlling public office” (as defined in the Public Records Act) that controls a particular record.²

Effect of expungement on disclosure and use of criminal records

We recommend amending clause 12 to confirm that the disclosure and use restrictions under this clause would apply to the controlling public office, rather than to Archives New Zealand.

Offence to disclose unlawfully information required to be concealed

Under clause 13, a person who has access to criminal records would commit an offence if they knowingly or recklessly disclosed the criminal record, or information about the criminal record, of an expunged conviction. We recommend inserting clause 13(1A) to clarify that the offence would apply only to officials who have access to official records in an official capacity, rather than to any person with personal knowledge of the conviction.

Exception if the convicted person has given written consent or if the disclosure is otherwise authorised by law

Clause 13(2) sets out two exceptions to the offence in clause 13(1): if the convicted person has given written consent to disclosure, or if the disclosure is otherwise authorised by law.

These exceptions are intended to allow a convicted person control over access to their own criminal record. However, we consider that they are problematic because many job applications include a general “tick box” to allow a criminal history check. This could be taken as consent to disclosure of the expunged conviction even if it was not relevant to the job. Further, it is possible that future legislation could include a presumption of full disclosure of all convictions.

We therefore recommend removing clause 13(2).

² Section 4 of the Public Records Act 2005 can be found at <http://www.legislation.govt.nz/act/public/2005/0040/31.0/DLM345537.html>

Offence does not prevent anonymised research or publication, or any disclosure necessary for the administration of the bill

Clause 13(3) provides that clause 13(1) would not apply to or prevent any anonymised research or publication about historical offences or expunged convictions, or any disclosure necessary or desirable for the administration of the bill.

We recommend inserting clause 13(3)(aaa) to make it clear that clause 13(1) would not apply to any disclosure or communication of criminal records of the expunged conviction, when the convicted person expressly requests the convicted person's criminal history, including any expunged conviction of the convicted person, be disclosed directly to the convicted person under the Privacy Act 1993, or any other enactment referred to in section 10(3). This amendment would be consistent with the principle that, where an agency holds personal information about an individual, the individual is entitled to access that information.

We also recommend inserting clause 13(3)(ba) to provide that, if criminal records of the expunged conviction are classified as open access records and are publicly available under the Public Records Act, then clause 13(1) would not apply to any disclosure or communication of those criminal records.

Offence to require or request that individual disregard expungement

The purpose of the bill is to reduce prejudice, stigma, and all other negative effects arising from a conviction for a historical homosexual offence. We are concerned that in some situations, even if a conviction had been successfully expunged, people might still be required to disclose the fact of the conviction. We therefore recommend inserting clause 13A, which would make it an offence to require or request an individual to disregard the effect of expungement under this bill.

Appendix A: Examples of how the bill would work

Clause 5 (Historical homosexual offence defined)

Example—An offence is only a historical homosexual conviction if the offence occurred on or after 4 August 1908, which is the date on which the Crimes Act 1908 came into operation.

Convictions for offences that occurred before this date (that is, offences against an enactment that is part of the laws of New Zealand and is in force on or after 14 January 1840 and before 4 August 1908) thus cannot be expunged under the bill.

A conviction for an offence against section 136 (Unnatural Offence) of the Criminal Code Act 1893, to the extent that the section covers committing buggery with any other male human being, and as in force before 4 August 1908, thus cannot be expunged under the bill.

Clause 9(2) (Criminal history questions are taken not to refer to expunged conviction)

Example—An employer recruiting employees asks the convicted person to disclose the convicted person's criminal conviction history (full "criminal record"). The question is taken not to refer to any expunged conviction (which, in clause 9, includes any criminal record of a conviction of that kind).

Clause 9(3) (Convicted person is not required to disclose expunged conviction)

Example—An employer recruiting employees asks the convicted person to disclose the convicted person's criminal conviction history (full "criminal record"). The convicted person is not required to disclose information about any expunged conviction.

Clause 9(4) (Enactments and arrangements do not apply to expunged conviction)

Example—An expunged conviction must not be considered under Part 3 of the Vulnerable Children Act 2014. Part 3 requires safety checking of people employed or engaged in work that involves regular or overnight contact with children, and prohibits specified organisations from employing or engaging as a core worker a person convicted of a specified offence who does not hold an exemption.

Example—An expunged conviction must not be considered under section 9(1)(j) of the Sentencing Act 2002 (which requires the court, in sentencing or otherwise dealing with an offender, to take into account previous convictions of the offender).

Clause 9(5) (Status cannot be refused or revoked on ground of expunged conviction)

Example—Any expunged conviction, or non-disclosure of one, is not a proper ground for refusing to register the convicted person as a teacher under section 353(a) (applicant not of good character) or (e)(i) or (ii) (applicant has specified convictions, without exemptions) of the Education Act 1989.

Clause 12(2) (Effect of expungement on requests to disclose, and use of, criminal records)

Example—An employer recruiting employees asks the office to disclose the convicted person's criminal record. The office must not disclose the criminal record of an expunged conviction.

Clause 13(3) (Offence to disclose unlawfully information required to be concealed)

Example—An officer, employee, or contractor of the department responsible for the administration of the Public Records Act 2005 discloses or communicates criminal records of expunged convictions when those criminal records are classified as open access records, and made available for inspection by members of the public, publication, or copying, under that Act. The disclosure or communication is not an offence under this clause. However, the criminal records disclosed or communicated still can be used contrary to clause 9.

Appendix B

Committee process

The Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill was referred to the Justice and Electoral Committee of the 51st Parliament on 6 July 2017, and reinstated with this committee on 8 November 2017.

The closing date for submissions was 18 August 2017. We received and considered 37 written submissions, and heard evidence from 10 submitters.

The Ministry of Justice and the Department of Internal Affairs provided advice on the bill.

Petition 2014/69 of Wiremu Demchick and 2,111 others was referred to the Justice and Electoral Committee of the 51st Parliament on 6 July 2016, and reinstated with this committee on 8 November 2017.

The committee received 20 written submissions, and heard evidence from 3 submitters. The Ministry of Justice provided advice on the petition.

Committee membership

Raymond Huo (Chairperson)

Hon Amy Adams

Ginny Andersen

Chris Bishop

Andrew Falloon

Matt King

Greg O'Connor

Priyanca Radhakrishnan

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

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Andrew Little

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

Government Bill

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The Parliament of New Zealand enacts as follows:

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|----------|--|----------|
| 1 | Title | |
| | This Act is the Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2017 . | |
| 2 | Commencement | 5 |
| | This Act comes into force on the day after the date on which it receives the Royal assent. | |

**Part 1
General provisions**

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|----------|---|-----------|
| 3 | Purpose of this Act | 10 |
| | 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 (before that person's death) or a representative (after the eligible person's death); and | 15 |
| | (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,—

controlling public office has the meaning given in section 4 of the Public Records Act 2005

convicted person, in relation to a conviction, means the person against whom the conviction is entered 5

criminal record, of a conviction for a historical offence, means any official public record (including an electronic public record) that is kept by, or on behalf of, the Crown (including by a government department or law enforcement agency) of— 10

- (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 15
- (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—~~ 20

- ~~(a) has been expunged under **section 8**; and~~
- ~~(b) has not ceased to be an expunged conviction under **section 19**~~

expunged conviction—

- (a) means a conviction that—
 - (i) has been expunged under **section 8**; and 25
 - (ii) has not ceased to be an expunged conviction under **section 19**; and
- (b) in **section 9**, includes any criminal record of a conviction of that kind

government department means a department named in Schedule 1 of the State Sector Act 1988 30

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 35
- (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

officer includes a chief executive officer

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post includes any office or position

public record has the meaning given in section 4 of the Public Records Act 2005

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

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- (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)**)

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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—

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- (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).

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- (2) The relevant repealed sections are—

- (a) section 141 (indecentcy 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

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- 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: 5
 - (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): 10
 - (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** 15
- This Act binds the Crown.

Part 2 Expungement of convictions

Test for, and effects of, expungement

- 8 Test for expungement** 20
- (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 18*). 25
- (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** 30
- Expungement has effects set out in this section*
- (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.

Criminal history questions are taken not to refer to expunged conviction

- (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. 5

Convicted person is not required to disclose expunged conviction

- (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~~. 10

Enactments and arrangements do not apply to 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 15
- (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~~. 20

Status cannot be refused or revoked on ground of expunged conviction 20

- (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. 25
- (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. 30

Expungement does not authorise or require destruction of criminal records

- (7) Expungement of a conviction neither authorises, nor requires, destruction of criminal records of the expunged conviction.

Compare: Sentencing Act 1991 s 105J (Vict) 35

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 the Privacy Act 1993 or any other enactment to request information about, or a copy of, the convicted person's own criminal record.

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

11 Duties of ~~departments and agencies controlling public offices~~ that hold criminal records

- (1) This section applies to the chief executive of a ~~government department or law enforcement agency controlling public office~~ that holds, or has access to, criminal records.
- (2) The chief executive must take all reasonable steps to ensure that the ~~department or agency office~~, and any employee or contractor of the ~~department or agency office~~,—
- (a) conceals criminal records of an expunged conviction when requests are made ~~(other than by the convicted person)~~ for their disclosure other than as authorised under **section 13(3)**; and
- (b) does not use criminal records of ~~convicted persons~~ an expunged conviction other than for a purpose authorised under this Act **section 13(3)**.

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- (3) The reasonable steps include the development of policies and procedures.
- Compare: 2004 No 36 s 15

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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 controlling public office~~, or any officer, employee, or contractor of a government department or law enforcement agency controlling public office, that holds, or has access to, criminal records.
- (2) The ~~department, agency, office, officer, 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 other than as authorised under **section 13(3)**.
- (3) The ~~department, agency, office, officer, employee, or contractor~~ is not entitled to use criminal records of an expunged conviction other than for a purpose authorised under this Act **section 13(3)**.

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Compare: 2004 No 36 s 16

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

- (1A) This section applies to a person who—

- (a) is an officer, employee, or contractor of a controlling public office, government department, or law enforcement agency; and
 - (b) has access to criminal records that are held by, or accessible to, the office, department, or agency.
- (1) ~~A person who has access to criminal records—~~ The person commits an offence if the person— 5
 - (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~~ other than as authorised under **subsection (3)**; 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~~ **subsection (3)**. 10
- (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~~ 15
 - (b) ~~the disclosure is otherwise authorised by law.~~
- (3) **Subsection (1)** does not apply to or prevent disclosure of the criminal record, or information about the criminal record, and that is all or any of the following (each of which is, for the purposes of **subsection (2)(b)**, authorised by law): 20
 - (aaa) any disclosure or communication of (or of information about) criminal records of an expunged conviction, when the convicted person expressly requests the convicted person's criminal history, including any expunged conviction of the convicted person, be disclosed directly to the convicted person under the Privacy Act 1993 or any other enactment referred to in **section 10(3)**: 25
 - (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): 30
 - (ba) any disclosure or communication of (or of information about) criminal records of expunged convictions, when those criminal records are classified as open access records, and made available for inspection by members of the public, publication, or copying, under the Public Records Act 2005; and 35
 - (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. 40

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

13A Offence to require or request that individual disregard expungement

- (1) A person commits an offence if the person requires or requests that an individual—
 - (a) disregard the effect of expungement under this Act when answering a question about the individual's criminal history, or disclosing information concerning any convictions of the individual, or both; or 5
 - (b) disregard the effect of expungement under this Act and disclose, or give consent to the disclosure of, any criminal records of an expunged conviction of the individual that are or may be disclosed to the individual under the Privacy Act 1993 or any other enactment referred to in **section 10(3)**. 10
- (2) A person who commits an offence against **subsection (1)** is liable on conviction to a fine not exceeding \$10,000.

Compare: 2004 No 36 s 18

Process for making and deciding application 15

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). 20
- (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 25
 - (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. 30

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**. 35

- (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. 5
 - (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** 10
- (1) This section applies if, in making a decision under **section 15, 18, or 19**, the Secretary believes on reasonable grounds that any document, thing, or information—
 - (a) is necessary to enable the Secretary to make 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 15
 - (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: 20
 - (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. 25
- 17 Offence to fail or refuse to comply with notice**
- (1) A person (other than one specified in **subsection (2)**) 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 **section 16**, to the extent that the person is capable of doing so: 30
 - (b) refuses to give information, or further information, or to be sworn or to affirm and give evidence, as required by a notice under **section 16**, to the extent that the person is capable of doing so. 35
 - (2) **Subsection (1)** does not apply to the eligible person or representative, or to the chief executive, or any employee or contractor, of a an officer, employee, or

contractor of a controlling public office, government department, or law enforcement agency, that holds, or has access to, criminal records.

- (3) Every person who commits an offence against **subsection (1)(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), (2), 30

5

18 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. 10

19 Reconsideration of decisions

- (1) The Secretary may reconsider a decision made under **section 15 or 18**.

- (2) The power to reconsider may be used on all or any of the following grounds: 15

(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: 20

(ii) documents that are false or misleading:

(c) any other grounds that the Secretary is satisfied make it, or may make it, necessary or desirable to reconsider the decision.

- (3) The Secretary may appoint an independent reviewer to assist with a reconsideration. 25

- (4) The Secretary may, as a result of the reconsideration, confirm, reverse, or modify the decision (and **section 18(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. 30

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

20 Evidence, independence, and process

In making a decision under **section 15, 18, or 19**, 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 35

- (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)

21 Protection for person providing information 5

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. 10

Compare: 2009 No 35 s 77

No entitlement to compensation

22 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— 15

- (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 20
- (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 25
- (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. 30

- (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)

Consequential amendments

23 Amendments to Criminal Records (Clean Slate) Act 2004

- (1) This section amends the Criminal Records (Clean Slate) Act 2004 (the **principal Act**).
- (2) Amend the principal Act as indicated in **Schedule 2**.

5

Schedule 1
Transitional, savings, and related provisions

s 6

Part 1
Provisions relating to this Act as enacted

5

1 Effect on legal proceedings

- (1) This Act does not prevent—
- (a) the completion of a legal proceeding commenced before the commencement of this Act; or
 - (b) the commencing of a legal proceeding on or after the commencement of this Act. 10
- (2) However, a proceeding 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 22** (no entitlement to compensation)).
- (3) This clause applies even if, and to the extent that, the proceeding concerned is amended before, on, or after the commencement of this Act. 15

Schedule 2
Consequential amendments to Criminal Records (Clean Slate)
Act 2004

s 23

- In section 4, insert in their appropriate alphabetical order: 5
- controlling public office** has the meaning given in section 4 of the Public Records Act 2005
- public record** has the meaning given in section 4 of the Public Records Act 2005
- In section 4, definition of **criminal record**, replace “official record” with “public record”. 10
- In section 4, definition of **criminal record**, replace “electronic record” with “electronic public record”.
- In the cross-heading above section 15, replace “*government departments and law enforcement agencies*” with “*controlling public offices*”. 15
- In section 15(1), replace “government department or law enforcement agency” with “controlling public office”.
- In section 15(2), replace “government department or law enforcement agency” in each place with “office”.
- In the heading to section 16, replace “**government departments, law enforcement agencies,**” with “**controlling public offices,**” 20
- In section 16(1) and (2), replace “government department or law enforcement agency” in each place with “controlling public office”.
- Before section 17(1), insert:
- (1A) This section applies to a person who— 25
- (a) is an officer, employee, or contractor of a controlling public office, government department, or law enforcement agency; and
- (b) has access to criminal records that are held by, or accessible to, the office, department, or agency.
- In section 17(1), replace “A person” with “The person”. 30
- In section 19(2) and (3)(g), replace “government department or law enforcement agency” in each place with “controlling public office”.
- In section 20(1) and (2), before “government department or law enforcement agency” in each place, insert “controlling public office or”.
- In the heading to section 23, replace “**2000**” with “**2011**”. 35
- In section 23, replace “2000” with “2011”.

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

Legislative history

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