# LEGISLATION NOTE: CRIMINAL RECORDS (EXPUNGEMENT OF CONVICTIONS FOR HISTORICAL HOMOSEXUAL OFFENCES) ACT 2018

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The Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018 came into effect on 10 April 2018. It joins a range of similar statutes from the UK, Canada and Australia. This article outlines the New Zealand statute, notes briefly the structure of the overseas statutes, and adds some commentary as to the limitations of the New Zealand statute.

## I. THE BACKGROUND

The Crimes Act 1961 as enacted contained several provisions that would quickly become antiquated. For example, s 128(3) provided that a man could not be convicted of rape against his wife unless the marriage had broken down; sections 182 to 187 criminalised abortion (and still do, now with a proviso relating to approved terminations). In addition, s 141 criminalised indecency between males and s 142 criminalised anal intercourse (irrespective of gender). Both sections expressly provided that consent was not a defence.[1] Section 146 set out the offence of "keeping a place of resort for homosexual offences". Further, s 28 of the Summary Offences Act 1981 provided (and still does) that it is an offence to be found in a public place "behaving in a manner from which it can reasonably be inferred that he is preparing to commit an imprisonable offence" (in relation to which there is express provision that previous convictions are admissible to determine the question of the reasonable inference). This included any form of loitering with a view to securing a partner for consensual activity that was illegal under the relevant parts of the Crimes Act at the time; it might be policed via covert observations or even entrapment-like activities.

Removing consensual sexual activity that happened to be homosexual from the ambit of the criminal law did not happen in New Zealand until after it had happened in many other jurisdictions with which we often make comparisons. It eventually occurred through the Homosexual Law Reform Act 1986, a short piece of legislation passed, it is worth noting, after the publication in 1985 of the White Paper 'A Bill of Rights for New Zealand' that would ultimately produce the New Zealand Bill of Rights Act 1990. It amended s 142 of the Crimes Act 1961 to provide that anal intercourse was illegal only if the person penetrated was under 16 or was "severely subnormal".[2] Section 141

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[1] Section 153 of the Crimes Act 1908 set out the offence of "buggery either with a human being or with any other living creature" (which carried life imprisonment and corporal punishment), and section 154 set out a series of separate offences, including a male indecently assaulting another male. There was express provision under section 154 that consent was not a defence, though this was not mentioned in section 153, which was titled the "Unnatural offence": doubtless courts would have made it clear that consent was not a permissible defence. See also sections 136 and 137 of the Criminal Code Act 1893, which had similar provisions; and sections 58 and 59 of the Offences against the Person Act 1867.

[2] There was also provision for consensual anal intercourse if both were under 16 but this required that the person penetrated be at least 12 and be the older.

was also amended so as to allow consensual contact unless there was fraudulently-obtained consent. Section 146 was repealed.[3]

Section 7 of the 1986 Act provided that no-one could be convicted after the Act came into effect in relation to conduct that had been covered by the 1961 Act prior to the amendment: even if they had already been charged, they could rely on the provisions of the 1986 Act.[4] However, no provision was made for those who had been convicted already. Whilst they would benefit from the Criminal Records (Clean Slate) Act 2004, they would be subject to the exemptions provided for in s 19 of that legislation (applying for a job in probation or security, or involving the care of children or young people) and they still had a conviction that might have to be declared for visa applications and the like.

On 6 July 2016, Kevin Hague MP presented to the House of Representatives a Petition in the name of Wiremu Demchick and 2,111 others.[5] The Petition was the output of the "Campaign to Pardon Gays in Aotearoa" and requested that persons convicted of consensual homosexual acts prior to the Homosexual Law Reform Act 1986 receive an apology and that Parliament enact "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 Petition was referred to the Justice and Electoral Committee (which, after the 2017 election, became the Justice Committee). Whilst the Petition was before the Committee, the then government introduced a Bill on 28 June 2017 which became the 2018 Act. At the first reading of the Bill, on 6 July 2017, the then Minister of Justice, Amy Adams, moved both that the Bill be read and that an apology be offered. There was celebratory support for the Bill and the motion to apologise.[6]

The Justice Committee, which considered the Petition and the Bill at the same time, supported the Bill, with some amendments.[7] In his written evidence to the Committee, Mr Demchick noted the "striking" social change in the 30 years since decriminalisation, but noted the stigma and past persecution, which he estimated involved 400 persons with convictions for conduct that had been decriminalised: it was suggested that a

[3] There were some other changes. Section 140 of the Crimes Act 1961 as enacted was an offence of indecency between a man (aged 21 or over) and a boy aged under 16, for which consent was no defence. It was amended and section 140A added: these sections now covered indecency between a man and a boy under 12 or a boy 12 and under 16, with differential consent provisions.

[4] In contrast, section 8 of the 1986 Act allowed the armed forces to continue to interpret the Armed Forces Discipline Act 1971 to include homosexual conduct within the disciplinary offence of disgraceful and indecent conduct: section 146 and Schedule 3 to the Human Rights Act 1993 removed this by repealing section 8. The Human Rights Act 1993 supplements the process started by the 1986 Act: section 21, which lists the prohibited grounds of discrimination, includes, at section 21(1)(m) "sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation".

[5] https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/51SCJE_EVI_51DBHOH_PET69556_1_A527001/wiremu-demchick.

[6] https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20170706_20170706_28.

[7] Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill, As reported from the Justice Committee, together with Commentary.

pardoning process was the logical next step.[8] The Committee recorded in its report of 6 March 2018[9] that information from the Department of Statistics indicated that there were almost 1000 convictions from 1965 to 1986 of offences against the pre-amendment s 141 of the Crimes Act 1961, leading to 138 prison sentences. It also noted the ongoing social and psychological effects of a conviction. The further Parliamentary stages were completed speedily, led by the new Minister of Justice, Andrew Little.

## II. The Regime Described

Section 3 of the Act sets out that its purpose 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
> (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.

This purpose clause encapsulates a number of questions that are addressed in the Act: what offences are covered by the reference to "a historical homosexual offence", what is the application process, what is the test for expungement, and what is the consequence?

### *A. The Offences Covered*

Section 5 of the Act defines "historical homosexual offence" or "historical offence" to cover convictions under sections 153 and 154 of the Crimes Act 1908 involving male homosexual conduct, and convictions under sections 141, 142 and 146 of the Crimes Act 1961 prior to the amendment in 1986. Inchoate and accessorial liability is also covered.

### *B. The Application Process*

As to the process, sections 15 to 22 of the Act set out the following. The application (for which a set form will be provided, under s 15(3)) is addressed to "the Secretary", defined in s 4 as the Secretary for Justice. Under s 15(1), it can be made by a living "eligible person", defined in s 4 as the convicted person; or by a representative after the death of the eligible person. Section 15(4) preserves the law relating to agency, enduring powers of attorney and welfare guardians in relation to making applications. In relation to the representative of a deceased person, s 16 gives a wide discretion to the Secretary to allow a person to carry out this role: the only express limit appears to be that in s 16(4), relating to the appointment being "in the interests of the deceased convicted person".

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[8] https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/51SCJE_EVI_51DBHOH_PET69556_1_A527001/wiremu-demchick.

[9] All relevant Parliamentary materials can be found at https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_74442/criminal-records-expungement-of-convictions-for-historical.

The form requires (s 15(3)) "any supporting information, and supporting submissions".[10] Under s 16, the Secretary can ask for further information or documentation that is reasonably believed to be necessary to make a decision, but also provided that it is "unlikely to be able to be obtained" other than through such a notice (s 17): there is a criminal offence (punishable by a fine of up to $1000) for not complying with the notice without reasonable excuse. The power of request includes calling for evidence on oath or affirmation or through affidavit, and the offence can be made out through failing to be sworn in or to affirm or give evidence.

### *C. The Test for Expungement and the Decision-Making Process*

Section 8(1) provides that "A conviction for a historical offence" – note, not the record of it, but the conviction itself – "is expunged if", first, an application is made as noted above and, second:

> (b) the Secretary's decision on the application is that, on the balance of probabilities, the conviction meets the test for expungement (*see* section 19).

Section 19 merely states that the Secretary has to make a written decision on whether the test for expungement is met and must give written reasons. The actual test is set out in s 8(2):

> (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.

In making the decision, and in deciding whether to allow a person to represent a deceased person with a conviction, s 21 requires the Secretary to "act independently", permits an oral hearing if "exceptional circumstances and … the interests of justice" require an oral hearing, and allows the consideration of evidence that would not be admissible in court. Section 22 protects from civil or criminal liability anyone who provides information if in "good faith" and it was "reasonable in the circumstances".

The decision made by the Secretary, whether to expunge or not, is open to reconsideration on the basis of further information, including that the application had false or misleading material: s 20. An independent reviewer may be appointed in such an event. The provisions of ss 21 and 22 apply to such a reconsideration.

### *D. The Consequences of Expungement*

Section 9 sets out that "for the purposes of New Zealand law", expunged convictions do not have to be referred to if a person is asked about their criminal history, or otherwise disclosed, and cannot be taken into account in any situation where a conviction might otherwise be relevant. The record, however, remains (s 9(7)), but must be concealed (s 11, which is backed-up by an offence of disclosure, s 13, with a potential fine of $20,000), unless the affected person consents (s 13(3)); academic

[10] The form and guidance can be obtained from https://www.justice.govt.nz/justice-sector-policy/key-initiatives/historical-homosexual-convictions/.

research is permitted, as is access to material under the Public Records Act 2005 (s 13(3)). There is a separate offence of requiring or indeed requesting a person to disregard the expungement: s 14, which carries a fine of up to $10,000.

Section 23 precludes any form of compensation, however, including the reimbursement of any fines or costs paid as a result of the prosecution.

## III. Comparison – Overseas Legislation

The New Zealand legislation was one of the later ones passed. The first steps were taken in the England and Wales, through the Protection of Freedoms Act 2012 (UK) (though it was supplemented subsequently through the Policing and Crime Act 2017 (UK), which also applied the process to Northern Ireland). South Australia was next: the Spent Convictions (Decriminalised Offences) Amendment Act 2013 (SA), which amended the Spent Convictions Act 2009 (SA). In 2014, two further Australian jurisdictions acted: the Criminal Records Amendment (Historical Homosexual Offences) Act 2014 (NSW) amended the Criminal Records Act 1991 (NSW); and the Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 (Vic) established a new regime within the Sentencing Act 1991 (Vic). Next was the Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Act 2015 (ACT), which modified the Spent Convictions Act 2000 (ACT). Queensland and Tasmania followed in 2017, with the Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 (QLD) and the Expungement of Historical Offences Act 2017 (TAS). New Zealand's legislation in 2018 brought up the rear, along with the Historical Homosexual Convictions Expungement Act 2018 (WA), the Expungement of Historical Homosexual Offence Records Act 2018 (NT), the Expungement of Historically Unjust Convictions Act 2018 (Can), and the Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018.

The initial UK provisions were in an omnibus statute, the Protection of Freedoms Act 2012, under the heading "Disregarding certain convictions for buggery etc". Under s 92, certain offences in England and Wales, being buggery and gross indecency between males, sections 12 and 13 respectively of the Sexual Offences Act 1956, and their equivalents under legislation from 1861 and 1885, were covered. On the basis of an application with required information and possible representations (s 93), but acting without an oral hearing (s 94), the Secretary of State decides whether "it appears" that the conduct was consensual and the other person was 16 or over: s 92. This is subject to a caveat that conduct that would amount to the current offence of sexual activity in a public lavatory (contrary to s 71 of the Sexual Offences Act 2003 (UK)) is excluded. If the test is met, the conviction is disregarded, meaning that it is treated as not existing: sections 95 and 96. The Explanatory Memorandum to the Act suggested, at paragraph 60, that some 12,000 convictions were recorded on the Police National Computer.

This statute's limitations led to the tagging of supplemental provisions on to the Policing and Crime Act 2017 (UK). The disregarded convictions from the 2012 Act are granted a statutory pardon. Further, all persons convicted of consensual involvement is now abolished offences are pardoned, including on a posthumous basis; these go

back to a 1533 statute, though the caveat relating to conduct in a public lavatory remains. Power is also given to the relevant Secretary of State to make regulations to cover additional offences. In addition, the regime of the 2012 Act and the new pardoning provisions is extended to Northern Ireland. Scotland then adopted its own pardoning and disregarding statute.

South Australia passed the first Australasian statute, with its Spent Convictions (Decriminalised Offences) Amendment Act 2013 (SA), though it follows a different regime. This came into effect on 22 December 2013,[11] amending the Spent Convictions Act 2009 (SA). Under this 2009 statute, whilst convictions for non-sexual offences that lead to non-custodial or short custodial sentence become spent with the passage of time, an order by a magistrate is required for sex offences. Factors relevant to the discretion in making such an order are set out. The 2013 Act added an additional category of "designated sex-related offence", involving consensual sexual conduct that would not have been an offence if the parties were not of the same sex. In relation to such convictions, the magistrate has a full discretion to make the conviction spent if satisfied that it involved conduct that is no longer an offence.

The other Australasian statutes have adopted the model of an application to the executive to allow for the conviction to be expunged and disregarded, which was also the process adopted in Canada. Although these statutes are similar, there are several variations. For example, the Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 (Vic) defines the offences, being sexual or public morality offences, by description rather than by specifying what offences were covered; and the Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 (QLD) specifies various offences but allows the list to be extended by regulation. The Expungement of Historical Offences Act 2017 (TAS) has a hybrid: it has a description of sexual and public morality offending, but also covers "cross-dressing offences" by reference to a specific offence in the Police Offences Act 1935 that was not repealed until 2001. The language of the standard to be satisfied varies: the Victorian statute refers to the decision maker being satisfied on the balance of probabilities that the charge involved was prosecuted only because it involved homosexual conduct, whereas the Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Act 2015 (ACT) requires the decision maker to be satisfied on reasonable grounds that the test is made out. Under the Expungement of Historically Unjust Convictions Act 2018 (Can), which involves the Parole Board as the decision-maker, the test involves an assessment of whether various criteria are evidenced, namely that it involved consensual homosexual conduct by persons who were 16 or older, with refusal to expunge requiring an assessment of whether there is evidence that the criteria are not satisfied.

Various of the statutes are clear that no compensation can be offered; there are also several provisions allowing an order for expungement to be overturned if there was misleading information provided on the application; it is common to allow an

[11] Spent Convictions (Decriminalised Offences) Amendment Act (Commencement) Proclamation 2013 (SA)

application to be made on behalf of someone who is deceased or lacks capacity; and it is common to make clear that the prerogative of mercy is not affected.

## IV. Commentary on the New Zealand Legislation

### *A. The Gaps in the Legislation – the Offences Covered*

As noted above, the application to expunge can only be made in relation to 5 specified offences, which leaves certain gaps. First, although applications can be made on behalf of deceased persons, they cannot be made in relation to convictions under the 1893 Act or the 1867 Act (or any earlier UK legislation that applied in New Zealand); given the importance of ancestors in New Zealand culture, this seems to be a gap that should not be permitted. The approach of the UK legislation in going back several hundred years is noted in this regard.

Secondly, there are limitations in the offences covered. In particular, there is no scope for expunging convictions under s 28 of the Summary Offences Act 1981: anyone convicted of such an offence when the only crime they were loitering with intent to commit was consensual homosexual conduct may well feel aggrieved that they cannot challenge that conviction. In Ministry of Justice advice to the Justice Committee,[12] it was noted that some submitters had suggested that public order offences should be included, but this was advised against on the basis that those would have been used in relation to heterosexual conduct as well.[13] If the practical reality was that police officers would prosecute in relation to homosexual conduct but warn (or ignore) those involved in heterosexual conduct, there is improper differential treatment based on sexual orientation. The flexibility of the approach of some of the Australian statutes, in either describing offending behaviour rather than limiting it to certain offences, or allowing additional offences to be added by regulation, is to be noted in this context.

Thirdly, there is a partial gap revealed by the limitation of the challenge to offences under sections 153 and 154 of the Crimes Act 1908 to cover only sexual conduct between males. The aim here is no doubt to cover the fact that the "unnatural offence" also covered what is now covered by bestiality. However, it also covered heterosexual anal intercourse, as did s 142 of the Crimes Act 1961 as enacted. It may be that there were no convictions other than in homosexual contexts and so there is no factual problem here: but the rationale – namely that the state has no role in using the criminal law in relation to consensual sexual activity between adults with capacity to make their own decisions – applies in all contexts. Perhaps Parliament has simply not turned its mind to these matters?

[12] Ministry of Justice, Departmental Report: Court Records (Expungement of Convictions for Historical Homosexual Offences) Bill.
[13] Ministry of Justice, Departmental Report: Court Records (Expungement of Convictions for Historical Homosexual Offences) Bill, paragraph 26.

*B. The Representative of a Deceased Person*

As noted above, there is an issue as to who can represent a deceased person who has a historical conviction. The only express limit appears to be that in s 16(4), relating to the appointment being "in the interests of the deceased convicted person". This allows significant scope for argument as to who has standing to make such an application, in relation to which the Secretary is required to act "independently" (s 19). This provides precious little guidance, which may prove unhelpful in determining standing if a point of dispute arises, for example between different branches of a family. Various of the Australian statutes offer more guidance in this regard, though it is apparent that they are more tied to a more European concept of close family than is appropriate in New Zealand. Nevertheless, more guidance could have been offered as to what counts as appropriate to justify standing. (This matter is only a problem if applications have to be made, on which see below.)

*C. The Decision-Making Process*

The Secretary of Justice is no doubt the decision-maker because of the costs of having a judicial process. At the same time, the Secretary of Justice is a busy person as well, although it seems to be the expectation of the Ministry of Justice that the role will be carried out by in-house lawyers.[14] Much of the process is judicial in nature, including the need to be satisfied to the civil standard and the need to give reasons; an oral heading can be held, and people can be required to take an oath or agree to affirm. As such, one wonders why the task has not been given to the judiciary or, as in Canada, the Parole Board.

More importantly, the question must be raised as to why it is necessary for there to be an application and a burden of proof on the applicant. This is a common feature of the Australian statutes and the first UK statute, which is no doubt why it features. However, the wrongs involved were perpetrated by the state. An alternative approach would be for the relevant branches of the state – perhaps headed by the police – to carry out a systematic examination of all relevant convictions, applying a presumption of expungement unless it could be demonstrated that the offence would have stood under current law. The Ministry of Justice suggested that an application process was necessary to avoid retraumatising people who wanted to put behind them the incident leading to the conviction:[15] this is unconvincing, since the process could easily proceed without anyone being told unless they asked for a copy of their criminal record to check whether a conviction was no longer recorded.

Possibly more likely as an explanation is the additional point made by the Ministry of Justice that records prior to 1976 are limited and so require the cooperation of the convicted person.[16] It is added that there needs to be an assessment that the conduct

[14] Ministry of Justice, Departmental Report: Court Records (Expungement of Convictions for Historical Homosexual Offences) Bill, paragraph 118.
[15] Ministry of Justice, Departmental Report: Court Records (Expungement of Convictions for Historical Homosexual Offences) Bill, paragraph 30.
[16] Ministry of Justice, Departmental Report: Court Records (Expungement of Convictions for Historical Homosexual Offences) Bill, paragraphs 32-33.

involved would not be an offence today because of a lack of consent.[17] However, if there is to be an application process for these reasons, it is wrong to place anything beyond a bare evidential burden on an applicant. A requirement to meet a legal burden of proof raises the obvious concern that a conviction will not be expunged if the available evidence is equivocal. This might occur if material has been lost, most likely by the police or the courts as part of destroying records. In the context of criminal convictions based on bigotry and the need to meet the presumption of innocence, it is inconsistent to require a person to prove that they were the victim of bigotry: it amounts to a presumption of guilt unless the person meets a legal burden of proving innocence.

*D. The Effects*

The indication that the expungement has effect only for the purposes of New Zealand law leaves open the question of its effect overseas, and most obviously for matters such as information to be provided for visa applications and the like. Extra-territorial effect may not be the norm for New Zealand statutes, but the language added into the New Zealand statute is likely to cause more confusion. For instance, an overseas visa application question "do you have any convictions" is tied to convictions in a particular country (given the limited number of international criminal law convictions). If all that exists is an expunged criminal conviction, the person should be able to say "no": however, the effect of the New Zealand language is that the answer has to be qualified as "for the purposes of New Zealand law, no". This is not a helpful limitation.

The failure to make provision for compensation is troubling. Examining this through a human rights lens, it is apparent that the criminalisation of consensual homosexual conduct breached privacy and non-discrimination standards, as declared in the Universal Declaration of Human Rights 1948. Article 8 of the UDHR also makes the point that remedies for breaches of rights are necessary, and this is an express obligation arising under article 2(3)(a) of the International Covenant on Civil and Political Rights 1966, including when the state is responsible for the violation. Note also article 14(6), which requires compensation for victims of miscarriages of justice. The point of principle arising is that the right to an adequate remedy is itself a fundamental human right. A panel of experts produced a soft law document on human rights principles in the context of sexuality, the Yogyakarta Principles 2006:[18] principle 28 relates to effective remedies and redress.

The Ministry advice to the Justice Committee was that the suggested approach of preventing compensation is in accord with what is provided for in overseas legislation, which is true in that several say that: but it was noted that Germany and Canada proposed to take a different approach.[19] The Ministry also added what purported to be a principled distinction between "convictions that were wrong at law and

[17] Ministry of Justice, Departmental Report: Court Records (Expungement of Convictions for Historical Homosexual Offences) Bill, paragraph 34.
[18] Available at http://yogyakartaprinciples.org/.
[19] Ministry of Justice, Departmental Report: Court Records (Expungement of Convictions for Historical Homosexual Offences) Bill, paragraphs 10-20 and 128 and Annex 2 (referring to Germany and Canada).

convictions for offences that have been repealed".[20] This is nonsense: the very decision to expunge convictions which were correct in law at the time they were made makes clear that such a legalistic argument cannot be correct. Expunging is a necessary step to righting the wrong, but the recognition that there was a legal harm arising from the fact that the law should not have provided as it did leads naturally to the question of compensation for those affected. In this regard, there is no valid difference between a conviction caused by improper police conduct (which would be within the miscarriage of justice provisions of article 14(6) of the ICCPR) and a conviction caused by the failure of the state to remove legislative bigotry. Moreover, the state keeping fines and costs is simply egregious.

The Select Committee endorsed the view that compensation goes beyond the purpose of preventing further negative effects and stigma:[21] the purpose should not be so constrained. Without compensation, the breach of rights that has occurred is remedied in a half-hearted fashion. We have been a slow follower of other jurisdictions in providing half a remedy: we should have led by example to provide a full remedy.

[20] Ministry of Justice, Departmental Report: Court Records (Expungement of Convictions for Historical Homosexual Offences) Bill, paragraph 128. At paragraph 17, it is reported that "there is no suggestion that the convictions in question were wrongfully imposed as they were in accordance with the law at the time".

[21] Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill, As reported from the Justice Committee, together with Commentary, p2.