

# Departmental Disclosure Statement

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Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

12 June 2016.

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## Part One: General Policy Statement

### *Purpose and overview*

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

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

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

### *General policy sought to be achieved*

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

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

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

The expungement scheme will apply only to specified repealed offences. The test will be that the conduct would not constitute an offence if engaged in when the application was made. The primary issues will be whether each person involved in the conduct

consented to that conduct and that all participants were aged 16 years or older. The scheme will not apply to people convicted of public order offences that may have involved consensual homosexual conduct (as other offending may have been involved). Including a broader range of offences in the scheme would make it considerably more complex and resource intensive, and is not appropriate at this time.

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

### *Comparable overseas legislation*

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

- Australian Capital Territory—Part 3A (Extinguishing historical homosexual offence convictions) of the Spent Convictions Act 2000 (ACT), as inserted on 7 November 2015 by the Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Act 2015 (ACT) — [http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/act/consol\\_act/sca2000222/index.html](http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/act/consol_act/sca2000222/index.html)
- New South Wales—Part 4A (Extinguishing convictions for historical homosexual offences) of the Criminal Records Act 1991, as inserted on 24 November 2014 by the Criminal Records Amendment (Historical Homosexual Offences) Act 2014 (NSW) — [http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/nsw/consol\\_act/cra1991167/index.html](http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/nsw/consol_act/cra1991167/index.html)
- South Australia—Section 8A (spent conviction for an eligible sex offence) of the Spent Convictions Act 2009, as inserted by the Spent Convictions (Decriminalised Offences) Amendment Act 2013 (South Australia) — [http://www.austlii.edu.au/cgibin/sinodisp/au/legis/sa/num\\_act/scoaa201388o2013524/index.html](http://www.austlii.edu.au/cgibin/sinodisp/au/legis/sa/num_act/scoaa201388o2013524/index.html)
- Tasmania—Historical Homosexual Convictions Bill 2016 (Tas) — exposure draft (consultation closed 26 July 2016) at [http://www.justice.tas.gov.au/community-consultation/inactive/historical\\_homosexual\\_convictions\\_bill\\_2016](http://www.justice.tas.gov.au/community-consultation/inactive/historical_homosexual_convictions_bill_2016) and Expungement of Historical Offences Bill (17 OF 2017) — <http://www.austlii.edu.au/au/legis/tas/bill/eohob17o2017371/> and [http://www.parliament.tas.gov.au/bills/pdf/17\\_of\\_2017.pdf](http://www.parliament.tas.gov.au/bills/pdf/17_of_2017.pdf)
- United Kingdom—Chapter 4 (Disregarding certain convictions for buggery etc) of the Protection of Freedoms Act 2012 (UK) — <http://www.legislation.gov.uk/ukpga/2012/9/contents> — and sections 164 to 172 (pardons for certain abolished offences etc) of the Policing and Crime Act 2017 — <http://www.legislation.gov.uk/ukpga/2017/3/contents/enacted>
- Victoria—Part 8 (Historical homosexual convictions) of the Sentencing Act 1991 (Vict), as inserted on 1 September 2015 by the Sentencing Amendment

(Historical Homosexual Convictions Expungement) Act 2014 (Vict) —  
[http://www.austlii.edu.au/au/legis/vic/consol\\_act/sa1991121/index.html](http://www.austlii.edu.au/au/legis/vic/consol_act/sa1991121/index.html)

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>NO</b>
Note: development of the policy was influenced by overseas jurisdictions with similar schemes	

### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>NO</b>
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### Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>YES</b>
A RIS was prepared for this Bill ("Expungement scheme for historical homosexual convictions" by the Ministry of Justice, 8 December 2016). The Ministry of Justice's RIA review panel considered that the information and analysis summarised in the RIS partially met the quality assurance criteria.	

<b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>	<b>NO</b>
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<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	<b>NO</b>
The features of Option 1 in the 8 December 2016 RIS correspond reasonably well with the key policy features of this Bill.	

### Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>
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<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	<b>NO</b>
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	<b>NO</b>
(a) Paragraph 21 of the 8 December 2016 RIS indicates that the scheme is to cost \$200,000 per annum to administer. 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.	
(b) The Bill will not have any impact on any group of persons' income or wealth.	

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	<b>NO</b>
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>NO</b>
The Bill does not create new obligations or standards, or impact on existing obligations and standards.	

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

<b>3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?</b>
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The Ministry's scan of international obligations has not identified any obligations that conflict with the policies contained in the Bill. The Bill affirms the right of freedom from discrimination on the basis of sexual orientation.
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### Consistency with the government's Treaty of Waitangi obligations

<b>3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?</b>
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The Bill does not have any implications for the rights and interests of Māori protected by the Treaty of Waitangi or customary interests protected at common law.
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### Consistency with the New Zealand Bill of Rights Act 1990

<b>3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?</b>	<b>YES</b>
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Advice provided to the Attorney-General by Crown Law, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon the introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at <a href="https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/">https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/</a>
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### Offences, penalties and court jurisdictions

<b>3.4. Does this Bill create, amend, or remove:</b>	
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<b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b>	<b>YES</b>
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<b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>	<b>YES</b>
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(a) Offences

- Clause 13 of the Bill creates an offence for disclosure or communication of an expunged conviction.
- Clause 17 of the Bill creates an offence if a person, without reasonable excuse, refuses to give information or fails to produce information requested by the Secretary in relation to an expungement application.

(b) Jurisdiction of a court or tribunal

The Bill provides for the Secretary to reconsider a decision made. The Secretary may appoint an independent reviewer to assist with the reconsideration. Judicial review and the ability to complain to the Ombudsman remain available for applicants.

<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>NO</b>
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The Ministry of Justice is the lead agency for this Bill.
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## Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	<b>YES</b>
Clause 11 of the Bill provides obligations on the chief executives of government departments or law enforcement agencies that hold, or have access to, criminal records to take all reasonable steps to ensure that an expunged conviction is not released. This clause mirrors the obligations under section 17 in the Criminal Records (Clean Slate) Act 2004.	

<b>3.5.1. Was the Privacy Commissioner consulted about these provisions?</b>	<b>NO</b>
The Privacy Commissioner was not consulted on the development of the Bill because the Bill does not create any new obligation on government departments; the provisions replicate those in the Criminal Records (Clean Slate) Act 2004.	

## External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>NO</b>
Consultation to date has only involved government departments that will be affected by the proposed legislation. 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 standard have changed. Interested individuals and groups will have the opportunity to make submissions to the select committee considering the Bill.	

## Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>NO</b>
It is proposed to make further inquiries about the process for accessing historical criminal records.	

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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### Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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### Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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### Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

### Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
Clause 21 protects a person from criminal or civil liability for providing information for, or in support of, an application or request under the Bill, as long as the action was taken in good faith and was reasonable in the circumstances.	

### Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
Clause 8 of the Bill provides that the Secretary for Justice must decide whether the conviction meets the test for expungement on the balance of probabilities. 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. Clause 15 provides that the Secretary for Justice may approve other persons to represent a deceased convicted person.	

### Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
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<b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>	<b>NO</b>
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**Any other unusual provisions or features**

<b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>	<b>NO</b>
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