

Q&A – Expungement scheme for historical homosexual convictions

Why is the Government introducing this scheme?

The Homosexual Law Reform Act 1986 decriminalised homosexual conduct between consenting men. There is no general rule that a person's conduct is deserving of a pardon because the conduct concerned is no longer an offence.

Allowing historical convictions for consensual homosexual offences to appear on a person's criminal record history can continue to stigmatise those affected.

Additionally, people with such convictions may be required to disclose their conviction for employment matters.

The scheme would provide an opportunity for people to be treated as if they had not been convicted, and to remove the stigma and prejudice that can arise from convictions of homosexual offences.

Who is eligible to apply under the scheme?

People will be eligible to apply if they were convicted of specific offences under the Crimes Act 1961 relating to sexual activity between males 16 years and over that were decriminalised by the Homosexual Law Reform Act 1986. The offences are:

- section 141 (indecentcy between males)
- section 142 (sodomy)
- section 146 (keeping place of resort for homosexual acts)

The threshold for granting an application would be satisfaction on the balance of probabilities that the conduct in question would no longer constitute a criminal offence – this means the sexual activity must have been consensual and involved adults 16 years or over.

How will the scheme work?

The Bill will set out the details of the process. In general terms:

- the Secretary for Justice will be responsible for determining applications
- an applicant will complete an application form including details about their convictions, together with any evidence they wish to submit
- applications can be made by certain people on behalf of a deceased person
- where the information provided by the applicant and official government records are insufficient for the Secretary to make a decision, the applicant will be invited to provide further information and evidence
- the Secretary may take steps to verify information provided by the applicant with third parties, and may make other inquiries into relevant records.

Applications will be treated in confidence and the privacy of applicants and other parties respected.

When will the scheme be introduced?

It is anticipated that the scheme will begin in 2018 - as soon as the necessary law changes are in place.

The Government intends to introduce a Bill to Parliament before the House rises for the election.

Members of the public will have an opportunity to make submissions on how the scheme should work when the Bill is before a select committee.

What does 'expungement' mean?

An eligible applicant's records will be 'expunged'. This means their criminal record would be amended to ensure the conviction does not appear on a criminal history check for any purpose in New Zealand and they will be entitled to declare they have no such conviction.

How does this scheme compare with the Clean Slate Act?

There are two main differences:

- to be eligible to conceal a conviction under the Clean Slate Act, the person must, among other factors, have been conviction free for seven years and have never been imprisoned, whereas an expungement will be available regardless of subsequent offending and the sentence imposed
- the scheme will not have the limitations that are included in the Clean Slate Act – if a conviction is expunged it cannot be disclosed for any purpose in NZ, whereas under the Clean Slate Act a conviction may still be disclosed in certain situations (e.g. when a person applies for a job working with children).

How does this scheme compare with what other jurisdictions have done?

The proposed approach is modelled on a number of schemes in Australian states, England and Wales. The New Zealand scheme is more closely aligned with schemes in Australian states where applicants (or family members on behalf of deceased applicants) can apply to have the convictions disregarded.

An expungement under the New Zealand scheme will take into account the discriminating effect of having a criminal conviction in this situation. This means their criminal record would be amended to ensure the conviction does not appear on a criminal history check for any purpose in New Zealand and they will be entitled to declare they have no such conviction.

How many people will this scheme affect?

It's estimated around 1000 people may be eligible to apply under the scheme. This is based on analysis of conviction data published by the (then) Department of Statistics on people convicted of indecency between males, the most common offence

prosecuted between 1965 and 1986. Not all of those people will choose to apply. Some of those convictions may have involved conduct that is still an offence.

Will people be able to apply on someone else's behalf?

Yes, if a person is deceased, family members will be able to apply on their behalf. The Bill will specify more detail.

Will there be compensation?

No, the Bill will explicitly rule out compensation. Compensation would go beyond the purpose of introducing an expungement scheme, which is to prevent further negative effects from the stigma 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. Where a person has been wrongfully convicted, there are existing avenues to seek compensation. In this instance, there is no suggestion that convictions in question were wrongfully imposed as they were in accordance with the law at the time.