NEW ZEALAND LAW SOCIETY

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

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Introduction

1. The New Zealand Law Society appreciates the opportunity to comment on the Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill (Bill).

2. The Law Society supports the objective of the Bill, to provide an expungement scheme to reduce prejudice, stigma, and all other negative effects, arising from a conviction for an historical homosexual offence. This submission makes recommendations concerning the scope of eligible convictions and drafting amendments to improve clarity and certainty for those to whom the expungement scheme applies.

Clause 5: definition of "historical homosexual offence"

3. The Bill is not limited to living persons who have been convicted of an historical homosexual offence, but would also enable posthumous expungement by a representative approved by the Secretary for Justice under clause 15.

4. Clause 5 of the Bill defines "historical homosexual offence". The starting point, as set out in clause 5(1)(a), is 4 August 1908, the date on which the Crimes Act 1908 came into operation. As drafted, any convictions for historical homosexual offences prior to that date will not be eligible for expungement.

5. No explanation is offered in any of the accompanying explanatory materials for the 1908 cut-off. If, in principle, the Bill is designed to expunge convictions for offending that was decriminalised by the Homosexual Law Reform Act 1986 (i.e. sexual conduct between consenting males aged 16 years and older), then it is unclear what principled basis exists for excluding convictions under earlier legislation from eligibility for expungement.

6. For example, section 137(3) of the Criminal Code Act 1893 provided that a male who indecently assaulted another male was liable to ten years' imprisonment with hard labour plus flogging or whipping, notwithstanding that the other male may have consented to the "act of indecency" (as it was then described in the statute). Further, section 58 of the Offences Against the Person Act 1867, one of a group of "unnatural offences", provided that a person convicted of (in the statutory language of the time) "the abominable crime of buggery" was liable to be kept in penal servitude for life or a minimum of ten years.[1] There is no principled reason offered for excluding these earlier offences from the expungement regime.

[1] Earlier similar legislation includes the Offences Against the Person Act 1861 (UK) 24 & 25 Vict c 100 and the Offences Against the Person Act 1828 (UK) 9 Geo 4 c 31. The English common law held that where England, or later Britain, acquired a new colony by settlement, the colonists brought elements of English law, statutory and common law that were applicable to the colony's circumstances: W Blackstone, *Commentaries* (15 ed), vol 1, 106. The English Laws Act 1858, s 1 provided that "The laws of England as existing on the 14th day of January 1840 shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that that day." See Spiller, Finn and Boast *A New Zealand Legal History* (Brooker's, Wellington, 1996) at 75-76; RI Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 9-10.

7. Although not advanced in the Bill's explanatory materials, the Law Society anticipates that one possible argument for the time limit might be that the further back in time one goes, the less likely it is that official records are available or complete. A lack of records will make it more difficult for the test for expungement to be met. But this potential difficulty does not justify a blanket exclusion of earlier offences from the expungement regime. Rather, the adequacy of records is likely to be case-specific. In other words, it is not self-evident that official records are presumptively adequate from 1908 onwards but conclusively inadequate before then. Accordingly, this possible rationale does not explain or justify the Bill's use of an arbitrary 1908 cut-off date.

Recommendation

8. A solution to this problem may be found in the approach taken in Victoria, Australia. In that jurisdiction, Part 8 of the Sentencing Act 1991 introduced a similar scheme for expungement of historical homosexual convictions. In section 105 of that Act, a broader definition of "historical homosexual offence" applies, which includes offences that were "in force at any time."[2] The Victorian legislation still requires that, at the time of the making of the application, the conduct in question would not constitute an offence under the law of Victoria (section 105G(1)(b)(ii)), which is equivalent to the test for expungement in the New Zealand Bill.

9. The Victorian legislature's approach to the definition of historical homosexual offence better upholds the principle that laws should apply equally to all, except where objective differences justify differentiation.[3] The Victorian approach avoids the possible arbitrary exclusion of convictions that otherwise would justify being expunged, apart from the fact they occurred earlier than the 1908 cut-off date in the New Zealand Bill's definition.

10. The Law Society recommends a similar open-ended definition to that used in Victoria should be adopted in the Bill, allowing the test for expungement in clause 8(2) to do the work. Under that test, the question for the Secretary is whether the conduct constituting the offence, if engaged in when the application was made, would not constitute an offence under the laws of New Zealand. Where there are inadequate records to assess whether the conduct constituting the offence would not constitute an offence under current law, the test for expungement will not be met.

Drafting improvements

11. The Law Society recommends amendments to the drafting of the Bill, as set out below.

Clause 5(3)(b): attempts

12. As drafted, the exception in the bracketed words "(unless the offence is itself specified as, or provides it may be completed on, an attempt)" is capable of being mis-read as excluding attempts from the definition of historical homosexual offence, where the

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2 In s 105, the definition of "historical homosexual offence" is defined as a "sexual offence" or a "public morality offence". Each of these sub-definitions is itself defined to include offences "in force at any time".

3 T Bingham *The Rule of Law* (Penguin, 2011), Chapter 5, pp 81-86.

offence specifically covers attempts. To avoid such confusion, the Law Society suggests the whole of paragraph (b) could simply be replaced by "as an attempt".

Clause 9(1): "for the purposes only of the laws of New Zealand"

13. The word "only" in clause 9(1) may unintentionally suggest extraterritorial application of the proposed law and should, therefore, be deleted. As currently drafted, this subclause suggests New Zealand expungement cannot be recognised as applicable in another country, even if that other country wants to recognise New Zealand expungement. The Law Society considers there is no reason the Bill needs to go this far. For example, another country may wish to enact a law that recognises New Zealand's expungement regime for the purposes of its own laws requiring disclosure of prior convictions.

14. The word “only” can be removed without otherwise affecting the meaning of the clause.

Clause 9(4)(a) and (b): "any criminal record of the expunged conviction"

15. The Law Society recommends the words "any criminal record of " should be deleted in both clauses 9(4)(a) and (b). It is the expunged conviction itself that is not to be taken into account, rather than the criminal record of it. The equivalent provision from Victoria, section 105J(c) of the Sentencing Act 1991, recognises this distinction.

Clause 13(1): "A person who has access to criminal records commits an offence …"

16. It is unclear who is "a person who has access to criminal records", for the purposes of clause 13(1). If, as appears to be intended, it is limited to the persons and agencies described in clause 12(1) ("a government department or law enforcement agency, or any employee or contractor of a government department or law enforcement agency, that holds, or has access to, criminal records"), then the Law Society recommends amending clause 13(1) to include a cross-reference to clause 12(1). Otherwise, clause 13(1) is potentially too broad in its reach. For example, it could be argued that the author of a book identifying a person with an expunged conviction, is a person who has access to the criminal records of that person, and would be at risk of offending against clause 13.

Clause 19(3): Independent reviewer

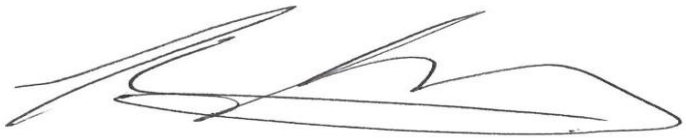
17. No right of appeal will exist against the Secretary's decision. Moreover, certain applications may involve reasonably fine assessments of whether the test for expungement is met. In addition, there may be complex historical research required. These factors suggest the Secretary should have access to as much assistance as necessary to ensure the Secretary's decisions are robust and defensible.

18. For this reason, the Law Society recommends the scope for the Secretary to appoint an independent reviewer should be expanded to allow appointment of an independent reviewer to assist with decisions under section 18, not just reconsiderations under section 19.

19. In addition, consideration should be given to amending clause 19(3) to specify that any independent reviewer be appropriately qualified (for example as a lawyer, historian or archivist).

Conclusion

20. The Law Society does not wish to be heard, but is happy to discuss this submission with officials if that would be helpful.



Kathryn Beck
President
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