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CRIMINAL RECORDS AMENDMENT (HISTORICAL HOMOSEXUAL OFFENCES) BILL 2014

Second Reading

The Hon. TREVOR KHAN [9.54 a.m.]: I move:

That this bill be now read a second time.

Until 1984, the Crimes Act 1900 contained a number of so-called unnatural offences prohibiting male homosexual activity. These offences applied to consensual and non-consensual conduct. Some people who engaged in homosexual activity were convicted of other offences such as indecent or offensive behaviour offences. The Crimes Amendment Act 1984 decriminalised homosexual activity for people over the age of 18 years. Further legislative reform occurred in 2003 when the Crimes Amendment (Sexual Offences) Act lowered the age of consent for male homosexual activity from 18 years to 16 years. These amendments to the criminal law demonstrated a well-founded desire by members of this Parliament to reflect the expectations of the wider community. No longer were homosexual acts between consenting adults seen as requiring the intervention of the criminal law. No longer did the community see homosexual men or, more broadly, members of the gay, lesbian, bisexual, transgender and intersex community as lesser members of the Australian community.

While consensual homosexual activity between people over the age of consent is no longer a criminal offence, people who were previously convicted of these offences still deal with the stigma of a criminal conviction for a sex offence. Such a conviction can and does constrain employment opportunities. It constrains volunteer options and overseas travel options. The existence of convictions for these historical offences perpetuates the discrimination suffered by these men, despite discriminatory laws having been repealed. Put another way, the burden of past convictions had and still has practical impacts upon those charged but it was the residual impact of the process of arrest, conviction and stigmatisation that accompanied the process that has left deep scars upon so many. It was the recognition of these impacts that has led a number of jurisdictions to allow convictions for historical homosexual offences to be extinguished.

The United Kingdom passed the Protection of Freedoms Act 2012 to allow people convicted of an historical offence involving consensual homosexual activity with another person aged at least 16 years to apply to the Home Secretary for the conviction or caution to be disregarded. Subsequently, the South Australian Parliament passed the Spent Convictions (Decriminalised Offences) Amendment Act 2013 to allow historical convictions for offences constituted by homosexual acts that are no longer criminal offences to be spent. Applications in that scheme, which commenced on 22 December 2013, are made to a magistrate. In recent weeks the Victorian Parliament, with bipartisan support, passed the Sentencing Amendment (Historical Homosexual Convictions Expungement) Bill 2014. In those circumstances it is appropriate that this Parliament also moves to address past wrongs.

The bill now before the House amends the Criminal Records Act 1991 to permit a person convicted of specified offences to apply for the convictions to be extinguished. The bill introduces an administrative scheme similar to the one adopted in the United Kingdom. The scheme, in a general sense, will be less costly for the applicant and the State than requiring an applicant to make their application to a court. Importantly, the scheme will be less stressful for applicants, especially given their previous court experience for the relevant offence. Another advantage of the administrative scheme is that it will allow the secretary to set up administrative processes with the NSW Police Force and the courts for obtaining historical records.

Applications will be made for convictions for offences such as procuring an indecent act with a male and for offences such as buggery. Applications will also be made for convictions for indecent or offensive behaviour offences for sexual activity with another person of the same sex. Applications will be made to the Secretary to the Department of Justice. A conviction will be extinguished if the secretary is satisfied that the other person consented to the sexual activity and was at least the current age of consent—that is, 16 years—unless there was a special care relationship where the offender was, for example, the step-parent, schoolteacher or health professional of the other person, in which case the age is 18 years. Where an application has been made the secretary will then obtain records about the conviction from public agencies such as the NSW Police Force and

the courts, and will make a decision based on the application and the records that are available.

If the secretary intends to reject the application on the basis of this information, he or she will give the applicant the opportunity to submit further information. In the event that the decision of the secretary has been unfavourable, an applicant will be able to seek administrative review of the decision by the NSW Civil and Administrative Tribunal. If an application is successful either at first instance or after application has been made to the NSW Civil and Administrative Tribunal, the conviction will be extinguished and the consequence will be similar to a quashed conviction or a pardon. The person will no longer be required to disclose the conviction and a public authority will not be able to disclose it.

The Criminal Records Act 1991 already provides for convictions for relativity minor offences to become spent, and so not disclose-able, if a person completes a crime-free behaviour period. However, the exceptions that apply to spent convictions in the Criminal Records Act will not apply. This will mean, for example, that extinguished convictions will not be disclose-able for applications for appointment as a judge, police officer or teacher, or for court proceedings. The new process allowing applications to be made for these convictions to be extinguished will be in addition to the existing spent conviction scheme.

Whilst it was generally men engaging in homosexual activity who were prosecuted for these offences, it is possible that women engaging in homosexual activity were also prosecuted for indecent or offensive behaviour offences. This bill will also allow women and transgender people to apply for convictions to be extinguished. The bill contains a note that it is an offence under the Crimes Act to knowingly provide false or misleading information in an application to a public authority. The bill also provides for the Secretary to the Department of Justice to determine that a conviction is no longer extinguished if the application contained false or misleading information.

For abundant caution, I wish to deal in some detail with the principal proposed sections. Proposed section 19A contains definitions for the purposes of the proposed part, including a definition of "eligible homosexual offence", being any of the following offences:

> (a) the former offences under sections 78K, 78L, 78Q, 81, 81A and 81B of the Crimes Act 1900,
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> (b) the former offences under sections 79 and 80 of the Crimes Act 1900 (before those offences were amended by the Crimes (Amendment) Act 1984), but not any offence relating to bestiality,
>
> (c) the former offences under section 12 of the Police Offences Act 1901 (now called the Police (Special Provisions) Act 1901) and under section 7 of the Summary Offences Act 1970, but only if the former offence was constituted by:
>
> > (i) a person engaging in sexual intercourse or another form of sexual activity with another person of the same sex, or
> >
> > (ii) a person procuring another person of the same sex to engage in sexual intercourse or another sexual activity with a person of the same sex,
>
> (d) an offence prescribed by the regulations for the purposes of this definition, and
>
> (e) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a), (b), (c) or (d).

Proposed section 19B will enable a person who has been convicted of an eligible homosexual offence to apply to the Secretary to the Department of Justice for the conviction to become extinguished. If the convicted person has died, an application may be made on behalf of the person by that person's legal personal representative or a spouse, de facto partner, parent or child of the convicted person, or a person who was in a close personal relationship with the convicted person immediately before the convicted person's death.

Proposed section 19C provides that a conviction for an eligible homosexual offence becomes an extinguished conviction when the Secretary to the Department of Justice decides that he or she is satisfied that the other person involved in the sexual activity constituting the offence consented to the sexual activity and was above the age of 16 years, or if the other person was under the special care of the convicted person within the meaning of section 73 (3) of the Crimes Act 1900—that is, 18 years of age. I will be moving an amendment in the Committee of the Whole to address an issue that has been raised by Ms Anna Brown of the Human Rights Law Centre. Briefly, the issue raised is that the failure to use the words "of or" before "above" in the proposed section may lead to a misinterpretation of the persons eligible under that subclause to extinguishment of an offence. I will speak further of this matter in Committee but our interactions with the Human Rights Law Centre have been entirely positive and constructive. I thank it for its input in regard to the draft bill.

I note proposed section 19C (2) provides that the secretary may, before making a decision, seek further information from the applicant, and may refuse to make a decision if the request for information is not complied

with. Proposed section 19C (3) provides that where the secretary intends to make an unfavourable decision to the applicant, the secretary must:

> (a) by notice in writing, inform the applicant of that intention,
>
> (b) provide the applicant with a copy of any historical records relating to the conviction in the possession of the Secretary, and
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> (c) give the applicant 14 days from the date of the notice to submit further information to the Secretary regarding the application.

I note that the Human Rights Law Centre raised concern that the time frame was unduly restrictive. I emphasise that nothing in the subclause prevents the secretary from giving applicants a longer time or advising people they could contact the department if they require an extension of time. The intent of this bill is to provide an avenue of redress to a class of people who have suffered an historical wrong. I am satisfied that the context in which this bill comes about, and the circumstances it seeks to redress, are sufficient to satisfy me that the secretary and those in the Department of Justice will approach this and other issues arising under the bill in an appropriately compassionate and flexible manner.

Proposed section 19D provides that the secretary may require certain persons or bodies such as the NSW Police Force, a court or the Director of Public Prosecutions to provide the secretary with information for the purposes of making a decision under proposed section 19C. The consequences of a conviction becoming an extinguished conviction are set out in proposed section 19F. This is a most important part of the bill. Proposed section 19F states:

> (1) If a conviction of a person is an extinguished conviction:
>
> (a) the person is not required to disclose to any other person for any purpose information concerning the extinguished conviction,
>
> (b) a question concerning the person's criminal history is taken not to refer to any convictions of the person which are extinguished convictions.

For abundant caution proposed section 19F (1) (c) provides that in interpreting the application to the provision of an Act or statutory instrument to a person whose convictions have been extinguished:

> (i) a reference in the provision to a conviction is taken not to be a reference to any convictions of the person which are extinguished convictions, and
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> (ii) a reference in the provision to the person's character or fitness is not to be interpreted as permitting or requiring account to be taken of extinguished convictions.

I emphasise that the intention of this proposed section is to protect applicants from disclosure in such situations. Proposed section 19F is based on section 12 of the NSW Criminal Records Act 1991 on spent convictions. However, section 16 of the Criminal Records Act provides that section 12 of the Act does not apply to proceedings before a court, including the giving of evidence. In this bill there is no equivalent provision to section 16 of the Criminal Records Act, precisely because it is the intention of this bill that there be no obligation under any circumstances, including when giving evidence in court, to disclose the existence of an extinguished conviction. I now turn to another effect of extinguishment.

Proposed section 19G provides that it is an offence for a person who has access to records of convictions, kept by or on behalf of a public authority, without lawful authority to disclose to any other person any information concerning an extinguished conviction. The offence carries a maximum penalty of 50 penalty units or imprisonment for up to six months, or both. It is important to recognise that, unlike the provisions of the Criminal Records Act relating to spent convictions, there is no exemption from this offence for the following: the Criminal Records Section of the NSW Police Force making information relating to an extinguished conviction available to law enforcement agencies or other prescribed office holders; law enforcement agencies or authorised officers of law enforcement agencies making information relating to an extinguished conviction available to another law enforcement agency or to a court in compliance with an order of the court; and persons making information relating to an extinguished conviction available in accordance with sections 33, 34 or 40A of the Child Protection (Working with Children) Act 2012. Those exemptions for spent convictions do not apply.

Nevertheless, proposed section 19G does provide for three limited exemptions from the prohibition of the disclosure of information concerning extinguished convictions. These limited exemptions are as follows: first, proposed section 19G (2) provides that it is not an offence for an archive or library to make available, in accordance with the normal procedures of the archive or library, material that is normally available for public use and that contains information relating to an extinguished conviction. In the course of consultations on the draft bill the Human Rights Law Centre raised concerns about this provision.

I note that the provision mirrors a similar provision relating to spent convictions in the Criminal Records Act. Additionally, I observe that, with the vast store of material held in archives or libraries, including newspapers and publications, it goes without saying that references will be made to court proceedings and convictions in the past. If archives and libraries were required to redact material relating to such court proceedings and convictions it would be an almost impossible task to achieve. It would also be an invitation to rewrite history and, as much as we can do with this bill, the existence of past wrongs should not in that sense be wiped from the record. We learn from our history; we learn from past experiences; and we learn from past wrongs.

Proposed section 19G (3) provides that it is not an offence for a public authority or other government agency that has a record of an extinguished conviction to make information about the conviction available to the person who was convicted. Finally, proposed section 19G (4) provides it is not an offence for the secretary to inform the NSW Police Force or any other public authority that holds information regarding convictions that a particular conviction has become an extinguished conviction. One might think this a necessary procedural exemption. Proposed section 19H makes it an offence for a person fraudulently or dishonestly to obtain or attempt to obtain information concerning an extinguished conviction from records of convictions kept by or on behalf of a public authority. The offence carries a maximum penalty of 50 penalty units or imprisonment for six months, or both.

Finally, I turn to proposed section 19I. This section provides that if the secretary is satisfied that a conviction became an extinguished conviction by reason of an application that included false or misleading information, or documents that are false or misleading, the secretary may determine that the conviction is no longer an extinguished conviction. The conviction ceases to be an extinguished conviction on and from the date of that determination. Proposed section 19I (4) provides that a person whose conviction is the subject of a determination by the secretary under the proposed section may apply to the Civil and Administrative Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of the determination. It is appropriate that I make reference to some comments made when this bill was considered in the other place. The Attorney General, the Hon. Brad Hazzard said:

> As Attorney General of New South Wales I had no hesitation in saying to the member for Coogee that I would be happy to support his proposal when he came to me in April shortly after I was appointed. I authorised the full resources of the Department of Attorney General and Justice to support the work that had been initiated in a number of meetings prior to my appointment as Attorney General. I place on the record the fact that the member for Coogee, Bruce Notley-Smith, already had sought the assistance of the former Liberal Attorney General, Greg Smith, who also facilitated access to the department for the necessary preliminary work, for which I thank him.

Not only did the Hon. Greg Smith facilitate access to the department for the necessary preliminary work; it was plain to see that work had already been undertaken within the Attorney General's department to consider this matter. It was not a fresh issue when approaches were first made. I thank the Attorney General, the Hon. Brad Hazzard, on behalf of all those who have worked to see this legislation come to fruition. I also note the words of the Hon. Paul Lynch who said:

> The Opposition supports the bill. The object of the bill is to amend the Criminal Records Act to enable certain convictions for a number of decriminalised homosexual sexual conduct offences to become extinguished. The logic is elegant and very powerful. Through this Parliament, the community decided that certain behaviour is not something that should have criminal sanctions attaching—and the general community view seems overwhelmingly to support that.

He concluded his speech by saying:

> As I have indicated, the Opposition supports the bill. It seems to be entirely correct as a matter of principle. I do not always say this about bills introduced into this House, but this bill shows signs of fairly careful consideration of the most practical and effective scheme to implement those principles. A fair amount of thought has gone into this quite elegant scheme. I am delighted to support the bill.

I also acknowledge the hard work and persistence of those who have fought for so long on this issue. It is perhaps wrong to single out individuals but, at the risk of offending those I forget, I particularly acknowledge: Lex Watson, deceased, and Craig Johnston from the Gay Rights Lobby; Robert French and Barry Charles; John Greenway and Terry Goulden, as well as Robert Johnston and Antony Green. I acknowledge John Cozijn, Max Pearce and Ken Davis from the Gay Solidarity Group. I acknowledge Phillip Chowan and John Marsden, deceased, from the NSW Council for Civil Liberties. I acknowledge Justin Koonin from the New South Wales Gay and Lesbian Rights Lobby. I acknowledge Nick Parkhill from ACON. I acknowledge Dan Stubbs from the Inner City Legal Centre. I acknowledge Anna Brown from the Human Rights Law Centre.

Amongst past members of Parliament I acknowledge the Hon. Neville Wran, deceased; the Hon. Barry Unsworth; the Hon. Frank Walker, deceased; and George Petersen, deceased; the Hon. Nick Greiner; the Hon.

Rosemary Foot and the Hon. Terry Metherell. I wish also to acknowledge the assistance and encouragement given by the former Premier Barry O'Farrell and the current Premier Mike Baird. Both, once again, have demonstrated their care and compassion. Finally, I congratulate the member for Coogee, Bruce Notley-Smith, for his tireless efforts to ensure this bill came before the Parliament. He has much to be proud of. There are, of course, many other individuals who have struggled and fought on this and related issues. Many of them, like some of those I have mentioned, have not lived to see this day. I grieve that they did not have that opportunity. To them I simply say, using the words of Tim Conigrave: Ci vedremo lassù, angelo. I commend the bill to the House.