



New South Wales

Criminal Records Amendment (Historical Homosexual Offences) Bill 2014

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Criminal Records Act 1991* (the *principal Act*) to enable certain convictions for a number of decriminalised homosexual sexual conduct offences to become extinguished.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Criminal Records Act 1991 No 8

Schedule 1 [1] provides for an additional object of the principal Act, being to provide for a scheme to enable certain convictions for a number of decriminalised homosexual sexual conduct offences to become extinguished.

Schedule 1 [2] makes a consequential amendment.

Schedule 1 [3] provides that notes included in the principal Act do not form part of that Act.

Schedule 1 [4] inserts proposed Part 4A (Extinguishing convictions for historical homosexual offences) into the principal Act to give effect to the object of this Bill.

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*,
- (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,
- (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 enables a person who has been convicted of an eligible homosexual offence to apply to the Secretary of the Department of Justice (the *Secretary*) for the conviction to become extinguished. If the convicted person has died, an application under the proposed section may be made on behalf of the person by the convicted 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 decides that he or she is satisfied that the other person involved in the sexual activity constituting the offence:

- (a) consented to the sexual activity, and
- (b) was above:
 - (i) the age of 16 years, or
 - (ii) 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*)—the age of 18 years.

Section 73 (3) of the *Crimes Act 1900* provides that a person (*the victim*) is under the special care of another person (*the offender*) if, and only if:

- (a) the offender is the step-parent, guardian or foster parent of the victim or the de facto partner of a parent, guardian or foster parent of the victim, or
- (b) the offender is a school teacher and the victim is a pupil of the offender, or
- (c) the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim, or
- (d) the offender is a custodial officer of an institution of which the victim is an inmate, or
- (e) the offender is a health professional and the victim is a patient of the health professional.

The proposed section includes other provisions dealing with these applications including providing that the Secretary is not to hold an oral hearing for the purpose of making a decision under the proposed section and that the Secretary may delegate the exercise of his or her functions under the proposed section.

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.

Proposed section 19E provides that a person who has made an application under the proposed Part may apply to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of a decision made by the Secretary under proposed section 19C.

Proposed section 19F sets out the consequences of a conviction becoming an extinguished conviction (being consequences similar to a conviction becoming a spent conviction). 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, and
- (b) a question concerning the person's criminal history is taken not to refer to any convictions of the person which are extinguished convictions, and
- (c) in the application to the person of a provision of an Act or statutory instrument:
 - (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
 - (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.

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 to, without lawful authority, disclose to any other person any information concerning an extinguished conviction. The offence carries a maximum penalty of 50 penalty units or imprisonment for 6 months, or both. Unlike the corresponding offence relating to spent convictions, there is no exemption from this offence for the following:

- (a) 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,
- (b) 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,
- (c) persons making information relating to an extinguished conviction available in accordance with section 33, 34 or 40A of the *Child Protection (Working with Children) Act 2012*.

Proposed section 19H makes it an offence for a person to, fraudulently or dishonestly, 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 6 months, or both.

Proposed section 19I 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.

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.

Schedule 1 [5] and [6] make consequential amendments.