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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**SPENT CONVICTIONS (HISTORICAL HOMOSEXUAL CONVICTIONS
EXTINGUISHMENT) AMENDMENT BILL 2015**

EXPLANATORY STATEMENT

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SPENT CONVICTIONS (HISTORICAL HOMOSEXUAL CONVICTIONS EXTINGUISHMENT) AMENDMENT BILL 2015

Outline

Purpose of the Bill

Until November 1976 consensual homosexual sex was illegal in the ACT. In November 1976 the Australian Government made the *Law Reform (Sexual Behaviour) Ordinance 1976* (Ordinance 55), which decriminalised consensual acts of buggery committed in private.

Prior to 1976, it was an offence under the *Crimes Act 1900* for a person to commit homosexual acts. Section 79 of the Act stated whosoever commits the abominable crime of buggery...shall be liable to penal servitude for life or any term not less than five years.

As well as a conviction of buggery on a male person, a person may have also been charged with attempted buggery (section 80) or indecent assault on a male person (section 81). Consent was not an element of these offences.

A criminal conviction for a consensual homosexual offence can limit a person's prospects for employment or voluntary work as currently a sexual conviction cannot become spent under the *Spent Convictions Act 2000*. Such a conviction needs to be disclosed when applying for a working with vulnerable people background check.

The scheme created by the *Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Bill 2015* will allow people to apply to have convictions erased permanently from their records. This will mean that a person's employment, appointment, licensing or travel opportunities are not affected by having a sexual offence conviction on their criminal record.

The Bill recognises that consensual homosexual sex is no longer considered a criminal offence in the Territory.

Human Rights Considerations

The proposed amendments engage rights in the *Human Rights Act 2004* (HRA). In particular, the following rights are engaged:

- a) recognition and equality before the law (section 8); and
- b) privacy and reputation (section 12).

Recognition and equality before the law

This Bill engages rights protected under the HRA particularly section 8 - the right to recognition and equality before the law.

Section 8 of the HRA provides that:

- 1) Everyone has the right to recognition as a person before the law.
- 2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.

- 3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

The non-discrimination provisions in the HRA are founded on articles 2 (1) and 26 of the International Covenant on Civil and Political Rights ('the ICCPR'). Article 3 of the ICCPR is also relevant in that it places an obligation on States Parties to 'ensure the equal rights of men and women to the enjoyment of all civil and political rights'. The Human Rights Committee (the 'HR Committee') established that 'discrimination' as the term appears in the ICCPR is understood as meaning 'any distinction, exclusion, restriction or preference which is based on any ground ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms'.

In *Toonen v Australia*,¹ the HR Committee stated that 'in its view, the reference to "sex" in Article 26 and Article 2 should be taken as including sexual orientation'. Therefore, the ICCPR and the right to equality at section 8 of the HRA operate to prohibit discrimination on the basis of sexual orientation. By extension the right to equality prohibits different treatment by the law, in the enjoyment of individual rights under the law, based solely on a person's sexual orientation. This principle was recently reaffirmed by the HR Committee in *Fedotova v Russia*.

The *Discrimination Act 1991* explicitly provides that it is unlawful to discriminate against a person on the grounds of sexuality or gender identity (section 7 (1) (b) and (c)).

The scheme provided by the Bill will ensure men who were convicted of gay sex offences in the ACT are no longer discriminated against on the basis of their convictions because those convictions remain on their criminal record. The Victorian Human Rights Centre in their background paper 'Righting historical wrongs' highlighted that;

A criminal conviction can cause significant and lifelong damage to a person's reputation, mental health and familial relations, their prospects for employment or volunteering and their self-worth. The potential negative impact of a criminal conviction is amplified when it is labelled a 'sex offence', a term that usually evokes images of non-consensual sexual exploitation.²

The ACT Government considers that the scheme to extinguish convictions for consensual homosexual offences supports the right to equality and the right to protection from discrimination under section 8 of the HRA.

¹ *Toonen v Australia*, Communication 4888/1992, UN Doc CCPR/C/50/D/488/1992 (1994),

² Human Rights Law Centre (2014) 'Right historical wrongs; Background paper for a legislative scheme to expunge convictions for historical consensual gay sex offences in Victoria. Accessed from http://www.hrlc.org.au/wp-content/uploads/2014/01/Gay_Sex_Convictions_Paper_January2014.pdf

Privacy and reputation

The Bill engages the right to privacy under section 12 of the HRA, section 12 provides:

Everyone has the right-

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have his or her reputation unlawfully attacked.

The right to privacy and reputation is limited and supported by the Bill.

The right is supported through the creation of a scheme to allow people with historical criminal conviction for a consensual homosexual offence to seek to have those convictions extinguished and thereby remove the requirement to disclose those convictions.

The scheme for the extinguishment of criminal conviction for a consensual homosexual offence requires applicants to disclose personal information and information about the circumstances of the conviction and therefore limits the right to privacy and reputation.

The nature of the right affected (section 28 (2) (a))

The amendment under section 19F allows the Director-General to access information to inform a decision under the scheme engaging section 12 of the HR Act. The amendment allows not only the Director-General to access the records of the convicted person but also the other person who was involved in the sexual activity.

The right to privacy is a fundamental right that encompasses the idea that individuals should have a separate area of autonomous development, dignity and freedom from arbitrary, unreasonable or oppressive government interference.

The right to privacy and reputation is ‘one of the broadest and most flexible of human rights’³ and has been described as protecting a wide range of personal interests that include physical or bodily integrity, personal identity and lifestyle (including sexuality and sexual orientation), reputation, family life, the home and home environment and correspondence (which encompasses all forms of communication).⁴

Section 12 of the HR Act gives effect to article 17 of the ICCPR and protects individuals from unlawful and arbitrary interference with privacy relating to their family, home or correspondence. An interference that is lawful may still be arbitrary if it is unreasonable or unjustified in all the circumstances of the case.

³ Gans et al. *Criminal Process and Human Rights*, 2011, para 8.1, p 301.

⁴ Lester QC., Pannick QC (General editors), 2005, *Human Rights Law and Practice*, Second edition, LexisNexis UK, p 261.

The UNHRC's General Comment 16 notes:

*'as all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society...'*⁵

Accordingly, the right to privacy requires that the state does not itself arbitrarily or capriciously invade a person's privacy in a manner not based on demonstrable evidence, and adopts legislative and other measures to protect people from arbitrary interference with their privacy from others.

The concept of arbitrariness requires that any interference with privacy, even when provided for by law, should be reasonable in the particular circumstances. Whether an interference with privacy is permissible will depend on whether a person has a reasonable expectation of privacy in the circumstances, and reasonableness implies that any interference with privacy must be proportionate to the end sought and must be necessary in the circumstances of any given case.⁶

Therefore, it is reasonable to suggest that a person's right to privacy can be interfered with, provided the interference is both lawful and reasonable in the circumstances.

The importance of the purpose of the limitation (section 28 (2) (b))

Please refer to the purpose section for a discussion on the broad purposes of this Bill. As discussed above, the limitations on the section 12 rights are important to identify and locate evidence to support an application under the scheme. Without this information the Director-General may not have enough evidence to be satisfied on reasonable grounds that the conviction should be extinguished.

Nature and extent of the limitation (section 28 (2) (c))

The provision has been drafted narrowly to ensure that it is reasonable, proportionate and necessary to achieve the policy objective of the Bill. The agencies that the Director-General can obtain the information from are limited to agencies that are likely to have records of the conviction. Furthermore the information requested must relate to the conviction.

The Director-General (or their delegate) is the only person who can collect the information and the use and disclosure of the information will be limited to the people involved in the decision-making process under the scheme.

Relationship between the limitation and its purpose (section 28 (2) (d))

The purpose of the provision is to provide the Director-General with a power to obtain information to satisfy the eligibility requirements to extinguish a conviction. The power limits the right to privacy of the other person involved in the sexual activity if their records are also accessed. The provision will allow the Director-General to identify and locate evidence to support an application for the extinguishment of a conviction.

Due to the passing of time evidence to satisfy the eligibility requirements has been lost or destroyed therefore a more thorough search is required to inform the Director-General's decision. For example it is important that the Director-General can access information of the other person involved in the

⁵ UN Human Rights Committee, General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art 17), UN Doc CCPR General Comment 16 (1988), para.7

⁶ *Toonen v Australia*, Communication 4888/1992, UN Doc CCPR/C/50/D/488/1992 (1994), para 8.3.

activity as that information could corroborate and inform the application. An example might be a report on the other person's police record that discloses consent.

If a person has died and an application has been made on their behalf by a person listed at new section 19B(3), the applicant may be unable to access the information without sufficient authorisation, making it important that the Director-General can access information on their behalf.

Certain provisions in the Bill also support the right to privacy and reputation. For example, sections 19I and 19J make it an offence if information about an extinguished conviction is unlawfully disclosed or obtained.

As highlighted above the provision has been drafted narrowly to ensure that it is reasonable, proportionate and necessary to achieve the policy objective of the Bill.

Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))

The ACT Government has concluded that in light of the rights of people who have been convicted of a consensual homosexual offence, and the current employment and volunteer impediments they face due to the conviction, the amendments do not unreasonably or unnecessarily infringe on the human rights of other people's personal details that may be disclosed under the provision.

Due to the circumstances, mainly the passage of time that has passed since the convictions were made, there is no less restrictive means reasonably available to achieve the purpose of the provision.

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DETAIL

Part 1 – Preliminary

Clause 1 – Name of Act

This is a technical clause that names the short title of the Act. The name of the Act would be the *Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Act 2015*.

Clause 2 – Commencement

This clause provides that the Act commences the day after it is notified.

Clause 3 – Legislation amended

This clause identifies the legislation amended by the Act.

Clause 4 – Long title

This clause amends the long title of the Act to make it clear that the Act may deal with extinguished convictions.

Clause 5 – Overview of Act, section 3 (3)

This clause amends the overview of the Act to include the extinguishment of convictions for historical homosexual offences.

Clause 6 – New section 5A

This clause applies the *Criminal Code 2002* to new offences in the Act.

Clause 7 – New section 7A

This clause defines an extinguished conviction. In particular this clause provides that if a conviction is extinguished the related charge is also extinguished.

Clause 8 – New parts 3A to 3C

Part 3A Extinguishing historical homosexual offence convictions

Section 19A Definitions – pt 3A

This section defines a historic homosexual offence. The offences eligible for extinguishing include former sections 79, 80 and 81 of the *Crimes Act 1900* as they relate to the offence of buggery.

The Bill also provides a regulation-making power to allow an eligible offence to be prescribed. The offence must either capture a:

- form of sexual activity with another person of the same sex; or
- public morality offence.

A public morality offence is defined in the Act as an offence, the essence of which is the maintenance of public decency or morality, by which homosexual behaviour could be punished.

The impetus for the regulation-making power arose from consultation with the ACT Lesbian, Gay, Bisexual, Transgender, Intersex and Queer Ministerial Advisory Council during the development of the Bill. The Council highlighted that, from time to time, men were charged with a public morality offence for queer behaviour such as cross-dressing in the Territory. Due to the passage of time and amendments to the law, it is not possible to readily identify the specific offences used. The regulation-making power will allow an offence that is a public morality offence to be prescribed and extinguished in appropriate circumstances if a person comes forward with such a conviction.

Similar schemes in NSW and Victoria also provide a regulation-making power to prescribe an offence as a historical homosexual offence eligible for extinguishment.

Section 19B Application to have conviction extinguished

This clause provides that a person convicted of a historical homosexual offence may apply to the Director-General to have their conviction extinguished.

An application must be made in writing unless the Director-General is satisfied that the application should be made in another form. An example of where it may not be appropriate for someone to make an application in writing is if they have a disability that prevents them from making a written application but are capable of applying in another way such as orally.

Section 19B(2)(b) outlines the details that must be included in an application. An application may also include any further information that may assist the Director-General to decide the application.

Importantly, if a person has died an application can be made on their behalf by someone else. In particular the following people have been included in the category of people who can make an application of behalf of the deceased person:

- a person who was in a close personal relationship with the person before their death; or
- if another person was involved in the activity that constituted the offence – the other person.

These people have been included as they may be the only person aware of the conviction so it is important that they have sufficient standing to make the application. The Director-General will have a discretion to accept the application on the basis that there was a close personal relationship.

Section 19C Requestion for additional information

This section provides that before making a decision, the Director-General may, by notice in writing, request the applicant to provide further information specified in the notice. If the applicant does not comply with this request, the Director-General may refuse to consider the application further.

However, the applicant is taken to have complied with the request if the applicant satisfies the Director-General that the applicant is unable to comply with the request.

Section 19D Decision on application to have conviction extinguished

This clause provides that if an application is made to have a conviction extinguished the Director-General must:

- extinguish the conviction if eligible under s19E; or
- refuse to extinguish a conviction.

In the interests of natural justice, under section 19D the Director-General must not refuse to extinguish a conviction before giving the applicant written notice of the proposed refusal and the reasons for the refusal. This gives the applicant the opportunity to provide further information within 14 days.

The Director-General must then consider the further information provided. If the Director-General decides to refuse the application they must inform the applicant by written notice and state the reasons for the refusal. They must also give the applicant notice that the applicant can apply to have the decision to refuse an application reviewed.

19E Eligibility

The purpose of the Bill is to extinguish convictions for a historical homosexual offence where the offence would not be considered a crime today. Therefore the eligibility criteria for extinguishing a conviction draws on the elements of the criminal law that point to a consensual sexual activity in relation to consent and age at the time of the offence.

Firstly the Director-General must be satisfied that the other person involved in the sexual activity consented. To be satisfied of this the Director-General will not only look at the evidence gathered to inform the decision but be guided by section 67 of the Crimes Act which deals with when consent is negated.

The second requirement relates to the age of the other person involved in the sexual activity and mirrors age requirements contained in the Crimes Act. There are three age criteria that apply to eligibility:

- the other person involved in the sexual activity must have been 16 years old or older (as 16 years is the age of consent); or
- if the other person involved in the sexual activity was under the special care of the applicant they must have been—

- 18 years or older; or
- not more than two years younger than the applicant (see section 55A of the Crimes Act); or
- if the convicted person and the other person involved in the sexual activity were both younger than 16 years old, the other person involved in the sexual activity must have been over the age of ten and must have been no more than two years younger than the applicant (see section 55 of the Crimes Act).

Certain exceptions to sexual offences contained in the Crimes Act have not been included as criteria for eligibility. For example section 55(3)(a) provides that it is a defence to the offence of sexual intercourse with a young person if the defendant establishes that they believed on reasonable grounds that the person on whom the offence is alleged to have been committed was 16 years old or older. To include this defence as criteria would require a level of investigation that the scheme cannot provide due to the passage of time and the loss and destruction of evidence. The purpose of the scheme is to assess the facts to extinguish a previous conviction and not to retry the facts of the conviction.

If the offence to be extinguished is not an offence that involved sexual activity, if required the eligibility criteria will be prescribed by regulation as provided for under section 19D(2)(b).

This is because the eligibility criteria for a sexual offence will not be suitable for a public morality offence. For example consent will not be an issue. Eligibility criteria is still required for a public morality offence as it is likely that people were convicted of a general offence such as public nuisance and it is not appropriate to allow all public nuisance offences to be extinguished.

19F Director-General may obtain information

The Director-General may, by notice in writing, require any of the following people or bodies to provide the Director-General with the information requested in the notice for the purposes of making a decision under the scheme:

- a) a public employee;
- b) a police officer;
- c) a court;
- d) the Director of Public Prosecutions; or
- e) any other person or body prescribed by the regulations.

An example of a document that the Director-General may request is the criminal record of the applicant or, if there was another person involved in the activity that constituted the offence, the other person's criminal record. It is important that the Director-General can access information about the

other person involved in the activity as the information could corroborate and inform the application. An example of relevant information might be a report on the other person's police record that discloses consent.

Section 19F has the effect of applying the 'required or authorised by or under law' exceptions in the territory privacy principles 3.4(a) and 6.2(b). In practice this means that where the required or authorised by law exceptions are applied, personal information can be collected, used or disclosed in a manner that may otherwise be inconsistent with obligations under the Territory Privacy Principles.

Please see a detailed discussion on the interaction of this provision with human rights and the territories privacy principles at pages 3 to 5 of this explanatory statement.

19G Restriction on right to re-apply

If the Director –General refuses a person's application under the scheme an applicant can only re-apply to have their conviction extinguished if new information to support the application becomes available.

Part 3B Consequence of extinguished convictions

19H Consequence of convictions becoming extinguished

As far as ACT law can provide, following the extinguishment of a historical homosexual offence, a convicted person is under no obligation to disclose the conviction to anyone under any circumstances. This approach differs from a spent conviction where a person still needs to declare their conviction when applying for working with vulnerable people checks. This will mean that a person's employment, appointment, licensing or travel opportunities are not affected by having a sexual offence conviction on their criminal record.

As highlighted above, the Bill confirms that if a person's conviction is extinguished a question about their criminal history or character is not taken to refer to the extinguished conviction.

19I Unlawful disclosure of extinguished conviction

This section provides that it is an offence if a person who has access to records of convictions kept by or on behalf of a public authority discloses to any other person any information concerning an extinguished conviction.

The section provides exceptions to the offence. For example a public authority that has a record of an extinguished conviction and makes it available to the convicted person will not commit an offence.

The maximum penalty is 50 penalty units or imprisonment for 6 months, or both.

19J Improperly obtaining information about extinguished convictions

This section provides that it is an offence if a person fraudulently or dishonestly obtains information concerning an extinguished conviction from records of convictions kept by or on behalf of a public authority.

The maximum penalty is 50 penalty units, imprisonment for 6 months or both.

Part 3C Notification and review of decisions

19K Meaning of a reviewable decision – pt 3C

This section provides that a decision under section 19D(1) to refuse to extinguish a conviction is a reviewable decision.

19L Reviewable decision notices

This section provides that when the Director-General refuses to extinguish a historical homosexual conviction they must also give the applicant notice that they can apply to have the decision to refuse the application reviewed.

19M Applications for review

This section provides that the applicant or another person whose interests are affected by a decision can seek to have the decision reviewed.

Clause 9 – Act does not affect certain other lawful acts, section 21

This is a technical amendment.

Clause 10 – Act does not authorise destruction of records, section 22

This is a technical amendment to provide that records of an extinguished conviction will not be destroyed. Records are maintained for historical research purposes. In light of the disclosure offences and the difficulty of de-identifying a criminal record it is proposed that records will not be de-identified.

Clause 11 – New sections 22A

This clause provides that the Director-General may approve forms under the scheme.

Clause 12 – New schedule 1

This schedule outlines reviewable decisions contained in the Bill. See part 3C for more detail.

Clause 13 – Dictionary, note 3

This is a technical amendment.

Clause 14 – Dictionary, new definitions

This is a technical amendment.

Schedule 1 – Consequential amendments

This schedule outlines consequential amendments to other ACT statutes following the amendment of the Spent Convictions Act by the Bill.