

NORTHERN TERRITORY OF AUSTRALIA

EXPUNGEMENT OF HISTORICAL HOMOSEXUAL OFFENCE RECORDS ACT 2018

As in force at 14 November 2018

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NORTHERN TERRITORY OF AUSTRALIA

As in force at 14 November 2018

EXPUNGEMENT OF HISTORICAL HOMOSEXUAL OFFENCE RECORDS ACT 2018

An Act to establish a scheme to expunge historical homosexual offences from criminal records, and for related purposes

Part 1 Preliminary matters

1 Short title

This Act may be cited as the *Expungement of Historical Homosexual Offence Records Act 2018*.

2 Commencement

This Act commences on the day fixed by the Administrator by *Gazette* notice.

3 Object of Act

The object of this Act is to establish a scheme that:

- (a) provides an application process to expunge charges and convictions for offences involving homosexual activity; and
- (b) treats, as far as practicable in law, a person whose charge or conviction is expunged as if it had not occurred.

4 Definitions

In this Act:

applicant means a person who makes an application or, in respect of a revocation, the person who made the application.

application means an application to expunge a charge or conviction under this Act.

charge means a charge of an expungable offence, including the following:

- (a) a charge on an arrest;
- (b) a complaint under an Act;
- (c) a charge by a court;
- (d) an indictment.

conviction means, in respect of an expungable offence, a finding of guilt, or the acceptance of a plea of guilty, by a court, judge, magistrate or person who exercised the jurisdiction of a court, whether or not a conviction is recorded.

court means any of the following:

- (a) a Local Court;
- (b) the Supreme Court;
- (c) the Youth Justice Court.

determination means a decision by the Chief Executive Officer whether to expunge a charge or conviction under this Act.

expungable offence, see section 7.

personal information, see section 4A of the *Information Act*.

record means recorded information in any form (including data in a computer system) that is required to be kept by the following organisations as evidence of the activities or operations of the organisation, or its predecessor, and includes part of a record and a copy of a record:

- (a) the Police Force;
- (b) the Director of Public Prosecutions;
- (c) a court;
- (d) the archives service established to perform the archives functions for the Territory under the *Information Act*.

revocation means a revocation of a determination to expunge a charge or conviction under this Act.

5 Act binds Crown

- (1) This Act binds the Crown in right of the Territory and, to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities.
- (2) This Act does not affect the Royal Prerogative of Mercy.

6 Application of Criminal Code

Part IIAA of the Criminal Code applies to an offence against this Act.

Note for section 6

Part IIAA of the Criminal Code states the general principles of criminal responsibility, establishes general defences, and deals with burden of proof. It also defines, or elaborates on, certain concepts commonly used in the creation of offences.

Part 2 Expungement process**7 Expungable offences**

The offences that may be expunged under this Act are the following:

- (a) an offence against section 71 or 72 of the *Criminal Law Consolidation Act, 1876* (SA) before its repeal by the *Criminal Code Act* on 1 January 1984;
- (b) an offence against section 127 or 128 of the Criminal Code before its repeal by the *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* on 17 March 2004;
- (c) an offence, prescribed by regulation, that involves consensual sexual activity between persons of the same sex;
- (d) an offence against public decency or morality by which homosexual behaviour could be punished;
- (e) an offence of attempting, or of conspiracy or incitement, to commit an offence mentioned in paragraphs (a) to (d).

8 Criteria to expunge charge or conviction

A person's charge or conviction may only be expunged if:

- (a) the offence is an expungable offence; and

- (b) the person would not have been charged with the offence but for the fact that the conduct engaged in by the person or constituting the offence was suspected of being, or connected to, homosexual activity; and
- (c) the conduct engaged in by the person or constituting the offence would not, at the time an application is considered, constitute an offence under the law of the Territory.

9 Application to expunge records

- (1) A person who was convicted of, or charged with, an expungable offence may apply to the Chief Executive Officer for the records of the person's charge or conviction to be expunged.
- (2) An application may be made on behalf of a deceased person by:
 - (a) the executor or administrator of the person's estate; or
 - (b) the person's surviving spouse or de facto partner; or
 - (c) the person's parent, child or sibling; or
 - (d) a person who was in a close personal relationship with the person before the person died; or
 - (e) a person who was involved in the conduct that was the subject of the charge or conviction.
- (3) An application may be made on behalf of a person with impaired decision-making capacity by:
 - (a) a guardian appointed for the person under a guardianship order; or
 - (b) if the Public Guardian is a guardian for the person under the *Guardianship of Adults Act* – the Public Guardian; or
 - (c) an attorney appointed under an enduring power of attorney (under Part III of the *Powers of Attorney Act*); or
 - (d) a decision-maker appointed under the *Advance Personal Planning Act*; or
 - (e) the person's spouse or de facto partner; or
 - (f) the person's parent, child or sibling; or
 - (g) a person who is in a close personal relationship with the person; or

- (h) a person who was involved in the conduct that was the subject of the charge or conviction.
- (4) The application must be in the approved form and contain the following information:
 - (a) the full name, date of birth and contact details of the person, including any difference in that information from the time of the charge or conviction;
 - (b) if the application is being made on behalf of another person – the name and contact details of the applicant;
 - (c) any particulars of the charge or conviction known to the applicant, including:
 - (i) a description of the offence; and
 - (ii) the date of the charge or conviction; and
 - (iii) the place and court (if any) of the charge or conviction;
 - (d) a copy of any transcript or sentencing remarks related to the charge or conviction in the possession of the applicant;
 - (e) a consent from the applicant authorising:
 - (i) the Chief Executive Officer to inquire into the charge or conviction; and
 - (ii) the disclosure to the Chief Executive Officer of any information or document relating to the application;
 - (f) any other information the applicant considers may help the Chief Executive Officer determine whether to expunge the charge or conviction.
- (5) For avoidance of doubt, an application may relate to more than one charge or conviction.

10 Insufficient information

- (1) If an application does not contain the information required under section 9(4), the Chief Executive Officer may, by written notice, require the applicant to give the Chief Executive Officer that information within 28 days, or such longer period as is specified in the notice.

- (2) An applicant may give the Chief Executive Officer documents or information required under section 9(4) at any time before the application is determined by the Chief Executive Officer.
- (3) An application that does not include all the information required under section 9(4) may still be considered by the Chief Executive Officer.
- (4) An applicant is taken to have complied with a requirement under subsection (1) to provide information if the applicant satisfies the Chief Executive Officer that the applicant is unable to comply with the requirement.

11 Additional information

- (1) The Chief Executive Officer may, by written notice, request the applicant to give further information or documents that the Chief Executive Officer considers are reasonably required to determine the application.
- (2) The Chief Executive Officer may give the applicant any information or document about the charge or conviction in the Chief Executive Officer's possession or control.

12 Security of information

- (1) The Chief Executive Officer must ensure that information given to an applicant under this Act does not include personal information concerning any person, other than the person who is the subject of the application.
- (2) The Chief Executive Officer may, by written notice, require the applicant to verify, by statutory declaration, any information or document given by the applicant.
- (3) To the extent that a person or body, in good faith, gives information or documents to the Chief Executive Officer in response to a request under section 10, 11 or 14, the person or body, in giving the information or documents:
 - (a) does not incur any civil, professional or criminal liability; and
 - (b) cannot be held to have:
 - (i) breached any code of professional etiquette or ethics; or
 - (ii) departed from any accepted standard of professional conduct; or
 - (iii) contravened any Act.

13 Withdrawal of application

- (1) An applicant may withdraw the application before the Chief Executive Officer makes a determination on it.
- (2) The Chief Executive Officer may treat an application as having been withdrawn if the applicant does not comply with a requirement to give information under section 10(1) or 11(1).
- (3) The withdrawal of an application does not, in itself, prevent a further application being made in relation to the same person, charge or conviction.

14 Making inquiries

- (1) The Chief Executive Officer must take reasonable steps to inquire into the charge or conviction relevant to an application.
- (2) The Chief Executive Officer may, by written notice, request the following persons to give the Chief Executive Officer any information or document in the person's possession or control that is relevant to an application:
 - (a) the holder of any information or document relating to charges or convictions;
 - (b) the Director of Public Prosecutions;
 - (c) the registrar of a court;
 - (d) the Commissioner of Police;
 - (e) a public sector employee;
 - (f) any person or body prescribed by regulation.
- (3) The Chief Executive Officer may, in the notice:
 - (a) request a particular item of information or document or a class of information or documents; and
 - (b) specify the manner and form of the requested information or documents; and
 - (c) specify the time for giving them.
- (4) A person given a notice under subsection (1) must take all reasonable steps to comply with the notice.

15 Consideration of application

- (1) The Chief Executive Officer must consider an application as soon as practicable after it is received to determine whether to expunge the charge or conviction.
- (2) No oral hearing is to be held in connection with the determination of an application.
- (3) When considering whether an application meets the criteria mentioned in section 8, the Chief Executive Officer must have regard to the following:
 - (a) whether any person involved in the conduct that was the subject of the charge or conviction did or did not consent to the conduct;
 - (b) the ages and respective ages of any persons involved in the conduct that was the subject of the charge or conviction;
 - (c) any other matter the Chief Executive Officer reasonably considers relevant in the circumstances.

16 Proposed refusal

- (1) If the Chief Executive Officer proposes to refuse to expunge a charge or conviction after considering an application, the Chief Executive Officer must give the applicant written notice of the proposed refusal.
- (2) The notice of the proposed refusal must include:
 - (a) the reasons for the proposed refusal; and
 - (b) a copy of any information or document that the Chief Executive Officer is relying on to support the proposed refusal; and
 - (c) a statement explaining the applicant's right to object to the proposed refusal and to give further submissions, information and documents in support of the application within 28 days of receiving the notice; and
 - (d) a statement explaining the applicant's right to have any determination reviewed by the Civil and Administrative Tribunal.
- (3) Within 28 days of receiving the notice mentioned in subsection (1), the applicant may give further submissions, information and documents to respond to the proposed refusal.

- (4) Before making a decision to refuse to expunge a charge or conviction, the Chief Executive Officer must consider any further submissions, information or documents given by the applicant.

17 Determination of application

- (1) The Chief Executive Officer must approve an application and expunge the charge or conviction if satisfied, on the balance of probabilities, that the application meets the criteria mentioned in section 8.
- (2) The Chief Executive Officer must refuse an application and refuse to expunge the charge or conviction if not satisfied, on the balance of probabilities, that the application meets the criteria mentioned in section 8.
- (3) The Chief Executive Officer must, as soon as practicable, give written notice of the determination to:
 - (a) the applicant; and
 - (b) the holder of any record of the charge or conviction.
- (4) The determination takes effect on the day the notice is given to the applicant.
- (5) The notice must include the reasons for the determination.

18 Subsequent application

If an application is refused, no subsequent application may be made in respect of the same charge or conviction unless new and relevant evidence becomes available or there are extenuating circumstances.

19 Expunging records

- (1) The holder of a record of a charge or conviction who receives notice from the Chief Executive Officer under section 17(3)(b) that the charge or conviction is expunged must, as soon as practicable:
 - (a) take all reasonable steps to change the record to show that the charge or conviction is expunged; and
 - (b) include a warning in the record that it is an offence to disclose a charge or conviction that is expunged; and
 - (c) include in the record any statement or information prescribed by regulation.

- (2) The holder of the record must, within 28 days of receiving the notice, advise the Chief Executive Officer, in writing, of:
 - (a) the date of compliance with subsection (1); or
 - (b) the extent to which and reasons why the holder of the record was unable to comply with subsection (1).
- (3) If the Chief Executive Officer receives advice under subsection (2)(b), the Chief Executive Officer may give the holder of the record written directions on what further steps the holder is required to take to comply with subsection (1).
- (4) The holder of the record is taken to have complied with subsection (1) if the holder has done all that is reasonably practicable to comply with that subsection, including following any directions given by the Chief Executive Officer under subsection (3).
- (5) The Chief Executive Officer must give the applicant written notice of:
 - (a) the date of compliance with subsection (1); or
 - (b) the date for which compliance is to be taken and the extent to which and reasons why, if any, the holder of the record was unable to fully comply with subsection (1).
- (6) A decision to expunge a charge or conviction from records does not authorise the destruction of any information or document.

20 Effect of expungement

- (1) A person whose charge or conviction is expunged under this Act is to be treated in law as if the person had never committed or been charged with, prosecuted for, convicted of or sentenced for the offence, as the case may be.
- (2) A reference in an agreement, an arrangement, any other Act or a statutory instrument to a charge or conviction is taken not to include one expunged under this Act.
- (3) If a person's charge or conviction is expunged:
 - (a) it is lawful for the person to claim, on oath or otherwise, including in a proceeding before any court, tribunal or entity, that the person was not charged with or convicted of the offence; and

- (b) evidence is not admissible in a proceeding before any court, tribunal or entity to prove the person was charged with or convicted of the offence; and
 - (c) the person's criminal history no longer includes the charge or conviction; and
 - (d) the person is not required to disclose information about the charge or conviction; and
 - (e) a reference to the person's character, however expressed, does not require or allow anyone to take the charge or conviction into account; and
 - (f) the charge or conviction, or non-disclosure of the charge or conviction, is not a ground for discriminating against, prejudicing or engaging in adverse conduct against the person in any way, including in respect of the following matters:
 - (i) any appointment, employment, exclusion or dismissal in respect of an office, profession, occupation or employment;
 - (ii) any grant, issuance, suspension, refusal or revocation of an approval, authorisation, licence, permit or registration; and
 - (g) the person may, without waiting any minimum period, reapply for any approval, authorisation, licence, permit or registration refused or revoked because of the charge or conviction before it was expunged.
- (4) Subsection (3) applies in respect of an indirect reference to an expunged charge or conviction, including a reference to any of the following that may have occurred in relation to the expunged charge or conviction:
- (a) an arrest;
 - (b) an investigation or prosecution;
 - (c) an appearance in court;
 - (d) a penalty, sentence or incarceration.
- (5) This section has effect despite any other law to the contrary, including:
- (a) sections 77(4), 79(3) and 135(3) of the *Health Practitioner Regulation National Law (NT)*; and

- (b) the *Criminal Record (Spent Convictions) Act*; and
- (c) any other law that allows or requires the disclosure of information relating to a charge, conviction, criminal record or criminal history.

21 No entitlement to compensation

No person is entitled to compensation of any kind by reason that:

- (a) the person was charged with, or prosecuted for, an expungable offence; or
- (b) the person was found guilty of, convicted of, or sentenced for, an expungable offence; or
- (c) the person served a sentence for an expungable offence; or
- (d) the person was required to pay a fine, costs, restitution, compensation or other money on account of being convicted of, or sentenced for, an expungable offence; or
- (e) the person has an expunged charge or conviction; or
- (f) a charge or conviction is expunged under this Act; or
- (g) the person incurred any loss, or suffered any consequence, as a result of an event mentioned in paragraph (a), (b), (c), (d), (e) or (f), whether or not that person was the person whose charge or conviction was expunged.

Part 3 Revocation process

22 Revoking a determination to expunge

- (1) The Chief Executive Officer may revoke a determination to expunge a charge or conviction, if satisfied that the determination was made because of false or misleading information or documents in the application.
- (2) If the Chief Executive Officer proposes to revoke a determination to expunge a charge or conviction, the Chief Executive Officer must give the applicant written notice of the proposed revocation.
- (3) The notice of the proposed revocation must include:
 - (a) the reasons for the proposed revocation; and

- (b) copies of all information and documents that the Chief Executive Officer is relying on to support the proposed revocation; and
 - (c) a statement explaining the applicant's right to object to the proposed revocation and to give submissions, information and documents in support of the objection within 28 days of receiving the notice; and
 - (d) a statement explaining the applicant's right to have any revocation reviewed by the Civil and Administrative Tribunal.
- (4) Within 28 days of receiving the notice mentioned in subsection (2), the applicant may give further submissions, information and documents to respond to the proposed revocation.
 - (5) Before making a decision to revoke a determination to expunge a charge or conviction, the Chief Executive Officer must consider any submissions, information and documents given by the applicant.
 - (6) The Chief Executive Officer must, as soon as practicable, give written notice of the decision on revocation to:
 - (a) the applicant; and
 - (b) the holder of any record of the charge or conviction.
 - (7) The decision takes effect on the day the notice is given to the applicant.
 - (8) The notice must include the reasons for the decision.

23 Restoring records

- (1) The holder of a record of a charge or conviction that was expunged who receives notice from the Chief Executive Officer under section 22(6)(b) that the expungement is revoked must, as soon as practicable:
 - (a) take all reasonable steps to change the record to show that the charge or conviction is no longer expunged; and
 - (b) remove from the record the warning previously included under section 19(1)(b); and
 - (c) remove from the record any prescribed statement or information previously included under section 19(1)(c).

- (2) The holder of the record must, within 28 days of receiving the notice, advise the Chief Executive Officer of:
 - (a) the date of compliance with subsection (1); or
 - (b) the extent to which and reasons why the holder of the record was unable to comply with subsection (1).
- (3) If the Chief Executive Officer receives advice under subsection (2)(b), the Chief Executive Officer may give the holder of the record written directions on what further steps the holder is required to take to comply with subsection (1).
- (4) The holder of the record is taken to have complied with subsection (1) if the holder has done all that is reasonably practicable to comply with that subsection, including following any directions given by the Chief Executive Officer under subsection (3).
- (5) The Chief Executive Officer must give the applicant written notice of:
 - (a) the date of compliance with subsection (1); or
 - (b) the date for which compliance is to be taken and the extent to which and reasons why, if any, the holder of the record was unable to fully comply with subsection (1).

24 Effect of revocation

Section 20 does not apply in respect of a person if the determination to expunge the person's charge or conviction is revoked.

Part 4 Offences

25 Unlawful disclosure

- (1) A person commits an offence if:
 - (a) the person has access to records of charges or convictions; and
 - (b) the person intentionally engages in conduct; and

- (c) the conduct results in the disclosure of information about a charge or conviction expunged under this Act and the person is reckless in relation to that result.

Maximum penalty: 50 penalty units or imprisonment for 6 months.

- (2) Strict liability applies to subsection (1)(a).
- (3) Subsection (1) does not apply if:
 - (a) the disclosure is authorised or required under this Act; or
 - (b) the disclosure is necessary for the performance of a function or the exercise of a power under this Act; or
 - (c) the disclosure is made with the written consent of the person whose charge or conviction was expunged; or
 - (d) the information was made available by an archive or library, or an authorised officer of an archive or library, in a form normally available for public use and in accordance with the normal procedures of the archive or library; or
 - (e) the disclosure is for statistical or research purposes in a form that cannot identify the person whose charge or conviction was expunged.

Note for subsection (3)

The defendant has an evidential burden in relation to the matters mentioned (see section 43BU of the Criminal Code).

26 Dishonestly obtaining information

- (1) A person commits an offence if:
 - (a) the person intentionally obtains information; and
 - (b) the information is contained in a record; and
 - (c) the information is about a charge or conviction that is expunged; and
 - (d) the person's conduct was dishonest according to the standards of ordinary people; and
 - (e) the person knew that conduct was dishonest according to the standards of ordinary people.

Maximum penalty: 50 penalty units or imprisonment for 6 months.

- (2) Absolute liability applies to subsection (1)(b).
- (3) Strict liability applies to subsection (1)(c).

Part 5 Administrative matters

27 Prior lawful acts not affected

Nothing in this Act affects anything lawfully done before a charge or conviction is expunged.

28 Protection from liability

- (1) A person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith when acting, or purportedly acting, in the exercise of a power or performance of a function by the person under this Act.
- (2) Subsection (1) does not affect any liability the Territory would, apart from that subsection, have for the act or omission.

29 Powers of Chief Executive Officer

- (1) The Chief Executive Officer has the powers necessary to perform the Chief Executive Officer's functions.
- (2) The Chief Executive Officer may approve forms for this Act.
- (3) The Chief Executive Officer may delegate any of the Chief Executive Officer's powers and functions under this Act to a person.

30 Review by Northern Territory Civil and Administrative Tribunal

- (1) The Civil and Administrative Tribunal has jurisdiction to review:
 - (a) a decision to refuse to expunge a charge or conviction; and
 - (b) a decision to revoke a determination to expunge a charge or conviction.
- (2) The following persons may apply to the Civil and Administrative Tribunal for a review of the decision:
 - (a) the applicant;
 - (b) the person who is the subject of the application, if that person is not the applicant.

(3) Despite section 60 of the *Northern Territory Civil and Administrative Tribunal Act*:

- (a) the hearing of the review is closed to the public; and
- (b) the publication of information about proceedings that identifies the person to whom the hearing relates or enables the identity of the person to be ascertained is prohibited.

(4) However, the Civil and Administrative Tribunal may make an order authorising the publication of information that is otherwise prohibited under subsection (3), if satisfied that the benefit of publication outweighs the interference with the person's privacy.

Note for section 30

The Northern Territory Civil and Administrative Tribunal Act sets out the procedure for applying to the Tribunal for review and other relevant matters in relation to reviews.

31 Regulations

The Administrator may make regulations under this Act.

Part 6 Consequential amendments

Division 1 Anti-Discrimination Act

32 Act amended

This Division amends the *Anti-Discrimination Act*.

33 Section 4 amended (Interpretation)

Section 4(1), definition ***irrelevant criminal record***, after paragraph (a)

insert

(ab) a record expunged under the *Expungement of Historical Homosexual Offence Records Act 2018*; or

Division 2 Care and Protection of Children Act

34 Act amended

This Division amends the *Care and Protection of Children Act*.

35 Section 190 amended (Provision of information)

After section 190(2)

insert

- (3) If a charge or conviction is expunged under the *Expungement of Historical Homosexual Offence Records Act 2018*:
- (a) the person is to be treated under this Act as if the person had never committed or been charged with, prosecuted for, convicted of or sentenced for the offence; and
 - (b) subsections (1) and (2) do not apply in respect of the expunged charge or conviction.

Division 3 Juries Act

36 Act amended

This Division amends the *Juries Act*.

37 Section 10 amended (Persons not qualified)

After section 10(2)

insert

- (2A) If a charge or conviction is expunged under the *Expungement of Historical Homosexual Offence Records Act 2018*:
- (a) the person is to be treated under this Act as if the person had never committed or been charged with, prosecuted for, convicted of or sentenced for the offence; and
 - (b) the expunged charge or conviction is not a ground for ineligibility to be a juror.

Division 4 Legal Profession Act

38 Act amended

This Division amends the *Legal Profession Act*.

39 Section 11 amended (Suitability matters)

After section 11(2)

insert

- (3) If a charge or conviction is expunged under the *Expungement of Historical Homosexual Offence Records Act 2018*:
- (a) the person is to be treated under this Act as if the person had never committed or been charged with, prosecuted for, convicted of or sentenced for the offence; and
 - (b) the expunged charge or conviction is not a suitability matter; and
 - (c) section 94 does not apply in respect of the expunged charge or conviction.

Division 5 Repeal of Part

40 Repeal of Part

This Part is repealed on the day after it commences.

ENDNOTES

1 KEY

Key to abbreviations

amd = amended
app = appendix
bl = by-law
ch = Chapter
cl = clause
div = Division
exp = expires/expired
f = forms
Gaz = Gazette
hdg = heading
ins = inserted
lt = long title
nc = not commenced

od = order
om = omitted
pt = Part
r = regulation/rule
rem = remainder
renum = renumbered
rep = repealed
s = section
sch = Schedule
sdiv = Subdivision
SL = Subordinate Legislation
sub = substituted

2 LIST OF LEGISLATION

Expungement of Historical Homosexual Offence Records Act 2018 (Act No. 8, 2018)

Assent date	23 May 2018
Commenced	14 November 2018 (Gaz G46, 14 November 2018, p 1)