

DRAFT SECOND READING SPEECH

HON. MATTHEW GROOM MP

Expungement of Historical Offences Bill 2017

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Madam Speaker

I move that the Bill be read a second time.

This Bill establishes a scheme for the expungement of charges and convictions relating to historical offences – specifically, homosexual offences and cross-dressing.

As Members are aware, Tasmania was the last state in Australia to decriminalise homosexuality. It is not so long ago that Tasmanians still faced the risk of prosecution relating to homosexuality – certainly well within our lifetimes.

Not only were gay men at risk of being charged, convicted and imprisoned because of their sexual orientation, in many cases they also experienced hatred, discrimination and violence. Many felt that they had no alternative but to leave their home in Tasmania.

In 1997, the Tasmanian Parliament decriminalised homosexuality with the repeal of sections 122(a), 122(c) and 123 of the Criminal Code Act 1924. Cross-dressing, which was an offence under the Police Offences Act 1935, was repealed in 2001.

Today, we acknowledge that laws criminalising consensual homosexual activity and cross-dressing were unfair and unjust. Many Tasmanians suffered as a result of these laws and I expect that it is now the widely held view in our community that these people should never have been charged or convicted in the first place.

Madam Speaker, Tasmania has come a long way in recognising the rights of LGBTI people. Couples in same sex relationships have the same legal entitlements under the Relationships Act as heterosexual couples and this flows on through to entitlements and rights under other Tasmanian legislation.

This Bill will continue this progression by allowing historical charges and convictions to be expunged - addressing a legacy of the old laws.

We cannot forget the past and we must acknowledge the suffering caused to LGBTI Tasmanians and their families by these historical laws.

Many Tasmanians have continued to suffer from distress and disadvantage resulting from the criminalisation of conduct that we now accept as lawful. Despite the repeal of homosexual offences, some men continue to have criminal records that affect various aspects of their lives, such as their work, volunteering and travelling.

Unfortunately, we cannot change the past. However, we can show that we recognise that these laws were wrong and caused harm. We can do this in part through the Bill currently before us to allow for the expunging of charges and convictions for these historical offences.

This will remove the ongoing disadvantage and stigma that results from having a criminal record.

The Government apologises to the LGBTI members of our community and their families who were hurt and negatively affected by convictions recorded as a result of these laws; we are sorry.

We hope those affected will accept our acknowledgement that those laws were wrong, and our expression of deep regret at any distress and suffering the impact of a criminal record has caused.

The Bill before us today was drafted taking account of recommendations made by the former Anti-Discrimination Commissioner, the relevant legislative provisions in other states and territories and extensive consultation with stakeholders.

As I have previously mentioned, in 2015, the former Anti-Discrimination Commissioner released a report on this issue titled "Treatment of historic criminal records for consensual homosexual sexual activity and related conduct".

In line with the former Commissioner's report, the Bill establishes a scheme to expunge charges and convictions for certain historical offences. I note that not all of the Commissioner's recommendations have been adopted. The main variation is that instead of establishing a Historic Criminal Records Expert Panel to determine applications as recommended by the Commissioner, the Bill provides for applications to be determined by the Secretary of the responsible department, the Department of Justice.

It was decided to take this approach after considering the schemes in other states. Victoria, New South Wales, South Australia and the ACT have all introduced legislation to expunge or extinguish historical homosexual convictions. With the exception of South Australia which provides for applications to be made to a magistrate, the other jurisdictions provide for an administrative process whereby applications are determined by the head of the Justice Agency.

The Bill is therefore consistent with most other jurisdictions in providing for the Secretary to be the decision-maker.

Under the Bill, the Secretary can take all steps and make all inquiries that are reasonable and appropriate to consider an application. This could include seeking information, guidance and advice from legal and other experts as necessary.

Madam Speaker, I now turn to other key features of the Bill.

The Bill provides for the expungement of charges and convictions. Conviction is broadly defined to include findings of guilt where no conviction is recorded.

It's important to point out that charges are also covered. This means that a person can apply to have a charge expunged even if that charge was subsequently withdrawn or did not result in a conviction or finding of guilt.

Charges have been included because in some circumstances a person can be required to disclose that they have been charged with an offence and this may be taken into account in some processes.

In relation to the types of offences covered by the scheme, the Bill provides for the expungement of charges or convictions for historical offences. A historical offence is defined as a homosexual offence or a cross-dressing offence.

Cross-dressing offences specifically relates to offences under section 8(1)(d) of the Police Offences Act 1935 as in force before 12 April 2001. This provision prohibited a male person from being in any public place at any time between sunset and sunrise, dressed in female apparel.

The Bill does not list specific homosexual offences. Instead the definition of "homosexual offence" refers to sexual offences and public morality offences.

Sexual offences would include offences under the previously repealed provisions of the Criminal Code – such as sexual intercourse against the order of nature, consenting to sexual intercourse with a male person against the order of nature and indecent practices between males.

The Bill provides that a public morality offence is an offence, other than a sexual offence, the essence of which is the maintenance of public decency and morality and by which homosexual behaviour could be punished. This is intended to capture other offences that were used to target homosexual behaviour such as loitering, indecency, and soliciting or importuning for immoral purposes.

The Bill also covers the offences of attempting, inciting, instigating, aiding or abetting the commission of a homosexual or cross-dressing offence.

Under the Bill an application to have a charge or conviction expunged is to be made to the Secretary of the responsible Department. Applications can be made by the person who was charged or convicted (the 'eligible person'), or if that person is deceased, by various parties including a spouse or person who was in a significant relationship with the eligible person, child, parent, sibling, niece, nephew or legal personal representative.

An application can relate to multiple charges or convictions meaning that separate applications do not need to be made for each charge or conviction that may be eligible to be expunged.

Madam Speaker, there are tests to be applied by the Secretary in determining whether to expunge a charge.

In relation to homosexual offences, the tests to be applied are:

- that the charge or conviction relates to a homosexual offence (within the definition in the Bill);
- that the eligible person would not have been charged but for the fact that he or she was suspected of having engaged in the conduct for the purposes of or in connection with, sexual activity of a homosexual nature; and
- that the conduct constituting the offence would not constitute an offence under Tasmanian law if it was engaged in at the time of making the application. In considering this test, the Secretary must have regard to whether the conduct was consensual and the ages of the persons involved.

These tests are very important to ensure still illegal conduct is not captured under these proposals.

If the sexual activity was not consensual or constituted a crime because of the ages of the parties involved, then it would still constitute an offence under today's laws and will not be expunged.

The scheme cannot be used to expunge conduct that is currently regarded as criminal behaviour, for example, rape or sex with a young person.

These convictions should and will stand.

In relation to cross-dressing offences, the only test that applies is whether the offence is a cross-dressing offence – that is, an offence under section 8(1)(d) of the Police Offences Act.

There is no requirement for the conduct to be linked to homosexuality which means that any person who was charged or convicted under section 8(1)(d) can apply to have the charge or conviction expunged.

In investigating the application, the Secretary is required, having regard to sensitivity and privacy concerns, to give other parties who the Secretary believes were involved in the conduct an opportunity to make a submission in relation to the application.

There are rights of review for certain parties who do not agree with a decision made by the Secretary. If the Secretary refuses to expunge a charge, the applicant can apply to the Magistrates Court (Administrative Appeals) Division to review the decision. If the Secretary decides to expunge a charge then the other party to the conduct constituting the offence can seek to have the decision reviewed.

A review of a decision to expunge a charge can also be sought by a data controller. A data controller is defined in the Bill as a court, Tasmania Police and the Director of Public Prosecutions.

Madam Speaker, once a charge or conviction is expunged, the Secretary is to advise the relevant data controllers and the data controllers are to annotate the records to indicate that the charge or conviction is expunged.

The Bill sets out the legal effects of an expunged charge or conviction including that it is taken not to form part of the person's official criminal record. A person is not required to disclose his or her expunged charge or conviction including when giving evidence in legal proceedings and an expunged charge or conviction is not a proper ground for refusing the person any appointment, office, status or privilege.

It is an offence for any other party to unlawfully disclose information about a person's expunged charge or conviction or to fraudulently or dishonestly obtain or attempt to obtain information about an expunged charge or conviction.

Madam Speaker, a number of people have been involved in the development of this Bill.

I would also like to acknowledge and thank all stakeholders and others who have made submissions and contributed to the development of the Bill. I would like to make mention of Rodney Croome and the Tasmanian Gay and Lesbian Rights Group for their discussions with the Government on these issues and their input into this Bill.

Madam Speaker, I am pleased to stand before the House today to move this important piece of legislation.

I reiterate our sincere regret at any distress and suffering these past laws caused. We recognise that these convictions should no longer stand –this is now the right thing to do.

I hope that it will go some way in helping to alleviate the difficulties, distress and stigma for those who have suffered from the ongoing effects of these convictions and charges.

I commend the Bill to the House.