

TASMANIA

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**EXPUNGEMENT OF HISTORICAL OFFENCES  
BILL 2017**

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**SCHEDULE 1 – CONSEQUENTIAL AMENDMENTS**

# **EXPUNGEMENT OF HISTORICAL OFFENCES BILL 2017**

This Public Bill originated in the House of Assembly, and, having this day passed, is now ready for presentation to the Legislative Council for its concurrence.

SHANE DONNELLY, *Clerk of the House*  
2 May 2017

*(Brought in by the Acting Attorney-General, the Honourable  
Matthew Guy Groom)*

## **A BILL FOR**

**An Act to provide for a scheme to enable charges and convictions for certain historical homosexual offences and other offences to be expunged, and for related purposes**

Be it enacted by Her Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

## **PART 1 – PRELIMINARY**

### **1. Short title**

This Act may be cited as the *Expungement of Historical Offences Act 2017*.

### **2. Commencement**

This Act commences on a day to be proclaimed.

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### 3. Interpretation

(1) In this Act –

**ACC** means the Australian Crime Commission established under section 7 of the *Australian Crime Commission Act 2002* of the Commonwealth or, if ACC is replaced by another body or agency that performs functions substantially similar to ACC's national policing information functions (as defined in section 4 of that Act), that body or agency;

**applicant** means a person who makes an application;

**application** means an application under section 6;

**charge** means a charge against a person for a historical offence and includes the following:

- (a) a charge on an arrest;
- (b) a complaint under the *Justices Act 1959*;
- (c) a charge by a court;
- (d) an indictment;

**conviction** means a conviction for a historical offence recorded against a person, whether on indictment or summarily;

**cross-dressing offence** means –

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- (a) an offence under section 8(1)(d) of the *Police Offences Act 1935* as in force before 12 April 2001; or
  - (b) an offence of attempting to commit an offence referred to in paragraph (a); or
  - (c) an offence of inciting, instigating, aiding, or abetting, the commission of an offence referred to in paragraph (a);

***data controller*** means the following:

- (a) the Registrar of the Supreme Court;
- (b) the Administrator of the Magistrates Court appointed under section 16 of the *Magistrates Court Act 1987*;
- (c) the Commissioner of Police;
- (d) the person for the time being holding, or acting in, the office of the Director of Public Prosecutions established by section 3(1) of the *Director of Public Prosecutions Act 1973*;

***eligible person*** means –

- (a) a person referred to in section 6(2); or

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- (b) a person who was charged with a historical offence and is deceased;

***expunged charge*** means a charge expunged under section 12(6) that has not ceased to be expunged under section 18;

***expunged conviction*** means a conviction expunged under section 12(6) that has not ceased to be expunged under section 18;

***historical offence*** means –

- (a) a homosexual offence; or
- (b) a cross-dressing offence;

***homosexual offence*** means –

- (a) a sexual offence or a public morality offence; or
- (b) an offence of attempting to commit an offence referred to in paragraph (a); or
- (c) an offence of inciting, instigating, aiding, or abetting, the commission of an offence referred to in paragraph (a);

***official criminal record*** means a record, containing information of criminal proceedings relating to a historical offence, kept by –

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- (a) a court of this State; or
  - (b) a Government department, or State authority, within the meaning of the *State Service Act 2000*;

***public morality offence*** means an offence, other than a sexual offence, as in force at any time –

- (a) the essence of which is the maintenance of public decency or morality; and
- (b) by which homosexual behaviour could be punished;

***regulations*** means regulations made and in force under this Act;

***Secretary*** means the Secretary of the Department;

***sexual offence*** means an offence under a law as in force at any time by which sexual activity of a homosexual nature, whether penetrative or non-penetrative, could be punished, whether or not heterosexual sexual activity could also be punished by the offence.

- (2) For the purposes of this Act, where a court finds a person guilty of an offence but does not proceed to record a conviction, the finding is to be regarded as a conviction.

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**4. Act binds Crown**

This Act binds the Crown in right of Tasmania and, so far as the legislative power of Parliament permits, in all its other capacities.

**5. Act prevails**

If a provision of this Act is inconsistent with a provision of any other Act, the provision of this Act prevails to the extent of the inconsistency.



## **PART 2 – APPLICATIONS**

### **6. Application to have historical offence expunged**

(1) In this section –

*spouse*, in relation to a person, includes the person who is in a significant relationship, within the meaning of the *Relationships Act 2003*, with that person.

(2) A person who, at any time, has been charged with a historical offence may apply to the Secretary for the charge to be expunged.

(3) If the person referred to in subsection (2) has died, an application under this section may be made in respect of that person by –

- (a) if the person, immediately before death had a spouse and the spouse is available, the spouse of the person; or
- (b) if no spouse is available, a son or daughter of the person if the son or daughter has attained the age of 18 years; or
- (c) where no person referred to in paragraph (a) or (b) is available, a parent of the person; or
- (d) where no person referred to in paragraph (a), (b) or (c) is available, a sibling of the person if the sibling has attained the age of 18 years; or

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- (e) where no person referred to in paragraph (a), (b), (c) or (d) is available, a niece or nephew of the person if the niece or nephew has attained the age of 18 years; or
  - (f) where no person referred to in paragraph (a), (b), (c), (d) or (e) is available, the legal personal representative of the person; or
  - (g) where no person referred to in paragraph (a), (b), (c), (d), (e) or (f) is available, a person determined to be an appropriate representative under subsection (4).
- (4) For the purposes of subsection (3)(g), a person is an appropriate representative if the Secretary determines that the person should be taken to be an appropriate representative of the deceased person because of the closeness of the person's relationship with the deceased person immediately before the deceased person's death.
- (5) An application under this section –
- (a) must be in a form approved by the Secretary; and
  - (b) is to contain the information required under section 7; and
  - (c) may relate to more than one charge; and
  - (d) is to be lodged in the manner prescribed by the regulations or, if no manner is so

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prescribed, in a manner approved by the Secretary.

- (6) Despite this section, if the Secretary decides to refuse to expunge a charge under section 12(2)(b), the person who made the application to have the charge expunged is only entitled to make a further application in respect of the same charge if the Secretary is satisfied on reasonable grounds that necessary supporting information became available only after the Secretary's initial decision.

**7. Contents of application**

- (1) An application in relation to an eligible person must include the following information, so far as the information is known to the applicant:
- (a) the name, date and place of birth of the eligible person;
  - (b) the residential address and phone number of the applicant;
  - (c) in respect of each historical offence to which the application relates –
    - (i) the name and address of the eligible person at the time the eligible person was charged with the historical offence; and
    - (ii) if the eligible person was convicted of the historical offence, the date when, and the

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court by which, the eligible  
person was convicted; and

(iii) the name of any other person  
involved in the conduct  
constituting the historical  
offence.

(2) An application must be accompanied by the applicant's consent for the Secretary to check the eligible person's criminal history and any other information about the eligible person that may be relevant in determining the application.

(3) An application may include, or be accompanied by –

(a) statements by the applicant; or

(b) written evidence given by any other person (including a person involved in the conduct constituting a historical offence to which the application relates) –

about the matters about which the Secretary must be satisfied under section 10.

(4) The applicant may submit to the Secretary statements or evidence relating to the application at any time after making the application and before it has been determined by the Secretary.

**8. Investigation of application**

(1) Subject to subsection (2), in considering an application, the Secretary may take all steps, and

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make all inquiries, that are reasonable and appropriate to consider the application properly.

- (2) The Secretary must not hold an oral hearing for the purpose of determining the application.
- (3) The Secretary may, by written notice, require an applicant to provide additional information or additional documents if the Secretary believes on reasonable grounds that the information or documents are necessary to consider the application properly.
- (4) If an applicant does not comply with a notice under subsection (3), the Secretary may refuse to consider the application further.
- (5) In considering an application, the Secretary is to –
  - (a) give each person, who the Secretary believes to have been involved in the conduct constituting a historical offence to which the application relates, a reasonable opportunity to make a submission in relation to the decision whether to expunge the charge for that historical offence; and
  - (b) take into consideration any such submissions.
- (6) When contacting, or attempting to contact a person for the purposes of subsection (5)(a), the Secretary is to –

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- (a) contact, or attempt to contact that person, in a manner that is appropriate to the circumstances; and
  - (b) have regard to the sensitivity of the information, confidentiality and the privacy of the applicant and the person contacted.
- (7) The Secretary may, by written notice, require any person (other than the applicant) to do any one or more of the following:
  - (a) answer specified questions which in the opinion of the Secretary are relevant to the investigation of the application;
  - (b) provide to the Secretary any document specified in the notice which is in the person's possession or control and which, in the opinion of the Secretary, is relevant to the investigation of the application;
  - (c) provide to the Secretary any other information specified in the notice which, in the opinion of the Secretary, is relevant to the investigation –

within a time and in a manner specified in the notice.
- (8) If a notice under subsection (7) requires a data controller to provide to the Secretary a copy of an official criminal record held by the data controller, the data controller is to comply with that requirement as soon as possible.

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- (9) A person must not fail, without reasonable excuse, to comply with a notice under subsection (7).

Penalty: Fine not exceeding 10 penalty units.

- (10) To the extent that a person or body, in good faith, provides information or documents in response to a requirement of the Secretary under this Act, the person or body –

(a) does not incur any civil or criminal liability in respect of the provision of the information or documents; and

(b) cannot be held, in respect of the provision of the information or documents, 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.

- (11) If any information or document is obtained by the Secretary under this Act, evidence of that information or document, or evidence of the obtaining of that information or document, may be used only for the purposes of this Act.

**9. Disclosure of records to applicant**

- (1) In this section –

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***personal information***, in relation to a person,  
means information –

- (a) that identifies a person or discloses his or her address or location; or
- (b) from which a person's identity, address or location can reasonably be identified;

***record*** means a record of the investigation of a historical offence or of proceedings relating to a historical offence.

- (2) If a record is obtained by the Secretary in relation to an application, the Secretary must, as soon as reasonably practicable after obtaining the record –
  - (a) give the applicant a copy of the record, except so far as it contains personal information relating to any person other than the applicant; and
  - (b) give written notice to the applicant that the Secretary will not proceed to determine the application until at least 28 days, or any longer period that the Secretary determines and specifies in the notice, after the day on which the applicant is given a copy of the record.



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**10. Matters to be considered in determining application**

- (1) The Secretary must not decide to expunge a charge under section 12(2)(a) unless satisfied on reasonable grounds that –
  - (a) the offence with which the eligible person was charged is a homosexual offence or a cross-dressing offence; and
  - (b) in the case of a charge for a homosexual offence –
    - (i) the eligible person would not have been charged with the homosexual offence but for the fact that the eligible person was suspected of having engaged in the conduct constituting the offence for the purposes of, or in connection with, sexual activity of a homosexual nature; and
    - (ii) the conduct constituting the homosexual offence, if engaged in by the eligible person at the time of the making of the application, would not constitute an offence under the law of this State.
- (2) In considering whether the test set out in subsection (1)(b)(ii) is satisfied, the Secretary must have regard to –
  - (a) whether any person involved in the conduct constituting the homosexual

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- offence, including the eligible person,  
consented to the conduct; and
- (b) the ages, or respective ages, of any such  
persons at the time of that conduct.
- (3) If the consent of a person to the conduct is an  
issue in the decision to expunge a charge for a  
homosexual offence, the Secretary may only be  
satisfied by written evidence on that issue –
- (a) from the official criminal records, if  
available; or
- (b) from a person, other than the eligible  
person, who was involved in the conduct  
constituting the homosexual offence; or
- (c) if no person referred to in paragraph (b)  
can be found after reasonable enquiries  
are made by the applicant, from a person  
(other than the applicant) with  
knowledge of the circumstances in which  
that conduct occurred.
- (4) In considering an application, the Secretary may  
have regard to any matter he or she reasonably  
considers relevant in the circumstances.

**11. Withdrawal of application**

- (1) An applicant may withdraw an application  
before the Secretary determines it.
- (2) Despite an application being withdrawn under  
this section, the Secretary may reinstate the  
application if satisfied that the applicant wishes

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to proceed with it and has provided any information required under section 7(1) or further information or documents required under section 8(3).

**12. Determination of application**

- (1) The Secretary must determine an application as soon as practicable after it is received.
- (2) In determining an application, the Secretary is to, in respect of each charge to which the application relates, decide to –
  - (a) expunge the charge for that offence; or
  - (b) refuse to expunge the charge for that offence.
- (3) If the Secretary intends to make a decision to refuse to expunge a charge, the Secretary must –
  - (a) by notice in writing, inform the applicant of that intention and the reasons for the intended decision; and
  - (b) provide the applicant with a copy of any relevant records, relating to the application, in the possession of the Secretary; and
  - (c) give the applicant 28 days from the date of that notice to submit further information to the Secretary regarding the charge.

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- (4) The Secretary must, within 28 days after a decision under this section is made, give –
- (a) the applicant written notice of the decision and, if the decision is to refuse to expunge a charge, inform the applicant of –
    - (i) the reasons for the decision; and
    - (ii) the applicant’s right to have the decision reviewed under section 19; and
  - (b) any person who has made a submission pursuant to section 8(5) written notice of the decision and, if the decision is to expunge a charge, inform the person of –
    - (i) the reasons for the decision; and
    - (ii) the person’s right to have the decision reviewed under section 19.
- (5) On making a decision to expunge a charge, the Secretary must, within 28 days, notify any relevant data controller of –
- (a) that decision and the reasons for the decision; and
  - (b) the data controller’s right to have the decision reviewed under section 19.
- (6) If the Secretary makes a decision to expunge a charge, the charge, and any conviction in respect of that charge, is expunged at the expiration of

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90 days after the day on which the Secretary makes the decision.

- (7) Despite subsection (6), if within those 90 days an interested person has applied for a review under section 19 in relation to the decision, the decision to expunge a charge –
- (a) does not take effect until all reviews in respect of the decision have been determined; and
  - (b) only takes effect if, in respect of each review –
    - (i) the decision of the Secretary is upheld; or
    - (ii) the review is abandoned or withdrawn by the person applying for that review.

**13. Confidentiality**

- (1) A person must not, directly or indirectly, make a record of, or disclose or communicate to another person, any information, relating to an application, acquired by the person for the purposes of this Act.

Penalty: Fine not exceeding 50 penalty units.

- (2) Subsection (1) does not apply if –
- (a) it is necessary to make the record, or disclose or communicate the information, for the purposes of this Act; or

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- (b) the person to whom the information relates gives written consent to the making of the record or to the disclosure or communication.
- (3) Subsection (1) also does not apply to the disclosure or communication of information –
  - (a) to a court or tribunal in the course of a legal proceeding; or
  - (b) under an order of a court or tribunal; or
  - (c) to a legal practitioner for the purpose of obtaining legal advice or representation; or
  - (d) as required or authorised by or under this Act or any other Act.

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## **PART 3 – CONSEQUENCES OF EXPUNGEMENT**

### **14. Annotation of official criminal records**

- (1) The Secretary must, as soon as possible after a charge has been expunged under section 12(6), notify any relevant data controller of the expunging of that charge and any conviction in respect of that charge.
- (2) On receipt of a notification under subsection (1), the relevant data controller must, within 28 days, annotate any entry relating to an expunged charge, or expunged conviction, contained in any official criminal records under his or her management or control, with a statement to the effect that –
  - (a) the entry relates to an expunged charge or expunged conviction; and
  - (b) it is an offence to disclose expunged charges or expunged convictions.
- (3) A data controller must notify the Secretary of an annotation made under subsection (2) as soon as possible after the annotation is made.
- (4) As soon as possible after the Secretary is satisfied that all necessary action has been taken in relation to entries in official criminal records, the Secretary must give written notice of that fact to the person who made the application to have the charge expunged.

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**15. Effect of expunging**

If a charge is expunged under section 12(6) in respect of a person –

- (a) the person is not required to disclose that the person has been charged with, or convicted for, that offence to any other person, including when giving evidence under oath in legal proceedings; and
- (b) each expunged charge and expunged conviction is taken not to form part of the person's official criminal record and is not required to be disclosed; and
- (c) a question about the person's criminal history, including a question in legal proceedings required to be answered under oath, is taken not to refer to an expunged charge or expunged conviction; and
- (d) in applying a provision of any legislation, agreement or arrangement to the person –
  - (i) a reference to a conviction, however expressed, is taken not to refer to an expunged conviction; and
  - (ii) a reference to a charge, however expressed, is taken not to refer to an expunged charge; and



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- (iii) a reference, however expressed, to the person's character is not to be taken to allow or require anyone to take account of any expunged charge or expunged conviction; and
  - (e) the disclosure or non-disclosure, of an expunged charge or expunged conviction is not a proper ground for –
    - (i) refusing the person any appointment, office, status or privilege; or
    - (ii) revoking any appointment, status or privilege held by the person or dismissing the person from any office.

**16. Disclosure of expunged records**

- (1) A person with access to official criminal records must not directly or indirectly, without lawful authority, disclose any information about another person's expunged charge, or expunged conviction, held in those records without the consent of that other person.

Penalty: Fine not exceeding 50 penalty units.

- (2) Subsection (1) does not apply to –
  - (a) an archive or library, or an authorised officer of an archive or library, that makes available to a member of the

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- public, or to another archive or library, under the normal procedures of the archive or library, material that is normally available for public use and that contains information about an expunged charge or expunged conviction; or
- (b) the Secretary, or any person acting under the direction of the Secretary, in informing a data controller that holds information about an expunged charge or expunged conviction; or
  - (c) the Commissioner of Police, or any person acting under the direction of the Commissioner of Police, disclosing to the ACC, for incorporation into the police information sharing system known as the National Police Reference System or any system for the sharing of police information that replaces that system, the fact that a charge or a conviction has become an expunged charge or expunged conviction.
- (3) It is a defence to a charge for an offence against subsection (1) to show that the defendant acted in good faith in the honest belief that –
- (a) he or she had lawful authority to disclose the information; or
  - (b) the charge or conviction had not been expunged; or

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(c) the person who made the application to have the charge expunged had consented to the disclosure of the information.

(4) This section has effect despite sections 77(4), 79(3) and 135(3) of the *Health Practitioner Regulation National Law (Tasmania)*.

**17. Improperly obtaining information about expunged convictions**

A person must not fraudulently or dishonestly obtain, or attempt to obtain, information about –

- (a) another person's expunged charge from an official criminal record; or
- (b) another person's expunged conviction from an official criminal record.

Penalty: Fine not exceeding 50 penalty units.

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Part 4 – Miscellaneous

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**PART 4 – MISCELLANEOUS**

**18. Determination that charge has ceased to be expunged**

- (1) If the Secretary is satisfied that a charge became expunged by reason of an application that included information that was false or misleading in a material particular, or documents that were false or misleading in a material particular, the Secretary may determine that the charge has ceased to be expunged.
- (2) The charge, and any conviction in respect of that charge, ceases to be expunged on and from the date of the determination under subsection (1).
- (3) The Secretary must, within 28 days of making a determination under subsection (1) –
  - (a) give the person who made the application to have the charge expunged written notice of the determination and inform the person in writing of –
    - (i) the reasons for the determination; and
    - (ii) the person's right to have the determination reviewed under section 19; and
  - (b) notify any relevant data controller in writing that the charge, and any conviction in respect of that charge, has ceased to be expunged.

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**19. Review of decisions**

(1) In this section –

***reviewable decision*** means –

- (a) a decision to expunge a charge under section 12(2)(a); or
- (b) a decision to refuse to expunge a charge under section 12(2)(b); or
- (c) a determination that a charge has ceased to be expunged under section 18(1).

(2) If the Secretary, or a person acting as the delegate of the Secretary, makes a reviewable decision –

- (a) an interested person may apply to the Magistrates Court (Administrative Appeals Division) under the *Magistrates Court (Administrative Appeals Division) Act 2001* for a review of the decision; and
- (b) that decision is a reviewable decision for the purposes of the *Magistrates Court (Administrative Appeals Division) Act 2001*.

(3) For the purposes of this section, each of the following persons is taken to be an interested person:

- (a) for a decision to expunge a charge under section 12(2)(a) –

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- (i) a person who has made a submission pursuant to section 8(5) in relation to the charge; and
    - (ii) a data controller who has any official criminal records relating to the charge under their management or control;
  - (b) for a decision to refuse to expunge a charge under section 12(2)(b), the applicant;
  - (c) for a determination that a charge has ceased to be expunged, the person who made the application to have the charge expunged.
- (4) Despite section 36(1) of the *Magistrates Court (Administrative Appeals Division) Act 2001*, the review by the Magistrates Court (Administrative Appeals Division) of a reviewable decision made under this Act is to be held in private.

**20. No entitlement to compensation**

If a charge or a conviction for an offence is expunged under section 12(6), a person is not entitled to compensation of any kind, on account of that charge or conviction becoming expunged, in respect of the fact that –

- (a) the person was charged with, or prosecuted for, the offence; or

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- (b) the person was convicted of, or sentenced for, the offence; or
- (c) the person served a sentence for the offence; or
- (d) the person was required to pay a fine or other money (including costs or any amount by way of restitution or compensation) on account of being convicted of, or sentenced for, the offence; or
- (e) the person has an expunged charge or expunged conviction; or
- (f) the person incurred any loss, or suffered any consequence, as a result of an event referred to in paragraph (a), (b), (c), (d) or (e), whether or not that person was the person whose charge or conviction was expunged.

**21. Royal prerogative of mercy not affected**

Nothing in this Act is to be taken as affecting the royal prerogative of mercy.

**22. Integrity of official criminal records**

Subject to section 14(2), nothing in this Act is to be taken as authorising or requiring any person to destroy, cull or edit any documents containing official criminal records.

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**23. Prior lawful acts not affected**

Nothing in this Act is to be taken as affecting anything lawfully done before a charge or a conviction for a historical offence is expunged.

**24. Offence to give false or misleading information**

A person must not, in answering a question, giving information or providing a document under this Act –

- (a) make a statement knowing it to be false or misleading; or
- (b) omit any matter from a statement knowing that without that matter the statement is false or misleading; or
- (c) provide a document that the person knows to be false or misleading without informing the person to whom the document is provided of that knowledge.

Penalty: Fine not exceeding 30 penalty units.

**25. Delegation by Secretary**

The Secretary may delegate any of his or her functions or powers under this Act, other than this power of delegation.

**26. Information sharing**

A person who is a personal information custodian, within the meaning of the *Personal*



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*Information Protection Act 2004*, is not taken to contravene that Act by reason only of collecting, using or disclosing, or otherwise dealing with, personal information for the purposes of this Act.

**27. Infringement notices**

(1) In this section –

*infringement offence* means an offence against this Act or the regulations that is prescribed by the regulations to be an infringement offence.

(2) The Secretary may issue and serve an infringement notice on a person if he or she reasonably believes that the person has committed an infringement offence.

(3) An infringement notice may not be served on an individual who has not attained the age of 16 years.

(4) An infringement notice is to be in accordance with section 14 of the *Monetary Penalties Enforcement Act 2005*.

(5) The regulations –

(a) may prescribe, for infringement offences, the penalties payable under infringement notices; and

(b) may prescribe different penalties for bodies corporate and individuals.

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**28. Regulations**

- (1) The Governor may make regulations for the purposes of this Act.
- (2) The regulations may be made so as to apply differently according to matters, limitations or restrictions, whether as to time, circumstance or otherwise, specified in the regulations.
- (3) The regulations may –
  - (a) provide that a contravention of any of the regulations is an offence; and
  - (b) in respect of such an offence, provide for the imposition of a fine not exceeding 50 penalty units and, in the case of a continuing offence, a further fine not exceeding 10 penalty units for each day during which the offence continues.
- (4) The regulations may authorise any matter to be from time to time determined, applied, regulated or approved by the Secretary.

**29. Administration of Act**

Until provision is made in relation to this Act by order under section 4 of the *Administrative Arrangements Act 1990* –

- (a) the administration of this Act is assigned to the Minister for Justice; and

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- (b) the department responsible to that Minister in relation to the administration of this Act is the Department of Justice.

**30. Consequential amendments**

The legislation specified in Schedule 1 is amended as specified in that Schedule.

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**SCHEDULE 1 – CONSEQUENTIAL AMENDMENTS**

Section 30

***Anti-Discrimination Act 1998***

1. The definition of *irrelevant criminal record* in section 3 is amended as follows:
  - (a) by inserting in paragraph (i) “or” after “arises,”;
  - (b) by inserting the following paragraph after paragraph (i):
    - (j) the person’s charge or conviction was expunged under the *Expungement of Historical Offences Act 2017*;