CLAUSE NOTES

Expungement of Historical Offences Bill 2017

Clause 1: Short title

This clause provides that, once passed, the Bill will be cited as the *Expungement of Historical Offences Act 2017*.

Clause 2: Commencement

This clause provides for the Bill to commence on proclamation. This will allow the necessary processes to be put in place to implement the scheme.

Clause 3: Interpretation

This clause defines terms used throughout the Bill.

Clause 4: Act binds Crown

This clause provides that the Act is binding on the Crown, not only in right of Tasmania but also so far as the legislative power of Parliament permits, in all of its other capacities. This means that the Crown is required to comply with the legislation.

Clause 5: Act prevails

This clause makes it clear that the Act prevails over any other inconsistent legislation to the extent of the inconsistency.

Clause 6 Application to have historical offence expunged

This clause allows applications, including posthumous applications to be made for the expungement of charges relating to historical offences. These applications are made to the Secretary.

Under this clause, applications can be made by the eligible person (i.e., the charged or convicted person) or, if the eligible person is deceased, the application can be made by various other persons as provided for by the Bill. The Bill also provides a hierarchy as to who can make the application.

Applications are to be made in the form approved by the Secretary and to include the information set out in clause 7. Applications may relate to more than one charge. They are to be lodged in the manner prescribed by regulations, or as approved by the Secretary.

Subclause (6) is intended to prevent repeated applications in relation to the same charge. Where an application has been refused, a person is only entitled to make a further application relating to that charge or conviction if the Secretary is satisfied on reasonable grounds that there is new supporting information (i.e., information that only became available after the refusal of the first application). For example, a statement, that was not available at the time of the first application, from the other party to the conduct constituting the historical homosexual offence to confirm that the conduct was consensual.

Clause 7

Contents of application

This clause sets out the required information to be included in an application to have a charge and/or conviction expunged. It includes details such as the name and address of the eligible person at the time he or she was charged, the date when and court where the eligible person was convicted (if there was a conviction) and the name of any other person involved in the conduct constituting the offence.

The information is only required to be provided to the extent that it is known to the applicant. In some cases, particularly in relation to posthumous applications, the applicant may not be sure of details such as the date of conviction or the address of the eligible person at the time of being charged.

As part of the application, the applicant must provide consent for the Secretary to check the eligible person's criminal history and any other relevant information. This is necessary so that the relevant police checks and searches of court and other records can be undertaken.

The applicant can include statements or written evidence relating to the application and the matters to be considered by the Secretary as part of the application or can submit them at any later time before the application has been determined by the Secretary. These statements or written evidence could be from the applicant or any other person.

Clause 8

Investigation of application

This clause sets out the Secretary's functions and powers in relation to investigating an application to expunge a charge or conviction, including:

- taking all steps and making all inquiries that are reasonable and appropriate to consider the application properly; and
- requiring information or documents from the applicant and other parties.

There are penalties for parties, other than the applicant, who do not provide information or documents required by the Secretary. If the applicant does not provide information or documents required by the Secretary, the Secretary can refuse to consider the application further.

The Secretary is required to give other parties who the Secretary believes were involved in the conduct an opportunity to make a submission in relation to the application. Contact with other parties is to be made in a manner that is appropriate to the circumstances and having regard to sensitivity, confidentiality and privacy concerns.

Clause 9

Disclosure of records to applicant

This clause requires the Secretary to give the applicant a copy of any records obtained in relation to the applicant's application (excluding any personal information about any other person, such as information identifying the other person or disclosing his or her address).

The Secretary is not to determine the application until at least 28 days after the applicant is given a copy of the records.

The purpose of this is to allow the applicant to consider the records and determine whether to provide any additional information or withdraw the application. For example, if the records are not clear about whether the relevant sexual activity was consensual, the applicant may wish to provide further statements or evidence on this issue.

Clause 10 Matters to be considered in determining application

This clause establishes the tests that the Secretary is to be satisfied of in determining an application.

To decide to expunge a charge, the Secretary must be satisfied on reasonable grounds that the charge relates to a homosexual offence or a cross-dressing offence as defined by the Bill.

If the charge relates to a homosexual offence, the Secretary must also be satisfied on reasonable grounds:

- that the eligible person would not have been charged with the offence but for the fact that the eligible person was suspected of having engaged in the conduct for the purposes of or in connection with sexual activity of a homosexual nature; and
- that if the conduct was engaged in at the time of making the application, it would not constitute an offence under Tasmanian law.

The Secretary must consider whether the conduct was consensual and the ages of the persons involved at the time of the conduct. This is to ensure that charges and convictions are not expunged if they relate to conduct that would be unlawful under current laws, for example, rape.

On the issue of consent, the Secretary may only be satisfied by written evidence from the available official criminal records or from a person, other than the eligible person, who was involved in the conduct. If the applicant is not able to find the other party, then written evidence from a third party who had knowledge of the circumstances in which the conduct occurred can be used.

Clause 11 Withdrawal of application

This clause allows an applicant to withdraw an application. The application can subsequently be reinstated if the Secretary is satisfied that the applicant wishes to proceed with it and has provided any required information or documents.

Clause 12 Determination of application

This clause requires the Secretary to determine an application as soon as practicable after receiving it.

As an application may relate to more than one charge, the Secretary is to decide in relation to each charge whether to expunge that charge or refuse to expunge the charge.

Under this clause, the Secretary must notify the applicant if he or she intends to make a decision refusing to expunge a charge, providing the applicant with reasons for the intended decision and a copy of any relevant records. The applicant then has 14 days to submit further information to the Secretary.

The clause also sets out requirements for notifying the relevant parties of a determination and review rights. The parties to be notified are:

- the applicant;
- any person who made a submission under clause 8(5) (i.e., a person who was involved in the conduct constituting the historical offence);
- any relevant data controller.

An expungement takes effect 90 days after an application is approved. This is to allow sufficient time for the review process to be completed.

Clause 13 Confidentiality

This clause prohibits making a record of or disclosing or communicating information obtained in relation to an application.

This covers people who obtain information in the exercise of a function under the Act, data controllers and other parties who may receive information for example, by being contacted by the Secretary in relation to the application. There is a penalty of a fine not exceeding 50 penalty units for breaching this provision.

There are exceptions where the making of the record, disclosure or communication:

- is necessary for the purposes of the Act; or
- is consented to in writing by the person to whom the information relates.

The prohibition also does not apply to the disclosure or communication of information to a court or tribunal in the course of a legal proceeding or under an order of the court or tribunal, to a legal practitioner for the purpose of obtaining legal advice or representation or as required or authorised by the Act.

Clause 14 Annotation of official criminal records

This clause sets out what is to happen to the records once a charge or conviction has been expunged.

Once a charge has been expunged, the Secretary is required to notify any relevant data controller (i.e., Tasmania Police, the courts, the Director of Public Prosecutions) as soon as possible of the expunging of the charge and any conviction in respect of that charge.

The data controller then has 28 days to annotate any official criminal records under his or her management or control to indicate that the charge or conviction has been expunged and that it is an offence to disclose expunged changes or convictions.

The data controller must notify the Secretary that the annotation has been made as soon as possible after making the annotation and then the Secretary must give written notice of the annotation to the applicant.

Clause 15 Effect of expunging

This clause is a key provision of the Bill. It sets out the effects of an expunged charge or conviction which are as follows:

- an expunged charge or conviction is taken not to form part of the person's official criminal record and is not required to be disclosed – this applies not only to the eligible person but also covers the situation where a person may be asked whether a relative has been charged or convicted;
- a question about the person's criminal history is taken not to refer to an expunged charge or conviction – this includes questions asked under oath in legal proceedings (for example, during a trial);
- a person is not required to disclose his or her expunged charge or conviction to any other person, including when giving evidence in legal proceedings;
- a reference to a charge or conviction in any legislation, agreement or arrangement is taken not to refer to an expunged charge or conviction;
- a reference to a person's character in any legislation, agreement or arrangement is taken not to refer to an expunged charge or conviction;
- an expunged charge or conviction, or the non-disclosure of an expunged charge or conviction is not a proper ground for refusing or revoking any appointment, office, status or privilege held by the person or dismissing the person from any office.

Unlike the *Annulled Convictions Act 2003* where annulled convictions can still be disclosed in certain circumstances such as in working with children checks or other employment checks, expunged charges and convictions are not required to be disclosed in legal proceedings or for any employment or volunteer check.

Clause 16 Disclosure of expunged records

This clause prohibits the unlawful disclosure of expunged charges and convictions by people who have access to official criminal records. There is a penalty of a fine not exceeding 50 penalty units for a breach of this provision.

The clause also provides certain exceptions where disclosure may be appropriate as well as defences to the disclosure.

Clause 17 Improperly obtaining information about expunged convictions

This clause creates an offence for fraudulently or dishonestly obtaining or attempting to obtain information about another person's expunged charge or expunged conviction from an official criminal record. The penalty is a fine not exceeding 50 penalty units.

Clause 18 Determination that charge has ceased to be expunged

This clause allows the Secretary to determine that a charge or conviction ceases to be expunged if the Secretary is satisfied that the charge or conviction was expunged on the basis of false or misleading information or documents. For example, the applicant has submitted false information that the conduct constituting the offence was consensual, when it was not.

Clause 19 Review of decisions

This clause sets out the parties who can seek a review of a decision made by the Secretary and the review process.

The parties who can seek a review are as follows:

- for a decision to refuse an application – the applicant;
- for a decision to approve an application:
  - a data controller;
  - a person who made a submission under clause 8(5) (that is, another party who was involved in the conduct constituting the offence);
- for a determination that a charge or conviction is no longer expunged – the person who applied to have the charge expunged.

Reviews are to be carried out in accordance with the *Magistrates Court (Administrative Appeals Division) Act 2001* with the exception that they are to be held in private.

Clause 20 No entitlement to compensation

This clause makes it clear that there is no entitlement to compensation in relation to an expunged charge or conviction.

The preclusion from compensation also extends to other parties. For example, a person is not entitled to compensation as a result of a relative's expunged charge or conviction.

Clause 21 Royal prerogative of mercy not affected

This clause preserves the royal prerogative of mercy.

The royal prerogative of mercy is the power of the monarch to show mercy to an offender and to redress miscarriages of justice. It is a personal executive power, vested in the sovereign. The prerogative enables the executive to override the final decision of a Court and as such, it is usually

only exercised where no other avenue of redress remains. In Tasmania, the prerogative can only be exercised by the Governor by virtue of section 7(2) of the *Australia Act 1986* (Cth).

Clause 22 — Integrity of official criminal records

This clause clarifies that the Act does not authorise or require the destruction or editing of official criminal records beyond the requirement in clause 14(2) on a data controller to annotate a record to reflect that a conviction has been expunged.

Clause 23 — Prior lawful acts not affected

This clause clarifies that this Act does not affect things that were done lawfully before a charge or conviction was expunged. For example a person will not be in breach of the Act for disclosing a charge or conviction under another Act such as the *Registration to Work with Vulnerable People Act 2013* prior to the charge or conviction being expunged.

Clause 24 — Offence to give false or misleading information

This clause creates offences for knowingly providing false or misleading documents or making false or misleading statements. This could relate to a person lodging an application or to someone answering questions or providing information when requested to do so by the Secretary. It should be noted that the person must have known at the time of providing the information that it was false or misleading for the offence to apply.

The penalty for these offences is a fine not exceeding 30 penalty units.

Clause 25 — Delegation by Secretary

This clause allows the Secretary to delegate his or her functions or powers under the Act.

Clause 26 — Information sharing

This clause clarifies that a person who is a personal information custodian, within the meaning of the *Personal Information Protection Act 2004* (the PIP Act), does not contravene the PIP Act simply by collecting, using, disclosing or otherwise dealing with personal information for the purposes of this Act.

Clause 27 — Infringement notices

This clause allows the Secretary to issue infringement notices for specific offences that are prescribed in the regulations (infringement offences). It sets out the requirements applying to infringement notices, i.e., an infringement notice may not be served on an individual who is under 16 years of age, an infringement notice must be in accordance with section 14 of the *Monetary Penalties Enforcement Act 2005* etc.

Clause 28 — Regulations

This clause is a standard regulation making provision.

Clause 29 Administration of Act

Under this clause, administration of the Act is assigned to the Minister for Justice and the department responsible to that Minister, i.e., the Department of Justice.

Clause 30 Consequential Amendments

This clause provides for consequential amendments as set out in Schedule 1.

Schedule 1 amends the *Anti-Discrimination Act 1998* so that the definition of "irrelevant criminal record" includes an expunged charge or conviction. This means that it will be unlawful under the Anti-Discrimination Act to discriminate against a person in the specified areas of activity (e.g., employment, education, accommodation etc) on the ground of a person's expunged charge or conviction.