

CLAUSE NOTES

Expungement of Historical Offences Amendment Bill 2023

Clause 1	<p>Short Title</p> <p>This specifies the name of the proposed Act.</p>
Clause 2	<p>Commencement</p> <p>This provides that the Act commences on Royal Assent.</p>
Clause 3	<p>Principal Act</p> <p>This provides that the <i>Expungement of Historical Offences Act 2017</i> is referred to as the Principal Act.</p>
Clause 4	<p>Section 3 amended (Interpretation)</p> <p>This clause amends definitions in section 3.</p> <p><u>Paragraph (a) and paragraph (b)</u> omits the words “offence; or” and inserts “related offence.” The variation expands the definition of “historical offence” to allow for the incorporation of “related offence”.</p> <p><u>Paragraph (c)</u> inserts a new definition of “personal information” which is consistent with the definition in the <i>Personal Information Protection Act 2004</i>.</p> <p><u>Paragraph (d)</u> provides for a definition of “related offence” which is defined to include under clause (a) an offence against section 34B of the <i>Police Offences Act 1935</i>, which is an offence relating to resisting, obstructing or assaulting police, and under clause (b) a provision in an Act that has substantially the same effect. The Department of Justice has been unable to locate historical variants of section 34B; however clause (b) has been inserted to ensure if there are any historical variants that they are explicitly included.</p> <p><u>Paragraph (e)</u> provides for a definition of “secondary electronic record”. It is inserted to assist with distinguishing it from ordinary records under the Principal Act; which will be managed differently. The definition is based on the Victorian provision in its expungement scheme. The definition provides that a secondary electronic record is derived from the “official criminal record”, acts as a duplicate, is derived from or is generated from the official criminal record and is in electronic form.</p>

Clause 5

Section 9 amended (Disclosure of records to applicant)

This clause has the effect of omitting the definition of “personal information” and substituting the current definition of “record”.

The definition of “personal information” in section 9 is omitted, as it is no longer required as the definition in section 3 will be applied, making it consistent with the definition in the *Personal Information Protection Act 2004*. This will ensure consistent treatment of personal information across the legislation and ensure any type of information or opinion or in any recorded format is captured.

The original definition of “record” in section 9 is replaced with a new definition of record. The new definition ensures records are only released which are relevant to the offences which are the subject of the application for expungement. The narrower definition ensures the confidentiality of complainants and directly responds to feedback from the Independent Reviewers who were concerned the existing definition had broader application than is necessary or intended.

Clause 6

Section 10 amended (Matters to be considered in determining application)

This clause amends section 10, which sets out the matters to be considered in determining an expungement application.

Paragraph (a) inserts the words “for a homosexual offence or a cross-dressing offence”. These words have been inserted as that part of the section address applications for the expungement of homosexual and cross-dressing offences and not “related offence” applications. This amendment was needed as there is a slightly different process for “related offences” which is outlined in paragraph (b) of the clause.

Paragraph (b) provides for the matters the Secretary is to consider when determining whether to expunge a charge for a related offence. In determining an expungement, the new clause requires the Secretary of the Department of Justice, to be satisfied on reasonable grounds, after considering advice from the Commissioner of Police in relation to the circumstances of the related offence, that the offence which the eligible person was charged is a related offence, that the eligible person would not have been charged with the related offence but for the fact that the eligible person was suspected of committing a homosexual offence or cross-dressing offence and expunging the charge is not contrary to the public interest.

Paragraph (c) provides for an amendment to section 10(3)(c) of the Principal Act. The amendment omits the words “by the applicant” and substitutes “by the Secretary”. The amendment will ensure when determining an application for expungement, where the consent of the

person to the conduct is in issue, the Secretary (not the applicant) will make reasonable enquiries to locate the other person involved. The change arises from the Independent Reviewers feedback in relation to confidentiality. The provision will prevent situations where the victim of a non-consensual act is looked for by the perpetrator of an offence, causing distress to the victim.

Clause 7 Section 12 amended (Determination of application)

This clause amends section 12 of the Principal Act by making amendments that will result in unsuccessful expungement applicants receiving relevant records “except so far as those records contain information relating to a person other than the eligible person”. The amendments provide for additional privacy protections as the applicant will now only receive personal information relating to the eligible person, not third party’s information, when the record is disclosed. This directly responds to the Independent Reviewer’s recommendation.

Clause 8 Section 15 amended (Removal or annotation of official criminal records)

Clause 15 sets out what is to happen to the records once a charge or conviction has been expunged. This clause amends section 15 of the Act by omitting and inserting clauses regarding when and how the data controller must annotate or remove official criminal records when a charge is successfully expunged under the Act. The current section annotates an entry about an expunged charge and does not distinguish between the treatment of ordinary records and secondary electronic records. The amendments clarifies that ordinary records and secondary electronic records are treated differently.

Under the clause, once a charge has been expunged in the case of a second electronic record, the data controller has 28 days to have the affected secondary electronic records either erased or removed, de-identified from the secondary electronic record that identifies the person whose charge was expunged or have any link between the secondary electronic record and data that could potentially identify the person whose charge was expunged removed. This will minimise the number of records which refer to an expunged conviction, thereby decreasing the risk of unintentional or accidental disclosure. The Bill also provides for an exception to this process that will allow the expungement for secondary electronic records to be applied for ordinary records where it is not possible to permanently delete records due to technical limitations.

In the case of official criminal records to be expunged, the data controller has 28 days to annotate the official criminal record under their management or control to indicate that the charge or conviction has been expunged and

with a notation that is an offence to disclose expunged charges or convictions.

The data controller must notify the Secretary of any action taken as soon as possible after the action is taken.

Clause 9 Section 28A inserted (Exemption from *Right to Information Act 2009* in certain circumstances)

This new clause provides that the *Right to Information Act 2009* does not apply to information in the possession of a relevant person, as defined for the purposes of this section, unless the information relates to the administration of a public authority within the meaning of this Act.

The clause was proposed by the independent reviewers of the Act, who noted that in the investigation and determination of applications there was the creation of secondary documents that contain sensitive, private and confidential information.

The exemption safeguards the confidentiality of a person's expunged charge or conviction if a Right to Information application arises.

Clause 10 Repeal of Act

This automatically repeals the amending legislation after the first anniversary of the day on which it commenced, as the amendments will be incorporated into the Principal Act.