DRAFT SECOND READING SPEECH

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Expungement of Historical Offences Amendment Bill 2024

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Honourable Speaker, I move that the Bill now be read a second time.

The Bill demonstrates our Government's commitment to respond to the *Independent Review of Expungement of Historical Offences Act* 2017.

The statutory review was conducted in accordance with the requirements of the Act, undertaken by Independent Reviewers Ms Melanie Bartlett and Ms Taya Ketelaar-Jones. I wish to thank and acknowledge their work reviewing the expungement scheme established under the Act and for making the recommendations our Government are now responding to.

Honourable Speaker, the Final Report of the Independent Review outlines 13 recommendations.

The recommended legislative amendments are addressed in this Bill, which will expand the operation and administration of the Act to include related offences, further support a victim centred approach to investigations, improve measures to support effective record disposal, and improve the confidentiality of records for all parties.

The Review also made a number of recommendations that did not require legislative amendment. However, I can confirm that our Government has completed, or is continuing to implement through the Department of Justice, to ensure a more streamlined process and ensure greater promotion of the Scheme.

Accordingly, our Government has committed to implement all recommendations made by the Independent Reviewers, with the exception of the proposal to establish a one-off ex-gratia payment for applicants who have their charges and convictions expunged; for the reasons that I will outline later in my contribution.

It is important to state up front that there has been very little uptake by members of the community who would be eligible for expungement, with only a small number of applications made since the scheme came into force in 2018.

While I will also go into this in more detail, it is also prudent to reflect on the comments made by the Independent Reviews that this fact in and of itself does not indicate

fundamental issues with the scheme, but rather partly a consequence of the relatively low number of persons with convictions in Tasmania. It is also demonstrative of the fact that many of these convictions occurred in the 1970's, with the last recorded prosecution in 1984, meaning that many people who may have been eligible, may no longer be alive.

It is also important to note that not every convicted person will want an investigation into the history of their conviction. There is a need to respect the privacy of those who choose, for whatever reason, not to pursue the option of having a conviction expunged.

Honourable Speaker, I will now address the substantive clauses of the Bill.

Clause 4 of the Bill makes a number of amendments to the definitions or interpretation section, including:

- amends the definition of "historical offence" to include a "related offence";
- inserts a definition of "personal information" to make it consistent with the *Personal Information Protection Act 2004;*
- inserts a definition of "related offence" to include offences against section 34B offences or substantially similar provisions in other Acts; and
- inserts a definition of "secondary electronic record" to assist with delivering the intent of the review to only retain records, which are necessary for historical purposes.

Clause 5 of the Bill amends section 9 of the Principal Act, which deals with the disclosure of records to the applicant.

The clause omits the definition of personal information in the current section, which is inconsistent with the definition in the *Personal Information Protection Act 2004,* and provides for a narrower definition of record.

This definitional change accords with the Reviewer's recommendation to ensure the Secretary doesn't inadvertently provide the applicant a third party's personal information.

The Principal Act currently 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.

Under the Bill the definition of historical offence has been expanded to also include a "related offence".

Honourable Speaker, Clause 6 of the Bill amends section 10, which deals with the matters to be considered in determining an application.

The first change being made to that section reflects that "related offences" can now be expunged.

The Bill provides that related offences are those that include charges or convictions for resisting, obstructing or assaulting police under section 34B of the *Police Offences Act 1935*, or offences that are substantially similar in other Acts.

The Bill further provides that related offences will only be eligible for expungement in situations where that the person would not have been charged with the related offence but for the fact they were suspected of committing a homosexual or cross-dressing offence, and expunging the charge is not contrary to the public interest.

The Bill provides that decisions regarding related offences will require the Secretary of the Department of Justice to be satisfied, on reasonable grounds, that the requirements for expungement are met. This will include receiving advice from the Commissioner of Police in relation to the circumstances of the related offence.

Honourable Speaker, there is a further small but important change to section 10, to address one of the recommendations in the Independent Review.

The Bill provides that in determining a historical offence expungement application, the reasonable enquiries that may be necessary to make to identify the location of the other party, are to be made by the Secretary.

This amendment means that it will be the Secretary, not the applicant, who will make reasonable enquiries to locate the other party to verify facts or seek consent.

Currently, section 10 provides for the matters the Secretary is to consider when determining an application for expungement. This section provides that the Secretary must not decide to expunge a charge unless satisfied that the conduct constituting the homosexual offence would not constitute an offence under Tasmanian law at the time of making the application.

In determining whether conduct would be an offence at the time of making the application, the Secretary is required to have regard to the issue of consent and the age of the parties. If consent is an issue in the decision to expunge, the Secretary may only be satisfied by written evidence from three alternative sources.

The first is the official criminal records, if available. The second is from the other person involved in the conduct, and thirdly, if that person is not able to be found after

reasonable enquires are made by the applicant, then from another person with knowledge of the circumstances in which the conduct occurred.

In circumstances where the Secretary cannot be satisfied on the basis of official criminal records, the name of the other person or persons involved becomes a necessary part of the investigative procedure.

The issue is that the Secretary does not currently have the power to locate the other persons or relevant third parties to seek their consent to use this evidence, and it falls to the applicant to make reasonable enquiries to locate them. The Independent Reviewers note that this may give rise to victim-survivors of non-consensual acts being contacted and searched for by perpetrators of historical offences, resulting in significant distress to the victim.

The amendment addresses the concerns raised by the Reviewers, in allowing the Secretary to instead make the location enquiries for third parties.

Honourable Speaker clause 7 of the Bill amends section 12 of the Act, which provides that the Secretary must provide an applicant with "a copy of any relevant records relating to the application" when explaining the reasons for intending to refuse an application.

The proposed change in the Bill will have the effect that when unsuccessful applicants receive refusal reasons and relevant records relating to the application, information will only relate to their personal information, and not that of third parties.

Clause 8 of the Bill amends section 15 of the Bill. Section 15 sets out what is to happen once a charge or conviction has been expunged and provides for a process for annotating records.

The Independent Reviewers recognised the benefits of treating secondary records different to ordinary records.

Therefore, the Bill amends section 15 to provide that when a record is expunged, secondary electronic records will not be annotated, as is the case for ordinary records, but instead permanently removed.

The Bill also allows for an exception that will allow the process of expungement for secondary electronic records where it is not possible to permanently delete records due to technical limitations. These changes will minimise the number of records which refer to an expunged conviction, thereby decreasing the risk of unintentional or accidental disclosure.

Honourable Speaker, clause 9 of the Bill creates a new section 28A, which responds to the Reviewers' recommendation that the Act requires an amendment to provide that any records, documents or material that has been collected or created in the investigation and determination of an application for expungement, are to be exempt from the application of the *Right to Information Act 2009.*

This recommendation was made to ensure the confidentiality of records created in the assessment of applications, and to ensure that they are not disclosed as part of an information request under that Act.

Honourable Speaker as I indicated earlier, I will now explain the Government's position regarding the only legislative recommendation made by the Independent Reviewers to which our Government has not accepted; that being Recommendation 13 regarding the proposal to establish an automatic statutory ex-gratia process for successful expungements.

The Review provides that a one-off fixed-amount ex-gratia payment scheme could be introduced for successful expungement applications. The proposed payment scheme was for a two-tiered system, distinguishing between applicants who have had charges or offences recorded on their criminal record, and those who have not.

While the Government acknowledges the observations made by the Reviewers in their Report, it is not considered appropriate to introduce a complex payment scheme that would have the effect of being discriminatory in its application (by the very nature of a two-tiered system).

The Government, and indeed the Parliament, has previously considered the issue of compensation at length and it is considered that a fixed amount compensation or redress scheme is not appropriate or justified as there are existing compensation avenues available.

It is important to note that the Act in section 22 specifically states that a successful expungement of a charge or offence does not create an entitlement to compensation for financial redress.

But this does not suggest that redressing past wrongs is not provided for under the scheme.

By its very nature, the Act and scheme itself provides the mechanism to extinguish past convictions and expunge the criminal record of those whose past behaviour is no longer criminal. Therefore the role of this scheme is to redress past wrongs and address ongoing issues of discrimination and harm.

While some stakeholders and the Independent Reviewers have referred to different financial redress schemes that have been enacted by various Governments in jurisdictions across Australia, for example the national and state-based schemes relating to child sexual abuse in institutional settings, there are no financial redress or compensatory schemes in place in any Australian jurisdiction with expungement schemes.

Victoria, Northern Territory, Western Australia, Queensland and New Zealand all have provisions drafted similarly to Tasmania which provides that a person who has a conviction or charge expunged is not entitled to compensation on account of that conviction or charge being expunged. New South Wales, South Australia and the Australian Capital Territory's expungement legislation does not address compensation at all in their legislation.

All the Australian jurisdictions, like New Zealand, therefore reflect the general principle that convictions for offences that are later repealed does not give rise to a right to compensation.

We are aware the people convicted of these offences may have suffered harm as a result of their convictions, and we acknowledge the concerns raised. However, the redress provided is in the form of expungement of the charge. A default payment to every successful applicant goes beyond the purpose of the Expungement of Historical Offences Act, and indeed every expungement scheme in Australia, which is to prevent further negative effects from the stigma of repealed convictions.

Our Government has considered the data for the expungement applications to date. In the five years since the scheme's operation there have been 14 applications for expungement under the scheme. Thirteen applications were for offences that were outside the scope of the Act.

One application was within scope of the Act, but not eligible for expungement due to the circumstances of the case, and the application was refused by the Secretary in 2020.

The thirteen applications outside the scope of the Act were seeking expungement for offences such as driving with illicit substance present in the blood, offences relating to the drug possession and supply, common assault, dishonesty offences and offences relating to the keeping of the peace.

While this is a very important scheme, it does cater for a very small number of people. It is uncertain how many persons are still alive who may wish to seek expungement of historical sexual offences.

The Independent Reviewer's report noted data that 96 people were convicted of homosexual offences, with no relevant prosecutions after 1984. This leaves the bulk of convictions occurring before the late 1970s. Many of those people will of course now be elderly or have passed away.

This may well reflect why we have only had one application to date that is within scope of the Scheme. It is our hope that the further promotion of the Scheme that is being planned will lead to further applications, but these may be very few.

As I stated earlier in my contribution, not all people with these charges will be interested in having them expunged.

As discussed when the scheme was first introduced, the mechanism for those who wish to seek financial compensation that best suits the scheme is the ex-gratia payment system that is already available under section 55 of the *Financial Management Act 2016.*

Under that provision, the Treasurer can, if satisfied that it is appropriate because of special circumstances, authorise an amount to be paid to a person even though the payment would not otherwise be authorised by law.

Due to the potential complexity of the expungement assessment process, including the large degree of variance with the individual circumstances of applicants, it is considered that this process remains the best mechanism available to those seeking financial redress, as it allows for the Treasurer to determine the application based on the demonstrated special circumstances.

Consequently, our Government has not proposed changes in the Bill to allow for a separate statutory compensation or financial redress payment to be made under the expungement regime. Given the low numbers of applications, the administrative cost of setting up a separate compensation scheme, it is simply not justified.

Honourable Speaker, it is considered by our Government that Bill appropriately responds to the recommendations of the Independent Review, which has received considerable support by stakeholders and the community as part of the public consultation processes conducted seeking feedback on the draft Bill.

This Bill contains important changes and we will continue to update the legislation where necessary to ensure it is consistent with our community's expectations and contemporary legislative processes.

It will improve the Expungement of Historical Offences Scheme to provide better support to affected persons whilst ensuring only relevant and appropriate convictions are expunged.

Honourable Speaker, I commend the Bill to the House.