

# Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017

## Explanatory Notes

### Short title

The short title of the Bill is the Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017.

### Policy objectives and the reasons for them

The objective of the Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017 (the Bill) is to establish an administrative scheme for the expungement, upon application, of convictions or charges for particular historical offences involving homosexual activity.

During the 2015 State general election campaign, the Queensland Government expressed in-principle support for an expungement scheme for criminal records for historical homosexual activity between consenting adults. However, recognising that the expungement of convictions from a person's criminal history is a significant step requiring full consideration of the inherent complexities connected with such reform, especially given the wide scope of the conduct captured by the relevant historical Criminal Code offences, the Government committed to having the Queensland Law Reform Commission (QLRC) examine the issue of an expungement scheme in Queensland.

Consensual adult male homosexual activity ceased to be a criminal offence in Queensland on 19 January 1991 when the relevant Criminal Code offences were repealed by the *Criminal Code and Another Act Amendment Act 1990* and new provisions relating to unlawful anal intercourse were enacted. The focus of the reforms was on sexual activity between consenting adults in private. The preamble introducing the amendments acknowledged that the private and voluntary acts of adults is not a matter of concern for the criminal justice system.

Prior to decriminalisation, the main offences relating to homosexual activity were in sections 208(1) and (3), 209 and 211 of the Criminal Code (the historical Criminal Code offences). Under sections 208(1) and (3) (Unnatural offences), and 209 (Attempt to commit unnatural offences), it was a crime for a person to have (or attempt to have) carnal knowledge of another person, or permit a male to have carnal knowledge with him or her, '*against the order of nature*' (i.e. anal intercourse). These offences prohibited absolutely two males (or a male and female) from engaging in anal intercourse. Section 211 (Indecent practices between men) made it a misdemeanour for a male, whether in public or private, to commit any act of '*gross indecency*' with another male.

This offence covered sexual activity, other than anal intercourse between two males, regardless of participants' ages, issues of consent or whether it occurred privately. It was also an offence to attempt or conspire to commit, or to enable, aid, counsel or procure another to commit any of those offences.

Anecdotal evidence also suggests that historically, homosexual and gender non-conforming activity was sometimes prosecuted using public order offences contained in the now repealed *Vagrants, Gaming and Other Offence Act 1931* (Qld) and section 227(1) of the Criminal Code.

Despite decriminalisation, there has been recognition in Australia and elsewhere that this reform fails to address the stigma and shame a criminal conviction for consensual adult homosexual activity carries. There are various circumstances where convictions (or charges) are required to be disclosed, particularly in relation to employment. The existence of a conviction may also prevent civic participation, for example in Queensland, a person convicted of an indictable offence is not eligible for jury service.

This resulted in calls for law reform to allow for the expungement of such convictions, that is, providing in law for the conviction to be removed from a person's criminal history and not disclosable. A growing number of Australian jurisdictions have recently enacted expungement scheme legislation in this context.

### **Queensland Law Reform Commission Report**

On 29 November 2016, the QLRC's report, '*Expunging criminal convictions for historical gay sex offences*' (No. 74) (the Report) was tabled in the Legislative Assembly. The Report recommended the creation of a new legislative expungement framework in Queensland to allow for the expungement, on application, of convictions (or charges) for historical Criminal Code offences from a person's criminal history in certain circumstances.

The Bill largely implements the QLRC's recommendations contained in the Report, however there are some aspects which depart from the Report's recommendations.

Although not recommended by the QLRC, certain historical 'public morality' type offences (i.e. offences designed to prevent disorderly, offensive or indecent behaviour in public) in force before 19 January 1991 under the repealed *Vagrants Gaming and Other Offences Act 1931* and section 227(1) of the Criminal Code are also included as eligible offences in the Bill. This recognises that prior to decriminalisation homosexual activity was prosecuted beyond the repealed historical Criminal Code offences.

Further, the criteria for expunging the historical Criminal Code male homosexual offences differs from the QLRC recommendation in two significant respects:

- it requires the decision-maker to be satisfied that the other person who engaged in the act or omission was an adult at the time the offence was committed or alleged to have been committed; and
- it does not require the decision-maker to be satisfied that the offence was not committed, or not alleged to have been committed, in a place to which the public are permitted to have access.

Limiting the scheme to conduct involving consenting adults ensures equity between individuals who have been convicted of offences after 1991 and maintains the nexus between the proposed expungement scheme and decriminalisation. It is also an acknowledgment that the age of consent has changed over the years in accordance with changing societal values and expectations, but it is not the case, for example, that a person convicted of sexual intercourse with a 16 year old female prior to the age of consent reducing from 17 years to 16 years in 1976 for all sexual activity other than anal intercourse is able to apply to have their conviction expunged.

Rather than require a decision-maker to be satisfied that an offence was not committed or alleged to have been committed in public, the Bill requires the decision-maker to be satisfied that the act or omission constituting the offence, if done at the time of the application, would not constitute an offence under the law of Queensland at the time the application is made. Queensland's current laws prohibit indecent and offensive conduct in public places (for example, see the current offences at section 227 of the Criminal Code (Indecent Acts) and section 9 of the *Summary Offences Act 2005* (Wilful Exposure)).

## **Achievement of policy objectives**

The Bill will achieve its policy objective of establishing an expungement scheme in Queensland. The key features of the expungement scheme in the Bill are:

### ***Creation of an administrative scheme for the processing of expungement applications***

The Bill creates an administrative scheme which allows for expungement applications for certain historical eligible offences to be made, and decided by, the Director-General (or delegated to an appropriately qualified senior officer) of the Department of Justice and Attorney-General (the decision-maker) on a case by case basis. Consistent with the administrative nature of the scheme, the Bill expressly provides that no oral hearing may be held with respect to an application for expungement.

The Bill provides that persons making an application for expungement must do so in accordance with an approved form and that the decision-maker can request further information from the applicant. The Bill allows the decision-maker to ask an applicant to verify by statutory declaration any information they have given to the decision-maker.

### ***Compensation will not be available as a result of expungement***

The Bill expressly provides that a person is not entitled to compensation of any kind on the basis that a conviction or charge has become expunged.

### ***Applications for expungement can be made posthumously and in some circumstances can be made by a guardian or another representative***

The Bill provides that an 'eligible person' is a person who was convicted or charged with an 'eligible offence' (see below) before 19 January 1991. The Bill allows an eligible person to make an application for expungement but also provides for alternative applicants in the case of eligible persons who have died after 19 January 1991 and adults

with impaired capacity. For eligible persons who have died after 19 January 1991 an application may be made by a personal representative, spouse, parent, adult child or sibling of the eligible person or a person who was in a close personal relationship with the eligible person shortly before their death.

Applications for eligible persons with impaired capacity can be made by a hierarchy of legal entities. If the eligible person is an adult with impaired capacity, the eligible person's guardian may apply on behalf of the eligible person. If the eligible person with an impaired capacity does not have a guardian, an attorney under an enduring power of attorney may apply on behalf of the eligible person. Finally, if the eligible person with an impaired capacity does not have a guardian or has not appointed an attorney under an enduring power of attorney, a member of the eligible person's support network or another person approved by the decision-maker may apply on their behalf.

***Prescription of certain offences as being eligible for expungement***

The Bill specifically prescribes three classes of offences that are 'eligible offences' for the purpose of the expungement scheme:

- Criminal Code male homosexual offences – sections 201(1)(3), 209 and 211 of the Criminal Code as in force before 19 January 1991 (including any offence of attempting, conspiring, counselling or procuring one of those offences);
- Public morality offences - sections 5(1)(b) or 7(e) of the *Vagrants, Gaming and Other Offences Act 1931* and section 227(1) of the Criminal Code as in force before 19 January 1991 (including any offence of attempting, conspiring, counselling or procuring one of those offences); and
- Another offence prescribed by regulation – the Bill provides that further offences can be prescribed by regulation to the extent that they happened or allegedly happened, before 19 January 1991 and involved homosexual activity.

***Specific criteria for the decision-maker depending on the type of eligible offence***

The Bill sets out specific criteria against which the decision-maker needs to be satisfied of, on the balance of probabilities, in order to decide to expunge a conviction or charge for an eligible offence.

The Bill provides for different criteria depending on the type of eligible offence.

In deciding an application for a Criminal Code male homosexual offence the decision-maker must be satisfied on the balance of probabilities that:

- the other person who engaged, or was alleged to have engaged in the act or omission constituting the offence consented to the act or omission;
- the other persons was 18 years or older at the time the offence was committed, or was alleged to have been committed: and

- that the act or omission constituting the offence, if done by the eligible person at the time the application was made, would not constitute an offence under the law of Queensland.

In deciding an application for a public morality offence the decision-maker must be satisfied on the balance of probabilities that:

- the offence involved homosexual activity; and
- the act or omission constituting the offence, if done by an eligible person at the time the application was made, would not constitute an offence under the law of Queensland.

For offences that are prescribed by regulation, the criteria that the decision-maker must be satisfied of will also be prescribed by regulation.

### *Provision for a review of the expungement decision*

The Bill provides that a person may seek a review of a decision to refuse an application for expungement to the Queensland Civil and Administrative Tribunal (QCAT).

The Bill also allows an applicant to make a subsequent expungement application with respect to an eligible offence in circumstances where the decision-maker is satisfied that evidence has become available to the applicant that was not available, or could not with reasonable diligence have been made available, to the applicant before the decision-maker made the decision to refuse the application for expungement.

### *Consequences of expungement*

The Bill allows for certain consequences to follow the expungement of a conviction or charge, for example, it will be lawful for a person to claim that the person was not convicted of the charge, and the person will not be required to disclose information about the conviction or charge. Further, the Bill requires public record holders to annotate relevant public records by making any necessary changes to indicate that a conviction or charge is expunged.

The Bill does not require the destruction of any public records.

### *Safeguards to protect the integrity of the scheme*

The integrity of the expungement scheme in the Bill is safeguarded by providing for the revival of a conviction or charge in circumstances where expungement was based on false or misleading information; and requiring the noting of any such revival on relevant records.

## **Alternative ways of achieving policy objectives**

There are no alternative ways of achieving the policy objectives other than through legislative amendment.

## Estimated cost for government implementation

It is anticipated that costs arising from these legislative amendments will be met from existing agency resources.

## Consistency with fundamental legislative principles

The Bill is generally consistent with fundamental legislative principles. Potential breaches of fundamental legislative principles are addressed below.

Legislation has sufficient regard to the rights and liberties of individuals (section 4(2)(a) Legislative Standards Act 1992) – creation of new offences in clauses 26, 27, 39 and 40

The creation of new offences potentially breach the fundamental legislative principle that legislation has sufficient regard to the rights and liberties of individuals as they impose a penalty upon the person for a breach of the provision.

### *Disclosing information from public records about expunged convictions or charges*

The Bill creates a new offence in relation to the unlawful disclosure of information in a public record about an expunged conviction or charge in certain specified circumstances.

The QLRC in its Report recommended the need for this type of offence (recommendations 5-6), stating such an offence is warranted in order to enforce the protections against disclosure provided by expungement and to strengthen the overall reparative aims of the scheme, given its general purpose. Further, the offence is necessary as the Bill does not authorise the destruction or deletion of information about an expunged conviction or expunged charge from a public record. Any potential breach is justified on this basis.

The new offence does not apply in certain stipulated instances, such as where disclosure of information is necessary to performing a function under the Bill or if there is a reasonable excuse.

The maximum penalty for the offence is 100 penalty units. This penalty is equivalent to the penalty amount imposed under the *Criminal Law (Rehabilitation of Offenders) Act 1986* for similar conduct.

### *Dishonestly obtaining information from public records about expunged convictions or charges*

The Bill creates a new offence prohibiting a person from dishonestly obtaining, or attempting to obtain information about an expunged conviction or charge from a public record. The new offence carries a maximum penalty of 100 penalty units. As noted above, the penalty is equivalent to provisions for similar conduct in existing Queensland legislation and is consistent with proposed penalties for offences of similar conduct contained in the Bill.

The QLRC also recommended the creation of such an offence (recommendations 5-7) on the basis the information is highly sensitive and should be protected from inappropriate access. Criminal sanction is warranted in order to afford its protection and bolster the overall purpose and effects of expungement and consequently, any potential breach if justified.

*False or misleading information*

The Bill creates a new offence of giving to the decision-maker information the person knows is false or misleading. The new offence carries a maximum penalty of 100 penalty units.

While it is acknowledged that the decision-maker may request the applicant or another person or entity to verify information by statutory declaration (noting the making of a false verified statement is a serious criminal offence carrying seven years imprisonment under section 193 of the Criminal Code), this requirement is discretionary. The making of such an offence is justified in order to ensure the integrity of the expungement scheme by providing appropriate deterrence for this conduct. The proposed penalty is consistent with like provisions in other legislation, for example sections 138 and 139 of the *Public Guardian Act 2014*.

*Confidentiality of information*

The Bill creates a new offence providing that a person must not disclose or give access to confidential information acquired, or gained, through involvement in the administration of the expungement scheme. The new offence carries a maximum penalty of 100 penalty units.

The offence recognises that information relevant to, or provided for, the purposes of expungement decisions is often highly sensitive in nature. The introduction of the offence is justified so as to ensure that the release of confidential information is contained (except in limited specified circumstances such as allowing for disclosure in performing functions under the Bill), therefore protecting the privacy of applicants for expungement. Again, the new offence provision is further justified as it both underscores and bolsters the general purpose of the expungement scheme.

The maximum penalty for the proposed offence is consistent with like provisions in other legislation, for example, section 172 of the *Public Service Act 2008*.

Legislation has sufficient regard to the rights and liberties of individuals (section 4(2)(a) *Legislative Standards Act 1992*) – ability of decision-maker to obtain information and privacy.

Clauses 12 and 15 of the Bill allow the decision-maker and defined criminal record holders (see Schedule 1) to exchange information about an eligible person the subject of an expungement application.

The need to obtain information about a conviction or charge proposed to be expunged is necessary to verify the existence of the eligible offence and decide the application, particularly in considering the criteria for expungement. The ability to obtain such

records is further required to ensure the integrity of expungement decisions, given the significance of making of such a decision. Any potential breach is justified on this basis and further mitigated by the special measures provided to accommodate any privacy concerns.

While the information provided may include confidential information, the Bill contains a number of safeguards in relation to privacy concerns, including, for example, that disclosure is initially limited to the criminal record holders. The Bill also creates a new offence in relation to ensuring the confidentiality of information (with a maximum penalty of 100 penalty units).

In addition, under clause 16 of the Bill, the decision-maker may only request information from another person (i.e. other than the applicant) or entity (i.e. other than a criminal record holder) that is reasonably required to decide the application and only with the written consent of the applicant. There is no requirement that the person to whom any request is made must respond to a request. This further strikes a balance between obtaining relevant information and confidentiality and privacy concerns.

Legislation has sufficient regard to the rights and liberties of individuals (section 4(3)(d) *Legislative Standards Act 1992*) – authorising certain matters to be proved by way of evidentiary certificate in *clause 37*

The Bill provides that in relation to proceedings under the expungement scheme, such as reviews of certain decisions before the Queensland Civil and Administrative Tribunal, a certificate signed by the decision-maker stating any of the prescribed matters is evidence of that matter.

Provisions relating to evidentiary certificates have been considered to potentially breach the principle that legislation does not reverse the onus of proof in criminal proceedings without adequate justification. Former Scrutiny of Legislation Committees have considered these types of provisions affect the onus of proof in a general sense by relieving a party to the proceeding of having to prove a matter it would otherwise be obliged to prove and expressed the view such provisions should be limited to technical and non-contentious matters. The matters proposed to be included in the evidentiary certificate come within this category.

Evidentiary aids such as these also benefit the administration of justice by potentially saving time and costs rather than requiring witnesses to appear and give evidence, particularly for non-contentious matters.

Legislation has sufficient regard to the institution of Parliament (sections 4(4)(a) and 4(4)(c) *Legislative Standards Act 1992*) – prescribing eligible offences, and criteria, by regulation in *clauses 8 and 20*

Under clause 8 of the Bill, the ‘eligible offence’ definition allows for the making of a regulation to extend the offences (albeit limited by stipulated requirements) capable of being expunged under the proposed scheme. As a consequence, clause 20 of the Bill allows a regulation to prescribe appropriate criteria with which the decision-maker must be satisfied before deciding to expunge a conviction or charge under the scheme. The

net effect is that both the offence and the criteria for deciding whether to expunge the conviction or charge of the offence may be prescribed by regulation.

The express ability to amend the Act by regulation in this way (a ‘Henry VIII’ clause) may have the potential to breach the principle that legislation has sufficient regard to the institution of Parliament. The clause may also raise the related fundamental legislative principle about the appropriateness of the delegation of legislative power, as the effect of the provision is that an entity other than Parliament has the power to change the application of the legislation.

However, any potential breach is considered justified in this instance based on the following grounds. The QLRC in its Report recommended providing for the flexibility to extend the ‘eligible offences’ to which the expungement scheme applies by allowing for other historical offences (possibly not identified) to be prescribed by regulation (recommendation 3-1). However, in order to appropriately limit the scheme, any such eligible offences prescribed by regulation should be restricted to conduct occurring before the date of decriminalisation (19 January 1991) and only to the extent the offence was constituted by a person engaging in same-sex sexual activity. Clauses 8 and 20 contain these limitations.

The type of Henry VIII clauses proposed under the Bill might be considered of less significant concern given that the expungement scheme is intended to be beneficial in nature and the Bill provides some limitations on the types of offences that may be prescribed. It is also noted that the regulation prescribing the additional eligible offences would be subject to disallowance. In relation to the appropriateness of the delegation of legislative power, it is noted that the power is delegated to the Governor in Council.

## **Consultation**

On 2 December 2016, a consultation draft of the Bill with a request for feedback by 27 January 2017 was sent to the following key legal and community stakeholders: Anti-Discrimination Commission Queensland; Australian Lawyers for Human Rights; Bar Association of Queensland; LGBTI Legal Service; Community Legal Centres Queensland; Parents and Friends of Lesbians and Gays – Queensland; Queensland Law Society; Human Rights Law Centre; Queensland Council for Civil Liberties; Legal Aid Queensland; Mr Robbie Katter, Member for Mount Isa; Mr Peter Wellington, Member for Nicklin; Shadow Attorney General; TC Beirne School of Law, University of Queensland; Caxton Legal Centre Inc.; Civil Liberties Australia Inc.; The Queensland AIDS Council; Director of Public Prosecutions (Qld); Griffith Criminology Institute and the Townsville Community Legal Service Inc.

Stakeholders were invited to provide their comments on the consultation draft and those comments were taken into account in further drafting.

## **Consistency with legislation of other jurisdictions**

The Bill is specific to the State of Queensland and is not uniform with, or complementary to, legislation of the Commonwealth or another State.

While the Bill is not intended to achieve uniformity with laws in other jurisdictions, the QLRC, in making its recommendations, considered expungement scheme legislation operating (and proposed) in Australia and certain other international jurisdictions.

## Notes on provisions

### Part 1 Preliminary

#### Division 1 introduction

*Clause 1* states that, when enacted, the Bill will be cited as the *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017*.

*Clause 2* provides for the commencement of the Bill on a day to be fixed by proclamation.

*Clause 3* provides the purpose of the Bill is to establish an administrative expungement scheme for particular offences involving homosexual activity prior to 19 January 1991. To the extent provided in the Bill, if a person's conviction or charge for an offence is expunged, the person is to be treated in law as if the person had not been convicted of, or charged with, the offence.

*Clause 4* provides that the Bill binds all persons, including the State and, as far as the legislative power of the Parliament permits, the Commonwealth and other States. However, it does not make the State or other jurisdictions liable to be prosecuted for an offence.

*Clause 5* provides that no provisions of the Bill affect anything lawfully done before a conviction or charge is expunged. Subsection (2) makes clear a person who has a conviction or charge expunged is not entitled to compensation of any kind on account of the conviction or charge becoming expunged.

#### Division 2 Interpretation

*Clause 6* provides that the Dictionary in Schedule 1 defines particular words used in the Bill.

*Clause 7* defines the term *eligible person* as a person who has been convicted of, or charged with, an eligible offence before 19 January 1991.

*Clause 8* defines the term *eligible offence* to mean a Criminal Code male homosexual offence; or a public morality offence; or another offence prescribed by regulation. Subsection (2) provides that an eligible offence prescribed by regulation is limited to an offence that happened, or is alleged to have happened, before 19 January 1991.

*Clause 9* defines a *Criminal Code male homosexual offence* for the purposes of the Bill as prescribed offences set out in this clause and as in force before 19 January 1991. Prescribed offences are: the offence against section 208(1) (carnal knowledge of any person against the order of nature) other than to the extent the offence involved heterosexual activity; 208(3) (permitting a male person to have carnal knowledge of him or her against the order of nature) other than to the extent the offence involved heterosexual activity; 209 (Attempt to commit unnatural offences) to the extent the offence involved an attempt to commit an offence mentioned in subparagraph (i); and 211 (indecent practices between males). Offences for attempting or conspiring to commit these offences or counselling or procuring another person to commit these offences are also included within the definition of a *Criminal Code male homosexual offence*.

*Clause 10* defines a *public morality offence* for the purposes of the Bill as prescribed offences in force prior to 19 January 1991. A public morality offence is an offence against sections 5(1)(b) (Soliciting for an immoral purpose) and 7(e) (behaving in an indecent or offensive manner) of the repealed *Vagrants, Gaming and Other Offences Act 1931* or section 227(1) (Indecent Acts) of the Criminal Code.

## **Part 2 Application for conviction or charge to be expunged**

*Clause 11* provides that an eligible person may apply to the chief executive for a charge or conviction to be expunged and provides for categories of other entities to apply on behalf of an eligible person in limited circumstances.

Subsection (2) provides a hierarchy of entities who may apply on behalf of an eligible person with an impaired capacity.

Subsection (3) provides the framework for individuals to apply to the chief executive to expunge a conviction or charge of an eligible offence on behalf of deceased eligible persons. The expungement of convictions and charges for eligible offences on behalf of eligible persons under subsection (3) is limited to applications on behalf of individuals who deceased after 19 January 1991.

Subsection (4) provides definition of key terms for the purpose of this clause.

*Clause 12* details the minimum requirements for an application to expunge a conviction or charge for an eligible offence. The application must be in the approved form and include particulars relevant to each conviction or charge included in the application. This clause does not contemplate the applicant being required to undertake extensive enquiries to locate information and documents relevant to the charge. Rather, the information is only required to the extent it is available to the applicant. It is intended that the application elicits enough information to enable a search of the relevant records, to enable the chief executive the opportunity to make a fully informed decision.

Subsection (2) provides for key pieces of information that must accompany an application. Subsection (3) allows an application to be accompanied by any other information or document the applicant reasonably considers may help the chief executive in deciding whether to expunge a conviction or charge. Subsection (4) provides that application may relate to more than one conviction or charge of an eligible

person for an eligible offence. Subsection (5) provides definitions of key terms for the purpose of this clause.

*Clause 13* provides that an applicant may withdraw an application at any time prior to being provided a notice of decision under clause 22 of the Bill. The applicant may withdraw the application in its entirety, or limit the withdrawal to one particular charge or conviction.

*Clause 14* provides the chief executive may, by written notice to the applicant, request further information or a document the chief executive reasonably requires to decide whether to expunge a conviction or charge and may request such information to be verified by statutory declaration.

Subsection (2) provides that when exercising this function, the chief executive may give the applicant any information or a document about the conviction or charge in the chief executive's possession or control. Subsection (3) provides that subsection (2) does not apply to the extent the information or document contains confidential information about a person other than an applicant or an eligible person.

*Clause 15* provides that the chief executive may make inquiries of, and exchange information with, a criminal record holder. The term 'criminal record holder' is defined in the Dictionary at schedule 1. The criminal record holder must comply with the request if the criminal record holder holds the record. However, the clause makes it clear that the chief executive may only make the inquiry or request an exchange of information with the criminal record holder with the consent of the applicant.

*Clause 16* provides the process and authority for the chief executive to make inquiries or request information from a person or entity who is not the applicant or a criminal record holder.

Subsection (2) provides that the chief executive may, by written notice, ask the other person or entity for the information or document. Subsection (3) provides that in instances where the information held by the other person or entity is not publicly available, the chief executive may only make the request with the consent of the applicant. Subsection (4) provides that the chief executive may, by notice given to the person or entity, request that information or document be verified by statutory declaration.

*Clause 17* states the options available to the chief executive when considering an application to expunge a charge or conviction for an eligible offence. The chief executive must decide to either expunge the conviction or charge, or refuse to expunge the conviction or charge. When making the decision, the chief executive is not authorised to conduct an oral hearing.

*Clause 18* applies if a Criminal Code male homosexual offence is the subject of an application.

Subsection (2) provides that the chief executive may decide to expunge a conviction or charge only if satisfied on the balance of probabilities of the matters set out in subsections (a) and (b). Subsection (3) provides that when considering the criteria

in subsection (2) the chief executive must have regard to any public record containing information about the conviction or charge that the chief executive has received from a criminal record holder and any information the chief executive has received under section 16. Subsection (4) defines the term ‘consent’ for the purpose of clause 18.

*Clause 19* applies if a public morality offence is the subject of an application. Subsection (2) provides that the chief executive may only decide to expunge the conviction if the chief executive is satisfied on the balance of probabilities of the matters listed in subsections (a) and (b). Subsection (3) provides that when considering the criteria in subsection (2) the chief executive must have regard to any public record containing information about the conviction or charge that the chief executive has received from a criminal record holder and any information the chief executive has received under section 16.

*Clause 20* applies if an offence other than Criminal Code male homosexual offence or a public morality offence is the subject of an application. Subsection (2) provides that the chief executive may only decide to expunge the conviction if the chief executive is satisfied on the balance of probabilities of the matters listed in subsections (a) and (b).

*Clause 21* provides the process for when the chief executive proposes to refuse an application to expunge a conviction or charge for an eligible offence.

Subsection (1) provides the chief executive is required to give the applicant a notice stating the chief executive proposes to refuse to expunge the conviction or charge; informing the applicant of the reasons for the proposed refusal; and inviting the applicant to make a submission within a stated period to the chief executive in relation to the proposed refusal.

Subsection (2) provides that the chief executive is required to provide information or documents obtained by the chief executive that have been relied on to support the proposed refusal. Subsection (3) provides that the requirement in subsection (2) does not apply to the extent that the disclosure of the documents or information would contain confidential information about a person other than the applicant or eligible person.

Subsection (4) provides that the applicant may make a written submission to the chief executive regarding the proposed refusal within the time period mentioned in subsection (1)(c).

Subsection (5) provides that the chief executive must consider the written submission mentioned in subsection (4) and decide whether or not to expunge or refuse to expunge the conviction or charge. It is clear that the chief executive must make a decision whether or not the applicant has made the submission mentioned in subsection (4).

*Clause 22* provides that the chief executive, upon making a decision to expunge a charge or conviction for an eligible offence, must provide notice to the applicant and each criminal record holder. The term ‘criminal record holder’ is defined in the dictionary at schedule 1.

Subsection (2) provides that the decision takes effect on the day the notice is given to the applicant. Subsection (3) provides that the chief executive, upon deciding to refuse an application, must provide the applicant with a QCAT information notice for the decision.

*Clause 23* provides limitations on the circumstances in which a person may make an expungement application to expunge a conviction or charge that has previously been the subject of a refusal decision by the chief executive. Subsection (2) provides that a person may only make such a subsequent expungement application in relation to a conviction or charge if the chief executive is satisfied that evidence relevant to the original application was not available, or could not with reasonable diligence have been available, to the applicant before the chief executive made the initial decision.

## **Part 3 Consequences of expungement**

### **Division 1 General**

*Clause 24* provides for the effects of a charge or a conviction being expunged. Subsection (1) provides that any reference in another Act to a conviction or charge does not include an expunged conviction or charge. Subsection (2) sets out the specific effects of a charge or conviction being expunged. Subsection (3) clarifies that a reference in subsection (2) to the happening of or information about a conviction or charge extends to information about investigation, prosecution, sentencing and other legal processes associated with conviction or charge. Subsection (4) provides for the definition of key terms for the purpose of this clause.

### **Division 2 Public Records**

*Clause 25* provides a number of definitions relevant to this Division of the Bill.

*Clause 26* creates the offence of disclosing information from public records about expunged convictions or charges. The provision captures individuals who have access to information in a public record about an expunged conviction or charge and know, or ought reasonably to know, the conviction or charge is an expunged conviction or charge. It is an offence for this class of individual to disclose the information to anyone unless the person has a reasonable excuse or has disclosed the information in the circumstances prescribed in subsection (3). The maximum penalty for the offence is 100 penalty units.

*Clause 27* creates the offence of dishonestly obtaining information from public records about expunged convictions or charges. The purpose of this offence provision is to support the effect of an expunged conviction or charge by providing that a person must not dishonestly obtain, or attempt to obtain, information about an expunged conviction or charge contained in a public record. The maximum penalty for the offence is 100 penalty units.

*Clause 28* imposes requirements on criminal record holders to annotate public records relevant to an expunged conviction or charge. The term ‘criminal record holder’ is defined in schedule 1.

Subsection (2) requires the record holder to annotate the public record by making any necessary changes and includes a prescribed statement that will reflect the expungement of the conviction or the charge. Once the criminal record holder has annotated the relevant public records, the criminal record holder is required to provide the chief executive with notice that the annotation has been made.

Subsection (3) requests the chief executive to give notice to the applicant that the annotation of records has taken place.

*Clause 29* imposes obligations on a criminal record holder who holds a public record containing information about an expunged conviction or charge in circumstances where the chief executive has been provided notice under clause 35 that an expunged conviction or charge is no longer an expunged conviction or charge.

Subsection (2) provides that the criminal record holder must make any necessary changes to the public record so the record no longer indicates the conviction or charge is expunged and provide notice to the chief executive that the action has been taken. Subsection (3) provides that the chief executive, upon receipt of the notification from the criminal record holder, must notify the applicant that the conviction or charge is no longer expunged.

*Clause 30* clarifies that the Act does not authorise or require a person to destroy a public record or omit information about an expunged conviction or charge from a public record.

## **Part 4 Revival of expunged conviction or charge**

*Clause 31* provides that the chief executive may decide that an expunged conviction or charge is no longer an expunged conviction or charge. The chief executive may make this decision if satisfied the conviction or charge became an expunged conviction or charge due to false or misleading information.

*Clause 32* provides for the show cause process that must be followed before the chief executive decides a conviction or charge is no longer expunged under clause 31. The chief executive is required to provide the applicant with a notice stating that the chief executive proposes to decide the charge or conviction is no longer expunged; the reasons for the decision; and invite the applicant to make a submission to the chief executive, within a stated period, in relation to the proposed decision. The applicant may make a written submission about the show cause notice to the chief executive.

*Clause 33* provides for the process if, after considering a submission from an applicant in response to a show cause notice provided under clause 32, the chief executive is no longer satisfied the conviction or charge was expunged on the basis of false or misleading information. The chief executive is required to not take any further action about the show cause notice and notify the applicant that no further action will be taken.

*Clause 34* provides for the process if, after considering a submission from an applicant in response to a show cause notice provided under clause 32, the chief executive is still

satisfied the conviction or charge was expunged on the basis of false or misleading information. The chief executive is required to decide the conviction is no longer expunged and provide the applicant with a QCAT information notice for the decision. The decision takes effect on the day the QCAT information notice is given to the applicant.

*Clause 35* applies if the chief executive decides under clause 34 that an expunged conviction or charge is no longer expunged. The chief executive must provide each criminal record holder notice that the conviction or charge is no longer expunged if the applicant has not applied for a review of the decision within the time allowed under section 33(3) of the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act); or, if the applicant has applied for a review, the review has been finally decided and the conviction or charge is no longer expunged.

## **Part 5      Reviews, evidence, legal proceedings and offences**

*Clause 36* provides that a person given, or entitled to be given a QCAT Information Notice for a decision may apply, as provided under the QCAT Act, for a review of the decision.

*Clause 37* is an evidentiary provision which applies to proceedings being conducted under this Act.

*Clause 38* provides that a proceeding for an offence against the Act must be taken in a summary way under the *Justice Act 1886*. The proceeding must be started within 1 year after the offence is committed; or 6 months after the offence comes to the complainant's knowledge, but within two years after the offence is committed.

*Clause 39* provides that a person must not, in relation to the administration of the Act, give the chief executive information the person knows is false or misleading. The clause provides that the maximum penalty is 100 penalty units. Subsection (2) details circumstances where a person will be taken not to have committed the offence if, when providing the information or document, the person tells the chief executive how the document is false or misleading to the best of their ability, and provides the correct information if it is in the person's possession or can be reasonably obtained.

*Clause 40* ensures the confidentiality of information obtained under the Act by providing that it is an offence for a prescribed class of person (an informed person) to disclose or give access to confidential information. An informed person, for the purposes of this provision, is a person who acquires or gains access to personal information through the person's involvement in the administration of the Act or because of an opportunity provided by the person's involvement in the Act. The definition of informed person extends to include individuals who acquire or gain access to confidential information from such a person. It is not an offence under this provision to disclose or give access to confidential information in the circumstances detailed in subsection (3). The maximum penalty for the offence is 100 penalty units.

## **Part 6    Miscellaneous**

*Clause 41* provides that the chief executive may appoint a lawyer of at least five years standing to help the chief executive in relation to an expungement application. Subsection (2) provides that the lawyer holds the office on the conditions stated in either the lawyer's instrument of appointment or a notice signed by the chief executive and provided to the lawyer. Subsection (3) provides that appointment is under this Act, and not the *Public Service Act 2008*.

*Clause 42* clarifies that this Bill does not affect the royal prerogative of mercy.

*Clause 43* provides that the chief executive may delegate functions under the Act to an appropriately qualified senior executive or senior officer under the *Public Service Act 2008*.

*Clause 44* provides that the chief executive may approve forms.

*Clause 45* provides that the Governor in Council may make regulations.

## **Part 7 Amendment of Acts**

### **Division 1 Amendment of this Act**

*Clause 46* provides that this clause amends this Act.

*Clause 47* provides for the amendment of the long title.

### **Division 2 Amendment of Child Protection Act 1999**

*Clause 48* provides that this division amends the *Child Protection Act 1999*.

*Clause 49* inserts a new subsection (5) in section 159C to provide that an expunged conviction or charge under this Act is not considered relevant information for the purposes of Chapter 5A of the *Child Protection Act 1999*. Clause 49 also inserts a new subsection (7), which provides the definitions of expunged charge and expunged conviction for the purposes of section 159C.

### **Division 3 Amendment of Family Responsibilities Commission Act 2008**

*Clause 50* provides that this division amends the *Family Responsibilities Commission Act 2008*.

*Clause 51* amends section 91(4) to provide that relevant information does not include information about an expunged charge under this Act.

## **Schedule 1 Dictionary**

Schedule 1 provides a dictionary of terms used in Act.