

TASMANIA

**HISTORICAL HOMOSEXUAL CONVICTIONS
BILL 2016**

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**HISTORICAL HOMOSEXUAL CONVICTIONS
BILL 2016**

*(Brought in by the Premier, the Honourable William Edward
Felix Hodgman)*

A BILL FOR

**An Act to provide for a scheme to enable certain
convictions for historical homosexual 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 *Historical
Homosexual Convictions Act 2016*.

2. Commencement

This Act commences on a day to be proclaimed.

3. Interpretation

(1) In this Act –

application means an application under
section 5;

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

CrimTrac means the CrimTrac Agency established as an Executive Agency by the Governor-General of the Commonwealth under section 65 of the *Public Service Act 1999* of the Commonwealth or, if the CrimTrac Agency is replaced by another agency that performs functions substantially similar to the functions of CrimTrac, that agency;

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 person who has been convicted of a historical homosexual offence;

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expunged conviction means a conviction expunged under section 9(3);

historical homosexual offence means any of the following offences:

- (a) an offence under section 122(a), 122(c) or 123 of the *Criminal Code* as in force before 14 May 1997;
- (b) an offence prescribed by the regulations for the purposes of this definition;
- (c) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraphs (a) or (b);

official criminal record means a record, containing information about the outcome of criminal proceedings, kept by –

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

Secretary means the Secretary of the Department.

- (2) For the purposes of this Act, where a court finds a person guilty of an offence but does not

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proceed to record a conviction, the finding is to be regarded as a conviction.

- (3) In this Act, a reference to an expunged conviction includes a reference to the charge to which the conviction related.

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.

PART 2 – APPLICATIONS

5. Application to have historical homosexual offence expunged

- (1) A person who has been convicted of a historical homosexual offence may apply to the Secretary for the conviction to be expunged.
- (2) If the person who has been convicted of a historical homosexual offence has died, an application under this section may be made in respect of that person by –
 - (a) the person’s legal personal representative; or
 - (b) if the person, immediately before their death had a spouse, the spouse of the person; or
 - (c) a person with whom the person was, immediately before their death, in a significant relationship within the meaning of the *Relationships Act 2003*; or
 - (d) a parent, guardian or step-parent of the person; or
 - (e) a child or stepchild of the person.
- (3) An application –
 - (a) must be in a form approved by the Secretary; and

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- (b) is to contain the information required in section 6; and
 - (c) is to be lodged in the manner prescribed by the regulations or, if no manner is so prescribed, in a manner approved by the Secretary.
- (4) Despite subsection (1), a person whose application in respect of a conviction has been refused by the Secretary is only entitled to have a further application in respect of the same conviction considered by the Secretary if the Secretary is satisfied on reasonable grounds that necessary supporting information in the further application became available only after the initial application was refused.

6. Contents of application

- (1) An application must include the following information:
- (a) the applicant's full name, residential address and phone number;
 - (b) the full name of the eligible person and any other names by which the eligible person is or has been known;
 - (c) the date and place of birth of the eligible person;
 - (d) the gender of the eligible person;
 - (e) the residential address of the eligible person at the time of the historical

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- homosexual offence and of the conviction for the offence;
- (f) the address to which notices or other documents addressed to the applicant may be sent;
 - (g) in relation to the historical homosexual offence to which the application relates –
 - (i) the name and location of the court by which the eligible person was convicted for the historical homosexual offence; and
 - (ii) the date of the conviction; and
 - (iii) the name of the historical homosexual offence; and
 - (iv) details of the historical homosexual offence and the conduct constituting the historical homosexual offence;
 - (h) any prescribed information;
 - (i) any additional information or additional documents that the Secretary requires.
- (2) An application must be accompanied by a consent by which the applicant authorises the disclosure to the Secretary of any records relating to that conviction created by a data controller, whether held by that data controller or any other entity.

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7. Investigation of application

- (1) In considering an application, the Secretary may take all steps, and make all inquiries, that are reasonable and appropriate to consider the application properly.
- (2) The Secretary may require an applicant to provide additional information or additional documents that the Secretary considers necessary to determine the application.
- (3) The Secretary may, by notice given to a person who may be able to provide information relevant to an application, require the person to answer specified questions or to provide other information or documents within a time and in a way specified in the notice.
- (4) A person must not fail, without reasonable excuse, to comply with a notice under subsection (3).

Penalty: Fine not exceeding 30 penalty units.

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

8. Matters to be considered in determining application

- (1) The Secretary must not approve an application unless satisfied –

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- (a) that the offence for which the eligible person was convicted is a historical homosexual offence; and
- (b) that, on the balance of probabilities, both of the following tests are satisfied in relation to the eligible person:
- (i) the eligible person would not have been charged with the historical 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;
 - (ii) the conduct constituting the historical 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 historical homosexual offence, including the eligible person, consented to the conduct; and

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- (b) the ages, or respective ages, of any such persons at the time of that conduct.
- (3) If the consent of a person is an issue in considering an application, the Secretary may only be satisfied by written evidence on that issue –
 - (a) from the available official criminal records; or
 - (b) from a person, other than the eligible person, who was involved in the conduct constituting the historical 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.

9. Determination of application to have conviction expunged

- (1) The Secretary must determine an application as soon as practicable after it is received.
- (2) The Secretary is to determine an application by –
 - (a) approving the application; or

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- (b) refusing the application.
- (3) If the application is approved, the conviction for the historical homosexual offence is expunged.
- (4) The Secretary must, as soon as possible after a determination under this section is made, give the applicant written notice of the determination and, if the application is refused, inform the applicant –
 - (a) of the reasons for the refusal; and
 - (b) of the applicant’s right to have the determination reviewed.

10. Confidentiality

- (1) A person must not, directly or indirectly, make a record of, or disclose or communicate to any person, any information, relating to an application, acquired by the person in performing a function or exercising a power under this Part.

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, or in connection with, the performance of a function or the exercise of a power under this Part; 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.

**PART 3 – CONSEQUENCES OF A CONVICTION
BEING EXPUNGED**

11. Annotation of official records

- (1) On approving an application under section 9(2), the Secretary must, within 28 days, notify any relevant data controller in writing of that determination.
- (2) On receipt of a notification under subsection (1), the relevant data controller must, within 28 days, annotate any entry relating to the expunged conviction contained in any official criminal records under his or her management or control with a statement to the effect that the entry relates to an expunged conviction.

12. Effect of expunging

If an eligible person's conviction is expunged under section 9(3) –

- (a) the person is not required to disclose the expunged conviction to any other person including when giving evidence under oath in legal proceedings; and
- (b) the expunged conviction is taken not to form part of the person's official criminal record; and
- (c) a question about the person's criminal history, including a question in legal proceedings required to be answered

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- under oath, is taken not to refer to the 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 the expunged conviction; and
 - (ii) a reference, however expressed, to the person's character is not to be taken to allow or require anyone to take account of the expunged conviction; and
- (e) the expunged conviction, or the non-disclosure of the 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.

13. 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

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person's 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 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 conviction; or
 - (b) the Secretary, or any person acting under the direction of the Secretary, in informing a data controller that holds information about convictions that a particular conviction is an expunged conviction; or
 - (c) the Commissioner of Police, or any person acting under the direction of the Commissioner of Police, disclosing to CrimTrac, for incorporation into the police information sharing system known as the National Police Reference System, the fact that a specified conviction has become an expunged conviction.
- (3) This section has effect despite sections 77(4), 79(3) and 135(3) of the *Health Practitioner Regulation National Law (Tasmania)*.

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Part 3 – Consequences of a conviction being expunged

14. Improperly obtaining information about expunged convictions

A person must not fraudulently or dishonestly obtain, or attempt to obtain, information about another person's expunged conviction from an official criminal record.

Penalty: Fine not exceeding 50 penalty units.

PART 4 – MISCELLANEOUS

15. Determination that conviction is no longer expunged

- (1) If the Secretary is satisfied that a conviction became an expunged conviction by reason of an application that included false or misleading information, or documents that are false or misleading, the Secretary may determine that the conviction is no longer an expunged conviction.
- (2) The conviction ceases to be an expunged conviction on and from the date of that determination.
- (3) The Secretary must, as soon as possible after a determination under this section is made, give the eligible person whose conviction is no longer expunged written notice of the determination and inform the person of –
 - (a) the reasons for the determination; and
 - (b) the person's right to have the determination reviewed.
- (4) The Secretary must, within 28 days of making a determination under this section, notify any relevant data controller in writing that the conviction is no longer an expunged conviction.

16. Review of decisions

- (1) In this section –

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reviewable decision means –

- (a) the refusal of an application under section 9(2); or
 - (b) a determination that a conviction is no longer an expunged conviction under section 15(1).
- (2) If the Secretary, or a person acting as the delegate of the Secretary, makes a reviewable decision –
- (a) a person aggrieved by that decision 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) 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.

17. No entitlement to compensation

A person who has an expunged conviction is not entitled to compensation of any kind, on account of that conviction becoming an expunged

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conviction, in respect of the fact that the person –

- (a) was charged with, or prosecuted for, the offence; or
- (b) was convicted of, or sentenced for, the offence; or
- (c) served a sentence for the offence; or
- (d) 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) incurred any loss, or suffered any consequence as a result of any circumstance referred to in paragraph (a), (b), (c) or (d); or
- (f) has an expunged conviction.

18. Royal prerogative of mercy not affected

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

19. Integrity of official criminal records

Subject to section 11(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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Part 4 – Miscellaneous

20. Prior lawful acts not affected

Nothing in this Act is to be taken as affecting anything lawfully done before a conviction is expunged.

21. 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.

22. Delegation by Secretary

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

23. Regulations

- (1) The Governor may make regulations for the purposes of this Act.

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- (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.

24. 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
- (b) the department responsible to that Minister in relation to the administration of this Act is the Department of Justice.