HISTORICAL HOMOSEXUAL CONVICTIONS EXPUNGEMENT BILL 2017

Committee

Resumed from 22 August. The Deputy Chair of Committees (Hon Dr Steve Thomas) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 11: Determination of application —

Progress was reported after the clause had been partly considered.

Hon MICHAEL MISCHIN: Before time elapsed yesterday and progress was reported, I put to the minister a scenario based on the assumption that, in accordance with the provisions of the act, I have been appointed the chief executive officer's delegate for dealing with applications, I have before me an application to expunge certain convictions and one of the decisions that I have to make is whether they are historical homosexual convictions within the meaning of the act. I seek and receive certain amounts of information from various agencies; let us say there is a question of consent involved. I receive the official criminal record and let us assume for the moment that the preferred interpretation is correct and it includes not only the outcome of the proceedings, but also the transcript of the trial against that particular applicant. I gather various other bits of material. I decide that really there is a fair bit of stuff to look through, this conviction occurred a long time ago and I cannot be bothered turning my mind to it and spending time on it. If I reject the application, I have to give reasons for that and there may be an appeal or a review by the State Administrative Tribunal. However, if I approve the application, that is where it ends; the applicant is happy the conviction is expunged and there is no review or appeal available to anyone, and, indeed, no-one else gets to see the material. I notify the relevant agencies that I have agreed to the expungement, that is communicated and as a matter of course the conviction material is noted accordingly. Minister, if I am so negligent or derelict in my responsibilities, who would find out about it, given that there is no oversight by either the CEO or the relevant minister responsible for the act?

Hon SUE ELLERY: There was a line of questioning yesterday about this and I answered the question then. It is possible that no-one would find out. It is possible that someone could find out, and if that person were to bring the matter to the attention of the director general, the director general could then reopen the matter and consider the information provided by the third party and deal with it accordingly.

Hon MICHAEL MISCHIN: There are a lot of possibilities there. How would they find out about it within the structure of the act? There are confidentiality provisions around it and as the CEO's delegate I do not have to communicate the reasons for my decision, do I?

Hon SUE ELLERY: We did go to this issue yesterday. With specific reference to consent, I took the member to the provisions in the clause in the bill that set out that the decision-maker can seek information from others if necessary. It is not contemplated in the structure of the bill that there would be deliberate action of people being able to track the decisions. The point that I made is that it is possible. If something went wrong in the confidentiality provisions and somebody decided to tell someone who had been consulted in the process that is set out in the clause relating to consent, in particular, it is possible that that information could get out. But I made the point yesterday in answer to this line of questioning that it is the case that it is possible that no-one will find out.

Hon MICHAEL MISCHIN: I want to make sure that I understand the extent of this issue. As the CEO's delegate, if I approve an application, do I have to give reasons for that approval and how would they be recorded?

Hon SUE ELLERY: There is no provision requiring it. Equally, there is no provision prohibiting it.

Hon MICHAEL MISCHIN: That is good! As the CEO's delegate, I do not actually have to articulate any reasons to support my decision to approve an application to expunge a conviction that is the subject of an application. Is that correct?

Hon SUE ELLERY: I think this is the third time—I answered that question yesterday—that is correct.

Hon MICHAEL MISCHIN: I would not have to give my reasons for concluding whether something is a historical homosexual conviction. It goes without saying, I suppose, that I do not have to give my reasons for anything that I do as long as I approve the application. If I have that wrong, then please interject. But I take it that that is the case. Given that, all I have to do as the CEO's delegate, for the sake of an easy life, is to approve the application. I do not have to give reasons for it; I just have to note "application approved", and the conviction will be expunged, and there is no means within the act for anyone else to be informed of the decision or to double-check it to find out about that decision. Is that correct? The Leader of the House said that she answered that question so many times yesterday—that may be right—but I want to understand and I want on the record that this government is proposing a system of expungement of court-ordered convictions by a bureaucrat without any minister being responsible for ensuring that the bureaucrat is acting within the intention of the legislation.

Hon SUE ELLERY: There are a few assumptions in there that I do not necessarily accept. I certainly do not accept that it is not already on the record. It is on the record; I put it on the record yesterday on several occasions. The prospect was put that the government has determined a bureaucrat. That certainly is the government's preferred model and indeed was endorsed by the chamber yesterday. What I have said today and yesterday is correct: there is no requirement in the bill for reasons to be given and no obstacle to reasons being given. I think it is also useful to start from the premise—to remind ourselves—that this is not any bureaucrat making this decision; this is either the director general or their delegate. There are constraints within the bill before us about what level that bureaucrat needs to be. It is a member of the senior executive service. I start from the assumption that in fact members of the senior executive service are not lazy and are not trying to avoid following the obligations that are set out for them in the legislation that the Parliament provides them.

Hon MICHAEL MISCHIN: I also approach it from that point of view, but I recall when I was sitting in the chair that the minister is currently sitting in that I would have an awful lot of concerns raised with me about the need for prescription for accountability, transparency and honesty, and how the government needed to ensure that was provided for in its legislation. In this case, the minister has told us she is relying entirely on the judgement and diligence of a delegate to expunge what the delegate considers, rightly or wrongly, to be a historical homosexual conviction, and so be it. But to throw back that somehow we ought to accept these things on trust, I recall earlier this week there was a great controversy about certain very, very senior officials of the Department of Health who had been doing things that were not quite within their job description, involving financial fidelity and honesty. The idea that there may not be at some point a member of the SES delegated this responsibility who thinks that for the sake of an easy life it is better to expunge a conviction rather than run the risk of having to provide reasons and having it reviewed, is quite possible. The government has rejected making a minister —

Hon Sue Ellery: The chamber rejected it.

Hon MICHAEL MISCHIN: Let us get back to cases. The government rejected it to start with. That motion was lost; so be it, but the government also had not seriously entertained the consequences of that. If this is the scheme the government is putting forward, so be it, but I want to make it quite clear that it can give rise to injustices. It is quite right and proper, if there is a historical homosexual conviction that would not be the subject of charges now, that it be expunged. On the other hand, if there were a historical conviction that would be the subject of charges now, it is wholly wrong and may create a very serious injustice if that were to be expunged. A person who should have been held to account, and was held to account for their actions, can then go around and say, "I have no convictions against me", when they should have. But that is the course that this government has chosen rather than to address the issue by having a responsible minister in charge, as onerous as I am sure it would have been.

Point of Order

Hon SUE ELLERY: The chamber has already determined the question about who is the decision-maker. The honourable member is revisiting a decision that the chamber has already made. I am happy to answer questions about clause 11, which is the clause we are on now, or any other matter that is ahead of us in the bill, but the honourable member is now revisiting a matter that the chamber determined yesterday.

The DEPUTY CHAIR (Hon Dr Steve Thomas): Obviously, the member has the opportunity to make a statement. I have listened very carefully. I believe it is a statement to date; I have not heard a question. If there is a question asked, I am sure the minister will respond to it, but there is an end to repetitive debate. We will get to that point in the fullness of time.

Committee Resumed

Hon MICHAEL MISCHIN: Anyway, the minister says she is happy to answer questions—she is happy to sometimes give a response. In any event I think I have made the point. I think the government understands it and is quite happy to have this situation continue. If the minister were to rethink the issue and go back to wanting to modify the circumstances about who should be a decision-maker, I am happy to accommodate that.

If I understand the current model correctly, there is no need for reasons to be given for a decision to expunge and there is no need to record any reasons that the decision-maker may have.

Clause put and passed.

Clause 12: Determination that conviction is no longer expunged —

Hon MICHAEL MISCHIN: There is a provision that an expungement can be set aside. Given the importance of confidentiality around this process and the decision-making by the decision-maker—as we have already heard, no reason needs to be articulated by the decision-maker, let alone recorded, or an opportunity provided for anyone else to see what that decision is because of the confidentiality—can the minister give me an example of how someone would find out that a conviction has been expunged that ought not to have been expunged and not have

broken the law in the process? How does one find out that an applicant has in fact committed a fraud if the applicant has made a confidential application using false material, a decision has been made, and a conviction has been expunged when in fact it should not have been? Can the minister provide an example of how one might find out without breaking the confidentiality provisions in the act?

Hon SUE ELLERY: If we start with a general answer, there are no provisions or prescribed ways to bring a point of view or a bit of information to the attention of the CEO once a conviction has been expunged, if someone believes it should not have been. That could be done in any number of ways and the website will set out how people can contact the CEO. In respect of consent, if we use that as an example, when we were back at clause 10 I outlined that the CEO can get information in a variety of ways. If it turns out that the information relied upon from a person whom the CEO consulted to determine whether the consent threshold was met was passed on by that person to someone else, and the victim or someone else found out and they knew that it was not accurate, that person could bring the matter to the attention of the CEO. The CEO would satisfy themselves that, as set out in clause 12(1) —

> … a conviction became an expunged conviction by reason of an application that included false or misleading information …

They would then follow the steps set out therein.

Hon MICHAEL MISCHIN: Let us say that consent is not an issue. Let us say that the conviction is one of a nature that, on the face of it, was an offence, whether or not the other party consented. Nowadays, that particular conduct might be lawful if the other party consents, but still be unlawful if it turns out that the other party was below a certain age—a child or an incapable person or something like that. Because the conviction and the outcome of the proceedings are part of the official criminal record, that may be available, but the decision-maker may not look into the question of consent because it just does not arise, or it may not arise directly, or it may be overlooked. Certainly, that means that those processes do not need to be complied with or may be overlooked. There is no way that anyone can find out that, in fact, consent has not been addressed and that the decision-maker has not properly looked into the question, is there?

Hon SUE ELLERY: We are back where we were before, talking about how people find out things. There is no provision in the act for these decisions to be made public. In answers to this line of questioning previously, I have already laid out the government's response.

Clause put and passed.

Clauses 13 and 14 put and passed.

Clause 15: Disclosure of expunged records —

Hon MICHAEL MISCHIN: Clause 15 proposes, amongst other things, an offence. Subclause (1) provides that —

> A person with access to official criminal records —

That is the sort of material we have been discussing —

> must not directly or indirectly, without lawful authority, disclose any information about another person's expunged conviction held in those records without the consent of that other person.

There is a penalty of a fine of $10 000. There are certain exemptions under subclause (2) in very narrow circumstances. In the scenario that we have been discussing, let us say that I am an officer working in the courts. I get information from the CEO's delegate saying that a conviction is expunged and to make the necessary notations on files et cetera. While I am doing that, I come across the fact that the offence being expunged involved children, and I have my doubts whether the decision has been a proper one. Something may have been overlooked or has simply been disregarded. Am I guilty of an offence under clause 15(1)? I do not want to go to the director general because he is the CEO and I might not have confidence that the CEO would look favourably on a criticism of his or her delegate. Am I able to go to the Attorney General and say, "Look, Attorney General, I have access to official criminal records and the delegate under the act has expunged this one, but I really have concerns about the propriety of that decision"? Have I committed an offence if I do so?

Hon SUE ELLERY: I think the honourable member's question was about people who have access to official criminal records and have reason to believe that a decision about expunging a conviction was made improperly or should not have been made. The first issue would be for the court to determine whether the person had lawful authority in the first instance. Then a judgement would be made on the nature of the circumstances that were presented before the court. As an aside, because the member was talking about somebody who had access to the information, the bill does not provide for offences regarding the general public disclosure of information relating to an expunged conviction unless it was by a person who had access to the official criminal records. It is also an

offence under clause 16 of the bill if a person fraudulently or dishonestly obtains, or attempts to obtain, from an official criminal record information about another person's expunged conviction.

Hon MICHAEL MISCHIN: I thank the minister; she has come part of the way to answering that question. But it seems to me that if I am an officer of a department, let us say the Department of Justice, and I have access to official criminal records and have become aware of the expungement and I have become aware of facts from my access to those records, I cannot bring this to the attention of any other person without the lawful authority to do so. Where would I get that lawful authority from? I want to be, in effect, a whistleblower, or at least an informant of something that I think was a wrong decision, but if I try to bring it to the attention of another officer or someone who is outside the department but responsible for it, such as the Attorney General, Minister for Police, Minister for Education and Training or the Premier, I will be committing an offence. That would be correct, would it not? Unless the minister can point me to an exemption or a defence under the Criminal Code or some exculpatory provision under the Criminal Code. It seems to me that I am prohibited from doing what I regard to be my duty because I do not have the specific lawful authority to disclose, directly or indirectly, information about that other person's expunged conviction without that person's consent, and they are not likely to give me consent. That would be so, would it not?

Hon SUE ELLERY: The same circumstances would apply to a person in the circumstances the member set out as they would apply to a whistleblower in any sense. There is the Public Interest Disclosure Act, a capacity to contact the Corruption and Crime Commission and a capacity to contact the Public Sector Commissioner. It is the same whether it is under this legislation or any manner of pieces of legislation. Procedures are in place for people to act on information. If the matter ended up before a court because someone was of the view that the person was not releasing the information in the public interest or whatever, then the court would have to look at all the circumstances. It is really not possible to contemplate what the particular circumstances would be, but that is why we have in place a range of measures already, such as the CCC and the Public Sector Commission.

Hon MICHAEL MISCHIN: It does not give me a great deal of comfort to be told that there are various acts of Parliament that cover various bodies that might cover this, and that a court will look at all the circumstances. The court will look at the elements of the offence. If I have access to official criminal records and I have disclosed information about another person's expunged conviction, and if I have done so directly by going to the Attorney General without the consent of that other person and I cannot show any lawful authority, the minister responsible for administering this act is one of the people to whom I cannot, in my concern, go to and report what I think is a misbehaviour or misfeasance on the part of one of the senior officers of the department of which I am a part. Would that be right?

Hon SUE ELLERY: People talk to ministers and members of Parliament regularly about matters that they think are incorrect and improper in the public sector. What I left out of my earlier answer is that a threshold decision has to be made by the Director of Public Prosecutions or whomever about whether charges in the particular circumstances are to be made. It is a hypothetical, but it really will depend on the particular circumstances.

Hon MICHAEL MISCHIN: I recall a great debate about mandatory sentencing for bodily harm done to police officers and the use of prosecutorial discretion, and whether something that would be a minor injury would be prosecuted or not as bodily harm. I was lectured at length about how the public could have no confidence in that. The minister is telling me that if I go to the Attorney General with information that discloses an offence on my part, with no lawful authority to go to him and disclose information, that I have to take it on trust that he is not going to immediately report me to the police and that I am not going to be charged by the police—because I do not think this is a DPP matter—with an offence under section 15(1) of the proposed legislation. Is that the best comfort that I can have—that ultimately a court will look at all the circumstances? Is the minister saying that, because the government has not put in an appropriate outlet in the case of the ability of a more senior person to take responsibility, I have to take it on trust that the Attorney General is not going to immediately turn me over to the police rather than be a party to this offence? It is because, remember, the subclause says quite clearly —

> A person with access to official criminal records must not … without lawful authority, disclose any information about another person's expunged conviction held in those records without the consent of that other person.

But if someone came to the minister and said, "Minister,"—or MP, as the case may be—"I have access to official records. I think that this person's expunged conviction was wrongly expunged. No, I have not seen that person and got their consent to come to you." The minister is saying that she would not feel responsible or at least concerned that she might have to report the matter as a breach of the legislation?

Hon SUE ELLERY: The line of questioning now is how I would feel as a minister or an MP if a person came to me with a particular set of circumstances. Let us put that to one side. The particular circumstances before us are

that the same provisions would apply to a person who thinks something wrong has happened as they would to any other public sector person who thinks something wrong has occurred. If that person took that point of view to an MP or minister, I am sure that that MP or minister would seek advice about what avenues that person could use, and if it were me, I would say—and have said to people who have raised these issues, not arising out of this particular set of circumstances—that they should contact the CCC if they believe there has been wrongdoing. Indeed, if they tell me and believe that what they are saying is right, I will contact the CCC. I have an obligation as well to do that. We are delving into the hypothetical here and it is not possible for me to give a precise answer, because it will depend entirely on the circumstances.

Clause put and passed.

Clauses 16 to 22 put and passed.

Clause 23: Confidentiality —

Hon MICHAEL MISCHIN: Clause 23 is one of the important confidentiality provisions in the proposed act. Subclause 1 provides —

> A person must not, directly or indirectly, record, disclose or make use of any information obtained by reason of a function that the person has, or at any time had, in the administration of this Act except —
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> (a) for the purpose of, or in connection with, performing a function under this Act; or
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> (b) as required or allowed by this Act or under another written law; or
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> (c) for the purposes of proceedings before a court or other person or body acting judicially; or
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> (d) under an order of a court or other person or body acting judicially; or
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> (e) with the written consent of the person to whom the information relates; or
>
> (f) in other circumstances prescribed for this subsection.

Where would one find the other purposes prescribed for this proposed subsection?

Hon SUE ELLERY: That clause was inserted in the event that sometime in the future it is determined that we need to have regulations in place for something that had not been contemplated by the regime before us. I am advised that at this point there is no anticipation that regulations will be required in the future, but it is there in the event that they will be.

Hon MICHAEL MISCHIN: Given that confidentiality provision, let us say I am a person who, by reason of my function in the administration of the act, realised that a conviction had been expunged that ought not to have been. Is there anything in the proposed section that will allow me to disclose that information to anyone else in order to remedy the situation?

Hon SUE ELLERY: Not outside the provisions set out in proposed section 23. Of course, the bill has to be read as a whole and we have already debated other elements of the bill that go to whether information can be released.

Hon MICHAEL MISCHIN: Is there anything in here that would permit the CEO's delegate or the CEO if, upon mature reflection, they have come to the realisation that they have made a mistake, to draw that mistake to the attention of the Attorney General?

Hon SUE ELLERY: Nothing is set out in the clause that we are talking about, but I think it would be generally considered to be within the scope of their function as the director general to communicate to the Attorney General if they thought that there was something they needed to bring to the Attorney General's notice about the application of this act.

Hon MICHAEL MISCHIN: Is the minister saying that there is an emphatic prohibition on directly or indirectly recording, disclosing or making use of any information obtained by reason of my function in the administration of the act, except for specific purposes; but that, notwithstanding all those, I can still disclose that information to someone who is not even mentioned in the legislation?

Hon SUE ELLERY: Having been a minister, the member would appreciate that directors general can and do raise with ministers all manner of things related to their legislative obligations. Annual reporting may be one avenue in which the DG has discussions with the Attorney General about the implementation of the provisions of the act.

We started by talking about what will happen if the DG or the delegate makes a decision that is found to be incorrect. Set out in the bill is that the decision-maker has the capacity to cancel an expungement if reasons for doing so have come to their attention. I am not sure I can give anything more specific about the disclosure of information between the DG and the relevant minister. The member would be aware from his own experience that directors general bring all manner of things to the attention of their respective ministers from time to time.

Hon MICHAEL MISCHIN: I am also aware that if there are specific statutory prohibitions against providing certain information to other people, even as a minister I would be limited by the operation of the law and my public servants under me would be so limited by the operation of the law.

Hon Sue Ellery: That is why I started the answer to this line of questioning by saying what is within the scope of the provision we are talking about, which is clause 23.

Hon MICHAEL MISCHIN: I know. I do not see anything in there that would give comfort to an officer of the department disclosing to a minister information that they are specifically not allowed to disclose. It does not say anything about exceptions for reporting to their relevant minister and the like.

I think the government has made its position clear on it, such as it is.

Clause put and passed.

Clauses 24 to 29 put and passed.

New clause 29A —

Hon SUE ELLERY: I move —

Page 23, after line 15 — To insert —

29A. Annual Report

(1) The CEO must prepare and submit to the Minister, not later than 30 September in each year, a report for the previous financial year that contains details of the following —

(a) the number of applications made under section 5;

(b) for applications determined under section 11 —

(i) the number of applications approved under section 11(2);

(ii) the number of applications refused under section 11(2) and a summary of the grounds for refusal;

(iii) the number of convictions expunged under section 11(3) and a summary of the offences to which the expunged convictions relate;

(iv) the average amount of time taken to determine an application;

(c) the number of determinations that a conviction is no longer an expunged conviction under section 12(1) and a summary of the grounds for the determinations;

(d) the number of review applications made to the State Administrative Tribunal under section 18 and the outcomes of such applications, if available;

(e) any other matters that are, in the CEO's opinion, of such significance as to require reporting.

(2) The Minister must cause a copy of the annual report to be laid before each House of Parliament within 14 sitting days after the report is received by the Minister.

Hon Michael Mischin has proposed and placed on the supplementary notice paper an amendment to deal with annual reporting. The government is prepared to accept amendments dealing with this matter, but we would prefer to introduce our own version of that. There is one difference between the government's proposal and the honourable member's proposal. Proposed clause 29A(1)(c) provides that an annual report must include the number of determinations made that a conviction is no longer expunged and a summary of the grounds for those determinations. The honourable member's amendment refers to a summary of the reasons for such determinations. The difference is "grounds" versus "reasons". The government prefers the use of "grounds", for two reasons. The first reason is to maintain consistency with proposed clause 29A(1)(b)(ii), which refers to the grounds for refusal of an application to have a conviction expunged. The second reason is that as the bill is focused, amongst other things, on the protection of an applicant's privacy, there was a concern that "reasons" may suggest that more detail of the matter is required in the report. That is the difference between the two propositions on the supplementary notice paper. For the reasons I have outlined, the government is prepared to include reporting provisions, but we prefer the version that is in my name.

Hon MICHAEL MISCHIN: Can we deal with the review clauses in due course, because I have some questions about what the government proposes there? As far as the annual report provision is concerned, unless I have missed it, it seems to be the only difference between the two versions. One states that the CEO must prepare and submit to the minister a report that contains details of the number of applications, for applications determined under section 11, the number approved, the number refused and a summary of the grounds for refusal. Clause 11(6) states —

> The CEO must, as soon as possible after a determination under this section is made, —

That is a determination about whether to approve or reject an application —

> give the applicant and, if the applicant is not the eligible person and it is practicable to do so, the eligible person, written notice of the determination and, if the application is refused, that notice is to —
>
> (a) set out the reasons for the refusal; …

But the government prefers the use of the term "grounds".

Hon Sue Ellery: They are in effect applying to do two different things. One is to the eligible person and the other is in a published annual report.

Hon MICHAEL MISCHIN: I am still not clear about the distinction between "grounds" and "reasons", particularly as what is being sought in the annual report is not reasons for the determination, but a summary of the reasons for the determination. Why is that materially different from "grounds"?

Hon SUE ELLERY: In Hon Michael Mischin's version of the new clause he uses the two different expressions. We are trying to use the same expression in both elements of our clause.

Hon MICHAEL MISCHIN: Maybe the term should be "reason" in both instances, rather than having two separate expressions. Is there a material qualification then of "summary of the grounds" or "grounds", or do they amount to the same thing?

Hon SUE ELLERY: As I set out when I spoke to the new clause in my name, there are two reasons. One is consistency, as we have already touched on. The second is that amongst other things the bill is focused on the protection of an applicant's privacy; therefore, there is a concern from the government that if we use the word "reasons" in this particular clause, which relates to a publishable annual report, it might suggest that more detail of the matter is required in the report, and we do not want to do that.

Hon MICHAEL MISCHIN: I appreciate the need for consistency in the clause. It does not seem unreasonable to me that a summary of the grounds in the circumstances that have been explained would be detrimental to the intention behind it. Perhaps if I can just have a few minutes to think that through, and we can see whether anyone else wishes to address the issue.

Hon Sue Ellery: There is not.

Hon MICHAEL MISCHIN: On reflection, I am prepared to accept the government's new clause in favour of mine and I will support the government's new clause. I am glad the government has at least seen merit in the idea of there being a report published annually in respect of this legislation and its operation, and to the level of detail I had proposed. I think it is important for a number of reasons, one of which is that the current scheme being decided upon allows for no other means of finding out how the legislation is operating, limited though it may be, because there is an inability for any oversight of decisions by a decision-maker who is the CEO or the CEO's delegate to ensure that decisions have been made properly; I think this the best we can do. I support new clause 29A that appears on the supplementary notice paper at 1/NC29A standing in the name of the Leader of the House.

Hon ALISON XAMON: I rise to indicate that I appreciate the explanation about why "grounds" has been changed from "reasons" in the proposed new clause. I am also pleased that the extent of what needs to be reported has been accepted. I think it is important that with such significant legislative reform it is ensured that there is extensive statutory reporting so people can feel confident that the new regime is transparent.

New clause put and passed.

Hon MICHAEL MISCHIN: That being so, I do not propose to move the new clause in my name standing at 71/NC29.

New clause 29B —

Hon SUE ELLERY: I move —

> Page 23, after line 15 — To insert —
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> **29B. Review of Act**
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> (1) The Minister must review the operation and effectiveness of this Act, and prepare a report based on the review, as soon as practicable after the 5th anniversary of the day on which this section comes into operation.
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> (2) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after it is prepared, but not later than 12 months after the 5th anniversary.

This is another provision for which there are two proposals before the house. The first one is the government's preferred proposition in respect of a review. Although the government has agreed in principle to a statutory review of the scheme, we think it should be a one-off statutory review, five years after commencement. There is no compelling reason for a cyclical statutory review every five years, particularly given the introduction of annual reporting requirements through the clause that the house has just passed, 29A. As the annual report will, on an annual basis, reflect the number of applications made and determinations in respect of those applications, review applications, and deal with any other matter that the CEO considers to be significant, the government's view is that that is sufficient information for consideration of how the scheme will work into the future. There is also a practical purpose. The best estimates of the number of applicants are that they are likely to be low and are likely to taper off, in fact, to negligible numbers after the first five years of operation. The government's amendment is also slightly more concise in that it does not deal with the exact matters that need to be considered. All the matters listed in the amendment standing in Hon Michael Mischin's name will necessarily be covered as part of the review into the operation and effectiveness of the legislation. The new clause that the government has moved was drafted in this manner by Parliamentary Counsel and is in line with drafting practice for clauses of this nature. I ask the chamber to consider the version of the review provisions that is set out in the government's name.

Hon MICHAEL MISCHIN: I thank the minister, and I should indicate my appreciation that the government has given mature consideration to the proposal I advanced for a review of the legislation being conducted. As I indicated in the course of my contribution to the second reading debate, there are several reasons for it. I think the necessity for it has been highlighted by the choice to proceed with a model under which the ultimate decision-maker in cases in which convictions are expunged is a chief executive officer of the relevant department, or the chief executive officer's delegate. With the lawful authority of Parliament there needs to be some proper oversight and consideration of the manner in which these applications have been dealt with, and—notwithstanding the confidentiality and other provisions in the legislation—it needs to be done in a robust fashion, to see whether or not the legislation is achieving its objects, whether the procedure is adequate or if there are flaws in it, and to deal with other matters that are relevant.

However, I prefer my version of the review clause, and there are several reasons for that. I should add that it has also been drafted by a Parliamentary Counsel officer. Firstly, I accept that certain things would necessarily be taken into account in a review of a statute of this nature. I specifically include in that subclause (2). Apart from drawing attention to the objects of the legislation and the adequacy of the procedure for the expungement of certain convictions, it provides for any other matters that appear to the minister to be relevant to the operation and effectiveness of the legislation. That is something that is not within the scope of the review clause proposed by the government.

It may come to the minister's attention that there is something that we have not anticipated. It may very well be some of the matters that I have raised about confidentiality. The minister may have heard about certain issues with certain convictions and the like. I do not know; there may be things we cannot anticipate, but that can be drawn to the minister's attention or that the minister becomes aware of and wants to include as part of the review. That allows greater flexibility and greater scope for review.

Secondly, I do not accept the argument that only one review is necessary. True, there will be annual reports and the like. If that is the argument, there does not have to be review in five years' time, if we are going to rely on annual reports and what they happen to contain. A proper review of the legislation and its efficacy goes beyond simply having a look at the annual report and thinking, "Oh, that could be done better", or, "I'm not sure what's happening there. Perhaps something needs to be tweaked." A proper review of the legislation would assess whether its objects are still being met, whether the purpose of the legislation has been exhausted, and whether its operation needs to be extended or contracted in some fashion. That is why a periodic review every five years is, I think, important. Five years is not a short space of time; it is a reasonable time. If, as I expect, the number of applications will drop off fairly quickly—I am just guessing here, but I suspect that it will be a bit of a bell curve with a few dribbling through to start with, then a significant number, and then a flattening-out—then after five years it may very well be that the trend is established. However, after 10 years, it may have become patent by the time of that review that the purposes of the legislation have been exhausted and that there have not been any applications for a certain number of years. In that case, rather than going to the trouble of conducting a review, the government could put in a sunset clause or some other provision to remove it from the statute books.

A number of purposes would be served by a sensibly paced review every several years; I do not think five years is unreasonable. Every five years is about the trend with reviews of legislation, as it is. Rather than simply reporting in annual reports, it would draw the government of the day's attention to the need to reassess the legislation and whether it is working properly, rather than allowing it to drift on interminably.

Although I respect the argument that has been advanced by the Leader of the House in respect of the government's proposed section 29B, my inclination is to not support it and to instead support the review of the legislation that I have proposed in my name.

Hon SUE ELLERY: I do not necessarily accept the argument that the honourable member put that his clause 29B(2)(c)—"any other matters that appear to the Minister to be relevant to the operation and effectiveness of this Act"—is not, in fact, captured by the first line of the government's clause 29B(1), which states —

> The Minister must review the operation and effectiveness of this Act, …

That can include any other matter that appears to the minister to be relevant to the operation and effectiveness of this legislation, which is what is set out in the honourable member's 29B(2)(c). I think it is captured and I think it is a broader set of words that captures all the things that are set out in the member's paragraphs (b) and (c), and for the reasons already outlined, I urge the chamber to support the government's version of the review.

Division

New clause put and a division taken, the Deputy Chair (Hon Martin Aldridge) casting his vote with the noes, with the following result —

Ayes (17)

Hon Robin Chapple	Hon Diane Evers	Hon Kyle McGinn	Hon Alison Xamon
Hon Tim Clifford	Hon Adele Farina	Hon Martin Pritchard	Hon Pierre Yang *(Teller)*
Hon Alanna Clohesy	Hon Laurie Graham	Hon Aaron Stonehouse	
Hon Stephen Dawson	Hon Alannah MacTiernan	Hon Dr Sally Talbot	
Hon Sue Ellery	Hon Rick Mazza	Hon Darren West	

Noes (14)

Hon Martin Aldridge	Hon Donna Faragher	Hon Simon O'Brien	Hon Colin Tincknell
Hon Jacqui Boydell	Hon Nick Goiran	Hon Robin Scott	Hon Ken Baston *(Teller)*
Hon Jim Chown	Hon Colin Holt	Hon Tjorn Sibma	
Hon Peter Collier	Hon Michael Mischin	Hon Charles Smith	

Pairs

Hon Matthew Swinbourn	Hon Colin de Grussa
Hon Samantha Rowe	Hon Dr Steve Thomas

New clause thus passed.

Leave granted for clauses 30 and 31 to be considered together.

Clauses 30 and 31 —

Hon MICHAEL MISCHIN: Bearing in mind the government's attitude about the change of scheme regarding decision-making, I cannot resist pointing out that it relied very much on advice from the Director of Public Prosecutions, heads of jurisdictions and others on this bill. There was no complaint about it, so the government considered that it did not need any changes or amendments, it was satisfactory and everyone was happy with it. The government now seems to have conceded that it would be worthwhile including the requirement for a report and a review clause. It only goes to show that we can rethink some of these things. Nevertheless, in the circumstances, I am pleased that a review of the act will be undertaken. I think it is unfortunate that it will be only one review of the act. We will see whether it is as flexible and all-embracing as the government has claimed. Otherwise, I indicate that in the circumstances I will not be proceeding with the amendment at 72/NC29B in my name, which would be otiose in the circumstances.

Clauses put and passed.

Schedule 1 put and passed.

Title put and passed.

Report

Bill reported, with amendments, and, by leave, the report adopted.

As to Third Reading — Standing Orders Suspension — Motion

On motion without notice by **Hon Sue Ellery (Leader of the House)**, resolved with an absolute majority —

> That so much of standing orders be suspended so as to enable the bill to be read a third time forthwith.

Third Reading

HON SUE ELLERY (South Metropolitan — Leader of the House) [3.37 pm]: I move —

That the bill be now read a third time.

HON ALISON XAMON (North Metropolitan) [3.38 pm]: I rise to make a few comments about the process. I appreciate Hon Michael Mischin including in his amendments a review clause in the Historical Homosexual Convictions Expungement Bill 2017 as well as a requirement for annual reporting. I think this is a really important piece of legislation and, as such, it is really important that we keep track of what is happening with bills such as this. I appreciate the fact that the government has tweaked those proposed amendments. I believe we now have a better bill in front of us.

I want to make the observation that a number of bills repeatedly come to this house that require amendment for the inclusion of review clauses as well as annual reporting or other such reporting measures. I wanted to put on the record for all ministers who are thinking of bringing legislation to this place that it would be terribly useful if that was an automatic provision within all future legislation brought to this place where appropriate, particularly when we are talking about a new piece of legislation that automatically includes review clauses of the legislation itself as well as annual reporting. Otherwise, we will constantly need to seek these sorts of amendments, which means that legislation will consistently need to be amended and go back to the other place.

Question put and passed.

Bill read a third time and returned to the Assembly with amendments.