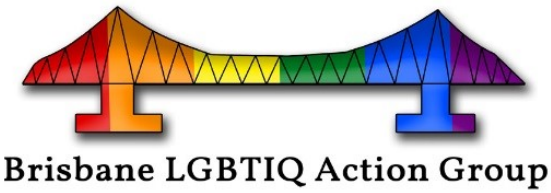

Removing stigma for Queenslanders with historical homosexual convictions

Submission on the *Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017* (Qld)

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About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights in Australia and internationally. We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

About the LGBTI Legal Service

The LGBTI Legal Service Inc is an organisation run by volunteers that seeks to assist and advocate for LGBTI people by providing legal advice, community education and participating in law reform.

About Community Legal Centres Queensland

Community Legal Centres Queensland provides support and advocacy for the 33 independent, community led community legal centres operating across Queensland. We work to achieve sustainable and adequate policy and funding decisions to ensure Queenslander are able to get the legal help they need and to ensure they get access to justice.

About Caxton Legal Centre

Caxton Legal Centre provides legal and social welfare services to low income and disadvantaged persons in need of relief from poverty and to educate such people in legal, social welfare and related matters. We are an independent, non-profit community organisation providing free legal advice, social work services, information and referrals.

About Brisbane LGBTIQ Action Group

The Brisbane LGBTIQ Action Group is a resident's group representing and advocating for lesbian, gay, bisexual, trans*, intersex and queer (LGBTIQ) people living in Brisbane.

About Queensland AIDS Council

The Queensland AIDS Council promotes the health and well-being of lesbian, gay, bisexual, transgender and intersex Queenslanders. It is a not-for-profit, community based organisation, funded by government grants and community fundraising, donations and sponsorships.

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1. Executive summary

1.1 Overview

We commend the Queensland Government taking action on the commitment made during the 2015 state election to expunge historical criminal records for consensual same-sex activity before homosexual activity was decriminalised in 1991. We note the Coalition's support of such a scheme, announced while they were in government in 2014, and commend and thank them for their support of the initiative.

The *Historical Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017* (Qld) (**Bill**) is a promising step forward, which builds on the Queensland Law Reform Commission report 'Expunging criminal convictions for historical gay sex offences'[1] (**QLRC Report**).

Introducing an expungement scheme is an important step forward to remove the stigma experienced by the LGBTI community in Queensland who lived in fear of criminal punishment and being socially ostracised under historical laws which punished people for being gay. The purpose identified in clause 3(3) of the Bill shows a strong commitment to ensure that a person with a conviction of charge for a historical homosexual offence should be treated in law as if the conviction or charge had not occurred, in line with the QLRC Report. It also sends a clear message that consensual adult same-sex activity should never have been criminalised.

The Bill includes a number of positive aspects which will give effect to the purposes of removing the stigma for older LGBTI people affected by the criminalisation of homosexuality, including allowing for:

- expungement of the key historical repealed offences, public morality type offences and allowing other eligible offences to be added by regulation;
- posthumous applications to be made by loved ones;
- an expungement application to be made for a conviction or a charge;
- important protections for ensuring the privacy of applicants and confidentiality of relevant documents and information; and
- a review process to QCAT for a review of an expungement decision.

We refer to the major research report '*Historical criminal treatment of consensual sexual activity between men in Queensland*' submitted by a coalition of community organisations for more detailed recommendations on an expungement scheme for Queensland.[2]

[1] Queensland Law Reform Commission, *Expunging criminal convictions for historical gay sex offences* (August 2016) http://www.qlrc.qld.gov.au/__data/assets/pdf_file/0007/484657/qlrc-report-no-74.pdf.

While this submission, as well as other reports on the topic, primarily focus on homosexual activity and gay men, the expungement scheme must provide redress to lesbian, gay, bisexual, transgender and intersex people (**LGBTI**) that were unjustly targeted by criminal laws.[3] This means the scope of the scheme must capture consensual behaviour by LGBTI people that was criminalised and the aim of the reform must be to restore those individuals, as much as possible, to the position they were in prior to their conviction. It should, as far as possible, extend to capture any gender or sexuality non-conforming activity, and not be limited to only homosexual acts or to those who identify as LGBTI.

We have a number of concerns about the current version of the Bill, which are reflected in the recommendations below.

Our primary concern is with the requirement that conduct need be lawful today. This test should be changed to 'would not be prosecuted today' in order to account for past discriminatory policing practices and reflect current police practice in relation to indecency offences. Alternatively, the Bill should be amended to clarify that 'public place' will be interpreted in accordance with the Victorian Supreme Court authority of *Inglis v Fish* to ensure that conduct that cannot be seen other than by unusual means (e.g. in a cubicle or a car at night time) is considered lawful for the purposes of the scheme.

While these laws were in place, and for the years following, many people have endured feelings of shame and stigma, been denied employment and study opportunities and been restricted from international travel. We note that applicants have waited at least 25 years – and in some cases over 40 or 50 years – for Queensland to pass legislation removing their convictions. Ensuring the expungement scheme is available and accessible to individuals affected by historical homosexual convictions should be the highest priority.

[2] LGBTI Legal Service Inc, Human Rights Law Centre, Caxton Legal Centre Inc, Queensland Association of Independent Legal Services Inc, Brisbane Pride Festival, *Historical criminal treatment of consensual sexual activity between men in Queensland* (September 2015) http://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/58169937bb7f1e05acdfbeea/58169a2bbb7f1e05acdfd0bf/1477876267821/DiscussionPaper_HistoricalCriminalTreatmentofSamesexActivity_Sep2015.pdf?format=original, This report includes a number of important case studies which should inform the development of the expungement process. This submission is a shorter submission which focuses on the bill, but we recommend that it be read in conjunction with our previous research report.

[3] We recognise that it was predominantly men who had sex with men that were impacted by the laws but we understand that some of these men were targeted because of their gender presentation or expression and that some of these individuals did identify, or would identify in contemporary Australia, as transgender. In some jurisdictions it appears that women engaging in homosexual behaviour were also prosecuted for offences such as 'offensive conduct' so we consider it prudent not to rule out the possibility that lesbian and bisexual women were charged under Queensland laws.

1.2 Recommendations

1	Expungement should be available to people convicted after 19 January 1991 in exceptional circumstances where people were wrongfully convicted after laws criminalising homosexuality were repealed.	Clause 3(2)
2	'Homosexual activity' should be expanded to include any 'gender or sexuality nonconforming activity'.	Schedule 1, 'homosexual activity'
3	The words 'other than to the extent the offence involved heterosexual activity' should be removed.	Clause 9(a)(i)
4	An eligible offence should include associated offences.	Clause 8(2)
5	Expungement should be available for official records relating to arrest, questioning or a warning in situations where charges were not laid and this information is required to be disclosed.	Clause 11(1)
6	Details of the offence or conviction should only be requested after the applicant has been provided with copies of relevant official records.	Clause 12(1)(b)
7	The application process should be simple, straightforward and sensitive to the privacy and confidentiality of applicants. Applicants should be provided with a copy of official records held by agencies as a matter of course and particularly before they are required to provide information about the circumstances of their offence.	Clause 12
8	The words 'If the information or document is not publicly available' should be removed.	Clause 16(3)
9	A person or entity asked for information by the chief executive should be required to provide the information within a prescribed period, or a reason why the information cannot be provided.	Clause 16
10	The relevant age of consent should be 16 in line with the test for expungement not constituting an offence today. Alternatively, the age of consent should be split, to be 17 years or more for offences prior to 1976, and 16 years or more for offences following that date.	Clause 18(2)(a)(ii)

11	The criteria for expungement should be amended from 'would not constitute an offence under the law of Queensland' to 'would not be prosecuted under the law of Queensland'. Alternatively, the Bill should be amended to clarify that 'public place' will be interpreted in accordance with the Victorian Supreme Court authority of *Inglis v Fish* to ensure that conduct that cannot be seen other than by unusual means (e.g. in a cubicle or a car at night time) is considered lawful for the purposes of the scheme.	Clauses 18(2)(b) and 19(2)(b)
12	The reference to 'section 16' should be replaced with 'sections 12, 14, 15 and 16, and any information or document publicly available which the chief executive has received'.	Clauses 18(3)(b) and 19(3)(b)
13	Original records should be annotated and stored securely for historical purposes, and secondary records and duplicate copies should be destroyed.	Clauses 28 and 30
14	The Bill should insert a right to re-apply for expungement in any circumstances, rather than only where new information has become available.	Clause 23
15	An independent panel or specialist advisers with appropriate legal (administrative law and criminal law) expertise, historical knowledge of policing and prosecutorial practice, LGBTI cultural sensitivity knowledge of the historical and social context should be available to provide technical support to the chief executive.	Clause 41
16	Compensation should be available to people affected by historical homosexual offences.	Clause 5(2)

2. *Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017*

2.1 Time limit on applications for expungement

Section 3(2) of the Bill states that the scheme only applies to convictions or charges that happened before 19 January 1991. We have been made aware that individuals were charged and convicted of homosexual offences in Victoria after the legislation repealing the historical homosexual offences had come into effect.[4]

We recommend that section 3(2) provide an exemption in these exceptional circumstances where the law was incorrectly applied. This would ensure that people with charges or convictions following the repeal of laws decriminalising homosexuality are able to apply under the proposed scheme.

Recommendation 1

Expungement should be available to people convicted after 19 January 1991 in exceptional circumstances where people were wrongfully convicted after laws criminalising homosexuality were repealed.

2.2 Eligible offences

(a) Current definition

We commend the Queensland Government on recognising the need to expand the recommendation in the QLRC report[5] to public morality offences and other offences to be prescribed by regulation. The inclusion of attempt, conspiracy and procurement offences in the expungement scheme is important to ensure the purpose of the Bill are achieved.

Clause 8(1) of the Bill sets out that an eligible offence is a Criminal Code male homosexual offence, a public morality offence or another offence prescribed by regulation. The Bill should include all offences that criminalised homosexual conduct, targeted gay men or women or were applied by law enforcement and/or the courts in a way that discriminated against same-sex attracted people.

(b) Homosexual activity

Clauses 19(2) (Criteria for public morality offence) and 20(2)(a) (Criteria for other eligible offences) require the offence to involve 'homosexual activity'.

'Homosexual activity' is defined in Schedule 1 to include 'an activity that before 19 January 1991 may have been regarded as an activity of a homosexual nature. [Example – a person wearing gender nonconforming clothing.]'.

[4] Interview with Jamie Gardiner who confirmed that he had located Magistrates Court records confirming the conviction of individuals after 1981.

[5] Above n 1, 50.

In contemporary Queensland, individuals do not view cross-dressing (or wearing gender nonconforming clothing) as an activity of a homosexual nature – indeed, many individuals who wear 'gender nonconforming clothing' do not identify as homosexual. We support the inclusion of gender noncomforming clothing as a behaviour that attracted prosecution, however the terminology used in the Bill should be improved to appropriately reflect the distinction between diversity of sexuality and gender expression.

Similarly, clause 9(a)(i) (Meaning of *Criminal Code male homosexual offence*) excludes offences which 'involved heterosexual activity'. We do not believe such a restriction is necessary (particularly given that it relates to the offence of sodomy) and may pose problems in interpretation when dealing with trans or intersex individuals.

Recommendation 2

'Homosexual activity' should be expanded to include any gender or sexuality nonconforming activity.

Recommendation 3

The words 'other than to the extent the offence involved heterosexual activity' should be removed from clause 9(a)(i).

(c) Associated offences

Clause 8(2) of the Bill does not allow for associated offences to be expunged.

Expungement of associated offences is crucial to enable applicants to have a clean slate and to find closure from their convictions. For example, a person who was arrested and physically removed from his home following a report that he was engaging in homosexual behaviour with his boyfriend, and later charged with unnatural sexual intercourse, swearing in a public place and resisting lawful apprehension. In this example, he would be able to apply for the unnatural sexual intercourse offence to be expunged, but not for expungement of the accompanying swearing and resisting arrest charges, even though he was only charged with these offences because the police were arresting him for consensual homosexual conduct.

Recommendation 4

An eligible offence should include associated offences.

2.3 Scope of records capable of expungement

The Bill currently allows for a conviction or charge to be eligible for expungement. However, the definition would not include police and arrest records where a person was arrested but given an official warning or not charged.

We are concerned that information about being arrested or questioned by the police must be disclosed when a person applies for a Blue Card or require disclosure in applying for government positions (e.g. applications to become a police officer) or in applying for a visa for overseas travel.

We strongly recommend that all records relating to the historical homosexual offences which may require disclosure should be eligible for expungement.

Recommendation 5

Expungement should be available for official records relating to arrest, questioning or a warning in situations where charges were not laid and this information is required to be disclosed.

2.4 Application process

(a) Information currently required in the Bill

Clause 12 of the Bill requires relatively detailed information to be provided by applicants, including historical information about the date of the conviction or charge, the place and court where the eligible person was convicted or charged, the particulars of the offence the person was convicted of or charged with (including the provision of the Act) and the details of any sentence imposed. This is more information than was recommended should be included on an expungement application in the QLRC report.[6]

We have no objections to the application form requiring current identifying information (e.g. name and former names, address, date of birth) to assist data controllers to locate their records. We also support the Bill's inclusion of the words 'to the extent the information is available to the applicant' for these additional details not relating to details required to confirm a person's identity. This will ensure that an application is not precluded if it does not contain all of the information required in the application. However, we are concerned that an applicant may provide information which is inaccurate or incorrect as they are unable to recall the exact details of the offence or court proceedings due to the historical nature of the offences.

(b) Practical difficulty in providing necessary information

The HRLC operates an Expungement Legal Service to assist people who want to apply for expungement of their historical homosexual convictions. In assisting people to apply for their convictions to be expunged, the HRLC have learned that many applicants, particularly those in their 70s and 80s, have significant difficulty recalling precise dates, names and details of the offending and conviction from 40 or 50 years prior. None of the clients which HRLC have assisted have any of the original documents relating to the original charge.[7]

In practice, applicants can easily provide information about their current contact details and can mostly remember the details of the offence, but often have significant difficulties providing specific information about the exact dates or details of the police and legal process for historical offences. Due to the traumatic nature of the events that took place, many applicants have deliberately or subconsciously attempted to forget the details in an effort to avoid emotional distress.

[6] Above n 1, recommendation 6-1.

[7] We note that recommendation 6-1 in the QLRC report recommends that a copy of transcripts or sentencing remarks should be required with the application and this is not included in the Bill.

Almost all of the applicants HRLC have assisted with these types of expungements describe the long-lasting and overwhelming impact of these convictions which have 'haunted' them their whole lives. One of HRLC's clients described the conviction as a 'sword of Damocles' hanging over his head, threatening to fall and expose his 'shameful secret' to his family and friends at any moment. Another client has described how even completing the application was 'traumatising' as it forced him to re-live his memories of being dragged out of his home by police, forced to resign from his job in disgrace and be rejected by his colleagues, friends and family.

The barriers to individuals making applications should not be underestimated. From experience advising clients and working with LGBTI communities in other jurisdictions, individuals with historical convictions still carry significant mistrust for the authorities and system responsible for their conviction and their conviction is a significant source of shame and emotional distress.

(c) Fairness to the applicant

Requiring detailed information is not only practically difficult and unnecessarily traumatising for applicants, but raises the risk that applicants may provide information that is inconsistent with official records which the applicant may not have access to in order to refresh their memory. Such information provided by the applicant and the inconsistency with official records may be used against the applicant in the determination of the application or may otherwise cause delays and additional costs in clarifying. The applicant also may not be aware of the legal requirements for expungement and inadvertently provide factual information about the circumstances of the offence that may prejudice the future success of the application.

We submit that requiring information from decades ago (often before modern record-keeping methods became available) at the initial application stage is unnecessary, overly burdensome and unfair given the risk of prejudice to the applicant.

(d) Comparison with interstate schemes

The practice in Victoria is to require only information sufficient to establish the applicant's identity before searches of official records are conducted. The applicant is provided with a copy of available court and police records and only then is requested to provide additional information. Additional information is not always necessary to for the decision maker to determine the application but the applicant is nevertheless provided with the opportunity to provide additional information.

In NSW, the extinguishment forms are relatively straightforward and easy to use, and a number of convictions have already been extinguished without requiring detailed information from the applicant. The equivalent Act requires an applicant to provide their name, address, date of birth, former name and address, and date and place of the conviction 'so far as is known to the applicant'. The ACT scheme also only requires information about the date and place of conviction 'to the extent known to the applicant'. Note that neither of these schemes require the provision of the details of the conduct in question.

In our view, the approaches in Victoria and New South Wales should be favoured as they minimises the burden and risk to the applicant, reflecting sensitivity to their experience of trauma.

Recommendation 6

Details of the offence or conviction should only be requested after the applicant has been provided with copies of relevant official records.

If this approach is not adopted, we recommend that the Bill be amended to provide that:

a) information provided in the course of the application process is merely provided in order to identify relevant records and is not for the purposes of considering the merits of the application; and/or

b) unfavourable inferences cannot be drawn by the decision maker regarding the credibility or reliability of the applicant's version of events on the basis of the provision of information in the application that is later contradicted in further information provided by the applicant or by official records.

In addition, we recommend that those administering the scheme in the future ensure that applicants are clearly advised that:

c) the information requested in the application form need not be provided in order to advance their application; and

d) they should seek legal advice before making an application and they are provided with details of legal referral options.

(e) Practical considerations for application process including access to records

An expungement process in Queensland should provide a simple and straightforward process tailored for different applications and clear information should be available to applicants on how to apply both online and on paper. Privacy difficulties applicants may face should be given full consideration. For example, applicants should be able to nominate their preferred method of communication (e.g. in situations where their family members do not know about their conviction or charge) and ensure that all mail is addressed private and confidential on a blank envelope. HRLC is happy to share its experience in other jurisdictions and all authors are willing provide input to the development of appropriate website information, fact sheets, application forms and other aspects of the application process.

In order to refresh memory and in the interests of natural justice, applicants should be provided with a copy of the official records held by the various authorities such as the Queensland Police and the relevant court before they are required to provide their account of events and before a decision is made.

As discussed above, in Victoria applicants are merely required to establish their identity in order to search for relevant criminal records. If an applicant is found to have an offence on their criminal record which is eligible for expungement, searches are then made of the relevant data holders and a copy of official records is made and provided to the applicant and the applicant's lawyer if relevant.

Obtaining access to these records is personally very important to some applicants and furthers the reparative purpose of the scheme. Some applicants have lived their lives in fear of what has been recorded against their names. HRLC clients have commented that they felt that their

experiences were validated by being able to review the records of interviews by police and records of the court proceeding. One HRLC client who was very young at the time of prosecution felt as though they might have imagined what happened to them and this client found reading the official records was finally a much needed confirmation of the reality of what had happened to him as a teenager. In this way, accessing official records can be an empowering and validating experience for applicants and should be provided for in the proposed scheme.

Recommendation 7

The application process should be simple, straightforward and sensitive to the privacy and confidentiality of applicants.

Applicants should be provided with a copy of official records held by agencies as a matter of course and particularly before they are required to provide information about the circumstances of their offence.

2.5 Information from another person or entity

(a) Consent to a request

Clause 16 of the Bill allows the chief executive to request information from another person or entity other than a criminal record holder for information, verification of information or a relevant document. Such a request can, generally, only occur with the applicant's written consent (clause 16(3)).

However, excluded from that is a request where information is publicly available. In such circumstances, it is difficult to see why the chief executive would need to request the information. However, it is crucial that any requests, which may have the effect of identifying the eligible person, only be made by the chief executive with the applicant's consent, given the sensitive nature of the application and material.

Recommendation 8

Clause 16(3) should be amended to remove the words 'If the information or document is not publicly available'.

(b) Provision in a timely manner

There is no prescribed period of time in which another person or entity is required to respond to a request under clause 16. Given that the expungement process can take a number of months to obtain relevant criminal records, a set time limit should be prescribed under the Bill or regulations requiring the information to be provided in a timely manner (e.g. 30 days or 42 days).

Recommendation 9

A person or entity asked for information by the chief executive should be required to provide the information within a prescribed period, or a reason why the information cannot be provided.

2.6 Age of consent for offences should be 16

The QLRC Report recommended that 'if the age of consent for sodomy is changed from 18 years to 16 years prior to or concurrently with the commencement of the proposed expungement legislation, applications for expungement of convictions or charges in relation to sodomy would be determined by reference to the age of consent of 16 years'.[8]

On 23 September 2016, the Queensland Parliament passed the *Health and Other Legislation Amendment Bill 2016* (Qld) which lowered the age of consent for consensual anal sex in line with other lawful sexual acts. This was a very positive development and will reduce barriers to young LGBTI people accessing healthcare and the stigma attached to LGBTI relationships.

Clause 18(2)(a)(ii) of the Bill provides that the chief executive may expunge the conviction or charge if satisfied that the other person was aged 18 years or more at the time of the offence. As the age of consent has been lowered, this clause should instead require that the other person was 'aged 16 years or over'. In situations where both of the people charged or convicted were underage (e.g. two 17 year olds having consensual homosexual sex), this provision as currently drafted would mean that expungement is not possible.

Attorney-General Yvette D'Ath, in her speech introducing the Bill, commented:

> *'[T]he criteria for the expungement of a Criminal Code male homosexual offence in the bill has regard to the age of consent at the date of decriminalisation on 19 January 1991 – that is, 18 years. This retains the expungement scheme's nexus with the decriminalisation of consensual adult homosexual activity and confirms that the scheme is only applicable to historical charges and convictions. It also ensures that there is no discrimination between people charged or convicted with offences between 1991 and 2016 or people charged before the age of consent for sexual activity other than anal intercourse was changed in Queensland in 1976 from 17 years to 16 years.'*

That position does not adequately give effect to the stated intention of the Bill - that is, to provide redress for people wrongly charged or convicted because of their sexual orientation. The continued presence in the Queensland statue book of discriminatory laws should not form a basis on which expungement is not available.

If the age of consent is not reduced to 16, reflecting current values, it should at least be altered to mirror the age of consent for intercourse (other than anal intercourse) over time.

The HRLC has been assisting clients across Australia impacted with convictions for historical homosexual offences. A significant proportion of our clients (approximately one quarter) were under 18 at the time of the offence. For this reason, we believe the age of consent employed will have a material impact on the number of individuals eligible for expungement.

Recommendation 10

The relevant age of consent should be 16 in line with the test for expungement not constituting an offence today. Alternatively, the age of consent should be split, to be 17 years or more for offences prior to 1976, and 16 years or more for offences following that date.

[8] Above n 1 [7.48].

2.7 Offences must not constitute an offence at time of application

Clauses 18(2)(b) and 19(2)(b) of the Bill consider whether conduct would not constitute an offence under the law of Queensland at the time of the making of the application.

We submit that a test should allow for expungement of offences which would not be prosecuted today. This distinction between laws that are 'unlawful today' and those that are 'not prosecuted today' recognises the reality the discretion exercised by police in their enforcement of such laws today. There is a significant gap between the letter of the law and the enforcement by police in relation to gay beat activity and, indeed, sexual activity in public places more broadly.

In the decades where homosexual conduct was criminalised, police would exercise their discretion to charge individuals in a discriminatory manner. For example, one HRLC client was 'car parking' in a popular laneway where couples were known to frequent. That client was arrested and charged only when the police realised it was two men in the car. The heterosexual couples in the laneway were not subjected to further police action.

Queensland's public morality laws are in place to deter conduct such as nudity and masturbation in view of other members of the public. However, these offences were used historically to penalise homosexual behaviour that was not viewable to the public. For example, a HRLC client in another state was charged with gross indecency after admitting to police officers that he had engaged in mutual masturbation with another man in a parked car on an empty street earlier in the night. Contemporaneous police evidence confirmed that the police officer could not see inside the car and would not have known that the offence had occurred had that client not confessed.

In reality, much gay beat activity in NSW is unlawful today due to a broad definition of public place under NSW criminal law. However, this activity is not actively prosecuted. When developing the NSW extinguishment scheme it was recognised that requiring a test of 'not unlawful today' would exclude the vast bulk of historical homosexual offences. For this reason, the NSW scheme instead adopted the approach of specifying the relevant historical offences and applicants are required only to prove that the conduct was consensual (including by reasons of age).

There are also concerns that maintaining the existing test could capture activities which are offences by virtue of occurring in a public place. Victoria has the benefit of Pape J's judgment in *Inglis v Fish*,[9] which provides that: 'the all-important consideration is that it must be shown that the behaviour could have been observed, had some member of the public been present, so that whatever he did was open to the public to see'. Pape J goes on to state that:

> *Where conduct is observable only by the observer taking some unusual or abnormal*

[9] [1961] VR 607.

> *action in order to obtain a view of that conduct – as by peeping through a keyhole, using a periscope in order to see through a fanlight, or crouching down and looking under a door – in my view such conduct does not cease to be what I might call behaviour in private.*

We have been unable to locate similar higher court authority in Queensland. In the absence of such authority, we are concerned that the current definition of 'a place to which the public are permitted' would exclude the large proportion of offences that took place in gay beats.

We would hope that behaviour by police such as patrolling a known gay beat in a toilet block after midnight in unlit areas or spying on a known gay beat from a clifftop through binoculars would constitute 'unusual or abnormal action'. Similarly, the shining of a torch into a car or peering under a toilet cubicle would be conduct engaged in by police to observe and identify homosexual sexual conduct that would constitute 'unusual or abnormal' action. In this way, the *Inglis v Fish* decision provides a reasonable basis to determine whether conduct should be classed as taking place in the public realm for the purposes of the proposed scheme. Such a test addresses the discriminatory way in which police targeted and 'hunted' gay men at beats. We note that this 'targeting' by police for prosecution was acknowledged in the QLRC report.[10]

Amending the existing test to 'would not be prosecuted today under the law of Queensland' would account for the discriminatory policing practices of the past.

Alternatively, the Bill should be amended to clarify that 'public place' will be interpreted in accordance with the Victorian Supreme Court authority of *Inglis v Fish* to ensure that conduct that cannot be seen other than by unusual means (e.g. in a cubicle or a car at night time) is considered lawful for the purposes of the scheme.

Recommendation 11

The criteria for expungement should be amended from 'would not constitute an offence under the law of Queensland' to 'would not be prosecuted under the law of Queensland'.

Alternatively, the Bill should be amended to clarify that 'public place' will be interpreted in accordance with the Victorian Supreme Court authority of Inglis v Fish to ensure that conduct that cannot be seen other than by unusual means (e.g. in a cubicle or a car at night time) is considered lawful for the purposes of the scheme.

2.8 Information or document to be considered

Clauses 18(3)(b) and 19(3)(b) require the chief executive to have regard to 'any information or document the chief executive has received under section 16 about the application'. We believe the intention would, of course, be that material provided under clauses 12, 14 and 15 (as

[10] Above n 1, 46.

applicable), as well as any information publicly available, would also be required to be considered.

Recommendation 12

Clauses 18(3)(b) and 19(3)(b) should be amended to replace 'section 16' with 'sections 12, 14, 15 and 16, and any information or document publicly available which the chief executive has received'.

2.9 Consequences of expungement

We support the effect of expungement in the Bill, which remains at the heart of the expungement process and is consistent with equivalent interstate provisions.

However, we query the way that the records will be removed in practice. Clause 28 of the Bill currently states that the original records will be annotated with the expungement. Clause 30 of the Bill provides that a person is not authorised to destroy a public record or omit information about an expunged conviction or expunged charge from a public record.

Given the potential for people in the future to misunderstand the effect of an annotation of expungement, and the gravity of the potential harm caused by an inadvertent disclosure of a historical homosexual offence, we support a more targeted approach to annotation and the destruction of some types of records, namely, secondary or duplicate records. We recommend that original records be retained in a secure, highly protected location, acknowledging their importance as an historical record and clearly annotated to reflect the fact of expungement with a warning that disclosure would constitute a criminal offence. Secondary records or duplicate files held in paper or electronic format should be destroyed.

We note that we do not have a detailed understanding of the nature and types of records held in Queensland and defer to those with such an understanding to formulate an appropriate policy on document management including storage, removal, annotation and destruction. In formulating such a policy, the aim should be to restore the individual, as much as possible, to the position they were in prior to the conviction and the privacy and dignity of applicants must be the overriding concern.

Recommendation 13

Original records should be annotated and stored securely for historical purposes, and secondary records and duplicate copies should be destroyed.

2.10 Right to re-apply

We consider that the Bill should also include a right to re-apply where an application has lapsed. The QLRC report recommends that subsequent applications for expungement only be

available if new relevant information has become available after an earlier application was decided. We respectfully disagree with this view.

There are many reasons for an expungement application to lapse – the main being because the applicant has not been able to provide additional information within the time frame requested by the decision-maker.

There are many barriers to providing this information, including when a decision-maker requests information which an applicant does not possess, particularly in situations where the records cannot be located and there is no way to obtain further information to allow the applicant to provide this information. In many cases, an applicant will make the application on their own without obtaining legal advice or assistance, but is unable to understand the legal implications of the records they are sent or understand what information they are required to provide in response to a request to additional information. For other applicants, the request to provide additional information can trigger a negative emotional response, as they believe that the integrity of their account is being called into question and struggle to manage their anxiety about providing information which they have spent decades trying to forget or to hide from the people closest to them.

Allowing an applicant to commence a further application when they are better supported and better able to complete the application (regardless of whether new information has come to light since the first application) would recognise the particular sensitivities in these cases and increase the accessibility and utility of the scheme.

Recommendation 14

The Bill should provide for the right to re-apply for expungement in any circumstances, rather than only where new information has become available.

2.11 Independent panel of LGBTI experts

Clause 41 of the Bill allows the chief executive to appoint an experienced lawyer to assist with an expungement application. We refer to our research report which recommended that an independent panel comprising experts with a combination of legal expertise and sensitivity to LGBTI cultural history should be appointed.[11]

[11] Above n 3, 3.

Whether specialist advisers or an independent is appointed, the decision maker must have access to both technical legal expertise and knowledge of the climate within the LGBTI community and the police force, including prosecutorial practices. For example, independent experts could confirm that a particular gay beat or neighbourhood was commonly patrolled by police.

Recommendation 15

An independent panel or specialist advisers with appropriate legal (administrative law and criminal law) expertise, historical knowledge of policing and prosecutorial practice, LGBTI cultural sensitivity knowledge of the historical and social context should be available to provide technical support to the chief executive.

2.12 Confidentiality

The critical need for information relating to expungements to be kept confidential is crucial and we support the Bill's clear definition of confidentiality and penalising unlawful disclosure of expunged records in line with the equivalent ACT, NSW, SA and Victorian schemes.[12]

2.13 Other matters to consider

(a) Compensation

Reparations for past wrongs include financial compensation as well as counselling and other support measures that promote reconciliation and healing.[13] Clause 5(2) of the Bill currently provides no entitlement to compensation. We acknowledge that no other states or territories have currently provided for compensation to people who have been unjustly convicted under historical homosexual offences.[14]

However, international best practice is to provide for such a measure in order to repair damaged relationships and to assist in restoring individuals to the position they were in prior to the conviction. For example, Germany has committed to annulling 50,000 convictions for men convicted of historic homosexual offences and to provide compensation to people convicted under these laws.[15]

[12] *Spent Convictions Act 2000* (ACT) s 19I(1), *Criminal Records Act 1991* (NSW) s 19G(1), *Spent Convictions Act 2009* (SA) s 14, *Sentencing Act 1991* (Vic) s 105K(6).

[13] S. Alter, 'Apologising for Serious Wrongdoing: Social, Psychological and Legal Considerations, Law Commission of Canada' (1999) cited in *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care* (August 2004) pp 192–193.

[14] See above n 8, p 57.

[15] Reuters UK, 'Germany to quash historic convictions of gay men, pay compensation – Minister' (11 May 2016) http://uk.reuters.com/article/uk-germany-homosexuals-idUKKCN0Y21TY.

The *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* assert that victims of such abuses have a right to prompt, adequate and effective reparation.[16] This is held to include, in some combination and as appropriate, restitution, compensation for harm, and rehabilitation in mind, body and status.[17]

The level and nature of compensation for individuals should have regard to the value of any fines paid and the length of detention (with reference to jurisprudence relating to wrongful imprisonment) as well as the psychological and other impacts on victims.

Recommendation 16

The Bill should provide for appropriate and fair compensation to people affected by historical homosexual offences.

(b) Awareness raising, support and appropriate funding

It is crucial that funding be provided to existing community organisations to disseminate information and provide assistance, support and legal advice to potential applicants for the effective implementation of the scheme. As the majority of applicants will be in their 50s and older, it is essential that adequate outreach and advertising of the existence of the scheme is facilitated for it to be used in practice.

Ensuring that appropriately funded and sensitive counselling, support and advice is available for applicants is vital. For many applicants, being required to remember the shame of being convicted and socially ostracised throughout the application process is an extremely distressing and upsetting experience which can in and of itself trigger mental health issues.

For further information, we refer to the QLRC report's recommendation that '[s]teps should be taken, in collaboration with LGBTI and other organisations, to raise awareness and provide information about the proposed expungement scheme, and to ensure affected individuals have access to legal assistance and information about other support.'[18]

Additional recommendation

Funding should be provided to raise awareness of the existence of the expungement scheme, and to provide counselling and legal support for applicants and potential applicants.

[16] Adopted and proclaimed by General Assembly Resolution 60/147 (16 December 2005) http://www.ohchr.org.au/english/law/remedy.htm.

[17] International Center for Transitional Justice, *Reparations in Theory and Practice* (2007) https://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf.

[18] Above n 1, recommendation 7-3.

3. Conclusion

This Bill provides a unique opportunity for Queensland to remove the stigma and shame of criminal convictions for consensual adult homosexual activity and improve the day to day lives of those affected. It is an historic opportunity to make amends for the impact of past unjust laws on the LGBTI community. While the Bill largely has a solid policy underpinning, there are a number of necessary recommendations needed in order for the scheme to fulfil its purpose. In particular, the threshold for expungement for conduct in public places needs to be addressed.

We would welcome further discussion on the issues raised above, as well as any other aspect of the proposed scheme. We hope to work constructively with the Queensland Government to ensure this important reform realises its primarily restorative objective.