Speech By

Hon. Yvette D'Ath

MEMBER FOR REDCLIFFE

Record of Proceedings, 10 October 2017

CRIMINAL LAW (HISTORICAL HOMOSEXUAL CONVICTIONS EXPUNGEMENT) BILL

Second Reading

Hon. YM D'ATH (Redcliffe—ALP) (Attorney-General and Minister for Justice and Minister for Training and Skills) (4.04 pm): I move—

That the bill be now read a second time.

The Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017 was introduced on 11 May 2017 and referred to the Legal Affairs and Community Safety Committee. I thank the Legal Affairs and Community Safety Committee for its consideration of the bill. I also thank the many organisations and individuals who took the time to make submissions on and attend the public hearing for the bill. I am pleased to inform the House that on 14 July the committee tabled report No. 57 and made one recommendation, that the Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017 be passed. I thank the Legal Affairs and Community Safety Committee for its timely consideration of the bill. I note the statement of reservations from the non-government members of the committee and will address the concerns they have raised in relation to certain aspects of the bill in my contribution today.

During the 2015 general state election, this government expressed in-principle support for a scheme to allow for the expungement of convictions and charges for historical homosexual offences and committed to referring the issue to the Queensland Law Reform Commission for consideration and report. The QLRC's final report, titled *Expunging criminal convictions for historical gay sex offences*, was tabled in this Legislative Assembly on 29 November 2016. The report made 31 detailed recommendations, including that expungement of criminal convictions or charges for historical homosexual offences requires a new legislative framework and other key procedural features. To a great extent, the bill incorporates the QLRC's recommendations and takes into account the views of a range of community and legal stakeholders who were consulted on a draft version of the bill.

Overall, the bill creates an administrative scheme that effectively allows expungement applications for certain eligible offences to be made to and decided by the director-general or delegated to an appropriate senior officer of the Department of Justice and Attorney-General on a case-by-case basis. The effect of the expungement scheme is that a successful applicant will, as far as possible, be treated in law as if the conviction had never been imposed. To achieve this aim, records relating to a successful expunged conviction or charge will be annotated by the relevant criminal record holder to show that the record relates to an expunged conviction or charge. Importantly, the successful applicant will not be obliged to disclose the expunged conviction or charge pursuant to any requirements under any other act and may claim under oath that the expunged conviction or charge never occurred.

The bill is an example of this government's strong commitment to law reform that provides equality to LGBTI Queenslanders and to address, as far as practicable, the institutionalised injustices of the past. Members will recall that the introduction of this bill was preceded by this Legislative Assembly's apology, given by the Premier, to those affected by historical homosexual convictions. I repeat my thanks to the Premier for her leadership in offering this assembly's unreserved and sincere apology to all LGBTI Queenslanders and their family and friends who suffered as a result of the discriminatory laws passed in this chamber and the institutional discrimination of the brutal regime of that time. Charges and convictions under those laws humiliated and hurt individuals who found themselves in the criminal justice system. The stigma of those charges and convictions continues to follow many individuals who have forgone employment and travel opportunities as a result of their criminal records. In the spirit of that apology, this bill is intended to provide a humble but meaningful measure of restorative justice to those people who suffered as a result of historical prejudice.

I turn now to the issues raised by non-government members in the committee's response to the bill. The non-government members acknowledge that the bill has considerable merit, subject to two matters. Firstly, non-government members do not support the inclusion of public morality offences in the expungement scheme because the QLRC did not recommend those offences be included in the scheme. Secondly, non-government members held the view that the scheme would be improved by providing for the inclusion of a process of consultation with any other party involved in an historical offence who was not the applicant, particularly when issues of consent were in question. I note that the opposition as a whole may take a different position to that statement of reservation, but I believe it is important and incumbent on me to address these issues.

With respect to the first issue, although the government acknowledges that the QLRC report did not recommend the inclusion of public morality offences in the exclusion scheme, there is strong anecdotal evidence to suggest that historically those offences were often utilised to prosecute and victimise homosexual people. The inclusion of public morality offences in the bill recognises the strong stakeholder support for the inclusion of these offences in the expungement scheme. The inclusion of these offences also appropriately acknowledges historical anecdotal evidence that suggests that members of the LGBTI community were prosecuted and punished under these types of offences for behaviour such as dressing or behaving in a gender or sexually nonconforming manner. Without extending it to public morality offences, this scheme would just not deliver on its true intent.

With respect to the second issue, the bill provides that a conviction or charge for a historical Criminal Code offence may not be expunged unless the decision-maker is satisfied, amongst other things, that the other party to the offence was a consenting adult. The expungement scheme in the bill is designed to address the wrongs associated with the criminalisation of sexual activity between consenting adults. For this reason, the bill already provides for the chief executive to gather relevant information from a variety of sources to make a determination regarding consent. When considering the matter of consent, the decision-maker is able to gather relevant information from criminal record holders such as the Director of Public Prosecutions, the Queensland Police Service, the Queensland courts and Queensland Corrective Services.

Although the bill does not provide a specific process for consultation with the other party to a Criminal Code male homosexual offence, clause 16 of the bill already allows for the chief executive to make inquiries or request information from any person, which may, where necessary and appropriate, include the other party to the offence. The bill provides for such an approach to be made only with the consent of the applicant.

Clause 39 of the bill provides that it will be a criminal offence for a person to knowingly provide false or misleading information to the decision-maker under the expungement scheme. This offence provides a disincentive to any person who may be tempted to provide false or misleading information about any element of an expungement application including consent. Finally, part 4 of the bill provides that if at any subsequent time the decision-maker becomes satisfied that a conviction or charge became expunged because of false or misleading information an expunged conviction can be revived.

I would like to foreshadow at this time that I will be moving amendments to the bill during the consideration in detail stage of the debate. Currently, the criteria for expungement of both Criminal Code male homosexual offences and public morality offences explicitly provide at clauses 18(2)(b) and 19(2)(b) respectively that the chief executive may only decide to expunge the conviction or charge if satisfied that the act or omission constituting the offence, if done by the eligible person at the time the application was made, would not constitute an offence under the current law of Queensland.

The Queensland statute book currently contains offences relating to indecent acts and wilful exposure in places to which the public have access. Therefore, the practical consequence of clauses 18(2)(b) and 19(2)(b) is that a conviction or charge derived from sexual activity in a public place will likely not be capable of being expunged under the bill.

Concerns were raised in stakeholder submissions during the committee process that the exclusion of conduct that occurred in public places does not properly take into account the historical context in which relevant offences took place—that is, historically, many homosexual men felt it was necessary to find their privacy in public. It is proposed to amend clauses 18 and 19 of the bill to provide that the chief executive may decide to expunge a conviction or charge if the chief executive is satisfied that all the criteria currently provided for in the bill has been met and that the conduct constituting the charge or conviction would not constitute an offence against the current law of Queensland but for the fact it occurred in a public place. This amendment will not provide for the expungement of convictions and charges relating to sexual activity that was overtly public.

South Australia, Victoria, New South Wales and the Australian Capital Territory have all passed legislation introducing expungement schemes. Tasmania has introduced a bill for an expungement scheme but it is yet to be passed by both houses of its parliament. The law in Victoria accords with the 1961 Victorian Supreme Court decision in Inglis v Fish which provides that the relevant public conduct must have only been able to be observed in plain view without abnormal or unusual action being taken, such as crouching to peer in a keyhole. Neither New South Wales nor the ACT require a decision-maker to be satisfied that the conduct giving rise to the offence would not amount to an offence under the current laws of New South Wales and the ACT. However, New South Wales has prescribed additional offences as eligible offences for its expungement scheme this year in response to issues related to historical offences for gay beat activity and has provided for a special criteria to be applied with respect to those offences. That criteria requires the decision-maker to be satisfied that the conduct was not witnessed by anyone except a police officer and that it was the offender's first conviction. In the second reading speech in the Tasmanian lower house, the acting Tasmanian Attorney-General referred to the Inglis case.

The proposed amendments that I will move will require the chief executive to further satisfy themselves that the conduct constituting the charge or conviction could not have been observed by a witness without that witness taking an abnormal or unusual action. I want to be clear that the proposed amendment is not intended to alter in any way the application of the current criminal law in Queensland as it applies to indecent acts or wilful exposure committed in places to which the public have access. The proposed amendments are intended to expand the restorative potential of this legislation by allowing it to acknowledge the real lived experiences of those impacted by historical convictions or charges prior to 19 January 1991.

Finally, I noted when introducing this bill that this legislation represents a continuation of the important work begun by the Goss government in 1990 to decriminalise private adult consensual homosexual activity. I hope the debate we are about to have on this bill will demonstrate to the LGBTI community how far we have come as a parliament and as a community from the discrimination and hatred that was displayed in this chamber during the debate of the decriminalisation reforms in 1990.

This bill represents an important opportunity for this parliament to endorse with tangible action the apology that was made by the Premier to those affected by historical homosexual convictions on 11 May 2017. I commend the bill to the House.