Historical criminal treatment of consensual sexual activity between men in Queensland

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LGBTI

Legal Service Inc

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1 Overview of this paper

1.1 Foreword

Consensual sexual activity between adult men was decriminalised in Queensland on 29 November 1990. Research conducted in the early 1990s at the Queensland State Archives in Brisbane evidenced 548 court cases involving male-to-male sex and 464 convictions in Queensland over ninety-five years.[1] Although decriminalisation removed the threat of further prosecution, it did not address the impacts of criminal records relating to historical homosexual offences. This means that a number of Queenslanders continue to live with ongoing stigma, shame, and practical difficulties presented by a criminal record for conduct that is now legal.

We welcome the Queensland Government's recognition of these impacts and preparedness to investigate option for reform to address this ongoing injustice.[2]

This discussion paper is intended to assist the Queensland Government to investigate options for reform to address the ongoing impact of prosecutions under historical homosexual offences.

Section 2 of this paper contains a summary of our recommendations for reform.

Section 3 discusses the historical background to the criminalisation and decriminalisation of male homosexual activity in Australia and the ongoing impacts on those prosecuted.

Section 4 outlines and analyses the various approaches for reform taken in other Australian jurisdictions.

Section 5 contains detailed recommendations for the implementation of reform in Queensland.

1.2 About LGBTI Legal Service

The LGBTI Legal Service Inc is an organisation run by volunteers that seeks to assist and advocate for LGBTI people. In doing so, the LGBTI Legal Service works closely with other community organisations such as the Queensland AIDS Council. In preparation of this paper, the LGBTI Legal Service has collaborated with the Queensland Association of Independent Legal Services, a state-based peak body representing funded and unfunded community legal centres throughout Queensland and the Human Rights Law Centre, which has played a key role in securing similar legislative reform in Victoria and NSW in partnership with LGBTI community groups.

1.3 Acknowledgements

The LGBTI Legal Service acknowledges the valuable pro bono contribution of Allens lawyers in relation to the research and preparation of this discussion paper. We also acknowledge the work previously undertaken by LGBTI groups and human rights experts, including Anna Brown, James Farrell and Peter Black, that the LGBTI Legal Service has been able to draw on extensively in the preparation of this paper.[3] We also thank Caxton Legal Centre for their support in this project.

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[1] Clive Moore and Bryan Jamison, 'Making the Modern Australian Homosexual Male: Queensland's Criminal Justice System and Homosexual Offences' (2007) 11 *Crime, Histoire @ Societies/ Crime, History & Societies* 1, 5.

[2] Amy Remeikis, 'Queensland looks to right wrongs against gay community' *The Brisbane Times* (April 9, 2015), accessed at <http://www.brisbanetimes.com.au/queensland/queensland-looks-to-right-wrongs-against-gay-community-20150408-1mgzp4.html>.

[3] Specifically, the report prepared by the Human Rights Law Centre in partnership with LGBTI community groups in Victoria entitled 'Righting Historical Wrongs: Background paper for a legislative scheme to expunge historical convictions for gay sex offences' 12 January 2014, accessed at <http://hrlc.org.au/righting-historical-wrongs-background-paper-for-a-legislative-scheme-to-expunge-convictions-for-historical-consensual-gay-sex-offences-in-victoria/> on 5 March 2015 and the report released by the Office of the Anti-Discrimination Commissioner (Tasmania), 'Treatment of historic criminal records for homosexual sexual activity and related

Finally, thank you to Alan Raabe for agreeing to share his story with us. We hope that his contribution can assist in bringing about a long-awaited change.

1.4 Terminology

Conviction is used in this document to refer to any conviction, charge, fine, good behaviour bond, community service order, or any other penalty or sentence prescribed by police, a tribunal or a court, within the meaning of the *Penalties and Sentencing Act 1992* (Qld) or other Queensland legislation. This is discussed further in section 5.5.

The process of removing a Conviction from a criminal record so that it appears that the Conviction never occurred is known as **expungement**. There is an important distinction between the process of expungement and the existing 'spent' convictions regime, which contains a number of exceptions which still require disclosure of the conviction in certain circumstances.

LGBTI means lesbian, gay, bi-sexual, trans (gender or sexual), and intersex. While most literature on this subject uses the terms 'gay' and 'homosexual' to describe people who have been relevantly convicted (or prosecuted), laws that are the subject of this discussion paper have also impacted on men who have sex with men regardless of how they identify their sexual orientation and the terminology used by the community to described this has evolved over time. Further, women or gender diverse people may also have been the targeted and the subject of convictions (or prosecutions) for consensual same sex activity. While the paper does not specifically address this issue, such convictions are intended to be encompassed with the scope of the recommendations.

conduct' April 2015, accessed at <http://www.antidiscrimination.tas.gov.au/__data/assets/pdf_file/0005/314069/2015-04_FINAL_REPORT-Treatment_of_historic_records_for_consensual_homosexual_activity.pdf> on 27 July 2015.

2 Summary of Recommendations

The Queensland Government should amend the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) to include a mechanism whereby 'eligible persons' can make an application to an independent panel for 'Convictions' and records of 'eligible offences' to be 'expunged'.

2.1 Eligible offences and eligible persons

(a) 'Eligible offence' should be defined as:

(i) a sexual offence as in force at any time by which any form of homosexual conduct (whether consensual or non-consensual, penetrative or non-penetrative) could be punished, whether or not heterosexual conduct could also be punished by the offence;

(ii) an offence other than a sexual offence, as in force at any time the essence of which is the maintenance of public order, public decency or morality, and by which homosexual behaviour could be punished (for example, associated offences such as resisting arrest or failing to provide name and address);

(iii) sections 208(1), 208(3), 209 and 211 of the *Criminal Code 1899* (Qld) as in force immediately prior to 29 November 1990;

(iv) an offence of attempting to commit, being involved in the commission of, or inciting or conspiring to commit, an offence the subject of the above paragraphs; and

(v) any other offence prescribed by regulation to be an 'eligible offence'.

(b) 'Eligible persons' should be defined as:

(i) a person who has been the subject of a 'Conviction' for an 'eligible offence' which occurred on or before 7 December 1992; or

(ii) if a convicted person is deceased, an appropriate representative of that person.

(c) The meaning of 'Conviction' for the purposes of expungement should encompass a broad range of matters, including any fine, charge, penalty, good behaviour bond, court appearance, community service order, conviction, or sentence within the meaning of the *Penalties and Sentencing Act 1992* (Qld).

2.2 Mechanism for expungement

The mechanism should involve an eligible person submitting a privately-made application for expungement to an independent panel comprising members with a combination of sufficient legal expertise and sensitivity to LGBTI cultural history. The panel should then decide whether to accept the application if satisfied, on the balance of probabilities, that:

(a) the person would not have been the subject of the Conviction but for:

(i) engaging in conduct in connection with same sex sexual activity; or

(ii) their sexual orientation or gender identity (actual or perceived); and

(b) that conduct, if engaged in by the person at the time of the making of the application, would not today result in a Conviction, including having regard to consent of the parties to (where relevant) whether persons involved in the sexual activity constituting the offence consented to the sexual activity and the prevailing social attitudes of the time of the offence as compared to today.

The panel should also have discretion, taking into account certain prescribed matters, to determine whether there are exceptional circumstances as to why the Conviction and associated records should not be expunged. Any decision of the panel should be reviewable upon application to the Queensland Civil and Administrative Tribunal.

2.3 Effect of expungement

The intended effect of expungement is that, as far as possible, the applicant is restored to a position where the Conviction never took place.

This involves the Conviction becoming an expired (i.e. ‘spent’) conviction for the purposes of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), but, importantly, the expiration would take place regardless of the criminal history of the applicant and the exceptions to the disclosure provisions of that Act would not apply.

Further, a successful application should result in a directive from the Minister for Justice that any secondary records pertaining to the Conviction be deleted or destroyed and that any primary records be restricted from access and disclosure and annotated accordingly, something which the expired conviction regime does not do.

2.4 Ancillary recommendations

To give full effect to the scheme, additional broader steps should be considered, including:

(a) funding for counselling and legal support for applicants;

(b) steps to acknowledge and repair the harm caused by past discriminatory laws including a formal apology; and

(c) consequential amendments to other legislation, such as the *Anti-Discrimination Act 1991* (Qld).

Each of these recommendations is considered in further detail in section 5 of this paper.

3 Historical background and the need for reform

3.1 Criminalisation of male homosexual activity

Same-sex activity among men was a "constant feature" of the convict era in Australia,[4] and the use of beats (public areas used for same-sex soliciting) along the Brisbane River dates back to the nineteenth century.[5] From the mid-1860s to the early 1890s, Australian governments systematically criminalised male homosexual activity, with the introduction of various offences targeting homosexual acts between men.[6]

The relevant law in Queensland was largely contained in the *Criminal Code 1899* (Qld), which came into force from 1 January 1901.

Section 208: Unnatural Offences

Any person who –

(1) Has carnal knowledge of any person against the order of nature; or

(2) Has carnal knowledge of an animal; or

(3) Permits a male person to have carnal knowledge of him or her against the order of nature;

Is guilty of a crime, and is liable to imprisonment with hard labour for fourteen years.

Section 209: Attempt to Commit Unnatural Offences

Any person who attempts to commit any of the crimes defined in the last preceding section is guilty of a crime, and is liable to imprisonment with hard labour for seven years. The offender cannot be arrested without a warrant.

Section 211: Indecent Practices between Males

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a misdemeanour and is liable to imprisonment with hard labour for three years.

These laws made no distinction between consensual and non-consensual acts.

Sporadic prosecutions may also have been based on section 5 of the *Vagrancy Gaming and Other Offences Act 1931* (Qld), which was the offence of being known to be a male prostitute.[7] Men who were not prostitutes were possibly targeted for their homosexual activities under this section (which was repealed on 7 December 1992).

Table 1: Current status of the relevant historical offences in Queensland

Section	Charge	Current status of provision
***Criminal Code 1899* (Qld)**		
208 - Unnatural Offences	Unlawful sodomy	Amended on 29 November 1990 to be a person who sodomises another person under 18
209 - Attempt to Commit Unnatural Offences	Attempt to commit unnatural offences	Repealed on 29 November 1990

[4] Moore and Jamison, above n 1, 5.

[5] Ibid 4.

[6] Robert French, *Camping by a billabong; Gay and Lesbian Stories from Australian History* (BlackWattle Press, 1993) 6,7.

[7] Bill Lane, 'Harassment of homosexuals in Queensland: Private lives, public 'crimes' (1988) 13 *Legal Service Bulletin* 4.

211 - Indecent Practices between Males	A male committing an act of gross indecency with another male	Replaced on 29 November 1990 with a prohibition on bestiality
***Vagrants, Gaming, Etc Act 1931* (Qld)**		
5 - Prostitutes, etc	Being a male person who knowingly lives wholly or in part on the earnings of prostitution	Repealed on 7 December 1992

In addition to the above offences, there may be penalties imposed for a range of other offences associated with the principal activity, such as resisting arrest, being an accessary to the offence or attempting to commit a crime.

It is likely that there are numerous cases where charges were laid for such general offences in addition or in preference to the specific offences related to homosexuality.

Case study

In 1988, Alan Raabe was walking along the Cairns foreshore late at night. His path was crossed by a young man, who stared suggestively at Alan before walking to the surrounding gardens hidden by public view. In anticipation of a possible sexual encounter, Alan followed the man and gradually struck up a conversation about a nearby affray between a group of people. The man replied that he wasn't interested in the other people, which Alan interpreted to mean that the man was interested in him, and brushed against the man's genitals. At this point, the man informed Alan that he was a policeman and that Alan was under arrest.

Alan was taken to the Cairns police station where he was formally interviewed. During the interview, Alan was honest in explaining what had occurred. The interviewing officer asked whether Alan had shown control over his "sexual urges", to which Alan responded that he evidently hadn't. The senior arresting officer then advised Alan that his answer would form the basis of the charge against him.

Alan was informed that he would be charged with aggravated sexual assault.

Appearing a fortnight later at the Magistrate's Court, Alan was allocated an overworked duty solicitor who asked Alan what he wanted to plead. As Alan had in fact brushed the man's genitals, Alan thought that should plead guilty. Following a brief hearing, Alan was found guilty and handed a suspended sentence.

Following his conviction, Alan was forced to abandon his dreams of gaining registration as a teacher. He had studied to gain a qualification but was advised not to proceed with an application for registration as a result of his conviction. Alan has also been prevented from working within the disabilities sector.

Consent was no defence under section 208 of the *Criminal Code 1899* (Qld) (as it then was), and where there was consent, the consenting party was deemed an accomplice.[8] As a result, it is possible that some men involved in consensual homosexual activities pleaded guilty to non-consensual sex offences in the *Criminal Code 1899* (Qld) such as sexual assault, indecent assault or rape in an attempt to protect their consenting partner from prosecution.

[8] *R v Tate* [1908] 2 KB 68.

3.2 Historical impacts of criminalisation

Prosecutions were mostly for conduct in public places as it was "impossible to detect the commission of homosexual acts which [took] place in private."[9] Methods for law enforcement involved looking into closed lavatory cubicles from hidden vantage points to detect men masturbating, covertly observing men urinating to detect any indication of "homosexual overtures," and loitering in the vicinity of toilets to apprehend any solicitors of homosexual activities.[10]

Case study

In 1988, two men were questioned in their home about a police matter that proved inconclusive.[11] However, the presence of some gay magazines prompted the police to question them about their relationship, and when one of the accused made admissions about their relationship, the men were arrested.

The men were charged with two counts of sodomy and six counts of gross indecency under sections 208 and 211 of the *Criminal Code 1899* (Qld).[12]

As the activities of the two men took place in the privacy of their own home, a Queensland District Court judge found that there was 'no outrage to public decency' and no conviction was recorded. However, the men were sentenced to a 12-month good behaviour bond with a $200 surety each.

Criminal laws prohibiting homosexual acts were regularly and 'enthusiastically' enforced by the Queensland Police Force.[13] In 1970, a member of the Queensland police force wrote that "the greatest benefit provided to the community by police action against homosexuals is that it deters them, as much as is possible, from introducing their immoral practices to the youth and the weak minded."[14] However, the only person likely to be offended or witness an "abhorrent homosexual act" through the police’s enforcement of the laws was the arresting officer.[15]

Academics of the time chronicled the "shattering impact of public disclosure of homosexual conduct upon the lives of many offenders, the risk of blackmail and corruption of law enforcement officers, and the arrest of innocent bystanders."[16]

The large majority of men arrested did not present any threat to young people and were not themselves in danger of becoming victims of crime.[17] Many offenders were "lonely, dissatisfied,

[9] Duncan Chappell and Paul Wilson, 'Public Attitudes to the Reform of the Law relating to Abortion and Homosexuality' (1968) 42 *Australian Law Journal* 120, 180.

[10] Duncan Chappell and Paul Wilson, 'Changing Attitudes towards Homosexual Law Reform' (1972) 46 *The Australian Law Journal* 22, 27.

[11] Graham Carbery, 'Towards Homosexual Equality in Australian Criminal Law – a Brief History' (2014) *Australian Lesbian & Gay Archives, Inc.*

[12] Lane, above n 7, 151-152.

[13] Ibid.

[14] V Green, 'The Role of the Police in the Detection of Homosexual Offences' (1970) 2 *Sydney University Institute of Criminology Proceedings* 49-51.

[15] Chappell and Wilson, above n 9, 27.

[16] Chappell and Wilson, above n 9.

[17] O. V Briscoe, 'The Problem of Indecent Behaviours in Male Public Conveniences in Sydney' (1969) 173 *Stipendiary Magistrates' Bulletin* 1.

unhappy men seeking emotional contact and companionship"[18], who endured living in a time when expression of their sexual identity was illegal.

Case study

In Roma in 1989, police began to suspect that a man may have been homosexual while questioning him on an unrelated matter. The man admitted to a homosexual relationship with another man. Both men were arrested, along with three other men identified from diaries and photographs seized from the first two men.

The five men were charged with gross indecency and carnal knowledge against the order of nature for consensual sexual conduct in private.[19] The story was picked up by the media and one of the men attempted suicide. Ultimately, all charges were dropped.[20]

3.3 Path to decriminalisation

In 1968, less than one in four Australians favoured liberalisation of the laws relating to homosexuality.[21] The prospects for reform were "dismal."[22]

Then, in 1972, in what was viewed as a homophobic hate crime, a group of men (who were also allegedly senior members of the police) threw respected university lecturer Dr George Duncan in Adelaide's Torrens River, drowning him.[23] The ensuing public uproar led to South Australia becoming the first Australian jurisdiction to decriminalise homosexual acts.[24]

In 1976 and 1980 respectively the Australian Capital Territory and Victoria passed legislation decriminalising homosexual activity between consenting adults in private, followed by the Northern Territory in 1983, and New South Wales in 1984. That same year, the Australian Medical Association removed homosexuality from its list of illnesses and disorders (although the Queensland and Tasmanian branches of the AMA opposed the decision).[25]

In 1989, Western Australia decriminalised homosexual activity, and in Queensland the Fitzgerald Report recommended that the Criminal Justice Commission review the laws governing voluntary sexual behaviour.[26]

On 21 November 1990, the Queensland State Caucus introduced legislation to amend the *Criminal Code 1899* (Qld) and the *Criminal Law (Sexual Offences) Act 1978* (Qld) to decriminalise consensual, private homosexual behaviour. The legislation was passed on 29 November 1990.

Tasmania was the last state in Australia to decriminalise homosexual activity in 1997.

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[18] Ibid.

[19] Greg Weir, 'Police arrest five on homosexual counts', *Sunday Mail* (Brisbane), 6 August 1989.

[20] Clive Moore, *Sunshine and Rainbows: The Development of Gay and Lesbian Culture in Queensland* (University of Queensland Press: 2001), 184.

[21] Chappell and Wilson, above n 9.

[22] Ibid.

[23] ABC, 'A look back at the Duncan murder' *The 7.30 Report* 9 May 2002, Mike Sexton.

[24] Rick Kuhn, *Class and Class Struggle in Australia* (Pearson Education, 2nd ed, 2005).

[25] Emily Wilson, 'Homosexual health hazards': Public discourse on homosexuality and medicine in Australia, 1973-1984' in Y. Smaal & G. Willett (eds.) O*ut here: Gay and lesbian perspectives VI* (Monash University Publishing, 2011).

[26] Queensland Crime and Corruption Commission, *Fitzgerald Report* (1989) 377.

3.4 Ongoing impacts

It is likely that there are a number of people alive and of working age in Queensland who still carry the legacy of records of criminal Convictions.

The courts, government departments, and various other public authorities are obliged to create and maintain full and accurate records of their activities.[27] The existence of a same-sex or an associated offence on a person's criminal record is a potential source of discrimination and prejudice, particularly in the context of pre-employment criminal history screenings. It is not currently illegal for employers to discriminate on the basis of a criminal record in Queensland.[28]

Queensland has existing laws which may provide some protection to persons convicted in court for engaging in consensual homosexual activity. Like all other Australian jurisdictions except Victoria, Queensland has a legislative regime whereby court convictions (whether recorded or not) can be deemed to have expired (or become 'spent') with the passage of time, subject to exceptions.[29]

In Queensland, a court conviction will expire with the passage of 10 years (or 5 years for a child) provided that, during that time period, the person the subject of the conviction was:

(a) not ordered to serve any period in custody; or

(b) ordered to serve a period not exceeding 30 months in custody, regardless of whether they were required to actually serve any part of that period in custody.[30]

The specific offences prohibiting homosexual sexual activity were repealed on 29 November 1990. Accordingly, for those persons whose convictions have not been subsequently convicted of other offences, their conviction would by now be expired under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).

When a conviction is 'spent', it becomes lawful (in limited circumstances) for a person to deny the existence of that conviction, whether under oath or otherwise.[31] There is also a duty on a person or authority charged with assessing a person's fitness to be admitted to a profession or occupation to disregard the 'spent' conviction.[32] However, a person can apply to the Minister for permission to disclose a 'spent' conviction', which can be granted if the Minister is satisfied that person has a legitimate and sufficient purpose for such disclosure.[33]

Importantly, there are various exclusions to the non-disclosure protection for 'spent' convictions, including, for example, for persons applying for jobs in the legal, justice, governmental and childcare services industries, who must disclose 'spent' convictions to their prospective employer.[34] Further, persons convicted of any sexual offence must disclose the relevant 'spent' conviction if applying to work as a teacher, teacher's aide, or as an employee at a State school.[35] Applying for a blue card is one instance where a person must disclose his or her complete

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[27] *Public Records Act 2002* (Qld) s 7(1)(a).

[28] *Anti-Discrimination Act 1991* (Qld) s 7.

[29] *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).

[30] Ibid s 3(2).

[31] Ibid ss 6, 8.

[32] Ibid s 9.

[33] Ibid s 10.

[34] Ibid ss 7, 9A.

[35] Ibid s 9A.

criminal history, including 'spent' convictions and charges.[36] This will be the case even if the charge in question did not result in a conviction (a non-conviction charge), for example because it was withdrawn, set aside or quashed on appeal.[37]

Accordingly, a conviction becoming 'spent' does not necessarily prevent future disclosure (including in respect of a person's ability to lawfully deny a conviction or employment and any other offences).

Further, a conviction becoming 'spent' does not remove or modify any police, court or other records of that conviction.

3.5 Conclusion

The serious historical and ongoing legal and societal impacts of a Conviction for conduct that is now legal (including the ongoing stigma, shame, and disadvantage outlined in this section 3), brings into clear focus the need for the Queensland Government to recognise and appreciate those impacts and to consider options for reform. Given its exclusions and limitations, the existing spent convictions regime does not adequately address these impacts.

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[36] Ibid; *Working with Children (Risk Management and Screening) Act 2000* (Qld) ss 157, 357F, 357Q.

[37] *Working with Children (Risk Management and Screening) Act 2000* (Qld) ss 357F, 357Q.

4 Reform in Australia

4.1 Overview

A number of Australian and overseas jurisdictions have acted to remove the discriminatory impacts of historical criminal treatment of consensual homosexual activity.

This section considers the approaches adopted in other jurisdictions to address the issue of expunging convictions for consensual sexual activity between male adults. An examination of the approach to expunging convictions in overseas jurisdictions is set out in Schedule 1 to this paper.

Five Australian jurisdictions (South Australia, Victoria, New South Wales, the Australian Capital Territory, and Tasmania) have already taken steps to address the issue of historic convictions for consensual homosexual activities and related conduct.

4.2 South Australia

South Australia has existing 'spent convictions' legislation, the effect of which is similar to spent convictions legislation in Queensland described in section 3.[38]

There are sanctions within the South Australian spent conviction regime for unlawful disclosure of a spent conviction by third parties.[39] However, there are (as in Queensland) a number of exclusions that apply, under which spent convictions may need to be disclosed (e.g. for justice and legal functions, care of children, care of vulnerable people, and other prescribed exclusions).[40] This means that, notwithstanding that a conviction for consensual homosexual activity might be 'spent', it could still be disclosed.

On 22 December 2013,[41] the *Spent Convictions (Decriminalised Offences) Amendment Act 2013* (SA) introduced amendments to the *Spent Convictions Act 2009* (SA), providing a mechanism for convictions for 'eligible sex offences' to become 'spent' for all purposes.[42]

An ‘eligible sex offence’ is:[43]

(a) a 'sex offence' (e.g. rape, child pornography, gross indecency, or aiding and abetting a person to undertake such) where no prison sentence is imposed; or

(b) a ‘designated sex-related offence,’ which is:

  (i) a 'sex offence', being adults engaging in, or an adult procuring another adult to engage in, consensual sexual activity; or

  (ii) an offence which involves:

    (A) consenting persons of the same sex engaging in sexual activities (this definition captures other offence which may not be 'sex offences');

    (B) at least one of those persons is 16 or 17 years old (and none is younger); and

    (C) whose actions would not have constituted an offence if they were not of the same sex (this definition addresses convictions under unequal age of consent laws).

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[38] *Spent Convictions Act 2009* (SA) s 10.

[39] Ibid ss 11, 12.

[40] Ibid Schedule 1.

[41] *Spent Convictions (Decriminalised Offences) Amendment Act (Commencement) Proclamation 2013* (SA).

[42] *Spent Convictions Act 2009* (SA) s 8A.

[43] Ibid s 3.

The amendments permit a person convicted of an 'eligible sex offence' to apply to a qualified magistrate for the conviction to be spent, provided:[44]

(a) they have completed the relevant ‘qualification period’ of 10 consecutive years (5 years for a juvenile) from the conviction without offending; and

(b) a qualified magistrate has not refused an application within the previous 2 years.

There is no express right for a person to apply on behalf of a convicted person (including a deceased person).

In exercising his or her discretion to make an order that the conviction is 'spent', the magistrate must only have regard to a number of prescribed circumstances.[45] However, in the case of a ‘designated sex-related offence', the magistrate may make the order the conviction is spent without reference to those prescribed circumstances upon being satisfied that the offence is a 'designated sex-related offence', and that the conduct constituting the offence has ceased, by operation of law, to be an offence.[46]

Upon a 'designated sex-related offence' becoming 'spent', it is not subject to the usual exclusions from non-disclosure, meaning that the conviction is not able to be disclosed for employment or police checks. However, the Act does not authorise the destruction of records – that is, the records still exist (albeit that access and use is restricted).[47]

There is no express provision in the Act which allows unsuccessful applicants to appeal the decision of the magistrate.

The South Australian Government has indicated to us that a number of applications have been made to magistrates since the implementation of the legislation.

4.3 Victoria

The Victorian Parliament passed the *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic) to include a new Part 8 of the *Sentencing Act 1991* (Vic). The amendment Act commenced on 1 September 2015.[48]

The purpose of the Victorian amendments is to establish a dedicated scheme to receive and consider applications to expunge historical homosexual convictions. There is no spent convictions legislation in Victoria for the amendments to extend upon (as is the case in South Australia and New South Wales).

Additionally, the relevant historical provisions in Victoria under which persons were convicted did not distinguish between consensual and non-consensual acts (as is the case in Queensland). Accordingly, it is possible that the person was found to be an adult engaging in consensual sex, but nonetheless was convicted.

The amendments establish a process whereby a person convicted of a 'historical homosexual offence' can apply to the Secretary of the Department of Justice for such offences to be 'expunged.' This is an administrative, rather than judicial, scheme.

Under the Victorian amendments, 'historical homosexual offence' means:[49]

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[44] *Spent Convictions Act 2009* (SA) s 8A(2).

[45] Ibid s 8A(5).

[46] Ibid s 8A(6).

[47] Ibid s 16.

[48] *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic) s 2.

[49] Ibid s 105B.

(a) a sexual offence, which is an offence as in force at any time by which any form of homosexual conduct (whether consensual or non-consensual, or penetrative or non-penetrative) could be punished, whether or not heterosexual conduct could also be punished by the offence;[50]

(b) a 'public morality' offence, which is an offence other than a sexual offence, as in force at any time, the essence of which is the maintenance of public decency or morality, and by which homosexual behaviour could be punished; and

(c) an offence of attempting to commit, being involved in the commission of, or inciting or conspiring to commit, a sexual offence of a public morality offence.

This definition is broad and captures all offences, whether or not the provisions that were used to prosecute homosexual behaviour have been repealed.

An 'appropriate representative' may also apply on behalf of a deceased person who was previously convicted of a 'historical homosexual offence' (e.g. a spouse or domestic partner, sibling, son or daughter, or another person determined to be appropriate having regard to the closeness of the relationship).[51]

As part of the application, the applicant must authorise a police record check in relation to the conviction, and consent to the disclosure to the Secretary of any official records relevant to the conviction.[52] The Secretary may also request additional information from the applicant, or any person the Secretary thinks fit.[53]

The Secretary must refuse an application for expungement unless satisfied that the offence is a 'historical homosexual offence' and that, on the balance of probabilities, the person both:[54]

(a) would not have been charged with the offence but for the fact that the person was suspected of having engaged in homosexual activity; and

(b) that the conduct would not constitute an offence at the time of the application (taking into account, if relevant, consent to the conduct and the ages, or respective ages, of any such persons at the time of the conduct).

If consent is a relevant issue, and the Secretary is not satisfied on the issue of consent from the available official records, the Secretary may only be satisfied by written evidence touching on that issue from:

(a) a person (other than the convicted person) who was involved in the conduct; or

(b) if no such person be reasonably found, from a person (other than the applicant) with knowledge of the circumstances.[55]

Following the Secretary making a determination, they must provide written notice to the Applicant and the data controller stating the reasons and:

(a) if it is a refusal, informing the applicant; or

(b) if it is an approval, informing a data controller,

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[50] *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic) s 105.

[51] Ibid ss 105(1), 105B.

[52] Ibid s 105B(5).

[53] Ibid s 105C.

[54] Ibid s 105G.

[55] Ibid s 105D.

of their right (and how) to apply to VCAT for a review. That is, decisions of the Secretary are reviewable upon application to VCAT.[56]

At the end of a prescribed period following approval of an application (which is yet to be prescribed by regulation), the historical homosexual conviction is expunged. Upon expungement:

(a) a question about the person's criminal history (including one put in a legal proceeding and required to be answered under oath) is taken not to refer to the expunged conviction;

(b) the person is not required to disclose any information concerning the expunged conviction to any other person for any purpose;

(c) references to a conviction, or the person's character or fitness, in legislation are taken not to refer to the expunged conviction; and

(d) the expunged conviction (or non-disclosure of such) is not a proper ground for refusing or revoking any appointment, post, status or privilege, or revoking any appointment, status or privilege.[57]

The Secretary must also notify data controllers within a prescribed period after expungement to:

(a) annotate the primary record with a statement that it relates to an expunged conviction; and

(b) for secondary records, do everything to remove the entry, or otherwise de-identify the entry.[58]

Further, any person who has access to any official records must not, directly or indirectly, disclose or communicate to any person the fact of a conviction, or of a charge related to a conviction, that the person knows, or ought reasonably to have known, is an expunged conviction.[59]

While there will be one copy of the record still in existence, this will be annotated with a statement that it relates to an expunged conviction and will be prohibited from disclosure in any form, subject to very limited exceptions permitted by law (e.g. notifying relevant agencies of the fact that the conviction is now an expunged conviction).

4.4 New South Wales

The New South Wales Parliament passed the *Criminal Records Amendment (Historical Sexual Offences) Act 2014* (NSW) inserting a new Part 4A into the *Criminal Records Act 1991* (NSW). This took effect on 24 November 2014 and enables persons convicted of 'eligible homosexual offences' to apply to 'extinguish' (i.e. expunge) their records.

'Eligible homosexual offences' are a number of prescribed offences under *the Crimes Act 1900* (NSW), the *Police Offences Act 1901* (NSW) and other legislation, and permits the inclusion of other offence provisions by regulation.[60]

The amendments also provide for consideration of requests for posthumous expungement of eligible convictions by a convicted person's legal person representative, spouse, de facto partner,

[56] *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic) s 105L.

[57] Ibid s 105J.

[58] Ibid s 105K.

[59] Ibid s 105J.

[60] *Criminal Records Act 1991* (NSW) s 19A.

child, or a person in a close personal relationship immediately before the convicted person's death.[61]

Once the Secretary of the Department of Justice receives the application, the Department works in connection with the Police and other bodies to gather information regarding the conviction, and may require the applicant to provide additional information before making a decision. If the Secretary intends to make a decision rejecting the application, the Secretary must provide written notice to the applicant informing them of that intention, providing a copy of the relevant historical records and giving the applicant 14 days from the date of the notice to submit further information.[62]

The Secretary of the Department of Justice determines whether a conviction will become 'extinguished' by considering whether the other person involved in the sexual activity:

(a) consented to the sexual activity;[63] and

(b) was of or above:

  (i) the age of 16 years;[64] and

  (ii) if the person was under the special care of the convicted person (for example, if the offender was the step-parent or guardian of the victim), the age of 18 years.[65]

It is important to note that, unlike Victoria, the test does not require the conduct to otherwise be considered lawful today. This is because of the broad definition of 'public' place under NSW law (which mirrors the position in Queensland[66]) that would have rendered a Victorian model of the scheme unable to extinguish the majority of convictions, which were understood to related to sexual conduct in public places such as toilets. In Victoria, the 1961 Victorian Supreme Court decision in *Inglis v Fish*[67] held that 'public' did not include circumstances where it is not reasonable to expect that a member of the public will be present or could observe the conduct (for example, inside toilet cubicles, in secluded bushes or in a car not able to be viewed from outside due to condensation or lack of light. By limiting the scope of 'public', many beat activities in Victoria are not unlawful, however it remains unlawful in NSW (and Queensland) given the much broader scope of 'public' place (although it is rare for police to charge and prosecute these offences).

The effect of an 'extinguishment' means the person convicted is not required to disclose any information concerning the conviction and questions concerning criminal history, and any application to the person of an Act, does not refer to the conviction.[68]

The New South Wales amendments specifically indicate that those provisions have effect despite any Act that provides that information relating to spent convictions may be disclosed despite the *Criminal Records Act 1991* (NSW).[69]

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[61] *Criminal Records Act 1991* (NSW) s 19A.

[62] Ibid s19C(3).

[63] Ibid s19C(1)(a).

[64] Ibid s19C(1)(b)(i).

[65] Ibid s19C(1)(b)(ii).

[66] See *Criminal Code 1899* (Qld) s 230A.

[67] *Inglis v Fish* [1961] VR 607.

[68] *Criminal Records Act 1991* (NSW) s19F.

[69] Ibid s19F(2).

If, following a successful application, the Secretary later becomes satisfied that a conviction became an extinguished conviction by reason of an application that included false or misleading information, or documents that are false or misleading, the Secretary may determine that the conviction is no longer an extinguished conviction. The conviction ceases to be an extinguished conviction on and from the date of that determination.[70]

If an applicant has not received a response from the Secretary within 9 months of making an application, the Secretary is deemed to have made a decision that they are not satisfied with the application requirements as outlined above.[71]

A person whose application is unsuccessful or whose conviction ceases to be an extinguished conviction by virtue of false or misleading information can apply to the NSW Civil and Administrative Tribunal for an administrative review of the decision.[72]

The amendments do not authorise the destruction of a record relating to an extinguished conviction, but restricts the use and disclosure of the records.[73]

The Secretary of the New South Wales Department of Justice has informed us that it has already received ten applications to expunge historical homosexual conduct offences since the commencement of the amendments, of which, extinguishment has occurred in three instances. The remainder are either awaiting the provision of relevant documents to allow the applications to progress, or are awaiting further discussion regarding the application of the *Criminal Records Act 1991* (NSW) to certain offences. As at the date of this paper, no applications have been definitively rejected.

4.5 Tasmania

The Tasmanian Government has publicly supported the establishment of a scheme to expunge historical convictions for homosexual offences.[74]

In April 2015, the Tasmanian Human Rights Commissioner released a final report on the treatment of historic criminal records for consensual homosexual activity and related conduct.[75]

The report recommends the enactment of legislation in Tasmania to establish a dedicated scheme for the consideration and expungement of criminal and related records, with the intended effect of:

(a) restoring all legal rights as if the historical criminal record had not been made;

(b) providing the right of non-disclosure of all expunged records under all circumstances;

(c) granting the Anti-Discrimination Commissioner custody of expunged records;

(d) destroying all secondary records; and

(e) prohibiting the disclosure of information relating to the conviction.

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[70] Ibid s 19I.

[71] Ibid s19E(2).

[72] Ibid s 19E.

[73] *Criminal Records Act 1991* (NSW) s 23.

[74] 'Tasmanian anti-discrimination commissioner wants criminal records for consensual gay sex erased', *ABC News* (online), 5 May 2015 <http://www.abc.net.au/news/2015-05-02/tasmania-erasing-historical-criminal-records-gay-sex/6439636>.

[75] Anti-Discrimination Commissioner Tasmania, *Treatment of Historic Criminal Records for Consensual Homosexual Sexual Activity and Related Conduct*, Final Report (2015).

The report recommends that the responsible decision maker would be a panel composed of the Anti-Discrimination Commissioner, the Dean of Law at the University of Tasmania, and the Registrar under the *Registration to Work with Vulnerable People Act 2013* (Tas).

The report also recommends that any decision to not expunge a record would be reviewable by a magistrates court.

4.6 Australian Capital Territory

On 9 January 2015, the Australian Capital Territory Attorney-General Simon Corbell announced plans to introduce a bill later this year to expunge historical homosexual offences in the Australian Capital Territory, using the schemes developed in Victoria, New South Wales and the United Kingdom as a guiding framework.[76] In August 2015, Chief Minister Andrew Barr indicated that the Spent Convictions Bill would be introduced during the Territory's spring legislation program.[77]

[76] 'ACT Government looks to erase historical gay sex convictions', *ABC News* (online), 18 January 2015 <http://www.abc.net.au/news/2015-01-09/act-government-looks-to-erase-all-historical-gay-sex-convictions/6008320>.

[77] 'New Bill set to clear historical consensual gay sex crimes in ACT', *Star Observer* (online), 5 August 2015 <http://www.starobserver.com.au/news/local-news/other-states/australian-capital-territory/new-bill-set-to-clear-historical-consensual-gay-sex-crimes-in-act/139437>.

5 Recommendations for reform in Queensland

5.1 Overarching recommendation

The Queensland Government should introduce legislation establishing a dedicated scheme to consider an application by eligible persons to expunge records for Convictions for eligible offences. This would involve amending the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) to provide that expunged Convictions for eligible offences are not required to be disclosed in any circumstances. The more specific aspects of this overarching recommendation are set out below.

We welcome discussion between relevant government agencies, the Queensland Law Reform Commission, support organisations and legal services on this issue and the development of an appropriate scheme in Queensland.

5.2 Acknowledgment of impact and community support

It is important to remember that the purpose of these proposed amendments is to work towards repairing the harm caused by historical discriminatory laws against the LGBTI community in Queensland. Introducing these amendments would send a clear message to Queenslanders that such laws ought never to have existed and that the government is committed to recognising and addressing the past and ongoing injustices which the laws have caused. For those affected, the amendments would represent an opportunity to be freed from the past and move forward into a more accepting and tolerant society, in which members of the LGBTI community can express themselves without fear of prosecution by the law.

Recognition of the purpose of the amendments should be included in the preamble to any amending Act to ensure that this objective of tolerance and justice is carried forward into the future.

In conjunction with this, we strongly recommend the Queensland Government consider issuing a formal apology for those who were impacted by the past attitudes of the police, courts and other governmental authorities as a gesture of the Government's regret for the discriminatory laws and attitudes. An apology would be directed at the affected individuals but also the LGBTI community more broadly. The apology would be a significant and meaningful step to repair the harm caused by past discriminatory laws and practices.

As outlined in the HRLC 'Righting Historical Wrongs' Report, to restore confidence of people in government and police administration, an apology should acknowledge the wrong done, accept responsibility for wrongs, express sincere regret and provide assurance that the wrong done will not be committed again. Following serious wrongdoing, concrete reparation measures should also be adopted to repair damaged relationships.[78]

We recommend that funding be made available for counselling and support services for applicants and others who may be affected by the public discussion around the reforms. Funding may also be needed for legal services depending on the model of any future scheme.

5.3 Method of implementation

As in South Australia and New South Wales, Queensland has spent convictions legislation – the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld). Amending this Act would be an

[78] Commonwealth Senate Committee, Commonwealth Contribution to Former Forced Adoption Policies and Practices (Cth) 29 February 2012, at [9.14-9.16] citing 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.

appropriate avenue for implementing an application process for, and dealing with the consequences of, expungement of eligible offences.

5.4 Definition of 'eligible offences'

While the primarily relevant sections of the *Criminal Code 1899* (Qld) (which have been amended or repealed) can be identified discretely, anecdotal evidence suggests that prosecutions for homosexual activity were often instead brought against men under a number of sections of the *Criminal Code 1899* (Qld) and other legislation (e.g. rape or sexual assault, even where the homosexual conduct was consensual, or 'public morality' offences such as loitering and soliciting).

As such, the NSW approach of definitively specifying the historical offences for which applications may be made (albeit with scope to prescribe additional provisions by regulation) should not be preferred. Instead, the preferable approach is for particular laws to be specified on an inclusive basis only, and supplemented by adopting a broad definition of eligible offence' similar to the definition of 'historical homosexual offence' used in Victoria. This would capture offences that may still be in effect which may have been used to prosecute consensual homosexual activity.

Accordingly, it is recommended that an 'eligible offence' should be defined as:

(a) a sexual offence as in force at any time by which any form of homosexual conduct, (whether consensual or non-consensual, or penetrative or non-penetrative), could be punished, whether or not heterosexual conduct could also be punished by the offence;

(b) an offence other than a sexual offence, as in force at any time, the essence of which is the maintenance of public order, public decency or morality, and by which homosexual behaviour could be punished;

(c) without limiting the preceding paragraphs, the offences as in force immediately prior to 29 November 1990 under sections 208 (except section 208(2)), 209 and 211 of the Criminal Code 1899 (Qld);

(d) an offence of attempting to commit, being involved in the commission of, or inciting or conspiring to commit, an offence the subject of the above paragraphs; and

(e) any other offence prescribed by regulation to be an 'eligible offence'.

We recognise that this definition is broad (potentially allowing applications for conduct which would still be considered an offence today) and would need to be regulated with appropriate safeguards in other areas (e.g. in the definition of 'eligible person', and relevant restrictions on the decision-maker's discretion) as discussed below.

5.5 Scope of 'Conviction'

The amending legislation should not be limited to expunging court convictions, but should include a broad definition of 'Conviction' (or similar term) for which applications for expungement can be made.

'Conviction' should be defined as any:

(a) fine;

(b) charge;

(c) penalty;

(d) good behaviour bond;

(e) court appearance;

(f) community service order;

(g) conviction; or

(h) sentence,

within the meaning of the *Penalties and Sentences Act 1992* (Qld).

While the eligibility of persons in other jurisdictions to make an application is restricted to court convictions, this broader definition is necessary to ensure that the broader impacts of criminalisation of homosexual activity are to be treated as though they never occurred. Expunging only court convictions will not satisfy this purpose.

5.6 Definition of ‘eligible person’

In New South Wales and Victoria, persons eligible to bring an application include not only those convicted of the offence but also family members of, and persons in a close personal relationship with a person who would have been eligible but is now deceased. The Queensland amending legislation should include similar provisions, ensuring that they are sufficient to capture de facto partners of eligible persons.

A risk with having a broad definition of 'eligible offence' that includes current offences is that applications may be made by persons subject to a Conviction after the decriminalisation of the historic laws took effect. For example, a person convicted of sexual assault in 2009 could notionally apply. Although that person's application would be declined as part of the recommended decision-making process, care must be taken to limit the scope for capricious applications.

So as to restrict the applications that can be made under the legislation, only persons the subject of a Conviction for an eligible offence on or before 7 December 1992 – the date of decriminalisation – should be eligible to bring an application. Although persons may have been subject of a Conviction in respect of offences for consensual same-sex activity after the repeal of the relevant laws, those issues would require much more detailed consideration so as to safeguard against abuse of the application process.

Accordingly, the definition of 'eligible person' should be:

(a) a person who has been subject of a Conviction for an eligible offence on or before 7 December 1992; or

(b) if a person described in the above paragraph is deceased or lacking capacity within the meaning of the *Guardianship and Administration Act 2000* (Qld), that person's legal personal representative, guardian, spouse, de facto partner, parent or child of the person, or an individual who was in a close personal relationship with the person immediately before the person's death.

5.7 Making an application

In Queensland, as discussed in section 3.1, the relevant repealed laws against homosexual conduct made no distinction between consensual and non-consensual acts. As such, expungement cannot be an automatic process. An application process and assessment of records would be required before a particular Conviction for an eligible offence recorded in relation to a particular person is expunged.

Give the reparative purpose of an expugement scheme, the application process should be made accessible, confidential and minimise impact on applicants. Applicants and the broader public should have confidence in the quality and independence of the decision making process. The decision making body should have appropriate legal expertise, be culturally competent in relation to LGBTI issues and be independent from government.

The South Australian model of applying to a magistrate is not the preferred approach. Such a process would potentially be a public,[79] time-consuming process involving court resources, and might raise fears among potential applicants that the process would bring further publicity of the Conviction the applicant is seeking to expunge. Additionally, if the process in South Australia were adopted, a proceeding may also be conducted without the applicant even being present,[80] and an application can be dismissed by the magistrate without the holding of a hearing.[81]

A privately-made application to the Attorney-General in Queensland would arguably risk the appearance of a politically influenced decision-making process. A more neutral alternative may be for applications to be made to the Secretary of the Department of Justice (supported by advisors), as is the process in NSW and particularly Victoria.[82]

The most satisfactory approach in Queensland would be a dedicated, independent panel (***the Panel***), as recommended by the Tasmanian Anti-Discrimination Commissioner. Possible Panel members, at least one of whom should be a member of the LGBTI community, include criminal and administrative law practitioners, the Anti-Discrimination Commissioner of Queensland, and members of Queensland Law Reform Commission.

Applications should state:

(a) information sufficient to establish the identity of the Applicant; and

(b) so far as is known to the applicant, the time and the place where the Conviction occurred.

We recommend a two-stage application process, as has effectively been adopted in Victoria. Following the initial application, the Panel should request information and records from relevant third parties, such as the police, the Director of Public Prosecutions and other government bodies holding records or information regarding the offence. This information should be provided to the applicant, following which further information can be provided by the applicant, if necessary, to substantively support the application.

It is important for this first step to occur given the extended period which will have passed since the offence took place. Rather than require the applicants to provide statements about their recollection of events from over 20 years ago, applicants should be provided with the relevant records so that they can review and seek assistance to coherently and succinctly state their case. If the opportunity to review records and information prior to the making of a substantive application is not afforded to applicants, the result may be that applicants will require various amendments to their application throughout the process as further information is brought to light, which would ultimately be more costly and time-consuming for all parties. The applicants may also inadvertently prejudice the outcome of their future application by making statements without the benefit of reviewing the available documents.

It may also be that decisions can be made to expunge certain convictions after verifying the identity of the applicant and reviewing the available documentary record without the need for further information from the applicant. In these cases, a two-stage process would be less intrusive and burdensome for applicants, and less costly in administration.

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[79] A magistrate may determine that the hearing be held in public: *Spent Convictions Act 2009* (SA) Sch 2; s 4.

[80] *Spent Convictions Act 2009* (SA) s 5(2).

[81] Ibid s 5(4).

[82] Discussions with Anna Brown, Human Rights Law Centre, September 2015, who has worked closely with the Victorian Government on the development and implementation of the expungement scheme.

5.8 Deciding an application

The preferred approach for decision-making is that the decision-maker must be satisfied that the offence the subject of the application is an eligible offence, the application was made by an eligible person, and on the *balance of probabilities* that both of the following tests are satisfied:

(a) the person would not have been the subject of a Conviction for the offence but for the fact the person was suspected of having engaged or did engage in the conduct constituting the offence for the purposes of, or in connection with, sexual activity of a homosexual nature; and

(b) that conduct, if engaged in by the person at the time of the making of the application, would not today result in a Conviction, including having regard to (where relevant) whether persons involved in the sexual activity constituting the offence consented to the sexual activity and the prevailing social attitudes of the time of the offence as compared to today.

If either or both of the above tests are not satisfied, the decision-maker should be required to refuse the application.

Scope of test

This test, and in particular part (b), focuses on the issue of consent and aligns with the NSW approach for the reasons discussed at section 4.4, ensuring that all appropriate Convictions can be captured.

Establishing consent

Where there is an issue of consent (including by reason of age of the other party), the decision-maker should be satisfied on the issue of consent by evidence touching on that issue:

(a) from a person (other than the entitled person) who was involved in the conduct constituting the offence; or

(b) if no such person can be found by the applicant, from a person (other than the applicant) with knowledge of the circumstances in which that conduct occurred.

The decision-maker (or their delegate) should be specifically authorised to make inquiries if the applicant is unable to identify or locate the applicant.

If the decision-maker is satisfied on those issues, the decision-maker should be required to expunge the Conviction.

Exceptional circumstances

The Government may consider including a discretion for the decision-maker to refuse to expunge the records if there are exceptional circumstances as to why the Conviction should not be expunged having regard to prescribed matters. The amending legislation in South Australia included a number of such prescribed matters. However, any consideration of reserving a discretion for the Panel to refuse to expunge the records despite being satisfied of the pre-requisite tests identified above should be balanced against the overarching purpose of the amendments, which is to expunge criminal records in relation to consensual same-sex sexual activity between adults.

Further information

The amending legislation should provide that if the decision-maker is satisfied that an expunged record became expunged by reason of false or misleading information, they may decide that the record of the Conviction is no longer considered expunged. Similarly, the amending legislation should provide for the applicant to make a further application if fresh evidence or information

comes to light, for example if an applicant locates a person with knowledge of the encounter that supports their version of events.

5.9 Rights after determination of application

In order to uphold the principles of natural justice we consider that it is preferable for an applicant to have a right to seek administrative review of a decision of the decision-maker as an additional safeguard for ensuring the robustness, transparency and consistency of the decision-making process.

Therefore, if the application is refused for any reason, or if the decision-maker determines that the Conviction is no longer considered expunged by reason of false or misleading information, the applicant should have a right to appeal to the Queensland Civil and Administrative Tribunal for administrative review of the decision within a specified time-frame.

5.10 Effect of expungement – destruction of records

Across jurisdictions, expungement (or the equivalent term 'extinguishment') refers either to the destruction of certain records upon the fulfilment of certain conditions or to the removal of references to the Conviction from a person’s criminal record. Victoria provides that official primary records relating to the Conviction should be annotated with a statement that the records relate to an expunged Conviction, and that secondary records (being records that are copies, extracts, or duplicates) should be destroyed, deleted or de-identified. New South Wales and South Australia explicitly provide that their legislation does not enable the destruction of any records. No state currently allows the destruction of primary records regarding expunged Convictions.

It is important that records of societal and legal treatment of homosexual behaviour are preserved for reasons of posterity and to ensure that the information is not lost (particularly in the event that further information comes to light regarding the expunged record). It may also not be practical to destroy records having regard to their form (for example if they are included as one entry in a ledger among a list of convictions).

Accordingly, we suggest that the Victorian approach should broadly be followed, allowing for variation to accommodate differences in the keeping of records in Queensland. This would mean that, following a successful application, primary records would be annotated as relating to an expunged record and secondary records would be destroyed, deleted or de-identified. The annotation on the primary record should expressly set out the prohibitions on persons accessing and/or disclosing the expunged record and the Conviction and the consequences for failing to abide by those restrictions. The practical implementation of this scheme may require consultation with the relevant record holders to ensure alignment between the legislative scheme and the record holders' ability to comply, having regard to their respective record holding processes.

5.11 Effect of expungement – non-disclosure of information

In addition to the above physical treatment of records, expunged records should be treated as if the rehabilitation period has expired in relation to Conviction recorded against the person and has not been revived within the meaning of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld). In addition, as per the South Australian regime, the exceptions for disclosure of spent convictions in particular circumstances should not extend to expunged Convictions. It should be made clear that the non-disclosure provisions take effect despite any other law that provides that information relating to expired convictions may be disclosed.

The effect should be that:

(a) the person is not required to disclose to any other person for any purpose information concerning the expunged records;

(b) questions concerning the person's criminal history are taken not to refer to any Conviction of the person which are the subject of expunged records; and

(c) in the application to the person of a provision of an Act or statutory instrument:

(i) a reference in the provision to Conviction is taken not to be a reference to any Conviction (as the case may be) of the person which are the subject of expunged records; and

(ii) a reference in the provision to the person's character or fitness is not to be interpreted as permitting or requiring account to be taken of expunged records.

This would be consistent with the New South Wales approach.

It should also be expressly provided that a person who has access to any official records must not, directly or indirectly, disclose or communicate to any person a record of a Conviction, that the person knows, or ought reasonably have known forms the subject of an expunged record (in accordance with the Victorian approach). There should be relevant exceptions if the person who has the expunged record gives written consent to the disclosure or communication, or the disclosure is otherwise expressly authorised by the amendments.

The Queensland Government should also consider consequential amendments to other legislation, such as criminal and anti-discrimination legislation, so as to give full effect to the intent of these proposed reforms.

5.12 Conclusion

We note that recommendations have been made on the basis of our analysis of available information about schemes in comparative jurisdictions and historical research. It may be that the approach we advocate for in this paper requires further development after investigation into practical considerations.

We look forward to working with the Queensland Government, the Queensland Law Reform Commission and key stakeholders in the community to address these issues and continue moving forward towards greater equality and recognition for the LGBTI community in Queensland.

Schedule 1

International Reform

1 United Kingdom: Protection of Freedoms Act 2012 (UK)

Until 1967, sex between men was illegal in the UK, and in 2003 the offence of gross indecency, used to prosecute individuals for a range of homosexual acts, was repealed. In 1994, the age of consent for homosexual men in the UK was reduced from 21 to 18 and from 2000 to 16, consistent with the age of consent for all other people.

These changes to the laws were not retrospective and an estimated 16,000 convictions as well as thousands of cautions, warnings or reprimands for consensual homosexual sex remained on police records. Some 50,000 cases were estimated to be listed in police computer and other records.

In 2012, the UK Government introduced the *Protection of Freedoms Act 2012* (UK) to enable those who were convicted of gross indecency or consensual sexual conduct to apply to have those convictions removed from their criminal record. The Act applies to convictions under the following specified provisions:

- sections 12 and 13 of the *Sexual Offences Act 1956*;
- section 61 of the *Offences against the Person Act 1961*; and
- section 11 of the *Criminal Law Amendment Act 1885*.

As well as convictions in respect of the above provisions, convictions under the specified provisions of the following Acts are also eligible to be disregarded:

- section 4 of the *Vagrancy Act 1824*;
- section 45 of the *Naval Discipline Act 1866*;
- section 41 of the *Army Act 1881*;
- section 41 of the *Air Force Act 1917*;
- section 70 of the *Army Act 1955*;
- section 70 of the *Air Force Act 1955*; and
- section 42 of the *Naval Discipline Act 1957*.

For the purposes of the *Protection of Freedoms Act 2012* (UK), a ‘conviction’ includes a conviction, caution, warning or reprimand. The request for removal involves the Home Secretary examining both police and other official records.

In order for a conviction to be disregarded, the conduct must no longer be considered an offence under existing law and all parties involved in the conduct constituting the offence must have been a consenting party and aged 16 years or over.

Consideration of applications to have convictions, cautions, warnings or reprimands disregarded involves a search of all official records (including police records, court records and records held by employing bodies such as the armed forces).

The effect of the scheme is to have relevant offences disregarded.

Where the decision is made to disregard a record, the Home Secretary will write to the relevant data controllers and require them to delete or annotate their records accordingly. The authority controlling the data is required to confirm that this has been done. Once this is done, the

previous conduct is treated in all circumstances as though it never occurred. The person to whom the conviction applied does not need to disclose it for any purpose.

Removal of the offences from the records under this law allows individuals who have no other convictions to legally say that they have no criminal record and to make applications for employment and other purposes without fearing disclosure of the record or their sexual orientation.

2 New Zealand: Criminal Records (Clean Slate) Act 2004 (NZ)

In New Zealand, male homosexual sex was a crime until 1986.

The *Criminal Records (Clean Slate) Act 2004* (NZ) automatically conceals the criminal record of eligible individuals. The legislation is designed to allow individuals with less serious convictions who have been conviction-free for seven years or more and who meet all other relevant criteria to have their convictions concealed.

In order for items on a criminal record to be concealed, the individual must meet relevant criteria. This includes not being convicted of a 'specified offence'. Specified offences include committing an unnatural offence or attempting to commit an unnatural offence as specified by sections 153 and 154 of the *Crimes Act 1908* (NZ).

Persons not considered eligible to have their record concealed are able to apply to a District Court to have a specified offence disregarded if that offence has subsequently been abolished and the conduct that constituted the abolished offence no longer constitutes an offence.

In considering the application, the Court must balance the interests of individuals concealing their criminal records with the wider public interest in the safety of the community. Decisions of the District Court not to disregard an offence can be appealed to the High Court.

3 Canada: Criminal Records Act 1985 (Can)

In Canada, a person is able to apply to the National Parole Board to have a record suspended under the *Criminal Records Act 1985* (Can). The effect of a suspension is to require that any judicial record of the conviction kept by any department or agency of the Canadian Government be kept separate and apart from other records and must only be disclosed with the authority of the Minister.[83]

The Act provides that the National Parole Board has absolute discretion to order, refuse to order or revoke an order of suspension of any record.[84] Specific convictions are not able to be suspended, including a range of sexual offences involving minors unless the person is able to provide evidence that the crime did not involve violence or other forms of coercion or the perpetrator was less than 5 years older than the victim.[85] A period of 10 years for an indictable offence and 5 years for a summary offence must have elapsed before any application can be made.[86] Whilst the Act does not contain appeal provisions, the Board is required to notify a person if they intend to refuse an application and the person has the right to make representations to the Board before a final decision is made.

[83] *Criminal Records Act 1985* (Can) s 6(2), (3).

[84] Ibid s 2.1.

[85] Ibid s 4(2), (3).

[86] Ibid s 4(1).

4 South Africa: Criminal Procedures Act 1977 (South Africa)

In 2008, the South African Parliament approved amendments to the *Criminal Procedures Act 1977* (RSA) to provide for the expungement of criminal records for offences where a period of imprisonment of 6 months or less has been imposed. This includes a sentence of corporal punishment before it became unconstitutional, and a fine, caution or deferred sentence.[87] A large number of offences based on race enacted by previous governments of South Africa are also eligible to be automatically expunged.[88] Persons convicted of crimes that have resulted in their name being entered into the National Sex Offenders database are not eligible to apply for expungement.

For convictions other than those automatically expunged, a request to expunge records is made to the Director General Justice and Constitutional Development. If a decision is made to expunge a record, a certificate of expungement is prepared and provided to the Criminal Record Centre of the South African Police Service.[89]

In the case of a dispute or uncertainty about whether a conviction should be expunged, the matter is to be referred to the Minister for final decision.

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[87] *Criminal Procedure Amendment Act 2008* (RSA) s 271B.

[88] Ibid s 271C.

[89] Ibid ss 271C, 271D.