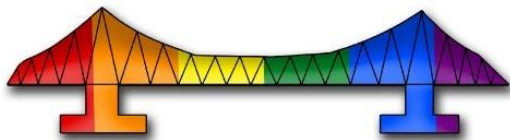

Community
Legal Centres
Queensland

Removing stigma for Queenslanders with historical homosexual convictions

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

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3 February 2017

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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.

The draft *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**). However, without significant amendment, the Bill will not adequately meet the needs of those affected and fail to achieve its intended purpose.

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- expungement of the key historical repealed offences, public morality type offences and allowing other eligible offences to be added by regulation;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.

[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.

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

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 and transgender people (**LGBT**) that were unjustly targeted by criminal laws.[3] This means the scope of the scheme must capture consensual behaviour by LGBT 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 LGBT.

The expungement scheme should include an accessible, user-friendly process with appropriately funded counselling and support throughout the application process.

We have a number of concerns about the current version of the Bill.

- There are some types of offences – including suspected homosexual behaviour, gender non-conforming behaviour and associated offences – which should be included in Queensland's expungement scheme.
- The application process proposed potentially requires applicants to produce an onerous level of information at an early stage through onerous means, namely, by way of statutory declaration. Such an unnecessarily burdensome process presents a barrier to an already vulnerable cohort of people. Requiring this level of information at an early stage is unreasonable given the period of time which has elapsed and carries the risk of prejudice for applicants due to their inability to clearly recall precise details of dates, names or locations.
- The criteria for expungement seemingly excludes the vast majority of homosexual offences because they occurred 'places accessible to the public'. The Bill should

[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.

employ a narrower definition of public place reflecting the Victorian Supreme Court decision of *Inglis v Fish*. The test of 'not unlawful today' 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.

- The scheme should allow for the complete removal of all records in the criminal justice system relating to offences that criminalised consensual LGBT behaviour and for such a scheme to be widely used by the affected communities.
- In the interests of fairness and to accommodate the particular sensitivities in these cases we recommend that applicants be given the opportunity to re-apply regardless of whether new evidence has come to light. We also recommend funding for emotional and legal support for applicants.
- We support compensation and a formal state apology by the Queensland Premier for the impact of these laws on the LGBTI community. This is particularly important given the number of people who could potentially access an expungement scheme is higher in Queensland given that decriminalisation took place relatively recently in 1991.

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.

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	An eligible offence should include suspected homosexual activities.	Clause 8(2)
3	A public morality offence should include perceived gender or sexuality non-conforming behaviour.	Clause 10(a)
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.	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)(e)
7	A statutory declaration should not be required at the application stage.	Clause 12(1)(g)

8	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
9	The relevant age of consent should be 16 in line with the test for expungement not constituting an offence today.	Clause 11(4)
10	The reference to 'a place to which the public are permitted to have access' in the criteria for expungement should be replaced with a narrower definition of public place reflecting the decision of *Inglis v Fish)*. More broadly, the criteria for expungement should take into account the historical social context of beat activity and policing of homosexual offences.	Clause 18(2)(b)
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'.	Clauses 18(2)(c)-19(2)(b)
12	Original records should be annotated and stored securely for historical purposes, and secondary records and duplicate copies should be destroyed.	Clauses 28 & 30
13	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
14	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 38
15	The Premier should make a formal state apology for the effect of historical homosexual laws, developed in consultation with the LGBTI community.	
16	The Bill should include consequential amendments as recommended by the QLRC report.	New clause
17	Funding should be provided to raise awareness of the expungement scheme and to provide counselling and support.	New clause
18	Compensation should be available to people affected by historical homosexual offences.	Clause 5

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

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 must 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.

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.

(b) Suspected homosexual offences

Clause 8(2)(b) of the Bill states that a regulation in subsection (1)(c) may only prescribe an offence which 'involved sexual activity of a homosexual nature'.[6] We have concerns that this

[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.

[6] We note that this requirement is also included in clause 19(2) of the Bill.

definition would not apply to offences for suspected sexual activity or offences for cross-dressing behaviour.

For example, a person may have charges or convictions for 'loitering for immoral purposes'. These types of offences relating to a police officer's suspicion that a person was going to commit an offence should also be eligible for expungement.

Recommendation 2

An eligible offence should include suspected homosexual activity.

(c) Cross-dressing offences

The definition of a public morality offence in clause 10 does not include cross-dressing offences.

Historically, gay men were also targeted for their cross-dressing behaviour. The scheme should also cover offences used against those people who did not conform with gender stereotypes, including in dress, mannerisms or appearances. At the time, cross-dressing was considered to be 'homosexual behaviour'. We know that in practice these types of laws were used against 'female impersonators / drag queens, transvestites and transgender people (including transsexuals, gender queer and/or cross-dressers).'[7]

In Victoria, the Explanatory Memorandum to the equivalent Bill recognised that the definition of 'historical homosexual offence' would include cross-dressing and beat activity:

> Nothing in the Bill … stops the Secretary from seeking broad contextual advice from a suitably qualified community representative about how homosexual behaviour has been regulated by the State in the past.
>
> For example, in any particular application the Secretary may seek information about how certain offences on the statute book were used to punish homosexual behaviour or whether certain behaviour was regarded as constituting an offence for the purpose of, or in connection with, sexual activity of a homosexual nature.
>
> General information about prevailing social attitudes to sexuality and activities such as cross-dressing or the identification of particular areas known by the homosexual community to be frequented by men seeking to meet other men for sex and where consensual acts between men were known to regularly occur may assist the Secretary to determine an application.[8]

We submit that gender identity related charges should be included in section 8(2) of the Bill (e.g. to include offences that related to cross-dressing used to target 'female impersonators', who were predominantly gay men and trans women).

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[7] Human Rights Law Centre in partnership with the Victorian Gay & Lesbian Rights Lobby, Liberty Victoria, Gay & Lesbian Health Victoria, Victorian AIDS Council and Gay Men's Health Centre, 'Righting historical wrongs: Background paper for a legislative scheme to expunge convictions for historical consensual gay sex offences in Victoria' (12 January 2014) http://www.hrlc.org.au/wp-content/uploads/2014/01/Gay_Sex_Convictions_Paper_January2014.pdf, p 39.

[8] Explanatory Memorandum (Amended Print), *Sentencing Amendment (Historical Homosexual Convictions Expungement) Bill 2014* (Vic) http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/CA2570CE0018AC6DCA257D5500191233/$FILE/571546exab1.pdf, p 8.

Recommendation 3

A public morality offence should include perceived gender and sexuality non-conforming behaviour.

(d) 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 requires disclosure.

2.4 Application process

(a) Information currently required in the Bill

Clause 12 of the Bill currently requires very 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 offence the person was convicted or charged of (including the provision of the Act), the particulars of the offence 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.[9]

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 record. We also support the Bill's inclusion of the words 'if known' 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 in a statutory declaration 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, we 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 we have assisted have any of the original documents relating to the original charge.[10]

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.

Almost all of the applicants we 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 our 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 rejected by his colleagues, friends and family.

The barriers to individuals making applications should not be underestimated. From our 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.

Requiring a statutory declaration will in practice force individuals to disclose to a Justice of the Peace, lawyer, police officer or pharmacist that they are applying for a historical homosexual offence when having the statutory declaration witnessed. This poses an additional barrier to

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

[10] 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.

older people who have limited mobility (and would struggle to have this document witnessed without assistance) and particularly for applicants living in rural areas where they are unlikely to find an authorised witness who is not known to them.

(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) in a statutory declaration 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.

Recommendation 7

A statutory declaration should not be required at the application stage.

(e) Practical considerations for application process

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. The 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.

2.5 Information should be provided in a timely manner

Clause 16 of the Bill allows a 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. However, there is no prescribed period of time in which another person or entity is required to respond to a request. Given that the expungement or extinguishment 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 8

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'.[11]

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 Act provides that the chief executive may expunge the conviction or charge if satisfied that the other person was an adult 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 would mean that expungement is not possible.

[11] Above n 1 [7.48].

Recommendation 9

The relevant age of consent should be 16 in line with the test for expungement not constituting an offence today.

2.7 Definition of a public place in criteria for eligible offences

Clause 18(2)(b) of the Bill provides that an offence may be expunged if the chief executive is satisfied on the balance of probabilities that the offences was not committed or alleged to have been committed in 'a place to which the public are permitted to have access, whether on payment of a charge for admission or not'.

This is consistent with the recommendation in the QLRC report.[12] However, we are concerned that this broad definition of a public place will undermine the efficacy of the proposed scheme.

The QLRC report summarises the relevant judicial guidance on a 'public place':

> 'Public place' is relevantly defined in s 3 sch 2 of the *Summary Offences Act 2005* (Qld) to mean 'a place that is open to or used by the public, whether or not on payment of a fee'. This definition is relevant to the offence of wilful exposure in s 9 of that Act. It has been held in relation to that definition that, where the public has an entitlement to use a place, it will be said to be 'open to the public' regardless of whether people can enter without impediment: *Atkinson v Gibson* [2012] 2 Qd R 403, applying *Schubert v Lee* (1946) 71 CLR 589 and *Ryan v Nominal Defendant* (2005) 62 NSWLR 192.
>
> Whether a particular place is a 'public place' is a question of fact: *Hughes v Fingleton* (1977) 17 SASR 433, 439 (Sangster J), cited with approval in *Atkinson v Gibson* [2012] 2 Qd R 403, [9]–[10] (McMurdo P). For example, a person who is inside a private vehicle situated in a public place (such as a public road) has been held to be in a public place: *Forte v Sweeney* [1982] Qd R 127 (Douglas, DM Campbell and WB Campbell JJ); but a person who is inside a structure such as a caravan or tent might not be found to be in a public place 'because of the degree of his insulation therefrom': *Mansfield v Kelly* [1972] VR 744, 745 (Newton J).[13]

The key Victorian authority is Pape J's judgment in *Inglis v Fish*,[14] 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 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.

[12] Above n 1, recommendation 4-1(c).

[13] Above n 1, 45.

[14] [1961] VR 607.

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.[15]

For example, a couple engaging in sexual activity in an unlit area in the middle of the night in a car on a quiet street could not be ordinarily be viewed by members of the public. In practice, they were likely only charged or convicted by police as police officers were aware that they were meeting in a popular gay beat location and shone a torch through the windows of the car at night. However, under the test proposed in the Bill the couple are, without doubt, located 'in a place to which the public are permitted to have access'. This would mean that their offences would not be able to be expunged under the proposed scheme.

The requirement for conduct not to have taken place in public is a serious flaw in the bill and would result in significant injustice for applicants, particularly given the specific targeting of homosexual conduct in public places by police.

Recommendation 10

The reference to 'a place to which the public are permitted to have access' in the criteria for expungement should be replaced with a narrower definition of public place reflecting the decision of *Inglis v Fish)*. More broadly, the criteria for expungement should take into account the historical social context of beat activity and policing of homosexual offences.

2.8 Offences must not constitute an offence at time of application

Clauses 18(2)(c) and 19(2) of the Bill considers 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

[15] Above n 1, 46.

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. Our 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 our 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).

Amending the existing test to 'would not be prosecuted today under the law of Queensland' is necessary due to the broad definition of public place provided for in the Bill. This test would account for the discriminatory policing practices of the past.

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'.

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 should be held in paper or electronic format 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 12

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. In our experience, the main reason for an expungement application to be cancelled is 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 13

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 38 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.[16]

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 14

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.[17]

[16] Above n 3, 3.

[17] *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).

2.13 Other matters to consider

(a) Apology

The reparative nature of an expungement scheme cannot be overstated. A critical part of rebuilding community confidence is a formal public apology by the Premier in the Queensland Parliament. The QLRC report did not consider a public apology because it was not included in the terms of reference for its enquiry.

A formal state apology recognises the harm caused by unjust laws which criminalised homosexuality, rebuilds LGBTI community trust and confidence in the government and law enforcement, and is a powerful gesture to applicants who may be reluctant to make a formal application. Following the Victorian state apology, there was a marked increase in the number of applicants who came forward to apply for their convictions to be expunged. The HRLC's 'Righting historical wrongs' paper[18] discusses the benefits of an apology in further detail.

We recommend that the Queensland Government consult with key stakeholders to provide assistance in the scope and wording of the apology and to publicise the event both within and outside of the LGBTI community. However, the potential benefit of the apology would be undermined if the scheme was to proceed in its current form without key concerns addressed in the final form of the legislation.

Recommendation 15

The Queensland Government should proceed with a formal state apology to individuals directly impacted by the criminalisation of homosexual conduct and the broader LGBTI community affected by these laws and their enforcement. The format of the apology and associated events should be developed in consultation with affected individuals (or those representing their interests) and LGBTI community groups.

(b) Consequential amendments

We also have concerns about consequential amendments which are necessary to fulfil the Bill's stated purpose by effectively restoring the person to the position they were in prior to their conviction. We recommend that the consequential amendments recommended in the QLRC report be made to the *Child Protection Act 1999* and *Family Responsibilities Commission Act 2008*.[19]

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[18] Human Rights Law Centre et al, *Righting historical wrongs: Background paper for a legislative scheme to expunge convictions for historical consensual gay sex offences in Victoria* (12 January 2014) https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5823b6c659cc6829f22afdb0/1478735601892/Gay_Sex_Convictions_Paper_January2014.pdf.

[19] Above n 1, recommendation 7-2.

Recommendation 16

The Bill should include consequential amendments as recommended by the QLRC report.

(c) 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. We recommend that appropriate legal and social supports be appropriately funded for applicants both within and outside the LGBTI community. 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.'[20]

Recommendation 17

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.

(d) Compensation

Reparations for past wrongs include financial compensation as well as counselling and other support measures that promote reconciliation and healing.[21] Clause 5 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.[22]

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

[21] 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.

[22] See above n 8, p 57.

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.[23]

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.[24] This is held to include, in some combination and as appropriate, restitution, compensation for harm, and rehabilitation in mind, body and status.[25]

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 18

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

[23] 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.

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

[25] 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.

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 a 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, it appears that the criteria for expungement will not allow the scheme to address the vast majority of cases (based on our knowledge of affected individuals in Queensland and experience in other jurisdictions). Given this, to proceed with the Bill in its current state would only serve to damage relations and trust with LGBTI communities in Queensland.

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.