

Law Reform Relating to Historical Homosexual Convictions

To
Attorney General

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Introduction

- 1 The Law Society of Western Australia encourages the Western Australian Parliament to introduce legislation to extinguish and expunge all criminal convictions for historical offences that were discriminatory to our Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (“LGBTIQ”) community.
- 2 There are still Western Australians who live with criminal records for committing acts contrary to prohibitions in the *Criminal Code* which are now recognised as discriminatory and have since been repealed.
- 3 Criminal records containing historic convictions for activities that modern society does not consider unlawful continue to have a real impact on those who carry them, including with respect to employment prospects and working with children.
- 4 The discrimination faced by our LGBTIQ community in the past, continues with the criminal records that have been left behind.
- 5 In 2014, Victoria and New South Wales enacted legislation to remedy the injustice of this ongoing discrimination.¹
- 6 In 2015, the Australian Capital Territory, Queensland, South Australia and Tasmania have all stated that they intend to enact legislation allowing historical homosexual convictions to be expunged.
- 7 Western Australia has an opportunity to join these other Australian states in making progress towards ending and rectifying the many years of discrimination our LGBTIQ community has faced. Western Australia can also take advantage of its delay in righting this wrong by building on the mechanisms enacted by other states to ensure that Western Australians are provided with the best means of expunging historical homosexual convictions.

The Residual Effects of Historical Homosexuality Convictions in Western Australia

- 8 In 1980, Australia ratified the *International Covenant on Civil and Political Rights* which includes at article 26 that:

'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

¹ *Sentencing Act 1991* (VIC) pt 8 & *Criminal Records Act 1991* (NSW) pt 4A.

- 9 These protections are also reflected in the *Sex Discrimination Act 1984 (Cth)*, section 5A which includes that:

"A person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person's sexual orientation if, by reason of: the aggrieved person's sexual orientation...the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different sexual orientation."

- 10 However, until 1989, the *Criminal Code Compilation Act 1913 (WA)* (**the Criminal Code**) contained laws that discriminated against the LGBTIQ community. These 'crimes against morality' included:

Section 181

Any person who;

- (1) has carnal knowledge of any person against the order of nature;
- (2) has carnal knowledge of an animal;
- (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 for imprisonment with hard labour for 14 years, with or without whipping.

Section 182

Any person who attempts to commit any of the crimes listed in the preceding section is guilty of a crime, and is liable to imprisonment with hard labour for 7 years, with or without whipping.

Section 184

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 3 years, with or without whipping.¹

- 11 These laws were eventually repealed by the *Law Reform (Decriminalisation of Sodomy) Act 1989 (WA)* (**1989 Act**), though in doing so the parliament made a conscious point of highlighting its disregard for the LGBTIQ community by inserting a highly discriminatory preamble² and partaking in a derogatory and offensive debate.³ The 1989 Act amended the Criminal Code as follows:

² "ALL WHEREAS, the Parliament does not believe that sexual acts between consenting adults in private ought to be regulated by the criminal law; AND WHEREAS, the Parliament disapproves of sexual relations between persons of the same sex; AND WHEREAS, the Parliament disapproves of the promotion or encouragement of homosexual behaviour; AND WHEREAS, the Parliament does not by its action in removing any criminal penalty for sexual acts in private between persons of the same sex wish to create a change in community attitude to homosexual behaviour; AND WHEREAS, in particular the Parliament disapproves of persons with care

- (a) Subsection 181(1) and (3) were repealed, leaving “carnal knowledge of an animal” as the only remaining offence under this section;
 - (b) Subsection 184 was amended so that the crime only existed where the offence was committed in public.
- 12 Whilst the 1989 Act amended these pre-existing discriminatory provisions, it also introduced new discriminatory provisions to the Criminal Code. These changes included:
- (a) Section 186 was replaced. Under the new section 186 it was an offence for the owner or occupier of a place to induce or permit a person under the prescribed age to go to that place for “carnal knowledge” with a man. This section was discriminatory as it prescribed the age for heterosexual “carnal knowledge” at 16, whilst homosexual “carnal knowledge” had a prescribed age of 21;⁴ and
 - (b) Section 187 was replaced. Under the new Section 187 it was an offence to have “carnal knowledge” of a person under the prescribed age. Again, this section was discriminatory as it prescribed an age limit of 16 years for heterosexual “carnal knowledge” and 21 years for homosexual “carnal knowledge”.⁵
- 13 The 1989 Act also enacted a provision that made it contrary to public policy to “encourage or promote homosexual behaviour”⁶ and made it unlawful to “promote or encourage homosexual behaviour as part of the teaching in any primary or secondary education institution”.⁷ We note the similarity of these provisions to the recent, internationally criticised Russian laws that make illegal the promotion of “non-traditional sexual relations”.⁸
- 14 The Western Australian Parliament gave the following reasoning, in an attempt to justify its decision to include these further discriminatory provisions into the Criminal Code:
- “I am concerned by the public concern - and it is a concern that I share - that changing the law may indicate a change of attitude in this Parliament ... I hope the people of Western Australia appreciate that the Parliament, by passing this Bill, is not expressing approval of homosexual behaviour ... It is important that we understand the idea of what is normal. Homosexuality is not normal in our society. There have been societies in which it has been considered normal ... I do not want it to become normal in our society, and it is an appropriate area of the law that we should have some influence on what is normal in our society.”⁹*

supervision or authority over young persons urging them to adopt homosexuality as a lifestyle and disapproves of instrumentalities of the State so doing: Be it therefore enacted by the Parliament of Western Australia”; *Law Reform (Decriminalization of Sodomy) Act 1989 (WA)* Preamble.

³ Western Australia, *Parliamentary Debates*, Legislative Council, 14 November 1989, pgs 4318 to 4343.

⁴ *Law Reform (Decriminalization of Sodomy) Act 1989 (WA)* s 9.

⁵ *Ibid* s 10.

⁶ *Ibid* s 23.

⁷ *Ibid* s 24.

⁸ Code of the Russian Federation on Administrative art 6.21.

⁹ Western Australia, *Parliamentary Debates*, Legislative Council, 14 November 1989, pgs 4318 - 4324.

"I am not sure whether this is the fourth or fifth attempt to legalise homosexuality ... but fortunately it has failed on every occasion ... I believe that homosexuality is a filthy habit. It is not only degrading but also directly responsible for the spreading of disease including the worse scourge of all, AIDS ... The argument is put that homosexuals can have safe sex – I am not sure whether "safe" is the right word or whether it should be "safer" ... Many women must be worried about their partners bringing AIDS and other diseases to the matrimonial bed. Above all, they do not want their children to be taught in schools that homosexuality is normal."¹⁰

- 15 These provisions remained in force until the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002 (WA) (the 2002 Act)* was enacted, on 17 April 2002. The 2002 Act repealed the 1989 Act and gave due recognition to same sex relationships and the LGBTIQ community in Western Australia. However, like the 1989 Act, the 2002 Act also drew derogatory and offensive comments from the members of parliament.¹¹
- 16 The purpose of the 2002 Act was acknowledged in the long title of the act as being:

The purpose of this Bill is to amend The Criminal Code and repeal The Law Reform (Decriminalization of Sodomy) Act 1989, and to amend other related acts, in order to provide for the reform of the law relating to same sex relationships, access to artificial fertilisation procedures and for related purposes.
- 17 Both the 1989 Act and 2002 Act have brought welcomed and much needed reform to the anti-homosexual laws of Australia's past, however those convicted of these crimes before the reforms came into effect still bear a black mark on their name. Whilst these Western Australians did commit crimes under the law of that time, these laws were discriminatory, offensive and should not have been enacted. For that reason, it would be unconscionable for the Western Australia government to not relieve these men of those criminal records.
- 18 Affected Western Australians do gain a partial reprieve under the *Spent Convictions Act 1988 (WA)*, which provides for those convicted of certain crimes to have that conviction deemed spent, provided certain requirements are met. However, the convictions are not expunged.

¹⁰ Ibid pgs 4324 - 4332

¹¹ "Irrespective of whether the participants are male or female. We do not believe it is appropriate sexual behaviour at that age. People say there should not be discrimination between the two. If those people cannot differentiate between normal sexual behaviour and sodomy, obviously they would not be able to appreciate why we see that ... What adults do in their bedroom is their own business ... However, when their abnormal practices start to intrude on our daily lives and that of our children, we must apply the brake. We must let them know that they are tolerated, but not accepted. They can work, live and play in our society without fear of persecution. Those individuals can achieve the highest position in the land; however, we will not accept their sexual behaviour. We will not approve of their choice of partner. We will not willingly allow them to bring up children in this world who cannot be accepted into a normal society ... By tolerating groups of people who have beliefs outside the norm, we are doing precisely that - we are tolerating them, nothing more and nothing less ... Girls are meant to have sex with boys; boys are not meant to have sex with boys - it is unnatural." Western Australia, *Parliamentary Debates*, Legislative Council, 19 February 2002, pgs 7456 - 7464.

- 19 The majority of the historical homosexual convictions are considered ‘serious convictions’ under the *Spent Convictions Act 1988 (WA)*,¹² which shows that inherent discrimination remains.
- 20 In order to have a ‘serious’ conviction deemed spent under the *Spent Convictions Act 1988 (WA)* the convicted party must wait 10 years from the end of the imposed sentence before an application can be lodged. The process requires that the application be submitted to a District Court judge. A filing fee is payable to lodge the application. The applicant is also required to pay their own costs and, if the application is refused, the judge may award costs against the applicant.¹³
- 21 Where a conviction is spent, that conviction remains on the individual’s criminal record. As such, it continues to affect the individual in many aspects of their life and in significant ways. For example, a spent conviction can still impact an individual’s application for employment, volunteer positions and visas. This is due to the fact that spent convictions must still be disclosed when the individual applies for:
- (a) appointment as or to:
- i. a justice of the peace;
 - ii. the Public Trustee or Public Advocate;
 - iii. the Commissioner of the Corruption and Crime Commission;
 - iv. a police constable, special constable, Aboriginal police liaison officer or police cadet;
 - v. a position that may require the provision of services to or dealings with a person not of full legal capacity;
 - vi. the Prisoners Review Board or the Supervised Release Review Board;
 - vii. a member of the Teachers Registration Board of Western Australia;
 - viii. a member of of a governing body of a school or kindergarten; or
 - ix. as a member of the Ministerial Advisory Council on Disability or a body that advises the Department of Local Government and Communities;
- (b) employment at, or as:
- i. the Departments of Sport and Recreation, Housing, Education and Training, Community Development, Education Services and Health;
 - ii. a transit officer;
 - iii. Australian Defence Forces;
 - iv. Disability Services Commission or an organisation funded by the Disability Services Commission;
 - v. the Public Sector Commission;

¹² A “serious conviction” is defined as a conviction in respect of which the sentence imposed is imprisonment for more than one year or for an indeterminate period or a fine of \$15000 or more. The historical homosexual offences imposed a maximum sentence of 14 years; *Spent Convictions Act 1988 (WA)* s 9.

¹³ *Spent Convictions Act 1988 (WA)* sch 1 s 8.

- vi. an organisation that has obtained funding from the Minister for Education;
 - vii. a kindergarten, child care centre, primary school, secondary school, college, university or any other educational or training service provider;
 - viii. any position that may require that person to come into contact with children for purposes related to school activities, for purposes related to health or for religious purposes;
 - ix. a prison superintendent or prison officer;
 - x. a security agent, officer, consultant, or installer;
 - xi. Perth's Crown Casino; or
 - xii. the Perth Mint;
- (c) placement within a school or child care centre;
 - (d) firearms licence;
 - (e) assessment as an adoptive parent;
 - (f) registration as a teacher; or
 - (g) admission as a lawyer.¹⁴

22 In all likelihood, even after that conviction was spent, you would not ever be able to drive a bus, become a police officer, teach, voluntarily foster children or participate in any number of public services because you were once convicted, for all intents and purposes, for being homosexual.

23 For these reasons, the ability to have a historical homosexual conviction spent is not enough to remove the stigma of a conviction nor does it stop continued discrimination against that person.

History of law reform in relation to LGBTIQ Community in Western Australia

24 Law reform in relation to discrimination of Western Australia's LGBTIQ community has, on previous occasions, resulted in furthering discriminatory commentary. Further law reform must be focused on acknowledging and remedying previous legislative discrimination.

25 Australia's anti-homosexuality laws were originally adopted from British law. Upon Federation, each State drafted their own criminal codes with only minor variations on the wording, but these changes had significant consequences. And whilst these laws did not make it illegal to be homosexual, it was illegal to engage in homosexual relations.

¹⁴ Ibid s 3.

- 26 Across Australia, penetrative sex between males was illegal. In Western Australia, this offence was referred to as ‘indecent practices between males’ and ‘carnal knowledge against the order of nature’, the maximum penalty for which was 14 years imprisonment with whipping.¹⁵
- 27 The maximum penalty for this offence was 14 years imprisonment with whipping. But for the whipping which shouldn’t be discounted, this penalty is comparable under the current Criminal Code to the offences of perjury, corruption (both judicial and official), and aggravated grievous bodily harm. This penalty is comparable to the current penalties for the offence of penetration without consent and sexual penetration of a child over 13 and under 16 years of age. The action constituting these offences, however, does not compare to the act of sexual relations between two consenting adults.
- 28 The first attempt to reform the homophobic provisions of the Criminal Code came in 1973 with the introduction of a bill that intended to create a defence to buggery, where the act was committed in private between consenting males aged 18 years or older. However, the bill was defeated in the Legislative Council.¹⁶
- 29 In 1974, a Royal Commission looked into the homophobic provisions of the Criminal Code. However, the terms of reference governing the Royal Commission were narrow and restrictive. The Royal Commission was only to examine the offences and punishments relating to acts of buggery and acts of gross indecency and to make recommendations as to the wordings of these sections.¹⁷
- 30 The recommendations of the Royal Commission were that Western Australia should follow the reform set by England in 1967, by removing the offences of buggery and gross indecency between consenting parties over the age of 18 years. It was also recommended that the words “carnal knowledge against the order of nature” should be replaced with “carnal knowledge per anum”.¹⁸ However, no subsequent steps were taken by the Western Australia Government to implement these recommendations.
- 31 In 1977, a private members bill sought to once again introduce a defence to the offence of buggery, where the act was committed in private between consenting adults.¹⁹ However, the bill sought to reduce the age of consent suggested in the 1973 bill to 16 years of age, equal to the age of consent for heterosexual intercourse. This time the bill was passed in the Legislative Council, however it was defeated in the Legislative Assembly.

¹⁵ *Criminal Code Compilation Act 1913 (WA)* s 181.

¹⁶ Western Australia, Honorary Royal Commission appointed to inquire into and report upon matters relating to homosexuality, *Report of the Honorary Royal Commission appointed to inquire into and report upon matters relating to homosexuality* (1974), pg 3.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Graham Carbery, ‘Towards Homosexual Equality in Australian Criminal Law – A Brief History’ pg 16.

- 32 The International Covenant on Civil and Political Rights came into force in Australia on 13 November 1980, following its ratification by the federal government. This led to new Commonwealth legislation raising human rights standards in Australia, including the *Sex Discrimination Act 1984 (Cth)*.
- 33 A third attempt to reform the anti-homosexuality laws was made in 1984, with a private members bill seeking to decriminalise homosexual conduct between consenting parties of adult age.²⁰ This bill still narrowly defeated in the Legislative Council.
- 34 In 1987, a private members bill was introduced in Western Australia that was practically identical in nature to the 1984 bill but was again defeated in the Legislative Council.²¹
- 35 It was not until 1989 that the Western Australian Government was successful in passing a law reform bill regarding homosexual offences. The *Criminal Code Amendment (Decriminalization of Sodomy) Bill 1989 (WA)* sought to reform the anti-homosexuality laws much in the same way as the previous bills, however, with the age of consent being 21 years of age, introduced new homophobic and discriminatory crimes.
- 36 During debate of the Bill, it was argued that a higher age of consent for homosexual activities was appropriate, as it would provide the opportunity for bisexuals to decide whether to respond heterosexually or homosexually.²²
- 37 The Bill included homophobic and discriminatory rhetoric in the preamble.
- 38 In 1994 Nick Toonen, a Tasmanian resident, brought a complaint against Australia before the United Nations Human Rights Committee.²³ His complaint was on the basis that the anti-homosexuality laws in Tasmania, where buggery was still a crime, were in breach of his human rights under the International Covenant on Civil and Political Rights. The Committee in this case found that adult consensual sexual activity in private is covered by the concept of “privacy”, and that laws criminalising homosexual relations were, for that reason, a breach of an individual's right to privacy. It was the Committee's opinion that legislation criminalising homosexual relations should be repealed.

²⁰ Ibid pg 17.

²¹ Ibid.

²² “Regarding the 21 year age limit, we must recognise the fact that what happens in our lives is very much in response to what happens between the ages of 14 and 25 ... It could be argued that I should have set the age at 25, but the problem is that people tend to marry in their early to mid 20s and what I am trying to do is to give people the opportunity to respond - if they have the ability both heterosexually and homosexually - to give them the opportunity to respond heterosexually in later life” Western Australia, *Parliamentary Debates*, Legislative Council, 14 November 1989, pgs 4323 - 4324.

²³ Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

- 39 Following the decision of the United Nations Human Rights Committee, the Commonwealth Government enacted the *Human Rights (Sexual Conduct) Act 1994* (Cth) which legalised sexual activity between consenting adults throughout Australia and prohibited the making of laws that arbitrarily interfere with the sexual conduct of adults in private.²⁴ An ‘adult’ was defined by the Act as “a person who is 18 years of age or more”, which therefore required all states to reconsider their legal age of consent in relation to homosexuals.²⁵
- 40 However, Western Australia did not amend its laws on the age of consent until 2002, some 8 years later. Under the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA) the legal age of consent for homosexual relations was reduced to 16 years of age; bringing it inline with the heterosexual age of consent.

Imperatives to expunging historical homosexual convictions

- 41 As at May 2013, it was illegal to engage in homosexual acts in at least 76 countries around the world and in 7 of these countries, homosexual offences are still punishable by death.²⁶
- 42 There is an imperative in international law to prevent discrimination on the basis of many things, including sexuality.
- 43 Whilst Australia has taken many steps to support the LGBTIQ community, it is far from being at the forefront of such movements, especially when compared to other countries such as Canada, New Zealand and the United Kingdom.
- 44 Expunging historic homosexual convictions would be an important step in making a clear statement that homosexuality is not a crime, and ought not to be the subject of any form of discrimination.
- 45 The expunging of criminal convictions is just one way in which Australia can help to support the eradication of homophobic practices.

²⁴ "Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth a State or Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights." *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4(1).

²⁵ *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4(2).

²⁶ **Africa:** Algeria, Angola, Botswana, Burundi, Cameroon, Comoros, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Liberia, Libya, Malawi, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Nigeria, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Sudan, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe. **Asia:** Afghanistan, Bangladesh, Bhutan, Brunei, Iran, Kuwait, Lebanon, Malaysia, Maldives, Myanmar, Oman, Pakistan, Qatar, Saudi Arabia, Singapore, Sri Lanka, Syria, Turkmenistan, United Arab Emirates, Uzbekistan, Yemen. Latin. **America & Caribbean:** Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St Kitts & Nevis, St Lucia, St Vincent & the Grenadines, Trinidad and Tobago. **Oceania:** Kiribati, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu. **Entities:** Cook Islands (New Zealand), Gaza (in the Occupied Palestinian Territory), Turkish Republic of Northern Cyprus (internationally unrecognised), South Sumatra and Aceh Province (Indonesia).

- 46 Only hindsight has shown us the discrimination these statutes have incited and enabled. Hindsight now grants us the power to signal our dissatisfaction with this discrimination.
- 47 By encouraging the expunging of historical homosexual convictions, the Law Society of Western Australia seeks to validate the status of sexual minorities in this state as equal to their heterosexual counterparts.
- 48 This action recognises the historical injustice suffered by homosexuals and sends a strong signal that such injustice and discrimination does not reflect modern Western Australia.

Legislative Expungement of Convictions (Australia and Overseas)

Victoria

- 49 On 14 October 2014, Victoria was the first State in Australia to expunge historical homosexual criminal convictions. The Victorian scheme was established by way of an amendment to the Sentencing Act 1991 (Vic).²⁷
- 50 Under the Victorian scheme an application can be made to the Secretary of the Department of Justice for an historical homosexual offence to be expunged.²⁸ Where the convicted person is deceased, the scheme still permits an application to be made on behalf of that person by a legal personal representative, spouse, de facto partner, parent, child or sibling.²⁹
- 51 The application must include the individual's name, current address and address at the time of conviction, date and place of birth, as well as the name and location of the court where, and the date that the conviction was made, the title of the offence of which the person was convicted and details of the offending conduct.³⁰
- 52 In considering an application, the Secretary may review police reports and other official records and the applicant must give consent for the Secretary to review these documents, in order for the application to be considered.³¹ Where the Secretary is not satisfied on the reports alone, there is power to summons evidence from any other person involved in the offence, or where such a person cannot be located after reasonable enquiries, any person with knowledge of the circumstances in which the act occurred.³² However, the Secretary is not permitted to conduct an oral hearing.³³

²⁷ *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014.*

²⁸ *Sentencing Act 1991 (Vic)* s105B(1).

²⁹ *Ibid* s 105.

³⁰ *Ibid* s 105B(4).

³¹ *Ibid* s 105B(5).

³² *Ibid* s 105C.

³³ *Ibid* s 105D.

- 53 In order for the application to be approved, the applicant must satisfy the Secretary that:
- (a) the offence is an historical homosexual offence; and
 - (b) on the balance of probabilities, both of the following tests are satisfied in relation to the applicant:
 - i. the applicant would not have been charged with the historical homosexual offence but for the fact that the applicant was suspected of having engaged in the conduct constituting the offence for the purposes of, or in connection with, sexual activity of a homosexual nature; and
 - ii. that conduct, if engaged in by the applicant at the time of making the application, would not constitute an offence under the law of Victoria.³⁴
- 54 In considering whether the test is satisfied, the Secretary must be satisfied that everyone who was involved in the conduct constituting the offence consented to the conduct and that no participants were under an age restriction that was in place at the time. For this purpose, where it is relevant to determine whether consent was given, the application must be supported by written evidence from any other person involved, and if the applicant cannot find the other person, from a person (other than the applicant) with knowledge of the circumstances in which that conduct occurred.³⁵
- 55 Where an historical homosexual conviction is expunged under the Victorian Scheme, the conviction will be removed from the individual's criminal record, as if the conviction had never occurred.³⁶
- 56 Where an application is rejected, the individual may apply to the Victorian Civil and Administrative Tribunal, for a review of the Secretary's decision.
- 57 Victoria provided further protection to those who were convicted of historical homosexual offences on 1 September 2015, by amending the *Equal Opportunities Act 2010 (Vic)* to include 'expunged homosexual convictions' as an attribute under section 6 of the Act. This amendment means it is now illegal to discriminate due to an expunged homosexual conviction.

New South Wales

- 58 New South Wales also enacted a scheme to expunge historical homosexual offences, by way of an amendment to the Criminal Records Act 1991 (NSW), which was passed on 28 October 2014.³⁷

³⁴ Ibid s 105G.

³⁵ Ibid s 105G(4).

³⁶ Ibid s 105J.

³⁷ *Criminal Records Amendment (Historical Homosexual Offences) Act 2014 (NSW)*.

- 59 Under the NSW scheme, an individual can apply to the Secretary of the Department of Justice to have an historical homosexual conviction extinguished.³⁸ Like the Victorian scheme, the NSW scheme also allows for the application to be made, where the person who has been convicted is deceased, by the person's legal personal representative, spouse, de facto partner, parent or child.³⁹ In addition to this, the NSW scheme also permits a posthumous application to be made by 'a person who was in a close personal relationship with the convicted person immediately before the convicted person's death'.⁴⁰ However, the NSW scheme does not permit the application to be made by a sibling, as is the case in Victoria.
- 60 The application must state the individual's name, address and date of birth, their name and address at the time of the conviction, and when and where the conviction was made.⁴¹
- 61 In NSW, the Secretary has wide powers to request copies of documents and other information held on file that would otherwise be private and confidential. To the extent that the Secretary requests information in relation to the application from government bodies, the Privacy and Personal Information Protection Act 1998 (NSW) and Health Records and Information Privacy Act 2002 (NSW) do not apply.
- 62 Under the NSW scheme, where the Secretary intends to reject an application, they must notify the applicant, in writing, of their intention to reject the application and the applicant is provided 14 days to submit any further information that may affect the Secretary's decision.⁴²
- 63 Where the Secretary extinguishes an historical homosexual conviction, the conviction is treated in all circumstances as if it was never made.⁴³
- 64 Where the Secretary rejects an application to have an historical homosexual conviction expunged, the applicant may apply to NSW's Civil and Administrative Tribunal for an administrative review of the Secretary's decision.⁴⁴
- 65 The NSW scheme also creates offences relating to the disclosure of information pertaining to an extinguished historical homosexual conviction⁴⁵ and also relating to the obtaining of, or an attempt to obtain, such information either fraudulently or dishonestly.⁴⁶ Both of these offences carry a maximum penalty of 50 penalty units and/or imprisonment for 6 months.

³⁸ Criminal Records Act 1991 (NSW) s 19B(1).

³⁹ Ibid s 19B(3).

⁴⁰ Ibid s 19B(3).

⁴¹ Ibid s 19B(2).

⁴² Ibid s 19C(3).

⁴³ Ibid s 19F.

⁴⁴ Ibid s 19E.

⁴⁵ Ibid s 19G.

⁴⁶ Ibid s 19H.

66 The NSW scheme also grants the Secretary the power to revoke the extinguishing of a conviction where the Secretary is satisfied that the original decision was made on the basis of false or misleading information or documents.⁴⁷

South Australia & New Zealand

67 Spent convictions schemes are in place in both South Australia and New Zealand, as is already the case in Western Australia. These schemes do not provide for the expunging of historical homosexual convictions and nor do they compare to the schemes enacted in other jurisdictions. For this reason, we do not consider the South Australian or New Zealand schemes to be an acceptable resolution to the wrongs that have been done to the LGBTIQ communities in those jurisdictions.

United Kingdom

68 In 2012, the United Kingdom enacted the Protection of Freedoms Act 2012 (UK), which created the UK's scheme for individuals to have historical homosexual convictions expunged. Under the UK's scheme, individuals may apply to the Secretary of the State to have historical homosexual convictions, warnings and official cautions disregarded.⁴⁸ Once disregarded, the convictions can be deleted or, where deletion is not possible, annotated, and will no longer be disclosed.

69 Applications for the expunging of historical homosexual convictions in the UK began on 1 October 2012. The UK application process requires individuals to disclose a name, address, date of birth, and, if the applicant remembers, when and where the conviction was handed down.⁴⁹ There is no requirement under the UK's scheme to provide any information about the circumstances of the offence(s). However it is recommended that applicants provide as much information as possible to show that the event would not have led to a conviction under current laws.

70 In making a decision, the Secretary of State may only consider any available record of the proceedings or the investigation of the offence, and whatever information the applicant provides.⁵⁰ The Secretary of State does not have the power to hold an oral hearing for the purpose of deciding whether to expunge a conviction.⁵¹

71 Where the application is approved, the relevant data controllers are required to delete their records accordingly.⁵² Once deleted, the conviction is treated to have never occurred and the person to whom the conviction applies is under no obligation to disclose that conviction under any circumstances.⁵³

⁴⁷ Ibid s 191.

⁴⁸ *Protection of Freedoms Act 2012 (UK)* s 92.

⁴⁹ Ibid s 93.

⁵⁰ Ibid s 94(1).

⁵¹ Ibid s 94(2).

⁵² Ibid s 95.

⁵³ Ibid s 96.

The UK scheme also specifically states that individuals are not required to disclose expunged convictions in court proceedings and others may not infer that an individual has been convicted of an historical homosexual offence that has been expunged.⁵⁴

- 72 Where the Secretary of State rejects an application, the applicant may appeal this decision to the High Court of Justice of England and Wales.

South Africa

- 73 In 2008, the South African government enacted the Criminal Procedures Act 1977 (RSA), which created an expungement scheme for historical offences, including historical offences relating to interracial or homosexual relations.

- 74 To have an historical homosexual conviction expunged under the South African scheme, an individual is required to submit an application to the Director of General Justice and Constitutional Development. The individual is required to disclose their name, address, telephone number, email address, date of birth, the title of the offence of which they were convicted and the date the offence occurred, as well as a justification for why the offence should be expunged. The applicant must also obtain and supply a police clearance certificate with their application.

- 75 Under the South African scheme, convictions for historical offences relating to interracial relations were automatically expunged from all criminal records, without applications being necessary.⁵⁵

Implementation of other jurisdiction's approaches within Western Australia

- 76 The Law Society supports the South African scheme's automatic expunging of convictions for offences that are not offences under modern day laws.

- 77 Where it cannot be easily identified whether an offence would be an offence under modern day laws, the Law Society supports the approach taken by the United Kingdom to expunging historical homosexual offences. The Law Society particularly supports the United Kingdom's approach towards:

a) the ambit of what can be expunged, which includes convictions, warnings and official cautions;

b) the limited information that the individual is required to provide, which prevents applications being automatically disregarded where certain information may not be known or remembered; and

c) limiting consideration of the application to the information contained in the application, records of the conviction and any reports relating to the investigation of the offence, which helps to speed up the application process and would best represent the information that would have been made available to the court at the time the conviction was made.

⁵⁴ Ibid.

⁵⁵ *Criminal Procedures Amendment Act 2008 (RSA), section 271C.*

- 78 The Law Society does note, however, the United Kingdom's position relating to age of consent. Under the UK's scheme, the applicant is required to show that all parties involved in the act in question were above the age of consent, with the relevant age of consent being the age of consent at the time the act took place. For the reasons set out above in relation to the history of anti-homosexuality laws, the uneven ages of consent for homosexual and heterosexual relations were discriminatory. Therefore, it would go against the purpose of this scheme to reiterate these discriminatory laws. Instead, the test should be whether the parties involved in the act were above the current age of consent.
- 79 The Law Society also supports the Victorian and New South Wales schemes' approach in permitting applications to be made posthumously. As is the general position under the New South Wales scheme, this application ought to be able to be made by any person that was in a close relationship to the convicted person, including family members, friends and romantic partners.
- 80 Any scheme to expunge convictions introduced into Western Australia should also provide for an opportunity to appeal a decision to reject an application. The Law Society supports the requirement under the New South Wales scheme, for the Secretary to notify an applicant if there is an intention to reject an application and provide the applicant time to provide further information that may otherwise affect the decision.

Western Australian Reform

- 81 The historical persecution of homosexuals in Western Australia was an unjust; enforced by the laws of the state, causing suffering to many Western Australian's. There is no reason why that suffering should be continued today.
- 82 While we are not able to change the past, we can take steps to end the burden of historical homosexual convictions, which a number of Western Australian's still bear and to correct the tarnished legacies of those who have died as convicted criminals, solely due to their sexual orientation.
- 83 Further, the Law Society is of the view that this is a step towards achieving equality for all Western Australians and will help to support the eradication of homophobic practices.
- 84 Expunging criminal convictions for historical offences relating to homosexuality moves Western Australia into a time where lesbian, gay, bisexual, transgender, intersex and queer Western Australians are embraced as fully engaged members of society: in the home, in the workplace and in every community.
- 85 This action recognises the historical prejudice homosexuals endured in this country and sends a strong signal that such prejudice has no place in Western Australia today.

Recommendation for a Western Australian Model

- 1) All convictions, warnings and official cautions ever recorded pursuant to sections 181, 182 and 184 of the *Criminal Code Compilation Act 1913* (WA) that can be identified as being acts that would not be illegal under the laws of today should be expunged.
- 2) All historical homosexual convictions that have been made spent under the *Spent Convictions Act 1988* (WA) should be expunged.
- 3) A scheme that allows:
 - (i) individuals who have been convicted of an historical homosexual offence, or who have been issued warnings or official cautions relating to an historical homosexual offence, which is not expunged pursuant to recommendation 1, to apply to have that conviction expunged; and
 - (ii) where the individual is deceased, a person who was in a close relationship with the deceased, including a family member, a friend or a person who was in a romantic relationship with the deceased, to apply, on behalf of the deceased, for an historical homosexual conviction to be expunged.
- 4) In legislating the scheme to expunge historical homosexual convictions, the government should consult LGBTIQ services and organisations in Western Australia.
- 5) The application process should only require the individual to disclose as much information as is necessary to identify the individual, such as name, address and date of birth.
- 6) Once an application has been made, the decision maker should have the power to request and review all available records of the investigation into the offence and the record of any related proceedings.
- 7) The application process should not require the individual to identify a particular conviction on their record, and instead, the decision maker should consider all convictions on an individual's criminal record that has the potential to be expunged under the scheme. The applicant should not be required to disclose any information relating to the circumstances of the offence, as such information should be contained in the reports relating to the investigation.
- 8) The scheme should require the decision maker to notify the applicant when they intend to reject an application and allow the applicant time to provide further information that may affect the final decision. Where the final decision is to reject the application, an avenue for appealing that decision should be available.



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