

BRIEFING PAPER

EXPUNGING HISTORICAL HOMOSEXUAL CONVICTIONS

THE **ESSENTIAL** MEMBERSHIP FOR
THE LEGAL PROFESSION

Prepared by the Law Society of Western Australia

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Issue

There are many Western Australians who have criminal records for historical offences under provisions of the *Criminal Code Compilation Act 1913 (WA)* (Criminal Code) that have since been repealed on the basis that they were discriminatory to our lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) community.

These Western Australians bear the stigma of having a criminal record and the practical impediments created by a criminal record in relation to travel, employment, volunteering, appointments, licences and other permissions.

Background

Prior to 1989, under section 181, 182 and 184 of the Criminal Code, Western Australians who were of legal age and whose acts would not otherwise have been a criminal offence were prosecuted simply because they chose to engage in sexual practices with a member of the same sex.

The laws against homosexuality did not begin to change until the enactment of the *Law Reform (Decriminalization of Sodomy) Act 1989 (WA)*. However, it was not until the *Act Amendment (Lesbian and Gay Law Reform) Act 2002 (WA)* that discrimination against homosexuality was finally removed from the Criminal Code. Whilst the law has now changed, many Western Australians still bear these discriminatory convictions on their criminal records.

In the past, it has been claimed that the *Spent Convictions Act 1988 (WA)* provides sufficient protections to those who have been convicted of historical homosexual convictions. However, there is a vast array of circumstances in which an individual must disclose a conviction, even if it has been made spent. This means that many are still being required to disclose and wear the stigma of having been convicted of an archaic historical homosexual offence.

Victoria, New South Wales, the Australian Capital Territory, Queensland, Tasmania and South

Australia have either enacted legislation or are considering proposed legislation for expunging historical homosexual convictions.

Policy position

Law Council of Australia

The Law Council of Australia recommends that past convictions for the historical offence of practicing homosexual acts should be removed from criminal records.¹

Law Society of Western Australia

In May 2016, the Law Society of Western Australia made submissions to then Attorney General Michael Mischin recommending that historical homosexual convictions be expunged.²

It is the Law Society's view that expunging these convictions upholds the fundamental human rights of equal protection before the law and freedom from discrimination as set out in Article 26 of the *International Covenant on Civil and Political Rights* to which Australia is a signatory. It also promotes the protections afforded under the 2013 amendments to the *Sex Discrimination Act 1984 (Cth)*, such that in Australia no person is treated less favourably, before the law or otherwise, because of that person's sexual orientation towards persons of the same sex.

Stigma and possible public persecution has prevented many Western Australians charged with these offences from campaigning for reform. A scheme to expunge historical homosexual convictions would be a significant step towards correcting the longstanding historical injustice and discrimination towards the LGBTQI community and promote the protection of human rights and the right to live free from discrimination.

Current status

Prior to the 2017 State election, Premier Mark McGowan pledged support for expunging historical homosexual convictions in Western Australia.³

Proposed legislation has not yet been introduced into the Parliament of Western Australia.

Funding implications

N/A

NOTES

1. <https://www.lawcouncil.asn.au/resources/submissions/submission-to-the-second-universal-periodic-review-of-australia>
2. <https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2016MAY04-FINAL-Submission-Expunging-homosexual-convictions-C260416C1.pdf>
3. <http://www.abc.net.au/news/2016-08-27/labor-vows-to-expunge-old-homosexual-offences-in-wa/7791342>

Recommendation

The Law Society of Western Australia recommends that the Parliament of Western Australia enact legislation expunging all historical homosexual convictions handed down within its jurisdiction and make amendments to the *Equal Opportunities Act 1984 (WA)* to prohibit discrimination on the basis of expunged historical homosexual convictions.