

Treatment of historic criminal records for consensual homosexual sexual activity and related conduct

Final Report

Anti-Discrimination Commissioner
Tasmania

April 2015



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Without these contributions, this report would not have been possible.

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Office of the Anti-Discrimination Commissioner
Level 1, 54 Victoria Street
Hobart, Tasmania 7000

Phone: 03 6165 7515

(For full contact details, please refer to the inside back cover of this report.)

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Foreword

It is with pleasure that I present this Report on the recommended treatment of historic criminal records for consensual homosexual sexual activity and related conduct.

For some Tasmanians the legacy of an era in which homosexual acts were outlawed remains with them today as a reminder of their treatment within our community before male homosexuality was decriminalised in 1997.

Some have lived with the impact of having a historic criminal record for many years and it is appropriate for arrangements to be established to enable those records to be permanently disregarded.

This Report sets out recommendations for removing the continuing effect of having a criminal record for behaviour and conduct that is now lawful, whilst ensuring that records related to non-consensual acts are retained.

I acknowledge with thanks the comments I received on the consultation paper released by me in October 2014 and look forward to the Government's response to this very important matter.



Robin Banks
Anti-Discrimination Commissioner

2 April 2015

Recommendations

It is recommended that:

Recommendation 1

A dedicated scheme is established to enable historic criminal and related records relating to homosexual activities or activities arising because of a person's diverse sexual orientation or gender identity to be expunged.

Recommendation 2

All criminal and related records arising from consensual sexual activity and related conduct in situations where the applicant would not have been dealt with by police but for the fact that the applicant was suspected of engaging in sexual activity of a homosexual nature or because of their sexual orientation or gender identity are covered by the scheme, including:

- (a) historic criminal records arising in relation to sections 122(a) and (c), and 123 of the *Criminal Code* involving consensual sexual activity;
- (b) historic criminal records arising in relation to other repealed offences used to prosecute activity of a homosexual nature or because of a person's sexual orientation or gender identity;
- (c) historic criminal records arising in relation to associated offences where the applicant would not have been charged but for the fact that the applicant was being dealt with in relation to engaging in conduct of a homosexual nature or their sexual orientation or gender identity;
- (d) historic criminal records related to any other offence by which homosexual and perceived homosexual conduct or conduct related to a person's sexual orientation or gender identity could be punished that do not represent an offence under current law or with which a person could still be charged where a record would not have been arisen but for the fact that the applicant was suspected of engaging in sexual activity of a homosexual nature; and
- (e) historic criminal records related to any offence of attempting, conspiring or inciting to commit any of the offences outlined above.

Recommendation 3

The scheme have the capacity for the expunction of historic criminal records of persons of diverse sexual orientation or gender identity in all circumstances where the conduct was otherwise lawful for those in the broader community.

Recommendation 4

The scheme has the capacity for the expunction of historic criminal records for offences that took place in association with the primary offence and/or records for inchoate offences relating to the primary offence.

Recommendation 5

Where age is relevant to consideration of whether an act is eligible to be permanently disregarded, the test to be used is whether the same behaviour between males and females would be considered lawful or unlawful in the circumstances.

Recommendation 6

Any conviction of a young person (and related records), in circumstances where they were the subject of non-consensual sexual abuse by an older person, also be eligible to be permanently disregarded.

Recommendation 7

The scheme enable a spouse, domestic partner, child, parent, sibling, personal representative or other appropriate representative to seek the posthumous expunction of relevant historic criminal records.

Recommendation 8

The Government consider issuing a formal apology to those who have suffered because of actions by authorities resulting in a historic criminal record and to the family and loved ones of those who are deceased.

Recommendation 9

The Government seek the grant of a royal pardon to deceased persons who were convicted under relevant sections of the Tasmanian Criminal Code and other Tasmanian or colonial laws who, as a result of the time that has elapsed since their death, no longer have a spouse, domestic partner, child, parent, sibling or personal representative to make application for a conviction to be disregarded.

Recommendation 10

Legislation be prepared to establish a dedicated scheme to enable historic criminal records to be expunged with the effect of:

- (a) restoring all legal rights as if the historic criminal record had not been made;
- (b) providing the right of non-disclosure of all expunged records under all circumstances;

- (c) separating all expunged criminal and related records (and all references to them) from a person's criminal and other records and empowering the Registrar to have custody of those records;
- (d) destroying all duplicates of all expunged relevant criminal and other records;
- (e) ensuring that the applicant's privacy and that of any other relevant person are respected; and
- (f) prohibiting the disclosure of any information relating to the conviction or related material.

Recommendation 11

A Historic Criminal Records Expert Panel (HCREP) be established comprising the Anti-Discrimination Commissioner, the Registrar under the *Working with Vulnerable People Act 2013* and the Dean of Law at the University of Tasmania. The Panel be authorised authority to make decisions, including binding orders, on applications for expunction of relevant records.

Recommendation 12

The Anti-Discrimination Commissioner be appointed as Registrar of the scheme.

Recommendation 13

The Historic Criminal Records Expert Panel be empowered to request and receive all records considered relevant to assessing an application.

Recommendation 14

A person who believes they have a historic criminal record that should be permanently disregarded be required to complete an application form, providing details of relevant records and offences, including information relating to the incidents leading to the conviction or other police action.

Recommendation 15

The application form should authorise the conduct of a police record search and consent to access any other relevant records.

Recommendation 16

The Registrar be authorised to provide the applicant with access to any records on the basis that any information contained within the records related to the identity or personal details of any person other than the applicant not to be disclosed.

Recommendation 17

It be an offence to knowingly give the Historic Criminal Records Expert Panel false or misleading information.

Recommendation 18

If the Historic Criminal Records Expert Panel is satisfied that an order to permanently disregard a historic criminal record was based on false or misleading information or documents that are false or misleading, the Historic Criminal Records Expert Panel be empowered to determine that the historic criminal record is no longer to be disregarded and the record reinstated; with such decisions to be subject to the same review rights as a decision not to order a record be permanently disregarded.

Recommendation 19

Information provided to the Historic Criminal Records Expert Panel as part of the application and during subsequent investigation not be capable of being used in any proceedings for perjury or similar offences related to statements or evidence given at the time of the original offence.

Recommendation 20

Decisions to expunge relevant records be binding on all authorities.

Recommendation 21

A decision that a historic criminal record is not eligible to be disregarded or to reinstate a permanently disregarded record be reviewable by a magistrate in private session under amended provisions of the *Magistrates Court (Administrative Appeals Division) Act 2001* (Tas).

Recommendation 22

Relevant authorities are required to notify the record holder prior to decision or the release of information for other purposes where a record is identified that may be eligible to be expunged. This includes procedures for the conduct of police record checks and the assessment of applications for registration under the *Registration to Work with Vulnerable People Act 2013*.

Recommendation 23

An order for expunction is to apply to all government records, including official police records, general police records, court documents and general government records.

Recommendation 24

Expunged historic records be permanently held by the Registrar of the scheme, with all remaining records to contain no indication of the nature of the amendment.

Recommendation 25

Secondary records or duplicate files held in paper or electronic format related to historic criminal records that are to be expunged should be destroyed.

Recommendation 26

Where the Historic Criminal Records Expert Panel has ordered that a record be expunged, disclosure of information regarding that record be an offence carrying a

serious penalty and the mechanism for investigation and prosecution of such an offence is specified clearly in the legislation.

Recommendation 27

The Attorney General liaise with the Attorneys General of the Commonwealth and other states and the territories to establish a mechanism for the identification and expunction of all relevant records that have been provided to or received from another jurisdiction.

Recommendation 28

Consequential amendments be made to the *Archives Act 1983* (Tas) to give effect to the intent of the scheme.

Recommendation 29

The definition of 'irrelevant criminal record' in section 3 of the *Anti-Discrimination Act 1998* (Tas) be amended to include records expunged under the scheme.

Recommendation 30

Consequential amendments be made to the *Annulled Convictions Act 2003* (Tas) and related legislation to provide for the non-disclosure of expunged historic criminal records.

Recommendation 31

The *Registration to Work with Vulnerable People Act 2013* (Tas) be amended as necessary to prohibit consideration of any records expunged under the scheme.

Recommendation 32

The Registrar of the scheme have authority to release expunged records in specific circumstances.

Recommendation 33

Arrangements are established to enable, including through an application costs reimbursement mechanism, necessary assistance to be provided to applicants by Community Legal Centres in Tasmania together with bodies in other states and territories such as the Human Rights Law Centre and the Public Interest Advocacy Centre.

Recommendation 34

Additional resources are made available to the Anti-Discrimination Commissioner to cover the one-off establishment activities for the scheme and the on-going administrative, investigative and communication activities.

1. Introduction

The history of the lesbian, gay, bisexual, trans and intersex (LGBTI) community in Tasmania before the late 1980s is largely unknown to most Tasmanians. Operating under a veil of secrecy, very little has been written about the way the community operated; how networks were maintained; and the social activities in which homosexuals living in this State took part.

That homosexuals lived within our community we can have no doubt. The existence of provisions criminalising homosexual behaviour stands as witness. Yet the fear of prosecution and the threat of associated stigma drove much behaviour underground. This was common across Australia and we have no reason to believe that things were different in this State.

Homosexuality (and strong reactions against it) formed a central theme in the politics of the State from the very beginnings of transportation. The era of transportation resulted in thousands of convicts being transported to Tasmania, many for sexual offences including sodomy. As was the case throughout the colonies, there were never any offence provisions relating to sexual relations between women, this presumably being beyond imagining.

While at the outset of the nineteenth century, capital punishment was the mandatory penalty for a wide range of offences, including sodomy, for the most part in England such penalties gave way to a more enlightened system of justice. By 1861, capital punishment remained on the statute books in England only in cases of treason, murder, espionage, arson in royal dockyards and piracy with violence.¹

Not so in Van Diemen's Land. Such reforms were resisted by the colony's Legislative Council and men continued to be executed for sodomy well into the late nineteenth century. This afforded Van Diemen's Land the dubious 'honour' of reputedly executing the last man for sodomy in Australia, when Hendrick Witnelder was hanged on 20 February 1873 at the Penitentiary Chapel in Hobart (then Campbell Street gaol).²

It was not until the introduction of the *Criminal Code* in 1924 when capital offences were restricted to murder and treason, that sodomy was removed from the statute books as a capital offence.

¹ Ruth McColl SC 'The argument against mandatory sentencing' in *Proceedings of the twelfth conference of the Samuel Griffith Society*, 10–12 November 2000 (Samuel Griffith Society, Sydney 2000).

² Jo Lennon and George Williams, 'The Death Penalty in Australian Law' (2012) 34 *Sydney Law Review* 664.

Although sodomy no longer attracted the death penalty after 1924, its continued inclusion in the *Criminal Code* until 1997 marked sexual relations between men as a severe crime punishable by incarceration. Therefore, whereas many jurisdictions around the world had commenced discussions to decriminalise homosexuality, in Tasmania a person found to have engaged of 'unnatural' sexual intercourse or 'indecent' practice between male persons continued to be at the mercy of the judicial system. In the hundred years since Hendrick Witnelder was hanged, Tasmania continued to have the highest rates of imprisonment for consensual sexual relations between men anywhere in the world.³

The story of Noel and Bert comes to mind.⁴ Bert was 21 and living with another man in Launceston in the late 1950s when the police came to his house. They asked where he and Noel slept and when he pointed to the only bed in the house, they were taken to the Launceston police station. Bert pleaded guilty in the Supreme Court and sentenced to 3 years in gaol. Noel shot himself.

It was not until the establishment of the Victimless Crimes Committee of the Tasmanian Parliament in 1979 and the subsequent formation of the Tasmanian Homosexual Law Reform Group in the early 1980s and the Tasmanian Gay and Lesbian Rights Group in 1988 that decriminalisation of homosexuality became a central plank for human rights campaigners in this State.

Nevertheless, immeasurable damage had been done to some individuals by then and for many the continued prohibition on homosexuality forced them to leave the State.

Tasmanian homosexual rights activist, Rodney Croome, recalls the thunderous applause of the crowds lining the streets when a group from Tasmania participated in the Sydney Mardi Gras in the mid-1990s. He recalls, in particular, the refrains from those he called the 'sexual refugees' calling out, 'I'm Tasmanian and I had to leave twenty years ago'⁵ Such was the moral tempo of the times.

The removal of criminal sanctions against homosexuality in 1997 was the culmination of a decade-long battle to remove one of the last bastions of discrimination and finally bring Tasmania into line with other Australian jurisdictions. It was a pivotal moment in the social history of this State.

The removal of criminal sanctions against homosexuality did not, however, address the implications for those who already had a criminal record for homosexual behaviour.

For those people, having a historic criminal record for engaging in homosexual activity remained as a stain against their name, affecting employment and other areas of their life.

³ Rodney Croome, *The Companion to Tasmanian history* (Centre for Tasmanian Historical Studies, 2008).

⁴ 'Why Noel shot himself and Bert went to gaol' *The Examiner* (13 March 1976) cited in Graham Carbery *Towards homosexual equality in Australian criminal law: a brief history* (2nd ed, Australian Lesbian and Gay Archives Inc 2010) 37.

⁵ Rodney Croome, 'The Promise of belonging' (2013) 41 *Griffith Review* <<https://griffithreview.com/articles/the-promise-of-belonging/>> at 17 March 2015.

They have lived with the stigma and discrimination associated with having a criminal record. For them, it is important that any possibility of the record being used to adversely impact on them is removed.

It is overcoming these remnants of our homophobic past that is the focus of this Report and the recommendations it contains.

2. Background

As Anti-Discrimination Commissioner, section 6 of the *Anti-Discrimination Act 1998* (Tas) authorises me to consult and inquire into discrimination and prohibited conduct and to make recommendations to the Minister in relation to those matters.

The impact of historic criminal records related to consensual homosexual acts was brought to my attention in 2013 with the publication of Gerber and O'Byrne's paper on the implications of historical convictions for homosexual acts.⁶

Gerber and O'Byrne examined the current legal framework in Australia relating to historic convictions, including the limitations under Tasmanian law of the *Annulled Convictions Act 2003* (Tas) as a mechanism for permitting the non-disclosure of criminal records in relation to offence provisions that have been repealed.

Examination of the contents of Gerber and O'Byrne's paper and the response to related issues in the United Kingdom and elsewhere confirmed the necessity to address this matter in Tasmania.

In October 2014, I invited public comment on a Discussion paper outlining options for establishing a scheme to enable historic criminal records for consensual sexual activity between adult males to be disregarded.⁷

Responses to the Discussion paper were overwhelmingly supportive of the introduction of arrangements to permanently disregard historic criminal records gained through police interaction with those of diverse sexual orientation or gender identity.⁸

A strong view emerged that consensual sex and associated activity between homosexual men should never have been criminalised, and the most appropriate step now was to put in place a scheme to remove the unjust impacts arising from related criminal records.

The Discussion paper identified a number of issues requiring consideration before finalising an approach to remove the ongoing negative consequences arising from historic criminal records of those who engaged in consensual sexual relations prior to the decriminalisation of homosexuality in 1997.

⁶ Paula Gerber and Katie O'Byrne, 'Should gay men still be labelled criminals?' (2013) 38(2) *ALTJ*.

⁷ The paper is available at <www.antidiscrimination.tas.gov.au>.

⁸ Public submissions are available at <www.antidiscrimination.tas.gov.au>.

These included:

1. the scope of the scheme, including the offences it should cover;
2. the nature of the scheme, including whether a legislative response is required;
3. the responsible decision maker;
4. administrative support for the scheme;
5. review arrangements;
6. provisions for amending records;
7. which records should be captured; and
8. the nature of support that should be provided to those seeking to have a conviction disregarded.

This Report sets out the recommended approach to these and other issues. It generally does not restate the options set out in the Discussion paper. Unless otherwise discussed, the recommendations are based on consideration of those options and the limits or benefits of those options identified in the Discussion paper.

3. Offence provisions

Before the *Criminal Code Amendment Act 1997* (Tas) was passed, the Tasmanian *Criminal Code Act 1924* (Tas) included provisions criminalising so-called 'unnatural crimes'.⁹ These included sexual intercourse with any person 'against the order of nature' and consenting to a male person having sexual intercourse (see Appendix 1).

The *Criminal Code* also prohibited indecent practices between males in both public and private, including indecent assault upon or acts of gross indecency with another male person or procuring another male person to commit acts of gross indecency.¹⁰

There is little public information about the number of convictions or the nature of acts resulting in convictions under sections 122(a) and (c), or 123 of the *Criminal Code* or under related provisions in the *Police Offences Act* and other statutes.

Information tabled during parliamentary debate on homosexual law reform in the mid-1990s tends to suggest that few were convicted for consensual homosexual acts in private under sections 122(a) and (c) and 123 after 1976. This was when discussion first began in the Tasmanian parliament around issues related to victimless crime, including homosexuality.

The Tasmanian Department of Police and Emergency Management has identified approximately 96 people who were convicted of offences under sections 122 or 123 of the *Criminal Code*. Many of these convictions date back to the 1930s and 1940s and it is not known how many of those convicted are alive today. Nor is it known how many people may have police records in respect of activity related to their actual or perceived homosexuality or gender identity.

Consensual sexual activity and related behaviour were also subject to charges under a range of generic offences provisions in the *Criminal Code* as well as under various sections of the *Police Offences Act 1935* (Tas) (see Appendix 2).

Section 137 of the *Criminal Code*, for example, provides for prosecution on charges of indecency and the *Police Offences Act 1935* (Tas) includes provisions relating to, for example, loitering and obscene public exposure.

⁹ *Criminal Code Act 1924* (Tas) s 122, repealed by *Criminal Code Amendment Act 1997*.

¹⁰ *Criminal Code Act 1924* (Tas) s 123, repealed by *Criminal Code Amendment Act 1997*.

Some of these charges related to behaviour detected in or around ‘beats’: publicly accessible places in cities and towns where men go to meet other men for sex. These activities may have resulted in offensive conduct or indecency charges, both of which remain current under the *Police Offences Act*. Appendix 3 summarises relevant provisions under the *Criminal Code* and the *Police Offences Act* and sets out the status of these provisions.

In addition to the principle offence provisions, individuals may also have criminal records in relation to a range of offences associated with the principal activity, for example resisting arrest, being an accessory to the offence, or attempting to commit a crime.

Anecdotally it appears there may be a number of cases where charges were laid for general offences in addition or in preference to specific offences related to homosexual activities.

Without examining the detail of individual cases, it is not possible to know the true extent to which associated charges may also be relevant. Nevertheless, there remains an issue about how these should be treated and whether the charge would have been laid had homosexual sexual conduct been lawful.

Any scheme have historic criminal records expunged should be flexible enough to capture criminal records generated in relation to all offences that criminalised consensual homosexual activity and related behaviour. At the same time, the scheme must ensure that criminal records related to non-consensual acts, which remain illegal, are not affected.

Whereas in other jurisdictions it may be possible to identify with great certainty the offence provisions used to prosecute homosexual sex offences and related conduct, in the context of Tasmanian law limiting the scheme to convictions under sections 122 or 123 of the *Criminal Code* is likely to exclude a number of highly relevant records.

The approach taken in Victoria is to include both public morality offences and sexual offences that were used to penalise homosexual behaviour. The Act does not list individual offence provisions to which the scheme will apply. Rather, it requires that the decision maker be satisfied¹¹:

- the ‘offence is a historical homosexual offence’; and
- the applicant ‘would not have been charged with the ... offence but for the fact [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
- ‘the conduct, if engaged in by the [applicant] at the time of making the application, would not constitute an offence under the law in Victoria’.

Under section 105 of the Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 (Vic), a historical sexual offence is defined as:

- (a) a sexual offence or a public morality offence; or

¹¹ Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 (Vic) s 105G.

- (b) an offence of attempting to commit a sexual offence or a public morality offence; or
- (c) an offence of being involved (within the meaning given by section 323(1)(a) or (b) of the *Crimes Act 1958*) in the commission of a sexual offence or a public morality offence; or
- (d) an offence of inciting or conspiring to commit a sexual offence or a public morality offence;

A sexual offence is defined as ‘an offence in force at any time by which any form of homosexual conduct, whether consensual or non-consensual or penetrative or non-penetrative, could be punished, whether or not heterosexual conduct could also be punished by the offence’.¹²

Section 105 of the Victorian Act defines a ‘public morality offence’ as being:

... an offence, other than a sexual offence, in force at any time –

- (a) the essence of which is the maintenance of public decency or morality; and
- (b) by which homosexual behaviour could be punished.

For a record to be eligible for expunction, the decision maker must be satisfied of a number of factors, including:

- that, on the balance of probabilities, the person would not have been charged other than because the person was suspected of engaging in homosexual behaviour;
- that the behaviour would not constitute an offence at the time of the application;
- whether the person involved in the behaviour consented to the conduct; and
- the age of the persons involved.

It is my view this is the most suitable approach for the Tasmanian circumstances, and I recommend it as the way in which all relevant criminal and related records be dealt with by the Tasmanian scheme.

Should this approach be adopted, the scheme would allow for the expunction of all records held in relation to:

- consensual homosexual sexual activities; and
- behaviour or actions that would not have been dealt with by the Police had it not been in relation to the primary offence; or because the behaviour was considered characteristic of homosexuals or those with particular gender identities, for example, cross-dressing.

This would include records of and related to:

- a. sections 122(a) and (c), and 123 of the *Criminal Code* involving consensual sexual activity between adults;
- b. subsequent repealed offences used to prosecute homosexual activity;
- c. associated charges related to principal convictions under 1 or 2 above where the applicant would not have been dealt with by police and/or charged but for the fact

¹² Sentencing Amendment (*Historical Homosexual Convictions Expungement*) Act 2014 (Vic) s 105.

that the applicant was suspected of engaging in sexual activity of a homosexual nature;

- d. any other offence by which homosexual or perceived homosexual conduct could be prosecuted that does not represent an offence under current law or with which a person could still be charged; and
- e. any offence of attempting, conspiring or inciting to commit any of the offences outlined above.

A record would only be considered for expunction if the related behaviour was consensual and took place between people of, or over, the relevant age of consent.

Cautions, warnings and other reprimands in relation to consensual sexual activity should also be encompassed.

Age of Consent

The Tasmanian Gay and Lesbian Rights Group is of the view that records related to sexual activity with a person under the age of consent where defences of minimal age difference now apply¹³ should also be capable of being permanently disregarded.

The removal of sections 122(a) and (c) and 123 from the *Criminal Code* in 1997 was accompanied by amendments to provide that consensual anal sexual intercourse under the age of 17 years was not subject to the defence provisions set out at section 124 of the *Criminal Code*. The Parliament also confirmed the lawfulness of convictions arising from conduct prior to 1987 when the defence provisions were amended.

Before 1987, the defence provisions contained in the *Criminal Code* applied only to activities involving unlawful carnal knowledge of a girl under the age of 17 years. The effect of amendments made in 1987 were to remove gender references, thereby enabling the defences provided under section 124 to apply to sexual intercourse with any young person under the age of 17 years.

Before amendment, section 124 provided a defence if the accused was able to prove to the relevant standard that the accused person believed that the other person was of or above the age of 17 years.¹⁴

Section 124 continues to provide a defence if the accused is able to prove consent was provided in a situation where¹⁵:

- the young person ‘was of or above the age of 15 years and the accused person was not more than 5 years older than that person’, or
- the young person ‘was of or above the age of 12 years and the accused person was not more than 3 years older than that person’.

¹³ *Criminal Code Act 1924* (Tas) s 124.

¹⁴ *Criminal Code Act 1924* (Tas) s 124(2), now repealed.

¹⁵ *Criminal Code Act 1924* (Tas) s 124(3).

By introducing a provision that excluded anal intercourse from these defence provisions and making the provisions of sections 124 and 127 retrospective to 4 April 1924, the Parliament removed the option of using the age defence in relation to consensual sexual activity between men under 17 years. This meant any charges under sections 122 and 123 were not able to seek to rely on the defence retrospectively where it had not previously applied.

In the circumstances, it is possible that some people have criminal records in relation to sexual intercourse with a young person despite the act having been consensual and the age difference between the two people being no greater than those outlined in section 124(3) of the *Criminal Code*.

It is not possible to determine whether the extent to which such records exist in Tasmania. In Victoria, however, in 1976 the Department of Social Welfare reported that sixteen young men aged between 15 and 16 had been placed in State Care or under other youth justice orders as a result of convictions for consensual sexual activities involving other males.¹⁶ Reports have also been received about victims of sexual abuse being found guilty of an offence because sex between men was illegal regardless of age.

Section 124(5) was removed through further amendment to the *Criminal Code* in October 2013. This removed the exemption relating to anal sexual intercourse from the defence provisions of actions involving sexual intercourse with a young person. The effect of these amendments was to change the age defence criteria and remove previous discrimination for sexual activity involving consensual anal sexual intercourse.

In considering approaches to expunging historic records related to sexual activity between consenting males, it is appropriate to apply the same criteria as that applied to people engaged in consensual heterosexual sexual conduct. That is, where age is relevant to the consideration of whether an act is eligible to be disregarded, the test to be used should be whether the same behaviour between males and females would be considered lawful or unlawful in the circumstances.

It is important to stress in this context that schemes aimed at redressing the legacy of historic criminal records for homosexual activity are not intended to cover situations where acts were not consensual or where the relevant age criteria apply.

The single exception to this circumstance should be where a young person who was the subject of non-consensual sexual abuse by an older person has a criminal record because of that abuse.

Posthumous Expunction

Comments received by me in response to the Discussion paper recommended the capacity to receive applications for the expunction of records of deceased persons

¹⁶ Human Rights Law Centre (HRLC), *Righting historical wrongs – background paper for a legislative scheme to expunge convictions for historical consensual gay sex offences in Victoria* (HRLC, January 2014) 18.

including the possibility that organisations with an interest in the subject matter of the action be able to apply to have records expunged.¹⁷

Both New South Wales and Victoria have included provision within their historic convictions schemes to enable applications to be received on behalf of deceased persons.

The *Criminal Records Amendment (Historical Homosexual Offences) Act 2014* (NSW) makes provision for application to be received on behalf of deceased persons by¹⁸:

- (a) the convicted person's legal personal representative; or
- (b) a spouse, de facto partner, parent or child of the convicted person or a person who was in a close personal relationship with the convicted person immediately before the convicted person's death.

Similarly, the *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic) provides that an appropriate representative of a person who has a historic criminal record and is deceased may apply to have the relevant records expunged.¹⁹ An appropriate representative means:

- (a) if the person, immediately before death had a spouse or domestic partner – the spouse or domestic partner of the person; or
- (b) if the person immediately before death did not have a spouse or domestic partner or if the spouse or domestic partner is not available – a son or daughter of the person of or over the age of 18 years; or
- (c) if a spouse, domestic partner, son or daughter is not available – a parent of the person; or
- (d) if a spouse, domestic partner, son or daughter is not available – a sibling of the person of or over the age of 18 years;
- (e) if a spouse, domestic partner, son, daughter, parent or sibling is not available – a person named in the will of the person as an executor; or
- (f) if a spouse, domestic partner, son, daughter, parent, sibling or executor is not available – a person who, immediately before the death, was a personal representative of the person;
- (g) if a spouse, domestic partner, son, daughter, parent, sibling, executor or personal representative is not available – a person determined to be the appropriate representative under subsection (3)

Section 105(3) of the Victorian Act provides that:

For the purposes of paragraph (g) of the definition of “appropriate representative”, a person is the appropriate representative if the Secretary determines that the person should be taken to be the appropriate representative of the deceased person because of the closeness of the person's relationship with the deceased person immediately before his or her death.

¹⁷ See submissions made on behalf of the Tasmanian Gay and Lesbian Rights Group and Community Legal Centres Tasmania.

¹⁸ *Criminal Records Amendment (Historical Homosexual Offences) Act 2014* (NSW) s 19B(3).

¹⁹ *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic) ss 105(1) and 105B(2).

The stigma associated with having a criminal record affects not only those who with the record, but also their loved ones and others around them. While the exact numbers are not clear, it is likely that many people with Tasmanian criminal records for historic homosexual offences are now deceased.

Arrangements that enable those closest to the person with a historic criminal record to apply on their behalf to have a record expunged will help to provide comfort to the family and help repair the hurt and stigma associated with such records. I, therefore, consider it appropriate that the Tasmanian scheme be extended to enable a spouse, domestic partner, child, parent, sibling, personal representative or other appropriate representative to seek the posthumous expunction of historic criminal records.

Public Apology Posthumous Pardons

In circumstances where, through the passage of time, a family member or person closely associated with a person with a historic criminal record is unlikely to be available, alternative approaches may be more appropriate, including issuing a public apology and/or seeking a posthumous pardon.

In the United Kingdom, for example, following an unequivocal apology in 2009 by then Prime Minister, The Hon Gordon Brown, posthumous royal pardon was granted to Alan Turing in 2013. This approach represented a departure from normal procedure for issuing royal pardons in that there was no requirement to prove innocence and the decision to grant the pardon was not accompanied by an express application from Mr Turing's family.²⁰ Subsequent petitions have been made to pardon an estimated 50,000 other individuals who were also convicted.²¹

It may be appropriate to consider seeking a similar pardon for those who were dealt with by the authorities for homosexual conduct, conduct related to their gender identity or under relevant provisions who are now deceased or have no persons who could make an application on their behalf. An appropriate apology should also be considered as a way of demonstrating the Government's regret for past actions and attitudes.

Recommendations

It is recommended that:

Recommendation 1

A dedicated scheme is established to enable historic criminal and related records relating to homosexual activities or activities arising because of a person's diverse sexual orientation or gender identity to be expunged.

²⁰ Caroline Davies 'Enigma Code Breaker receives Royal Pardon' (*The Guardian*, 23 December 2013).

²¹ 'Family of Alan Turing to demand government pardon 49,000 other men' (*The Guardian*, 23 February 2015); and 'Ed Miliband backs campaign to pardon gay sex offences' (*Pink News*, 3 March 2015).

Recommendation 2

All criminal and related records arising from consensual sexual activity and related conduct in situations where the applicant would not have been dealt with by police but for the fact that the applicant was suspected of engaging in sexual activity of a homosexual nature or because of their sexual orientation or gender identity are covered by the scheme, including:

- (a) historic criminal records arising in relation to sections 122(a) and (c), and 123 of the Criminal Code involving consensual sexual activity;
- (b) historic criminal records arising in relation to other repealed offences used to prosecute activity of a homosexual nature or because of a person's sexual orientation or gender identity;
- (c) historic criminal records arising in relation to associated offences where the applicant would not have been charged but for the fact that the applicant was being dealt with in relation to engaging in conduct of a homosexual nature or their sexual orientation or gender identity;
- (d) historic criminal records related to any other offence by which homosexual and perceived homosexual conduct or conduct related to a person's sexual orientation or gender identity could be punished that do not represent an offence under current law or with which a person could still be charged where a record would not have been arisen but for the fact that the applicant was suspected of engaging in sexual activity of a homosexual nature; and
- (e) historic criminal records related to any offence of attempting, conspiring or inciting to commit any of the offences outlined above.

Recommendation 3

The scheme have the capacity for the expunction of historic criminal records of persons of diverse sexual orientation or gender identity in all circumstances where the conduct was otherwise lawful for those in the broader community.

Recommendation 4

The scheme has the capacity for the expunction of historic criminal records for offences that took place in association with the primary offence and/or records for inchoate offences relating to the primary offence.

Recommendation 5

Where age is relevant to consideration of whether an act is eligible to be permanently disregarded, the test to be used is whether the same behaviour between males and females would be considered lawful or unlawful in the circumstances.

Recommendation 6

Any conviction of a young person (and related records), in circumstances where they were the subject of non-consensual sexual abuse by an older person, also be eligible to be permanently disregarded.

Recommendation 7

The scheme enable a spouse, domestic partner, child, parent, sibling, personal representative or other appropriate representative to seek the posthumous expunction of relevant historic criminal records.

Recommendation 8

The Government consider issuing a formal apology to those who have suffered because of actions by authorities resulting in a historic criminal record and to the family and loved ones of those who are deceased.

Recommendation 9

The Government seek the grant of a royal pardon to deceased persons who were convicted under relevant sections of the Tasmanian Criminal Code and other Tasmanian or colonial laws who, as a result of the time that has elapsed since their death, no longer have a spouse, domestic partner, child, parent, sibling or personal representative to make application for a conviction to be disregarded.

4. The process for expunging historic criminal records

The process for expunging historic criminal records should be designed to have no further negative impact on those whose lives have already been affected by the stigma and hurt associated with past laws and attitudes.

For some, this may mean they do not wish to re-visit that part of their lives. Others may have concerns about further public exposure associated with applying to have a criminal record expunged.

It is important, therefore, that procedures established under the scheme are sensitive to the needs of those directly affected. The process for having a record considered must be as confidential and discreet as possible, whilst ensuring that matters surrounding the conviction are assessed comprehensively.

This part identifies administrative arrangement to enable the consideration of eligible offences.

Legislation

In the Discussion paper, I examined possible mechanisms to remove the continuing impact of having a criminal record relating to consensual sexual conduct and related behaviour.

This included:

1. amendments to police procedures for undertaking criminal history checks;
2. amendment of the Annulled Convictions Act;
3. grant of pardon; or
4. the introduction of specific legislation.

Adapting existing administrative procedures or amending existing legislation to enable expunction of convictions and related records for consensual homosexual sexual behaviour limits the extent to which a comprehensive response to dealing with such convictions can be achieved.

While a grant of a pardon would have the effect of discharging an offender from all legal consequences of the offence, it is suggested that this approach is more suited to

situations where it is unlikely an application could be made to have the conviction permanently disregarded due to the passage of time.

The introduction of new legislation to establish a dedicated procedure would deliver the capacity to comprehensively address relevant past convictions and related records and restore all legal rights.

It has the advantage of permitting flexibility in the offence provisions able to be considered and allows processes to be established that would enable the circumstances surrounding any conviction or related actions to be considered in detail.

This approach is supported by stakeholders and is the recommended approach.

Responsible Decision Maker

In the Discussion paper, I identified three broad options for the appointment of a responsible decision maker. The first involved application to a member of the judiciary or court; the second application to a relevant Minister; the third to a Head of Agency.

Given the nature of the issues raised by this process, it is my view that the scheme should be established in a way that enables the greatest flexibility in the way in which determinations are made and the information that is sought to enable that decision. I am also of the view that applications should be assessed with as little formality as possible. The intention of the scheme is not to conduct a re-trial or to conduct formal hearing of evidence. Nor do I envisage it being a procedure in which applicants feel the need to engage legal representation. I am also of the view that it is important to remove the decision making from the political sphere.

For this reason, my initial preference in relation to the options set out in the Discussion paper was for the approach adopted in the Victoria and other jurisdictions. This was that applications be made to the Secretary of the Department of Justice (or similar), with provision for her/him to appoint a senior legal practitioner (such as a retired judge or former prosecutor) or advisory panel to assess applications.

Stakeholder organisations have, however, indicated their strong view that location of the scheme within any Agency historically connected with the enforcement of anti-gay laws is likely to deter applicants from seeking to have records expunged. The preferred model of those groups is for the Anti-Discrimination Commissioner to receive and assess submissions and for decisions to be reviewable by the Anti-Discrimination Tribunal.²²

I have considered this approach and it is my view that the nature of the issues to be assessed as part of any scheme that enables historic convictions to be disregarded is sufficiently different from my role and functions as the Anti-Discrimination Commissioner to warrant the establishment of arrangements that are separate from those functions.

²² See submissions made on behalf of the Tasmanian Gay and Lesbian Rights Group and Community Legal Centres Tasmania and also, less directly, the comments made by the Tasmanian Commissioner of Police.

I have, however, given further consideration to the underlying concerns that led to that recommendation and recommend that a Historic Criminal Records Expert Panel (HCREP) be established comprising the Dean of Law at the University of Tasmania, the Registrar under the *Registration to Work with Vulnerable People Act 2013* (Tas), and the Anti-Discrimination Commissioner.

The advantage of this approach is that responsibility is attached to identified and ongoing positions rather than individuals and the scheme would retain capacity to deal with applications over time without the need for new individuals to be considered for appointment.

The Department of Justice has responsibility for undertaking checks of people who seek registration to work with vulnerable people. An important rationale for centralising processes for conducting criminal record checks is to ensure improved consistency in the way criminal record information is assessed. For this reason, it would be appropriate for the Registrar appointed under the *Working with Vulnerable People Act* to be included as a panel member.

The Dean of Law at the University of Tasmania would provide expertise in the law and legal history, together with independence from all branches of government and an understanding of the social context in which historic penalties were conceived.

The Anti-Discrimination Commissioner would provide understanding of the discriminatory impact of historic convictions and records and is seen by key stakeholders as an entity that applicants are likely to trust.

The HCREP would be responsible for assessing applications, including conducting private inquiries involving relevant parties regarding matters raised within the application. The HCREP would have the authority to issue a binding order in relation to relevant records (in whole or part) or to dismiss the application.

Under this model, it would be appropriate for the Commissioner of Police to be provided with the capacity to make representations to the HCREP on matters related to the application.

Appropriate safeguards as to the privacy of all proceedings and the protection of information assessed under the scheme would be required. It will, however, be necessary to ensure those who hold personal information required for an assessment to be undertaken, including criminal, police and other court records, be permitted to disclose those records to the HCREP's administrator under suitable authorities from the applicant. The scheme will also need to ensure that records relating to deceased persons that are subject to an application can lawfully be disclosed. Further, those with responsibility for administering the scheme and assessment or review of applications must have authority to collect and retain relevant personal information to the extent required to undertake relevant tasks.

Administrative Arrangements

It is proposed that the Anti-Discrimination Commissioner be appointed as Registrar with overall responsibility for administration of the scheme. As Registrar, the Commissioner would have responsibility for receiving, registering and processing applications, including arranging for relevant materials to be made available to the HCREP and ensuring the provision of support reasonably required by the Panel to conduct its inquiries.

The Registrar would be responsible for recording investigation and Panel outcomes, notifying applicants of the Panel's decision, and providing binding orders to the relevant record keepers for action. The Registrar would also provide relevant services to enable appeals, including providing the appeal body with all relevant materials relating to the decision being reviewed.

The Registrar would require the authority to seek information from any entity considered appropriate to assist in conducting an assessment. This would include information relating to the criminal history of the applicant (both in Tasmania and elsewhere). It also includes records relating to an offence of which the applicant was found guilty where a conviction was not recorded and any relevant arrest or other records, and information from other entities, including any other government agency or body. This authority will need to clearly apply irrespective of other privacy and confidentiality obligations of other entities. The authority would need to permit the Registrar to access records even where a third party is identified in the record, as that third party may be relevant in the review process.

Applications

A person who believes they have a historic criminal record that may be eligible to be expunged would be required to apply to the HCREP to have the matter considered. The application would include information about the offence (or record), including when and where the situation that gave rise to the record occurred. Signing the application would provide consent to a police record search being conducted and to the Panel accessing any other relevant records created by a Government body, including records held by the courts, the Director of Public Prosecutions and the Department of Police and Emergency Management.

The applicant should also be asked to provide information (whether from the applicant or any other person connected with the incident) regarding the offence and the subsequent conviction or record.

The information contained with the application, together with any other material provided to the Panel, should not be capable of being used in any proceedings for perjury or similar offences related to statements or evidence given at the time of the original offence.

Penalties should, however, be applied in circumstances where the information supplied to the Panel as part of an application is later found to be false or misleading (see following section).

Making records available

The Registrar should be authorised to provide the applicant with access to any records before the investigation begins and to provide the applicant with the opportunity to provide additional information relevant to matters contained within the files to assist in the consideration of the nature and circumstances of the offence and record.

Provisions will be required, however, to ensure that information included in the records related to the identity or personal details of any person other than the applicant are not disclosed.

Providing false or misleading information

Knowingly giving false or misleading information to the Panel should be an offence.

If the Panel is satisfied that an order to permanently disregard a historic criminal record is based on false or misleading information or on documents that are false or misleading, the Panel should be empowered to determine the criminal record is no longer to be disregarded. In such instances, the person would be notified that the record is to be reinstated.

The decision to reinstate a criminal record should be subject to the same appeal rights as an adverse Panel decision using the same mechanism.

Compensation

A decision to permanently disregard a historic criminal record should not create the right to compensation in any form.

Review arrangements

There should be an accessible mechanism for review of any decision that a record is not eligible to be expunged.

To enable this, it is proposed that a decision to not expunge a criminal record made by the HCREP is a reviewable decision for the purposes of the *Magistrates Court (Administrative Appeal Division) Act 2001* (Tas).

This will enable a person who is not satisfied with a decision by the HCREP not to expunge a record to apply to the Magistrates Court for a review of the decision.

It is appropriate that the availability of the review mechanism be time limited and it is proposed that this be twice the current 'prescribed period' in section 17 of the *Magistrates Court (Administrative Appeal Division) Act* in order to ensure that the appellant has sufficient time to obtain appropriate legal advice on what will be a new jurisdiction. Legislative provisions should also be enacted to ensure that such appeals are

held in private without unduly limiting the discretion of the Court to determine who needs to be present at the hearing.

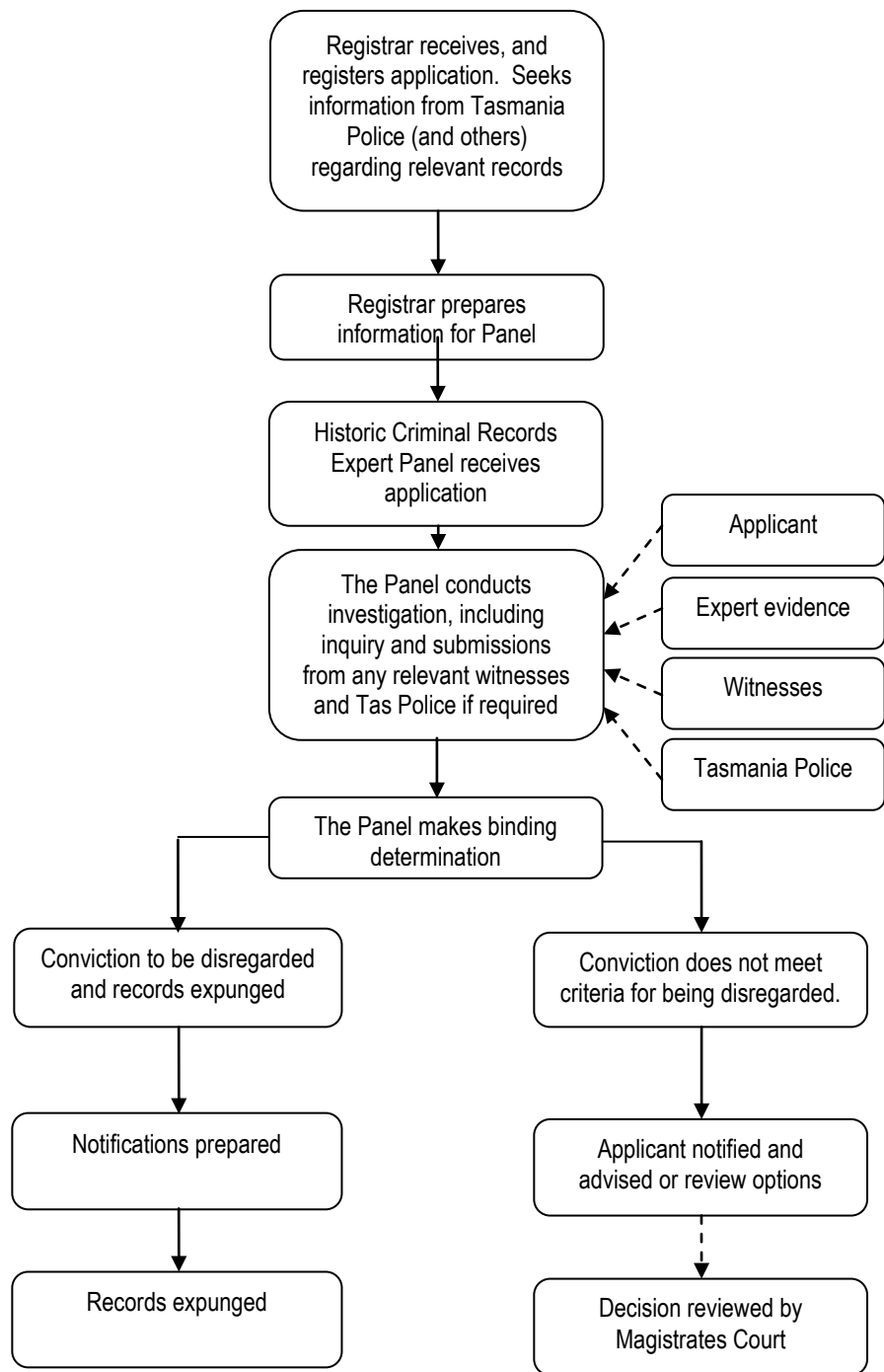
Requirement to inform

There may be circumstances where an individual with a relevant record may not be aware that it is capable of being expunged.

Where information contained in Police records is provided to third parties, the person whose record it is may not be aware of their right to have the record reviewed under the scheme.

For this reason, there should be a requirement that custodians of police and related records and those with responsibility for examining such records (such as responsible officers under the *Registration to Work with Vulnerable People Act*) be required to notify a person if their record includes information related to a conviction or related matters that may be eligible to be expunged. This would only arise where the custodian has accessed the records for any purpose, rather than being a proactive obligation on custodians to review all records. The scheme should develop appropriate information materials for such custodians to provide to the person when they are informed of the scheme. Further, any decision-making process, such as that under the *Registration to Work with Vulnerable People Act*, should include a mechanism to delay a final decision pending review of the record.

Figure 1: Overview of proposed process



Recommendations

It is recommended that:

Recommendation 10

Legislation be prepared to establish a dedicated scheme to enable historic criminal records to be expunged with the effect of:

- (g) restoring all legal rights as if the historic criminal record had not been made;
- (h) providing the right of non-disclosure of all expunged records under all circumstances;
- (i) separating all expunged criminal and related records (and all references to them) from a person's criminal and other records and empowering the Registrar to have custody of those records;
- (j) destroying all duplicates of all expunged relevant criminal and other records;
- (k) ensuring that the applicant's privacy and that of any other relevant person are respected; and
- (l) prohibiting the disclosure of any information relating to the conviction or related material.

Recommendation 11

A Historic Criminal Records Expert Panel (HCREP) be established comprising the Anti-Discrimination Commissioner, the Registrar under the *Working with Vulnerable People Act 2013* and the Dean of Law at the University of Tasmania. The Panel be authorised authority to make decisions, including binding orders, on applications for expunction of relevant records.

Recommendation 12

The Anti-Discrimination Commissioner be appointed as Registrar of the scheme.

Recommendation 13

The Historic Criminal Records Expert Panel be empowered to request and receive all records considered relevant to assessing an application.

Recommendation 14

A person who believes they have a historic criminal record that should be permanently disregarded be required to complete an application form, providing details of relevant records and offences, including information relating to the incidents leading to the conviction or other police action.

Recommendation 15

The application form should authorise the conduct of a police record search and consent to access any other relevant records.

Recommendation 16

The Registrar be authorised to provide the applicant with access to any records on the basis that any information contained within the records related to the identity or personal details of any person other than the applicant not to be disclosed.

Recommendation 17

It be an offence to knowingly give the Historic Criminal Records Expert Panel false or misleading information.

Recommendation 18

If the Historic Criminal Records Expert Panel is satisfied that an order to permanently disregard a historic criminal record was based on false or misleading information or documents that are false or misleading, the Historic Criminal Records Expert Panel be empowered to determine that the historic criminal record is no longer to be disregarded and the record reinstated; with such decisions to be subject to the same review rights as a decision not to order a record be permanently disregarded.

Recommendation 19

Information provided to the Historic Criminal Records Expert Panel as part of the application and during subsequent investigation not be capable of being used in any proceedings for perjury or similar offences related to statements or evidence given at the time of the original offence.

Recommendation 20

Decisions to expunge relevant records be binding on all authorities.

Recommendation 21

A decision that a historic criminal record is not eligible to be disregarded or to reinstate a permanently disregarded record be reviewable by a magistrate in private session under amended provisions of the *Magistrates Court (Administrative Appeals Division) Act 2001* (Tas).

Recommendation 22

Relevant authorities are required to notify the record holder prior to decision or the release of information for other purposes where a record is identified that may be eligible to be expunged. This includes procedures for the conduct of police record checks and the assessment of applications for registration under the *Registration to Work with Vulnerable People Act 2013*.

5. Consequences of an expunged record

If a record is expunged, it is envisaged the person would not be required to disclose the record to any other person and the record would no longer form part of the person's official criminal record. Questions about a person's criminal history would not be taken to refer to the expunged record and the non-disclosure of the record would not be permitted to form a ground for refusing or revoking an appointment, status or privilege.

Expunction of relevant records

Expunction refers variously to the destruction of records on fulfilment of certain conditions or to the removal of references to the expunged record from a person's criminal record.

Removal of references can take a variety of forms. These range from:

- an official marker being included in the full record indicating that the particular record is to be disregarded;
- the physical separation of the expunged record from other records;
- the concealing of references to prevent the expunged record being accessible to persons reviewing the file; through to
- the destruction of relevant sections of the record.

Destruction of criminal records (or that part related to an historic conviction) would mean that the record was no longer available as an historic record of past action and societal attitudes in relation to sexual orientation and gender identity or for other genuine purposes.

For this reason, it is preferable that relevant records be retained.

Options considered included an official marker being placed on the relevant records to make clear the record has been expunged. There is a strong argument, however, that this will not give applicants confidence that their records will truly be disregarded. As such, it is not the preferred option.

Physical separation of the expunged record by the official record holder was also considered as an alternative. There is a risk, however, that this could draw inappropriate attention to records unless the separated records were kept by a different

authority from the residual records and those residual records contain no indication of having been amended.

For this reason, it is proposed that the Registrar of the scheme be authorised to hold all expunged records.

Where there are duplicate records that do not form part of an official record, the scheme should be given authority to require the permanent destruction of the duplicate record.

To enable this, the Registrar should be provided with the power to request Agencies identify relevant records and either transfer them to the Registrar or destroy them as appropriate (and where permitted under relevant document retention laws) and provide confirmation of the record destruction. Consequential amendment of the *Archives Act 1983* (Tas) may be required for this purpose.

Strong penalties should attach to the disclosure of information about or from expunged records other than for legitimate administrative or research purposes as discussed later in this report.

Records to be covered by the scheme

For the purposes of the scheme, the following records should be capable of being expunged:

- 1) Official records of court outcomes as prescribed under the *Record of Offences (Access) Act 1981* (Tas)
- 2) References to official court outcomes on related official records, eg, a co-defendant
- 3) General police records, including:
 - a) files related to the detention in custody of a person;
 - b) records relating to:
 - i) charging of offenders;
 - ii) investigation of crime;
 - iii) incidents reported to Tasmania Police;
 - c) records of interview;
 - d) witness statements;
 - e) surveillance records;
 - f) forensic reports;
 - g) police notebooks;
 - h) notes and other briefing material for the purposes of major police investigation or operations;
 - i) records relating to the details and conditions of bail;
 - j) finger-print records;
 - k) documents related to the provision of evidence in a court; and
 - l) records of investigations that resulted in decisions not to proceed with charges.
- 4) Records associated with the undertaking of police or criminal record checks, including:
 - a) records of information gathered from state systems and provided by other jurisdictions;
 - b) queries about the results of criminal history checks and records;

- c) the granting of a licence or appointment to a specified position; and
 - d) security clearances held by Tasmanian Police or other sworn members, including unsuccessful applicants.
- 5) Records related to the operation of courts, including:
 - a) registers of criminal and general cases;
 - b) complaints, applications and proceedings sheets;
 - c) records related to warrants, summonses and related documentation;
 - d) court minute books;
 - e) records related to indictment and orders; and
 - f) records related to appeals.
 - 6) Other Government records that may disclose information about convictions, including:
 - a) prison records;
 - b) employment files;
 - c) conviction check assessment files;
 - d) child protection files;
 - e) adoption files; and
 - f) other general government records relation to the successful applicant that may include information related to their criminal record.

As records (or related information) may have already been transferred to other jurisdictions, a mechanism should be established to enable such records to be identified and expunged. This will require a co-operative mechanism with the Commonwealth and other states and territories.

It is recommended, therefore, that the Attorney-General liaise with her interstate counterparts to establish a mechanism for the identification and expunction of all relevant records that have been provided to or received from another jurisdiction.

Unauthorised disclosure of or reliance on an expunged record

The disclosure of a record that has been ordered to be expunged or the dissemination of information about any expunged record has a very real capacity to cause harm. Consequently, disclosure or dissemination of any such information should be an offence carrying a severe penalty.

The *Anti-Discrimination Act 1998* (Tas) currently makes it unlawful to discriminate on the basis of an irrelevant criminal record. The term ‘irrelevant criminal record’ is defined in section 3 of the Act. The scope of the current definition is insufficient to encompass a record expunged under the proposed scheme. As such, an amendment is needed to ensure that an expunged record is an ‘irrelevant criminal record’ for the purposes of the *Anti-Discrimination Act 1998*.

Consideration also needs to be given to amendments to the *Registration to Work with Vulnerable People Act* to ensure that the registration process is prohibited from considering or disclosing any expunged record.

Authorising disclosure of information regarding an expunged record

There should, however, be a mechanism for records to be requested by, and disclosed to, the person to whom the expunged record relates. It is also important to enable information to be provided in an appropriate form for *bona fide* research purposes. In circumstances where records are requested by a person other than the person to whom the record relates, appropriate privacy protections, including the de-identification of information are required.

Authority to release a record containing information relating to a disregarded conviction should rest with the Registrar of the scheme.

Recommendations

It is recommended that:

Recommendation 23

An order for expunction is to apply to all government records, including official police records, general police records, court documents and general government records.

Recommendation 24

Expunged historic records be permanently held by the Registrar of the scheme, with all remaining records to contain no indication of the nature of the amendment.

Recommendation 25

Secondary records or duplicate files held in paper or electronic format related to historic criminal records that are to be expunged should be destroyed.

Recommendation 26

Where the Historic Criminal Records Expert Panel has ordered that a record be expunged, disclosure of information regarding that record be an offence carrying a serious penalty and the mechanism for investigation and prosecution of such an offence is specified clearly in the legislation.

Recommendation 27

The Attorney General liaise with the Attorneys General of the Commonwealth and other states and the territories to establish a mechanism for the identification and expunction of all relevant records that have been provided to or received from another jurisdiction.

Recommendation 28

Consequential amendments be made to the *Archives Act 1983* (Tas) to give effect to the intent of the scheme.

Recommendation 29

The definition of 'irrelevant criminal record' in section 3 of the *Anti-Discrimination Act 1998* (Tas) be amended to include records expunged under the scheme.

Recommendation 30

Consequential amendments be made to the *Annulled Convictions Act 2003* (Tas) and related legislation to provide for the non-disclosure of expunged historic criminal records.

Recommendation 31

The *Registration to Work with Vulnerable People Act 2013* (Tas) be amended as necessary to prohibit consideration of any records expunged under the scheme.

Recommendation 32

The Registrar of the scheme be provided with authority to release expunged records in specific circumstances.

6. Supporting applicants and the scheme

Supporting applicants

It is appropriate that arrangements be made to support those seeking to have their records expunged.

As outlined in the Discussion paper, jurisdictions with legislation to enable such records to be expunged have generally included arrangements to support applicants in the process, particularly where there may be disputes about the law or privacy concerns are evident.

The Tasmanian Gay and Lesbian Rights Group has suggested Community Legal Centres located throughout the State may be a suitable group to provide advocacy and support services to persons making application under the law. This position is supported by Community Legal Centres Tasmania, which requests the provision of additional resources to enable its member centres to provide these services as required.

For people who live outside Tasmania, bodies such as the Human Rights Law Centre in Victoria or the Public Interest Advocacy Centre in New South Wales may be appropriate interstate options for providing external assistance. Both bodies have played a strong role in addressing the discriminatory impacts of current law.

As it is uncertain how many applications may be received and the extent to which advocacy and support services of these organisations may be required, I suggest that arrangements are established to enable the scheme to reimburse costs associated with the provision of assistance to applicants to an agreed level.

Establishing and maintaining the scheme

While the establishment of the scheme using an existing authority as the Registrar and administrative support mechanism is recommended, this will not be feasible within the current resourcing levels available to the Anti-Discrimination Commissioner.

It is envisaged that there will be some one-off scheme establishment costs, such as:

- establishing processes for receipt and investigation of applications and for the Panel's deliberations;
- modifying the Commissioner's current case management system to include applications under the scheme;
- developing information materials and application forms;
- creating on-line information resources;
- establishing protocols with authorities currently holding relevant records; and
- development of mechanisms to assess requests for reimbursement of costs reasonably incurred.

There will also be some ongoing costs of the scheme. The scheme will result in some additional administrative work, investigation work to be done in preparation for the Panel's deliberations, and documentation and provision of orders to relevant authorities.

Recommendations

It is recommended that:

Recommendation 32

Arrangements are established to enable, including through an application costs reimbursement mechanism, necessary assistance to be provided to applicants by Community Legal Centres in Tasmania together with bodies in other states and territories such as the Human Rights Law Centre and the Public Interest Advocacy Centre.

Recommendation 33

Additional resources are made available to the Anti-Discrimination Commissioner to cover the one-off establishment activities for the scheme and the on-going administrative, investigative and communication activities.

Appendix 1: Extracts of repealed Tasmanian laws

Criminal Code Act 1924 (Tas)

The following provisions were repealed by the *Criminal Code Amendment Act 1997 (Tas)*

122. Unnatural crimes

Any person who –

(a) has sexual intercourse with any person against the order of nature;

...

(c) consents to a male person having sexual intercourse with him or her against the order of nature –

is guilty of a crime.

Charge: Unnatural sexual intercourse.

123. Indecent practices between males

Any male person who, whether in public or private, commits any indecent assault upon, or other act of gross indecency with, another male person, or procures another male person to commit any act of gross indecency with himself or any other male person, is guilty of a crime.

Charge: Indecent practice between male persons.

Police Offences Act 1935 (Tas)

The following provisions were removed by the *Sex Industry Offences Act 2005* with respect of section 8(1)(c) and the *Police Offences Amendment Act 2001* with respect of section 8(1)(d).

8. Begging, imposition, prostitution, &c.

(1) A person shall not –

...

(c) being a common prostitute, in any public place, or within the view or hearing of any person being therein, solicit, importune, or accost any person for immoral purposes, or loiter about for any such purpose;

(d) being a male person, be in any public place at any time between sunset and sunrise, dressed in female apparel;

...

(1AA) A person who contravenes a provision of subsection (1) is guilty of an offence and is liable on summary conviction to a penalty not exceeding 5 penalty units or to imprisonment for a term not exceeding 6 months.

Reference to male persons was removed by application of the *Police Offences Amendment Act (No 2) (2001)*. The following provisions were repealed by *Sex Industry Offences Act 2005*.

8. Begging, imposition, prostitution, &c.

(1A) A person shall not –

...

(b) knowingly live wholly or in part on the earnings of prostitution; or

(c) being a male person, in any public place, solicit or importune for immoral purposes.

(1AB) A person who contravenes a provision of subsection (1) is guilty of an offence and is liable on summary conviction to a penalty not exceeding 10 penalty units or to imprisonment for a term not exceeding 12 months.

Appendix 2: Extract of provisions with potential to lead to conviction for consensual sexual homosexual activity – current

Crime Code Act 1924 (Tas)

137. Indecency

Any person who wilfully –

- (a) does any indecent act in any place to which the public have access or in the public view; or
- (b) does any such act in any place with intent to insult or offend any other person –

is guilty of a crime.

Charge: Indecency.

Police Offences Act 1935 (Tas)

7. Loiterers, &c.

- (1) A person, being a suspected person or reputed thief, shall not –
 - (a) be in or upon any building whatsoever or in any enclosed yard, garden, or area for any unlawful purpose; or
 - (b) frequent or loiter in or near any public place, or any river, or navigable stream with intent to commit a crime.
- (2) In proving under this section intent to commit a crime it shall not be necessary to show that the person charged was guilty of any particular act tending to show his intent, and he may be convicted if from the circumstances of the case and from his known character as proved to the

court before which he is charged it appears to such court that his intent was to commit a crime.

- (3) A person shall not have in his possession without lawful excuse any implement or instrument with intent to commit a crime.
- (4) Every such key, implement, or instrument may be taken from the offender by any police officer and shall, on conviction of the offender, become forfeit to the Crown.
- (5) A person who contravenes a provision of subsection (1) or (3) is guilty of an offence and is liable on summary conviction to imprisonment for a term not exceeding 6 months

7A. Loitering near children

- (1) For the purposes of this section, a person loiters near children if the person loiters at, or in the vicinity of –
 - (a) a school; or
 - (b) any of the following, while children are present:
 - (i) a public toilet;
 - (ii) a playground;
 - (iii) a swimming pool;
 - (iv) a games arcade;
 - (v) any other place at which children are commonly present.
- (2) A person who has been found guilty of a sexual offence must not, without reasonable excuse, loiter near children.

Penalty: Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 2 years, or both.

8. Begging, imposition, prostitution, &c.

- (1A) A person shall not –
 - (a) wilfully and obscenely expose his person in any public place or in the view of persons therein;
- (1AB) A person who contravenes a provision of subsection (1A) is guilty of an offence and is liable on summary conviction to a penalty not exceeding 10 penalty units or to imprisonment for a term not exceeding 12 months.

13. Public annoyance

- (1) A person shall not, in a public place –
 - (a) behave in a violent, riotous, offensive, or indecent manner;

...

(3AA) A person who contravenes a provision of subsection (1) ... is guilty of an offence and is liable on summary conviction to –

- (a) a penalty not exceeding 3 penalty units or to imprisonment for a term not exceeding 3 months, in the case of an offence under subsection (1) ...

...

(3A) A person convicted in respect of an offence under this section committed within 6 months after he has been convicted of that or any other offence thereunder is liable to double the penalty prescribed in respect of the offence in respect of which he is so convicted.

14. Public decency

(1) A person, in any public place or within sight of any person in a public place, must not bathe in any river, lake, harbour or stream or sunbathe unless –

- (a) the person is decently clothed; or
- (b) the conduct is authorised in that place by the appropriate council.

(2) A person who contravenes subsection (1) is guilty of an offence and is liable on summary conviction to a penalty not exceeding one penalty unit.

Appendix 3: Provisions leading to conviction for consensual sexual activity between adult men

Provisions	Charge	Current status of provision
<i>Criminal Code Act 1924 (Tas)</i>		
Section 122(a)	Unnatural sexual intercourse	Repealed by no 12 of 1997
Section 122(c)	Intercourse against nature	Repealed by no 12 of 1997
Section 123	Indecent practice between male persons	Repealed by no 12 of 1997
Section 137	Indecency	Current
<i>Police Offences Act 1935 (Tas)</i>		
Section 7	Loitering	Current
Section 8(1)(c)	Prostitution	Repealed by no 42 of 2005
Section 8(1)(d)	Male dressed in female apparel	Repealed by no 1 of 2001
Section 8(1A)(a)	Obscene public exposure	Current
Section 8(1A)(b)	Living off the earning of prostitution	Repealed by no 42 of 2005
Section 8(1A)(c)	Male in public place soliciting or importuning for immoral purpose	Amended by no 86 of 2001 to remove reference to male persons. Repealed no 42 of 2005
Section 13(1)(a)	Person in a public place behaving in a violent, riotous, offensive or indecent manner	Current
Section 14(1)	Public decency – unauthorised bathing unless decently clothed	Current

Appendix 4: Responses received to the Discussion Paper

The following provided a response to the Discussion Paper:

Non-government organisations

Community Legal Centres Tasmania
Lisa Annese, CEO, Diversity Council of Australia
Deidre Murray, Rainbow Communities Tas Inc
Sabine Wagner, CEO, Tasmanian Council of AIDS, Hepatitis and Related Diseases Inc
Tasmanian Gay and Lesbian Rights Group

Tasmanian Government

Michael Pervan, Acting Secretary, Department of Health and Human Services
Commissioner Darren Hine, Commissioner of Police
Colin Pettit, Secretary, Department of Education

CONTACT US

If you have any questions about the content of this report or would like to receive this document in an alternate format, please contact the Office of the Anti-Discrimination Commissioner, Tasmania:

Telephone:

1300 305 062 (Local call) or (03) 6165 7515 (Office)

Facsimile:

(03) 6233 5333

Web:

SMS 0409 401 083

Location:

Level 1, 54 Victoria Street Hobart, Tasmania 7000

Postal:

GPO Box 197 Hobart, Tasmania 7001

E-mail:

antidiscrimination@justice.tas.gov.au

Website:

www.antidiscrimination.tas.gov.au

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