Parliamentary Committees



Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017

Report No. 57, 55th Parliament
Legal Affairs and Community Safety Committee
July 2017

Legal Affairs and Community Safety Committee

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Acknowledgements

The committee acknowledges the assistance provided by representatives from the Department of Justice and Attorney-General.

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Abbreviations and glossary

ADCQ	Anti-Discrimination Commission Queensland
ASIO	Australian Security Intelligence Organisation
the Bill	Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017
CCC	Crime and Corruption Commission
the QLRC or commission	Queensland Law Reform Commission
the committee	Legal Affairs and Community Safety Committee
Decision-maker	The Director-General of the Department of Justice and Attorney-General
the department	Department of Justice and Attorney-General
FLPs	Fundamental legislative principles
Historical gay sex offence	Particular offences that were repealed by the *Criminal Code and Another Act Amendment Act 1990.* The terminology used in this report refers generally to historical offences for which homosexual activity could be punished, and particularly in relation to the former offences under sections 208(1), 208(3), 209 and 211 of the Criminal Code
HOLAA 2016	*Health and Other Legislation Amendment Act 2016*
Homosexual activity	The QLRC report provides the following definition: sexual activity between people of the same sex, regardless of how they identify their sexual orientation or gender
HRLC	Human Rights Law Centre
Human Rights Law Centre joint submission	A joint submission (submission 13) from the Human Rights Law Centre Ltd, Community Legal Centres Queensland, LGBTI Legal Service Inc, Caxton Legal Centre Inc, Brisbane LGBTI Action Group and Queensland Aids Council
LGBTI	Lesbian, gay, bi-sexual, transgender (or transsexual), and intersex
QCAT	Queensland Civil and Administrative Tribunal
QCCL	Queensland Council for Civil Liberties
QLRC report	Queensland Law Reform Commission report: *Expunging criminal convictions for historical gay sex offences,* Report No 74, August 2016
QLS	Queensland Law Society

Chair's foreword

This report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017.

The committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

The committee has recommended that the Bill be passed.

On behalf of the committee, I thank those individuals and organisations who lodged written submissions on the Bill. I also thank the committee's secretariat, and the Department of Justice and Attorney-General.

I commend this report to the House.

Duncan Pegg MP

Chair

Recommendations

The committee recommends the Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017 be passed.

1 Introduction

1.1 Role of the committee

The Legal Affairs and Community Safety Committee (the committee) is a portfolio committee of the Legislative Assembly which commenced on 27 March 2015 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility include:

- Justice and Attorney-General, Training and Skills, and
- Police, Fire and Emergency Services, and Corrective Services.

The *Parliament of Queensland Act 2001* provided that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.[2]

1.2 Inquiry process

The Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017 (the Bill) was introduced into the House and referred to the committee on 11 May 2017.

On 19 May 2017, the committee wrote to the Department of Justice and Attorney-General (the department) seeking advice on the Bill, and invited stakeholders and subscribers to lodge written submissions.

The committee received 13 submissions by the closing date of 5 June 2017, which are listed in Appendix A. On 16 June 2017 the committee received a written response to issues raised in submissions from the department.

The committee held a public briefing with the department on 14 June 2017 (see Appendix B). A public hearing was held on 19 June 2017 (see Appendix C).

The committee was required to report to the Legislative Assembly by 14 July 2017.

1.3 Objectives and background

The objectives of the Bill are to establish a scheme for the expungement, on application, of convictions and charges for particular offences involving homosexual activity. The scheme applies to convictions or charges that happened before 19 January 1991.

At the public briefing, the department advised:

> *Beginning in South Australia in 1972, the Australian Capital Territory in 1976, Victoria in 1981, the Northern Territory and New South Wales both in 1984, Western Australia in 1990, Queensland in 1991 and ending with Tasmania in 1997, all Australian states and territories have decriminalised private homosexual acts by consenting adults …*
>
> *Over the last five years, South Australia, New South Wales, the Australian Capital Territory and Victoria have introduced legislative schemes providing for the expungement of charges or convictions for historical homosexual offences.*

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1 *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

2 *Parliament of Queensland Act 2001,* s 93(1).

Consensual adult male homosexual activity ceased to be a criminal offence in Queensland on 19 January 1991 when the relevant Criminal Code offences were repealed by the *Criminal Code and Another Act Amendment Act 1990* and new provisions relating to unlawful anal intercourse were enacted.[3]

In 2015, the Attorney-General stated 'there are a growing number of Australian jurisdictions considering the question of whether historical convictions for consensual sexual activity between males should be expunged from a person's criminal record', and expressed support for consideration of this issue in Queensland.[4]

In January 2016, the Attorney-General referred the issue to the Queensland Law Reform Commission (commission or QLRC), which reviewed 'how Queensland can expunge criminal convictions for historical gay sex offences from a person's criminal history'.[5] The Attorney-General tabled the commission's final report titled *Expunging criminal convictions for historical gay sex offences* (QLRC report) in the Legislative Assembly on 29 November 2016.

On 23 September 2016, the *Health and Other Legislation Amendment Act 2016* (HOLAA 2016) commenced, which amended the Criminal Code to standardise the age of consent for all forms of sexual intercourse to 16 years of age. The age of consent is relevant to this inquiry as the Bill limits the scheme to conduct involving consenting adults of 18 years and over in order to ensure equity between individuals who have been convicted of offences from 1991 to 2016.[6]

1.4 Consultation on the Bill

As set out in the explanatory notes, the department provided a consultation draft of the Bill to the following key legal and community stakeholders:

Anti-Discrimination Commission Queensland (ADCQ)
Australian Lawyers for Human Rights
Bar Association of Queensland
LGBTI Legal Service
Community Legal Centres Queensland
Parents and Friends of Lesbians and Gays – Queensland
Queensland Law Society (QLS)
Human Rights Law Centre (HRLC)
Queensland Council for Civil Liberties (QCCL)
Legal Aid Queensland
Mr Robbie Katter, Member for Mount Isa
Mr Peter Wellington, Member for Nicklin
Shadow Attorney General
TC Beirne School of Law, University of Queensland
Caxton Legal Centre Inc.
Civil Liberties Australia Inc.
The Queensland AIDS Council
Director of Public Prosecutions (Qld)
Griffith Criminology Institute
Townsville Community Legal Service Inc.

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3 Explanatory notes, p 1.

4 Queensland Parliament, *Record of Proceedings,* 20 August 2015, p 35; see also Queensland Government, *Service Delivery Statements Department of Justice and Attorney-General, Electoral Commission of Queensland, Office of the Queensland Ombudsman, The Public Trustee of Queensland* (2015) Queensland Budget 2015-16, p 13; Queensland Government, 'Palaszczuk Government Acts to Expunge Historic Homosexual Convictions' (Media Statement, 13 January 2016) cited in QLRC, *Expunging criminal convictions for historical gay sex offences*, Report No 74, August 2016, p 1.

5 The terms of reference dated 4 January 2016, received by the commission and announced on 13 January 2016, set out in full in QLRC, *Expunging criminal convictions for historical gay sex offences*, Report No 74, August 2016, Appendix A.

6 Explanatory notes, p 3.

The explanatory notes state that stakeholders' comments were taken into account in further drafting of the Bill.[7]

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend the Bill be passed.

After examination of the Bill, the committee recommends that the Bill be passed.

Recommendation 1

The committee recommends the Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017 be passed.

Statement of non-government members

It is not open to the Committee, under this Standing Order, to recommend that only part of the Bill is passed. The Committee has only two choices – recommend passage of the Bill, or not.

The committee has resolved, in accordance with Standing Orders, that the bill should be passed. The committee was unable to agree that the "public morality" offences be included as part of the scheme enacted by the Bill because this was not recommended by the Queensland Law Reform Commission.

Non-Government members also submit that consideration should be given to a consultation process to ensure that any issues, particularly relating to the consensual nature of the activity being considered, are fully canvassed before expungement occurs.

This position is consistent with the publicly indicated position of the LNP in 2015, that is:

That the LNP supports the expungement of historical homosexual convictions.

The LNP recognises the significance of the reforms to those directly impacted and the broader message communicated by the expungement - that it was unfair and discriminatory that certain practices were previously criminalised.

The LNP also supported the referral of this issue to the Queensland Law Reform Commission (QLRC), because it involves complex legal issues that need to be thoroughly examined by eminent legal minds.

While giving broad in-principle support for change, the LNP recognised the need to ensure that any changes had a sound legal basis, providing certainty to those seeking expungement under any proposed scheme.

In supporting the passing of the Bill, the non-government members confirm the Bill has considerable merit, except for elements that are proposed that go against the recommendations of the QLRC.

Specifically, non-government members do not support certain offences being deemed as eligible offences for expungement under the Bill. As outlined in the explanatory notes, the QLRC did not recommend these offences be included as part of any expungement scheme.

Non-government members also believe that the scheme would be improved by providing that any expungement sought included a process of consultation that involved any other party involved in an historical offence, who was not the applicant for a conviction expungement, particularly when issues of consent were in question.

Non-government members believe the inclusion of offences that were not recommended by the QLRC undermines the previous statements made by the Attorney-General. Further, it is disappointing that these issues could not have been resolved prior to the legislation's introduction, particularly

[7] Explanatory notes, p 9.

considering the numerous public statements from LNP members on this issue, in particular the Member for Mansfield.

2 Examination of the Bill

This section provides an overview of the committee's consideration of key issues raised during its examination of the Bill.

2.1 The expungement scheme

The objective of the Bill is to establish an administrative scheme for the expungement, upon application, of convictions or charges for particular historical offences involving homosexual activity. According to the Attorney-General, persons who were convicted of these charges 'will have an opportunity to legally decide not to disclose ever again certain types of convictions and charges'.[8]

The scheme proposes that persons eligible to apply for expungement are those who were convicted or charged with an 'eligible offence' that involved homosexual activity prior to 19 January 1991.[9]

The proposed scheme has certain criteria. The scheme is only applicable to historic homosexual offences with regards to conduct involving consenting adults. The scheme therefore has regard not only for acts consented to, but also for the age of consent at the date of decriminalisation in 1991, which at the time was 18 years.[10]

For eligible persons who have died since 19 January 1991, the scheme would allow for an application to be made on the person's behalf.[11]

The Bill provides for three classes of offences under 'eligible offences' in the scheme. They are:

- Criminal Code male homosexual offences
- public morality offences, and
- other offences that may be prescribed by regulation in the future and also involve historic homosexual activity.[12]

At the public briefing, the department advised:

> *… the bill provides that a regulation can proscribe another eligible offence by regulation to the extent the offence involved homosexual activity that happened or allegedly happened before 19 January 1991. The QLRC report identified that it was difficult to identify every relevant offence that should be an eligible offence and therefore recommended that the scheme provide for other offences to be prescribed by regulation in order to create the appropriate amount of flexibility for the scheme.*[13]

Expungement applications would be considered by the Director-General of the department ('the decision-maker') on a case by case basis. As the proposed scheme is administrative, people making an application would do so in an approved form. The decision-maker could request additional information, but the Bill provides that no oral hearing would be held with respect to an application.[14] The Bill provides that the decision-maker must be satisfied that the act causing the offence would not constitute an offence under the law of Queensland today.[15]

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8 Queensland Parliament, *Record of Proceedings*, 11 May 2017, p 1167.

9 Queensland Parliament, *Record of Proceedings*, 11 May 2017, p 1167.

10 Explanatory notes, p 4.

11 Explanatory notes, p 4.

12 Public briefing transcript, Brisbane, 14 June 2017, p 2.

13 Public briefing transcript, Brisbane, 14 June 2017, p 2.

14 Explanatory notes, p 5.

15 Explanatory notes, p 5.

Under the scheme, if the application is successful, the person could lawfully choose not to disclose the charge or the conviction.[16] Relevant public records would be annotated to record the expungement and there would be penalties for anyone that disclosed information about expunged charges or convictions. Compensation would not be available as a result of expungement.[17]

The Bill proposes a scheme largely implemented from recommendations of the QLRC report and from feedback during consultation by the department on a draft bill.

During the process of this inquiry the committee received 13 submissions, of which most were supportive of the reforms.[18]

The Human Rights Law Centre joint submission stated:

> *Introducing an expungement scheme is an important step forward to remove the stigma experienced by the LGBTI community in Queensland who lived in fear of criminal punishment and being socially ostracised under historical laws which punished people for being gay.*[19]

The Anti-Discrimination Commission Queensland stated:

> *Consensual adult male homosexual activity ceased to be criminal offence in Queensland in January 1991. Despite decriminalisation, there has been growing recognition that this reform fails to address the stigma that a historical conviction for consensual homosexual activity carries.*
>
> *Having a conviction for consensual homosexual activity that is no longer considered a criminal offence can be a great disadvantage where convictions have to be disclosed, for example, in employment.*[20]

Mr Alan Raabe told the committee:

> *As a citizen who has been charged and convicted of one of these 'crimes', I wish to encourage you to ensure that as many injustices as possible are able to be righted.*
>
> *This action which you are now undertaking will enable many (including me) to finally resume a 'normal' life, and families and loved ones of those not with us any longer, some comfort.*[21]

While acknowledging the largely supportive nature of the submissions received in respect to this Bill, the committee identified a number of issues that are considered in the remainder of this chapter.

In response to a question about the difficulty of separating consensual and non-consensual sex for the purposes of expungement, the department advised:

> *The decision-maker—the chief executive or the director-general—has to be satisfied that it was consensual conduct, so they can look at several different things in determining whether that was consensual. They must be satisfied on the balance of probabilities, so they will look at the public records available to them—the court transcripts that are available to the extent they are, police records, any records that they can find. Also, the bill provides that they can request information from third parties if that is what the decision-maker believes is necessary to satisfy them to the correct standard. It will depend, on a case-by-case basis, on what material they obtain. In some circumstances the transcripts from the proceedings may make it obvious and there may be no*

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16 Hon Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for Training and Skills, Queensland Parliament, *Record of Proceedings*, 11 May 2017, p 1168.

17 Public briefing transcript, Brisbane, 14 June 2017, p 4.

18 See for example submissions 3, 4, 5, 7, 8, 9 and 10.

19 Submission 13, p. 4.

20 Submission 8, pp 1-2.

21 Submission 10, p 1.

need to contact a third party, but in some circumstances they may wish to do that. They can only do that with the consent of the applicant, and that is provided for in the bill.[22]

As regards possible recourse for a third party who considers that a non-consensual case was expunged, the department advised:

… the bill provides for the revival of expunged conviction if the chief executive is satisfied that the expungement was based on false or misleading information. That safeguard is accompanied by an offence of knowingly providing false and misleading information to the decision-maker.[23]

2.2 Scope of the expungement scheme

The Bill would expunge convictions or charges for particular historical offences involving homosexual activity that occurred before 19 January 1991, on application, by eligible persons.

There are certain criteria proposed in regards the scope of the scheme. The Bill sets out specific criteria against which the decision-maker needs to be satisfied, 'on the balance of probabilities', in order to expunge a conviction or charge. Criteria includes:

- the other person engaged in the act consented to the act
- the other person was 18 years or older at the time the offence was committed, and
- that the act would not constitute an offence under the current law of Queensland.[24]

Clause 12 of the Bill sets out requirements for application for expungement. The requirements include that the application be in the correct form and provide certain information about the historical conviction or charge.[25]

The department advised that the Bill introduces a historical expungement scheme and would apply to historical, rather than recent, homosexual sexual offences:

It [the Bill] *will not cover any convictions for the period between January 1991 and September 2016 … This is a historical homosexual expungement scheme so it covers the historical period only.*[26]

At the public briefing, the department explained the significance of 19 January 1991:

19 January 1991 was the date that consensual adult male homosexual activity ceased to be a criminal offence in Queensland upon the commencement of the Criminal Code and Another Act Amendment Act 1990. This key date underpins the framework of the expungement scheme proposed in the bill. To be eligible for expungement under the proposed scheme, charges and convictions must relate to conduct that occurred before 19 January 1991 and that conduct must have involved homosexual activity ... Before 19 January 1991, it was unlawful for both heterosexual and homosexual couples to engage in consensual anal intercourse, but a conviction or charge for an offence relating to anal intercourse or attempted anal intercourse between heterosexual couples will not be eligible for expungement under the proposed scheme. [27]

Prior to the commencement of the HOLAA 2016 on 23 September 2016, the age of consent for anal intercourse for homosexual and heterosexual couples in Queensland was 18 years. Since 23 September 2016, the age of consent for all forms of sexual intercourse has been standardised

22 Public briefing transcript, Brisbane, 14 June 2017, p 6.

23 Public briefing transcript, Brisbane, 14 June 2017, p 6.

24 Public briefing transcript, Brisbane, 14 June 2017, p 3.

25 Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017, clause 12.

26 Public briefing transcript, Brisbane, 14 June 2017, p 4.

27 Public briefing transcript, Brisbane, 14 June 2017, p 2.

to 16 years of age.[28] The age of consent for all other types of sexual activity has been 16 years since 1976.[29]

While supportive of the general intent of the Bill, some submitters considered the scope of the expungement scheme should be expanded to include charges or convictions for consensual homosexual activity that took place:

- between 19 January 1991 and 23 September 2016, and
- prior to 19 January 1991 for people aged 16 or 17 years.[30]

2.2.1 Convictions or charges between 19 January 1991 and 23 September 2016

People who had convictions or charges for consensual homosexual activity that took place between 19 January 1991 and 23 September 2016 would not be eligible to apply to have these convictions expunged under the Bill.[31]

At the public briefing, the department explained:

> *It will not cover any convictions for the period between January 1991 and September 2016, which is when the HOLAA commenced. The situation was that in Queensland between 1991 and 2016 the age of consent was 18 but only for acts of anal intercourse, and that was for homosexual and heterosexual couples. This is a historical homosexual expungement scheme so it covers the historical period only. What the explanatory notes allude to is that the age of consent changes at various times in different jurisdictions for various reasons, but this bill is not addressing differences in the age of consent; it is addressing the decriminalisation of homosexuality. It is tied to that purpose.*[32]

Ms Lee Carnie, a lawyer from the Human Rights Law Centre, noted that a similar date limit had not been imposed in homosexual offences expungement schemes in other jurisdictions:

> *I would quickly note that this date limit which has been introduced in this bill, has not been introduced in other jurisdictions. For example, this bill is most closely aligned with the Victorian bill and that does not have a similar date limit.*[33]

At the public hearing, the committee asked about issues associated with broadening the expungement scheme. Mr Bill Potts, Immediate Past President, Queensland Law Society stated:

> *I wonder often about those sorts of floodgate arguments that a tsunami of claims or applications will be made when in fact we simply do not know the size, if I can put it that way, of the iceberg that is there … My personal view is that the scheme should be as broad as possible …*[34]

In response to a question about the time period proposed by the scheme, the department advised:

> *Both homosexual and heterosexual acts of consensual anal intercourse were prosecuted right up to 2016. If we extended the scheme up to 2016, it would encompass people who may currently be serving sentences of imprisonment. They were prosecuted only recently and the Director of Public Prosecutions has considered public interest factors in determining whether to prosecute*

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28 Public briefing transcript, Brisbane, 14 June 2017, p 3.

29 Explanatory notes, p 3.

30 See for example Ms Carnie, Mr McPhee, Mr Browne, Mr Black, Mr Potts, Mr Frame, Mr Page and Mr Raabe, public hearing transcript, Brisbane, 19 June 2017, pp 1-10.

31 Prior to the commencement of the HOLAA 2016 on 23 September 2016, section 208 of the Criminal Code provided for the offence of unlawful sodomy, which had the effect, inter alia, of criminalising consensual homosexual activity involving a person aged 16 or 17 years.

32 Public briefing transcript, Brisbane, 14 June 2017, p 4.

33 Public hearing transcript, Brisbane, 19 June 2017, p 3.

34 Public hearing transcript, Brisbane, 19 June 2017, p 6.

those offences. It would expand the scheme hugely. We could exclude heterosexual convictions, but that may be unfair. If you were to include all the convictions right up to 2016, this would be a much larger scheme. Arguably, what the QLRC has recommended is an administrative scheme. It may not be appropriate for an administrative scheme to look at convictions as recent as 2016. You will be going behind very recent court judgements about behaviour and findings of guilt about behaviour. It would be a much wider scheme, a much more expensive scheme and a much more resource intensive scheme—and a completely different scheme to the scheme the QLRC has recommended.[35]

2.2.2 Convictions or charges of 16 and 17 year olds prior 19 January 1991

The Bill would not provide for the expungement of convictions or charges that took place prior 19 January 1991 if they relate to consensual homosexual activity involving a person who was aged 16 or 17 years.

When considering an expungement scheme for Queensland, the QLRC report recommended the relevant age of consent should be used in such a scheme:

If the age of consent for sodomy were changed to 16 years prior to or in conjunction with the commencement of the proposed expungement legislation, applications for expungement in respect of eligible offences would be decided by reference to the age of consent of 16 years.[36]

…

The overarching principle is that convictions and charges for eligible offences should be expunged if the conduct constituting the offence is no longer criminal conduct.[37]

The QLRC considered that that expungement criteria should include the relevant age of consent, having regard to the law in Queensland as in force at the commencement of the expungement legislation.[38]

Some stakeholders expressed concern that the Bill would not apply to charges or convictions that took place after 19 January 1991 for consensual anal intercourse with a person aged under 18 years.[39]

The Anti-Discrimination Commission Queensland stated:

… the Commission is concerned that the proposed scheme will not cover criminal convictions since 1991 for consensual anal intercourse with a person between the age of 16 and 18 years.

…

Not allowing the expungement of post-1991 criminal convictions of persons having anal sex with persons over 16 years of age disproportionally criminalises men who have same-sex sexual relations with other men aged between 16 and 18 years since that date.[40]

The Human Rights Law Centre's joint submission[41], and Mr Page, noted the number of people aged under 18 years that have historical homosexual convictions. Mr Page stated:

The Law Reform Commission, of course, looked at this and recommended that the scheme be wider than the government bill. What particularly struck me were the words of the Human Rights Law Centre. They have helped people across Australia but one-quarter of their clients they helped

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35 Public briefing transcript, Brisbane, 14 June 2017, p 5.

36 QLRC report, p iii.

37 QLRC report, p 80.

38 QLRC report, p 81.

39 See for example submissions 3, 6, 8 and 13.

40 Submission 8, pp 3-4.

41 Submission 13, para 2.6.

> *were under 18 at the time of the commission of the offences. I was really stunned when I read that this morning, because I thought that these are teenage boys who forever after have a conviction following and haunting them, maybe 30, 40 years later.*[42]

The Human Rights Law Centre's joint submission stated:

> *Clause 18(2)(a)(ii) of the Bill provides that the chief executive may expunge the conviction or charge if satisfied that the other person was aged 18 years or more at the time of the offence. As the age of consent has been lowered, this clause should instead require that the other person was 'aged 16 years or over'.*

It further recommended:

> *The relevant age of consent should be 16 in line with the test for expungement not constituting an offence today. Alternatively, the age of consent should be split, to be 17 years or more for offences prior to 1976, and 16 years or more for offences following that date.*[43]

At the public hearing, Mr Peter Black, Vice-President of the Queensland AIDS Council also commented on the timing in addressing the age of consent issue:

> *In terms of the age of consent issue … It is worth noting that the Attorney-General has said that that is something that could potentially be changed or amended in future. It would again be our submission that there does not seem to be much merit in delaying a decision like that.*[44]

Conversely, with regard to the age of consent, Mr Michael Cope, President of the Queensland Council for Civil Liberties stated:

> *… I agree with the government's position. It seems to me that what we are doing here is overturning court established convictions. To that end, you need particular purposes—either one of an individual injustice or alternatively you need to say that the law itself was unjust. We say that the law was unjust. Homosexuality should never have been a criminal offence. What should be the age of consent is, it seems to me, in a different category.*[45]

The department highlighted a number of reasons for its departure from the QLRC recommendation:

> *Making charges and convictions that occurred prior to 19 January 1991 for Criminal Code male homosexual offences involving 16 and 17 year olds eligible for expungement would discriminate against those convicted for similar offences between 1991 and 2016.*
>
> *Extending the scheme to convictions for consensual anal intercourse with 16 and 17 year olds between 1991 and 2016 would mean that the scheme may extend to people who are currently serving sentences relevant to those convictions.*
>
> *The scheme would cease to be historical in nature and it may be considered inappropriate for such recent convictions to be expunged administratively as recommended by the QLRC and provided in the Bill.*
>
> *Further, if the scheme was extended to convictions for consensual anal intercourse with 16 and 17 year olds between 1991 and 2016, it would arguably be unfair to continue to restrict the scheme to convictions involving only homosexual activity.*[46]

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42 Public hearing transcript, Brisbane, 19 June 2017, p 8.

43 Submission 13, para 2.6.

44 Public hearing transcript, Brisbane, 19 June 2017, p 3.

45 Public hearing transcript, Brisbane, 19 June 2017, p 11.

46 Department, correspondence dated 16 June 2017, pp 2-3.

In its response to the recommendation for the expungement scheme to reflect the age of 16 years being the age of consent for anal intercourse at the date of commencement, rather than 18 years, the department identified four unjust scenarios that would result:

> ***Person A*** *is convicted on the basis of a consensual homosexual act of anal intercourse with a 16 year old in 1975.*
>
> *Person A's conviction would be eligible for expungement.*
>
> ***Person B*** *is convicted on the basis of consensual heterosexual activity (other than anal intercourse) with a 16 year old in 1975.*
>
> *Person B's conviction would not be eligible for expungement.*
>
> ***Person C*** *is convicted on the basis of consensual homosexual act of anal intercourse with a 16 year old in 1992.*
>
> *Person C's conviction would not be eligible for expungement.*
>
> ***Person D*** *is convicted on the basis of a consensual heterosexual act of anal intercourse with a 16 year old in 1992.*
>
> *Person D's conviction would not be eligible for expungement.*[47]

2.3 Definition of public place

The Bill provides that certain historical public morality-type offences[48] are eligible for expungement under the Bill, including offences designed to prevent disorderly, offensive or indecent behaviour in public. The explanatory notes state:

> *In deciding an application for a public morality offence the decision-maker must be satisfied on the balance of probabilities that:*
>
> - *the offence involved homosexual activity; and*
> - *the act or omission constituting the offence, if done by an eligible person at the time the application was made, would not constitute an offence under the law of Queensland.*[49]

A decision-maker is not required to be satisfied that an offence was not committed, or alleged to have been committed, in public, rather:

> *… the Bill requires the decision-maker to be satisfied that the act or omission constituting the offence, if done at the time of the application, would not constitute an offence under the law of Queensland at the time the application is made. Queensland's current laws prohibit indecent and offensive conduct in public places …*[50]

Queensland law prohibits indecent and offensive conduct, including sexual activity, in a public place.[51]

At the public briefing, the department acknowledged that this provision departs from a recommendation of the QLRC. It stated:

> *... the inclusion of the public morality offences as eligible offences is a departure from the recommendation of the QLRC report. The QLRC recommended against their inclusion for three*

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47 Department, correspondence dated 16 June 2017, pp 15-16.

48 That is, certain historical 'public morality' type offences in force before 19 January 1991 under the repealed *Vagrants Gaming and Other Offences Act 1931* and section 227(1) of the Criminal Code.

49 Explanatory notes, pp 2 and 4.

50 Explanatory notes, p 3.

51 See for example section 227 of the Criminal Code (Indecent Acts), and section 9 of the *Summary Offences Act 2005* (Wilful Exposure).

reasons: firstly, the inclusion of the public morality offences goes beyond the focus of the decriminalisation reforms in the 1990 act—that is, legalisation of consensual homosexual activity in private; secondly, the conduct covered by public morality offences still amounts to a criminal offence under the current law; and, thirdly, because the conduct constituting the offences remains criminalised today, it requires the decision-maker to make an assessment of the reasons and motivations for historical prosecutions. The decision to include public morality offences in the expungement scheme is a policy decision of the government …[52]

At the public briefing, the department explained which definition of 'public place' would be used:

There are two relevant definitions of 'public place'. They are very similar. One is in the Summary Offences Act and one is in the Criminal Code. That would be the relevant definition for this scheme, and that is a place the public is permitted to have access to, whether on payment or not.[53]

At the public hearing, Ms Carnie expressed concern about the definition of public place:

I want to emphasise one key point from our submission, an element of the bill that has the potential to undermine the efficacy of the entire scheme—that is, the definition in the bill of `public place'. The vast bulk of conduct prosecuted under these laws took place at gay beats—places where men met up late at night to have sex in toilets, cars or behind bushes in parks. These men were arrested by police officers deliberately patrolling these beats to enforce these unjust, historic laws.[54]

Mr Peter Black, Vice-President of the Queensland AIDS Council observed that '[g]iven the nature of these laws, prosecutions were mostly for conduct that took place in public places.'[55]

Some submitters expressed concern that the Bill would not expunge charges or convictions for consensual homosexual activity that occurred in public places such as cubicles and in cars or parks at night.[56]

Civil Liberties Australia Inc stated that the Bill does not take into account the historical reality of offending; that is, that private locations such as homes and hotels were not viable options.[57] At the public hearing, Mr John Frame explained why homosexual activity was sometimes undertaken in public places:

In the past, especially at the time when homosexual sexual activity was illegal, there were a very limited number of places where you could expect to be able to have sex—even in your own home—and not have other people know about it and therefore be able to report it as a crime. This is a reason sex was happening in public places.[58]

The Human Rights Law Centre joint submission recommended:

The criteria for expungement should be amended from 'would not constitute an offence under the law of Queensland' to 'would not be prosecuted under the law of Queensland'.

Alternatively, the Bill should be amended to clarify that 'public place' will be interpreted in accordance with the Victorian Supreme Court authority of Inglis v Fish to ensure that conduct

52 Public briefing transcript, Brisbane, 14 June 2017, p 2.

53 Public briefing transcript, Brisbane, 14 June 2017, p 5.

54 Public hearing transcript, Brisbane, 19 June 2017, p 2.

55 Public hearing transcript, Brisbane, 19 June 2017, p 2.

56 See for example submissions 5 and 13.

57 Submission 5, p 2.

58 Public hearing transcript, Brisbane, 19 June 2017, p 10.

that cannot be seen other than by unusual means (e.g. in a cubicle or a car at night time) is considered lawful for the purposes of the scheme.[59]

In response to concerns raised about the definition of a public place, the department noted:

The QLRC Report recommended that charges or convictions should not be capable of expungement if the conduct still amounted to a criminal offence under the current law.

Conduct involving indecent sexual behaviour in a public place would be an offence under Queensland's current law. For example, section 227 of the Criminal Code provides that it is an offence to wilfully do any incident act in any place to which the public has access and section 9 of the Summary Offences Act 2005 *provides that it is an offence for a person to wilfully expose their genitals in a public place without reasonable excuse.*[60]

With regard to the recommendation to adopt the test of 'would not be prosecuted today', rather than 'would not constitute an offence under the law of Queensland', the department advised:

The QLRC specifically considered adopting the test of 'would not be prosecuted today' at page 77 of its report and found that it was problematic for two reasons:

- *the focus of the Government's terms of reference for the QLRC was on acts between consenting adults; and*
- *the Director of Public Prosecution's Guidelines as to when prosecuting is or is not in the public interest are non-binding. Therefore, such an approach would effectively require the decision-maker to exercise a retrospective prosecutorial discretion, rather than apply an objective legal test.*[61]

With regard to the recommendation to follow the definition in *Inglis v Fish*, the department noted that Victoria and New South Wales are common law jurisdictions whilst Queensland is a 'Code jurisdiction':

The case of Inglis v Fish is a Victorian Supreme Court decision. It should be noted that both Victoria and New South Wales are common law jurisdictions for the purpose of the criminal law. That means that while they still have statute based criminal offences and penalties they draw predominantly from the common law for their principals of criminal liability.

Queensland is a 'Code jurisdiction' which means that all of the law on criminal liability is 'codified' or written down in legislation.[62]

2.4 Assault offences

The Bill identifies three types of eligible offences that could be expunged: a Criminal Code male homosexual offence; a public morality offence; or another offence prescribed by legislation.[63]

The Queensland Council for Civil Liberties recommended that convictions and charges for the Criminal Code offences of *Assault with intent to commit unnatural offence* (section 336) and *Indecent Assaults* (section 337) also be capable of expungement.

The Queensland Council for Civil Liberties considered that by not including such a provision, '[t]he [Law Reform] Commission dismissed the concern of numerous people that some of those convictions maybe as a result of a pragmatic plea of guilty'.[64]

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59 Submission 13, para 2.7.

60 Department, correspondence dated 16 June 2017, p 7.

61 Department, correspondence dated 16 June 2017, p 17.

62 Department, correspondence dated 16 June 2017, p 16.

63 Explanatory notes, p 4.

64 Submission 9, p 2.

The issue of a pragmatic plea was also raised at the public hearing. Mr Cope advised the following, in relation to assault offences:

> *… there may well be people out there who have entered what criminal lawyers call a pragmatic plea. Even though those offences on their face involve non-consensual acts, they may not be exactly what they did and those people should be given an opportunity to put their case and have it reviewed through this process.*[65]

Ms Carnie provided an example of a person affected by the application of laws in the 1980s who would not be eligible under the current definitions in the scheme:

> *Alan Raabe – you will hear from him later today – said that he has been convicted of aggravated sexual assault after being arrested for approaching an undercover police officer for sex at a gay beat in 1988. I would like to note that, under the current definition of the offences under the bill, we believe that Mr Raabe would not be eligible to have his conviction expunged.*[66]

The QLRC stated:

> *Sections 336 and 337 generally applied in instances involving an assault; namely, where a person applied force to the person of another, either directly or indirectly, and without the other person's consent or with consent obtained by fraud.* [footnote omitted] *Given the element of assault, prosecutions for these offences would generally have involved an element of non-consensual sexual contact.* [footnote omitted][67]
>
> *However, for the purposes of indecent assault offences, such as former section 337, the Criminal Code had previously included a deeming provision (in force between 1946 and 1989) to the general effect that a male person under the age of 17 years was not capable of consenting to a sexual act by another male person.* [footnote omitted] *This was consistent with the approach of the Criminal Code to protecting children from sexual offending.* [footnote omitted] *As a result, depending on the circumstances, purportedly consensual sexual activity with a 16-year-old male was able to be charged under either former sections 208(1), (3), 209 or 211 (whichever was applicable) or former section 337 of the Criminal Code.*[68]

The QLRC concluded:

> *… it would not be appropriate for either former section 336 or 337 to be an eligible offence. These offences involved (or were deemed to involve) an element of assault, and therefore involved non-consensual contact with another person* [footnote omitted]. *In addition, the focus of the deeming provision mentioned … above appears to have been the protection of children from sexual abuse or exploitation, rather than addressing consensual homosexual activity between adults* [footnote omitted]. *Further, these offences were not substantively altered at the date of legalisation, and there are equivalent offences under the current Queensland law.*[69]

The QLRC acknowledged that in some instances a pragmatic plea of guilty may be entered but it did not consider that an expungement scheme is a suitable vehicle to deal with such instances.

> *The Commission notes … that it has been suggested that some men may have entered a plea of guilty in relation to a non-consensual offence in order to protect a consenting partner in*

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65 Public hearing transcript, Brisbane, 19 June 2017, p 11.

66 Public hearing transcript, Brisbane, 19 June 2017, p 2.

67 Queensland Law Reform Commission report: *Expunging criminal convictions for historical gay sex offences,* Report No 74, August 2016, pp 30-31.

68 Queensland Law Reform Commission report: *Expunging criminal convictions for historical gay sex offences,* Report No 74, August 2016, p 31.

69 Queensland Law Reform Commission report: *Expunging criminal convictions for historical gay sex offences,* Report No 74, August 2016, pp 34-35.

circumstances where there was in fact no element of assault. The Commission accepts that this may have occurred, but does not consider that an expungement scheme for historical gay sex offences is well adapted to address this scenario. This would necessitate 'going behind the conviction' to consider subjective factors and question the facts of the offence upon which the historical conviction is based (rather than being based on the fact the offence has subsequently been repealed).

A person may enter a plea of guilty for many reasons. Ordinarily, a conviction following such a plea will not be overturned unless there has been a miscarriage of justice: see, eg, Meissner v The Queen (1995) 184 CLR 132, 141 (Brennan, Toohey and McHugh JJ), cited with approval in R v Pryce [2016] QCA 43, [17] (P McMurdo JA; Fraser JA and Jackson J agreeing), and R v Murray [2014] QCA 160, [30] (M McMurdo P; Fraser and Morrison JJA agreeing):

> *A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence. …*[70]

The department advised:

> *The QLRC expressly considered the inclusion of the offences but considered that as the offences contained an element of assault and therefore involved non-consensual contact they were not appropriate for inclusion in the scheme.*[71]

The Member for Currumbin raised the issue of the expungement of non-consensual acts, where both parties were not consulted, could result in an expungement being granted without the non-applicant's knowledge. The Member for Currumbin considered that additional rigour is required regarding the notification of both parties, where possible, when an application is being considered.

2.5 Alternative applicant

The Bill provides that certain people, other than an eligible person[72], can apply for the expungement of an eligible person's historical charge or conviction. These people are referred to as alternative applicants. The Bill also provides for alternative applicants in the case of eligible persons who have died after 19 January 1991 and adults with impaired capacity.[73]

Alternative applicants include a personal representative, spouse, parent, adult child or sibling of the eligible person, or a person who was in a close personal relationship with the eligible person shortly before their death.[74]

A submitter to the QLRC review stated:

> *[W]hile it may be argued that the historical discrimination is of no legal effect or practical significance in the instance of deceased persons, the reparative effect on family and community members who wish to clear the person's name may be of greater significance.*[75]

The QLRC report concluded that extending an expungement scheme to a deceased eligible person would:

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70 Queensland Law Reform Commission report: *Expunging criminal convictions for historical gay sex offences,* Report No 74, August 2016, p 34, footnote 42.

71 Department, correspondence dated 16 June 2017, p 9; QLRC report, pp 34-35.

72 An 'eligible person' is a person who was charged or convicted with an 'eligible offence' before 19 January 1991.

73 Explanatory notes, pp 3-4.

74 Explanatory notes, p 4.

75 QLRC report, p 62.

> *… strike an appropriate balance between the need to recognise and include people who are deceased, and the need to place appropriate time limitations on the scope of the proposed expungement legislation.*[76]

2.6 Application for expungement

2.6.1 Automatic scheme

The Bill provides that persons making an application for expungement must do so in accordance with an approved form and that the decision-maker can request further information from the applicant. The Bill allows the decision-maker to ask an applicant to verify by statutory declaration any information they have given to the decision-maker.[77]

In its submission, the QLS noted 'the application process has the potential to be distressing, inconvenient and costly for applicants':

> *We acknowledge the Queensland Law Reform Commission's Report on Expunging criminal convictions for historical gay sex offences concluded that the expungement of criminal convictions cannot be achieved by an automatic scheme. However, if there is any scope for an automatic regime to be implemented, this should be pursued.*[78]

Some submitters to the committee's inquiry supported a fully or partially automated scheme.[79]

The QLRC report noted that some respondents supported an automatic expungement scheme, to minimise the burden on individuals and protect their privacy. The QLRC concluded that this type of scheme 'is neither practicable nor desirable' for a number of reasons:

> *Due to the passage of time, the range of relevant offences and factual circumstances (including that some historical gay sex offences were capable of applying to both consensual and non-consensual behaviour), and the format in which criminal records are held by the QPS and the ODPP, it would not be possible to identify the convictions (or charges) that are to be expunged with sufficient certainty and clarity for an automatic scheme. It would also be difficult for individuals, relevant government entities, and other agencies to determine whether a particular conviction (or charge) is, by force of law, expunged.*[80]

The Bill follows the QLRC recommendation and proposes a case by case administrative scheme, rather than automatic scheme.

In its response to submissions the department indicated the non-automatic process was the result of the QLRC report recommendation, and '… it is intended that the application elicits enough information to enable a search of the relevant records, to enable the chief executive the opportunity to make a fully informed decision.'[81] The department also indicated it would work with stakeholders to make the application form as 'user friendly' as possible.[82]

2.6.2 Application form

Clause 12 of the Bill sets out the requirements for an expungement application. It provides that an application must be in an approved form and '… provides that the applicant must provide certain

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76 QLRC report, pp 65-66.

77 Explanatory notes, p 3.

78 Submission 4, p 2.

79 See for example submissions 4, 5 and 13.

80 QLRC report, p 25.

81 Department, correspondence dated 16 June 2017, p 4.

82 Department, correspondence dated 16 June 2017, p 14.

information about the relevant eligible offence to the extent the information is available to the applicant.'[83]

Some submitters expressed concern about the level of detail required of applicants pursuant to clause 12.[84] For example, the Human Rights Law Centre joint submission stated:

> *Clause 12 of the Bill requires relatively detailed information to be provided by applicants, including historical information about the date of the conviction or charge, the place and court where the eligible person was convicted or charged, the particulars of the offence the person was convicted of or charged with … and the details of any sentence imposed. This is more information than was recommended should be included on an expungement application in the QLRC report.*
>
> *…*
>
> *[W]e are concerned that an applicant may provide information which is inaccurate or incorrect as they are unable to recall the exact details of the offence or court proceedings due to the historical nature of the offences.*
>
> *…*
>
> *None of the clients which HRLC have assisted have any of the original documents relating to the original charge … Due to the traumatic nature of the events that took place, many applicants have deliberately or subconsciously attempted to forget the details in an effort to avoid emotional distress.*[85]

Civil Liberties Australia Inc recommended that minimal information should be required in the application and suggested the decision-maker should be in a position to ascertain further details. Civil Liberties Australia Inc also recommended that the application should not require extensive research, legal advice or costs of obtaining official documents.[86]

In response to these concerns, the department stated:

> *Clause 12(1)(b) provides that the information requested needs to be provided '**to the extent the information is available to the applicant**'. The information set out at section 12 is seeking relevant information from the applicant that will greatly assist in the timely search of archival records. Clause 12(3) provides that the applicant can provide any documents that support the application.*
>
> *The information required at clause 12 is less onerous than the QLRC recommended in its recommendation at 6-1. This deviation from the QLRC recommendation in the Bill was made with concerns about simplifying the application process in mind.*[87]

The department also indicated the intent to keep stakeholders involved in relation to the application form:

> *As a matter of course consultation will likely occur with relevant stakeholders such as the LGBTI Legal Services Inc to make sure that we can make that form as user friendly as possible.*[88]

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83 Public briefing transcript, Brisbane, 14 June 2017, p 3.

84 See for example submissions 4, 5 and 13.

85 Submission 13, para 2.4.

86 Submission 5, p 2.

87 Department, correspondence dated 16 June 2017, p 6.

88 Department, correspondence dated 16 June 2017, p 14.

2.7 Support and assistance

The provision of support and assistance for applicants and potential applicants was identified by some stakeholders as an important element of an expungement scheme.[89]

The QLS considered that:

> *… free and confidential support and legal assistance should be made available to people who wish to apply for expungement of a charge or conviction. Expungement schemes in other jurisdictions, including Victoria and New South Wales, have been complemented by the provision of community information, support and legal assistance.*
>
> *In our view, similar support and assistance should be provided in Queensland to assist in making the application for expungement less difficult and onerous. Further, to be effective, information about the expungement process would need to be easily accessible and promoted in the community. We note the QLRC recommendation in this regard.*[90]

The Human Rights Law Centre joint submission highlighted the potential impact on applicants applying for an expungement, and the importance of providing appropriate support:

> *Ensuring that appropriately funded and sensitive counselling, support and advice is available for applicants is vital. For many applicants, being required to remember the shame of being convicted and socially ostracised throughout the application process is an extremely distressing and upsetting experience which can in and of itself trigger mental health issues.*[91]

The department acknowledged that although no specific funding has been allocated for support such as legal advice and counselling:

> *… on 27 March 2017 the Attorney-General announced the allocation of $52.3 million in State and Commonwealth funding for 36 community legal centres. That announcement included a directed allocation of $409,818 over three years to the LGBTI Legal Services Inc to assist in the implementation of the Government reforms that may impact on the LGBTI community, and that is the first time the LGBTI Legal Services has received that type of funding.*[92]

2.8 Effect of expungement

2.8.1 Effects of expungement for disclosure and other purposes

Following the expungement of a conviction or charge '… it will be lawful for a person to claim that the person was not convicted of the charge, and the person will not be required to disclose information about the conviction or charge.'[93]

Some stakeholders expressed concern that the Bill may not cover certain situations,[94] for example, in cases where there was an official warning, an arrest but no charge, or the person was convicted of an associated offence (such as resisting arrest) that is ineligible for expungement.[95]

In relation to situations that may not be covered by the Bill, Ms Carnie stated:

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89 See for example submissions 4 and 13, and public hearing transcript, Brisbane, 19 June 2017, p 3.

90 Submission 4, p 2.

91 Submission 13, para 2.13 (b).

92 Department, correspondence dated 16 June 2017, p 19; public briefing transcript, Brisbane, 14 June 2017, p 6.

93 Explanatory notes, p 5.

94 Submission 13, para 2.2(c); Mr Page, public hearing transcript, Brisbane, 19 June 2017, p 8; Mr Cope, public hearing transcript, Brisbane, 19 June 2017, p 12.

95 Submission 13, para 2.2(c).

Certain types of positions require you to disclose if you have ever been arrested or questioned by police if you want to join the police force, if you want to join the armed services, high-level government positions. It may also come up on visa applications as well-if you have ever been questioned or arrested by police. I suppose the concern is if there is a disjunct in how the official records are dealt with there might be a situation where records are inadvertently disclosed.[96]

Mr Page provided an example where disclosure is required for arrests or warnings:

If you apply for a passport to the United States on ESTA you have to say whether you have a conviction or arrest for morality. It extends beyond conviction. It does have some impact about the width of the bill.[97]

In response to concerns relating to information that is required to be disclosed as a result of an arrest or a warning in situations where charges were not laid, the department stated:

The scheme only applies to actual charges and convictions …

Where an eligible charge or conviction is expunged clause 24(3) of the Bill makes it clear that person can lawfully deny not only the expunged charge or conviction but also any information about the investigation associated with the charge or conviction or any other legal process associated with charge or conviction.[98]

The committee considered the consequences in relation to employment declarations, and asked the department:

Even if an application is successful, could it still be the case that a person would be required to inform an employer or potential employer of an expunged conviction? For instance, some agencies such as ASIO and the CCC have a higher threshold than other employers in relation to declaration of personal history.[99]

The department advised:

Clause 24 of the bill provides that they can lawfully deny those convictions to anyone. It gives a whole set of circumstances. For any employer, those convictions are basically treated as if they did not occur.[100]

The Human Rights Law Centre joint submission raised the issue of associated offences such as 'resisting lawful apprehension' and provided an example:

Expungement of associated offences is crucial to enable applicants to have a clean slate and to find closure from their convictions. For example, a person who was arrested and physically removed from his home following a report that he was engaging in homosexual behaviour with his boyfriend, and later charged with unnatural sexual intercourse, swearing in a public place and resisting lawful apprehension. In this example, he would be able to apply for the unnatural sexual intercourse offence to be expunged, but not for expungement of the accompanying swearing and resisting arrest charges, even though he was only charged with these offences because the police were arresting him for consensual homosexual conduct.[101]

In response to these concerns the department stated:

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96 Public hearing transcript, Brisbane, 19 June 2017, p 3.

97 Public hearing transcript, Brisbane, 19 June 2017, p 8.

98 Department, correspondence dated 16 June 2017, p 12.

99 Public briefing transcript, Brisbane, 14 June 2017, p 4.

100 Public briefing transcript, Brisbane, 14 June 2017, p 4.

101 Submission 13, para 2.2(c).

To include offences such as resisting arrest or assaulting police would be inconsistent with the principle that a conviction or charge is not capable of being expunged if it is still considered an offence under the current law.[102]

2.8.2 Public records

The Bill provides that, as a consequence of expungement, public record holders would be required to annotate relevant public records to indicate that a conviction or charge is expunged.[103]

At the public briefing, the department advised:

Overall, the bill establishes a framework to allow a person who has been convicted of or charged with an eligible offence to apply to the director-general of the Department of Justice and Attorney-General as the decision-maker for the expungement of that conviction or charge from relevant public records.[104]

The explanatory notes state that the Bill creates a new offence of prohibiting the disclosure of information from public records about expunged convictions or charges or dishonestly obtaining information from public records:

The bill does not provide for the destruction of public records relevant to an expunged conviction or charge. Rather, clause 28 of the bill requires criminal record holders to annotate records to reflect the expungement. A criminal record holder is defined in schedule 1 of the bill to be the Commissioner of the Police Service, a court registrar, the Director of Public Prosecutions or the chief executive of the department in which the Corrective Services Act is administered.[105]

Some submitters considered that records should be treated differently to the method proposed by the Bill.[106] For example, the QLS suggested that expunged records should be permanently removed from the QPRIME system and other official records.[107]

The Human Rights Law Centre joint submission recommended that original records should be annotated and stored securely for historical purposes, and secondary records and duplicate copies should be destroyed.[108]

The department advised:

Clause 30 of the Bill expressly provides that nothing in the Bill requires or authorises a person to destroy a public record or omit information about an expunged public record. This is consistent with the recommendation at paragraph 5.115 of the QLRC Report. Chapter 5 of the QLRC Report provides in depth analysis of the issues surrounding the proposed destruction of public records.[109]

2.9 Compensation

The Bill provides that a person who has a conviction or charge expunged is not entitled to compensation on account of the conviction or charge becoming expunged.[110]

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102 Department, correspondence dated 16 June 2017, p 12.

103 Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017, clause 28; explanatory notes, p 5.

104 Public briefing transcript, Brisbane, 14 June 2017, p 2.

105 Public briefing transcript, Brisbane, 14 June 2017, p 4.

106 See for example submissions 4 and 13.

107 Submission 4, p 2.

108 Submission 13, para 2.9.

109 Department, correspondence dated 16 June 2017, pp 5-6.

110 Explanatory notes, p 11.

Some stakeholders acknowledged that no other states or territories have provided for compensation to people who have had historical homosexual offences expunged.[111]

At the public hearing Ms Carnie noted:

> *Unfortunately, no other Australian jurisdictions which have implemented an expungement scheme or an extinguishment scheme have allowed compensation to be available, even though we have so far assisted three clients who have spent long periods of time in jail and other clients who have had to pay significant sums on a good behaviour bond. Not even for the people in those kinds of situations has any kind of compensation been made available. However, there are some examples of compensation being made available overseas. Germany is one example. Germany committed to annulling 50,000 convictions of men convicted of historic homosexual offences and to provide compensation to people convicted under the laws that they had.*[112]

The QLS and Dr James Roffee, Senior Lecturer in Criminology at Monash University, expressed concern that the operation of this provision could preclude an applicant from claiming compensation in circumstances where they may otherwise be entitled.[113]

Dr Roffee stated:

> *While I had not envisaged a right to compensation as part of the expungement process, it is worth noting that there may be circumstances where compensation is appropriate. The blanket prohibition on compensation in Clause 5(2) appears to be a recognition that in some cases, more than simple expungement may be required to redress historical wrongs committed by the state.*[114]

In the department's response to issues raised in submissions it advised:

> *The clause as drafted is limited to providing that a person is not entitled to compensation because that conviction or charge becomes expunged ie, the fact of the expungement does not give rise to claim for compensation. If a person has some other legal cause of action that otherwise arises out of the same facts that gave rise to the expungement the clause does not operate to extinguish that cause of action.*[115]

2.10 Revival of expunged conviction and charges

The Bill provides that the expungement scheme is only applicable to historic homosexual offences with regards to conduct involving consenting adults.[116]

At the public briefing, the committee considered whether there was any recourse for a third party if they discover that a case had been expunged and they believed the homosexual activity was not consensual.

The department advised the committee:

> *If they do find that, the bill provides for the revival of expunged convictions if the chief executive is satisfied that the expungement was based on false or misleading information. That safeguard is accompanied by an offence of knowingly providing false and misleading information to the decision-maker.*[117]

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111 Submission 13, para 2.13 and public hearing transcript, Brisbane, 19 June 2017, p 3.

112 Public hearing transcript, Brisbane, 19 June 2017, p 3.

113 Submission 4, p 1 and submission 11, p 1.

114 Submission 11, p 1.

115 Department, correspondence dated 16 June 2017, p 4.

116 Explanatory notes, p 1.

117 Public briefing transcript, Brisbane, 14 June 2017, p 6.

2.11 Number of convictions and cost of scheme

During its examination of the Bill, the committee considered the likely number of people who may seek to have their charge or conviction expunged, and how much the scheme may cost.[118]

In its report, the QLRC considered the likely number of people convicted under historical laws that criminalised homosexual activity. It noted that gaps in available data make it difficult to specify an exact number:

> *Criminal laws against homosexual activity were still being enforced in most Australian jurisdictions until the mid-1970s. In Queensland, these laws were still being enforced in the late 1980s and up to the date of legalisation, albeit sporadically.*
>
> *However, it is difficult to identify, with accuracy, the likely numbers of persons convicted of (or charged with) historical gay sex offences prior to legalisation.*[119]

The department considered other jurisdictions when advising the number of convictions that may be sought to be expunged, and potential scheme costs:

> *Currently, for the scheme in the Bill (that only takes into account charges and convictions that occurred prior to 19 January 1991) based on the experience of other jurisdictions who have historical schemes, the department estimates it will receive a maximum of 20 applications over the initial 2 years of the scheme's operation at an estimated cost of $5000 per application (ie, $100,000 over two years).*[120]

The committee requested information about the number of people who would potentially be included in a broader scheme. The department indicated there were 323 people convicted between 1 July 2005 and 23 September 2016[121] for an offence against section 208(1)(a) and (b) of the Criminal Code.[122]

Data on the number of people currently serving sentences who would be eligible to apply to a widened scheme was not provided to the committee. The QLS considered:

> *While I understand that there may be such cases, I suspect they are extraordinarily rare and I suspect if people are there, they are there* [prison] *for other offending and other backgrounds. We do not jail people in this state unless there is good cause, we hope. … Quite frankly, it would be an extraordinarily small number of people, if at all.*[123]

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118 See for example public briefing transcript, Brisbane, 14 June 2017, pp 5 – 6 and public hearing transcript, Brisbane, 19 June 2017, pp 6 and 8.

119 QLRC report, p 9.

120 Department, correspondence dated 16 June 2017, p 4.

121 Department, correspondence dated 16 June 2017, p 2 indicates that electronic conviction data for offences against section 208 for the period between 19 January 1991 and 30 June 2005 is not available.

122 Department, correspondence, dated 19 June 2017, p 2.

123 Mr Potts, QLS, public hearing transcript, Brisbane, 19 June 2017, p 6.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the House.

3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.

Chief executive may request further information or document from applicant

Whether legislation has sufficient regard to the rights and liberties of individuals depends on whether the legislation is consistent with, for example, the principles of natural justice.[124]

Clause 14(1) of the Bill provides that the chief executive may, by written notice to the applicant, request further information or a document the chief executive reasonably requires to decide whether to expunge a conviction or charge.

Subsection (4) provides that, if the chief executive makes such a request, the chief executive may make a decision under section 17 to expunge or refuse to expunge the conviction or charge, regardless of whether the applicant gives the further information or document requested.

Potential FLP issues

The OQPC Notebook observes that the principles of natural justice, which are developed by the common law, incorporate the following: (1) something should not be done to a person that will deprive them of some right, interest, or legitimate expectation of a benefit without the person being given an adequate opportunity to present their case to the decision-maker; (2) the decision maker must be unbiased; (3) procedural fairness should be afforded to the person, meaning fair procedures that are appropriate and adapted to the circumstances of the particular case.[125]

Despite providing a mechanism for the chief executive to request further information or documentation reasonably required in order to determine whether to expunge a conviction or charge, the Bill empowers the chief executive to make the decision regardless of whether the applicant gives the further information or document requested.

The Bill does not propose a timeframe in which the applicant must attend to the chief executive's request. The issue of whether the applicant is afforded natural justice depends on a consideration of whether, before the chief executive makes a decision, the applicant has been given adequate opportunity to present his or her case as part of a procedurally fair decision-making process.

Committee comment

The committee notes it is an exercise of the chief executive's discretion to consider whether an applicant has been afforded natural justice in the decision-making process employed here,

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[124] *Legislative Standards Act 1992,* s4(3)(b)

[125] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 25.

including whether they have been given sufficient time to supply any requested information or documentation.

Proposed refusal to expunge conviction or charge

Clause 21 of the Bill provides the process for when the chief executive proposes to refuse an application to expunge a conviction or charge for an eligible offence.

Subsection (1) requires the chief executive to give the applicant a notice stating that the chief executive proposes to refuse the application; informing the applicant of the reasons for the proposed refusal; and inviting the applicant to make a submission in relation to the proposed refusal.

Subsection (2) requires the chief executive to provide the applicant with any information or documents obtained by the chief executive from a person or entity other than the applicant that have been relied on to support the proposed refusal. However, subsection (3) provides that this requirement does not apply to the extent that the disclosure of the documents or information would contain 'confidential information' about a person other than the applicant or eligible person.

Schedule 1 of the Bill proposes to define 'confidential information' to include information about a person's affairs, but to exclude already 'public' information as well as statistical or other information that could not reasonably be expected to identify the person.

Clause 21(4) allows the applicant to make a written submission about the proposed refusal and subsection (5) requires the chief executive to consider that submission in making a decision.

Potential FLP issues

Section 4(3)(b) of the LSA provides that legislation should be consistent with the principles of natural justice.

As noted above, natural justice includes the principle that something should not be done to a person that will deprive them of some right, interest, or legitimate expectation of a benefit without the person being given an adequate opportunity to present their case to the decision-maker.

Committee comment

The issue of whether an applicant is afforded natural justice depends on a consideration of whether, in circumstances where the chief executive proposes to refuse the application, and, therefore, deprive the applicant of an expected beneficial outcome, the applicant has been given adequate opportunity to present its case as part of a procedurally fair decision-making process, including the opportunity to have access to all the information upon which the decision being challenged was based.

Although the Bill provides for both internal and external (to QCAT) review mechanisms, the applicant's ability to challenge the decisions made may be hampered if they are not allowed access to all of the information that was relied on to support the refusal, which will occur when some of the information identifies a third party and is therefore protected from disclosure.

It must be recognised however that natural justice for the applicant has to be balanced against the rights of any third party who has contributed to the process, in circumstances where they have supplied personal information with an expectation that such information would remain confidential.

The balancing of rights that must occur is between the confidentiality of a third party's personal information against an applicant's right to know all of the information that was a relevant consideration in the making of the decision they wish to challenge.

Evidentiary provisions

Whether legislation has sufficient regard to the rights and liberties of individuals depends on whether the legislation, for example, reverses the onus of proof in criminal proceedings without adequate justification.[126]

Clause 37 applies to proceedings related to the proposed expungement scheme, such as a review of a decision by the chief executive to refuse an application for expungement that is heard before the Queensland Civil and Administrative Tribunal (QCAT).

In this context, subsection (4) provides that:

A certificate purporting to be signed by the chief executive and stating any of the following matters is evidence of the matter—

(a) that a conviction or charge of a stated eligible person for a stated eligible offence was or was not expunged under this Act;

(b) on a stated day, a stated person was given a stated notice under this Act;

(c) on a stated day, a stated request was made of a stated person or entity.

Potential FLP issues

Section 4(3)(d) of the LSA provides that legislation should not reverse the onus of proof in criminal matters, without adequate justification. It can be argued that provisions that state that something is evidence, without 'putting the prosecution to proof' assist the prosecution in the making of their case, to the detriment of a defendant.

The explanatory notes state that:

> *Provisions relating to evidentiary certificates have been considered to potentially breach the principle that legislation does not reverse the onus of proof in criminal proceedings without adequate justification. Former Scrutiny of Legislation Committees have considered these types of provisions affect the onus of proof in a general sense by relieving a party to the proceeding of having to prove a matter it would otherwise be obliged to prove and expressed the view such provisions should be limited to technical and non-contentious matters. The matters proposed to be included in the evidentiary certificate come within this category.*
>
> *Evidentiary aids such as these also benefit the administration of justice by potentially saving time and costs rather than requiring witnesses to appear and give evidence, particularly for non-contentious matters.*[127]

The OQPC Notebook advises that it is not uncommon for Queensland legislation to provide that a certificate signed by a person administering a law is evidence of a fact stated in the certificate:

> *These provisions enable an administering authority to put evidence before courts about a range of basic matters relating to its activities records without the need to call witnesses. The Scrutiny Committee noted the purpose of the provisions is usually to improve administrative efficiency and reduce the workload of officials administering the legislation. The Scrutiny Committee generally considered provisions about evidentiary certificates as being unexceptional, provided the matters to which the certificates related were non-contentious and the certificates were treated merely as evidence and not as being conclusive proof of the fact stated or determinative of the ultimate issue in question.*[128]

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126 *Legislative Standards Act 1992,* s4(3)(d)

127 Explanatory notes, p 8.

128 Office of the Queensland Parliamentary Counsel, *Principles of good legislation: OQPC guide to FLPs*, Reversal of onus of proof, p 15.

Committee comment

The committee considers the evidentiary matters able to be included in the certificate signed by the chief executive are administrative in nature and likely to be non-contentious. The clause also provides that the content of the certificate is 'evidence' of the matter, not conclusive evidence, therefore the accuracy or veracity of the information contained in the certificates is still able to be challenged by contrary evidence put forward by the defendant if required.

Such evidentiary aids are fairly common, administratively convenient and avoid the need to unnecessarily protract court hearings in that the prosecution is not required to waste the court's time adducing evidence to prove matters that are not likely to be in contention anyway.

3.1.2 Institution of Parliament

Section 4(2)(b) of the LSA requires legislation to have sufficient regard to the institution of Parliament.

'Meaning of eligible offence' and 'Criteria for other eligible offences'

Whether legislation has sufficient regard to the institution of Parliament depends on whether, for example, it allows the delegation of legislative power only in appropriate cases and to appropriate persons.[129]

Clause 11 of the Bill provides that an eligible person may apply to the chief executive for a conviction or charge of the eligible person for an eligible offence to be expunged.

Clause 8(1) of the Bill provides that an 'eligible offence' is a 'Criminal Code male homosexual offence', a 'public morality offence' or another offence prescribed by regulation. A regulation may only prescribe an offence to the extent the offence happened, or allegedly happened, before 19 January 1991.

Clause 20 applies if a conviction or charge the subject of the application is for an eligible offence other than a 'Criminal Code male homosexual offence' or a 'public morality offence'. Clause 20(2) provides that:

The chief executive may decide to expunge the conviction or charge for the offence only if the chief executive is satisfied, on the balance of probabilities—

(a) that the offence involved homosexual activity; and

(b) of the criteria prescribed by regulation for the offence.

The explanatory notes observe that '[t]he net effect is that both the offence and the criteria for deciding whether to expunge the conviction or charge of the offence may be prescribed by regulation'.[130]

Potential FLP issues

Section 4(4)(a) of the LSA provides that a Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons. Generally, the greater the level of political interference with individual rights and liberties, or the institution of Parliament, the greater the likelihood that the power should be prescribed in an Act of Parliament and not delegated below Parliament.

The explanatory notes state that any potential breach is considered justified:

> *The QLRC in its Report recommended providing for the flexibility to extend the 'eligible offences' to which the expungement scheme applies by allowing for other historical offences (possibly not identified) to be prescribed by regulation (recommendation 3-1). However, in order to*

[129] *Legislative Standards Act 1992,* s4(4)(a)

[130] Explanatory notes, pp 8-9

appropriately limit the scheme, any such eligible offences prescribed by regulation should be restricted to conduct occurring before the date of decriminalisation (19 January 1991) and only to the extent the offence was constituted by a person engaging in same-sex sexual activity. Clauses 8 and 20 contain these limitations.

The type of Henry VIII clauses proposed under the Bill might be considered of less significant concern given that the expungement scheme is intended to be beneficial in nature and the Bill provides some limitations on the types of offences that may be prescribed. It is also noted that the regulation prescribing the additional eligible offences would be subject to disallowance. In relation to the appropriateness of the delegation of legislative power, it is noted that the power is delegated to the Governor in Council.[131]

Committee comment

Henry VIII clauses are generally regarded as unacceptable delegations of legislative power.

However, it is considered that, on balance, clauses 8 and 20 of the Bill have sufficient regard to the institution of Parliament. While it is noted that a regulation specifying both an offence and the criteria for that offence's expungement is a significant matter, the expungement scheme is intended to be beneficial to applicants and other persons. The proposed clauses reflect the recommendations of the QLRC.

Being a regulation, the content of any expansion of the scheme will also be subject to Parliamentary scrutiny in the same manner as other subordinate legislation.

3.2 Proposed new offence provisions

Clause	Offence	Proposed maximum penalty
26	**Disclosing information from public records about expunged convictions or charges** (1) This section applies to a person who— (a) has access to information in a public record about an expunged conviction or expunged charge; and (b) knows, or ought reasonably to know, the conviction or charge is an expunged conviction or expunged charge. (2) The person must not disclose the information to anyone unless the person has a reasonable excuse. (3) Subsection (2) does not apply to a disclosure of information— (a) to the extent necessary to perform a function under this Act; or (b) to the extent necessary to perform a function under the *Public Records Act 2002*; or (c) to, or with the written consent of, the person to whom the expunged conviction or expunged charge relates; or	100 penalty units

131 Explanatory notes, p 9.

	(d) in a form that could not identify any person to whom the information relates.	
27	**Dishonestly obtaining information from public records about expunged convictions or charges** A person must not dishonestly obtain, or attempt to obtain, information about an expunged conviction or expunged charge contained in a public record.	100 penalty units
39	**False or misleading information** (1) A person must not, in relation to the administration of this Act, give the chief executive information the person knows is false or misleading in a material particular. (2) Subsection (1) does not apply to a person if the person, when giving information in a document— (a) tells the chief executive, to the best of the person's ability, how the document is false or misleading; and (b) if the person has, or can reasonably obtain, the correct information—gives the correct information.	100 penalty units
40	**Confidentiality of information** (1) This section applies to the following persons (each an ***informed person***)— (a) a person who acquires or gains access to confidential information through the person's involvement in the administration of this Act or because of an opportunity provided by the person's involvement in the administration of this Act; (b) a person who acquires or gains access to confidential information, whether directly or indirectly, from a person mentioned in paragraph (a). (2) The informed person must not disclose or give access to confidential information acquired or gained by the person to anyone other than under subsection (3). (3) The informed person may disclose or give access to confidential information— (a) for or under this Act; or (b) as authorised or required under another law; or (c) to, or with the written consent of, the person to whom the information relates; or (d) for a proceeding under this Act.	100 penalty units

3.3 Explanatory notes

Part 4 of the LSA relates to explanatory notes. It requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

Appendix A – List of submissions

Sub #	Submitter
001	Mr Stephen Page
002	Mr Mark Sznajder
003	Mr Alastair Lawrie
004	Queensland Law Society
005	Civil Liberties Australia Inc.
006	Mr John Frame
007	Protect All Children Today Inc.
008	Anti-Discrimination Commission Queensland
009	Queensland Council for Civil Liberties
010	Mr Alan Raabe
011	Dr James Roffee
012	Association of Labor Lawyers QLD (Inc.)
013	Joint submission - Human Rights Law Centre, LGBTI Legal Service Inc., Brisbane LGBTIQ Action Group, Caxton Legal Centre Inc., Queensland Aids Council and Community Legal Centres Queensland

Appendix B – List of witnesses at public departmental briefing

Department of Justice and Attorney-General

- Mrs Leanne Robertson, Acting Assistant Director-General, Strategic Policy and Legal Services
- Ms Carolyn McAnally, Acting Director, Strategic Policy and Legal Services
- Ms Sarah Kay, Principal Legal Officer, Strategic Policy and Legal Services

Appendix C - List of witnesses at public hearing

LGBTI Legal Service
- Mr Emile McPhee

Human Rights Law Centre
- Ms Lee Carnie

Queensland AIDS Council
- Mr Peter Black

Brisbane LGBTIQ Action Group
- Phil Browne

Queensland Law Society
- Ms Christine Smyth
- Mr Bill Potts
- Ms Kate Brodnik

Mr Stephen Page

Mr John Frame

Mr Alan Raabe (by telephone)

Queensland Council for Civil Liberties
- Mr Michael Cope