



Queensland
Law Reform Commission

**Expunging criminal convictions
for historical gay sex offences**

Report

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Report No 74
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To: The Honourable Yvette D'Ath MP
Attorney-General and Minister for Justice and Minister for Training and Skills

In accordance with section 15 of the *Law Reform Commission Act 1968*, the Commission is pleased to present its Report, *Expunging Criminal Convictions for Historical Gay Sex Offences*.

[original signed]

[original signed]

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Chairperson

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Member

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Abbreviations and Glossary

ACT	Australian Capital Territory
ADCQ	Anti-Discrimination Commission Queensland
ADC Tasmania Discussion Paper (2014)	Anti-Discrimination Commissioner Tasmania, 'Treatment of convictions for consensual sexual activity between adult males' (Discussion Paper, 31 October 2014)
ADC Tasmania Report (2015)	Anti-Discrimination Commissioner Tasmania, 'Treatment of historic criminal records for consensual homosexual activity and related conduct' (Report, April 2015)
BAQ	Bar Association of Queensland
CJC Information Paper (1990)	Criminal Justice Commission Queensland, 'Reforms in Laws Relating to Homosexuality' (Information Paper, May 1990)
date of legalisation	The date of commencement of the <i>Criminal Code and Another Act Amendment Act 1990</i> — 19 January 1991 — by which the former offences under sections 208(1), 208(3), 209 and 211 of the Criminal Code were repealed.
DJAG	Department of Justice and Attorney-General, Queensland
expungement legislation	<p>Legislation providing for the expungement of convictions for historical gay sex offences, namely, in other jurisdictions:</p> <ul style="list-style-type: none"> • <i>Spent Convictions Act 2000</i> (ACT) pts 3A–3C, inserted by <i>Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Act 2015</i> (ACT) • <i>Criminal Records Act 1991</i> (NSW) pt 4A, inserted by <i>Criminal Records Amendment (Historical Homosexual Offences) Act 2014</i> (NSW) • <i>Spent Convictions Act 2009</i> (SA), as amended by <i>Spent Convictions (Decriminalised Offences) Amendment Act 2013</i> (SA) • Draft Historical Homosexual Convictions Bill 2016 (Tas), released for public comment on 4 July 2016 • <i>Sentencing Act 1991</i> (Vic) pt 8, inserted by <i>Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014</i> (Vic) • <i>Protection of Freedoms Act 2012</i> (UK) c 9, pt 5 ch 4
expungement scheme	Provisions for the expungement of convictions for historical gay sex offences, including those introduced by expungement legislation in other jurisdictions. Although different schemes use different language when referring to expungement (such as 'extinguish' or 'disregard'), the terms 'expunge' and 'expungement' are generally used throughout this Report.
gross indecency	Sexual activity between males, other than anal intercourse, under former section 211 of the Criminal Code and its equivalents in other jurisdictions (also called 'indecent assault on males' or 'indecent practices between males').
historical gay sex offence	The terms of reference for this review refer to 'historical gay sex offences', including particular offences that were repealed by the <i>Criminal Code and Another Act Amendment Act 1990</i> . Accordingly, that terminology is used to refer generally to former 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 and their equivalents in other jurisdictions.
homosexual activity	Used throughout this Report generally to refer to sexual activity between people of the same sex, regardless of how they identify their sexual orientation or gender.

Human Rights Law Centre Background Paper (2014)	Human Rights Law Centre, 'Righting historical wrongs: Background paper for a legislative scheme to expunge convictions for historical consensual gay sex offences in Victoria' (Background Paper, 12 January 2014)
LGBTI	Lesbian, gay, bi-sexual, transgender (or transsexual), and intersex
LGBTI Legal Service Discussion Paper (2015)	LGBTI Legal Service Inc et al, 'Historical criminal treatment of consensual sexual activity between men in Queensland' (Discussion Paper, September 2015)
NSW	New South Wales
ODPP	Office of the Director of Public Prosecutions, Queensland
proposed expungement legislation	The proposed new expungement legislation for Queensland recommended in Chapter 2 of this Report.
PCJC Report No 2 (1990)	Parliamentary Criminal Justice Committee, Parliament of Queensland, <i>Report into the Report of the Criminal Justice Commission entitled 'Reforms in Laws Relating to Homosexuality — An Information Paper'</i> , Report No 2 (October 1990)
QCAT	Queensland Civil and Administrative Tribunal
QCS	Queensland Corrective Services, Department of Justice and Attorney-General
QLRC Consultation Paper No 74 (2016)	Queensland Law Reform Commission, <i>Review of expunging of criminal convictions for historical gay sex offences</i> , Consultation Paper WP No 74 (February 2016)
QPS	Queensland Police Service
QSA	Queensland State Archives
SA	South Australia
sodomy	Anal intercourse under former sections 208(1) and 208(3), and current section 208, of the Criminal Code, and their equivalents in other jurisdictions (which are sometimes also referred to as 'buggery').
spent convictions legislation	Legislation in Queensland and other jurisdictions providing for certain types of convictions to be treated as spent, or non-existent, after the lapse of a particular period of time and on other conditions, namely: <ul style="list-style-type: none"> • <i>Spent Convictions Act 2000</i> (ACT) • <i>Criminal Records Act 1991</i> (NSW) • <i>Criminal Records (Spent Convictions) Act</i> (NT) • <i>Criminal Law (Rehabilitation of Offenders) Act 1986</i> (Qld) • <i>Spent Convictions Act 2009</i> (SA) • <i>Annulled Convictions Act 2003</i> (Tas) • <i>Spent Convictions Act 1988</i> (WA) • <i>Criminal Records (Clean Slate) Act 2004</i> (NZ) • <i>Rehabilitation of Offenders Act 1974</i> (UK) c 53
Vic	Victoria

* Except where otherwise indicated, references to legislation in this Report are references to Queensland legislation.

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Executive Summary

TERMS OF REFERENCE

[1] The Commission was asked to recommend how Queensland can expunge criminal convictions for historical gay sex offences from a person's criminal history.

[2] Expungement schemes with different features have been introduced in several other jurisdictions. The main purpose of this review is to consider what the nature and features of an expungement scheme in Queensland should be and how it should operate.

THE COMMISSION'S APPROACH

[3] The Commission's recommendations are informed by a number of general principles.

[4] First, 'expungement' refers to the process of removing a past conviction from a person's criminal history. The proposed expungement scheme should restore a person's position so that, as far as possible, they are treated in law as if the conviction had never been imposed.

[5] Second, as well as overcoming the effect of criminal history disclosure laws, the expungement scheme should recognise the wider impact on individuals and the LGBTI community of the continued existence of historical gay sex convictions on a person's criminal history, and the reparative purpose of expungement.

[6] Third, convictions for historical gay sex offences should be expunged if the conduct constituting the offence is no longer an offence. In this respect, expungement is a further step in the reform process that began with the legalisation of private homosexual acts between consenting adults by the *Criminal Code and Another Act Amendment Act 1990*.

[7] Finally:

- the expungement scheme should be as simple and clear as possible both for those seeking expungement and those administering the scheme;
- expungement is a significant legal step and requires an objective and procedurally fair decision-making framework; and
- the expungement scheme should be practical to implement, taking into account the age, form and diversity of relevant records and record keeping systems, and the importance of preserving historical records for legitimate research purposes.

SUMMARY OF RECOMMENDATIONS

A new expungement scheme

[8] The expungement of criminal convictions for historical gay sex offences cannot be achieved under existing mechanisms, or by an automatic scheme. Accordingly, the Commission recommends a new legislative framework for people to apply to the Director-General of DJAG (the ‘decision-maker’) for the expungement of convictions from their criminal history (the ‘proposed expungement legislation’).¹

Eligible offences, convictions and applicants

[9] The proposed expungement legislation should provide that a person who has been convicted of, or charged with, any of the following ‘eligible offences’ may apply for expungement of the conviction or charge:²

- an offence under sections 208(1), 208(3), 209 or 211 of the Criminal Code, as in force prior to 19 January 1991 (the ‘date of legalisation’), except as constituted by heterosexual activity;
- an offence prescribed by regulation and occurring before the date of legalisation, to the extent that it was constituted by a person engaging in any form of sexual activity with another person of the same sex;
- an offence of attempting or conspiring to commit, or enabling, aiding, counselling or procuring another person to commit, any of the above offences.

[10] This would generally limit the expungement scheme to those former offences repealed in 1991 that specifically applied to homosexual activity, including the former ‘unnatural offences’ of having, or permitting a male person to have, carnal knowledge ‘against the order of nature’. It would extend both to convictions for and charges of those offences.

[11] In addition, if the eligible person has impaired capacity, or is deceased and died after the date of legalisation, certain other persons should be entitled to apply on the eligible person’s behalf, such as the person’s guardian for legal matters or personal representative under the *Succession Act 1981*.³

Criteria for expungement

[12] Applications for expungement should be decided on a case-by-case basis against specific criteria so that convictions and charges are not expunged if the conduct would be criminal under the current law. Specifically, the proposed

¹ Chapter 2, Rec 2-1. Decision-making power under the proposed legislation should be delegable only to certain senior persons: see Chapter 6, Rec 6-5.

² Chapter 3, Recs 3-1, 3-2 and 3-4(a). The Commission also recommends that, for the purpose of the legislation, a ‘conviction’ should be widely defined as ‘a finding of guilt by a court or the acceptance of a plea of guilty, whether or not a conviction is recorded’, and a ‘charge’ should have the inclusive meaning given in the *Acts Interpretation Act 1954* (Qld): Rec 3-3. See also Rec 7-1 for a regulation-making power.

³ Chapter 3, Rec 3-4(b), (d). See also Rec 3-4(c) as to applications on behalf of an eligible person who does not have impaired capacity but requires assistance to make an application. The specific persons who may apply in each case are listed in the recommendations.

expungement legislation should provide that an application is to be granted if the decision-maker is satisfied, having regard to the law in Queensland as in force at the commencement of the expungement legislation, that:⁴

- the other person involved in the conduct constituting the offence (the ‘other person’) consented to the conduct;
- the other person was of or above the relevant age of consent; and
- the conduct constituting the offence did not occur in a place to which the public are permitted to have access.

[13] At present, the age of consent is generally 16 years but is 18 years for sodomy. 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.⁵

Consequences of expungement

[14] The proposed expungement legislation should provide that a person whose conviction or charge is expunged is to be treated for all purposes in law as if the person had not committed the offence or been charged with, prosecuted for, convicted of, or sentenced for the offence (as the case may be).⁶

[15] The proposed legislation should also include specific provisions:⁷

- to ensure that information about an expunged conviction or charge is not disclosed or taken into account under other legislation, including in the assessment of a person’s character;
- to make it an offence to unlawfully disclose, or to dishonestly obtain, information about an expunged conviction or charge from records kept by or on behalf of a public authority; and
- to require, as far as it is reasonably practicable to do so, the annotation of records kept by or on behalf of the QPS, the Queensland Courts, the ODPP and QCS by recording the fact that a conviction or charge is expunged, and that unlawful disclosure, or dishonest obtaining, of information about an expunged conviction or charge is prohibited.

⁴ Chapter 4, Rec 4-1.

⁵ On 16 June 2016, the Health and Other Legislation Amendment Bill 2016 (Qld) was introduced into Parliament. Among other things, it proposes amendments to the Criminal Code (Qld) to standardise the age of consent for all lawful sexual intercourse to 16 years: see Chapter 7 of this Report.

⁶ Chapter 5, Rec 5-1. See also Rec 5-2 which extends the effect of expungement to the charge to which the expunged conviction related and associated investigations or legal processes.

⁷ Chapter 5, Recs 5-3, 5-4 and 5-6 to 5-10. See the full recommendations for specific and further details including, for example, exceptions to the proposed offences and the requirement to annotate records. See also Rec 5-5 as to the recognition in Queensland of convictions expunged in other jurisdictions.

[16] The proposed legislation should also provide for an expunged conviction or charge to be revived if it was expunged on the basis of false or misleading information.⁸

Procedural features — applications, decisions, and reviews

[17] The Commission recommends an application and administrative decision-making process intended to be as streamlined as possible for the applicant:⁹

- An application should be in writing and contain prescribed information, but failure to include all the information should not preclude the application being considered;
- The decision-maker should be authorised to request and receive, orally or in writing, any information reasonably required to make a decision from the applicant, or another person or body;
- If the decision-maker proposes to refuse the application, the applicant should be given written notice and a copy of any relevant documents or notice of the information on which the decision-maker intends to rely;
- The applicant should be able to withdraw the application at any time before the decision is made;
- Notice of the decision and, if the application is refused, reasons should be given to the applicant in writing as soon as reasonably practicable after the decision is made;
- If the application is granted, written notice of the decision should be given to the relevant record keeper;
- If an application has been refused, an applicant should be able to make a further application in relation to the same conviction or charge only if new relevant information has become available;
- The applicant should be able to apply to the QCAT for review of a decision to refuse an application for expungement.

Other matters

[18] The Commission recommends consequential amendments to a small number of other Acts where necessary to give full effect to the intended consequences of expungement.¹⁰ The Commission also recommends that steps be taken to raise awareness and provide information about the proposed expungement scheme and in relation to legal and other support.¹¹

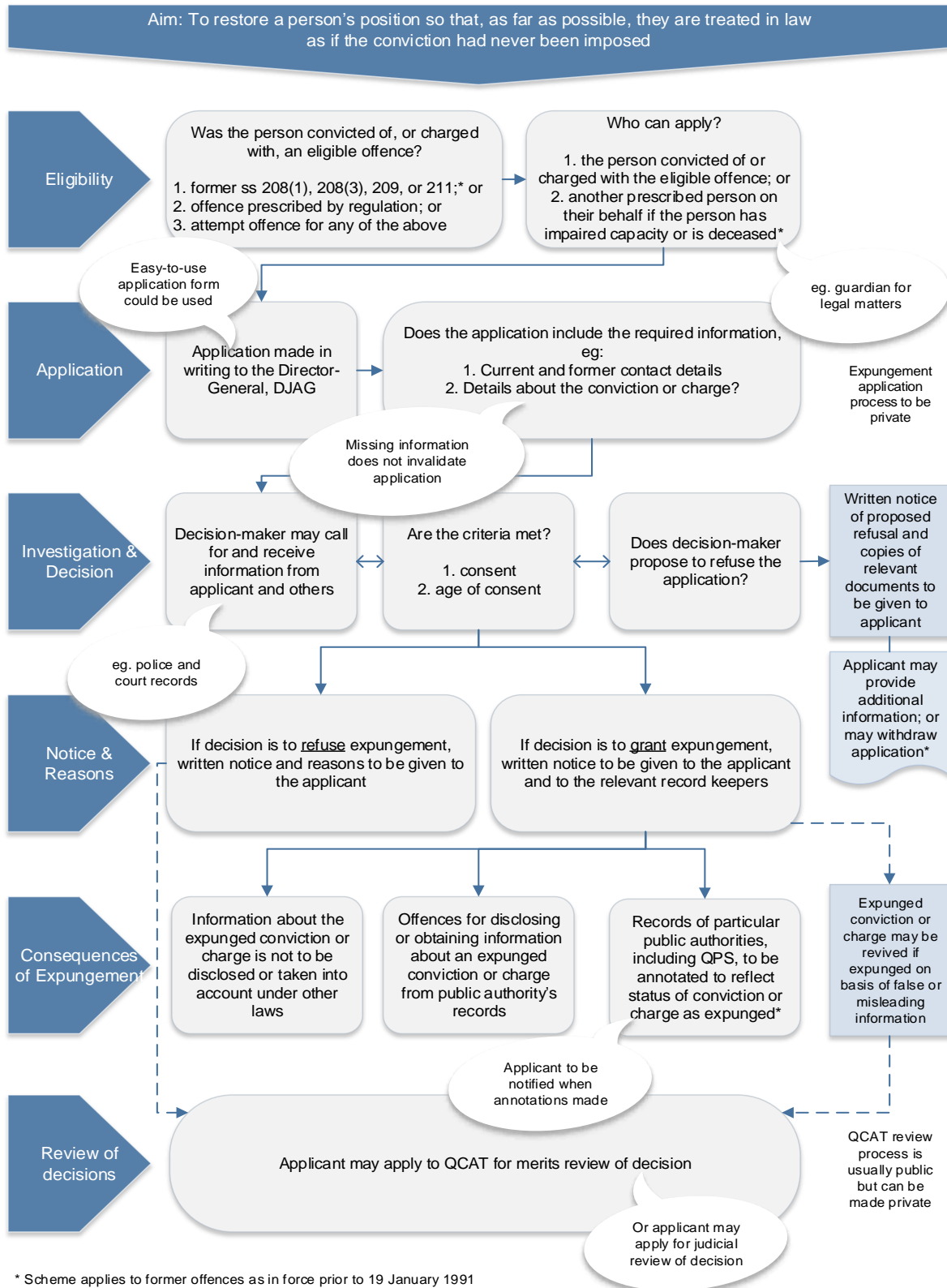
⁸ Chapter 5, Rec 5-11. See also Rec 5-12 and Chapter 6, Recs 6-9 and 6-10.

⁹ See Chapter 6, Recs 6-1(a)–(b), (d)–(e), 6-2 to 6-4 and 6-6 to 6-8. See also Rec 6-1(c) that a single application may relate to more than one conviction or charge.

¹⁰ Chapter 7, Rec 7-2.

¹¹ Chapter 7, Rec 7-3.

OVERVIEW OF PROPOSED SCHEME



* Scheme applies to former offences as in force prior to 19 January 1991
 * Scheme applies to deceased persons who died after 19 January 1991
 * Application for expungement may be withdrawn at any time prior to decision
 * Annotation is required only to the extent it is reasonably practicable; destruction of records is not authorised; and original QPS records held on microfilm would not be affected

COMPARATIVE GUIDE TO THE APPROACHES IN OTHER JURISDICTIONS

		ACT	NSW	SA	TAS	VIC	ENG & WALES	QLRC's proposed legislation
Type of scheme and decision-maker	New legislation	✓ Separate part in spent convictions Act	✓ Separate part in spent convictions Act	✓ Extended provisions in spent convictions Act	✓ Separate Act	✓ Separate part in Sentencing Act	✓ Separate part in new Act	✓ Separate new Act: Rec 2-1
	Case-by-case decisions	✓	✓	✓	✓	✓	✓	✓ Rec 2-1
	Administrative decision-maker	✓ Director-General, Justice & Community Safety Directorate	✓ Secretary Department of Justice, with power to delegate to departmental staff member or authorised person		✓ Secretary Justice Department, with power to delegate	✓ Secretary Justice Department, with power to appoint advisers and to delegate expungement decision to an executive	✓ Home Secretary, with power to appoint advisers	✓ Director-General DJAG, with power to delegate to senior executive or senior officer: Recs 2-1, 6-5
	Judicial decision-maker			✓ Qualified Magistrate				
Eligible offences	Gay sex offences	✓ Specific offences	✓ Specific offences	✓ Defined by description	✓ Specific offences	✓ Defined by description	✓ Specific offences	✓ Specific offences: Rec 3-1(a)
	Public morality offences	✓	✓ (With limitations)	(No, but solicitation might arguably be included)		✓	(No, but some might be captured as attempt offences)	
	Offences added by regulation	✓ (With limits)	✓		✓			✓ With limits: Rec 3-1(b). See also 7-1
	Attempt offences	✓	✓	✓ (If within definition)	✓	✓	✓	✓ Rec 3-1(c)
Eligible conviction and charges	Conviction for eligible offence	✓	✓	✓	✓	✓	✓	✓ Rec 3-2(a); see also 3-3(a)
	Charge of eligible offence that did not result in conviction						(No, but includes 'cautions')	✓ Rec 3-2(b); see also 3-3(b)

		ACT	NSW	SA	TAS	VIC	ENG & WALES	QLRC's proposed legislation
Eligible applicants	Convicted person	✓	✓	✓	✓	✓	✓	✓ A person convicted of or charged with an eligible offence: Rec 3-4(a)
	Guardian etc for convicted person					✓ Litigation guardian or guardian, if the person has disability		✓ Guardian for legal matters or other prescribed persons, if the person has impaired capacity, or requires assistance: Rec 3-4(b)–(c)
	Family etc for deceased convicted person	✓ Eg, personal representative, spouse, parent, child, or other person involved in offence	✓ Eg, personal representative, spouse, parent, child		✓ Eg, personal representative, spouse, parent, child	✓ Hierarchy of persons, eg, spouse, child, parent		✓ Eg, personal representative, spouse, parent, child; but only if person died after 19 Jan 1991: Rec 3-4(d)
Criteria for expungement	Consent and age of consent	✓	✓	✓ As part of definition of eligible offence	✓ As part of test 'would not be an offence today'	✓ As part of test 'would not be an offence today'	✓	✓ Rec 4-1(a)–(b)
	Would not be an offence today			✓	✓	✓	✓ Would not be an offence today of 'sexual activity in a public lavatory'	✓ Conduct did not occur in a place to which the public are permitted to have access: Rec 4-1(c)
	Would not have been charged but for suspected homosexual activity			(No, but some offences eligible if would not have been an offence if persons were not of the same sex)	✓	✓		

		ACT	NSW	SA	TAS	VIC	ENG & WALES	QLRC's proposed legislation
Consequences of expungement	Expungement extends to the charge to which conviction related, etc	✓ Charge to which conviction related	✓ Charge to which conviction related	✓ Charge to which conviction related, and investigation or legal process associated with offence or conviction	✓ Charge to which conviction related	✓ Charge to which conviction related, and investigation or legal process associated with the charge or conviction	✓ Treated in law as if had not committed or been charged with, convicted of, cautioned, prosecuted or sentenced for offence; extends to associated investigations	✓ Treated in law as if had not committed or been charged with, convicted of, prosecuted or sentenced for offence; extends to charge to which conviction related and associated investigation or legal process: Recs 5-1, 5-2
	Conviction not to be disclosed or taken into account	✓	✓	✓	✓	✓	✓ Includes circumstances ancillary to the conviction	✓ Recs 5-3, 5-4; see also 7-2
	Offences for unlawful disclosure or access	✓	✓	✓	✓	✓		✓ Recs 5-6 to 5-8
	Official records to be annotated	(No, and destruction of records not authorised)	(No, and destruction of records not authorised)	(No, and destruction of records not authorised)	✓ (Subject to the annotation requirement, nothing in the Bill authorises destruction of records)	✓ (Duplicate electronic records also to be changed)	✓	✓ If reasonably practicable and subject to prohibition on destruction of records: Recs 5-9, 5-10
Making an application	Must include details of person and conviction etc	✓	✓ And any information decision-maker requires	✓ And transcript or sentencing remarks if in applicant's possession	✓ And consent to disclosure of records; And any information or documents decision-maker requires	✓ And consent to disclosure of records; Application may be considered without all information	✓	✓ Including, eg, transcript or sentencing remarks if in applicant's possession; Application may be considered without all information: Rec 6-1(a)–(d)
	May include other information	✓ Other information that may assist in deciding application		✓ Supporting statements about circumstance of offence and applicant		✓ Supporting statements about circumstance of offence, and evidence of other persons	✓ Supporting statements or written evidence about circumstance of offence	
	Application may be withdrawn					✓ At any time prior to decision		✓ At any time prior to decision: Rec 6-1(e)

		ACT	NSW	SA	TAS	VIC	ENG & WALES	QLRC's proposed legislation
Deciding an application	Decision-maker may request information or documents	✓ From applicant and other entities	✓ From applicant and other entities		✓ All reasonable and appropriate inquiries; from applicant and other persons	✓ From applicant and other entities		✓ Any information reasonably required, from applicant and other bodies: Recs 6-2, 6-3
	Oral hearing not to be held		✓	May be conducted on papers unless Attorney-General, etc intervenes (and ordinarily in private)		✓	✓	Oral hearing not required, but decision-maker may call for and receive information orally or in writing: Rec 6-2
	Notice to applicant of proposed refusal	✓ With reasons and copy of records	✓ With copy of records			(No, but access to information to be given with opportunity to withdraw or add to application)		✓ With copy of relevant documents (and obligation on applicant to maintain confidentiality): Rec 6-4
	Notice of decision	✓ To applicant and, if expunged, to Chief Police Officer	✓ To applicant		✓ To applicant (and decision to be made 'as soon as practicable')	✓ Within 14 days, to applicant and, if expunged, to data controller for official records (and decision to be made 'as promptly as possible')	✓ To applicant and, if expunged, to data controller for official records	✓ As soon as reasonably practicable to applicant and, if expunged, to relevant record keeper: Rec 6-6(a),(c)
	Reasons for decision to applicant	✓ If application refused			✓ If application refused	✓ Within 14 days, if application refused or approved		✓ As soon as reasonably practicable, if application refused: Rec 6-6(b)
	Revival	Decision-maker may revive conviction if expunged on basis of false or misleading information or documents		✓		✓		
Notice of decision to revive expunged conviction			✓ To convicted person		✓ To convicted person (with reasons) and relevant data controller			✓ To applicant for expungement (with reasons) and relevant record keeper: Rec 6-9; see also 5-12

		ACT	NSW	SA	TAS	VIC	ENG & WALES	QLRC's proposed legislation
Reviews etc	Subsequent application if expungement refused	✓ If necessary supporting information becomes available		Not if order refused for same conviction within preceding two years	✓ If necessary supporting information becomes available	✓ If necessary supporting information becomes available		✓ If new relevant information becomes available: Rec 6-7
	Applicant's right of review	✓ To ACAT (if application refused)	✓ To NCAT	(No, but decision would be subject to judicial review)	✓ To Mags Court Administrative Appeals Division (if application refused, or expunged conviction revived)	✓ To VCAT (if application refused); data controller may seek review of decision to expunge	✓ Appeal to High Court with leave (if application refused)	✓ To QCAT (if application refused, or expunged conviction or charge revived): Recs 6-8, 6-10
Mutual recognition	Express provision for recognition of convictions expunged in other jurisdictions							✓ Conviction expunged under a similar scheme in another State is recognised as expunged in Queensland: Rec 5-5

* The table above is a brief comparison between the main provisions of each jurisdictions' expungement legislation (including the draft expungement legislation in Tasmania), as well as with the provisions the Commission recommends in this Report. For more detail, see the description of each jurisdiction in Appendix C and the relevant discussion in each chapter.

List of Recommendations

CHAPTER 2: A NEW EXPUNGEMENT SCHEME

- 2-1** The expungement of criminal convictions for historical gay sex offences should be given effect by new legislation allowing people to apply to the Director-General of DJAG (the 'decision-maker') for the expungement of convictions from their criminal history (the 'proposed expungement legislation').

CHAPTER 3: ELIGIBLE OFFENCES, CONVICTIONS AND APPLICANTS

Eligible offences

- 3-1** The proposed expungement legislation should apply to the following offences ('eligible offences'):
- (a) an offence under sections 208(1), 208(3), 209 or 211 of the Criminal Code, as in force prior to 19 January 1991 (the 'date of legalisation'), except as constituted by heterosexual activity; or
 - (b) an offence prescribed by regulation and occurring before the date of legalisation, to the extent that it was constituted by a person engaging in any form of sexual activity with another person of the same sex; or
 - (c) an offence of attempting or conspiring to commit, or enabling, aiding, counselling or procuring another person to commit, any of the above offences.

Eligible convictions and charges

- 3-2** The proposed expungement legislation should provide that an application may be made for the expungement of:
- (a) a conviction for an eligible offence; or
 - (b) a charge of an eligible offence which, for any reason, did not result in a conviction.

3-3 For the purposes of the proposed expungement legislation:

- (a) 'conviction' should be defined as a finding of guilt by a court or the acceptance of a plea of guilty, whether or not a conviction is recorded; and
- (b) 'charge' should have the meaning given in the *Acts Interpretation Act 1954*.

Eligible persons and other applicants**3-4 The following persons should be eligible to make an application for expungement ('applicants'):**

- (a) a person who was convicted of or charged with an eligible offence (the 'eligible person'); or
- (b) if the eligible person is an adult with impaired capacity:
 - (i) the eligible person's guardian for a legal matter; or
 - (ii) if the eligible person does not have a guardian for a legal matter, an attorney appointed by the person under an enduring power of attorney; or
 - (iii) if the eligible person does not have a guardian for a legal matter and has not appointed an attorney under an enduring power of attorney:
 - (A) a member of the person's support network, as defined by the *Guardianship and Administration Act 2000*; or
 - (B) another person approved by the decision-maker; or
- (c) if the eligible person is not an adult with impaired capacity but requires assistance in making an application for expungement, a person approved by the decision-maker; or
- (d) if the eligible person died after the date of legalisation, any one of the following:
 - (i) a personal representative of the deceased person, as defined in the *Succession Act 1981*; or
 - (ii) a spouse, parent, child or sibling of the deceased person; or
 - (iii) a person who was in a close personal relationship with the deceased person immediately before the deceased person's death.

CHAPTER 4: CRITERIA FOR EXPUNGEMENT

- 4-1** The proposed expungement legislation should provide that an application for expungement is to be granted if the decision-maker is satisfied, having regard to the law in Queensland as in force at the commencement of the expungement legislation, that:
- (a)** the other person involved in the conduct constituting the offence (the 'other person') consented to the conduct;
 - (b)** the other person was of or above the relevant age of consent; and
 - (c)** the conduct constituting the offence did not occur in a place to which the public are permitted to have access.

CHAPTER 5: CONSEQUENCES OF EXPUNGEMENT**The general effect of expungement**

- 5-1** The proposed expungement legislation should provide that a person whose conviction or charge is expunged is to be treated for all purposes in law as if the person had not committed the offence or been charged with, prosecuted for, convicted of, or sentenced for the offence (as the case may be).
- 5-2** The proposed expungement legislation should provide that:
- (a)** a reference to an 'expunged conviction' includes a reference to the charge to which the expunged conviction related and any investigation or legal process associated with that charge or conviction; and
 - (b)** a reference to an 'expunged charge', in relation to a charge that did not result in a conviction, includes a reference to any investigation or legal process associated with that charge.

Effects of expungement for disclosure and other purposes

- 5-3** The proposed expungement legislation should provide that, if a person's conviction or charge is expunged:
- (a)** it is lawful for the person to claim upon oath or otherwise that the person was not convicted or charged, and evidence is not admissible in any proceedings to show that the claim is false;
 - (b)** the person is not required to disclose information about the expunged conviction or charge;
 - (c)** a question about the person's criminal history is taken not to refer to the expunged conviction or charge;
 - (d)** evidence is not admissible or receivable in proceedings before any court, tribunal, body or person having power to determine any question affecting a person's rights, privileges, obligations or liabilities, to prove that the person was charged with, prosecuted for, convicted of, or sentenced for the offence;
 - (e)** in applying an Act, agreement or arrangement to the person:
 - (i)** a reference to a conviction or charge or the person's criminal history is taken not to refer to the expunged conviction or charge or to the person's criminal history to the extent it relates to the expunged conviction or charge; and
 - (ii)** a reference to the person's character does not allow or require anyone to take the expunged conviction or charge into account;
 - (f)** the expunged conviction or charge is not a proper ground for dismissing or excluding the person from any office, profession, occupation or employment, or prejudicing the person in any way in any office, profession, occupation or employment; and
 - (g)** the person may reapply for any licence, permit, approval or other authorisation under an Act that was refused because of the conviction or charge, before it became an expunged conviction or charge, without waiting any minimum period.

Other Acts authorising or requiring disclosure not to apply

- 5-4** The proposed expungement legislation should provide that any other Act (including the *Criminal Law (Rehabilitation of Offenders) Act 1986*) which authorises or requires the disclosure of a person's criminal history (however defined), convictions or charges does not apply to an expunged conviction or charge.

Mutual recognition

- 5-5** The proposed expungement legislation should provide that a conviction (or charge) that is expunged under a similar scheme in another State should be recognised as an expunged conviction (or charge) in Queensland.

Offence provisions

- 5-6** The proposed expungement legislation should provide that:
- (a) a person commits an offence if the person:
 - (i) has access to records, containing information about an expunged conviction or charge, kept by or on behalf of a public authority;
 - (ii) discloses information about the expunged conviction or charge to any other person; and
 - (iii) knew, or ought reasonably to have known, at the time of the disclosure, that the conviction or charge is an expunged conviction or charge;
 - (b) the offence provision in Recommendation 5-6(a) does not apply if:
 - (i) the disclosure is made to, or with the written consent of, the person whose conviction or charge has been expunged;
 - (ii) the disclosure is necessary for the purposes of, or in connection with, the performance of a function or the exercise of a power under the proposed expungement legislation;
 - (iii) the disclosure is made in discharge of a duty under the *Public Records Act 2002*; or
 - (iv) the person has a reasonable excuse for making the disclosure.

5-7 The proposed expungement legislation should provide that it is an offence if a person dishonestly obtains, or attempts to obtain, information about an expunged conviction or charge from a record kept by or on behalf of a public authority.

5-8 A person who contravenes an offence provision mentioned in Recommendation 5-6(a) or 5-7 is liable to a penalty.

Annotation of records

5-9 The proposed expungement legislation should provide that the Act does not authorise or require the destruction or removal of a record kept by or on behalf of a public authority, or an entry in a record kept by or on behalf of a public authority, relating to an expunged conviction or charge.

5-10 The proposed expungement legislation should provide that:

- (a)** a 'relevant official record' means a record containing information about a conviction or charge kept by or on behalf of the QPS, the Queensland Courts, the ODPP and QCS, and includes information about a conviction or charge in the QPS database known as QPRIME;
- (b)** a 'relevant record keeper' is the person who has the management or control of a record containing information about a conviction or charge kept by or on behalf of the QPS, the Queensland Courts, the ODPP and QCS (as the case may be);
- (c)** subject to Recommendation 5-9, as soon as reasonably practicable after receiving notice of a decision to expunge a conviction or charge, a relevant record keeper must, so far as it is reasonably practicable to do so, annotate any entry relating to the expunged conviction or charge contained in any relevant official records under the record keeper's management or control by recording, with the details of the entry, the fact that it relates to an expunged conviction or charge and the effect of it being expunged;
- (d)** as soon as reasonably practicable after taking any action required by Recommendation 5-10(c) in relation to an entry, the relevant record keeper must give written notice of the action taken to the decision-maker; and
- (e)** as soon as reasonably practicable after the decision-maker is satisfied that any action required by Recommendation 5-10(c) has been taken in relation to entries in relevant official records, the decision-maker must give written notice of that fact to the applicant for expungement.

Revival of expunged convictions and charges

- 5-11** The proposed expungement legislation should provide that, if a decision-maker is satisfied that a conviction or charge became an expunged conviction or charge by reason of an application that included false or misleading information, or a document that is false or misleading, the decision-maker may decide that the conviction or charge is no longer an expunged conviction or charge.
- 5-12** The proposed expungement legislation should require a relevant record keeper, as soon as reasonably practicable after receiving notice of a decision to revive an expunged conviction or charge, to annotate any entry that was made as a result of the expungement of the conviction or charge in any relevant official records under the record keeper's management or control, by recording with the entry the details of the decision to revive the expunged conviction or charge.

CHAPTER 6: PROCEDURAL FEATURES**Making an application for expungement**

- 6-1** The proposed expungement legislation should:
- (a) require an application for expungement to be made to the decision-maker in writing and contain the following information:
 - (i) the eligible person's full name and address, their date of birth and contact details;
 - (ii) if the applicant is not the eligible person, the applicant's full name and contact details;
 - (iii) the eligible person's name and address at the time of the conviction or charge, so far as is known to the applicant;
 - (iv) the date when and the court where the eligible person was convicted or charged, and the name and statutory provision of the eligible offence, so far as is known to the applicant; and
 - (v) a copy of the transcripts or sentencing remarks in connection with the conviction or charge that are in the actual possession of the applicant;

- (b) provide that the decision-maker is not precluded from considering an application that does not contain all the information required to be included in the application, or that is subsequently requested by the decision-maker;
- (c) provide that a single application may relate to more than one conviction or charge;
- (d) require the application to include a declaration that the information provided is, to the applicant's knowledge, correct; and
- (e) provide that an application may be withdrawn, without prejudice, at any time prior to the application being decided.

Deciding an application for expungement

Gathering additional information

6-2 The proposed expungement legislation should authorise the decision-maker to request and receive, orally or in writing, any information that is reasonably required to make a decision on an application for expungement.

6-3 In particular, and without limiting Recommendation 6-2, the proposed expungement legislation should provide that:

- (a) the decision-maker may, in writing, request that the applicant give the decision-maker additional information or documents;
- (b) the decision-maker may, by written notice, require another person or body (including, for example, the QPS, the Queensland Courts, and the ODPP) to provide the decision-maker with information in their possession, or under their control; and the person or body must comply with the notice as soon as is reasonably practicable.

Notifying the applicant of a proposed refusal

6-4 The proposed expungement legislation should provide that:

- (a) before the decision-maker decides to refuse an application for expungement, the decision-maker must give the applicant:
 - (i) written notice of the proposed refusal; and
 - (ii) a copy of any relevant documents in the decision-maker's possession or under their control, and notification of relevant information or facts not contained in those documents, on which they propose to rely; and

- (b) the applicant may use or disclose confidential information provided pursuant to Recommendation 6-4(a) only for the purposes of an application for expungement, or a subsequent review or appeal.

Delegation

- 6-5 The proposed expungement legislation should provide that the Director-General's decision-making powers under the proposed expungement legislation may be delegated only to a person employed as a senior executive or a senior officer under the *Public Service Act 2008*.

Giving notice of a decision on an application for expungement

- 6-6 The proposed expungement legislation should provide that, as soon as is reasonably practicable after an application for expungement is decided, the decision-maker must:
- (a) give written notice of the decision to the applicant; and
 - (b) if the application is refused—
 - (i) give written reasons for the refusal to the applicant; and
 - (ii) inform the applicant of the right to have the decision reviewed; or
 - (c) if a decision is made to expunge a conviction or charge, give written notice of the decision to the relevant record keeper.

Subsequent applications for expungement

- 6-7 The proposed expungement legislation should provide that, if an application for the expungement of a conviction or charge has been refused, a further application for expungement in relation to the same conviction or charge may be made only if new relevant information has become available that was not available at the time of the refusal.

Review of a decision on an application for expungement

- 6-8 The proposed expungement legislation should provide that the applicant may apply to QCAT for administrative review of a decision to refuse an application for expungement.

Revival of an expunged conviction or charge

Giving notice of a decision to revive an expunged conviction or charge

6-9 The proposed expungement legislation should provide that, if the decision-maker decides in accordance with Recommendation 5-11 that an expunged conviction or charge is no longer an expunged conviction or charge, the decision-maker must, as soon as is reasonably practicable after making the decision:

- (a)** give written notice of the decision and written reasons for the decision to the applicant for expungement;
- (b)** inform the applicant of the right to have the decision reviewed; and
- (c)** give written notice of the decision to the relevant record keeper.

Review of a decision to revive an expunged conviction or charge

6-10 The proposed expungement legislation should provide that the applicant for expungement may apply to QCAT for administrative review of a decision to revive an expunged conviction or charge (see Recommendation 5-11).

CHAPTER 7: OTHER MATTERS

Regulation-making power

7-1 The proposed expungement legislation should provide that, for the purpose of Recommendation 3-1(b), the Governor in Council may make regulations under the legislation.

Consequential amendments

7-2 To give full effect to the intended purpose of the proposed expungement scheme, consequential amendments to particular information disclosure provisions of some other Acts should be made, including the following:

- (a)** *Child Protection Act 1999*, chapter 5A section 159C(4); and
- (b)** *Family Responsibilities Commission Act 2008*, part 8 section 91(4).

Support and assistance

- 7-3 Steps should be taken, in collaboration with LGBTI and other organisations, to raise awareness and provide information about the proposed expungement scheme, and to ensure affected individuals have access to legal assistance and information about other support.**

Chapter 1

Introduction

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BACKGROUND

1.1 Consensual adult male homosexual activity ceased to be a criminal offence in Queensland on 19 January 1991 (the 'date of legalisation').¹

1.2 In 2015, the Attorney-General stated that '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 the consideration of this issue in Queensland.²

1.3 In September 2015, the LGBTI Legal Service Inc released a discussion paper about 'options for reform to address the ongoing impact of prosecutions under historical homosexual offences'.³

1.4 On 4 January 2016, the Attorney-General referred the issue to the Commission, requesting it to 'recommend how Queensland can expunge criminal convictions for "historical gay sex offences" from a person's criminal history'.⁴

1 See [2.6] and [3.6]–[3.9] below.

2 Queensland, *Parliamentary Debates*, Legislative Assembly, 20 August 2015, 35 (YM D'Ath, Attorney-General and Minister for Justice and Minister for Training and Skills). 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, 13 <<https://treasury.qld.gov.au/publications-resources/state-budget/2015-16/budget-papers/bp5.php>>; Queensland Government, 'Palaszczuk Government Acts to Expunge Historic Homosexual Convictions' (Media Statement, 13 January 2016).

3 *LGBTI Legal Service Discussion Paper* (2015). That paper was prepared by the LGBTI Legal Service Inc, with the Human Rights Law Centre, Caxton Legal Centre Inc, Queensland Association of Independent Legal Services Inc (now Community Legal Centres Queensland), and Brisbane Pride.

4 The terms of reference, dated 4 January 2016, were received by the Commission and announced on 13 January 2016. They are set out in full in Appendix A to this Report.

THE COMMISSION'S REVIEW

1.5 In making its recommendations in this review, the Commission is required to consider a number of specific matters, including:

- which criminal offences can be identified as historical gay sex offences, and the likely numbers of persons convicted of those offences;
- the extent to which the offences applied to consensual and non-consensual sexual activity and activity involving adults only, and whether there are factual elements in the convictions that would amount to criminal behaviour under the current law;
- whether other records or information associated with convictions are held, who holds them, and whether they can be disclosed;
- the relevant legislation in other jurisdictions; and
- if a new expungement scheme is recommended:
 - how and by what entity the scheme should be administered, whether it should be given a legislative basis or otherwise supported by legislation, and its associated financial implications;
 - what the process for expungement should be;
 - which historical offences are appropriate to be included in the scheme;
 - how the scheme will ensure that only convictions relating to consensual sexual activity, and acts that would not amount to criminal behaviour under the current law in Queensland, are expunged;
 - whether expungement should extend to charges that did not result in conviction;
 - whether the scheme should be confined to living applicants;
 - whether there are sufficient historical records available for a determining authority to properly assess an application for expungement;
 - whether, and to whom, there should be a right of appeal or review of decisions under the scheme;
 - whether an expunged conviction should be reinstated if expungement occurred as a result of fraud; and
 - whether unlawful disclosure of, or improper obtaining of, information about an expunged conviction should be an offence.

1.6 The terms of reference are set out in full in Appendix A.

METHODOLOGY OF THIS REVIEW

The Consultation Paper

1.7 In February 2016, the Commission produced a Consultation Paper outlining the relevant legal issues in the review, and seeking submissions on a number of specific questions.

Consultation process

1.8 Following the release of the Consultation Paper, the Commission wrote to more than 100 organisations and individuals inviting submissions. They included members of the judiciary, the Queensland Law Society and Bar Association of Queensland, community legal centres, human rights organisations, academics, government departments, and LGBTI community organisations, groups and services.

1.9 A media statement to publicise the release of the Consultation Paper and call for submissions was issued to the print and electronic media on 17 February 2016.

1.10 An advertisement calling for submissions in response to the Consultation Paper was placed in *The Australian* and *The Courier Mail* newspapers and in nine Queensland regional newspapers on 20 February 2016.⁵ A similar advertisement was published in 13 local newspapers servicing the greater Brisbane area, on 24 or 25 February 2016.⁶

1.11 Notices calling for submissions were also placed on the Commission's website, on the Queensland Government 'qld.gov.au' and 'Get Involved' websites, in *QLS Update* (an electronic newsletter of the Queensland Law Society), on Australian Policy Online, and in the *National Seniors Newsletter*.⁷

1.12 The closing date for submissions was 29 March 2016.⁸

1.13 The Commission received 17 submissions from more than 40 organisations and individuals, including the LGBTI Legal Service Inc and other community legal centres, the Anti-Discrimination Commission Queensland, the Bar Association of Queensland, human rights law organisations, legal academics, historians, and members of the public.

1.14 In addition, the Commission held consultation meetings with a number of key stakeholders, and received information and assistance from several organisations and individuals, including the Australian Lesbian and Gay Archives,

⁵ Namely, the *Bundaberg News Mail*, *Cairns Post*, *Fraser Coast Chronicle*, *Gold Coast Bulletin*, *Mackay Daily Mercury*, *Rockhampton Bulletin*, *Sunshine Coast Daily*, *Toowoomba Chronicle*, and *Townsville Bulletin*.

⁶ Namely, the *Albert and Logan News*, *Caboolture Herald*, *City North News*, *City South News*, *Northside Chronicle*, *North-West News*, *Pine Rivers Press/North Lake Times*, *Redcliffe and Bayside Herald*, *South-East Advertiser*, *South-West News/Springfield News*, *Southern Star*, *Westside News* and *Wynnum Herald*.

⁷ Requests were also made to community legal centres and other agencies around the State to publicise the call for submissions.

⁸ The Commission received a total of three submissions after the closing date.

the Human Rights Law Centre, the LGBTI Legal Service Inc, the Office of the Director of Public Prosecutions Queensland, the Queensland Police Service, Queensland State Archives, and departmental officers involved with the development and operation of expungement schemes in other Australian jurisdictions.

1.15 A list of respondents and consultees is set out in Appendix D.

1.16 The Commission would like to thank all those organisations and individuals who participated in the review for their contribution to this Report. As well as providing views on the issues raised, a number of consultees provided factual information and data that have assisted in the review.

STRUCTURE OF THIS REPORT

1.17 Chapter 2 examines the extent to which expungement can be achieved under existing laws or requires a new legislative scheme.

1.18 Chapter 3 identifies the offences, and the convictions and charges for those offences, to which the expungement scheme should apply. It also considers who should be eligible to apply for expungement.

1.19 Chapter 4 examines what criteria should be met for a conviction or charge to be expunged under the scheme.

1.20 Chapter 5 deals with the effect of expungement under the scheme, including non-disclosure of information about an expunged conviction or charge.

1.21 Chapter 6 considers procedural features of the proposed expungement scheme, including requirements about applications, decisions and reviews.

1.22 Finally, Chapter 7 deals with a small number of miscellaneous matters.

TERMINOLOGY

1.23 A list of Abbreviations and Glossary of terms commonly used in this Report is set out at the beginning of the Report.

SOURCES

1.24 A Select Bibliography of sources is included in Appendix E. Care has been taken throughout the Report to limit, where practicable, specific reference to material in which individuals charged with or convicted of historical gay sex offences are named.

Chapter 2

A New Expungement Scheme

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INTRODUCTION

2.1 The terms of reference require the Commission to consider the extent to which the expungement of convictions for historical gay sex offences can be addressed under existing laws or requires a new scheme. If a new scheme is recommended, the Commission is also to consider how and by what entity the scheme should be administered, and whether it should be given a legislative basis.¹ As part of its review, the Commission has also been asked to consider the likely numbers of persons convicted of historical gay sex offences.²

BACKGROUND

2.2 Until the latter half of the last century, male homosexual activity in Australia was the subject of a number of criminal offences. In Queensland, the main offences were in sections 208, 209 and 211 of the Criminal Code under which:³

¹ See terms of reference paras 4(i), 5(a), (c) and (d).

² See terms of reference para 4(c). The terms of reference para 3 also ask the Commission to consider whether expungement should extend to charges that did not result in a conviction, as to which see Chapter 3 below.

³ See Criminal Code (Qld) ch 22 (Offences against morality) ss 208(1), (3), 209, 211 (Act as passed). The Criminal Code (Qld) ch 30 (Assaults) also included offences for assault with intent to commit unnatural offences (s 336) and indecent assaults, formerly called 'indecent assault on males' (s 337): see further Chapter 3 and Appendix B below.

- it was a crime for a person to have (or attempt to have) carnal knowledge of another person ‘against the order of nature’, or to permit a male person to have carnal knowledge of him or her ‘against the order of nature’; and
- it was a misdemeanour for a male person, whether in public or private, to commit any act of ‘gross indecency’ with another male person, or to procure or attempt to procure the commission of such an act.

2.3 It was also an offence to attempt or conspire to commit, or to enable, aid, counsel or procure another person to commit, any of those offences.⁴

2.4 The offences at [2.2] above applied in relation to conduct between males (or, in the case of anal intercourse, between a male and female). The Criminal Code did not contain offences specific to sexual conduct between females.⁵

Homosexual law reform

2.5 Beginning in 1972 with South Australia, all of the Australian states and territories legalised private homosexual acts by consenting adults,⁶ although there remain differences between the jurisdictions, including the age of consent.⁷

2.6 In Queensland, the former offences in sections 208(1) and (3), 209 and 211 of the Criminal Code were repealed on 19 January 1991 (the ‘date of legalisation’) by the *Criminal Code and Another Act Amendment Act 1990*.⁸ The focus of the reforms was on sexual activity between consenting adults in private.⁹ The amending Act was introduced by a preamble acknowledging that:

Whereas democracy requires proper limits should be placed on the right of any State to interfere in the lives of its citizens ... making criminal the private and voluntary sexual acts of adults, when those acts do not involve circumstances of aggravation and affect only the participants, goes beyond those limits ...

⁴ See Criminal Code (Qld) ss 7(1), 535, 539, 541–543, discussed at [3.15] above.

⁵ See also C Moore, *Sunshine and Rainbows: The Development of Gay and Lesbian Culture in Queensland* (University of Queensland Press, 2001) 163.

⁶ See generally G Carbery, *Towards Homosexual Equality in Australian Criminal Law — A Brief History* (Australian Lesbian & Gay Archives Inc, revised ed, 2014) 50–53.

⁷ The age of consent is 16 years (but 18 years for sodomy) in Queensland; 16 years in the Australian Capital Territory, New South Wales, Northern Territory, Victoria and Western Australia; and 17 years in South Australia and Tasmania: see, respectively, Criminal Code (Qld) ss 208(1), 215(1); *Crimes Act 1900* (ACT) s 55(2); *Crimes Act 1900* (NSW) s 66C(3); *Criminal Code Act* (NT) s 127(1); *Crimes Act 1958* (Vic) s 45(1); *Criminal Code Act Compilation Act 1913* (WA) s 321(1)–(2); *Criminal Law Consolidation Act 1935* (SA) s 49(3); *Criminal Code Act 1924* (Tas) s 124(1). See Chapter 7 below as to proposed changes to the age of consent for sodomy by the Health and Other Legislation Amendment Bill 2016 (Qld).

⁸ This was prompted by a recommendation in the Fitzgerald Report, and subsequent consideration by the Criminal Justice Commission and the Parliamentary Criminal Justice Committee: see, respectively, Queensland, *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 186–7, 377 Rec 2 (‘Fitzgerald Report’); *CJC Information Paper* (1990); and *PCJC Report No 2* (1990).

⁹ See Queensland, *Parliamentary Debates*, Legislative Assembly, 21 November 1990, 5024–5 (DM Wells, Attorney-General). See also *PCJC Report No 2* (1990), Recs 2 and 3:

Homosexual acts between consenting males in private should no longer be a criminal offence in Queensland. ... A homosexual act [should be] an offence in public in those circumstances where a heterosexual act would also constitute an offence in a public place.

This echoed the approach earlier taken in England and Wales: see Wolfenden Report, below n 43, 25.

2.7 Federal legislation was also introduced to protect the right to sexual privacy, consistent with international human rights law.¹⁰ The *Human Rights (Sexual Conduct) Act 1994* (Cth) provides that:¹¹

Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.

2.8 In Queensland, the *Anti-Discrimination Act 1991* has prohibited discrimination on the basis of ‘sexuality’ (meaning ‘heterosexuality, homosexuality or bisexuality’) and ‘gender identity’ since 2002.¹² Accordingly, it is unlawful to discriminate against a person on the basis of such attributes, directly or indirectly, in a range of areas of public life including employment, education, the provision of goods and services, accommodation and club membership.¹³ There are, however, a number of exemptions in the Act, including for acts done in compliance with other legislation.¹⁴

¹⁰ Adult consensual sexual activity in private is covered by the right to privacy under the International Covenant on Civil and Political Rights (‘ICCPR’) art 17: see Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D488/1992 (4 April 1994) (‘*Toonen v Australia*’), [8.2]. In addition, the prohibition against discrimination under the ICCPR encompasses discrimination on the basis of sexual orientation or gender identity: *Toonen v Australia* [8.7]; Human Rights Committee, *Views: Communication No 941/2000*, 78th sess, UN Doc CCPR/C/78/D/941/2000 (18 September 2003), [10.4] (‘*Young v Australia*’); Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-discrimination in economic, social and cultural rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)*, 42nd sess, UN Doc E/C.12/GC/20 (2 July 2009), [32]. The principle of non-discrimination without distinction of any kind, such as sex or other status, is also reflected in the *Universal Declaration of Human Rights*, GA Res 217A (III), 10 December 1948, art 2.

¹¹ *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4(1). The Act was introduced following a successful complaint made to the United Nations Human Rights Committee that the existence in Tasmania of criminal offences for sexual activity between consenting adult males in private was a violation of the right to privacy under the ICCPR art 17: *Toonen v Australia*, UN Doc CCPR/C/50/D/488/1992.

¹² *Anti-Discrimination Act 1991* (Qld) s 7(m), (n). These grounds were added to ‘provide more comprehensive protection for the general community, and in particular for the gay and lesbian community’ and to ‘protect people of transgender identity and intersex people’: Explanatory Notes, *Discrimination Law Amendment Bill 2002* (Qld) 5. The former ground of ‘marital status’ in s 7(b) was also extended by the 2002 amendments to ‘relationship status’.

¹³ See *Anti-Discrimination Act 1991* (Qld) ch 2 pts 3, 4.

¹⁴ *Anti-Discrimination Act 1991* (Qld) s 106. Other exemptions are included throughout the Act. Similar provisions prohibiting discrimination on the basis of homosexuality apply in other Australian jurisdictions: see *Discrimination Act 1991* (ACT) s 7(1)(b); *Anti-Discrimination Act 1977* (NSW) pt 4C; *Anti-Discrimination Act* (NT) s 19(1)(c); *Equal Opportunity Act 1984* (SA) pt 3; *Anti-Discrimination Act 1998* (Tas) s 16(c); *Equal Opportunity Act 2010* (Vic) s 6(p); *Equal Opportunity Act 1984* (WA) s 35O. See also *Sex Discrimination Act 1984* (Cth) s 5A.

2.9 In some jurisdictions, discrimination is also prohibited on the basis of a spent conviction,¹⁵ an irrelevant criminal record,¹⁶ or an expunged conviction for an historical gay sex offence.¹⁷ There are no equivalent provisions in Queensland.

2.10 The application of international human rights law to issues of sexual orientation and gender identity is also the subject of a set of non-binding international principles, the *Yogyakarta Principles*. Relevantly, these Principles refer to:¹⁸

- the repeal of laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent;
- the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity;
- the elimination of discrimination on the basis of sexual orientation or gender identity in public and private employment; and
- the need for legal procedures to ensure that victims of human rights violations on the basis of sexual orientation or gender identity have access to redress.

2.11 It is against this background that expungement schemes have been considered. Some of the respondents to the review commented on the role of an expungement scheme in redressing past wrongs and addressing ongoing discrimination and harm.¹⁹

2.12 The Castan Centre for Human Rights Law observed that a dedicated expungement scheme 'would provide redress for wrongs suffered at the hands of the State many years ago, the effects of which are still being experienced'.²⁰

2.13 The Bar Association of Queensland (the 'BAQ') also referred to the principle of non-discrimination as informing the need for a new expungement scheme:

expungement of convictions ... suffered by people in circumstances where the criminal law was enforced against them, because they were LGBTI or engaging

¹⁵ *Discrimination Act 1991* (ACT) s 7(1)(o). See also *Anti-Discrimination Act* (NT) s 19(1)(q) which applies, among other things, to a spent conviction.

¹⁶ *Anti-Discrimination Act* (NT) s 19(1)(q); *Anti-Discrimination Act 1998* (Tas) s 16(q). Those provisions apply, for example, to a record relating to an arrest or charge where no further action was taken, the charge was dismissed, the person was found not guilty, or the finding of guilt was quashed or set aside. See also *Australian Human Rights Commission Act 1986* (Cth) pt II div 4 and *Australian Human Rights Commission Regulations 1989* (Cth) reg 4(a)(iii); and Australian Human Rights Commission, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (2012) <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-record>>, in relation to complaints about discrimination in employment or occupation on the basis of criminal record.

¹⁷ *Discrimination Act 1991* (ACT) s 7(1)(o); *Equal Opportunity Act 2010* (Vic) s 6(pa), referring to convictions 'extinguished' or 'expunged' under the expungement legislation in those jurisdictions.

¹⁸ *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007) <http://www.yogyakartaprinciples.org/principles_en.htm>. The Principles were developed by the International Commission of Jurists and the International Service for Human Rights and adopted, following a meeting at Yogyakarta, Indonesia, by a group of 29 experts from 25 countries.

¹⁹ Submissions 2, 5, 7, 11, 13, 14.

²⁰ This respondent also referred to the *Yogyakarta Principles* and the principle of non-discrimination.

in same-sex sexual activity of some kind, is an appropriate next step in society's recognition that all forms of discrimination against people based on sexual orientation or identity or consensual sexual activity is wrong and a breach of human rights principles.

It is a next step in recognising that everyone is, indeed, entitled to the rights and freedoms protected by ... human rights instruments without distinction of any kind, including distinction on the grounds of sexual orientation or identity or consensual sexual activity.

2.14 The Anti-Discrimination Commission Queensland (the 'ADCQ') similarly observed that expungement is consistent with the purpose of equality before the law which underpins the *Anti-Discrimination Act 1991*. It suggested that, unlike other activities which might be legalised, homosexuality is an attribute in respect of which discrimination is prohibited, making expungement appropriate.

Likely numbers of persons convicted

2.15 Criminal laws against homosexual activity were still being enforced in most Australian jurisdictions until the mid-1970s.²¹ In Queensland, these laws were still being enforced in the late 1980s and up to the date of legalisation, albeit sporadically.²²

2.16 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.²³

2.17 One archival study of Queensland court cases involving male-to-male sexual offences found 548 such cases and 464 convictions in the 95-year period between 1859 and 1954.²⁴ There may also have been additional cases not identified because of the loss of archival material.²⁵ The researchers also noted that men

21 Carbery, above n 6, 3.

22 Ibid 21–2. See also *PCJC Report No 2* (1990).

23 See Chapter 3 and Rec 3-1 below as to which offences are identified as eligible 'historical gay sex offences' for the purposes of the proposed expungement scheme. Due to the form in which they are held, there is a limited ability to search records of the Queensland Police Service (the 'QPS') to identify numbers of relevant charges and convictions: Information provided by the Queensland Police Service, Police Information Centre, Brisbane, 22 March 2016. The Office of the Director of Public Prosecutions (the 'ODPP') has indicated that it is unable to provide information about the number of charges, prosecutions, convictions or sentences in relation to former ss 208(1), (3), 209 and 211 of the Criminal Code (Qld): Information provided by the Office of Director of Public Prosecutions, Brisbane, 29 July 2016.

24 C Moore and B Jamison, 'Making the Modern Australian Homosexual Male: Queensland's Criminal Justice System and Homosexual Offences, 1860–1954' (2007) 11(1) *Crime, History and Societies* 1, 4–5. The researchers observed that '[w]hile some of the homosexual cases may also have involved rape or involuntary participation, there is no evidence to support this': ibid 17, note 49. It was explained that the 1954 cut-off for this study was 'due to archival access policy': ibid 5. The study is also reported in C Moore and B Jamison, 'Queensland's Criminal Justice System and Homosexuality, 1860–1954' (2007) 14(2) *Queensland Review* 3. See also Moore, above n 5, 41–2, for a brief discussion of the number of 'offences against morality', including homosexual offences, going to trial in higher Courts in Queensland between 1861 and 1900.

25 Moore and Jamison, above n 24, 4: 'The vicissitudes of archival practices and management in the nineteenth and early-mid twentieth century' means that 'a considerable body of material has been lost to historians forever'.

sometimes appear to have been charged with offences to ‘frighten and intimidate’ them, even if a conviction was unlikely to result.²⁶

2.18 The researchers in that study observed some particular differences between the earlier period of 1859–1900, and the later period between 1901 and 1954. Eighty percent of the cases occurred in the later period,²⁷ but the number of convictions for anal intercourse was higher in the earlier period (54% compared with 22%).²⁸ This reflected, in part, the introduction by the Criminal Code in 1901 of the specific offence of indecent practices between males (also referred to as ‘gross indecency’) which accounted for 34% of all convictions between 1901 and 1954.²⁹ The study also showed changes in sentencing patterns with the number of convictions resulting in a non-custodial sentence increasing from 4% in 1901–1940, to 24%, mostly for juvenile offenders, in 1941–1954.³⁰

2.19 Another study, of sentencing for homosexual offences in Queensland, identified a total of 151 male-to-male sexual offences indicted in the Supreme Court between 1939 and 1948, with 134 of those returning a verdict.³¹ Of those 134 cases, 127 involved adult defendants. Of those, 51 related to gross indecency (40%), 38 related to anal intercourse or attempted anal intercourse (30%), and 9 related to indecent assault (7%).³² Most of the indictments resulted in a conviction (112) and a custodial sentence (100),³³ although a small number of persons were discharged on bonds and recognisances (12).³⁴

2.20 The Commission is not aware of any similar archival studies covering all or part of the period between 1954 and 1991 in Queensland. There are, however, isolated accounts of prosecutions and convictions occurring in Queensland up to the late 1980s for the former offences of sodomy and gross indecency between males.³⁵

2.21 During the consideration of reforms to legalise consensual adult homosexual activity in 1990, the Queensland Parliamentary Criminal Justice

26 Ibid 17.

27 Ibid 7.

28 Ibid 9.

29 Ibid. Prior to the introduction of the Criminal Code (Qld), homosexual activity was the subject of criminal offences for buggery and attempt to commit buggery, assault with intent to commit buggery, and indecent assault on a male person (but not ‘indecent practices between males’): see n 6 in Chapter 3 below.

30 Ibid.

31 Y Smaal, ‘The “leniency problem”: A Queensland case study on sentencing male same-sex offences, 1939–1948’ (2012) 21(5) *Women’s History Review* 798–9, 800–802.

32 A further 29 indictments were for indecent treatment of boys (23%): *ibid* 800.

33 The average sentence length was 2 years and 3 weeks: *ibid* 801. Custodial sentences were suspended in 23 cases: *ibid* 800. Comparisons with male-female sex offences in the same period indicate similarly moderate sentences: *ibid* 805.

34 *Ibid* 801.

35 See, eg, Carbery, above n 6, 22; Moore, above n 5, 184; and B Lane, ‘Harassment of homosexuals in Queensland: Private lives, public “crimes”’ (1988) 13(4) *Legal Service Bulletin* 154. Accounts of prosecutions between the 1950s and late 1980s can also be found in archived newspapers, including former Brisbane newspapers, *Truth* and *Brisbane Telegraph*.

Committee received evidence of a modest number of contemporary cases. The Committee reported that:³⁶

Whilst [it] was not provided with any detailed statistics of the number of charges of consensual sodomy, evidence was provided that seven men had been charged with these offences, committed in private, over the last few years. These prosecutions usually arise out of evidence obtained in the course of other investigations by police and are prompted by open admissions of homosexuality. The reason why heterosexual couples who engage in similar behaviour are not also prosecuted to the same degree is probably due to the fact that there is not a similar interest by the community in inquiring into the private bedrooms of heterosexual partners. Policing of these laws therefore discriminates against homosexual men.

2.22 Some historical statistics are available for other jurisdictions, although caution is needed in drawing comparisons with Queensland. Notably, the New South Wales Bureau of Crimes Statistics and Research conducted a study of homosexual offence cases using court data from 1975.³⁷ It found 193 cases involving 'unnatural offences' under the *Crimes Act 1900* (NSW), including 92 cases of indecent assault on a male, 86 of committing or procuring indecent acts with a male, and 15 of buggery or attempted buggery.³⁸ There was a high number of guilty pleas, and most cases (87%) resulted in a recognisance, fine or sentence of imprisonment.³⁹ The study found that, in most cases, the conduct was consensual (68%)⁴⁰ and took place in public places (74%), most notably inside public toilet cubicles (36%).⁴¹

2.23 Police statistics about the number of charges brought in relation to homosexual offences in Western Australia are also available for the period 1964-1973, immediately prior to legalisation in that State. In that period, 68 complaints were made to police for investigation, and a total of 82 persons were

³⁶ *PCJC Report No 2* (1990) 31. The seven cases referred to appear to include the following, mentioned in several sources including, for example, in Evidence to Parliamentary Criminal Justice Committee, Legislative Assembly of Queensland, Brisbane, 6 August 1990 (Mr Ward):

- The conviction in 1988 of two men, aged 29 and 39, on two counts of sodomy (s 208) and six counts of gross indecency (s 211). The defendants were placed on a 12 month good behaviour bond with a \$200 surety. The charges resulted when police attended the men's home on a separate matter and learned of their consensual same-sex relationship.
- The charging in 1989 of five men, aged 19, 22, 24, 30 and 32, for sodomy (s 208) and gross indecency (s 211). The behaviour had reportedly been consensual and in private. One of the men attempted suicide after being charged. All of the charges were ultimately dropped.

In relation to the first of those cases, *The Sunday Mail* reported that it was 'the first time in 35 years that Queensland homosexuals have been charged over sexual offences committed in their own home': S McLean, 'Gays say police flirting in toilets', *The Sunday Mail* (Brisbane), 27 March 1988, 5.

³⁷ NSW Bureau of Crime Statistics and Research, 'Homosexual Offences' (Research Report No 3, Department of the Attorney-General & of Justice, 1978) 7.

³⁸ Ibid 10.

³⁹ Ibid 11, 16.

⁴⁰ Ibid 13. There were differences between the offence types with coercion being involved in a number of buggery and indecent assault cases: *ibid*.

⁴¹ Ibid 15. The researchers observed (at 15) that, 'while only 46 [of 193] offences took place in strictly private areas a further 90 offences were very unlikely to be seen accidentally', being those undertaken in publicly owned but 'secluded' areas (21 offences) and inside public toilet cubicles (69 offences).

charged, the majority of whom (57) were 21 years or older and all of whom were male.⁴² Those statistics did not indicate the number of resulting convictions.

2.24 Detailed figures are also available in relation to homosexual offences prosecuted in England and Wales in the period immediately preceding the recommendations for reform made in the 'Wolfenden Report'.⁴³ In the five years ending December 1955, more than 5000 persons were found guilty of indictable homosexual offences in England and Wales — 1588 for buggery, and 3866 for gross indecency.⁴⁴

2.25 Of those found guilty of buggery in that period, most (897) were sentenced to a term of imprisonment, ranging from 6 months or less to more than 7 years,⁴⁵ and about 30% (511) were dealt with by a recognisance or conditional discharge, a fine or a probation order. In contrast, most (69%) of those found guilty of gross indecency during the same period were either fined (1250 cases), put on probation (752 cases) or discharged on a recognisance or on conditions (668); comparatively few were sentenced to a term of imprisonment (874).⁴⁶

2.26 More particularly, in the three years ending March 1956, a total of 480 men aged 21 or older were convicted of offences committed in private with consenting adult partners. Of those, the majority (300) were found to have been guilty *only* of offences committed in private with consenting adult partners, whilst the remainder were also convicted of or admitted to offences in public places or with partners under 21 years old.⁴⁷

42 Western Australia, *Report of the Honorary Royal Commission Appointed to Inquire into and Report upon Matters Relating to Homosexuality* (1974) 27–8, in the context of discussion about existing criminal offences of sodomy, buggery and gross indecency. Some of those complaints resulted in charges against multiple persons.

43 United Kingdom, *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd 247 (1957) ('Wolfenden Report') 21, App I. That Committee, chaired by Sir John Wolfenden, was appointed in 1954 to consider the law and practice relating to homosexual offences in England, Wales and Scotland and to report what changes, if any, were desirable (it was also required to examine the law in relation to prostitution). It recommended that homosexual behaviour between consenting adults in private should no longer be a criminal offence: [355], Rec (i). This was subsequently given effect by the *Sexual Offences Act 1967* (UK) c 60 and the *Criminal Justice (Scotland) Act 1980* (UK) c 62, s 80. The Wolfenden Report also influenced the legalisation of homosexual conduct in other Commonwealth countries.

44 Wolfenden Report, above n 43, app I, table III. This does not include the further 4638 persons found guilty in that period of indecent assault on a male person, attempted buggery, or assault with intent to commit buggery.

45 The most common terms of imprisonment for those offences in that period were 1 to 2 years (245 cases), 6 months to 1 year (162 cases), 3 to 5 years (183 cases), and 2 to 3 years (155 cases): *ibid* app I, table IV.

46 *Ibid* app I, table IV.

47 *Ibid* 21, app I, table VI. In Scotland in the same period, a total of 9 men aged 21 or older were convicted of offences committed in private with consenting adult partners, with 7 of those men found to have committed homosexual offences *only* in those circumstances, and with one also admitting offences in public places and one admitting offences with a partner under 21 years: *ibid* 21, app I, table XI. The Committee considered that homosexual behaviour is about as prevalent in Scotland as in England and Wales, and observed that the difference in figures is attributable to differences in prosecution practice: *ibid* 50–52. It also observed more generally that figures about homosexual offences will 'be conditioned to a large extent both by the efficiency of the police methods of detecting and recording, and by the intensity of police activity', which are factors that 'vary from time to time and from place to place': *ibid* 19.

EXPUNGEMENT AND EXISTING LAWS

2.27 In ordinary usage, to ‘expunge’ something is ‘to strike or blot out; erase; obliterate’ or ‘to efface; wipe out or destroy’.⁴⁸ Accordingly, ‘expungement’ is used to refer to the process of removing a past conviction from a person’s criminal record.⁴⁹

2.28 In the context of historical gay sex offences, expungement schemes generally aim to restore a person’s position so that, as far as possible, they are treated in law as if the conviction had never been imposed.⁵⁰ This is commonly taken to have two main aspects: the conviction is to be disregarded and not disclosed; and, in some instances, references to the conviction in official records, such as those held by police, are to be annotated or removed.⁵¹

2.29 Information about a person’s criminal history (ordinarily being a formal record of the convictions recorded against the person) is held by the Queensland Police Service (the ‘QPS’) and other public authorities. There are various circumstances in which the law requires or authorises convictions (and, in some cases, charges) to be disclosed to others.⁵²

2.30 This includes disclosure when applying for work in particular professions or occupations, obtaining a ‘blue card’ for working or volunteering with children⁵³ and young people, applying to adopt a child and applying for an entry visa to a foreign country. In these contexts, disclosure generally forms part of an assessment of the person’s suitability to hold the particular position, role or right. The existence of a

48 *Macquarie Dictionary online* (MacMillan, 6th ed, 2015) (definition of ‘expunge’). See also the definition in similar terms in *Oxford English Dictionary online* (Oxford University Press, 2015).

49 See, eg, *Human Rights Law Centre Background Paper* (2014) 3; *ADC Tasmania Report* (2015) 24. The ‘expungement’ of a criminal record is defined in RN Howie, PE Nygh and P Butt (eds), *Butterworths Australian Criminal Law Dictionary* (Butterworths, 1997) as the ‘process by which a criminal conviction or other sentencing order recorded against a person may be expurgated by operation of law’.

50 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 2014, 3352 (R Clark, Attorney-General):

Once expunged, a conviction will be treated at law as if it were never imposed. It will not be released as part of a criminal history check and a person will be protected from ever having to reveal that conviction.

See also, Legislation Review Committee, Parliament of New South Wales, ‘Legislation Review Digest’, No 62/55 (14 October 2014) 5; *ADC Tasmania Report* (2015) 22, Rec 10(g); *Protection of Freedoms Act 2012* (UK) c 9, s 96.

51 The particular effect of expungement differs among jurisdictions, as does the language used in expungement legislation. See further Chapter 5 and Appendix C below.

52 The meaning of ‘criminal history’ may vary depending on the legislative context in which it is used. See the more detailed discussions of disclosure and records in Chapter 5 below.

53 See *Working with Children (Risk Management and Screening) Act 2000* (Qld) chs 8, 8A, which set out screening requirements and procedures for applicants for a ‘positive notice blue card’ (commonly referred to as a ‘blue card’). The blue card screening check (also called the ‘working with children check’) assesses a person’s eligibility to work or volunteer with children and young people and involves a check of the person’s national criminal history (including all spent convictions and charges) and other disciplinary and police information. A person whose application is approved is issued with a positive notice letter and a blue card. A person whose application is refused is issued with a negative notice which prohibits them from carrying on a regulated business or providing regulated child-related activities.

conviction may also bar a person from particular civic offices or roles (for example, justice of the peace or jury service).⁵⁴

2.31 People with a conviction or charge may also choose to limit their career choices or participation in community life for fear that the conviction or charge may be revealed, and that they may suffer from associated stigma or discrimination.

2.32 There are existing mechanisms to limit the disclosure of, or consequences relating to, convictions. However, the scope and effect of those mechanisms is limited.

Spent convictions legislation

2.33 The *Criminal Law (Rehabilitation of Offenders) Act 1986* provides a scheme 'for the notional sealing of criminal records under certain circumstances'.⁵⁵ It therefore provides an incentive 'to encourage offenders to rehabilitate themselves, to cast aside the social stigma associated with a criminal conviction'.⁵⁶

2.34 The Act does not apply to all convictions, but applies if the following conditions are met:

- in respect of the conviction, the offender was not ordered to serve any period in custody or was ordered to serve a period in custody not exceeding 30 months;⁵⁷ and
- the 'rehabilitation period' (10 years for a person convicted on indictment as an adult, or otherwise five years) has expired;⁵⁸ and
- the conviction has not been 'revived' (by the person's conviction for another offence).⁵⁹

2.35 A criminal conviction that meets those requirements may be referred to as a 'spent' conviction. In general, the Act provides that the rehabilitated offender need not disclose the spent conviction,⁶⁰ and it is to be disregarded in an assessment of

⁵⁴ See *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 17(1)(b); *Jury Act 1995* (Qld) s 4(3)(m), (n).

⁵⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 12 March 1986, 4110 (NJ Harper, Minister for Justice and Attorney-General).

⁵⁶ Ibid.

⁵⁷ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(2). This applies whether or not the offender was required to actually serve any part of the period in custody: s 3(2)(b).

⁵⁸ See *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(1) (definition of 'rehabilitation period'). The rehabilitation period is the later of 10 years (or five years for a person convicted otherwise than on indictment where the conviction was recorded, or as a child) after the date the conviction was recorded or, if an order of the court in relation to the conviction is not satisfied within that time, the date the order is satisfied.

⁵⁹ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) ss 3(1) (definition of 'revived'), 11. A spent conviction is not revived if the person commits a simple or a regulatory offence, unless the court is satisfied that it should be revived and makes an order to that effect: s 11(2).

⁶⁰ Neither the rehabilitated offender nor any other person who knows that the rehabilitation period has expired is required to disclose the conviction: *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 6. See also s 8, in relation to when it is lawful for the rehabilitated offender to deny the spent conviction, upon oath or otherwise. It is an offence for someone other than the offender to disclose the conviction in contravention of the Act: s 12.

the person's fitness to be admitted to a profession, occupation or calling or for any other purpose.⁶¹

2.36 However, there are exceptions to the general rule of non-disclosure.⁶² Relevantly, persons who apply for particular professions, occupations or licences are still required to disclose convictions in relation to all, or certain, offences as specified in the Act.⁶³ This includes, for example, persons applying to be police officers, corrective services officers, justices of the peace, lawyers and (for certain types of sexual and other offences) teachers.

2.37 Similar legislation applies in most other Australian jurisdictions.⁶⁴

Pardons

2.38 The Governor may, on petition and after receiving advice from the Attorney-General, grant a pardon to a convicted person in the exercise of the Royal prerogative of mercy.⁶⁵ A pardon 'has the effect of discharging the convicted person from the consequences of the conviction',⁶⁶ but does not expunge the conviction.⁶⁷

2.39 In providing advice to the Governor on a petition, the Attorney-General may refer the whole case (or a point arising in it) to the Court of Appeal.⁶⁸ On referral of the whole case, the matter will be heard and determined as an ordinary appeal against conviction. If the appeal is successful, the Court may quash the conviction and substitute a verdict of acquittal.⁶⁹

⁶¹ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9(1), but see the exceptions set out in that section.

⁶² Importantly, s 4(1) of the Act provides that the Act 'shall be construed so as not to prejudice any provision of law or rule of legal practice that requires ... disclosure of the criminal history of any person'.

⁶³ See the list in *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9A(1). Generally, this applies to convictions recorded against the person. As explained in Chapter 5 below, there are also some circumstances in which a charge or a conviction that is not recorded is subject to disclosure under other legislation.

⁶⁴ See the spent convictions legislation listed in the Abbreviations and Glossary at the beginning of this Report.

⁶⁵ See *Constitution of Queensland 2001* (Qld) s 36; *Criminal Code* (Qld) ss 18, 672A. In addition to a 'pardon', the Governor may grant a commutation or reprieve of sentence or a remission of a fine, penalty, forfeiture or other consequence of conviction. Historically, this has been described as 'the king's most gracious pardon; the granting of which is the most amiable prerogative of the crown. ... the great operation of [the king's] sceptre is mercy': W Blackstone, *Commentaries on the Laws of England* (JB Lippincott, 1893) vol 2, [396].

⁶⁶ *Criminal Code* (Qld) s 677.

⁶⁷ See, eg, *Eastman v DPP* (2003) 214 CLR 318, 350–51 (Heydon J; Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ agreeing), citing *R v Foster* [1985] 1 QB 115, 130:

the effect of a free pardon is such as, in the words of the pardon itself, to remove from the subject of the pardon, 'all pains penalties and punishments whatsoever that from the said conviction may ensue,' but not to eliminate the conviction itself.

⁶⁸ *Criminal Code* (Qld) s 672A. See, eg, *Re Fritz* [1995] 2 Qd R 580, 586–8 in relation to the Attorney-General's discretion under s 672A. There is limited guidance about whether to refer the case to the Court of Appeal: see L Weathered, 'Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia', *Current Issues in Criminal Justice* 17(2) (2005) 203, 212. As to the usual process for dealing with petitions in Queensland, see: C Lohe, 'The Law in Relation to the Pardoning Power' (Paper presented at Lead Seminar, 31 May 1996) 16–18.

⁶⁹ See *Criminal Code* (Qld) ss 672A(a), 668E(2). The Court may also order a retrial: see s 669(1). The question on appeal is, among other things, whether there was a miscarriage of justice: see s 668E(1).

2.40 However, the Court cannot quash a conviction on the basis that the relevant conduct was, but should not have been or is no longer, an offence. The power to grant a pardon is exercised rarely; for example, in the case of a wrongful conviction, rather than where the relevant conduct is no longer considered a criminal offence.⁷⁰

A NEW EXPUNGEMENT SCHEME

2.41 The threshold question for this review is the extent to which expungement requires a change to the law.⁷¹

Other jurisdictions

2.42 Expungement legislation has been enacted in the Australian Capital Territory, New South Wales, South Australia, Victoria and England and Wales.⁷² Draft expungement legislation has also been released in Tasmania.⁷³

2.43 Each of those jurisdictions has established a new scheme to provide for expungement, rather than relying on existing laws. The schemes are included as a separate part of either the spent convictions legislation (in the Australian Capital Territory and New South Wales), sentencing legislation (in Victoria, which does not have spent convictions legislation), or new legislation (in England and Wales and as proposed in Tasmania). The South Australian expungement scheme was introduced by extending pre-existing provisions for relevant convictions to be made 'spent' by order of a qualified magistrate.

2.44 In each of those jurisdictions, the expungement legislation provides for the non-disclosure of information about an expunged conviction, including when applying for particular positions or jobs. In this respect, the provisions differ from the spent convictions legislation, under which disclosure of a spent conviction may still be required.

2.45 In Victoria and England and Wales, the expungement legislation additionally provides for the annotation of official records of police and other government entities, to reflect the changed status of a conviction as 'expunged'. Similar provision is made in the draft expungement legislation in Tasmania.

2.46 A more detailed description of the expungement schemes in other jurisdictions is provided in Appendix C to this Report.⁷⁴

⁷⁰ See, eg, H Douglas et al, *Criminal Process in Queensland and Western Australia* (Lawbook, 2010) [14.20]. See also *ADC Tasmania Discussion Paper* (2014) 30; and *Human Rights Law Centre Background Paper* (2014) 60, in which it is noted that pardons are usually granted in circumstances of mercy and compassion.

⁷¹ See *QLRC Consultation Paper No 74* (2016), Q-1.

⁷² See the expungement legislation listed in the Abbreviations and Glossary at the beginning of this Report. In some of those jurisdictions, the expungement legislation provides that the legislation does not affect the exercise of the Royal prerogative of mercy, to grant a pardon: see *Spent Convictions Act 2009* (SA) s 15; *Sentencing Act 1991* (Vic) s 106; *Protection of Freedoms Act 2012* (UK) c 9, s 97. Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 18 is in similar terms.

⁷³ Draft Historical Homosexual Convictions Bill 2016 (Tas) available at <http://www.justice.tas.gov.au/community-consultation/previous_consultations/historical_homosexual_convictions_bill_2016>.

⁷⁴ See also Chapter 5 below as to the effect of expungement, including non-disclosure and annotation of records.

Submissions

2.47 All of the respondents to the Consultation Paper who addressed this issue — including the BAQ, the ADCQ, the LGBTI Legal Service Inc and others,⁷⁵ Australian Lawyers for Human Rights, and the Queensland Council for Civil Liberties — considered that expungement requires the introduction of a new legislative scheme.⁷⁶ It was also suggested that this should be given effect by separate legislation, rather than by amendments to existing legislation, such as the *Criminal Law (Rehabilitation of Offenders) Act 1986*.⁷⁷

2.48 A number of respondents, including several academics, specifically commented that the existing mechanism for obtaining a pardon is inadequate for the purpose of expungement.⁷⁸ Most of these respondents noted, in particular, that a pardon does not remove or alter the conviction itself. An academic from Monash University observed that:

the conviction itself is key to the discrimination that occurred and is continuing. As such, a pardon, that does not remove the conviction itself, is insufficient to remedy the wrong.

2.49 Some respondents raised additional concerns about pardons. For example, the BAQ observed that the ‘pardon system is ... time consuming and only successful in very special circumstances often going to a subsequent realisation that a conviction may be unsafe in some way’.

2.50 The LGBTI Legal Service Inc and others submitted that:

A pardon ... does not remove the conviction from the person’s criminal record. ... The process is non-transparent and purely discretionary, and no guidelines exist on how the Governor’s powers are to be exercised. The regime also operates on the basis that the conviction was appropriate but for exceptional circumstances that warrant the pardon. (notes omitted)

2.51 Several respondents commented that the existing mechanism for treating a conviction as ‘spent’ is also inadequate or unsuitable for expungement.⁷⁹

2.52 The Diversity Council of Australia, the ADCQ, an academic from Monash University and a group of academics from the TC Beirne School of Law noted that, whilst a conviction may become ‘spent’, it may nevertheless remain subject to disclosure in some circumstances, including in relation to certain types of

⁷⁵ The LGBTI Legal Service Inc made a joint submission with Caxton Legal Centre Inc, Human Rights Law Centre, Queensland Aids Council, Queensland Association of Independent Legal Services Inc (now Community Legal Centres Queensland), and Townsville Community Legal Service Inc.

⁷⁶ Submissions 2, 3, 4, 5, 7, 8, 9, 10, 11, 13, 14, 15.

⁷⁷ Submissions 3, 5, 9, 11, 15. Cf Submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights which expressed general support for the proposals in the *LGBTI Legal Service Discussion Paper* (2015). That paper had proposed (at 3–4, 18–19, Recs 2, 2.3) that a dedicated scheme for expungement be introduced by making amendments to the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), including amendments to provide that expunged convictions are not required to be disclosed. In its submission, however, the LGBTI Legal Service Inc and others expressed the view that separate expungement legislation should be introduced.

⁷⁸ Submissions 3, 5, 7, 8, 9, 11, 15.

⁷⁹ Submissions 3, 4, 5, 7, 9, 11, 15.

employment. A group of academics from the TC Beirne School of Law also noted that a spent conviction can be revived by subsequent offending.⁸⁰

2.53 Several respondents additionally considered that the spent convictions legislation has a different rationale from expungement. For example, the BAQ considered that the rationale on which the spent convictions legislation is based is ‘thematically quite different from the human rights principles that are sought to be applied in respect of expungement’. A member of the public similarly submitted that:⁸¹

Spent convictions are ... substantively different in nature from expungement, minimising the consequences of previous convictions ..., rather than acknowledging the wrongness of, and attempting to remove, convictions that should never have been imposed in the first place.

2.54 An academic from Monash University similarly considered that the ‘rehabilitative’ purpose of the spent convictions legislation is inappropriate in this context, stating that ‘individuals convicted of consensual sexual activity are not in need of rehabilitation’.

2.55 The LGBTI Legal Service Inc and others explained that:

The spent convictions regime is, as suggested by both the name and short title of that legislation, directed towards the rehabilitation of persons convicted [of] offences. The key purpose of an expungement scheme is to reflect the position at law that consensual sexual acts between same-sex attracted adults should never have been criminalised, and the effect to restore the applicant to a position as if the conviction was never recorded in the first place. The discourse and messaging of the existing [spent convictions] regime cuts across the reparative aims of an expungement regime.

2.56 Accordingly, the LGBTI Legal Service Inc and others noted that, if the spent convictions legislation were to be used as a framework for expungement, significant amendments would be required, including amendments directed to:

- (i) consideration of issues of age and consent;
- (ii) more robust protections against non-disclosure;
- (iii) provisions for the destruction or de-identification of records;
- (iv) an application and assessment process to enable applications to be decided on a case-by-case basis; and
- (v) provisions for review of a refusal to expunge a conviction;

none of which are provided for in the current spent convictions legislation.

2.57 In those respondents’ view, new legislation would ‘provide greater flexibility’ and ‘would be easier for applicants to navigate’.

⁸⁰ In addition, the Queensland Council for Civil Liberties made the general observation that the necessity to disclose convictions for historical gay sex offences has been ‘the overarching problem for many gay men’, particularly since it may result in being ‘rejected for jobs’.

⁸¹ Submission 3.

2.58 The Diversity Council of Australia observed that federal law and guidelines provide limited protection when an employer becomes aware of an historical conviction.⁸² This respondent referred to the introduction of expungement legislation in other Australian jurisdictions and expressed the view that Queensland should ‘move in this direction ... to ensure as far as possible, national consistency in this area’, noting that ‘this is particularly important where an individual may have a historical conviction in one state but be required to disclose that conviction in another jurisdiction’.

The Commission’s view

2.59 In the Commission’s view, the expungement of criminal convictions for (or charges of) historical gay sex offences from a person’s criminal history cannot be effected under existing mechanisms and requires a new legislative scheme.⁸³

2.60 First, the aims of expungement schemes in other jurisdictions have gone beyond existing mechanisms for convictions to become spent or to be pardoned.⁸⁴ The informing concept of expungement, unlike the mechanisms for spent convictions and pardons, is that the conduct constituting the offence should never have been criminal.

2.61 Second, spent convictions, although otherwise protected from disclosure, must still be revealed and may be taken into account when applying for particular jobs and positions. Spent convictions may also be revived by subsequent reoffending.

2.62 Third, there are limitations to the Governor’s existing power to pardon an offender. In any event, a pardon discharges the person from the consequences of the conviction but does not remove the conviction itself.⁸⁵

2.63 Fourth, legislation is required to overcome specific provision made in a number of Acts authorising or requiring disclosure of information about a person’s convictions (and, in some cases, charges).⁸⁶

2.64 Introducing a new scheme will also have the advantage of being able to tailor the provisions to meet the intended objects.

2.65 It would be possible to introduce a new scheme by amending the *Criminal Law (Rehabilitation of Offenders) Act 1986*. However, the provisions and operation of that Act lie outside the concept of an expungement scheme. In addition to the specific provisions under which disclosure of spent convictions is allowed (which

82 See the *Sex Discrimination Act 1984* (Cth); and Australian Human Rights Commission, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (2012) <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-record>>, referred to at n 16 above.

83 In Chapter 3 below, the Commission recommends that the proposed expungement legislation should apply both to convictions and charges that did not result in a conviction: Rec 3-2.

84 See [2.27]–[2.28] and [2.44] above.

85 It is not intended that the proposed expungement legislation would affect the Governor’s power to pardon an offender. See, in this respect, the saving provisions in other jurisdictions at n 72 above.

86 See, eg, the *Working with Children (Risk Management and Screening) Act 2000* (Qld), referred to in n 53 above.

would need to be excluded in the case of expungement), that Act contains a general provision to the effect that the Act, as a whole, is to be construed so as not to prejudice any provision of law that requires disclosure of a person's criminal history.⁸⁷ Further, the focus of that Act is on the rehabilitation of offenders, not the expungement of convictions (or charges) by their removal from a person's criminal history. Accordingly, the Commission does not consider that Act to be an appropriate place for a new expungement scheme. Instead, the new expungement scheme should be provided for in its own legislation.

THE TYPE OF SCHEME

2.66 In the Consultation Paper, the Commission sought submissions on what type of expungement scheme should be implemented. In particular, it asked whether the scheme should provide for expungement on a case-by-case basis and, if so, whether it should be an administrative or judicial process and who the decision-maker should be.⁸⁸

Other jurisdictions

2.67 Each of the expungement schemes in other jurisdictions operates on a case-by-case basis with applications made to a particular entity. This allows for the facts surrounding the conviction to be considered.⁸⁹

2.68 With one exception, expungement in the other jurisdictions is an administrative process. Applications are made to the Director-General or Secretary of the justice department (in the Australian Capital Territory, New South Wales and Victoria), or to the Home Secretary (in England and Wales).⁹⁰ It was considered, for example, that this approach would be less costly and less stressful than an application made to a court.⁹¹ It was also envisaged that it would enable administrative processes to be established with the police and courts to obtain relevant historical records.⁹² In Victoria and England and Wales, the decision-maker also has power to appoint advisers.⁹³

2.69 In South Australia, applications are instead made to a 'qualified magistrate'.⁹⁴ This builds on a pre-existing process for qualified magistrates to determine whether convictions for certain types of sexual offences should be spent. Under this scheme, applications are ordinarily to be heard in private and may be

⁸⁷ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 4(1). See also s 4(2)–(3).

⁸⁸ *QLRC Consultation Paper No 74* (2016), Q-5.

⁸⁹ See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 2014, 3352 (R Clark, Attorney-General).

⁹⁰ See *Spent Convictions Act 2000* (ACT) s 19B(1); *Criminal Records Act 1991* (NSW) s 19B(1); *Sentencing Act 1991* (Vic) s 105B(1); *Protection of Freedoms Act 2012* (UK) c 9, s 92(1).

⁹¹ See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 September 2014, 823–24 (B Notley-Smith).

⁹² *Ibid* 824.

⁹³ *Sentencing Act 1991* (Vic) s 105F; *Protection of Freedoms Act 2012* (UK) c 9, s 100.

⁹⁴ A 'qualified magistrate' is a magistrate in relation to whom a consent is in force and who has been approved by the Chief Magistrate to act as a qualified magistrate: *Spent Convictions Act 2009* (SA) s 6A.

conducted entirely on the basis of the documents without a hearing (unless the Attorney-General, another Minister or the Commissioner of Police intervenes).⁹⁵

2.70 In Tasmania, the Anti-Discrimination Commissioner recommended that applications for expungement should be made to an expert panel established for this purpose, 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.⁹⁶ This was proposed to overcome concerns by stakeholders 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'.⁹⁷ However, the draft expungement legislation released by the Tasmanian Attorney-General proposes that applications be made to the Secretary of the Department of Justice, consistently with the approach in most other jurisdictions.⁹⁸

Submissions and consultation

2.71 Most respondents favoured a case-by-case approach to expungement.⁹⁹ Although a few respondents suggested that an automatic scheme would be ideal (because it would minimise the burden on individuals and/or protect their privacy), they ultimately preferred a case-by-case process to distinguish between convictions relating to consensual and non-consensual behaviour.¹⁰⁰ An academic from Monash University submitted, for example, that:¹⁰¹

in redressing this wrong, no significant burden should be placed on, or action expected from, citizens who have been convicted of these discriminatory crimes. As such, I would prima facie favour an automatic scheme. However, I recognize the difficulty of such a scheme to a large number of offences that criminalised both consensual and non-consensual activity. ... [A] case-by-case scheme is thus preferable.

2.72 The LGBTI Legal Service Inc and others submitted that a case-by-case approach is 'by far the most appropriate method to ensure that all (and only) relevant

⁹⁵ See *Spent Convictions Act 2009* (SA) s 8A(4), sch 2 items 4, 5(2)–(3). The qualified magistrate is not bound by the rules of evidence but may inform himself or herself as he or she thinks fit and must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms: sch 2 item 5(1). The Attorney-General and Commissioner of Police must each be served with a copy of the application and may each intervene in the proceedings: sch 2 item 3(1)–(2).

⁹⁶ *ADC Tasmania Report* (2015) 17, Rec 11.

⁹⁷ *Ibid* 16.

⁹⁸ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 5(1).

⁹⁹ Submissions 2, 3, 5, 9, 10, 11, 12, 13, 15, 16.

¹⁰⁰ Submissions 2, 3, 11.

¹⁰¹ This respondent further commented that, by limiting the information required to be provided to commence an application, the scheme need not impose a significant burden on applicants. See further Chapter 6 below.

convictions are captured'.¹⁰² Similar comments were made by other respondents, including the BAQ and a group of academics from the TC Beirne School of Law.¹⁰³

2.73 Queensland State Archives ('QSA') also supported a case-by-case approach, observing that 'the resource implications of an automatic scheme, whereby all the records of all individuals convicted are identified, would be an extremely onerous scheme for all government agencies involved'.¹⁰⁴

2.74 The QPS has provided preliminary information that, because of the limited ability to search criminal histories held and maintained by them, an automatic expungement scheme would not be practicable. Essentially, it appears that the system would require a name and date of birth to locate the criminal record of an individual and determine whether any relevant conviction or charge is included in that person's history. The QPS explained:¹⁰⁵

Currently historical records are on microfilm dating from 1934 to 2010. There are approximately 1000 microfilms with an average of 6000 to 8000 records on each film. Microfilm records cannot be searched like computer based information. As from 2010 all court outcomes are recorded on QPRIME. Searches can be carried out on QPRIME except for PDF scanned documents containing court outcome information that have been linked into the QPRIME occurrence (copied from microfilm).

A check of QPRIME using certain words to search revealed approximately 1200 associated events but there would need to be a full manual process and investigation into each one of these events to establish the circumstances.

Until the circumstances of each individual matter [are] actually read [the presence or absence of consent, the ages of the parties, and identity of the complainant] would not be known. QP9s (court briefs) contain the summary of facts presented to the court. This information describes the police investigation and the prima facie case to substantiate the charges against the defendant. QP9s are now sourced from and stored on QPRIME. Pre 2010, QP9s were stored on microfilm. Some microfilm (QP9) records are not legible due to a poor transfer of information in the first instance.

2.75 Similarly, the ODPP has explained that historical record keeping systems are searchable usually only by the name of the accused, rather than the type of offence committed.¹⁰⁶

2.76 Respondents generally agreed that the scheme should be administrative, rather than judicial.¹⁰⁷ The LGBTI Legal Service Inc and others observed that a judicial process, such as that adopted in South Australia, 'would potentially be a

¹⁰² See also *LGBTI Legal Service Discussion Paper* (2015) 20, in similar terms.

¹⁰³ A member of the public also submitted that the scheme should operate on a case-by-case basis 'to ensure that the individual circumstances of each case are considered': Submission 12.

¹⁰⁴ This respondent also explained that, whilst some relevant records in their custody (such as registers of criminal cases tried) may include an alphabetical name index, most (including court transcripts, criminal case files, and indictments) are arranged chronologically. See further Chapter 5 below.

¹⁰⁵ Information provided by the Queensland Police Service, Police Information Centre, 22 March 2016.

¹⁰⁶ Information provided by the Office of Director of Public Prosecutions, Brisbane, 29 July 2016.

¹⁰⁷ Submissions 2, 3, 8, 9, 10, 11, 12, 13, 15, 16.

public, time-consuming process involving court resources'.¹⁰⁸ An academic from Monash University observed that:¹⁰⁹

The judiciary has a significant burden of cases, and ... this would add to its workload. There is no need for a retrial or rehearing of the facts. Nor is there a need for a public process. While some individuals may wish to make public the expungement of a historical wrong, I am inclined to note that a judicial scheme is an excessive use of resources for this purpose.

2.77 There were mixed responses about who the decision-maker under the scheme should be. Most respondents who addressed this issue — including Australian Lawyers for Human Rights, the Castan Centre for Human Rights Law, the LGBTI Legal Service Inc and others, and the Queensland Council for Civil Liberties — favoured the creation of an independent or expert panel,¹¹⁰ although there was also support for applications to be decided by the Director-General of the Department of Justice and Attorney-General ('DJAG').¹¹¹

2.78 The LGBTI Legal Service Inc and others suggested 'a dedicated, independent panel of three or more members', including at least one person who identifies as a member of the LGBTI community.¹¹² In their view:

Given the reparative purpose of an expungement scheme, the application process should be made accessible, confidential and minimise impact on applicants. Applicants and the broader public should have confidence in the quality and independence of the decision-making process. The decision-making body should have appropriate legal expertise, be culturally competent in relation to LGBTI issues and be independent from government.

2.79 Their preferred alternative (if an independent panel is not adopted) is for the Victorian approach of providing for the Secretary of the Department of Justice, as the decision-maker, to receive assistance from special advisers. They observed that:¹¹³

advisers can include members of the LGBTI community and [this approach] enables the Department to draw upon the specialist knowledge of former prosecutors of sex offences and administrative law experts.

2.80 Several historians from the Griffith Criminology Institute also referred to the need for independence and particular expertise:

Given the historical mistrust between queer individuals and communities and the police and courts, an administrative scheme might appear less intimidating for some individuals. It would also provide for a range of experts and opinions (we

¹⁰⁸ See also *LGBTI Legal Service Discussion Paper* (2015) 21.

¹⁰⁹ A group of academics from the TC Beirne School of Law similarly submitted that a judicial approach 'would add unnecessarily to the complexity for applicants, the workload of judges and the overall cost of the scheme'.

¹¹⁰ Submissions 2, 3, 9, 10, 12, 13.

¹¹¹ Submissions 3, 9, 11, 15, 16.

¹¹² This respondent suggested that the panel members could include retired prosecutors or judges, criminal and administrative law practitioners, the Anti-Discrimination Commissioner of Queensland, and senior government legal officers. See also *LGBTI Legal Service Discussion Paper* (2015) 3, 20–21, Rec 2.2. The Queensland Council for Civil Liberties made a similar suggestion.

¹¹³ This respondent additionally suggested that 'any decision-maker undertake LGBTI cultural competency training'.

note the importance of professional historical and archival expertise here with regards to the identification and analysis of appropriate records) as well as independence and accessibility.

2.81 A member of the public preferred the establishment of an independent panel, but noted that, depending on resources, this ‘may not be possible’ in which case:¹¹⁴

an administrative scheme (overseen by the Director-General of the Department of Justice and Attorney-General) would ensure accessibility, flexibility, privacy and lower cost (and align with the approach adopted in Victoria, NSW and the ACT).

2.82 An academic from Monash University also observed that, while an independent panel might be preferred for its independence, ‘it would involve significant resources’. In his view, the scheme should be administered by the Director-General of DJAG, with advice from experts and with participation from the Attorney-General or Governor through a signed letter to the applicant to recognise the wrong committed by the State. This respondent explained:

It is right that someone in a position of authority, be it the Governor or the Attorney-General, is part of the process to remedy the wrong done. I am not convinced that decision-making power is best placed in their hands. Experts with legal knowledge and those who regularly access case data should do the decision-making. They are better placed to make a decision on the appropriateness of a conviction from today’s standards than a politician or representative of the Head of State.

While it is noted that individuals may be deterred from dealing with an agency associated with the enforcement of historical gay sex offences, the same can be said for dealings with any agency of the state. Applications could be made to the Director-General of DJAG and advice sought from a panel of experts (not necessarily comprised from the ODPP).

2.83 A group of academics from the TC Beirne School of Law also preferred that applications be made to the Director-General of DJAG. In their view, this would ensure ‘relevant expertise, flexibility and independence’.

2.84 QSA considered that the scheme should be administered by DJAG on the basis that it is the department with oversight of the Queensland Courts Service and other agencies ‘which together retain responsibility for the bulk of relevant records’.¹¹⁵

2.85 One respondent, the BAQ, suggested a different alternative — that applications be determined by the Queensland Civil and Administrative Tribunal (‘QCAT’), with the qualification that they not be conducted in public or published. In its view, QCAT ‘has the flexibility, procedures, infrastructure, skills and personnel to make it ideal for the individual decision-making required’ under the scheme.

114 Submission 3.

115 The Queensland Courts Service, within DJAG, includes the Supreme, District and Land Courts Service and the Magistrates Courts Service.

The Commission's view

2.86 An automatic scheme is neither practicable nor desirable. 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),¹¹⁶ 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.¹¹⁷

2.87 Accordingly, the new scheme should provide for applications for expungement to be made on a case-by-case basis. This would allow for each conviction (or charge) and its circumstances to be assessed against available records and appropriate criteria, with the flexibility necessary to distinguish between those that should and should not be expunged. It would also ensure greater certainty about whether a conviction (or charge) has been expunged.

2.88 The scheme should be administrative, rather than judicial. Members of the judiciary are experienced in deciding legal questions on the facts of each case. However, the degree of formality and potential publicity of a judicial process is unsuitable to an expungement scheme that should be kept as simple as possible and which should not involve a retrial or formal rehearing of evidence.¹¹⁸ A judicial approach is also likely to add to the overall cost of the scheme, and to the existing judicial workload. Similar considerations apply in relation to QCAT.

2.89 Applications for expungement should be made to and decided by the Director-General of DJAG. Expungement is a significant step that requires a decision by a senior position within government.¹¹⁹ The Director-General is the chief executive officer of the department and is responsible for a number of other administrative decisions. The department also relevantly oversees the Queensland Courts Service¹²⁰ and the ODPP, both essential agencies for the operation of the scheme.¹²¹

2.90 Expungement is also a relatively discrete process and, as such, does not require the establishment of a new decision-making entity, such as an independent panel or committee. Establishing and operating such an entity would involve

116 See further Chapters 3 and 4 below.

117 In Chapter 3 below, the Commission recommends that the proposed expungement legislation should apply both to convictions and charges that did not result in a conviction: Rec 3-2.

118 There may also be constitutional difficulties, under the principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, with the purported conferral of a non-judicial function or power on a State court: see generally, Office of Queensland Parliamentary Counsel, 'Institutional integrity of courts and judicial independence' in *Principles of Good Legislation: OQPC Guide to FLPs* (30 June 2014) [5] ff <http://www.legislation.qld.gov.au/Leg_Info/flp.htm>. See Chapter 6 below as to information gathering by the decision-maker.

119 An alternative decision-maker is the Attorney-General, but this office is vulnerable to the political process.

120 See n 115 above.

121 See Chapter 6, Rec 6-5 below as to the proposed power to delegate decision-making powers under the scheme.

significant additional resources and practical challenges, for example, in establishing procedures to ensure confidentiality and provide for appropriate review of decisions.

2.91 The conferral of decision-making power on the Director-General is also consistent with the approach adopted in most other jurisdictions.

RECOMMENDATION

2-1 The expungement of criminal convictions for historical gay sex offences should be given effect by new legislation allowing people to apply to the Director-General of DJAG (the 'decision-maker') for the expungement of convictions from their criminal history (the 'proposed expungement legislation').

Chapter 3

Eligible Offences, Convictions and Applicants

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INTRODUCTION

3.1 In recommending how Queensland can expunge criminal convictions for historical gay sex offences, the terms of reference require the Commission to consider which criminal offences¹ can be identified as ‘historical gay sex offences’ since the formation of the State of Queensland in 1901 and which of these should appropriately be the subject of applications for expungement.² In relation to those offences, the Commission is to take into account various matters including consent, age and whether factual elements of reported convictions for those offences would still amount to criminal behaviour under the current law.³

3.2 In Queensland, homosexual activity was prosecuted under a range of criminal offences, including offences under the Criminal Code and public morality

¹ ‘Criminal offences comprise crimes, misdemeanours and simple offences’; regulatory offences are not criminal offences: Criminal Code (Qld) s 3(1)–(2).

² See terms of reference paras 4(a), 5(f).

³ See terms of reference paras 4(d)–(f), 5(h)–(i).

offences.⁴ This chapter discusses which of these offences should be identified as an ‘historical gay sex offence’ to which the proposed expungement legislation should apply.

3.3 The terms of reference also require the Commission to consider how a ‘conviction’ is defined, whether the expungement scheme should extend to charges that did not result in a conviction, and whether it should extend to deceased persons.⁵ These matters are discussed below.

CRIMINAL CODE OFFENCES

Relevant offences

3.4 Several former offences under the Criminal Code can be described as historical gay sex offences that applied to homosexual activity, specifically sexual activity between males.

3.5 Other historical provisions in the Criminal Code of general relevance may also have been used to prosecute homosexual behaviour.

Repealed offences

3.6 Prior to 19 January 1991 (the ‘date of legalisation’), homosexual activity was the subject of the criminal offences constituted by sections 208(1), 208(3), 209 and 211 of the Criminal Code as they then stood. These provisions are the ‘repealed offences’ with regard to historical gay sex offences.⁶

From Criminal Code, Chapter 22 (Offences against Morality) — these offences were repealed on 19 January 1991		
Section 208(1)	A person has carnal knowledge of any person against the order of nature — then commonly known as ‘sodomy’.	These offences prohibited two males (or a male and female) from engaging in anal intercourse, regardless of the participants’ ages and whether or not the act was consensual and done in private. ⁷
Section 208(3)	A person permits a male person to have carnal knowledge of him or her against the order of nature.	

⁴ Public morality offences include some offences under the Criminal Code but principally include offences created under other pieces of legislation. See the discussion of ‘public morality offences’ later in this chapter.

⁵ See terms of reference paras 3, 4(b), 5(g).

⁶ Prior to the enactment of the Criminal Code (Qld), homosexual activity had been the subject of criminal offences constituted by ss 62 and 63 of *An Act to Consolidate and Amend the Statute Law of Queensland Relating to Offences Against the Person* (13 September 1865) 29 Vict No 11. Section 62 criminalised ‘the abominable crime of buggery’ and s 63 criminalised attempts to commit buggery, assault with intent to commit buggery and indecent assault upon any male person. These former offences applied to activity similar to that later captured by the Criminal Code (Qld) ss 208(1), (3), 209, 336, 337.

⁷ See RF Carter, *Criminal Law of Queensland* (Butterworths, 7th ed, 1988) [s 208.1].

From Criminal Code, Chapter 22 (Offences against Morality) — these offences were repealed on 19 January 1991		
Section 209	A person attempts to commit any of the crimes in section 208.	
Section 211	A male person, whether in public or private, commits any act of gross indecency with another male person, procures another male for such acts, or attempts to procure any such act.	This offence covered sexual activity, other than anal intercourse, between two males and applied whether the act occurred in public or private. It was not relevant to consider the participants' ages or the question of consent. The phrase 'gross indecency' had no specific definition. ⁸

* The offences above are set out in full in Appendix B to this Report

3.7 A person could be prosecuted for these offences regardless of the age of the participants, and whether the sexual activity was consensual and done in private.⁹ That is, the offences applied equally in all circumstances.

3.8 These offences were limited in their application to anal intercourse and other relevant sexual activity between males (and anal intercourse between a male and a female).¹⁰ Due to the nature of the activity involved in these offences, they did not apply to activity occurring between females.

3.9 These offences existed in Queensland until the date of legalisation when they were repealed, and new provisions dealing with unlawful sodomy were enacted, by the *Criminal Code and Another Act Amendment Act 1990*.¹¹ As a result, consensual sodomy between two people over the age of 18 years is no longer an offence.¹²

⁸ See *R v Whitehouse* [1955] QWN 76, in which it was observed by Macrossan CJ (at 101); Mansfield SPJ and Philp J agreeing (at 101–2), that 'gross indecency' requires 'something more than indecency'. It has been held, in the context of other offences, that 'indecent' should be given its ordinary and popular meaning, assessed against contemporary community standards and that what is 'indecent' must always be judged in the light of time, place and circumstance: see *AG (SA) v Huber* (1971) 2 SASR 142, 167–8 (Bray CJ), 184–5 (Walters J), 206 (Wells J); *R v Dunn* [1973] 2 NZLR 481, 483–5 (Turner P, McCarthy and Richmond JJ); LexisNexis, *Carter's Criminal Law of Queensland*, vol 1 (at February 2016) [s 210.25]. See also Carter, above n 7, [s 210.1], [s 211.1].

⁹ Where the offence did occur on a consensual basis, the other consenting party could be considered an accomplice to the offence: see, eg, *R v Tate* [1908] 2 KB 680. As an accomplice, that person could also be charged with and convicted of the offence.

¹⁰ In recommending the legalisation of homosexual offences, the Parliamentary Criminal Justice Committee observed that:

An act done in private, such as sodomy, is unlawful between consenting couples whether they are homosexual or heterosexual. The difference in attention given to it by the criminal justice system ... resides in the community's perception of homosexual behaviour. Whilst sections of the community condemn sodomy, its policing is almost exclusively associated with homosexual men: See *PCJC Report No 2* (1990) 15.

¹¹ *Criminal Code and Another Act Amendment Act 1990* (Qld) ss 5–7 (commenced 19 January 1991).

¹² See now Criminal Code (Qld) s 208, set out in full in Appendix B below.

Other specific offences

3.10 Prior to the date of legalisation, homosexual activity was also the subject of criminal offences in sections 336 and 337 of the Criminal Code.

From Criminal Code, Chapter 30 (Assaults) — these offences were not substantively changed in 1991¹³		
Section 336	A person assaults another person with intent to have carnal knowledge of him or her against the order of nature.	This offence applied where a person was assaulted with intent, and therefore in non-consensual situations.
Section 337	A person unlawfully and indecently assaults a male person.	This offence applied where a male was unlawfully and indecently assaulted, and therefore generally in non-consensual situations.

* The offences above are set out in full in Appendix B to this Report

3.11 It was a crime under former section 336 of the Criminal Code to assault another person with intent to have carnal knowledge of him or her ‘against the order of nature’. This offence was limited to conduct occurring between males, or between a male and a female. It did not substantively change at the date of legalisation.¹⁴

3.12 Under former section 337, it was a crime to unlawfully and indecently assault a ‘male person’. On 3 July 1989, section 337 was replaced with the generally applicable offence of ‘indecent assault’, under which it was a crime to unlawfully and indecently assault ‘another’ person, or to procure another person without their consent to commit or witness an act of gross indecency. An indecent assault or act of gross indecency could consist of an act of ‘carnal knowledge against the order of nature’, with the maximum penalty in that instance being life imprisonment.¹⁵ This offence did not substantively change at the date of legalisation.¹⁶

3.13 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.¹⁷

¹³ Although these offences were not substantively amended at the date of legalisation, they have since undergone amendments. On 1 July 1997, s 336 was amended to refer to the offence of assault with intent to commit rape and s 337 was amended to refer to the offence of sexual assault: *Criminal Law Amendment Act 1997* (Qld) ss 57–58. On 27 October 2000, s 336 was relocated and renumbered as s 351, and s 337 was omitted and s 352 (sexual assaults) was inserted: *Criminal Law Amendment Act 2000* (Qld) ss 20–21, 26.

The current equivalent offences are ‘assault with intent to commit rape’ and ‘sexual assault’ in Criminal Code (Qld) ss 351–352, set out in Appendix B below.

¹⁴ See *Criminal Code and Another Act Amendment Act 1990* (Qld) s 12 and n 6 in Appendix B below.

¹⁵ See Criminal Code (Qld) s 337, as amended by the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 28 (commenced 3 July 1989).

¹⁶ See *Criminal Code and Another Act Amendment Act 1990* (Qld) s 13 and n 7 in Appendix B below.

¹⁷ Assault also includes instances where a person threatened or attempted by any bodily act or gesture to apply force, with an actual or apparent ability to effect this threat: Criminal Code (Qld) s 245 (Act as passed). See now, in similar terms, Criminal Code (Qld) s 245.

Given the element of assault, prosecutions for these offences would generally have involved an element of non-consensual sexual contact.¹⁸

3.14 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.¹⁹ This was consistent with the approach of the Criminal Code to protecting children from sexual offending.²⁰ 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.

Attempts, conspiracy and parties to an offence

3.15 Since its enactment, the Criminal Code has provided (and continues to provide) that:

- It is an offence to attempt to commit an offence,²¹ or to attempt to procure another person to do an act or make an omission, the result of which would be the commission of an offence.²²
- It is an offence for a person to conspire with another person to commit a crime or another offence.²³ Similarly, if two persons jointly pursue an unlawful common purpose and in doing so commit an offence, they may each be deemed to have committed the offence.²⁴

¹⁸ As noted at n 9 above, where consensual sodomy occurred, both parties to that offence could be charged and convicted. It has been suggested that some men may have pleaded guilty to a non-consensual sexual offence (such as under ss 336 or 337 of the Criminal Code (Qld)) in order to protect their consenting partner from prosecution: *LGBTI Legal Service Discussion Paper* (2015) 6.

¹⁹ Between 20 December 1946 and 2 July 1989, the definition of assault included a statement that ‘no male person under the age of seventeen years shall be deemed capable of consenting to any act by any other male person which but for such consent would be an indecent assault’: Criminal Code (Qld) s 245, as amended by the *Criminal Law Amendment Act 1946* (Qld) s 5 (commenced 20 December 1946). This deeming provision was removed by the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 24 (commenced 3 July 1989).

²⁰ Whilst the deeming provision in s 245 was in existence, the Criminal Code (Qld) protected male children from sexual offending by providing (in part) that it was an offence to unlawfully and indecently deal with a boy under 14 years of age (until 1 July 1975) and subsequently that it was an offence to unlawfully and indecently deal with a boy under 17 years of age: Criminal Code (Qld) s 210; *Criminal Code and Justices Act Amendment Act 1975* (Qld) s 6. On the same date as the deeming provision in s 245 was removed (that is, 3 July 1989), former s 210 was repealed and the offence of indecent treatment of children under 16 was inserted: see *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 12.

²¹ Criminal Code (Qld) s 535. The Queensland Court of Appeal has recently stated in obiter that, even where a specific ‘attempt offence’ exists (in this case, attempted robbery) a defendant may still be charged using a combination of the offence (in this case, robbery) and s 535: *R v Agius* [2015] QCA 277, [15].

²² Criminal Code (Qld) s 539.

²³ Criminal Code (Qld) ss 541–542. See also s 543, which provides (and provided) that a person commits a misdemeanour if they conspire with another person to effect one of a number of purposes, including an unlawful purpose.

²⁴ Criminal Code (Qld) s 8.

- A person can be deemed to have taken part in and therefore be found guilty of an offence if the person does or omits to do any act for the purpose of enabling or aiding another person to commit the offence, aids another person in committing the offence, or counsels or procures any other person to commit the offence.²⁵

The offences that should be included in the proposed expungement scheme (the 'eligible offences')

3.16 In the Consultation Paper, the Commission sought submissions about which offences should be included in the proposed expungement scheme.²⁶ This included a consideration of whether only offences constituted by sexual activity or also other more general offences should be included,²⁷ and whether attempts and other types of involvement in offending should be included.

Other jurisdictions

3.17 Generally, the expungement legislation in other jurisdictions includes offences similar to the repealed offences in Queensland, and identifies these offences either specifically or by description.²⁸

3.18 The Australian Capital Territory and New South Wales also include the former offence of 'indecent assault on a male'.²⁹ However, a person committed this offence if he or she committed 'an indecent assault upon a male person of whatever age, with or without the consent of such person'.³⁰ This contrasts with former sections 336 and 337 in Queensland, which were generally limited to non-consensual situations.

3.19 The draft expungement legislation in Tasmania includes the offence of 'indecent practices between males', which encompassed both acts of gross indecency with a male person and indecent assaults upon a male person.³¹

3.20 Rather than including specific offences, Victoria's expungement legislation describes the types of offences to which the scheme applies, and gives some legislative examples of specific historical offences that fall within the scope of that

²⁵ Criminal Code (Qld) s 7(1)(b)–(d).

²⁶ QLRC Consultation Paper No 74 (2016), Q-2.

²⁷ See also the discussion of 'public morality offences' later in this chapter.

²⁸ *Spent Convictions Act 2000* (ACT) s 19A (definition of 'historical homosexual offence' para (a)); *Criminal Records Act 1991* (NSW) s 19A (definition of 'eligible homosexual offence' paras (a)–(b)); *Spent Convictions Act 2009* (SA) s 3(1) (definition of 'designated sex-related offence'); *Sentencing Act 1991* (Vic) s 105(1) (definitions of 'historical homosexual offence' and 'sexual offence'); *Protection of Freedoms Act 2012* (UK) c 9, s 92(1). Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 3(1) (definition of 'historical homosexual offence' para (a)) includes similar offences.

²⁹ *Spent Convictions Act 2000* (ACT) s 19A (definition of 'historical homosexual offence' para (a)(iii)); *Criminal Records Act 1991* (NSW) s 19A (definition of 'eligible homosexual offence' para (a)).

³⁰ *Crimes Act 1900* (ACT) s 81 (as at 18 December 1984); *Crimes Act 1900* (NSW) s 81 (as at 7 June 1984).

³¹ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 3(1) (definition of 'historical homosexual offence' para (a)); *Criminal Code Act 1924* (Tas) s 123 (as at 13 May 1997).

description.³² An example given in the legislation of a ‘sexual offence’ eligible under the scheme is the offence of ‘indecent assault on a male person’ under section 65(3) of the former *Crimes Act 1928 (Vic)*.³³

3.21 Some jurisdictions also make provision for the inclusion of more general criminal offences by which sexual activity with a person of the same sex could be punished. For example, in Victoria the legislation applies to an offence ‘by which any form of homosexual conduct ... could be punished’.³⁴ Some other jurisdictions have the capacity to add such offences to their scheme by regulation.³⁵

3.22 The expungement schemes in other jurisdictions also apply to offences of attempting, or conspiring or inciting, to commit any of the eligible offences.³⁶

Submissions

3.23 A number of respondents expressly stated that the proposed expungement scheme should include the repealed offences (under sections 208(1) and (3), 209 and 211 of the Criminal Code), including sodomy and indecent practices between males.³⁷ The LGBTI Legal Service Inc and others³⁸ submitted that these should be restricted to the offences as they were in force up until the date of legalisation. Respondents also submitted that the expungement scheme should include offences of attempting, conspiring to commit or otherwise taking part in any such offence.³⁹

³² See *Sentencing Act 1991 (Vic)* s 105(1) (definitions of ‘historical homosexual offence’, ‘public morality offence’ and ‘sexual offence’).

³³ See *Sentencing Act 1991 (Vic)* s 105(1), which defines ‘sexual offence’ to mean ‘an offence as 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’. Section 65(3) of the former *Crimes Act 1928 (Vic)* captured several offences, namely, attempt to commit buggery, assault with intent to commit buggery, and indecent assault upon any male person.

³⁴ *Sentencing Act 1991 (Vic)* s 105(1) (definition of ‘sexual offence’).

³⁵ *Spent Convictions Act 2000 (ACT)* s 19A (definition of ‘historical homosexual offence’ para (b)); *Criminal Records Act 1991 (NSW)* s 19A (definition of ‘eligible homosexual offence’ para (d)). Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 3(1) (definition of ‘historical homosexual offence’ para (b)) makes similar provision.

³⁶ *Spent Convictions Act 2000 (ACT)* s 19A (definition of ‘historical homosexual offence’ para (c)); *Criminal Records Act 1991 (NSW)* s 19A (definition of ‘eligible homosexual offence’ para (e)); *Spent Convictions Act 2009 (SA)* s 3(1) (definitions of ‘designated sex-related offence’ and ‘sex offence’) and *Spent Convictions Regulations 2011 (SA)* reg 5(d); *Sentencing Act 1991 (Vic)* s 105(1) (definition of ‘historical homosexual offence’ paras (b)–(d)); *Protection of Freedoms Act 2012 (UK)* c 9, s 101(5). Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 3(1) (definition of ‘historical homosexual offence’ para (c)) also includes these offences.

³⁷ Submissions 3, 5, 8, 9, 11, 12, 15. See also *LGBTI Legal Service Discussion Paper (2015)* 3, 19, Rec 2.1(a) to the same general effect, and for which the submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support.

³⁸ The LGBTI Legal Service Inc made a joint submission with Caxton Legal Centre Inc, Human Rights Law Centre, Queensland Aids Council, Queensland Association of Independent Legal Services Inc (now Community Legal Centres Queensland), and Townsville Community Legal Service Inc.

³⁹ Submissions 3, 5, 8, 9, 15. Queensland State Archives (‘QSA’) also observed that consideration could be given to the inclusion of such offences.

3.24 Several respondents stated more generally (or in some instances, in addition to the specific inclusion of the repealed offences) that a broad range of offences, which would incorporate these repealed offences, should be included.⁴⁰

3.25 Some other respondents expressed general support for the creation of an expungement scheme in relation to ‘historical gay sex offences’, without specifying which offences this should include.⁴¹

3.26 Where relevant, these submissions are discussed further in later parts of this chapter.

The Commission’s view

3.27 It is appropriate to identify each of the repealed offences (namely, former sections 208(1), 208(3), 209 and 211 of the Criminal Code) — as they were in force at any time up to the date of legalisation — as an ‘historical gay sex offence’ that should be eligible under the proposed expungement legislation (an ‘eligible offence’). Prior to the date of legalisation, these provisions could be used to prosecute activity that was consensual, occurring between adults and/or in private. It is appropriate that convictions (or charges) for these repealed offences are eligible for expungement.

3.28 It is also appropriate to identify as an eligible offence any offence of attempting or conspiring to commit, or enabling, aiding, counselling or procuring another person to commit, any of those repealed offences. It is appropriate that such an offence is included to the same extent as the primary offence to which it relates.

3.29 However, 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.⁴² In addition, the focus of the deeming provision mentioned at [3.14] above appears to have been the protection of children from sexual abuse or exploitation,

⁴⁰ Submissions 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, 15.

⁴¹ Submissions 1, 4, 14.

⁴² The Commission notes (at n 18 above) 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 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. (note omitted)

rather than addressing consensual homosexual activity between adults.⁴³ Further, these offences were not substantively altered at the date of legalisation, and there are equivalent offences under the current Queensland law.

3.30 Apart from the repealed offences already identified, it does not appear that there were other historical offences in the Criminal Code or otherwise under which homosexual activity between consenting adults in private was prosecuted. However, to provide for the possibility of adding other offences that might later be considered appropriate for inclusion in the scheme, the proposed expungement legislation should provide for other offences, constituted by a person engaging in consensual sexual activity with a person of the same sex, to be made eligible offences.

Definition of the eligible offences

3.31 In the Consultation Paper, the Commission sought submissions on how the eligible offences under the proposed expungement scheme should be defined and identified.⁴⁴

Other jurisdictions

3.32 Other jurisdictions have taken varied approaches to this issue. These include identifying specific former offences, providing for regulations to identify relevant offences, and describing the types of offences that are eligible.

Identification of specific offences

3.33 In the Australian Capital Territory, New South Wales and England and Wales, the expungement legislation defines the eligible offences by identifying a number of specific former offences.⁴⁵ These generally include former offences of buggery and indecent acts between males. An offence of attempting, or of conspiracy or incitement, to commit such an offence is also included.⁴⁶ The draft expungement legislation in Tasmania also adopts this approach.⁴⁷

⁴³ The Commission notes the discussion at [3.14] above that a male person may have been charged under former s 337 where another male person involved consented to the activity but was deemed incapable of giving such consent because he was under 17 years of age. Due to the change occurring in 1989, where the relevant age was decreased from 17 to 16 years (see n 20 above), such activity with a 16-year-old would no longer be criminal (unless consent was otherwise vitiated). However, the focus of the deeming provision (particularly when considered in conjunction with s 210 of the Criminal Code (Qld), which criminalised unlawful and indecent dealings with boys under 17 years) appears to have been directed toward the protection of children from sexual offending, rather than the prohibition of consensual adult homosexual activity.

⁴⁴ *QLRC Consultation Paper No 74* (2016), Q-2.

⁴⁵ *Spent Convictions Act 2000* (ACT) s 19A (definition of 'historical homosexual offence' para (a)); *Criminal Records Act 1991* (NSW) s 19A (definition of 'eligible homosexual offence' paras (a)–(b)); *Protection of Freedoms Act 2012* (UK) c 9, ss 92(1), 101(3)–(7).

⁴⁶ *Spent Convictions Act 2000* (ACT) s 19A (definition of 'historical homosexual offence' para (c)); *Criminal Records Act 1991* (NSW) s 19A (definition of 'eligible homosexual offence' para (e)); *Protection of Freedoms Act 2012* (UK) c 9, ss 92(1), 101(5)–(7). In England and Wales, this also includes aiding, abetting, counselling or procuring the commission of an offence.

⁴⁷ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 3(1) (definition of 'historical homosexual offence' paras (a), (c)).

Offences prescribed by regulation

3.34 In the Australian Capital Territory and New South Wales, in conjunction with the identification of specific offences, the expungement legislation applies to offences that are prescribed by regulation.⁴⁸ The draft expungement legislation in Tasmania also includes offences prescribed by regulation.⁴⁹

3.35 In the Australian Capital Territory, this is restricted to a prescribed offence to the extent that it is constituted by a person engaging in any form of sexual activity with a person of the same sex or that it is a public morality offence.⁵⁰

3.36 An offence of attempting, or of conspiracy or incitement, to commit an offence prescribed by regulation is also included within those expungement schemes (including the draft expungement legislation in Tasmania).⁵¹

3.37 To date, no offences have been prescribed by regulation in the Australian Capital Territory or New South Wales.

3.38 This approach was also considered in South Australia, but rejected. It was initially proposed that a regulation-making power be included to cover offences that existed at the time when the age of consent for males in that jurisdiction was 21. However, concerns were raised that those offences may have involved sexual activity that was non-consensual or with a person under the age of consent, and that the proposed legislation may have been ineffective to limit their expungement.⁵² To address those concerns, the regulation-making power was removed and additional descriptive criteria were inserted instead.⁵³

Description of relevant offences

3.39 In South Australia and Victoria, the offences to which the expungement legislation applies are defined by description.

3.40 In South Australia, the expungement legislation applies to a 'designated sex-related offence', which is defined as:⁵⁴

⁴⁸ *Spent Convictions Act 2000* (ACT) s 19A (definition of 'historical homosexual offence' para (b)); *Criminal Records Act 1991* (NSW) s 19A (definition of 'eligible homosexual offence' para (d)).

⁴⁹ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 3(1) (definition of 'historical homosexual offence' para (b)).

⁵⁰ *Spent Convictions Act 2000* (ACT) s 19A (definition of 'historical homosexual offence' para (b)). Public morality offences are discussed later in this chapter.

⁵¹ *Spent Convictions Act 2000* (ACT) s 19A (definition of 'historical homosexual offence' para (c)); *Criminal Records Act 1991* (NSW) s 19A (definition of 'eligible homosexual offence' para (e)); draft Historical Homosexual Convictions Bill 2016 (Tas) cl 3(1) (definition of 'historical homosexual offence' para (c)).

⁵² South Australia, *Parliamentary Debates*, House of Assembly, 14 November 2013, 7859 (V Chapman, Deputy Leader of the Opposition); and Legislative Council, 28 November 2013, 6018–19 (SG Wade).

⁵³ South Australia, *Parliamentary Debates*, Legislative Council, 28 November 2013, 6020–21 (SG Wade). The relevant descriptive criteria appears in the *Spent Convictions Act 2009* (SA) s 3(1) (definition of 'designated sex-related offence' para (b)).

⁵⁴ *Spent Convictions Act 2009* (SA) s 3(1) (definition of 'designated sex-related offence').

- (a) a sex offence [as prescribed by regulation]⁵⁵—
 - (i) that is constituted by consenting adults engaging in sexual intercourse, or another form of sexual activity; or
 - (ii) that is constituted by an adult procuring another adult to engage in consensual sexual intercourse, or another form of consensual sexual activity; or
- (b) an offence where—
 - (i) the offence is constituted by consenting persons of the same sex engaging in sexual intercourse, or another form of sexual activity; and
 - (ii) at least 1 of them is 16 or 17 years of age (and none of them is younger); and
 - (iii) their actions would not have constituted an offence if they were not of the same sex; and
 - (iv) no person engaged in the activity was in a position of authority in relation to another person engaged in the activity (note added)

3.41 In Victoria, the expungement legislation adopts a broad descriptive definition, applying to ‘an offence as 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’.⁵⁶ The legislation also applies to an offence of attempting to commit, of being involved in, or of conspiracy or incitement to commit, such an offence.⁵⁷

Submissions

3.42 Generally, respondents were of the view that Queensland’s proposed expungement scheme should take a broad approach to identifying the offences that are to be eligible under the scheme. The majority of respondents suggested some combination of the approaches taken in other jurisdictions⁵⁸ and some indicated that the definition should clearly encompass attempting, conspiring or otherwise being involved in any included offence.⁵⁹

⁵⁵ The offences prescribed as ‘sex offences’ include offences against the *Criminal Law Consolidation Act 1935* (SA) pt 3 divs 11 (rape and other sexual offences), 11A (child exploitation material and related offences), 12 (commercial sexual services and related offences), and 13 (miscellaneous sexual offences); offences against the *Summary Offences Act 1953* (SA) s 23(2) (gross indecency); substantially similar offences in corresponding previous enactments; and offences of aiding, abetting, counselling or procuring such an offence: *Spent Convictions Act 2009* (SA) s 3 (definition of ‘sex offence’); *Spent Convictions Regulations 2011* (SA) reg 5.

⁵⁶ *Sentencing Act 1991* (Vic) s 105(1) (definitions of ‘historical homosexual offence’ and ‘sexual offence’). Buggery and indecent assault on a male person under, respectively, s 68(2) of the former *Crimes Act 1958* (Vic) and s 65(3) of the former *Crimes Act 1928* (Vic) are given as examples to s 105(1) of offences that would fall within this definition.

⁵⁷ *Sentencing Act 1991* (Vic) s 105(1) (definition of ‘historical homosexual offence’ paras (b)–(d)).

⁵⁸ Submissions 2, 3, 5, 7, 8, 9, 10, 11, 13, 15.

⁵⁹ Submissions 3, 5, 8, 9, 15. QSA also observed that consideration could be given to the inclusion of such offences.

3.43 The Bar Association of Queensland (the 'BAQ') expressed support for 'a broad multi-faceted definition of the offences which potentially fall within the scheme'. The BAQ submitted that any definition should include reference to specific offences (such as sodomy) but should also encompass a broader approach that would capture 'other (undefined) offences'.

3.44 The Anti-Discrimination Commission Queensland (the 'ADCQ') supported a similar approach, submitting that:

Homosexual activity may have been the subject of charges other than those under the *Criminal Code* that were repealed in 1990. With the objective of equality before the law for people with convictions relating to homosexual conduct that is no longer unlawful, it is important that the scheme covers a broad range of offences. Specific offences should be identified, and there should also be a broad definition so that convictions for homosexual conduct that was the subject of more generic offences are captured by the scheme.

3.45 Several historians from the Griffith Criminology Institute also supported a broader approach, suggesting that the scheme incorporate both criminal offences that were explicitly defined as relating to same-sex relationships and other relevant offences.

3.46 The LGBTI Legal Service Inc and others submitted that 'a broad approach should be taken in identifying the types of offences ... covered by the scheme'. These respondents noted that it may be difficult to identify all offences used to prosecute individuals regarding homosexual and gender-diverse activity, and that people may have been prosecuted under 'generic indecency offences' or other offences that are not specific to homosexuality. They submitted that the scheme should be broad and flexible to avoid inappropriately excluding potential applicants, and further stated that '[w]hile this may raise the concern of "opening the floodgates", experience from Victoria and New South Wales suggests that the number of applicants is not likely to be large'.⁶⁰

3.47 A number of respondents submitted that Queensland's expungement scheme should take a combined approach to identifying the eligible offences; including elements of the specific, regulatory and descriptive approaches.⁶¹

3.48 Specifically, the LGBTI Legal Service Inc and others, a group of academics from the TC Beirne School of Law, and a member of the public⁶² submitted that the relevant offences should be defined by way of a combined approach that includes the repealed offences, offences prescribed by regulation and offences identified by description.

3.49 In this respect, the group of academics from the TC Beirne School of Law submitted that the inclusion of specific offences alone would provide clarity, but that this would be outweighed by the unfair potential exclusion of relevant convictions;

⁶⁰ See also in relation to this paragraph and [3.48] below, *LGBTI Legal Service Discussion Paper* (2015) 3, 19, Rec 2.1(a) to the same general effect, and for which the submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support.

⁶¹ Submissions 3, 9, 15.

⁶² Submission 3.

although it was also noted that a regulation-making power would improve the flexibility of the scheme. They also submitted that a wider descriptive approach would ensure that the scheme does not exclude relevant offences, although it was noted that this could reduce the clarity and efficiency of the scheme.

3.50 The member of the public similarly favoured a combined approach because 'it would be difficult to list, from the outset, all relevant offences'.⁶³

3.51 In contrast, the Castan Centre for Human Rights Law, the Queensland Council for Civil Liberties and an academic from Monash University submitted that Queensland's expungement scheme should follow the broad descriptive approach taken in Victoria.

3.52 The Castan Centre for Human Rights Law noted anecdotal evidence suggesting that charges were brought against homosexual males under both the repealed offence provisions and more general offences, and on this basis expressed support for the inclusion of a broad scope of offences within the expungement scheme. It submitted that this broad scope, tempered by appropriate safeguards such as the exclusion of acts that would constitute an offence under the current law, would 'help to ensure that no victims of these discriminatory convictions are denied the redress to which they have a right under international human rights law'.⁶⁴

3.53 The academic from Monash University described Victoria as having a 'flexible approach' which is a 'model of best practice'. This academic submitted that such a flexible approach should be adopted in Queensland in order to avoid exacerbating the systemic discrimination of homosexual people. Further, it was submitted that the use of a flexible approach would avoid 'inadvertently excluding relevant offences'. It was therefore submitted that Queensland should utilise a combined approach, where some specific offences are listed alongside a description of included offences.

3.54 A number of these respondents who favoured a broader or descriptive approach also submitted that public morality offences should be included in the scheme.⁶⁵

3.55 Conversely, Queensland State Archives ('QSA') favoured a more limited approach that would involve the identification of specific offences rather than the use of a general description, on the basis that 'this balances the social justice outcome of including all relevant offences, by later amendment where necessary, with the practical considerations of successfully locating records'.

⁶³ Ibid. It was submitted that it would be difficult to list all relevant offences 'where people were prosecuted primarily because of who they were'.

⁶⁴ This respondent referred to the *International Covenant on Civil and Political Rights* art 2(3) and the *LGBTI Legal Service Discussion Paper* (2015) 19.

⁶⁵ Submissions 3, 5, 8, 9, 11, 12, 13, 15. Some of those respondents also considered that the scheme should include prosecutions motivated by sexual orientation. These issues are discussed later in this chapter in the context of public morality offences.

The Commission's view

3.56 The definition of the eligible offences can best be achieved by a combined approach, such as has been adopted in the Australian Capital Territory and New South Wales (and proposed in Tasmania), to cover specific offences and offences prescribed by regulation.

3.57 First, the proposed expungement legislation should define as an eligible offence each of the repealed offences identified at [3.27] above; namely sections 208(1), 208(3), 209 and 211 of the Criminal Code (as in force at any time up to the date of legalisation).⁶⁶ Second, it should define as an eligible offence any offence that is prescribed by regulation.⁶⁷ Finally, it should define an eligible offence to include the related offences of attempting or conspiring to commit, and enabling, aiding, counselling or procuring another person to commit any of the eligible offences.

3.58 A difficulty for the proposed expungement legislation is in identifying every historical offence (or limited instances thereof)⁶⁸ that may be of relevance and, on balance, justified in the particular circumstances as being an eligible offence. The combined approach the Commission recommends has the advantage of specifying the offences that are most relevant to the expungement of convictions (or charges) for historical gay sex offences, whilst creating flexibility to include other (limited) offences by regulation if necessary and justified in a particular instance.

3.59 Some offences prescribed as eligible offences by regulation could be offences of general application. To include such offences without restriction would be too broad. In order to ensure that the scheme is appropriately limited, offences prescribed by regulation should be defined as eligible offences only where the conduct occurred before the date of legalisation and only to the extent the offence was constituted by a person engaging in any form of sexual activity with another person of the same sex.⁶⁹

3.60 The Commission has considered whether to adopt a descriptive approach, such as that introduced in Victoria. In support of the Victorian approach, it was explained that:⁷⁰

The scheme has been drafted broadly to allow those who believe they have such a conviction on their record to apply to have it expunged. A historical homosexual offence can be any sexual offence, or any public morality offence, that was used to punish homosexual behaviour.

⁶⁶ Former ss 208(1), (3) and 209 of the Criminal Code (Qld) were also capable of applying to activity occurring between a male and a female, however, it is not intended that the proposed expungement legislation will apply to heterosexual activity: see further [3.177] below.

⁶⁷ See further [7.2]–[7.3] and Rec 7-1 below.

⁶⁸ See, for example, the discussion of Criminal Code (Qld) s 337 at [3.14] above.

⁶⁹ As discussed at [3.76]–[3.78] and Chapter 4 below, the Commission intends that convictions (and charges) for eligible offences, including eligible offences prescribed by regulation, will be expunged only where particular criteria are met.

⁷⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 2014, 3352 (R Clark, Attorney-General).

The bill does not exhaustively list these eligible offences because of the large number of relevant offences that have applied over the years, and the varied range of offences that have been used to target homosexual behaviour. ... These offences have been defined broadly to ensure that the scheme can consider convictions for behaviour ranging from loitering at a known gay beat, to public displays of affection between same-sex couples.

3.61 This descriptive approach is not suited to the proposed expungement legislation in Queensland. Under such an approach, former sections 336 and 337 of the Criminal Code would be brought within the scheme. However, the Commission considers that these offences should not be eligible offences.⁷¹ The Commission also observes that, in Victoria, offences are defined in both the common law and legislation, whilst in Queensland criminal offences have been codified. As a result, there is less difficulty in Queensland in identifying relevant offences and listing them in the proposed expungement legislation.

3.62 The combination of identifying the specific repealed offences and allowing for the inclusion of additional criminal offences by regulation will adequately capture the eligible offences.

Limitations on the eligible offences

3.63 In the Consultation Paper, the Commission sought submissions on whether limiting factors such as age, consent and lawfulness should be included in the definition of the offences to which the proposed expungement scheme applies, or whether they should be included as criteria for expungement.⁷²

3.64 The repealed offences (namely, former sections 208(1), 208(3), 209 and 211 of the Criminal Code) applied to sexual activity between adult males regardless of the participants' ages and whether or not the relevant sexual activity was consensual and done in private.⁷³

3.65 Accordingly, a conviction under any of those offences may relate to consensual sexual activity between two people over the current age of consent or it might relate to circumstances in which the other party was under the age of consent⁷⁴ or where the sexual activity was non-consensual.⁷⁵

3.66 Under the current law in Queensland, a number of offences prohibit sexual activity that is non-consensual or that involves a person under the age of consent.

⁷¹ See [3.29] above. Cf [3.20] above as to the inclusion of the offence of 'indecent assault on a male person' within the Victorian expungement legislation.

⁷² *QLRC Consultation Paper No 74* (2016), Q-2. See Chapter 4 below as to what the criteria should be.

⁷³ See the discussion of 'repealed offences' earlier in this chapter.

⁷⁴ See, eg, *R v Witham* [1962] Qd R 49, in which the accused was convicted of sodomising his 14-year-old daughter.

⁷⁵ See, eg, *R v Howie* [1978] Qd R 386 and *R v Williams; Ex parte Attorney-General* [1984] 1 Qd R 353, relating to convictions under s 208 where a prisoner had sodomised a fellow prisoner without his consent.

They include unlawful sodomy, indecent treatment, rape and sexual assault.⁷⁶ The age of consent is generally 16 years of age, but for sodomy it is 18 years of age.⁷⁷

3.67 It is apparent that there is a need to place appropriate limitations on an expungement scheme, to ensure that a conviction (or charge) for an eligible offence is not expunged in circumstances where it is not appropriate to do so because the behaviour would amount to an offence under the current law.

3.68 This was noted in Victoria, where it was stated that:⁷⁸

Although allowing historical convictions to be expunged is simple in concept, it presents a legally complex problem. The offences that have over the years been used to charge those engaged in consensual homosexual activities are often the same offences that were used to charge cases of truly criminal sexual assault. We cannot tell simply from looking at a person's criminal record whether the convictions on that record relate to consensual adult behaviour, or conduct that would still be criminal today. It is very important that this scheme not expunge the criminal records of those who have committed serious criminal offences that remain crimes today.

Other jurisdictions

3.69 All jurisdictions with expungement legislation have included limitations on the expungement of convictions for historical gay sex offences. With the exception of South Australia, this is done by the inclusion of criteria for expungement. That is, the offences to which the expungement schemes apply are included in broader terms, but convictions for those offences are expunged only if the relevant criteria are met.⁷⁹ The draft expungement legislation in Tasmania takes the same approach.⁸⁰

3.70 In contrast, in South Australia, the expungement legislation extends to convictions for a 'designated sex-related offence', which is defined by description. The description includes limiting factors such as age and consent; for example, the legislation applies to a sex offence 'that is constituted by consenting adults engaging in sexual intercourse, or another form of sexual activity'.⁸¹

⁷⁶ See, respectively, Criminal Code (Qld) ss 208, 210, 349, 352. This is not an exhaustive list. See also [4.5]–[4.6] below.

⁷⁷ See Criminal Code (Qld) ss 208, 210(1)(a), 215(1). See [4.6] below as to the age of consent, and Chapter 7 below as to proposed changes to the age of consent for sodomy by the Health and Other Legislation Amendment Bill 2016 (Qld).

⁷⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 2014, 3352 (R Clark, Attorney-General).

⁷⁹ See *Spent Convictions Act 2000* (ACT) s 19E; *Criminal Records Act 1991* (NSW) s 19C(1); *Sentencing Act 1991* (Vic) s 105G(1); *Protection of Freedoms Act 2012* (UK) c 9, s 92(3).

⁸⁰ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 8(1).

⁸¹ *Spent Convictions Act 2009* (SA) s 3(1) (definition of 'designated sex-related offence' para (a)), set out at [3.40] above.

Submissions

3.71 All of the respondents that addressed this issue were of the view that Queensland's expungement scheme should include relevant limiting factors as criteria for expungement, rather than as part of the definition of an eligible offence.⁸²

3.72 A group of academics from the TC Beirne School of Law submitted that 'in order to ensure the scheme does not *prima facie* exclude relevant offences, [limiting] factors should be included in the criteria for expungement'. These academics suggested that the inclusion of relevant factors in the definition of the offence may narrow the scheme and minimise the use of resources, but could result in some relevant offences being ineligible for expungement and therefore result in unfairness.

3.73 Similarly, an academic from Monash University noted that criteria such as age and consent may not be relevant to all offences, and that the inclusion of criteria appropriately 'allows for a wide net to be cast' with regard to the offences included in the scheme.

3.74 The BAQ submitted that:⁸³

salient factors such as age or consent should be addressed in the exercise of the discretion to grant expungement rather than be built into the definition of the offences which come within the scheme. This is because factors such as age or consent or lack thereof may not be properly reflected in the character of the charges which have given rise to historic convictions.

3.75 The LGBTI Legal Service Inc and others similarly submitted that limiting factors should be addressed separately in order to avoid applications being inappropriately excluded at an early stage. These respondents also considered that this would ensure that applicants are not discouraged from making an application, stating that:

To reduce as much as possible the barriers and impact on the applicant, it is important to not place the onus on the applicant to prove, or require them to turn their mind to these questions [of limiting factors such as age, consent and lawfulness] at the initial application stage ... [T]he scheme should be accessible to applicants without legal knowledge or legal advisors, and as such, applicants should not be required to address questions of lawfulness in their application.

In addition, in light of the experience of Victoria and New South Wales, it is important to ensure the eligibility for making an application is clear to encourage potential applicants to make use of the scheme.

⁸² Submissions 3, 5, 8, 9, 11, 15. In relation to this paragraph and [3.75] below, see also *LGBTI Legal Service Discussion Paper* (2015) 3, 22, Rec 2.2 to the same general effect, and for which the submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support.

⁸³ This respondent gave several examples of how relevant factors may not be properly reflected in charges. It noted that discriminatory practices and attitudes existed within society and were reflected in the police service, and suggested that this may have led to a lack of consent being presumed by police, or that discriminatory attitudes may have informed decisions regarding whether or not to charge a person in relation to non-exploitative sexual activity. The BAQ submitted that including criteria for expungement would allow these circumstances to be considered. See further the discussion of public morality offences later in this chapter.

The Commission's view

3.76 The Commission prefers a model where the eligible offences under the proposed expungement legislation are specified separately from the factors or criteria that limit expungement to convictions (or charges) for activity between consenting adults.⁸⁴

3.77 This will enable an application to be made for any conviction (or charge) for any eligible offence. Consideration of whether it is appropriate to expunge that particular conviction (or charge) will involve the application of the limiting factors or criteria.

3.78 This approach will ensure that there is no confusion under the proposed legislation as to the offences for which a conviction (or charge) can be expunged.

PUBLIC MORALITY OFFENCES

3.79 In the present context, the term 'public morality offences' refers to offences that are intended to maintain public decency or morality.⁸⁵ Generally, public morality offences (sometimes also referred to as 'public order offences') are designed to prevent disorderly, offensive or indecent behaviour occurring in public.⁸⁶ A common example of a public morality offence is the offence of public nuisance.⁸⁷

3.80 Anecdotal evidence suggests that, historically, some public morality offences were used to prosecute conduct that was relevant or connected to homosexual or same-sex activity.⁸⁸ However, these public morality offences were general in nature and not used or intended to be used exclusively to punish homosexual behaviour. In Queensland, there were no public morality offences that applied exclusively to homosexual people or conduct.

3.81 Unlike Queensland, Victorian legislation historically included public morality offences that were specific to homosexual behaviour, which prohibited loitering or

⁸⁴ See Chapter 4 and Rec 4-1 below as to what the criteria should be.

⁸⁵ See *Spent Convictions Act 2000* (ACT) s 19A (definition of 'public morality offence'); *Sentencing Act 1991* (Vic) s 105(1) (definition of 'public morality offence').

⁸⁶ See generally Crime and Misconduct Commission, 'Policing Public Order: A Review of the Public Nuisance Offence' (Report, May 2008); LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at January 2011), definition of 'public order'.

⁸⁷ See *Summary Offences Act 2005* (Qld) s 6, which provides that a person must not commit a public nuisance offence: s 6(1). A person commits a public nuisance offence if they behave in a way that is disorderly, offensive, threatening or violent and the person's behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public: s 6(2).

⁸⁸ See, eg, M Bull, S Pinto and P Wilson, 'Homosexual Law Reform in Australia' (Trends and Issues in Crime and Criminal Justice No 29, Australian Institute of Criminology, January 1991) 6; B Lane, 'Harassment of homosexuals in Queensland: Private lives, public "crimes"' (1988) 13(4) *Legal Service Bulletin* 154, 156.

soliciting for 'homosexual purposes'.⁸⁹ In the context of the Victorian expungement legislation, it was also recognised more generally that:⁹⁰

many of the offences with which persons were charged were offences that did not relate solely to homosexual activity, even where those offences were used to target homosexual activity.

3.82 There are a number of public morality offences in Queensland that may have been utilised to prosecute homosexual people. Some examples of these offences include wilful exposure, soliciting for immoral purposes or the purpose of prostitution, behaving in an indecent or offensive manner, and doing an indecent act.⁹¹ All of these offences prohibited a person from engaging in the relevant conduct in a public place.

3.83 Those offences continue to be offences under current Queensland law.⁹² Further, all of these offences have retained the 'public' element and continue to prohibit engagement in the relevant conduct in public places.⁹³

⁸⁹ *Summary Offences Act 1966* (Vic) s 18 (as at 28 February 1981). This offence was repealed on 1 March 1981 by the *Crimes (Sexual Offences) Act 1980* (Vic) s 11(2).

⁹⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 2014, 3352 (R Clark, Attorney-General). See also Victoria, *Parliamentary Debates*, Legislative Council, 18 September 2014, 3190 (DM Davis, Minister for Health).

⁹¹ See, respectively, *Vagrants, Gaming and Other Offences Act 1931* (Qld) ss 4(1)(viii)(d), 5(1)(b), 7(e) (incorporating amendments up to 20 December 1971) (repealed); Criminal Code (Qld) s 227(1). It was also an offence to be or be known or reputed as a prostitute and behave in a riotous, disorderly or indecent manner in a public place; or to loiter in, near or within view from a public place for the purpose of prostitution or soliciting for prostitution: *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 5(1)(a), (e) (incorporating amendments up to 20 December 1971) (repealed). The relevant provisions of that Act were not further amended prior to the date of legalisation, and the Criminal Code (Qld) s 227 underwent no substantive amendments prior to the date of legalisation.

As at 3 July 1989, s 217 of the Criminal Code (Qld) provided that it was an offence to procure a person to become a prostitute or to leave Queensland for the purpose of engaging in prostitution elsewhere or leave their residence for the purpose of engaging in prostitution in Queensland or elsewhere: s 217(2)–(3), as inserted by the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 15 (commenced 3 July 1989).

⁹² *Summary Offences Act 2005* (Qld) ss 6 (public nuisance), 9 (wilful exposure); *Prostitution Act 1999* (Qld) s 73 (public soliciting for purposes of prostitution); Criminal Code (Qld) s 227(1) (indecent acts).

⁹³ 'Public place' is relevantly defined in s 3 sch 2 of the *Summary Offences Act 2005* (Qld) to mean 'a place that is open to or used by the public, whether or not on payment of a fee'. This definition is relevant to the offence of wilful exposure in s 9 of that Act. It has been held in relation to that definition that, where the public has an entitlement to use a place, it will be said to be 'open to the public' regardless of whether people can enter without impediment: *Atkinson v Gibson* [2012] 2 Qd R 403, applying *Schubert v Lee* (1946) 71 CLR 589 and *Ryan v Nominal Defendant* (2005) 62 NSWLR 192.

Whether a particular place is a 'public place' is a question of fact: *Hughes v Fingleton* (1977) 17 SASR 433, 439 (Sangster J), cited with approval in *Atkinson v Gibson* [2012] 2 Qd R 403, [9]–[10] (McMurdo P). For example, a person who is inside a private vehicle situated in a public place (such as a public road) has been held to be in a public place: *Forte v Sweeney* [1982] Qd R 127 (Douglas, DM Campbell and WB Campbell JJ); but a person who is inside a structure such as a caravan or tent might not be found to be in a public place 'because of the degree of his insulation therefrom': *Mansfield v Kelly* [1972] VR 744, 745 (Newton J).

In Victoria, there is authority that conduct, although in a public place, is not 'offensive' if it is not capable of being observed except by 'taking some unusual or abnormal action ... as by peeping through a keyhole, using a periscope in order to see through a fanlight, or crouching down and looking under a door': *Inglis v Fish* [1961] VR 607 (Pape J). That case concerned conduct occurring inside a locked cubicle of a public toilet, and has not been applied in Queensland.

3.84 There is also anecdotal evidence that homosexual people were specifically ‘targeted’ by police for prosecution in a number of ways.⁹⁴ This appears to have been particularly prominent in relation to homosexual behaviour in public places, such as public parks and lavatories.⁹⁵

3.85 It was observed in one contemporary account that, whilst prosecutions for homosexual-related behaviour in public had formerly proceeded on less serious offences such as solicitation, they were also sometimes prosecuted as the more serious offences of gross indecency or indecent assault.⁹⁶

3.86 In the Consultation Paper, the Commission sought submissions on whether Queensland’s expungement scheme should be limited to offences constituted by sexual activity, or whether it should also include relevant offences of general application.⁹⁷

Other jurisdictions

3.87 Public morality offences are included in the expungement legislation of some jurisdictions. These offences are generally defined by way of description, and have eligibility criteria attached.

3.88 In the Australian Capital Territory and Victoria, the legislation applies to a ‘public morality offence’, defined as an offence:⁹⁸

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

3.89 The New South Wales expungement legislation takes a different approach. It specifically includes the former offences of riotous, violent or indecent behaviour⁹⁹

⁹⁴ See generally *PCJC Report No 2* (1990) 14–15; G Carbery, *Towards Homosexual Equality in Australian Criminal Law — A Brief History* (Australian Lesbian & Gay Archives Inc, revised ed, 2014) 21; Lane, above n 88, 156; *LGBTI Legal Service Discussion Paper* (2015) 7.

⁹⁵ Lane, above n 88, 156. See also ‘Gay harassment claim’, *The Courier Mail* (Brisbane), 12 April 1981, 6; ‘Govt attacked over arrests of 60 alleged homosexuals’, *The Courier Mail* (Brisbane), 25 February 1988, 13; S McLean, ‘Gays say police flirting in toilets’, *The Sunday Mail* (Brisbane), 27 March 1988, 5; G Roberts, ‘Calls for end to Qld crackdown on gays’, *Sydney Morning Herald* (Sydney), 28 March 1988, 5; G Roberts, ‘Premier to review crackdown orders on homosexuals’, *Sydney Morning Herald* (Sydney), 5 April 1988, 6.

⁹⁶ Lane, above n 88, 156. Lane also observed that this involved the use of ‘entrapment’ by police officers. Lane states that entrapment ‘is a general term used to describe methods used by police to detect the commission of consensual crimes where there is no complaining party’ and that ‘the practice varies from passively affording a person the opportunity to commit the crime to actively inciting or assisting someone to commit the offence’: 156. See also *PCJC Report No 2* (1990) 15. At common law, entrapment does not constitute a substantive defence to a criminal charge: *Ridgeway v The Queen* (1995) 184 CLR 19. It was also held in that case that it is not an abuse of process to prosecute an offender who has been induced to commit an offence in order to procure her or his conviction: 40 (Mason CJ, Deane and Dawson JJ), 46–8 (Brennan J), 63 (Toohey J).

⁹⁷ *QLRC Consultation Paper No 74* (2016), Q-2.

⁹⁸ *Spent Convictions Act 2000* (ACT) s 19A (definition of ‘public morality offence’); *Sentencing Act 1991* (Vic) s 105(1) (definition of ‘public morality offence’). In Victoria, the definition also requires that it be ‘an offence, other than a sexual offence, as in force at any time’.

⁹⁹ *Police Offences Act 1901* (NSW) s 12 (repealed). This provision imposed a penalty on any person ‘guilty of any riotous, violent, or indecent behaviour in any street or public place, or in any police office or police station-house’.

and offensive conduct,¹⁰⁰ but only to the extent that they were constituted by a person engaging in, or procuring another person of the same sex to engage in, sexual intercourse or sexual activity with a person of the same sex.¹⁰¹

3.90 In each of those jurisdictions, a conviction for an eligible public morality offence may be expunged only if the relevant criteria are met. Generally, those criteria are the same as for other eligible offences.¹⁰² However, in the Australian Capital Territory, relevant eligibility criteria may also be prescribed by regulation, including in relation to public morality offences.¹⁰³ It was observed that eligibility criteria would need to be prescribed for public morality offences:¹⁰⁴

because the eligibility criteria for a sexual offence will not be suitable for a public morality offence ... Eligibility criteria [are] still required for a public morality offence as it is likely that people were convicted of a general offence such as public nuisance and it is not appropriate to allow all public nuisance offences to be extinguished.

3.91 In Victoria, the offences of running an illegal brothel or assaulting a police officer were identified as examples of public morality offences that would not be intended to be expunged, as they remain offences under the current law, and should be excluded by the criteria for expungement. It was further explained, however, that:¹⁰⁵

the [criterion] of engaging in the conduct constituting the offence for the purposes of, or in connection with, sexual activity of a homosexual nature is intended to be broad enough to capture public morality offences such as behaving in an indecent or offensive manner, or loitering for homosexual purposes, which are not sexual offences ... but which were used to prosecute behaviour engaged in by homosexuals.

3.92 In contrast, public morality offences are not expressly included in the expungement legislation in South Australia and England and Wales, or in the draft expungement legislation in Tasmania.¹⁰⁶

¹⁰⁰ *Summary Offences Act 1970* (NSW) s 7 (repealed). This provision provided that 'a person who in or within view from a public place or a school behaves in a riotous, indecent, offensive, threatening or insulting manner is guilty of an offence'.

¹⁰¹ *Criminal Records Act 1991* (NSW) s 19A (definition of 'eligible homosexual offence' para (c)).

¹⁰² *Spent Convictions Act 2000* (ACT) s 19D(2); *Criminal Records Act 1991* (NSW) s 19C(1); *Sentencing Act 1991* (Vic) s 105G(1)–(2). See further Chapter 4 below.

¹⁰³ *Spent Convictions Act 2000* (ACT) s 19D(2)(b). No criteria have been prescribed to date.

¹⁰⁴ Explanatory Statement, *Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Bill 2015* (ACT) 9.

¹⁰⁵ Explanatory Memorandum, *Sentencing Amendment (Historical Homosexual Convictions Expungement) Bill 2014* (Vic) 9. See also at 8.

¹⁰⁶ However, in South Australia, the definition of a 'designated sex-related offence' may arguably be broad enough to encompass the public morality offences of 'soliciting' (which includes both soliciting and loitering in a public place for the purpose of prostitution) and 'procurement for prostitution': see *Spent Convictions Act 2009* (SA) s 3(1) (definition of 'designated sex-related offence' para (b)); *Summary Offences Act 1953* (SA) ss 25, 25A. If these offences are considered to be designated sex-related offences then, because they are current offences in South Australian law, a magistrate would be unable to expunge the offences without having regard to the matters included in s 8A(5) of the *Spent Convictions Act 2009* (SA), set out at [4.43] below: *Spent Convictions Act 2009* (SA) s 8A(6)(b).

Submissions

3.93 Several respondents expressly considered whether public morality offences should be included in Queensland's expungement scheme, and among those submissions there was general agreement that such offences should be included in the scheme.¹⁰⁷ Several respondents stated more generally (or in some instances, in addition to the specific inclusion of the public morality offences) that the scheme should include a broad range of offences.¹⁰⁸

3.94 A number of respondents were of the view that public morality offences should be included in order to capture all relevant offences within the expungement scheme.¹⁰⁹ The BAQ submitted that the scheme should apply to offences where 'the activity which was the subject of the charge arose from the person's LGBTI status', and noted that public morality offences, such as prosecutions for two men kissing in public, could fall within such a description.

3.95 The LGBTI Legal Service Inc and others noted that there is anecdotal evidence to suggest that public morality offences were often used to prosecute people who were homosexual, or who engaged in 'cross-dressing' and 'female impersonation'.¹¹⁰ They referred, for example, to loitering, soliciting, indecent exposure and wearing a disguise with unlawful intent or without lawful cause (in relation to cross-dressing). These respondents were of the view that all such offences should also be included within the expungement scheme.¹¹¹

3.96 A group of academics from the TC Beirne School of Law submitted that the inclusion of public morality offences would enable adequate recognition of the fact that homosexuality was prosecuted broadly and beyond the repealed offences, and would enable the scheme to address resulting injustices.

In England and Wales, the expungement legislation provides that an attempt to commit an offence includes conduct that:

- (a) consisted of frequenting, with intent to commit the relevant eligible offence, any river, canal, street, highway, place of public resort or other location that was mentioned in the *Vagrancy Act 1824*, 5 Geo 4, c 38, s 4 (as it then had effect) in connection with the offence of frequenting by suspected persons or reputable thieves; and
- (b) was itself an offence under the *Vagrancy Act 1824*, 5 Geo 4, c 38, s 4.

This provision may have the effect that a conviction or caution for an offence under the *Vagrancy Act 1824*, 5 Geo 4, c 38, s 4 may be eligible for expungement if the person had intended to commit one of the offences included within the expungement legislation: *Protection of Freedoms Act 2012* (UK) c 9, s 101(7).

Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 3(1) (definition of 'historical homosexual offence' para (b)) may also provide scope to include relevant public morality offences by regulation.

¹⁰⁷ Submissions 3, 5, 8, 9, 11, 12, 13, 15.

¹⁰⁸ Submissions 2, 3, 5, 7, 8, 9, 11, 15.

¹⁰⁹ Submissions 5, 8, 9, 11, 13, 15.

¹¹⁰ This respondent noted that people who were identified as 'cross-dressers' or 'female impersonators' were often identified as part of the 'homosexual' cohort, and that those people might identify as transgender in contemporary Queensland.

¹¹¹ See also *LGBTI Legal Service Discussion Paper* (2015) 3, 5–6, 19, Rec 2.1(a) to the same general effect, and for which the submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support.

3.97 A number of submissions were of the view that public morality offences should be included in the scheme to take into account 'the dynamics of policing and prosecution'¹¹² and to address discrimination.¹¹³

3.98 Several historians from the Griffith Criminology Institute suggested that the prosecution of same-sex behaviour included the use of 'offences against public order and morality with no specific reference to sexual activity such as the *Vagrants, Gaming and Other Offences Act 1931*'. These respondents supported the inclusion of public morality offences, including those 'constituted by sexual activity between consenting adults of the same sex or displays of sexual identity (eg crossdressing)', on the basis that:

a significant proportion of individuals were prosecuted historically for public behaviours. This feature is a consequence of hostility towards same-sex behaviour, inadequate private space and policing priorities and surveillance.

3.99 An academic from Monash University noted that specific legislation, such as the repealed offences, operated as a form of systemic discrimination and that 'the use of other statutes, including public morality and public order offences and acts of over-policing' also resulted in discrimination. It was submitted that Queensland's expungement scheme must be able to respond to both types of discrimination, and that a failure to do so may exacerbate this discrimination.¹¹⁴

3.100 More generally, a member of the public stated that:¹¹⁵

The criminalisation of same-sex activity extended beyond sexual activity to include prosecution for a range of other offences where they would not otherwise have been prosecuted if not for their sexual orientation.

3.101 Another member of the public observed that, due to the current criminal law, there would be difficulties associated with the expungement of public morality offences, particularly offences of 'public indecency'. However, it was submitted that such offences should nonetheless be eligible because of: the historical over-policing of the homosexual community; the likelihood that, due to societal attitudes, many males hid their sexuality and lacked 'safe spaces' to engage in sexual relations or felt they required the anonymity of public places; and the probability that, if the convicted persons had been engaging in heterosexual relations, they would either have gone unnoticed by police or have been less likely to be charged with an offence.¹¹⁶

112 Submission 8.

113 Submissions 3, 8, 9, 11, 12. The BAQ identified discrimination as an issue in relation to the repealed (or other sexual) offences, suggesting that it may have informed decisions about whether activity was consensual and whether to charge a person with an offence in relation to non-exploitative sexual activity.

114 Similarly, a group of academics from the TC Beirne Law School submitted that the inclusion of public morality offences will assist in addressing injustice. The LGBTI Legal Service Inc and others also noted anecdotal evidence suggesting that public morality offences were used as a means of discrimination and intimidation.

115 Submission 3.

116 Submission 12.

3.102 The LGBTI Legal Service Inc and others submitted that, in order to include public morality offences in the scheme and address the issue of discrimination, an expungement scheme in Queensland should apply to:¹¹⁷

a sexual or other offence ... which could be used to punish same-sex and gender-diverse activities or intimidate or discriminate against a person on the basis of that person's participation in, or association with, same-sex or gender-diverse activities.

Example: 'loitering or soliciting', 'indecent exposure'.

3.103 Several respondents also specifically addressed the offence of resisting arrest.¹¹⁸ The BAQ noted the possibility that such charges arose only because of a person's LGBTI status.¹¹⁹ Some submitted that such offences would not have occurred but for the existence and prosecution of offences pertaining to homosexuality.¹²⁰ On this basis, they submitted that these offences (and others of similar character) should potentially be included in the scheme.

The Commission's view

3.104 The Commission has considered the issue of discrimination against homosexual people, both through the application of public morality offences to homosexual activity and the targeting of homosexual people. The Commission acknowledges the grave seriousness of these matters.

3.105 On balance, however, the Commission is of the view that public morality offences should not be included in the proposed expungement legislation. There are a number of factors upon which the Commission bases this view.

3.106 First, as a matter of principle, the *Criminal Code and Another Act Amendment Act 1990*, which repealed the offences under former sections 208(1) and (3), 209 and 211 of the Criminal Code, did not more broadly address the issues of discrimination or homosexuality, but rather focussed upon the legalisation of consensual homosexual activity in private.¹²¹

3.107 The proposed expungement legislation has the purpose of removing from a person's criminal history convictions (and charges) for private sexual acts that are no longer criminal.

¹¹⁷ See also *LGBTI Legal Service Discussion Paper (2015)* 3, 4–5, 19, Rec 2.1(a), for which the submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support. Recommendation 2.1(a)(ii) of that paper expressed this in more specific terms, stating that an expungement scheme in Queensland should apply to 'an offence other than a sexual offence, as in force at any time, the essence of which is the maintenance of public order, public decency or morality, and by which homosexual behaviour could be punished'.

¹¹⁸ Submissions 5, 9, 12, 16. Note that some respondents, particularly the LGBTI Legal Service Inc and others, advocated generally for the inclusion of offences that would not have occurred but for the occurrence of another offence that is eligible for expungement. Resisting arrest was given as an example of such an offence. QSA also observed that consideration could be given to the inclusion of such offences.

¹¹⁹ In making this submission, the BAQ referred to the *LGBTI Legal Service Discussion Paper (2015)* Rec 2.1(a).

¹²⁰ Submissions 9, 12.

¹²¹ See [2.6] above.

3.108 It might be argued that, by not including public morality offences, the proposed legislation does not go far enough. However, there is a distinction between the existence of discriminatory laws in the form of the repealed offences, and the experience of discriminatory practices in the enforcement of public morality laws of general application. Whilst an expungement scheme is able to address the former (which is predominantly a legal issue), it is not well suited to addressing the latter (which is a wider social and cultural issue).

3.109 Second, and of particular importance, public morality offences remain offences under the current law in Queensland. As a matter of principle, it is not appropriate to expunge a conviction (or charge) for an offence that continues to be an offence today.¹²²

3.110 It is possible that the application and enforcement of some of those offences has changed over time, so that some types of public behaviour which might have historically been considered 'indecent' or 'offensive' might no longer necessarily be considered so today.¹²³ However, to distinguish between these different types of conduct would involve a degree of subjectivity and discretion to which an expungement scheme is not well suited.

3.111 This highlights that, third, the inclusion of public morality offences in the proposed expungement legislation would present inherent practical difficulties for the decision-maker.

3.112 Applications for the expungement of convictions (or charges) for eligible offences should be assessed against specific criteria that focus on whether the activity occurred between consenting adults.¹²⁴ Those criteria are apposite to the repealed offences, which relate to sexual activity between two persons. In most instances, the decision-maker should reasonably be able to consider and determine questions of consent and age from available material about the specific conviction (or charge).¹²⁵

3.113 However, public morality offences would require a different criterion since consent and age are not relevant.¹²⁶ In particular, since the offences continue to exist, the criterion for expungement would need to focus not on whether the particular behaviour would amount to an offence under the current law, but on whether, for example, the offence was charged or prosecuted because of the person's homosexuality.¹²⁷

¹²² See, in particular, para 5(i) of the terms of reference.

¹²³ Note, for example, that 'indecent' is a matter that is to be judged 'in the light of time, place and circumstance' and is to be given its ordinary meaning, as assessed against contemporary community standards, and that whether a particular place is a 'public place' is a question of fact: see n 8 and n 93 above.

¹²⁴ See Rec 4-1 below.

¹²⁵ For example, material such as police documentation and witness statements are likely to address or at least be of assistance in considering matters of age and consent.

¹²⁶ The criteria the Commission recommends in Chapter 4 below also requires that the conduct constituting the offence did not occur in a place to which the public are permitted to have access.

¹²⁷ This point was raised in a number of submissions, including, for example, those received from the BAQ, the LGBTI Legal Service Inc and others, and a member of the public.

3.114 The Commission acknowledges that these are important issues which cannot be overlooked, and acknowledges the ill-effects and discrimination that resulted from the enforcement of public morality offences against the LGBTI community. However, the application and consideration of a criterion of this kind would be inherently problematic.

3.115 To give proper consideration to such a criterion would necessitate a decision-maker ‘going behind the conviction’ and attempting to inform themselves of the reasons and motivations for prosecution. This may not be evident from the available material about a specific conviction (or charge), such as police documentation and statements.¹²⁸ The decision-maker might then be left to inform themselves by inference and from anecdotal, less reliable sources.¹²⁹ In many such instances, the decision-maker would effectively be required to make decisions based upon general historical information without direct connection to the specific conviction (or charge) to which the application for expungement relates.

3.116 The inclusion of public morality offences and the associated requirement for a decision-maker to ‘go behind a conviction’ therefore brings with it a much higher degree of subjectivity and uncertainty than in relation to the expungement of the repealed offences. It does not lend itself to the creation of a clear legal test that can be fairly and effectively applied in practice.

3.117 The Commission acknowledges the value of all submissions received in relation to this issue. The issues raised in those submissions have been carefully considered, and the general importance that is attached to the creation and implementation of an expungement scheme has been noted.

3.118 However, the Commission considers that it is not practicable for an expungement scheme to overcome the particular difficulties presented by the inclusion of public morality offences, including the complexities that would be associated with deciding applications for expungement. Even if those difficulties could be mitigated, the Commission considers that the continuing existence of public morality offences under the current law in Queensland tells against the inclusion of those offences in the proposed expungement legislation.

CONVICTIONS AND CHARGES

3.119 The terms of reference require the Commission to consider how a ‘conviction’ is defined.¹³⁰ This includes consideration of whether the scheme should extend to findings or pleas of guilty that did not result in a recorded conviction.

¹²⁸ It is unlikely, for example, that the police file associated with a charge or conviction would provide clear evidence as to the motivations of the arresting officer.

¹²⁹ In some instances, police documents and statements might be of some assistance in considering these matters: see, eg, Lane, above n 88, 156. However, this is unlikely to be the case in all instances, meaning that issues would still arise for any decision-maker required to consider those matters on a case-by-case basis. Other more general sources might include newspaper sources from the relevant time or later written sources, such as studies and articles, which explain and analyse the historical prosecution of homosexual people.

¹³⁰ See terms of reference para 4(b).

3.120 In the Consultation Paper, the Commission also sought submissions on whether expungement should be available for charges that did not result in a conviction.¹³¹

Convictions under the *Penalties and Sentences Act 1992*

3.121 Section 4 of the *Penalties and Sentences Act 1992* states that 'conviction means a finding of guilt, or the acceptance of a plea of guilty, by a court'.¹³²

3.122 When a person is convicted of an offence, the relevant court has a discretion to record or not record a conviction for that offence.¹³³ Where a conviction is not recorded, it is generally taken not to be a conviction for any purpose and is generally not entered into any records.¹³⁴

3.123 However, a conviction that is not recorded may be entered into the person's criminal history for the limited purposes of an appeal against the sentence imposed for the conviction, subsequent sentencing or other proceedings for the same offence, and proceedings against the person for a subsequent offence.¹³⁵

Convictions and charges under the spent convictions legislation

3.124 The *Criminal Law (Rehabilitation of Offenders) Act 1986* defines the term 'conviction' broadly as 'a conviction by or before any court for an offence, whether recorded, in Queensland or elsewhere'.¹³⁶ That Act also defines a 'charge' to include an allegation that a person has committed an offence, where that allegation is formally made in court and either 'the allegation is not pursued to a final determination in a court' or 'a conviction is not recorded by a court in respect of the allegation'.¹³⁷

¹³¹ *QLRC Consultation Paper No 74* (2016), Q-3. See also terms of reference para 3. The related issue of whether the expungement of a conviction would also have the effect of expunging records of the charge to which the conviction related and/or any investigation or legal process associated with that conviction is addressed in Chapter 5 below.

¹³² In Queensland, the definition of 'conviction' varies depending upon the legislative context in which the term is used.

¹³³ *Penalties and Sentences Act 1992* (Qld) s 12(1). There are a number of circumstances, under s 12(2) of that Act, to which the court must have regard when making this decision. See also former s 657A of the Criminal Code (Qld) under which the court or justices had discretion to discharge an offender who had been found guilty of or pleaded guilty to an offence, absolutely or conditionally on entering into a recognisance, without recording a conviction, later omitted by the *Penalties and Sentences Act 1992* (Qld) s 207, sch (Act as passed).

¹³⁴ *Penalties and Sentences Act 1992* (Qld) s 12(3). There are exceptions for recording in relation to the court before which the person was convicted, and for a department, prosecuting authority and the person's legal representative: s 12(3)(b)(i), (3A).

¹³⁵ *Penalties and Sentences Act 1992* (Qld) s 12(3)(b)(ii), (4)(b).

¹³⁶ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(1). The definition of 'conviction' also provides that it includes a conviction existing before or after the date of commencement of that Act.

¹³⁷ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(1). The definition of 'charge' also includes an allegation that a person has committed an offence, where the allegation is formally made in court and 'a conviction recorded by a court in respect of the allegation is to be deemed, pursuant to law, not to be a conviction'. There does not appear to be any provision made in current Queensland legislation whereby a conviction is deemed not to be a conviction for particular purposes. However, an example of such a deeming provision can be found in s 252 of the *Corrective Services Act 1988* (Qld) (repealed), which provided that a conviction for an offence where a probation order (under s 197(1)(a) of that Act) or a community service order was made would be deemed not to be a conviction except in relation to some specified purposes.

3.125 Under that Act, a person's 'criminal history' is limited to convictions recorded against a person in respect of offences.¹³⁸ It does not include convictions that are not recorded, convictions that have been set aside or quashed, or charges.¹³⁹

3.126 As a consequence of that Act, a person cannot ordinarily be required or asked to disclose, and if required or asked, is not obliged to disclose for any purpose, a conviction that is not part of the person's criminal history or a charge made against the person.¹⁴⁰ However, a person may be required to make such a disclosure in some circumstances; for example, where it is required by another Act or necessary for court proceedings.¹⁴¹

3.127 Accordingly, a charge or a conviction that is not recorded will sometimes be required to be disclosed under specific legislation.¹⁴² For example, the *Working with Children (Risk Management and Screening) Act 2000* requires that a person seeking approval to work or volunteer with children must disclose their complete criminal history, including all convictions and charges.¹⁴³ The terms 'conviction' and 'charge' are defined broadly in that legislation to encompass all relevant offences, including convictions that are not recorded and 'a charge in any form'.¹⁴⁴ The definition of charge, in particular, is broader than that of the *Criminal Law (Rehabilitation of Offenders) Act 1986*.

Other jurisdictions

3.128 The expungement legislation in other Australian jurisdictions provides for a person to apply to have a 'conviction' expunged, which is defined to include a finding of guilt by a court and (in some cases) a finding that an offence has been proved.¹⁴⁵

¹³⁸ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(1) (definition of 'criminal history'). The term 'offence' is defined in s 3(1) of that Act to mean 'an act or omission that renders the person doing the act or making the omission liable to punishment'.

¹³⁹ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) ss 3(1) (definition of 'criminal history'), 5(1). See also Office of the Queensland Parliamentary Council, *Principles of Good Legislation: OQPC Guide to FLPs—Criminal History* (2013) 10.

¹⁴⁰ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 5(2). See further Chapter 5 below.

¹⁴¹ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 5(3).

¹⁴² Further, as explained in Chapter 5 below, recorded convictions will sometimes also need to be disclosed, even if the conviction is spent. See, in particular, *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) ss 4, 9.

¹⁴³ *Working with Children (Risk Management and Screening) Act 2000* (Qld) chs 8 and 8A. A person's 'criminal history' is defined (in sch 7) to include every conviction of a person for an offence and every charge made against a person for an offence, whether the conviction or charge occurred in Queensland or another place and whether the conviction or charge occurred before or after the commencement of the Act.

¹⁴⁴ *Working with Children (Risk Management and Screening) Act 2000* (Qld) sch 7 (definitions of 'charge' and 'conviction'). Specifically, the Act states that 'conviction means a finding of guilt by a court, or the acceptance of a plea of guilty by a court, whether or not a conviction is recorded'. Further the Act states that a 'charge, of an offence, means a charge in any form' and gives a number of examples including a charge following an arrest, a notice to appear under s 382 of the *Police Powers and Responsibilities Act 2000* (Qld), a complaint or a charge by the court under the *Justices Act 1886*, and an indictment.

¹⁴⁵ In the Australian Capital Territory, a 'conviction' is defined in the *Spent Convictions Act 2000* (ACT) s 6 with reference to when a person is 'convicted' of an offence, which is relevantly if the person is convicted of the offence, whether summarily or on indictment, or the person is charged with the offence and a court finds the person guilty of the offence.

3.129 In those jurisdictions, the expungement legislation provides that a reference to an expunged conviction includes a reference to the charge to which the conviction related (with the effect that, if a conviction is expunged, the record of the charge to which it related is also expunged).¹⁴⁶ However, none of the schemes provide for the expungement of a charge that did not result in a conviction.¹⁴⁷

3.130 In England and Wales, the expungement legislation allows for the expungement of a ‘conviction’ or a ‘caution’. A conviction includes a finding in criminal proceedings that a person has committed an offence, and a conviction where an order has been made which discharges the person either conditionally or absolutely.¹⁴⁸ A caution includes both a caution given to a person in respect of an offence which, at the time of the caution being given, the person had admitted; and also a reprimand or a warning given to a person under 18 years of age.¹⁴⁹

Submissions

3.131 All of the respondents who addressed this issue were of the view that Queensland’s expungement scheme should apply to both convictions and charges.¹⁵⁰

3.132 The BAQ submitted that ‘the concept of “conviction” should be defined broadly’ and supported the inclusion of convictions¹⁵¹ and charges (as well as any

In New South Wales, a ‘conviction’ is defined in the *Criminal Records Act 1991* (NSW) s 4(1) to mean a conviction made either summarily or on indictment for an offence and to include findings or orders that are treated, under s 5(a)–(b) of that Act, as convictions for the purposes of that Act, which relevantly include:

- (a) a finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction,
- (b) a finding that an offence has been proved, or that a person is guilty of an offence, and the discharging of, or the making of an order releasing, the offender conditionally on entering into a recognisance to be of good behaviour for a specified period or on other conditions determined by the court.

In Victoria, a ‘conviction’ is defined in the *Sentencing Act 1991* (Vic) s 105(1) to include ‘a finding of guilt made by a court, whether or not a conviction is recorded’.

In South Australia, a ‘conviction’ is defined in the *Spent Convictions Act 2009* (SA) s 3(1) as a conviction made summarily or on indictment for an offence. It includes both a formal finding of guilt by a court, and a finding by a court that an offence has been proved: s 3(5). It also includes an offence that has been ‘taken into account’ for the purposes of sentencing for another offence or offences: s 3(6).

Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 3(1) defines a ‘conviction’ as ‘a conviction recorded against a person for an offence, whether on indictment or summarily’. It also provides that, for the purposes of the Bill, where a court finds a person guilty of an offence but does not record a conviction, that finding is to be regarded as a conviction: cl 3(2).

¹⁴⁶ *Spent Convictions Act 2000* (ACT) s 7A(2); *Criminal Records Act 1991* (NSW) s 4(2A); *Spent Convictions Act 2009* (SA) s 3(4); *Sentencing Act 1991* (Vic) s 105(4)(a). Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 3(3) is in similar terms. See further Chapter 5 below.

¹⁴⁷ This may be the outcome where, for example, the person is found ‘not guilty’ or a decision is made to discontinue the prosecution of the charge.

¹⁴⁸ See *Protection of Freedoms Act 2012* (UK) c 9, s 101(1) (definition of ‘conviction’).

¹⁴⁹ *Protection of Freedoms Act 2012* (UK) c 9, s 101(1) (definition of ‘caution’).

¹⁵⁰ Submissions 3, 5, 8, 9, 11, 12, 15.

¹⁵¹ The BAQ noted that the *LGBTI Legal Service Discussion Paper* (2015) proposed a broad definition of ‘conviction’, which would expressly include court orders such as a good behaviour bond, probation, or a fine without the recording of a conviction.

police record of criminal activity and any record of unofficial warnings for same-sex activity).

3.133 The LGBTI Legal Service Inc and others submitted that ‘conviction’ should be defined to ensure that all relevant convictions (regardless of the outcome or sentence imposed), charges and associated investigations or legal processes are included within the expungement scheme. They submitted that the expungement of convictions alone would be insufficient to completely address the impact of homosexual activity having been criminalised, and therefore that this broader approach is required.¹⁵²

3.134 A number of other respondents were similarly of the view that the expungement scheme should be drafted broadly to include (variously) convictions, charges and associated investigations and other legal processes in order to address the issue of disclosure.¹⁵³

3.135 A group of academics from the TC Beirne School of Law submitted that this broad approach ‘is consistent with the purpose of the scheme in ensuring that disclosure of activity which would no longer be considered an offence is no longer mandatory in certain situations’. Similarly, a member of the public submitted that this is required due to the ‘ever-expanding requirement to disclose charges and other matters (beyond simply convictions) in a range of circumstances, and the increased sharing of such information between Australian jurisdictions’.¹⁵⁴

3.136 An academic from Monash University submitted that, in order to properly address the issue of discrimination, it is necessary for charges to be included in the scheme, stating that:

The aim of the scheme is to respond to systemic discrimination and achieve justice for those who have been historically discriminated against. A wilful decision to ignore the impact of charges will leave an anomalous position where individuals who are required to disclose if they have been charged (and not convicted with an offence) will be in a worse position than those who are convicted and have that conviction successfully expunged.

3.137 Several historians from the Griffith Criminology Institute focused upon the impacts of contact with the justice system and submitted that convictions, charges and other legal processes should be included because:

the process of prosecution has many repercussions for those involved. Arrests, police questioning, court appearances and costs, as well as the public humiliation associated with media reporting, cause significant personal, emotional and financial stress for individuals, partners, families and friends irrespective of outcome.

152 See also *LGBTI Legal Service Discussion Paper* (2015) 3, 19–20, Rec 2.1(c) to the same general effect, and for which the submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support.

153 Submissions 3, 11, 15. Submission 15 referred specifically to ‘any other legal processes that are subject to mandatory public disclosure’.

154 Submission 3.

The Commission's view

3.138 The proposed expungement legislation should be broadly inclusive of all relevant convictions.

3.139 The term 'conviction' is broadly defined in both the *Penalties and Sentences Act 1992* and the *Criminal Law (Rehabilitation of Offenders) Act 1986*. The definition of 'charge' in the latter Act includes instances where either a conviction is not recorded or a conviction recorded by a court is deemed not to be a conviction.

3.140 The circumstances in which a conviction may be disclosed or considered are more limited if the conviction is not recorded. However, this does not alter the ongoing existence of the conviction, and there are significant exceptions permitting disclosure which apply despite any limitations.

3.141 Accordingly, the proposed expungement legislation should allow an application for expungement to be made in relation to any conviction for an eligible offence and, to ensure all relevant convictions are included, should define the term 'conviction' as 'a finding of guilt by a court or the acceptance of a plea of guilty, whether or not a conviction is recorded'.

3.142 In some circumstances, a person can be required to disclose having been charged with an offence. As such, the proposed expungement legislation should also allow a person who was charged with an eligible offence (where the charge, for any reason, did not result in a conviction) to apply for that charge to be expunged. This is necessary to give full effect to the scheme.¹⁵⁵

3.143 For the purpose of the proposed expungement legislation, 'charge' should have the broad meaning given by the *Acts Interpretation Act 1954*.¹⁵⁶

ELIGIBLE PERSONS AND OTHER APPLICANTS

3.144 In the Consultation Paper, the Commission sought submissions in relation to who should be eligible to apply for expungement (an 'applicant'), including whether the scheme should be limited to sexual activity between males, or should also extend to sexual activity between females.¹⁵⁷

3.145 The Commission also sought submissions on whether expungement should be available if the convicted person has died.¹⁵⁸

¹⁵⁵ The separate issue of whether the expungement of a conviction would also have the effect of expunging the records of the charge to which that conviction related and any investigation or legal process associated with that charge or conviction, is discussed in Chapter 5 below.

¹⁵⁶ See *Acts Interpretation Act 1954* (Qld) s 36 sch 1 (definition of 'charge'), which provides that a 'charge', of an offence, means 'a charge in any form', including, for example: a charge on an arrest; a complaint under the *Justices Act 1886* (Qld); a charge by a court under the *Justices Act 1886* (Qld) s 42(1A) or another provision of an Act; and an indictment.

¹⁵⁷ See generally *QLRC Consultation Paper No 74* (2016), Q-2.

¹⁵⁸ *Ibid*, Q-4.

Other jurisdictions

Eligible persons

3.146 Under each jurisdiction's expungement legislation, a person who has been convicted of an eligible offence may apply for that conviction to be expunged.¹⁵⁹

3.147 In all Australian jurisdictions, the expungement legislation is drafted in gender-neutral terms. The Acts refer to a 'person' convicted of a relevant offence¹⁶⁰ and use descriptors such as 'sexual intercourse or sexual activity with another person of the same sex'¹⁶¹ and 'homosexual behaviour or conduct'.¹⁶²

3.148 It was observed in New South Wales and Victoria that women may have been prosecuted for 'indecent or offensive behaviour offences'¹⁶³ and that transgender people or people who engage in cross-dressing may have been targeted,¹⁶⁴ and that such persons should be included within the expungement scheme.

3.149 Conversely, because of the more limited range of included offences, the application of the legislation in England and Wales appears to be limited to sexual activity between males.¹⁶⁵

Eligible persons with impaired capacity

3.150 In Queensland, an adult with impaired capacity may have a guardian appointed or may themselves have appointed an attorney to act as their decision-maker in relation to some or all personal matters.¹⁶⁶ A personal matter may include

¹⁵⁹ *Spent Convictions Act 2000* (ACT) s 19B(1); *Criminal Records Act 1991* (NSW) s 19B(1); *Spent Convictions Act 2009* (SA) s 8A(1); *Sentencing Act 1991* (Vic) s 105B(1); *Protection of Freedoms Act 2012* (UK) c 9, s 92(1). Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 5(1) takes the same approach.

¹⁶⁰ *Spent Convictions Act 2000* (ACT) s 19B(1); *Criminal Records Act 1991* (NSW) s 19B(1); *Spent Convictions Act 2009* (SA) s 8A(1); *Sentencing Act 1991* (Vic) ss 105(1) (definition of 'applicant'), 105B(1). Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 5(1) takes the same approach.

¹⁶¹ *Spent Convictions Act 2000* (ACT) s 19A (definition of 'historical homosexual offence' para (b)(i)); *Criminal Records Act 1991* (NSW) s 19A (definition of 'eligible homosexual offence' para (c)(i)); *Spent Convictions Act 2009* (SA) s 3(1) (definition of 'designated sex-related offence' para (b)(i)).

¹⁶² *Spent Convictions Act 2000* (ACT) s 19A (definition of 'public morality offence' para (b)); *Sentencing Act 1991* (Vic) s 105(1) (definition of 'sexual offence'). Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 8(1)(b)(i) refers to 'sexual activity of a homosexual nature'.

¹⁶³ See, respectively, New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 September 2014, 823 (B Notley-Smith); Legislative Council, 23 October 2014, 1750 (T Khan); and *Human Rights Law Centre Background Paper* (2014) 39–40.

¹⁶⁴ *Human Rights Law Centre Background Paper* (2014) 39. The Human Rights Law Centre was unable to confirm whether and by which offences this group was targeted, but located anecdotal evidence to this effect sufficient to indicate that they should be able to be included within any expungement scheme.

¹⁶⁵ *Protection of Freedoms Act 2010* (UK) c 9, ss 92(1), 101(3)–(7).

¹⁶⁶ See generally *Guardianship and Administration Act 2000* (Qld) and *Powers of Attorney Act 1998* (Qld). A person has 'impaired capacity' when they do not have capacity. 'Capacity', for a person for a matter, means that a person is capable of: (a) understanding the nature and effect of decisions about the matter; (b) freely and voluntarily making decisions about the matter; and (c) communicating the decisions in some way: *Guardianship and Administration Act 2000* (Qld) s 12(1), sch 4 (definitions of 'capacity' and 'impaired capacity').

matters such as the adult's care and living arrangements and legal matters (other than those related to the adult's financial or property matters).¹⁶⁷

3.151 Similar provisions for decision-making on behalf of adults with impaired capacity apply in the other Australian jurisdictions.

3.152 In Victoria, the expungement legislation expressly provides that, if a person has been convicted of an historical homosexual offence but is unable to make an application for expungement due to a disability,¹⁶⁸ the person's litigation guardian or guardian within the meaning of the *Guardianship and Administration Act 1986 (Vic)* may apply for expungement on their behalf.¹⁶⁹

3.153 Express provision to similar effect is not included in the expungement legislation of the other jurisdictions.

Eligible persons who are deceased

3.154 The Australian Capital Territory, New South Wales and Victoria permit applications to be made on behalf of a person convicted of an eligible offence who has died.

3.155 In the Australian Capital Territory and New South Wales, the application may be made on behalf of the convicted person by any one of:¹⁷⁰

- the person's legal personal representative;
- a spouse, domestic or de facto partner, parent, child or sibling 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.

3.156 In the Australian Capital Territory, the application may also be made on behalf of the convicted person by another person who was involved in the activity that constituted the offence.¹⁷¹

3.157 In Victoria, 'an appropriate representative of a person who was convicted of a historical homosexual offence and is deceased' may make an application. The term 'appropriate representative' is defined by a hierarchical approach, whereby the first

¹⁶⁷ *Guardianship and Administration Act 2000 (Qld)* sch 2 pts 2–3 (definitions of 'personal matter' and 'legal matter'). A 'legal matter', for an adult, includes a matter relating to: (a) use of legal services to obtain information about the adult's legal rights; (b) use of legal services to undertake a transaction; (c) use of legal services to bring or defend a proceeding before a court, tribunal or other entity, including an application under the *Succession Act 1981 (Qld)* pt 4 or an application for compensation arising from a compulsory acquisition; and (d) bringing or defending a proceeding, including settling a claim, whether before or after the start of a proceeding.

¹⁶⁸ As to the meaning of 'disability', see *Sentencing Act 1991 (Vic)* s 105(1) (definition of 'applicant' para (b)) and *Equal Opportunity Act 2010 (Vic)* s 4(1) (definition of 'disability'), which is in wide terms.

¹⁶⁹ *Sentencing Act 1991 (Vic)* ss 105(1) (definition of 'applicant').

¹⁷⁰ *Spent Convictions Act 2000 (ACT)* s 19B(3)(a)–(c); *Criminal Records Act 1991 (NSW)* s 19B(3). Note that these vary slightly between jurisdictions; for example, New South Wales does not refer to siblings.

¹⁷¹ *Spent Convictions Act 2000 (ACT)* s 19B(3)(d).

available person on the list of appropriate representatives is entitled to make the application. The persons on the list include a spouse or domestic partner, various relatives, the executor of the person's will and a personal representative. If none of these is available, then the scheme's decision-maker may determine that another person should be taken as the appropriate representative based upon the existence of a close relationship with the deceased person.¹⁷²

3.158 In Tasmania, the draft expungement legislation provides that an application may be made on behalf of a deceased person by any one of a number of listed persons, including a legal representative, spouse or specified family member.¹⁷³ In recommending such an approach, the Tasmanian Anti-Discrimination Commissioner acknowledged that the stigma of having a criminal record may also affect a person's loved ones, and that posthumous expungement 'will help to provide comfort to the family and ... repair the hurt and stigma associated with such records'.¹⁷⁴

3.159 The Tasmanian Anti-Discrimination Commissioner also recommended that, where the passage of time has meant that no appropriate representative is available to make an application, a posthumous pardon should be issued to a deceased person convicted of a relevant offence.¹⁷⁵

Submissions

Eligible persons

3.160 A group of academics from the TC Beirne School of Law submitted that 'the person who is the subject of an eligible offence' should be eligible to make an application for expungement. Those academics submitted that the expungement scheme should not be restricted to sexual activity between males, but should apply more broadly to sexual activity between people of the same sex, stating that:

Although it appears that the legislation mainly affected males due to the wording of sections 208(1), 208(3), 209 and 211 of the Criminal Code, the possibility that females were also affected means that the scheme should not be limited by gender. This approach has been adopted in the Australian Capital Territory, New South Wales, South Australia and Victoria. (note omitted)

3.161 The LGBTI Legal Service Inc and others submitted that the expungement scheme should not be limited to males, but should also include females and gender-diverse people.¹⁷⁶

¹⁷² See *Sentencing Act 1991* (Vic) ss 105(1) (definitions of 'applicant' para (c) and 'appropriate representative'), 105(3), 105B(2).

¹⁷³ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 5(2).

¹⁷⁴ *ADC Tasmania Report* (2015) 12, Rec 7.

¹⁷⁵ *Ibid* 12, Rec 9.

¹⁷⁶ In relation to this paragraph, and [3.164], [3.167] and [3.171] below, see also *LGBTI Legal Service Discussion Paper* (2015) 3, 20, Rec 2.1(b) to the same general effect, and for which the submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support.

3.162 Several historians from the Griffith Criminology Institute submitted that the applicability of the expungement scheme should not be limited to particular groups of people, stating that:

We note the limitations of the term 'gay' ... which is historically recent (post-1970s), identity-based and male. It describes inadequately the complex nature of sexual behaviours and identities and potentially obscures the scope and breadth of any expungement scheme, which should include the prosecution of non-identifying males as well as the possible prosecution of females ...

3.163 A member of the public also submitted that the scheme should not be limited to male same-sex activity, but noted that it is predominantly males who are affected.¹⁷⁷

Eligible persons with impaired capacity

3.164 The LGBTI Legal Service Inc and others submitted that other persons, such as an attorney, should be able to make an application for expungement on behalf of an eligible person with impaired capacity.

3.165 A group of academics from the TC Beirne School of Law and an academic from Monash University similarly submitted that, where a person has a disability and as a result is unable to make an application, that person's guardian should be eligible to bring an application on their behalf.

Eligible persons who are deceased

3.166 The majority of respondents were of the view that Queensland's expungement scheme should also extend to people who are deceased.¹⁷⁸ A number of reasons were given in support of this view.

3.167 The LGBTI Legal Service Inc and others submitted that, taking into account the nature and purpose of the scheme and the historical impacts that the scheme is intended to address, it is appropriate to extend the scheme to deceased persons.¹⁷⁹

3.168 A member of the public stated that 'the injustice of the discriminatory application of criminal laws does not change simply because the person charged or convicted has since died'.¹⁸⁰ Similarly, an academic from Monash University submitted that deceased individuals were equally stigmatised and discriminated against, and also experienced the negative social and cultural impacts of these convictions. This respondent submitted that the scheme must not be simply about removing legal disadvantage but, to have any meaning, must also recognise and address the impacts of a conviction for all affected persons.

3.169 The BAQ noted that, for some people, clearing a person's own name may be of secondary importance to clearing the name of a loved one. Similarly, an

177 Submission 3.

178 Submissions 3, 5, 8, 9, 10, 11, 12.

179 The LGBTI Legal Service Inc and others also noted the higher suicide rate among LGBTI people as a relevant factor.

180 Submission 3.

academic from Monash University argued that, for some friends or relatives, the ongoing existence of a conviction represents a continuing source of stigma which it is important that they correct on behalf of their loved one. Finally, the LGBTI Legal Service Inc and others submitted that:

while 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.

3.170 Several historians from the Griffith Criminology Institute noted that the inclusion of deceased persons would act as a source of comfort and redress to surviving relatives and friends, although they acknowledged that the actual application of the scheme to deceased persons would be limited by the availability (or otherwise) of historical records.

3.171 Some respondents suggested that 'close relatives', 'family members' or 'loved ones' should be able to apply for expungement on behalf of a deceased person.¹⁸¹ The LGBTI Legal Service Inc and others also submitted that a person who was in a 'close personal relationship' with the deceased person, including a de facto partner, should be included.

3.172 The BAQ noted that the inclusion of deceased persons may have resource implications, but nonetheless supported this extension of the scheme. Conversely, the LGBTI Legal Service Inc and others indicated that, taking into account the fact that no other jurisdictions appear to have received applications relating to deceased persons, 'any potential impracticalities and resourcing impacts are not sufficient to justify confining access to the scheme to living persons'.

3.173 In contrast, a group of academics from the TC Beirne School of Law submitted that the expungement scheme should be restricted to living persons, as they 'are still suffering the immediate effects of the discriminatory laws'. They submitted that to extend the scheme to deceased persons 'may result in a greater number of applications being made, which may lead to a longer application process and a drain on resources'.

3.174 However, those respondents acknowledged that relatives and close friends of a deceased person should still be provided with an option for recourse, and suggested that a public apology or the issuing of a posthumous pardon may be a suitable alternative. They submitted that:¹⁸²

This would allow the expungement scheme to focus on living persons, while using [an] apology and pardons [to] provide comfort to the surviving family and friends of the deceased ... [This] will serve as recognition for the injustices and discrimination suffered by these individuals and attempt to remove the social stigma attached to their conviction. (note omitted)

3.175 QSA did not express a view on whether or not deceased persons should be included within the scheme. However, this respondent noted that, if deceased

¹⁸¹ Submissions 3, 9, 10, 12.

¹⁸² See also Chapter 7 below.

persons were included, consideration would need to be given to who may apply on their behalf, who can consent to or contest the expungement of records, and whether and to whom notification of any proposed expungement should be provided.

The Commission's view

Eligible persons

3.176 Under the proposed expungement legislation, any person who has been convicted of or charged with an 'eligible offence' should be eligible to make an application for expungement (an 'eligible person').¹⁸³

3.177 However, the proposed expungement legislation should not apply to a person convicted of or charged with an eligible offence (such as sodomy) in the context of consensual *heterosexual* activity. Whilst such convictions or charges might also be based upon behaviour that is no longer an offence, they do not relevantly fall within an expungement scheme for 'historical gay sex offences'.

Eligible persons with impaired capacity

3.178 The proposed expungement legislation should expressly provide a means by which applications can be made on behalf of an eligible person who is an adult with impaired capacity.

3.179 The Commission has considered the adoption of the Victorian approach, which simply states that, where a person is unable to make an application due to a disability, that person's guardian may apply.¹⁸⁴ However, this approach is too general and not well adapted to Queensland law.

3.180 A similar, but more specific, approach has been taken in Queensland in the *Victims of Crime Assistance Act 2009*. In addressing the issue of who may apply for victim assistance, section 51(4) of that Act provides:

- (4) If the victim is an adult with an impaired capacity, the application may be made by—
 - (a) if the victim has a guardian for a legal matter¹⁸⁵—the guardian; or
 - (b) if the victim does not have a guardian for a legal matter but has an administrator—the administrator; or
 - (c) if the victim does not have a guardian for a legal matter or an administrator—an attorney appointed by the victim under an enduring power of attorney; or

¹⁸³ See also [3.57], [3.59] above and Rec 0 below, which would have the effect of limiting this to convictions and charges for eligible offences in force prior to the date of legalisation.

¹⁸⁴ See [3.152] above.

¹⁸⁵ See *Guardianship and Administration Act 2000* (Qld) sch 2 pt 3 (definition of 'legal matter'), set out at n 167 above.

- (d) if the victim does not have a guardian for legal matters or an administrator and has not appointed a person under an enduring power of attorney—
 - (i) a member of the victim’s support network; or
 - (ii) someone else approved by the scheme manager. (note added)

3.181 The term ‘support network’ is defined to consist of members of the adult’s family, close friends of the adult, and other people that the Queensland Civil and Administrative Tribunal (‘QCAT’) decides provide support to the adult.¹⁸⁶

3.182 This approach is consistent with the Queensland legislative framework for decision-making for adults with impaired capacity, and is flexible, simple and clear. Accordingly, the Commission considers that, subject to one modification, it is an appropriate model to follow for the proposed expungement legislation. This will operate as beneficial legislation, in that it will assist adults with impaired capacity to exercise their rights without imposing any restrictions.

3.183 The one modification to this model is the inclusion of administrators. An application for victim assistance has a strong financial aspect, whereas an application for expungement is of a personal nature. An administrator is appointed to make decisions regarding financial matters and may not be the most appropriate person or entity to make an application for expungement.¹⁸⁷ Accordingly, the proposed expungement legislation should not provide for an administrator to make an application for expungement on behalf of a person with impaired capacity.

3.184 Section 51(5) of the *Victims of Crime Assistance Act 2009* additionally provides that:

- (5) If the victim is not a child or an adult with impaired capacity but requires assistance in making an application under this chapter, the application may be made by someone else approved by the scheme manager.

Example —

If a victim can not understand English, the scheme manager may approve a relative of the victim who can understand English to make the application on the victim’s behalf.

3.185 A general provision to this effect should also be included in the proposed expungement legislation. This would enable assistance to be provided, for example, to an older person who wishes to make an application if required.

¹⁸⁶ See the definition of ‘support network’ in *Victims of Crime Assistance Act 2009* (Qld) s 51(7) and *Guardianship and Administration Act 2000* (Qld) s 3 sch 4.

¹⁸⁷ Often the Public Trustee or a financial body will be appointed as administrator, and such appointees would arguably not be appropriate to make an application. If the appointed administrator is an individual and would be appropriate (for example, a member of the adult’s family) then they could still make the application under the proposed provisions as they would also be a member of the person’s support network.

Eligible persons who are deceased

3.186 The proposed expungement legislation should extend to an eligible person who is now deceased. As a result of such convictions or charges, those persons would likely have experienced stigma, discrimination and other ill-effects during their lifetime.

3.187 A significant reason for expunging a conviction or charge for an eligible offence is the ongoing legal requirement to disclose that conviction or charge, and the varied implications of disclosure. The Commission accepts that these legal implications are no longer relevant if the person has died.¹⁸⁸

3.188 However, the proposed expungement legislation can appropriately perform a wider purpose. Deceased people should be included on the basis that they were convicted or charged with an eligible offence and are likely to have been negatively impacted as a result. Although expungement cannot correct these ill-effects after the person has died, it may assist in acknowledging the existence of and the need to take steps to address these historical wrongs.

3.189 This may also be of benefit to friends or relatives of the deceased. Although friends and relatives may not experience any practical or legal disadvantage, they may nonetheless wish to correct any injustice experienced by a deceased person. The opportunity to do so may, in turn, offer them comfort and healing.

3.190 The Commission considers that any one of the following persons should be able to make an application of behalf of an eligible person who is now deceased:

- the deceased person's personal representative, as defined in the *Succession Act 1981*;¹⁸⁹
- a spouse,¹⁹⁰ parent, child or sibling of the deceased person; or
- a person who was in a close personal relationship with the deceased person immediately before the deceased person's death.

3.191 This approach is consistent with the approach taken in the Australian Capital Territory and New South Wales (and the approach proposed in Tasmania). The Commission does not favour the hierarchical approach adopted in Victoria, which appears unnecessarily complex.

3.192 However, the application of the proposed expungement legislation to deceased persons should be appropriately restricted. The primary purpose of extending the scheme to deceased persons is to allow a living person to clear the name of their deceased partner or close family member. An appropriate restriction will assist to minimise any financial or other impacts on the scheme brought about

¹⁸⁸ On this point, see, eg, *The Queen v Stanley Jnr* [2015] QSC 327, in which McMeekin J observed (at [17]) that a deceased person cannot be defamed and stated that 'their interest in their reputation is gone'.

¹⁸⁹ The term 'personal representative' is defined in *Succession Act 1981* (Qld) s 5 as 'the executor, original or by representation, or the administrator of a deceased person'.

¹⁹⁰ 'Spouse' is defined in *Acts Interpretation Act 1954* (Qld) s 36 sch 1 to include a de facto partner and a civil partner.

by the inclusion of deceased people and the potential for resulting difficulties associated with relevant historical records.

3.193 An appropriate restriction would be to allow applications to be made in relation to a deceased person only where the deceased person was alive at the date of legalisation. This will 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.

3.194 The inclusion of deceased people within the proposed expungement legislation on this basis should not result in a significantly higher number of applications, and is therefore unlikely to have a significant negative impact upon either the financial implications of the scheme or the priority with which other applications can be addressed.

RECOMMENDATIONS

Eligible offences

3-1 The proposed expungement legislation should apply to the following offences ('eligible offences'):

- (a) an offence under sections 208(1), 208(3), 209 or 211 of the Criminal Code, as in force prior to 19 January 1991 (the 'date of legalisation'), except as constituted by heterosexual activity; or**
- (b) an offence prescribed by regulation and occurring before the date of legalisation, to the extent that it was constituted by a person engaging in any form of sexual activity with another person of the same sex; or**
- (c) an offence of attempting or conspiring to commit, or enabling, aiding, counselling or procuring another person to commit, any of the above offences.**

Eligible convictions and charges

3-2 The proposed expungement legislation should provide that an application may be made for the expungement of:

- (a) a conviction for an eligible offence; or**
- (b) a charge of an eligible offence which, for any reason, did not result in a conviction.**

3-3 For the purposes of the proposed expungement legislation:

- (a) 'conviction' should be defined as a finding of guilt by a court or the acceptance of a plea of guilty, whether or not a conviction is recorded; and**

- (b) 'charge' should have the meaning given in the *Acts Interpretation Act 1954*.

Eligible persons and other applicants

3-4 The following persons should be eligible to make an application for expungement ('applicants'):

- (a) a person who was convicted of or charged with an eligible offence (the 'eligible person'); or
- (b) if the eligible person is an adult with impaired capacity:
 - (i) the eligible person's guardian for a legal matter; or
 - (ii) if the eligible person does not have a guardian for a legal matter, an attorney appointed by the person under an enduring power of attorney; or
 - (iii) if the eligible person does not have a guardian for a legal matter and has not appointed an attorney under an enduring power of attorney:
 - (A) a member of the person's support network, as defined by the *Guardianship and Administration Act 2000*; or
 - (B) another person approved by the decision-maker; or
- (c) if the eligible person is not an adult with impaired capacity but requires assistance in making an application for expungement, a person approved by the decision-maker; or
- (d) if the eligible person died after the date of legalisation, any one of the following:
 - (i) a personal representative of the deceased person, as defined in the *Succession Act 1981*; or
 - (ii) a spouse, parent, child or sibling of the deceased person; or
 - (iii) a person who was in a close personal relationship with the deceased person immediately before the deceased person's death.

Chapter 4

Criteria for Expungement

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INTRODUCTION

4.1 The terms of reference require the Commission to consider, having regard to the nature of the identified offences and the factual elements of convictions, how the expungement scheme will ensure that only convictions (and charges) relating to consensual sexual activity, and for acts that would not amount to criminal behaviour under the current laws of Queensland, are expunged.¹

LIMITING THE SCOPE OF THE EXPUNGEMENT SCHEME

4.2 There is a need to ensure that the proposed expungement legislation is appropriately limited so that convictions and charges are not expunged if the behaviour constituting the offence would be criminal under the current law. The most practicable and desirable way to achieve this is to provide appropriate criteria that must be satisfied before a conviction or charge is expunged.² This is also the general approach taken by expungement schemes in other jurisdictions.

CRITERIA FOR EXPUNGEMENT

4.3 In the Consultation Paper, the Commission sought submissions on what criteria should be met for a conviction to be expunged. It observed that considerations include the scope of the offences to be captured by the scheme and how they are defined for the scheme.³

¹ See terms of reference paras 4(d)–(f), 5(h)–(i). The terms of reference also ask the Commission to consider whether there are sufficient historical records available for a determining authority to properly assess an application for the expunging of an historical conviction: para 5(j). As to this, see Chapters 5 and 6 below.

² See [3.76]–[3.78] above.

³ *QLRC Consultation Paper No 74* (2016), Q-6.

4.4 In Chapter 3 of this Report, the Commission recommends that the following sexual offences should be 'eligible offences' under the proposed expungement legislation:⁴

- an offence under sections 208(1), 208(3), 209 and 211 of the Criminal Code as in force prior to 19 January 1991 (the 'date of legalisation'), except as constituted by heterosexual activity;
- an offence prescribed by regulation and occurring before the date of legalisation, to the extent that it was constituted by a person engaging in any form of sexual activity with another person of the same sex; and
- an offence of attempting or conspiring to commit, or enabling, aiding, counselling or procuring another person to commit, any of the above offences.

Identifying relevant criteria from the current law

4.5 Consent is a key issue that 'divides legal from illegal sexual interaction'.⁵ Under the current law in Queensland, sexual activity that is non-consensual or that involves a person under the age of consent forms the basis of a variety of offences, including unlawful sodomy, indecent treatment, rape and sexual assault.⁶

4.6 In general, the age of consent is 16 years,⁷ but is 18 years for sodomy.⁸ The Criminal Code also provides defences based on reasonable belief in age. For an offence of unlawful sodomy alleged to have been committed in respect of a child who is 12 years or more, it is a defence to prove that the accused believed on reasonable

⁴ See Rec 3-1 above.

⁵ B Fileborn, 'Sexual assault laws in Australia' (Resource Sheet No 1, Australian Centre for the Study of Sexual Assault, February 2011) 7 <<https://aifs.gov.au/publications/sexual-assault-laws-australia>>.

⁶ See Criminal Code (Qld) ss 208, 210, 215, 349, 352. This is not an exhaustive list. For rape and sexual assault (in ch 32) of the Code, 'consent' is defined (in s 348) to mean 'consent freely and voluntarily given by a person with the cognitive capacity to give the consent'. Prior to amendments made by the *Criminal Law Amendment Act 1997* (Qld) s 62, the offence of 'rape' was limited to non-consensual carnal knowledge by a male of a female. Subsequently, it has applied to non-consensual carnal knowledge by a person of another person, whether male or female and, following amendments made by the *Criminal Law Amendment Act 2000* (Qld) s 24, it has applied to carnal knowledge and other forms of penetration.

Sexual activity with a 'person with an impairment of the mind' also forms the basis of specific offences: see in particular ss 208(1)(c)–(d) (Unlawful sodomy) and 216 (Abuse of persons with an impairment of the mind). A 'person with an impairment of the mind' is defined (in s 1) to mean a person with a disability that is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these and that results in a substantial reduction of the person's capacity for communication, social interaction or learning and in the person needing support.

⁷ See Criminal Code (Qld) ss 215(1), which provides that it is an offence to have or attempt to have carnal knowledge with a child under the age of 16 years, and 210(1)(a), which provides that it is an offence to unlawfully and indecently deal with a child under the age of 16 years. 'Carnal knowledge' is generally defined (in s 6) to be complete on penetration to any extent, and includes sodomy. For s 215, however, 'carnal knowledge' does not include sodomy: s 215(6).

⁸ See Criminal Code (Qld) s 208(1)(a)–(b), set out in full in Appendix B below. See Chapter 7 below as to proposed changes to the age of consent for sodomy by the Health and Other Legislation Amendment Bill 2016 (Qld).

grounds that the person in respect of whom the offence was committed was 18 years or more.⁹

4.7 As explained at [4.16]–[4.17] below, in some other Australian jurisdictions, other specific age-based defences are included in the criminal law. Similar defences (based on the close ages of the parties) are not included in the Criminal Code in Queensland. Whether a person will be prosecuted for a sexual offence in such circumstances is a matter of prosecutorial discretion.¹⁰

4.8 In this respect, the current guidelines issued by the Director of Public Prosecutions (*Director's Guidelines*) explain that 'the prosecution process should be initiated or continued wherever it appears to be in the public interest'.¹¹ In relation to sexual offences by children, the *Director's Guidelines* state that a child should not be prosecuted for 'sexual experimentation involving children of similar ages in consensual activity'.¹²

4.9 In some circumstances, behaviour that involves sexual activity might also amount to a criminal offence if conducted in a public place. Under section 227 of the Criminal Code, a person is guilty of a misdemeanour if the person 'wilfully and without lawful excuse does any indecent act in any place to which the public are permitted to have access, whether on payment of a charge for admission or not'.¹³

4.10 Accordingly, for eligible offences relating to sexual activity, it will be necessary to consider the presence or absence of consent and the ages of the persons involved to decide if the behaviour would be criminal under the current law.¹⁴

⁹ Criminal Code (Qld) s 208(3). That defence was inserted by *Criminal Code and Another Act Amendment Act 1990* (Qld) s 5, bringing s 208 into line with other sexual offences (see, in particular, s 215(5) in similar terms). Those defences place the onus on the defendant to prove mistake, and operate as an exception to s 229, which provides that a defendant's lack of knowledge or mistaken belief as to age is immaterial except as otherwise expressly stated. Cf the general mistake of fact excuse in s 24 which, if raised on the evidence, is for the prosecution to negative: see generally, LexisNexis, *Carter's Criminal Law of Queensland* (at April 2016) [24.10], [208.55].

¹⁰ It has been observed that '[d]rawing the line between childhood play or consensual teenage sex on the one hand and sexual exploitation or abuse on the other can be difficult': K Warner and L Bartels, 'Juvenile Sex Offending: Its Prevalence and the Criminal Justice Response' (2015) 38(1) *University of New South Wales Law Journal* 48, 57.

¹¹ Office of the Director of Public Prosecutions, *Director's Guidelines* (1 August 2014) [4], made under *Director of Public Prosecutions Act 1984* (Qld) s 11(1)(a)(i) and available at <<http://www.justice.qld.gov.au/corporate/justice-agencies/office-of-the-director-of-public-prosecutions>>. The *Director's Guidelines* are not directions but guidelines 'designed to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency in the administration of criminal justice': 1.

¹² Ibid [5](v)(b). The *Director's Guidelines* also state that a child should not be prosecuted for 'a sexual offence in which he or she is also the "complainant", as in the case of unlawful carnal knowledge or indecent dealing', but that a child 'may be prosecuted for a sexual offence where the child has exercised force, coerced someone younger, or otherwise acted without the consent of the other person': 5(v)(a). Generally, a 'child' means an individual who is under 18: *Acts Interpretation Act 1954* (Qld) s 36 sch 1 (definition of 'child').

¹³ Criminal Code (Qld) s 227 is set out in full in Appendix B below. Under s 227(1)(b), it is also a misdemeanour to wilfully do any indecent act in a place with intent to insult or offend a person. See also *Summary Offences Act 2005* (Qld) s 9, set out in Appendix B, which provides that wilful exposure in a public place is a summary offence. Whether a place is in 'public', and whether conduct is 'indecent', are questions of fact: see n 8 and n 93 in Chapter 3 above.

¹⁴ The need to consider consent in the context of expungement schemes for historical gay sex offences is widely recognised: see, eg, P Gerber and K O'Byrne, 'Should gay men still be labelled criminals?' (2013) 38(2) *Alternative Law Journal* 82, 86; and the discussion at [4.13] ff below.

It may also be necessary to consider whether the behaviour, even if it was between consenting adults, occurred in a public place.

4.11 In particular, the eligible offences in former sections 208(1) and (3), 209 and 211 of the Criminal Code were capable of applying whether or not the sexual activity was consensual (and done in private) and regardless of the participants' ages.

4.12 Some convictions under those offences related to consensual behaviour between persons of or above the current age of consent.¹⁵ However, convictions or charges might also have occurred where there was an absence of consent; where the other party, although consenting, had not reached the current age of consent; or where the behaviour occurred in a public place.

Other jurisdictions

4.13 In other jurisdictions with expungement schemes, different tests for expungement are used. However, the overall focus in each jurisdiction is to ensure that convictions are expunged only if the conduct involved is no longer considered criminal.¹⁶

4.14 In the Australian Capital Territory and New South Wales — in which the main eligible offences are specifically identified — the decision-maker must be satisfied that the other person involved in the sexual activity constituting the offence:¹⁷

- consented to the sexual activity; and
- was of the required age.

4.15 A similar approach is taken in England and Wales.¹⁸

4.16 The ages nominated for those schemes reflect the age of consent and age-based defences for sexual offences under the current law in those jurisdictions.¹⁹ For example, in the Australian Capital Territory, it is an offence to engage in sexual

¹⁵ See, eg, the case discussed in B Lane, 'Harassment of homosexuals in Qld' (1988) 13(4) *Legal Service Bulletin* 154, 154–5.

¹⁶ See, eg, Explanatory Notes, Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Bill 2015 (ACT) 8; South Australia, *Parliamentary Debates*, House of Assembly, 25 September 2013, 7103–4 (JR Rau, Deputy Premier, Attorney-General, Minister for Planning, Minister for Industrial Relations, Minister for Business Services and Consumers); Explanatory Notes, Sentencing Amendment (Historical Homosexual Convictions Expungement) Bill 2014 (Vic) 8; Explanatory Notes, Protection of Freedoms Act 2012 (UK) [363].

¹⁷ *Spent Convictions Act 2000* (ACT) ss 19D(2), 19E ('satisfied on reasonable grounds'); *Criminal Records Act 1991* (NSW) s 19C(1) ('satisfied'). In the Australian Capital Territory, the decision-maker must also be satisfied of any other matters prescribed by regulation: s 19D(2)(b). This is particularly relevant to the public morality offences that are also included in that legislation. As to the 'required age' in those jurisdictions see, respectively, [4.18] and n 22 below.

¹⁸ *Protection of Freedoms Act 2012* (UK) c 9, s 92(2)–(3). Under that legislation, it must appear to the decision-maker that: (a) the other person involved in the conduct constituting the offence consented to it and was 16 years or over; and (b) any such conduct would not now be an offence under s 71 of the *Sexual Offences Act 2003* (UK) (sexual activity in a public lavatory).

¹⁹ With the exception of defences based on a reasonable belief about the other person's age, similar age-based defences do not apply under the Criminal Code (Qld). See, however, the *Director's Guidelines* discussed at [4.8] above.

intercourse with a person under 16 years. The criminal law provides, however, that it is a defence if the conduct was consensual, the other person was of or above the age of 10 years and the defendant was not more than 2 years older than the other person.²⁰

4.17 It is also an offence in that jurisdiction to engage in sexual intercourse with a 'young person' (of 16 or 17 years) who is under the person's special care. The criminal law provides, however, that it is not an offence if the person was not more than two years older than the young person.²¹

4.18 Consistently with this, the expungement legislation in the Australian Capital Territory requires that the other person consented to the sexual activity and:²²

- (a) was 16 years old or older; or
- (b) was 10 years old or older and not more than 2 years younger than the person; or
- (c) for a person who was under the special care of the person within the meaning of the *Crimes Act 1900*, section 55A (Sexual intercourse with young person under special care)—
 - (i) was 18 years old or older; or
 - (ii) was under 18 years old and not more than 2 years younger than the person.

4.19 Different criteria apply in South Australia and Victoria, where the eligible offences are defined by description rather than specific identification.

4.20 In South Australia, the decision-maker must be satisfied that the offence is an eligible offence, and the conduct constituting the offence has ceased, by operation of law, to be an offence.²³ Consent and age are incorporated into the definition of what is an eligible offence.²⁴

²⁰ *Crimes Act 1900* (ACT) s 55(2), (3)(b). It is also a defence, under s 55(3)(a), to prove that the defendant believed on reasonable grounds that the person on whom the offence is alleged to have been committed was of or above the age of 16 years.

²¹ Or if the person was married to the young person. See *Crimes Act 1900* (ACT) s 55A(1), (3), (5). It is also a defence, under s 55(4), to prove that the defendant believed on reasonable grounds that the young person was at least 18 years old. As to when a young person is under a person's 'special care', such as where the person is a step-parent, foster carer or legal guardian of the young person, see s 55A(2).

²² *Spent Convictions Act 2000* (ACT) s 19E. Cf *Criminal Records Act 1991* (NSW) s 19C(1), which requires that the other person consented to the sexual activity and was of or above 16 years or, if the other person was under the special care of the convicted person within the meaning of the *Crimes Act 1900* (NSW) s 73(3), 18 years.

²³ *Spent Convictions Act 2009* (SA) s 8A(6). The decision is at the discretion of the magistrate: s 8A(5).

²⁴ See *Spent Convictions Act 2009* (SA) s 3(1) (definition of 'designated sex-related offence'), set out at [3.40] above.

4.21 Similar criteria apply in Victoria, with the additional requirement to be satisfied that the person would not have been charged but for the suspected involvement of homosexual activity:²⁵

- (1) The Secretary must refuse an application unless satisfied—
 - (a) that the offence is a historical homosexual offence; and
 - (b) that, on the balance of probabilities, both of the following tests are satisfied in relation to the entitled person—
 - (i) the entitled person would not have been charged with the historical homosexual offence but for the fact that the entitled person 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;
 - (ii) that conduct, if engaged in by the entitled person at the time of the making of the application, would not constitute an offence under the law of Victoria.

4.22 In deciding whether the conduct would constitute an offence under the current law, the decision-maker must have regard, where relevant, to whether any person involved in the conduct consented to the conduct, and the ages or respective ages of those persons.²⁶

4.23 The draft expungement legislation in Tasmania includes criteria in similar terms to those in Victoria.²⁷

Submissions

4.24 Most of the respondents who addressed this issue considered that the criteria for expungement should refer to consent and age.²⁸ Several historians from the Griffith Criminology Institute submitted, for example, that a 'criteria-based scheme identifying factors of age and consent should sufficiently exclude unlawful offences' such as sexual assault.²⁹

4.25 However, some respondents suggested that a wide range of offences, including 'public morality offences' should be eligible under the scheme and that,

²⁵ *Sentencing Act 1991* (Vic) s 105G(1). The test in s 105G(1)(b)(i) is particularly relevant to the 'public morality offences' that are also eligible for expungement under the Victorian legislation: see Explanatory Memorandum, Sentencing Amendment (Historical Homosexual Convictions Expungement) Bill 2014 (Vic) 9, quoted at [3.91] above.

²⁶ *Sentencing Act 1991* (Vic) s 105G(2). See also s 105G(3)–(4), referred to at [6.61] below, as to which sources of evidence are to be used in assessing the issue of consent and when they are to be relied upon.

²⁷ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 8(1)–(2).

²⁸ Submissions 3, 5, 8, 9, 11, 15. One of these respondents, a member of the public, qualified this by saying that he did not oppose age and consent as criteria 'provided the age of consent for anal intercourse is lowered to 16': see further Chapter 7 below.

²⁹ These respondents observed that the possibility of a future change to the age of consent for sodomy might present a difficulty for an expungement scheme: see further Chapter 7 below.

accordingly, alternative or additional criteria should be adopted.³⁰ An academic from Monash University noted that, although it may be difficult to assess, the criteria for such offences could not be limited to consent and age.

4.26 In this respect, some respondents suggested that convictions should be expunged if the activity would not constitute an offence under the current law.³¹

4.27 In the same context, the LGBTI Legal Service Inc and others³² suggested a two-part test, namely, that a conviction should be expunged if the decision-maker is satisfied, on the balance of probabilities, that:³³

- (i) the person would not have been the subject of a conviction but for the fact the person was suspected of having engaged or did engage in the conduct constituting the offence for the purposes of, or in connection with, same-sex or gender-diverse activities; and
- (ii) that conduct, if engaged in by the person at the time of the making of the application, would not today result in a conviction, including having regard to (where relevant) whether persons involved in the sexual activity constituting the offence consented to the sexual activity and the prevailing social attitudes of the time of the offence as compared to the date of the application.

4.28 The Queensland Council for Civil Liberties and a group of academics from the TC Beirne School of Law favoured a similar test, modelled on the approach taken in Victoria.³⁴ The academics from the TC Beirne School of Law explained that the first part of that test 'aims to ensure the scheme is broad enough to encompass all offences', whilst the second 'serve[s] as a check to ensure that the scheme does not expunge convictions for offences which ... remain unlawful under current Queensland law'.

4.29 The Bar Association of Queensland (the 'BAQ') suggested a different formulation, namely that the conviction 'would not have eventuated in the absence of discrimination on the grounds of sexual activity or sexual orientation or identity'.

The Commission's view

4.30 The need for criteria principally arises because the eligible offences may be constituted not only by conduct that has been legalised, but in some cases also by conduct that remains criminal. It is necessary to ensure that the decision-maker has

³⁰ Submissions 5, 9, 11, 13, 15. As to public morality offences, see Chapter 3 above in which the Commission expresses the view that such offences should not be eligible under the proposed expungement legislation.

³¹ Submissions 3, 10.

³² The LGBTI Legal Service Inc made a joint submission with Caxton Legal Centre Inc, Human Rights Law Centre, Queensland Aids Council, Queensland Association of Independent Legal Services Inc (now Community Legal Centres Queensland), and Townsville Community Legal Service Inc.

³³ See also *LGBTI Legal Service Discussion Paper* (2015) 3, 22, Rec 2.2 to the same general effect, and for which the submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support. The submission from the LGBTI Legal Service Inc and others also suggested that the decision-maker should be satisfied that the offence is an 'eligible offence' and the application was made by an 'eligible person'.

³⁴ See [4.21]–[4.22] above, in relation to *Sentencing Act 1991* (Vic) s 105G(1)(b).

an appropriate and clear test against which to distinguish between convictions and charges that should be expunged and those that should not.

4.31 For offences involving sexual activity (or attempted sexual activity) between two persons,³⁵ the criteria in other jurisdictions has tended to focus on consent and age, and whether the conduct has ceased to be an offence. In the Commission's view, an approach to the same general effect is warranted in Queensland, namely, that the decision-maker must be satisfied, having regard to the law in Queensland as in force at the commencement of the expungement legislation, that:³⁶

- the other person involved in the conduct constituting the offence (the 'other person') consented to the conduct;
- the other person was of or above the relevant age of consent; and
- the conduct constituting the offence did not occur in a place to which the public are permitted to have access.

4.32 Under this test, the first consideration is whether the other person consented to the activity. It is clearly the intention to limit expungement to those situations in which the behaviour was consensual.³⁷ This reflects an equal approach to heterosexual and homosexual sexual activity.

4.33 The second consideration is whether, in relation to the conduct constituting the offence, the other person had reached the relevant age of consent.³⁸ Such a situation, where the behaviour was consensual and with a person of or above the age of consent, is clearly appropriate to be expunged.

4.34 The Commission has considered whether this second test should be modified to allow for expungement where the other person had not reached the age of consent but the charged or convicted person could rely on a defence, under the current law, based on a reasonable belief about the other person's age.³⁹ On balance, however, whilst such a test might provide a benefit to some applicants, it would not be appropriate or practical.⁴⁰

³⁵ This would encompass all of the offences that the Commission recommends should be eligible offences under the proposed expungement legislation: see Rec 3-1 above.

³⁶ The Commission does not consider it necessary or desirable to specify a particular standard of satisfaction, preferring that the administrative decision-maker has a broad discretion to consider and weigh relevant matters in applying the criteria, guided but not bound by the strict rules of evidence.

³⁷ See terms of reference para 5(h).

³⁸ Applying the current law, this would be 18 years for offences in relation to sodomy and otherwise 16 years, but see n 45 below.

³⁹ See Criminal Code (Qld) s 208(3), discussed at [4.6] above.

⁴⁰ This is consistent with the approach taken in the Australian Capital Territory. Whilst the expungement criteria in that jurisdiction incorporates some age-based defences (which do not exist in Queensland), it does not include the defence based on a reasonable belief as to the other person's age. The Explanatory Statement, Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Bill 2015 (ACT) explained (at 9) that:

4.35 The third consideration is whether the conduct occurred in a place to which the public are permitted to have access. This adopts the language used in section 227 of the Criminal Code,⁴¹ and aligns the proposed expungement legislation most closely with the principle of not expunging convictions and charges for conduct that constitutes a criminal offence under the current law.⁴²

4.36 The Commission has also considered whether to include an alternative test that, having regard to the *Director's Guidelines*, the person would not be prosecuted for the same conduct today. This wider test could allow for expungement where the conviction or charge related, for example, to consensual sexual experimentation between children of a similar age.⁴³ However, this approach is problematic for several reasons. First, the focus of the terms of reference is on acts between consenting adults. This is reflected in the age of consent embodied in the Criminal Code, which does not itself recognise age-based defences of this kind, unlike some other jurisdictions. Second, the *Director's Guidelines* are non-binding. Such an approach would effectively require the decision-maker to exercise a retrospective prosecutorial discretion, rather than apply an objective legal test. For these reasons, the Commission does not recommend this approach.

4.37 Neither is it necessary nor desirable to include a criterion, along the lines suggested by some of the submissions, that would require the decision-maker to consider whether the person would not have been charged 'but for' the suspected involvement of homosexual activity. Such a test is unnecessary in relation to the offences proposed to be eligible under the legislation,⁴⁴ and would be difficult to apply in practice.

4.38 The proposed requirement in [4.31] above to have regard to the law in Queensland as in force at the commencement of the expungement legislation will provide certainty. An alternative approach might be to apply the law in force at the time the application for expungement is made, to take account of any relevant intervening changes to the law. This would allow any beneficial changes in the law to be considered; however, it would equally expose applications to possible adverse

To include this defence as criteria would require a level of investigation that the scheme cannot provide due to the passage of time and the loss and destruction of evidence. The purpose of the scheme is to assess the facts to extinguish a previous conviction and not to retry the facts of the conviction.

⁴¹ See [4.9] above. See also the offence of wilful exposure in *Summary Offences Act 2005* (Qld) s 9, for which 'public place' is defined (in s 3 sch 2) to mean a place that is open to or used by the public, whether or not on payment of a fee.

⁴² See terms of reference paras 4(f), 5(i).

⁴³ See [4.8] above. This wider test could also allow for expungement where, for example, a child under 18 years was convicted of 'permitting' another person to sodomise him or her in circumstances where the child would be characterised as the 'complainant' to a sexual offence, even if the child consented to the activity: see n 12 above.

⁴⁴ Such a test would be of more relevance if public morality offences, which remain offences under the current law, were to be included as eligible offences under the proposed expungement legislation. The Commission does not, however, recommend that such offences be eligible offences: see Chapter 3 above.

changes and introduce uncertainty. For this reason, the Commission prefers the fixed point in time of the commencement of the expungement legislation.⁴⁵

ADDITIONAL MATTERS

4.39 In the Consultation Paper, the Commission also sought submissions on whether, in addition to the criteria, there are other factors the decision-maker should consider in deciding an application.⁴⁶

Other jurisdictions

4.40 Additional factors are generally not specified in the expungement legislation of other jurisdictions.⁴⁷ With the exception of South Australia, the expungement legislation in those jurisdictions has the general effect that a conviction must not be expunged unless the relevant criteria are satisfied.

4.41 In contrast, in South Australia, expungement is ‘at the discretion’ of the qualified magistrate, having regard (in some circumstances) to prescribed matters.⁴⁸

4.42 The expungement scheme in that jurisdiction builds on existing provisions, in section 8A of the *Spent Convictions Act 2009* (SA), for a qualified magistrate to order that certain types of ‘eligible sex offences’ are spent. This includes both existing prescribed ‘sex offences’ and the new category — added by the expungement legislation to deal with historical gay sex offences — of ‘designated sex-related offences’.⁴⁹

4.43 Section 8A provides that the magistrate may make an order in relation to a designated sex-related offence if satisfied that the offence is such an offence and that the conduct has ceased by operation of law to be an offence.⁵⁰ Otherwise, however, in making a decision about an eligible sex offence under that legislation,

⁴⁵ A relevant change in law might be, for example, a change to the age of consent, as to which see the Health and Other Legislation Amendment Bill 2016 (Qld) discussed in Chapter 7 below. The effect of the Commission’s recommendation is that, if, prior to or concurrently with the commencement of the proposed expungement legislation, the age of consent for offences in relation to sodomy were to be lowered from 18 years to 16 years, applications for expungement would be assessed by reference to the new age of consent of 16 years (whether the offence involved anal intercourse or other sexual activity). If the same change to the age of consent for sodomy were made *after* the commencement of the proposed expungement legislation, however, applications for expungement of convictions or charges in relation to sodomy would be assessed by reference to the age of consent of 18 years applying at the commencement of the legislation.

⁴⁶ *QLRC Consultation Paper No 74* (2016), Q-6. As to the information to which the decision-maker might have regard in applying the criteria on an application for expungement, see Chapter 6 below.

⁴⁷ See, however, *Sentencing Act 1991* (Vic) s 105G(2) in relation to consent and age as factors to which the decision-maker must, if relevant, have regard in deciding whether the conduct constituting the offence would not constitute an offence if engaged in at the time of the application. Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 8(2) takes a similar approach.

⁴⁸ *Spent Convictions Act 2009* (SA) s 8A(5).

⁴⁹ *Spent Convictions Act 2009* (SA) s 8A(1). See the definitions in s 3(1) of ‘eligible sex offence’, ‘sex offence’, and ‘designated sex-related offence’, the latter of which is set out in full at [3.40] above.

⁵⁰ *Spent Convictions Act 2009* (SA) s 8A(6).

the magistrate may decide the matter in his or her discretion, having regard to the following matters:⁵¹

- (a) the nature, circumstances and seriousness of the offence; and
- (b) if a victim impact statement was furnished to the sentencing court in connection with the sentencing of the applicant for the offence (and that statement is available to the qualified magistrate)—anything referred to in that statement; and
- (c) any penalty imposed, and any other order or requirement made or imposed by a court, in relation to the offence; and
- (d) the length of time since the conviction; and
- (e) all the circumstances of the applicant, including the circumstances of the applicant at the time of the commission of the offence and at the time of the application and whether the applicant appears to have rehabilitated and to be of good character; and
- (f) whether the spending of the conviction and the non-disclosure of the offence to other persons by operation of an order under this section might present a risk to the public (and, if so, the extent of that risk); and
- (g) whether there is any other public interest served in not making the order; and
- (h) any other matter considered relevant by the qualified magistrate.

4.44 Arguably, the effect of section 8A is that, if a magistrate is not satisfied of the criteria for expungement of a designated sex-related offence, the magistrate may nevertheless order that the conviction be spent in the exercise of discretion having regard to the matters listed in [4.43] above.

Submissions

4.45 In its Discussion Paper, the LGBTI Legal Service Inc had observed that consideration might be given to ‘a discretion for the decision-maker to refuse to expunge the records’, despite being satisfied of the relevant criteria, ‘if there are exceptional circumstances as to why the conviction should not be expunged having regard to prescribed matters’. To this end, it noted that the legislation in South Australia includes prescribed matters.⁵²

4.46 However, in their submission, the LGBTI Legal Service Inc and others did not suggest the adoption of a similar list of prescribed matters, and ‘recommend[ed] against allowing the decision-maker discretion to refuse to expunge records’ in exceptional circumstances. As the LGBTI Legal Service Inc had observed in its Discussion Paper, the question whether to include such a discretion ‘should be

⁵¹ *Spent Convictions Act 2009 (SA)* s 8A(5).

⁵² *LGBTI Legal Service Discussion Paper (2015)* 4, 22, Rec 2.2.

balanced against the overarching purpose' of the scheme to expunge convictions for consensual adult homosexual activity.⁵³

4.47 The Castan Centre for Human Rights Law expressed overall support for the proposals in that Discussion Paper and submitted that an 'appropriate safeguard' for the expungement scheme might be a discretion on the part of the decision-maker 'to exclude acts which would still constitute an offence today'.⁵⁴

4.48 The BAQ discussed the factors of consent and age as forming 'a possible basis for exercising [a] discretion to refuse expungement'. It suggested that 'it is better' that such factors are 'part of the discretion as to whether or not to grant expungement so that individual circumstances may be considered'.⁵⁵

4.49 However, none of the respondents suggested that, in addition to the relevant criteria, the decision-maker should consider other prescribed matters when deciding an application for expungement.

The Commission's view

4.50 It is unnecessary and undesirable to provide an overriding discretion on the part of the decision-maker either to grant or refuse an application for expungement, despite the application of the criteria.

4.51 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.⁵⁶ For this purpose, the Commission recommends in this chapter the adoption of clear criteria relating to consent and age and whether the conduct occurred in a place to which the public are permitted to have access.⁵⁷ The application of these criteria is sufficient, without the need to consider additional contextual factors, to determine whether an application for expungement should be granted.

4.52 Unlike the South Australian expungement scheme, the scheme recommended by the Commission is an administrative one. It would not be appropriate to adopt a more subjective discretionary approach under which regard is had to such matters as, for example, the public interest in granting or not granting an application for expungement.⁵⁸

53 Ibid 22.

54 Australian Lawyers for Human Rights also expressed general support in its submission for the proposals in the *LGBTI Legal Service Discussion Paper* (2015), although it did not comment specifically on this issue.

55 This respondent also noted the current unequal age of consent for sodomy: see further Chapter 7 below.

56 See terms of reference para 5(i).

57 See [4.31] above, Rec 4-1 below.

58 See *Spent Convictions Act 2009* (SA) s 8A(5)(g), set out at [4.43] above.

RECOMMENDATION

- 4-1 The proposed expungement legislation should provide that an application for expungement is to be granted if the decision-maker is satisfied, having regard to the law in Queensland as in force at the commencement of the expungement legislation, that:**
- (a) the other person involved in the conduct constituting the offence (the 'other person') consented to the conduct;**
 - (b) the other person was of or above the relevant age of consent; and**
 - (c) the conduct constituting the offence did not occur in a place to which the public are permitted to have access.**

Chapter 5

Consequences of Expungement

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INTRODUCTION

5.1 In this report, the Commission recommends the enactment of a new legislative scheme to provide for the expungement of convictions and charges for eligible offences from a person's criminal history.¹

5.2 If an application under the proposed expungement legislation to expunge a conviction, or a charge (which for any reason did not result in a conviction), is successful, the result will be that the conviction or charge is expunged.

5.3 This chapter deals with what the consequences of expungement under the legislation should be. In particular, it discusses:²

- the general effect of expungement, including the effect of expungement on a conviction and the charge to which the conviction related;

¹ See Recs 2-1, 3-1, 3-2 and 4-1 above. See also Rec 3-4 above as to who may make an application for expungement.

² See terms of reference paras 4(g), 5(m) and (n).

- the effect of expungement for disclosure and other purposes;
- whether there should be offences for the unlawful disclosure, or improper obtaining, of information about an expunged conviction or charge;
- whether official records of an expunged conviction or charge should be annotated or deleted, and what records should be identified as 'official records'; and
- whether there should be a provision for reviving an expunged conviction or charge if it was later determined that the expungement occurred as a result of fraud.

THE GENERAL EFFECT OF EXPUNGEMENT

5.4 Expungement schemes generally aim to restore a person's position so that, as far as possible, they are treated in law as if the conviction had never been imposed.³ This aim is given particular effect by making legislative provision for the conviction to be disregarded and not disclosed except in appropriate circumstances.

Other jurisdictions

5.5 The expungement legislation in England and Wales generally states that a person whose conviction is expunged is to be treated for all purposes in law as if the person has not committed the offence or been charged with, prosecuted for, convicted of, sentenced for or cautioned for the offence.⁴ It then sets out particular consequences of expunging a conviction or caution,⁵ which extend to the 'circumstances ancillary' to an expunged conviction (including the offence which was the subject of the conviction and any process or proceedings preliminary to the conviction).⁶

5.6 A similar general statement is not included in the expungement legislation in other jurisdictions. Instead, those jurisdictions set out the specific consequences of expunging a conviction (such as non-disclosure),⁷ and provide for those consequences to extend not only to the conviction but also to the charge to which the conviction related and, in some cases, any investigation or legal process associated with that charge or conviction.⁸

³ See generally, Chapter 2 above.

⁴ *Protection of Freedoms Act 2012* (UK) c 9, s 96(1). The expungement provisions of the Act also apply in relation to cautions. See n 77 in Appendix C below for the definition of 'caution'.

⁵ *Protection of Freedoms Act 2012* (UK) c 9, s 96(2)–(5), referred to at [5.27] below.

⁶ *Protection of Freedoms Act 2012* (UK) c 9, s 98(2).

⁷ See [5.24]–[5.26] below.

⁸ See *Spent Convictions Act 2000* (ACT) s 7A(2); *Criminal Records Act 1991* (NSW) s 4(2A); *Spent Convictions Act 2009* (SA) s 3(4); *Sentencing Act 1991* (Vic) s 105(4). Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 3(3) takes a similar approach.

Submissions

5.7 A group of academics from the TC Beirne School of Law considered that the general aim of the scheme should be ‘to recognise injustices committed in the past, but also to avoid exacerbating those injustices by ensuring that the convictions are removed from a person’s criminal history’ and to avoid discrimination based on the conviction.

5.8 The Queensland Council for Civil Liberties commented that the scheme should have the effect that there is no point at which a homosexual man should have to disclose an historical charge or offence of a homosexual nature:

The overarching problem for many gay men in all states, has been the necessity to admit to having a criminal record based on having been charged with what was at the time a crime, but is no longer so, and in that exposure, many of those men are rejected for jobs, particularly in government

5.9 A number of respondents — including the LGBTI Legal Service Inc and others,⁹ several historians from the Griffith Criminology Institute, an academic from Monash University, and a group of academics from the TC Beirne School of Law — submitted that, similar to the approach in England and Wales, the proposed expungement legislation should expressly state that a person whose conviction is expunged is to be treated for all purposes in law as if the person had not committed the offence or been charged with, prosecuted for, convicted of, sentenced for or cautioned for the offence.¹⁰

5.10 Several respondents — including the LGBTI Legal Service Inc and others, several historians from the Griffith Criminology Institute and a group of academics from the TC Beirne School of Law — submitted that the expungement legislation should extend to any legal processes to which an expunged conviction or charge relates.¹¹

The Commission’s view

5.11 The proposed expungement legislation should make a clear statement as to the general effect of the legal rights created by expungement.

5.12 Accordingly, the legislation should provide that a person whose conviction or charge is expunged is to be treated for all purposes in law as if the person had not committed the offence or been charged with, prosecuted for, convicted of, or sentenced for the offence (as the case may be).

⁹ The LGBTI Legal Service Inc made a joint submission with Caxton Legal Centre Inc, Human Rights Law Centre, Queensland Aids Council, Queensland Association of Independent Legal Services Inc (now Community Legal Centres Queensland), and Townsville Community Legal Service Inc.

¹⁰ Submissions 3, 8, 9, 11, 15.

¹¹ See, eg, Submissions 3, 8, 9 and 15. The LGBTI Legal Service Inc and others submitted that a broad definition of conviction should be adopted to include any finding of guilt, fines, charges, penalties, court appearances, community service orders, investigations and legal services. See also *LGBTI Legal Service Discussion Paper* (2015) 3, 19–20, Rec 2.1(c) to the same general effect, and for which the submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support.

5.13 Further, the legislation should provide that a reference to an ‘expunged conviction’ includes a reference to the charge to which the expunged conviction related and any investigation or legal process associated with that charge or conviction. Similarly, a reference to an ‘expunged charge’, in relation to a charge that did not result in a conviction, should be taken to include a reference to any investigation or legal process associated with that charge. The practical effect of this is to ensure that the specific consequences of expungement (as recommended later in this chapter) extend to these ancillary circumstances.¹²

EFFECTS OF EXPUNGEMENT FOR DISCLOSURE AND OTHER PURPOSES

5.14 In the Consultation Paper, the Commission sought submissions on the extent to which an expunged conviction should be protected from disclosure.¹³

5.15 The *Criminal Law (Rehabilitation of Offenders) Act 1986* regulates the disclosure of charges and particular convictions. The Act lays down two main propositions, each of which has exceptions.

5.16 The first proposition relates to matters that are declared, for the purposes of the Act, not to form part of a person’s ‘criminal history’.¹⁴ To that end, if a person is asked or requested to disclose a conviction that is not recorded or has been set aside or quashed or a charge made against the person,¹⁵ the person is not required to disclose that information for any purpose.¹⁶

5.17 However, this is subject to an exception where the requirement or request is made for the purposes of an inquiry being conducted pursuant to authority conferred by or under an Act, or in criminal or civil proceedings before a court if the fact of the conviction or charge is relevant to an issue in the proceedings or the court has granted permission for the requisition or request to be made.¹⁷

5.18 The second proposition is that a person has a right not to disclose (and other persons must not disclose) a spent conviction (that is, a recorded conviction where the ‘rehabilitation period’ in relation to the conviction has expired and has not

¹² See, in particular, [5.39] ff, Rec 5-3 below.

¹³ *QLRC Consultation Paper No 74* (2016), Q-7.

¹⁴ Generally, only convictions that are recorded against a person in respect of offences are part of the person’s criminal history: ss 3 (definition of ‘criminal history’), 5(1). An ‘offence’ is an act or omission that renders the person doing the act or making the omission liable to punishment: s 3 (definition of ‘offence’). However, a conviction that is not recorded is also part of a person’s criminal history but only for the limited purposes of an appeal against the sentence imposed for the conviction, subsequent sentencing proceedings or subsequent proceedings for the same or a later offence: *Penalties and Sentences Act 1992* (Qld) s 12(3)(b), (4)(b).

¹⁵ A conviction that is set aside or quashed and a charge are not part of the criminal history of a person: *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 5(1). A ‘charge’ means an allegation formally made in court that a person has committed an offence where the allegation is not pursued to a final determination in a court, a conviction is not recorded in respect of the allegation, or a conviction recorded in respect of the allegation is deemed by law not to be a conviction: s 3 (definition of ‘charge’).

¹⁶ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 5(2). There is nothing in the Act to prevent a person from making a disclosure voluntarily.

¹⁷ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 5(3). The court has a discretion pursuant to s 5(3)(b) to allow cross-examination on prior convictions where relevant to an issue in the proceedings: see, eg, *R v Clarke* [2005] QCA 483, [35]–[42] (McMurdo P; Helman and Chesterman JJ concurring); *R v Millar* [2000] 1 Qd R 437, [14]–[15] (McPherson JA; McMurdo P and Ambrose J agreeing).

been revived).¹⁸ The prohibition applies if the person making the disclosure knows that the rehabilitation period has expired.

5.19 If a person's conviction is spent, the person also has a general right to claim upon oath or otherwise that they have not been convicted.¹⁹ Evidence is not admissible in any proceeding to show that the claim is false.²⁰

5.20 The Act also provides that a person or authority charged with the function of assessing a person's fitness to be admitted to a profession, occupation or calling or for any other purpose, is required to disregard the conviction, unless the law expressly requires the person to be assessed to disclose their criminal history, or the person or authority making the assessment to have regard to the criminal history.²¹

5.21 Despite providing that a person has a right to refuse to disclose a charge or a conviction not forming part of that person's criminal history, and a right not to disclose spent convictions, the Act requires applicants for particular professions, occupations, licences or roles (including police officers, justices of the peace or commissioners for declarations, teachers, employees of particular government departments and legal practitioners) to disclose that information if requested or required.²²

5.22 Other Acts may also impose separate disclosure requirements (which may, in some cases, include a requirement to disclose a charge) on persons seeking entry into particular professions, occupations or roles.²³ For example, the *Working with Children (Risk Management and Screening) Act 2000* requires the disclosure of information about charges laid against a person that did not result in a conviction if

18 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 6. See s 11 of the Act in relation to when a spent conviction is revived. However, the Act permits the disclosure of spent convictions in particular circumstances, including if the disclosure was made in a report by a person who is required by law to make a report that includes references to or a disclosure of the conviction, or in discharge of a duty under the *Public Records Act 2002* (Qld): *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 7.

19 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 8(1). However, this does not apply when, as provided by s 4, the Act is to be construed so as not to prejudice any provision of law or rule of legal practice that requires disclosure of a person's criminal history. For example, evidence of prior convictions may in certain circumstances be admissible under the laws of evidence to discredit a witness: LexisNexis, *Australian Criminal Trial Directions* (at March 2012) [3-4200].

See also *Evidence Act 1977* (Qld) ss 15A, 16. Section 16 of the Act permits a witness to be questioned about previous convictions and, if the witness either denies the fact or refuses to answer, the party so questioning may prove such conviction. This is, however, subject to s 15A, which provides that cross-examination as to spent convictions may be conducted only with the permission of the court.

20 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 8(2).

21 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9(1)(a)–(b). For example, under the Act, there are specific disclosure requirements for people applying for employment as a police officer or a teacher: s 9A.

22 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9A.

23 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 4(1) provides that the Act 'shall be construed so as not to prejudice any provision of law or rule of legal practice that requires, or is to be construed to require, disclosure of the criminal history of any person'.

requested as part of the screening requirements for a blue card for working or volunteering with children.²⁴

5.23 As explained in Chapter 2 of this Report, the limited protection given by the *Criminal Law (Rehabilitation of Offenders) Act 1986* and the disclosure requirements under other legislation are some of the main reasons why a new legislative scheme is required to give effect to expungement.

Other jurisdictions

5.24 In the Australian Capital Territory, New South Wales, South Australia and Victoria:

- the person is not required to disclose information about the expunged conviction;²⁵
- a question about the person's criminal history is taken not to refer to the expunged conviction;²⁶ and
- in applying an Act to the person, a reference to a conviction is taken not to refer to the expunged conviction, and/or a reference to the person's character does not allow or require anyone to take the expunged conviction into account.²⁷

5.25 Additionally, in South Australia and Victoria, the expunged conviction or its non-disclosure is not a proper ground for refusing the person, or dismissing the person from, any appointment, post, status or privilege.²⁸ In Victoria, the person may reapply if the refusal was made solely on the basis of the conviction before it was expunged.²⁹

²⁴ See *Working with Children (Risk Management and Screening) Act 2000* (Qld) ch 8 pt 6 div 2, ch 8A. The information required includes the person's criminal history, which is widely defined under the Act to include unrecorded convictions, spent convictions and charges: s 3, sch 7 (definitions of 'police information', 'criminal history', 'conviction' and 'charge'). The Act states that the relevant provisions apply despite anything in the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld): ss 157, 357B.

²⁵ *Spent Convictions Act 2000* (ACT) s 19H(1)(a); *Criminal Records Act 1991* (NSW) s 19F(1)(a); *Spent Convictions Act 2009* (SA) s 10(b); *Sentencing Act 1991* (Vic) s 105J(b). The Victorian provision also expressly refers to giving evidence under oath in a judicial proceeding.

²⁶ *Spent Convictions Act 2000* (ACT) s 19H(1)(b); *Criminal Records Act 1991* (NSW) s 19F(1)(b); *Spent Convictions Act 2009* (SA) s 10(a); *Sentencing Act 1991* (Vic) s 105J(a). The Victorian provision also expressly refers to questions put in a legal proceeding and required to be answered on oath.

²⁷ *Spent Convictions Act 2000* (ACT) s 19H(1)(c); *Criminal Records Act 1991* (NSW) s 19F(1)(c); *Spent Convictions Act 2009* (SA) s 10(c); *Sentencing Act 1991* (Vic) s 105J(c). The South Australian and Victorian provisions extend to the application of an agreement to a person. The South Australian provisions also apply to the application of an arrangement to a person.

²⁸ *Spent Convictions Act 2009* (SA) s 10(d); *Sentencing Act 1991* (Vic) s 105J(d).

²⁹ *Sentencing Act 1991* (Vic) s 105J(e)–(f).

5.26 The equivalent provisions in the draft expungement legislation in Tasmania are in generally similar terms to those in South Australia and Victoria.³⁰

5.27 In England and Wales, a person whose conviction is expunged is to be treated 'for all purposes in law as if the person has not' committed the offence or been charged with, prosecuted for, convicted of, sentenced for, or cautioned for, the offence.³¹ In particular:³²

- evidence is not admissible in proceedings before a judicial authority to prove the person committed the offence or was charged with, prosecuted for, convicted of, sentenced for, or cautioned for, the offence;
- questions about previous convictions, cautions, offences, conduct or circumstances are to be treated as not relating to any disregarded conviction or caution, or any circumstances ancillary to it;
- any disclosure obligation on the person is not to extend to disclosure of a disregarded conviction or caution, or any circumstances ancillary to it; and
- a disregarded conviction or caution, or any circumstances ancillary to it, is not a proper ground for dismissing or excluding the person from or prejudicing a person in any way in any office, profession, occupation or employment.

Submissions

5.28 The LGBTI Legal Service Inc and others considered that the expungement scheme should provide 'robust' protections against disclosure, while a member of the public³³ suggested that the scheme should include 'more, rather than fewer, protections against disclosure'.

³⁰ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 12. The draft Bill also expressly provides that the expunged conviction is taken not to form part of the person's criminal record: cl 12(b). In contrast to Victoria, the draft expungement legislation in Tasmania does not provide for a person to reapply for any appointment, post, status or privilege which was refused solely on the basis of the conviction before it was expunged.

³¹ *Protection of Freedoms Act 2012* (UK) c 9, s 96(1).

³² *Protection of Freedoms Act 2012* (UK) c 9, s 96(2)–(5). For the purposes of s 96:

- 'proceedings before a judicial authority' include (in addition to proceedings before any of the ordinary courts of law) proceedings before any tribunal, body or person having power by virtue of any enactment, law, custom or practice, under the rules governing any association, institution, profession, occupation or employment, or under any provision of an agreement providing for arbitration with respect to questions arising under that agreement, to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question: s 98(1); and
- 'circumstances ancillary' to a disregarded conviction or caution include the circumstances of the offence which was the subject of the conviction or caution, the conduct constituting the offence, any process or proceedings preliminary to the conviction or caution, any sentence imposed, any appeal or review proceedings, and anything done pursuant to or in compliance with any such sentence: s 98(2), (3).

³³ Submission 3.

5.29 The LGBTI Legal Service Inc and others, an academic from Monash University and a member of the public³⁴ submitted that the scheme should provide that:

- the person is not required to disclose information about the expunged conviction;
- a question about the person's criminal history is taken not to refer to the expunged conviction; and
- in applying an Act to a person, a reference to a conviction is taken not to refer to the expunged conviction, and/or a reference to the person's character does not allow or require anyone to take the expunged conviction into account.

5.30 A group of academics from the TC Beirne School of Law also submitted that a question about the person's criminal history should be taken not to refer to the expunged conviction, so that effectively '[a person's] criminal history, with respect to the expungement, disappears'.

5.31 Australian Lawyers for Human Rights and Queensland State Archives ('QSA') similarly considered that an expunged conviction should not be disclosed in any criminal history check.

5.32 QSA considered that the scheme should achieve expungement by means of legislative provisions to the effect that records of expunged convictions are null and void and should not be required to be disclosed as part of any criminal history check.

5.33 The Queensland Council for Civil Liberties submitted that, once a conviction or charge is expunged, the person should be entitled to deny it ever existed.

5.34 The Anti-Discrimination Commission Queensland (the 'ADCQ') considered that a conviction for doing something that it is now not unlawful to do, and which is also a ground for unlawful discrimination, should not form part of an assessment of a person's character or suitability to hold a particular position, role or right.

5.35 The LGBTI Legal Service Inc and others and an academic from Monash University submitted that an expunged conviction or charge should not be admissible in judicial proceedings to prove the person was charged with, prosecuted for, convicted of, or sentenced (or cautioned) for the offence.

5.36 Those respondents and a member of the public³⁵ also submitted that the expungement scheme should provide that the expunged conviction or its non-disclosure is not a proper ground for refusing to a person, or dismissing the person from, an appointment, post, status or privilege and the person may reapply if the refusal was made solely on the basis of the conviction before it was expunged.

³⁴ Ibid. See also *LGBTI Legal Service Discussion Paper* (2015) 23–4 to the same general effect, and for which the submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support.

³⁵ Submission 3.

The Commission's view

Effects of expungement for disclosure and other purposes

5.37 As mentioned above, there are particular circumstances and purposes for which the law requires or authorises information about a person's convictions or charges to be disclosed or taken into account. Such disclosures are often made in the context of criminal history checks required for employment and other areas of public life.

5.38 The proposed expungement legislation should include specific provisions to override the effect of any such requirement or authorisation to the extent that it may apply to an expunged conviction or charge.

5.39 Accordingly, the legislation should provide that, if a person's conviction or charge is expunged:

- it is lawful for the person to claim upon oath or otherwise that the person was not convicted or charged, and evidence is not admissible in any proceedings to show that the claim is false;
- the person is not required to disclose information about the expunged conviction or charge;
- a question about the person's criminal history is taken not to refer to the expunged conviction or charge;
- evidence is not admissible or receivable in proceedings before any court, tribunal, body or person having power to determine any question affecting a person's rights, privileges, obligations or liabilities, to prove that the person was charged with, prosecuted for, convicted of, or sentenced for the offence; and
- in applying an Act, agreement or arrangement to the person, a reference to a conviction or charge or the person's criminal history is taken not to refer to the expunged conviction or charge or to the person's criminal history to the extent it relates to the expunged conviction or charge, and a reference to the person's character does not allow or require anyone to take the expunged conviction or charge into account.

5.40 Additionally, to deal with the possibility of an expunged conviction or charge being used as a reason to dismiss, or to not appoint, a person in respect of any office, profession, occupation or employment, the legislation should also provide that:

- the expunged conviction or charge is not a proper ground for dismissing or excluding the person from any office, profession, occupation or employment, or prejudicing the person in any way in any office, profession, occupation or employment; and
- the person may reapply for any licence, permit, approval or other authorisation under an Act that was refused because of the conviction or charge, before it became an expunged conviction or charge, without waiting any minimum period.

Other Acts authorising or requiring disclosure not to apply

5.41 The proposed expungement legislation should also provide that any other Act (including the *Criminal Law (Rehabilitation of Offenders) Act 1986*) which authorises or requires disclosure of a person's criminal history (however defined), convictions or charges does not apply to an expunged conviction or charge.

Mutual recognition

5.42 As mentioned above, expungement legislation has been enacted in the Australian Capital Territory, New South Wales, South Australia and Victoria, and proposed in Tasmania. In its submission, the Diversity Council of Australia commented on the importance of national consistency in this area.

5.43 The Commission is of the view that the proposed expungement legislation should provide that a conviction (or charge)³⁶ that is expunged under a similar scheme in another State³⁷ should be recognised as an expunged conviction (or charge) in Queensland.

OFFENCES

5.44 In the Consultation Paper, the Commission sought submissions on whether there should be offences for the unlawful disclosure or improper obtaining of information about an expunged conviction.³⁸

Other jurisdictions

Unlawful disclosure of an expunged conviction

5.45 In the Australian Capital Territory, New South Wales and South Australia, a person who has access to records of convictions kept by or on behalf of a public authority commits an offence if the person discloses information about an expunged conviction to another person.³⁹ The draft expungement legislation in Tasmania includes a similar offence.⁴⁰ The South Australian offence also requires that the person making the disclosure knows, or ought reasonably to have known, that the information is about an expunged conviction.

³⁶ The expungement legislation in other jurisdictions applies to 'convictions'. Under the legislation, a reference to an 'expunged conviction' includes a reference to the charge to which the conviction related: see [5.6] and n 8 above.

³⁷ 'State' includes the Australian Capital Territory and Northern Territory: *Acts Interpretation Act 1954* (Qld) s 33A.

³⁸ *QLRC Consultation Paper No 74* (2016), Q-7.

³⁹ *Spent Convictions Act 2000* (ACT) s 19I(1); *Criminal Records Act 1991* (NSW) s 19G(1); *Spent Convictions Act 2009* (SA) s 11(1). A reference to a 'conviction' also includes a reference to the charge to which it relates: *Spent Convictions Act 2000* (ACT) s 7A(2); *Criminal Records Act 1991* (NSW) s 4(2A); *Spent Convictions Act 2009* (SA) s 3(4). In the Australian Capital Territory and New South Wales, an offence is committed where information is disclosed to any person: *Spent Convictions Act 2000* (ACT) s 19I(1)(b); *Criminal Records Act 1991* (NSW) s 19G(1).

⁴⁰ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 13(1). The offence provision applies if the disclosure is made without the consent of the person whose conviction was expunged.

5.46 In Victoria, a person who has access to ‘official records’ — that is, records containing information about convictions held by any court, the Victorian Civil and Administrative Tribunal (‘VCAT’), Victoria Police or the Office of Public Prosecutions — commits an offence if the person, directly or indirectly, discloses or communicates to any person, the fact of a conviction (or a charge related to a conviction) that the person knows, or ought reasonably to have known, is an expunged conviction.⁴¹

5.47 There are exceptions to these offences.

5.48 It is not an offence if the disclosure is made to the person whose conviction has been expunged (Australian Capital Territory and New South Wales),⁴² or if the disclosure is made with the consent of the convicted person (South Australia and Victoria).⁴³

5.49 In the Australian Capital Territory and New South Wales, the offence provision also does not apply to the decision-maker under the scheme for the purpose of informing a public authority holding information about convictions that the conviction is expunged.⁴⁴ Similar provision is made in the draft expungement legislation in Tasmania.⁴⁵

5.50 The Australian Capital Territory and New South Wales also make an exception for archival documents. In those jurisdictions, it is not an offence for an archive or library (or an authorised officer of an archive or library) to make available to a member of the public, or to another archive or library, in accordance with the normal procedures of the archive or library, material that is normally available for public use and that contains information relating to an expunged conviction.⁴⁶ In support of the New South Wales scheme, it was stated that:⁴⁷

with the vast store of material held in archives or libraries, including newspapers and publications, it goes without saying that references will be made to court proceedings and convictions in the past. If archives and libraries were required to redact material relating to such court proceedings and convictions it would be an almost impossible task to achieve. It would also be an invitation to rewrite history and, as much as we can do with this bill, the existence of past wrongs should not in that sense be wiped from the record. We learn from our history; we learn from past experiences; and we learn from past wrongs.

⁴¹ *Sentencing Act 1991* (Vic) ss 105(1) (definition of ‘official records’), 105K(6).

⁴² *Spent Convictions Act 2000* (ACT) s 19(2)(b); *Criminal Records Act 1991* (NSW) s 19G(3).

⁴³ *Spent Convictions Act 2009* (SA) s 11(2)(a); *Sentencing Act 1991* (Vic) s 105K(7)(a). In Victoria, consent must be given in writing.

⁴⁴ *Spent Convictions Act 2000* (ACT) s 19(2)(c); *Criminal Records Act 1991* (NSW) s 19G(4).

⁴⁵ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 13(2)(b). The non-disclosure offence also does not apply if the Commissioner of Police discloses to CrimTrac for incorporation into the police information sharing system known as the National Police Reference System the fact that a specified conviction has become an expunged conviction: cl 13(2)(c). Similar provision is made in Victoria: *Sentencing Act 1991* (Vic) s 105K(8).

⁴⁶ *Spent Convictions Act 2000* (ACT) s 19(2)(a); *Criminal Records Act 1991* (NSW) s 19G(2). The terms ‘archive’ and ‘library’ are not specifically defined in either Act. Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 13(2)(a) is in similar terms.

⁴⁷ New South Wales, *Parliamentary Debates*, Legislative Council, 23 October 2014, 1752 (T Khan).

5.51 In Victoria, it is also not an offence to disclose information about an expunged conviction if ‘the disclosure or communication is otherwise authorised by law’.⁴⁸

Improperly obtaining information about an expunged conviction

5.52 The expungement legislation in the Australian Capital Territory, New South Wales and South Australia⁴⁹ and the draft expungement legislation in Tasmania,⁵⁰ make it an offence for a person to fraudulently or dishonestly obtain information about an expunged conviction from records of convictions kept by or on behalf of a public authority.

Submissions

5.53 A number of respondents submitted that the expungement scheme should make it an offence to unlawfully disclose information about an expunged conviction.⁵¹ A member of the public suggested that the offence should operate in respect of either ‘records kept by or on behalf of a public authority’ or ‘a person with access to official records’.⁵²

5.54 A group of academics from the TC Beirne School of Law considered that the primary records relating to an expunged conviction should be subject to prohibitions on access and disclosure, in order to protect the applicant’s privacy and maintain certainty in the expungement process.⁵³ They commented:

The information in question is highly sensitive. The aim of this scheme is to begin to remove the social stigma and legal obstacles resulting from these convictions. It would undermine the effect of an expungement if information regarding the offence or identifying an applicant were to become public knowledge. It is important that the necessary safeguards are built into the scheme and within Queensland law to provide adequate protection for applicants. The scheme must provide that authorities are not permitted to disclose information about convictions, applications or expungements, and impose a positive duty on people working with this information to not disclose any information about the applicant, conviction or expungement, or any information contained in an application. Given the sensitivity of the information, it would be appropriate to enforce a penalty for any contravention of this duty. There should also be a duty to ensure the information is adequately protected, and must be anonymised if it is made public. (notes omitted)

5.55 An academic from Monash University also considered that the provision of an unlawful disclosure offence is necessary to prevent ‘the conviction being used as

⁴⁸ *Sentencing Act 1991* (Vic) s 105K(7)(b).

⁴⁹ *Spent Convictions Act 2000* (ACT) s 19J; *Criminal Records Act 1991* (NSW) s 19H; *Spent Convictions Act 2009* (SA) s 14. In New South Wales, the offence also applies to an attempt to obtain such information.

⁵⁰ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 14.

⁵¹ Submissions 3, 5, 6, 9, 11, 15.

⁵² Submission 3.

⁵³ Those respondents also suggested that primary records should be annotated and secondary records should be destroyed.

a continued source of stigma, [or] ... to bribe or coerce the individual to which the conviction or charge was applicable’.

5.56 A member of the public also commented that unlawful disclosure is ‘a harm that warrants prohibition by the state and punishment’.⁵⁴

5.57 The LGBTI Legal Service Inc and others preferred the Victorian form of the offence, submitting that the scheme should expressly provide that:⁵⁵

a person who has access to any official records must not, directly or indirectly, disclose or communicate to any person a record of a conviction, that the person knows, or ought reasonably have known forms the subject of an expunged record.

5.58 The Bar Association of Queensland (‘the BAQ’) also supported civil and criminal penalties for unauthorised disclosure of expunged convictions or questions directed to requiring self-disclosure of expunged convictions (for example, by employers).

5.59 In contrast, several historians from the Griffith Criminology Institute, noting that ‘the balance between public interest and privacy is difficult’, submitted that adequate protections for individuals are already provided through ‘existing legislative provisions on the disclosure of convictions as well as restrictions on access to criminal files held at Queensland State Archives (currently 100 years)’.⁵⁶

5.60 A member of the public submitted that disclosing or obtaining information about expunged convictions should not be the subject of a criminal offence on the basis that it would ‘not serve the collective interest’.⁵⁷

5.61 A number of respondents submitted that the application of the offence of unlawful disclosure should be subject to limited exceptions.⁵⁸

5.62 The LGBTI Legal Service Inc and others, a group of academics from the TC Beirne School of Law, and a member of the public⁵⁹ considered that an exception should apply if the disclosure is made to, or with the consent of, the convicted person.⁶⁰

54 Submission 6.

55 See also *LGBTI Legal Service Discussion Paper* (2015) 24 to the same effect, and for which the submissions from the Castan Centre for Human Rights Law and the Australian Lawyers for Human Rights expressed general support.

56 These respondents also noted that some genealogy websites and publicly accessible databases contain case details and names up to the mid-1950s.

57 Submission 17.

58 Submissions 3, 9, 11, 15.

59 Submission 3.

60 The LGBTI Legal Service Inc and others submitted that consent should be given in writing. See also *LGBTI Legal Service Discussion Paper* (2015) 24 to the same effect, and for which the submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support.

5.63 An academic from Monash University submitted that the person to whom the conviction applied should be able to disclose its former existence and give permission for others to disclose the existence of the conviction:

This is necessary to ensure personal narratives are not unduly impinged by legislation and to prevent any attempt by legislation to blanch or suppress historical events. It should be remembered that the person convicted or charged should be empowered to disseminate such information should they so wish.

5.64 The LGBTI Legal Service Inc and others, and a member of the public⁶¹ also considered that an exception should apply to allow the decision-maker under the scheme to inform a public authority holding information about convictions that the conviction is expunged.⁶²

5.65 The LGBTI Legal Service Inc and others also considered that the expungement scheme should make it an offence ‘to fraudulently or dishonestly obtain information about an expunged conviction from records kept by or on behalf of a public authority’. A member of the public expressed a similar view.⁶³

The Commission’s view

5.66 The proposed expungement legislation should include a specific offence relating to the unlawful disclosure of information about an expunged conviction or charge.

5.67 Information about an expunged conviction or charge is highly sensitive. The disclosure of that information has a real potential to cause harm.

5.68 The inclusion in the proposed expungement legislation of an offence provision that applies specifically to the unlawful disclosure of expunged convictions and charges is necessary and desirable to enforce the protections against disclosure given under the legislation.

5.69 Accordingly, the proposed expungement legislation should make it an offence if a person:

- has access to records, containing information about an expunged conviction or charge, kept by or on behalf of a public authority;
- discloses information about the expunged conviction or charge to any other person; and
- knew or ought reasonably to have known, at the time of the disclosure, that the conviction or charge is an expunged conviction or charge.

61 Submission 3.

62 In its Discussion Paper, the LGBTI Legal Service Inc stated that an exception should apply where the disclosure is otherwise expressly authorised by the proposed expungement legislation: *LGBTI Legal Service Discussion Paper* (2015) 24. The submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights also expressed general support for the proposals in that paper.

63 Submission 3.

5.70 The Commission considers, however, that there are some circumstances in which it will be appropriate for the offence of unlawful disclosure not to apply.

5.71 First, the unlawful disclosure offence should not apply if the disclosure is made to, or with the written consent of, the person whose conviction or charge has been expunged.

5.72 Second, the unlawful disclosure offence should not apply if the disclosure is necessary for the purposes of, or in connection with, the performance of a function or exercise of a power under the proposed expungement legislation.

5.73 Third, the unlawful disclosure offence should not apply if the disclosure is made in discharge of a duty under the *Public Records Act 2002*.⁶⁴ This exception provides specific protection to the State Archivist and QSA staff in light of the age, form and diversity of public records (including records that might relate to an expunged conviction or charge) in QSA's custody.

5.74 Finally, the unlawful disclosure offence should not apply if the person who discloses the information has a reasonable excuse for doing so.

5.75 The proposed expungement legislation should also provide that it is an offence for a person to dishonestly obtain, or attempt to obtain, information about an expunged conviction or charge from the records of a public authority. Again, this information is highly sensitive, and should be protected from inappropriate access.

5.76 The *Criminal Law (Rehabilitation of Offenders) Act 1986* makes it an offence to breach any provision of that Act,⁶⁵ including the provisions prohibiting the disclosure of convictions and charges in certain circumstances. It also imposes a penalty for a breach. In the Commission's view, the offence provisions of the proposed expungement legislation should similarly provide for the imposition of a penalty for a breach.

ANNOTATION OF RECORDS

5.77 In the Consultation Paper, the Commission sought submissions on whether, and to what extent, the proposed expungement legislation should provide for official records to be annotated or otherwise changed, and if so, what records should be subject to any such requirement.⁶⁶

⁶⁴ The *Public Records Act 2002* (Qld) is discussed at [5.91]–[5.95] below. A similar exception applies under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 7(1)(d) in relation to the prohibition against the disclosure of spent convictions in s 6 of the Act.

⁶⁵ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 12(1) provides that a person who contravenes any provision of the Act is liable, on summary conviction, to a maximum penalty of 100 penalty units.

⁶⁶ QLRC Consultation Paper No 74 (2016), Q-7.

Records containing information about expunged convictions or charges

5.78 The *Public Records Act 2002* requires public authorities to make and keep full and accurate records of their activities.⁶⁷ For the purposes of the Act, these records are called 'public records'.⁶⁸

5.79 Public records containing information about expunged convictions or charges are, or may be, held by or on behalf of a number of public authorities.⁶⁹

5.80 In the context of expunging criminal convictions and charges from a person's criminal history, the key records will be those made by a public authority for the purposes of a person being charged with, prosecuted for, convicted of, or sentenced for a criminal offence (and any associated legal process, including any appeal or anything done pursuant to or in compliance with any sentence imposed).

5.81 In this respect, the records of the Queensland Police Service (the 'QPS'), the Queensland Courts, the Office of the Director of Public Prosecutions (the 'ODPP') and Queensland Corrective Services, Department of Justice and Attorney-General ('QCS') are the most relevant.⁷⁰

5.82 QPS records include records of all court outcomes in criminal matters, including convictions and dismissals or withdrawals of charges. They may also include QP9 forms⁷¹ and bench charge sheets, which set out a summary of the facts relating to the offence or offences alleged to have been committed by the person charged. All original QPS records from the period prior to 19 January 1991 (the 'date of legalisation') have been transferred to microfilm. In some cases, information about a court occurrence relating to a particular conviction or charge from that period may also be recorded electronically in the QPS database known as QPRIME.⁷²

5.83 The official records of the Queensland Courts include records of criminal proceedings and their outcomes. They include, for example, indictments, order sheets, warrants, witness statements, exhibits, subpoenas, verdict and judgment

67 *Public Records Act 2002* (Qld) s 7(1). A 'public authority' is defined in the Act to include the registrar or other officer of a court with responsibility for official records of the court, a department, an entity that is established by an Act, a government owned corporation and the Governor in his or her official capacity: s 4 sch 2 (definition of 'public authority').

68 A 'public record' includes a copy of a public record and a part of a public record, or a copy of a part of a public record: *Public Records Act 2002* (Qld) s 6(2).

69 For example, based on a preliminary analysis of public records that may relate to historical gay sex offences, QSA has explained in its submission that, in addition to records held in its custody, other public authorities, including the Queensland Courts, the ODPP and QCS (Department of Justice and Attorney-General), the QPS and the Office of the Governor, may potentially have historical records in their custody.

70 Including, if relevant, any of their predecessors.

71 A Queensland Police Form 9 ('QP9') lists the charge and a brief description of the alleged facts constituting the charge.

72 Information provided by the Queensland Police Service, Police Information Centre, 22 March 2016. 'QPRIME' is the acronym for the Queensland Police Records and Information Management Exchange.

records, pre-sentence reports and orders made in sentencing proceedings. All records from the period prior to the date of legalisation are in hard copy form.⁷³

5.84 ODPF records include, for example, QP9 forms and bench charge sheets, criminal depositions, indictments, criminal histories, records of interview, trial transcripts, sentencing remarks and appeal record books. With very limited, if any, exceptions, ODPF records relating to criminal matters from the period between 17 January 1985⁷⁴ and the date of legalisation are held in hard copy form.⁷⁵

5.85 QCS records may also be relevant, for example, in relation to records made for the purpose of anything done pursuant to or in compliance with any sentence imposed for the offence.⁷⁶

5.86 Some of these historical records, while still remaining under the management or control of the relevant public authority responsible for those records, are held in the custody of QSA.⁷⁷ Records in QSA's custody from the period prior to the date of legalisation include registers of criminal cases tried, court transcripts, criminal case files, depositions, indictments, police charge bench books and appeals.⁷⁸

5.87 Apart from records directly related to the charging, prosecution, conviction or sentencing of a person (including associated legal processes), records containing information about a person's criminal history which have been created at some later point in time for an unrelated purpose (for example, conducting criminal history checks required for the assessment of a person's suitability to work in a particular

73 Information provided by the Performance Reporting & Business Application Support Unit, Queensland Courts Service, Department of Justice and Attorney-General, 27 April 2016. See also Courts Sector Retention and Disposal Schedule: QDAN 705 v.1 at <<http://www.archives.qld.gov.au/Recordkeeping/RetentionDisposal/Schedules/Pages/CourtsSectorQDAN705.aspx>>. 'Queensland Courts' is named as the responsible public authority for the records listed in the schedule. The schedule comprises core business records of Queensland Courts. Those courts include the Supreme Court of Queensland, including the Court of Appeal, the District Court of Queensland and the Magistrates Court of Queensland. The schedule also includes entities providing recording and transcription services to Queensland Courts.

74 The date on which the provisions of the *Director of Public Prosecutions Act 1984* (Qld) establishing the office of Director of Prosecutions (later established as the Office of the Director of Public Prosecutions) and providing for the appointment of the Director of Prosecutions (later the Director of Public Prosecutions) commenced: see *Director of Public Prosecutions Act 1984* (Qld) pt 2.

75 Information provided by the Office of the Director of Public Prosecutions, Brisbane, 15 April 2016. The ODPF has advised that records created by the relevant prosecuting agency authority prior to 1985 (namely, the Solicitor-General's Office) are in the custody of the Supreme Court of Queensland and held by Queensland State Archives: *ibid.*

76 QCS manages custodial and probation and parole services at locations across Queensland. See Department of Community Safety (Queensland Corrective Services) Retention and Disposal Schedule QDAN 638 v.2 at <<http://www.archives.qld.gov.au/Recordkeeping/RetentionDisposal/Schedules/Pages/Retention-and-Disposal-Schedules.aspx>>.

77 Submission 16. QSA accepts the transfer of hard copy public records which have been designated as records of permanent value. While QSA is the custodian of these records, the ownership and responsibility for access to these records remains with the public authority which transferred them. QSA does not currently accept the transfer of digital records from public authorities.

78 *Ibid.* See also Courts Sector Retention and Disposal Schedule: QDAN 705 v.1 at <<http://www.archives.qld.gov.au/Recordkeeping/RetentionDisposal/Schedules/Pages/CourtsSectorQDAN705.aspx>>.

profession or occupation may also be held by various government departments and agencies.⁷⁹

Criminal histories

5.88 QPS records are used to generate official QPS reports about a person's criminal history, either as requested or authorised by the person, or as authorised or required by law.⁸⁰ The information contained in a person's criminal history report will depend on the disclosure obligations that apply in the particular circumstances.

5.89 For example, a criminal history report that complies with the disclosure requirements under the *Working with Children (Risk Management and Screening) Act 2000* as part of the blue card screening check for assessing a person's eligibility to work or volunteer with children⁸¹ contains information about all court outcomes in criminal cases, including any convictions and charges (including a charge that has been withdrawn, dismissed or resulted in a finding of not guilty).

5.90 Criminal history reports for convictions or charges from before the date of legalisation are sourced from information contained in QPS microfilm records.⁸²

Dealing with records of public authorities

The Public Records Act 2002

5.91 Under the *Public Records Act 2002*, any public records transferred into QSA's custody are subject to a restricted access period.⁸³ During this period, the record cannot be accessed by any person except by authorisation of the responsible

⁷⁹ For example, the Public Safety Business Agency is responsible for administering the criminal history checks undertaken as part of the blue card screening requirements under the *Working with Children (Risk Management and Screening) Act 2000* (Qld) chs 8, 8A.

⁸⁰ Information provided by the Queensland Police Service, Police Information Centre, 22 March 2016.

⁸¹ *Working with Children (Risk Management and Screening) Act 2000* (Qld) chs 8 and 8A. The blue card screening check also requires a check of pending charges and other disciplinary and police information.

⁸² Information provided by the Queensland Police Service, Police Information Centre, 22 March 2016. In a limited number of cases, records contained in the QPS microfilm records have been digitised and transferred to the QPRIME database.

⁸³ *Public Records Act 2002* (Qld) s 16. The responsible public authority, in consultation with the State Archivist, determines the restricted access period for a record. All restricted access periods are determined by reference to the day of the last action on the record. Depending on the sensitivity of a record, the restricted access period may be from 0 years up to 20 years, 30 years, 65 years or 100 years. Records classified as containing information about an individual's personal affairs are permitted to be restricted for up to 100 years: s 16(4). Restrictions on access of greater than 100 years may be obtained by regulation in limited circumstances: s 18(4), (5).

public authority⁸⁴ or by application under the *Information Privacy Act 2009* or the *Right to Information Act 2009*.⁸⁵

5.92 Many of the records relating to criminal matters that have been transferred into the QSA's custody — including records of registers of criminal cases tried, court transcripts, criminal case files, some depositions, and indictments — are subject to a restricted access period of 100 years.⁸⁶

5.93 Once the restricted access period for a public record in QSA's custody has ended, the record is open to public access.⁸⁷

5.94 If an Act other than the *Public Records Act 2002* prohibits the disclosure of a matter contained in a public record or restricts access to a public record, the State Archivist and QSA staff must not disclose information in, or otherwise give access to, the public record (except as necessary to perform certain official duties).⁸⁸ This prohibition does not apply, however, if the record is already open to public access or access has been authorised as mentioned at [5.91] above.

5.95 The disposal (including the destruction, damage, abandonment, donation, amendment, sale or transfer)⁸⁹ of a public record or part of a record can be performed only with the written authorisation of the State Archivist or under other legal authority.⁹⁰ A person must not damage a public record (including by an alteration that causes harm to the integrity or condition of a record)⁹¹ that is more than 30 years old

84 See *Public Records Act 2002* (Qld) s 18(2)(b), under which access may be given if the responsible public authority notifies the State Archivist in writing that the record is a record to which unrestricted access is allowed or access to the record is given on stated conditions (under an administrative access arrangement). A 'responsible public authority', for a public record, is the public authority currently responsible for administering the function or activity from which a record is generated: s 15. See s 18(3)–(5), in relation to the circumstances in which access to a public record may be restricted. See also *Criminal Practice Rules 1999* (Qld) r 57, in relation to access to court files.

85 See *Public Records Act 2002* (Qld) s 18(2)(a). The *Information Privacy Act 2009* (Qld) ch 3 and the *Right to Information Act 2009* (Qld) ch 3 set out procedures for being given access to documents and about reviewing decisions about access under those Acts.

86 Submission 16. See also Courts Sector Retention and Disposal Schedule: QDAN 705 v.1 at <<http://www.archives.qld.gov.au/Recordkeeping/RetentionDisposal/Schedules/Pages/CourtsSectorQDAN705.aspx>>.

87 *Public Records Act 2002* (Qld) s 18(1). At present this includes some criminal records (for example, some of the registers of criminal depositions, identified as series 6226 in QSA's catalogue).

88 *Public Records Act 2002* (Qld) s 51(1). For the purposes of s 51(1), 'official duties', of the State Archivist and QSA staff, do not include allowing access to public records under s 18 of the Act: s 51(3).

89 *Public Records Act 2002* (Qld) s 4, sch 2 (definition of 'disposal').

90 *Public Records Act 2002* (Qld) s 13. See, eg, *Information Privacy Act 2009* (Qld) s 41(1), which generally entitles an individual to apply for the amendment of the individual's personal information in a document held by a Queensland government agency that is inaccurate, incomplete, out-of-date or misleading. If the agency decides to amend the document in relation to the personal information contained in the document, the agency may make the amendment by altering, or adding an appropriate notation to the personal information: s 74. If a notation is made, it must state how the information is inaccurate, incomplete, out-of-date or misleading and, if the information is claimed to be incomplete or out-of-date, set out the information required to complete the information or bring it up to date: s 75.

91 *Public Records Act 2002* (Qld) s 12(4); Explanatory Notes, Public Records Bill 2001 (Qld) 8.

unless the person has a reasonable excuse.⁹² This will be the case for many of the public records that might relate to an expunged conviction or charge.

The Information Privacy Act 2009

5.96 The *Information Privacy Act 2009* generally entitles an individual to be given access to documents of a Queensland government agency to the extent they contain the individual's personal information (including personal information in the individual's criminal history).⁹³ Subject to limited exceptions, the Act prohibits the disclosure by an agency of an individual's personal information to a third party.⁹⁴ Such disclosure is permitted, for example, where the individual has agreed to the disclosure, or the disclosure is authorised or required under a law.⁹⁵

Other jurisdictions

5.97 The Victorian expungement legislation requires any entry about an expunged conviction contained in:⁹⁶

- records containing information about expunged convictions held by any court, VCAT, Victoria Police or the Office of Public Prosecutions ('official records')⁹⁷ to be annotated with a statement to the effect that the entry relates to an expunged conviction;⁹⁸ and
- copies, duplicates, reproductions or extracts of official records ('secondary records')⁹⁹ that are held in an electronic format by the Victoria Police or the Office of Public Prosecutions to be removed, made incapable of being found,

⁹² *Public Records Act 2002* (Qld) s 12.

⁹³ *Information Privacy Act 2009* (Qld) s 40. 'Personal information' is information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion: s 12.

⁹⁴ The *Information Privacy Act 2009* (Qld) sets out 11 Information Privacy Principles ('IPPs') that govern how Queensland government agencies collect, store, use and disclose an individual's personal information: s 27, sch 3. IPP 11 deals with limits on the disclosure of individual's personal information: sch 3 IPP 11. Note that the IPP's do not apply to a document that is: a generally available publication; or kept in a library, art gallery or museum for the purposes of reference, study or exhibition; or a public record under the *Public Records Act 2002* (Qld) in the custody of Queensland State Archives that is not in a restricted access period under that Act; or a letter, or anything else, while it is being transmitted by post: ss 15–16, sch 1 item 7.

⁹⁵ *Information Privacy Act 2009* (Qld) sch 3 IPP 11(1)(b), (d). The Act also provides an exception where the agency is satisfied on reasonable grounds that the disclosure of the information is necessary by or for a law enforcement agency for the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal: sch 3 IPP 11(1)(e)(v). In certain circumstances, law enforcement agencies are not bound by particular information privacy principles: s 29.

⁹⁶ These obligations apply 'as soon as reasonably practicable' after a relevant data controller receives notice that a person's conviction has been expunged, and extend to records of the charge to which the expunged conviction relates and any investigation or legal process associated with that charge or conviction: *Sentencing Act 1991* (Vic) s 105(4), 105K(2).

⁹⁷ *Sentencing Act 1991* (Vic) s 105(1) (definition of 'official records').

⁹⁸ *Sentencing Act 1991* (Vic) s 105K(2)–(3)(a).

⁹⁹ *Sentencing Act 1991* (Vic) s 105(1) (definition of 'secondary record').

or de-identified and any link between the entry and information that would identify the person to whom it referred to be destroyed.¹⁰⁰

5.98 The obligation to annotate records under the Victorian expungement legislation applies to official records held by any court, the Victoria Police, the Office of Public Prosecutions and VCAT, as it was considered that they are ‘the documents that are used to generate a criminal history and so are the documents that must be addressed if a conviction is to be expunged’.¹⁰¹

5.99 The draft expungement legislation in Tasmania requires a relevant data controller, within 28 days of being notified of an expunged conviction, to annotate any entry relating to the expunged conviction contained in any official criminal records under their management or control with a statement to the effect that the entry relates to an expunged conviction.¹⁰² This obligation applies in relation to records which contain information about the outcome of criminal proceedings and which are kept by the Tasmanian courts, police and Director of Public Prosecutions.¹⁰³

5.100 In England and Wales, the expungement legislation provides that any details in relevant official records of an expunged conviction or caution are to be ‘deleted’ by recording with the details of the conviction or caution concerned the fact that it is an expunged conviction or caution and the effect of it being such a conviction or caution.¹⁰⁴ The relevant records include the names database for the use of constables, police records kept locally for the use of constables, and records of the magistrates’ courts (dating from 1992) and of the Crown Court kept by the Courts and Tribunals Service.¹⁰⁵

5.101 The expungement legislation in the Australian Capital Territory, New South Wales and South Australia does not make any provision for the amendment of records of an expunged conviction. Instead, the legislation expressly states that nothing in the legislation authorises the destruction by or on behalf of a public authority of records relating to expunged convictions.¹⁰⁶

Submissions

5.102 The LGBTI Legal Service Inc and others, Australian Lawyers for Human Rights, the Castan Centre for Human Rights Law, a group of academics from the

¹⁰⁰ *Sentencing Act 1991* (Vic) s 105K(2), (3)(b).

¹⁰¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 2014, 3353 (R Clark, Attorney-General).

¹⁰² Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 11(2).

¹⁰³ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 3(1) (definitions of ‘data controller’ and ‘official criminal record’). These obligations extend to records of the charge to which the expunged conviction related: cl 3(3).

¹⁰⁴ *Protection of Freedoms Act 2012* (UK) c 9, s 95(1)–(3), (5) (definition of ‘delete’).

¹⁰⁵ *Protection of Freedoms Act 2012* (UK) c 9, s 95(5) (definitions of ‘relevant official records’ and ‘the names database’); *Protection of Freedoms Act 2012 (Relevant Official Records) Order 2012* (UK) SI 2012/2279, O 2.

¹⁰⁶ *Spent Convictions Act 2000* (ACT) s 22; *Criminal Records Act 1991* (NSW) s 23; *Spent Convictions Act 2009* (SA) s 16.

TC Beirne School of Law and a member of the public¹⁰⁷ submitted that the Victorian approach should be adopted.¹⁰⁸

5.103 The LGBTI Legal Service Inc and others, however, also submitted that the scheme should allow for any necessary variations to accommodate differences in the keeping of records in Queensland. They commented that:

It is important that records of societal and legal treatment of homosexual behaviour are preserved for reasons of posterity and to ensure that the information is not lost (particularly in the event that further information comes to light regarding the expunged record). It may also not be practical to destroy records having regard to their form (for example if they are included as one entry in a ledger among a list of convictions).

5.104 Those respondents also suggested that the annotation on the primary record should expressly set out the prohibitions on persons accessing and/or disclosing the expunged record and the conviction and the consequences for failing to comply with those restrictions.

5.105 The BAQ supported the annotation of official records of a conviction, charge or warning that has been expunged.

5.106 Australian Lawyers for Human Rights submitted that an expunged conviction or charge should not appear on any criminal record searches, and that related documents should be destroyed, annotated to clearly show that the conviction is expunged, or withheld from release in any form.

5.107 A group of academics from the TC Beirne School of Law considered that there should be a positive duty on the relevant agency to take all reasonable steps to 'destroy' records of an expunged conviction, by annotating any primary records and destroying any secondary records of the conviction:

The practical effect of the duty to 'destroy' varies in different jurisdictions — in order to give full effect to the expungement of the conviction, 'destroy' should be taken to mean the complete removal and destruction of the records, not simply an annotation. However, this must be balanced with the need to preserve information and records of the treatment of homosexual behaviour. (notes omitted)

5.108 An academic from Monash University submitted that the existence of a conviction should be retained as part of the historical record, but the record should be de-identified if the individual wishes:

¹⁰⁷ Submission 3.

¹⁰⁸ See also *LGBTI Legal Service Discussion Paper* (2015) 3, 23, Rec 2.3 to similar effect, and for which the submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support.

This allows for empowerment of the party asking for the expungement of the conviction.

Some people may wish their name to be completely cleared in the sense of no traceable attachment to their name. This is entirely reasonable. Others will utilize or see the conviction as a marker of societal progress. They will not want the suffering that went along with their name to be removed from 'public record'. This is a persuasive argument. To remove a name is to dehumanize and to put the conviction into the abstract. As such, when applying for the expungement of the conviction the party should be asked which remedy they would prefer.

5.109 Several historians from the Griffith Criminology Institute opposed making any alteration to existing records of convictions that are expunged under the scheme:

The preservation and integrity of all social and legal historical information for *bona fide* research purposes should be a primary consideration of the scheme. The amendment, destruction or de-identification of any archival material (or current information that might be archived) threatens to whitewash the state's regulation and control of sexuality and to remove from the historical record the circumstances which this scheme seeks to redress.

While the balance between public interest and privacy is difficult, adequate protections for individuals are provided through existing legislative provisions on the disclosure of convictions as well as restrictions on access to criminal files held at Queensland State Archives (currently 100 years). We note that publicly accessible and digitised databases such as TROVE provide case details and names (to the mid-1950s) with other information also available on genealogy websites such as findmypast.com and ancestry.com.

5.110 QSA strongly argued against the actual destruction of public records:

No Australian or British jurisdiction has implemented a scheme whereby documents are destroyed. QSA strongly supports a continuation of this approach and would further strongly recommend against modifying documents to the extent that they are unsearchable through de-identification, anonymisation or pseudonymisation.

Public records are important to preserve for social and legal historical information to assist legitimate research, additionally a record which has been destroyed or rendered unsearchable is not able to be returned to its former state where a decision to expunge is overturned.

... There is a public expectation that archival institutions will provide [a digitisation program], bearing available resources in mind. As summary records, such as indexes, are good candidates for digitisation due to the number of names they contain, any restriction on an entry in those records can potentially impact access to a significant portion of the summary record.

5.111 That respondent submitted that consideration should be given to the 'achievable objects' of the expungement scheme. It noted that:

Given that an unknown number of copies may exist of a public record in various physical and virtual locations, it should not be assumed that all copies of a record can be found and expunged.

5.112 QSA highlighted the following considerations:

- given the volume of public records and the difficulty in identifying records relating to historical gay sex offences, the volume of possible records containing information about historical gay sex offences is unknown and effectively unknowable;
- records exist on pages or within books, such as registers of criminal cases tried, where other records are also contained;
- where information has been stored electronically, in the cloud or other network, it may be difficult to guarantee that all copies of a record have been expunged; and
- some of the records concerned are already in the public domain.¹⁰⁹

5.113 QSA further submitted that, where a process reveals a conviction that might be eligible for expungement, such as an application for a blue card to work with children, consideration could be given to compelling the agency which undertook the process to advise the applicant that the record may be eligible for expungement.

The Commission's view

5.114 The proposed expungement legislation should provide for the annotation of records relating to expunged convictions and charges, within practical limits. Relevant record keepers must be able to comply with any such requirement, given the age, form and diversity of the records involved and the limitations of the record keeping systems involved.

5.115 The proposed expungement legislation should provide that the Act does not authorise or require the destruction or removal of a record of a public authority, or an entry in a record of a public authority, relating to an expunged conviction or charge. It is important to retain the original records against the possibility that an expunged conviction or charge might be revived at some future time, and to preserve the information contained in the records for legitimate research purposes.¹¹⁰

5.116 Given the practical difficulties of finding and locating all historical records that might relate to an expunged conviction or charge, and the general protections in existing legislation relating to access to and disclosure of criminal history information in the records of public authorities, a focussed and pragmatic approach to the annotation of records is warranted.

5.117 To that end, the proposed expungement legislation should provide for the annotation of records containing information about a conviction or charge kept by or on behalf of the QPS, the Queensland Courts, the ODPP and QCS ('relevant official records').¹¹¹ These are the records made for the purpose of a person being charged

¹⁰⁹ QSA noted, for example, that Bench records from the Court of Petty Sessions had a restricted access period of 30 years and some of these records have already been accessed for the purposes of research which has since been published.

¹¹⁰ The revival of an expunged conviction or charge is discussed at [5.127] ff below.

¹¹¹ Including, if relevant, any of their predecessors.

with, prosecuted for, convicted of, or sentenced for a criminal offence (and associated legal processes, including any appeal or anything done pursuant to or in compliance with any sentence imposed). QPS records also include information about convictions and charges held electronically in the QPRIME database (and which may be disclosed as part of a criminal history check).

5.118 This requirement should be imposed on the person who has the management or control of the records of the QPS, the Queensland Courts, the ODPP and QCS, as the case may be (a 'relevant record keeper').

5.119 The relevant record keeper should be required, as soon as reasonably practicable after receiving notice of the decision-maker's decision to expunge a conviction or charge,¹¹² to annotate any entry relating to the expunged conviction or charge contained in any relevant official records under the record keeper's management or control by recording, with the details of the entry, the fact that the entry relates to an expunged conviction or charge and the effect of it being expunged.

5.120 However, this obligation should not be absolute, as it may be difficult to ensure that all of the relevant records have been identified and located, or, in some cases, to annotate a record without destroying other records. For that reason, the requirement to annotate should extend only so far as it is reasonably practicable to do so.

5.121 As soon as reasonably practicable after taking any required action in relation to an entry, the relevant record keeper should give written notice of the action taken to the decision-maker.

5.122 As soon as reasonably practicable after the decision-maker is satisfied that the relevant record keeper has taken any required action in relation to entries in relevant official records, the decision-maker should give written notice of that fact to the applicant for expungement.

5.123 Importantly, the requirement to annotate an entry relating to an expunged conviction or charge in the QPRIME database gives practical effect to the non-disclosure requirements under the proposed expungement legislation, by removing expunged convictions or charges from a person's criminal history.¹¹³ The consequence of making such an annotation is that any criminal history information released by the QPS pursuant to a requirement in other legislation for a person's criminal history, convictions or charges to be disclosed or taken into account will not include expunged convictions or charges.¹¹⁴

112 In Chapter 6 below, the Commission recommends that the decision-maker should be required to give written notice of a decision to expunge a conviction or charge to the relevant record keeper: see Rec 6-6(c), discussed at [6.118] below.

113 In this chapter, the Commission recommends specific provisions to ensure that information about an expunged conviction or charge is not required to be disclosed, and a question about the person's criminal history is taken not to refer to the expunged conviction or charge: see [5.39] above, Rec 5-3(a)–(e).

114 See, eg, *Working with Children (Risk Management and Screening) Act 2000* (Qld) ch 8 pt 6 div 2, ch 8A, under which applicants for a blue card for working or volunteering with children are required to disclose unrecorded convictions, spent convictions, and charges.

5.124 Given that the proposed legislation does not authorise or require the destruction or removal of a record relating to an expunged conviction or charge, this process should not involve any alteration of the QPS microfilm records themselves.

5.125 The proposed annotation requirement will also have the practical effect that, if a conviction is expunged, this will extend to the charge to which the conviction related, given the type of records to which the obligation to annotate is proposed to apply.

5.126 If specific rules are to be made about the annotation of records made by other public authorities, other administrative arrangements or delegated legislation will need to be made.

REVIVAL OF EXPUNGED CONVICTIONS AND CHARGES

5.127 In the Consultation Paper, the Commission sought submissions on whether, and in what circumstances, it should be possible to revive an expunged conviction.¹¹⁵

Other jurisdictions

5.128 The expungement legislation in New South Wales makes provision for the decision-maker to determine that a conviction is no longer expunged if the decision-maker is satisfied that the conviction was expunged on the basis of an application that included false or misleading information, or documents that are false or misleading.¹¹⁶

5.129 The draft expungement legislation in Tasmania contains a similar provision.¹¹⁷

Submissions

5.130 The LGBTI Legal Service Inc and others submitted that an expunged conviction should not be able to be revived unless there was fraud on the part of the applicant, or misleading information was provided in support of an application, and 'the conviction would not have been expunged had that information not been relied upon by the decision-maker'.

5.131 A group of academics from the TC Beirne School of Law similarly considered that the only basis for the revival of an expunged conviction should be that the applicant provided false evidence in support of the application.

¹¹⁵ QLRC Consultation Paper No 74 (2016), Q-7.

¹¹⁶ *Criminal Records Act 1991* (NSW) s 19I(1). The conviction ceases to be an expunged conviction on and from the date of the decision-maker's determination: s 19I(2). The decision-maker must notify the person whose conviction was expunged of the determination: s 19I(3). The person may apply to the New South Wales Civil and Administrative Tribunal for an administrative review of the determination under the *Administrative Decisions Review Act 1997* (NSW): s 19I(4).

¹¹⁷ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 15. In addition to notifying the person whose conviction was expunged of the determination, the decision-maker must also inform the person of the reasons for the determination and the person's right to have the determination reviewed: cl 15(3). The decision-maker must also notify the relevant data controller that the conviction is no longer an expunged conviction: cl 15(4). A determination that a conviction is no longer an expunged conviction is reviewable under cl 16.

5.132 A member of the public, while noting that the revival of an expunged conviction is theoretically a necessary safeguard, also commented that because it is unlikely that large numbers of people will have their records expunged (based on the experience in other jurisdictions that have adopted an expungement scheme), the risk of an inappropriate expungement that requires reversal is likely to be relatively small.¹¹⁸

The Commission's view

5.133 Under the proposed expungement legislation, the decision-maker will be required to decide whether to expunge a conviction or charge on the information available at the time the application is made. To ensure the integrity of the scheme, the possibility that a decision to expunge may have been made on the basis of false or misleading information should be provided for in the legislation.

5.134 Accordingly, the proposed expungement legislation should provide that, if a decision-maker is satisfied that a conviction or charge became an expunged conviction or charge by reason of an application that included false or misleading information, or a document that is false or misleading, the decision-maker may decide that the conviction or charge is no longer an expunged conviction or charge. This approach balances the need for finality in the decision-making process and the need to ensure that convictions and charges are expunged only in appropriate circumstances.¹¹⁹

5.135 The proposed expungement legislation should also require a relevant record keeper, as soon as reasonably practicable after receiving notice of a decision to revive an expunged conviction or charge, to annotate any entry that was made as a result of the expungement of the conviction or charge, in any relevant official records under the record keeper's management or control, by recording with the entry the details of the decision to revive the expunged conviction or charge.

RECOMMENDATIONS

The general effect of expungement

5-1 The proposed expungement legislation should provide that a person whose conviction or charge is expunged is to be treated for all purposes in law as if the person had not committed the offence or been charged with, prosecuted for, convicted of, or sentenced for the offence (as the case may be).

¹¹⁸ Submission 3.

¹¹⁹ The Commission's recommendations about the requirements for giving notice of the revival of an expunged conviction or charge, and the mechanisms for reviewing a decision to revive an expunged conviction or charge, are set out in Chapter 6 below: see [6.146]–[6.151], Recs 6-9 and 6-10 below.

5-2 The proposed expungement legislation should provide that:

- (a) a reference to an ‘expunged conviction’ includes a reference to the charge to which the expunged conviction related and any investigation or legal process associated with that charge or conviction; and**
- (b) a reference to an ‘expunged charge’, in relation to a charge that did not result in a conviction, includes a reference to any investigation or legal process associated with that charge.**

Effects of expungement for disclosure and other purposes

5-3 The proposed expungement legislation should provide that, if a person’s conviction or charge is expunged:

- (a) it is lawful for the person to claim upon oath or otherwise that the person was not convicted or charged, and evidence is not admissible in any proceedings to show that the claim is false;**
- (b) the person is not required to disclose information about the expunged conviction or charge;**
- (c) a question about the person’s criminal history is taken not to refer to the expunged conviction or charge;**
- (d) evidence is not admissible or receivable in proceedings before any court, tribunal, body or person having power to determine any question affecting a person’s rights, privileges, obligations or liabilities, to prove that the person was charged with, prosecuted for, convicted of, or sentenced for the offence;**
- (e) in applying an Act, agreement or arrangement to the person:**
 - (i) a reference to a conviction or charge or the person’s criminal history is taken not to refer to the expunged conviction or charge or to the person’s criminal history to the extent it relates to the expunged conviction or charge; and**
 - (ii) a reference to the person’s character does not allow or require anyone to take the expunged conviction or charge into account;**
- (f) the expunged conviction or charge is not a proper ground for dismissing or excluding the person from any office, profession, occupation or employment, or prejudicing the person in any way in any office, profession, occupation or employment; and**

- (g) the person may reapply for any licence, permit, approval or other authorisation under an Act that was refused because of the conviction or charge, before it became an expunged conviction or charge, without waiting any minimum period.

Other Acts authorising or requiring disclosure not to apply

- 5-4 The proposed expungement legislation should provide that any other Act (including the *Criminal Law (Rehabilitation of Offenders) Act 1986*) which authorises or requires the disclosure of a person's criminal history (however defined), convictions or charges does not apply to an expunged conviction or charge.

Mutual recognition

- 5-5 The proposed expungement legislation should provide that a conviction (or charge) that is expunged under a similar scheme in another State should be recognised as an expunged conviction (or charge) in Queensland.

Offence provisions

- 5-6 The proposed expungement legislation should provide that:
- (a) a person commits an offence if the person:
 - (i) has access to records, containing information about an expunged conviction or charge, kept by or on behalf of a public authority;
 - (ii) discloses information about the expunged conviction or charge to any other person; and
 - (iii) knew, or ought reasonably to have known, at the time of the disclosure, that the conviction or charge is an expunged conviction or charge;
 - (b) the offence provision in Recommendation 5-6(a) does not apply if:
 - (i) the disclosure is made to, or with the written consent of, the person whose conviction or charge has been expunged;
 - (ii) the disclosure is necessary for the purposes of, or in connection with, the performance of a function or the exercise of a power under the proposed expungement legislation;
 - (iii) the disclosure is made in discharge of a duty under the *Public Records Act 2002*; or

- (iv) the person has a reasonable excuse for making the disclosure.

5-7 The proposed expungement legislation should provide that it is an offence if a person dishonestly obtains, or attempts to obtain, information about an expunged conviction or charge from a record kept by or on behalf of a public authority.

5-8 A person who contravenes an offence provision mentioned in Recommendation 5-6(a) or 5-7 is liable to a penalty.

Annotation of records

5-9 The proposed expungement legislation should provide that the Act does not authorise or require the destruction or removal of a record kept by or on behalf of a public authority, or an entry in a record kept by or on behalf of a public authority, relating to an expunged conviction or charge.

5-10 The proposed expungement legislation should provide that:

- (a) a 'relevant official record' means a record containing information about a conviction or charge kept by or on behalf of the QPS, the Queensland Courts, the ODPP and QCS, and includes information about a conviction or charge in the QPS database known as QPRIME;
- (b) a 'relevant record keeper' is the person who has the management or control of a record containing information about a conviction or charge kept by or on behalf of the QPS, the Queensland Courts, the ODPP and QCS (as the case may be);
- (c) subject to Recommendation 5-9, as soon as reasonably practicable after receiving notice of a decision to expunge a conviction or charge, a relevant record keeper must, so far as it is reasonably practicable to do so, annotate any entry relating to the expunged conviction or charge contained in any relevant official records under the record keeper's management or control by recording, with the details of the entry, the fact that it relates to an expunged conviction or charge and the effect of it being expunged;
- (d) as soon as reasonably practicable after taking any action required by Recommendation 5-10(c) in relation to an entry, the relevant record keeper must give written notice of the action taken to the decision-maker; and

- (e) as soon as reasonably practicable after the decision-maker is satisfied that any action required by Recommendation 5-10(c) has been taken in relation to entries in relevant official records, the decision-maker must give written notice of that fact to the applicant for expungement.

Revival of expunged convictions and charges

- 5-11** The proposed expungement legislation should provide that, if a decision-maker is satisfied that a conviction or charge became an expunged conviction or charge by reason of an application that included false or misleading information, or a document that is false or misleading, the decision-maker may decide that the conviction or charge is no longer an expunged conviction or charge.
- 5-12** The proposed expungement legislation should require a relevant record keeper, as soon as reasonably practicable after receiving notice of a decision to revive an expunged conviction or charge, to annotate any entry that was made as a result of the expungement of the conviction or charge in any relevant official records under the record keeper's management or control, by recording with the entry the details of the decision to revive the expunged conviction or charge.

Chapter 6

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INTRODUCTION

6.1 In this Report, the Commission recommends the introduction of a new legislative scheme for the expungement of convictions and charges for eligible offences from a person's criminal history.¹ Under the proposed expungement legislation, applications will be made to the Director-General of DJAG and decided on a case-by-case basis.

6.2 The terms of reference require the Commission to consider what the process for expungement should be.² This chapter deals with the procedural features of making and deciding an application for expungement.

6.3 It also deals with procedures following a decision to revive an expunged conviction or charge.³

¹ See Recs 2-1, 3-1 and 3-2 above. See also Rec 3-4 above as to who may make an application for expungement.

² See terms of reference para 5(e).

³ See Rec 5-11 above, in which the Commission recommends that the proposed expungement legislation should provide that, if a decision-maker is satisfied that a conviction or charge became an expunged conviction or charge by reason of an application that included false or misleading information, or a document that is false or misleading, the decision-maker may decide that the conviction or charge is no longer an expunged conviction or charge.

MAKING AN APPLICATION FOR EXPUNGEMENT

6.4 In the Consultation Paper, the Commission asked what the process of making an application should be, and what information should be included in an application.⁴

Other jurisdictions

Form of application and information that must be included

6.5 Expungement legislation in other jurisdictions generally provides for applications to be made in writing or in an approved form.⁵

6.6 An application must include the following information:⁶

- the name, address, date of birth (Australian Capital Territory, New South Wales, South Australia, Victoria and England and Wales) other contact details (South Australia and Victoria) and gender (Victoria) of the person eligible to make the application;⁷
- the name and address of the person at the time of the conviction (Australian Capital Territory, New South Wales, Victoria and England and Wales);
- details about the offence, including:
 - to the extent known/so far as is known to the applicant (Australian Capital Territory, New South Wales, Victoria and England and Wales) the date when and the court where the applicant was convicted (Australian Capital Territory, New South Wales, South Australia, Victoria and England and Wales);

⁴ QLRC Consultation Paper No 74 (2016), Q-8.

⁵ See *Spent Convictions Act 2000* (ACT) s 19B(2)(a)(i); *Criminal Records Act 1991* (NSW) s 19B(1); *Spent Convictions Act 2009* (SA) s 8A(1) and *Spent Convictions Regulations 2011* (SA) reg 5A(2); *Sentencing Act 1991* (Vic) s 105B(3)(a); *Protection of Freedoms Act 2012* (UK) c 9, s 93(1). In the Australian Capital Territory, the application may alternatively be made 'in any other way' the decision-maker is 'satisfied on reasonable grounds is appropriate': *Spent Convictions Act 2000* (ACT) s 19B(2)(a)(ii). In Victoria, the legislation expressly requires that, for the convenience of applicants, the decision-maker must publish the approved application form, and a list of approved identifying information, on its website: *Sentencing Act 1991* (Vic) s 105B(7).

The relevant forms are available online. See Australian Capital Territory at <<http://www.legislation.act.gov.au/a/2000-48/af.asp>>; New South Wales at <<http://www.justice.nsw.gov.au/Pages/legal-info-services/Historical-homosexual-offences.aspx>>; Victoria at <<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/criminal+law/expungement+scheme>>; South Australia at <<http://www.courts.sa.gov.au/ForLawyers/Pages/Magistrates-Court-Criminal-Forms.aspx>>; and England and Wales at <<https://www.gov.uk/government/publications/disregarding-convictions-for-decriminalised-sexual-offences>>.

⁶ *Spent Convictions Act 2000* (ACT) s 19B(2)(b); *Criminal Records Act 1991* (NSW) s 19B(2); *Spent Convictions Act 2009* (SA) s 8A(1) and *Spent Convictions Regulations 2011* (SA) reg 5A(2); *Sentencing Act 1991* (Vic) s 105B(4); *Protection of Freedoms Act 2012* (UK) c 9, s 93(2).

⁷ As to who may make an application, see [3.146] ff above.

- the statutory provision that constitutes the offence (South Australia) or, so far as is known to the applicant (Victoria and England and Wales), the name of the offence and details of the offence and the offending conduct (Victoria) or the case number for the conviction (England and Wales);
- any other information that the decision-maker requires (New South Wales and England and Wales); and
- a copy of any transcript and sentencing remarks made in connection with the conviction that are in the possession of the applicant (South Australia).

6.7 Similar provisions are included in the draft expungement legislation in Tasmania.⁸

6.8 In Victoria, if the application does not include all the information required by the legislation, the decision-maker may require the applicant to provide the information within 28 days or any longer period that the decision-maker determines.⁹ However, this does not prevent the decision-maker from considering an application that does not include all the information required, if they choose to do so.¹⁰

Other information that may be included in an application

6.9 In the Australian Capital Territory, South Australia, Victoria and England and Wales, the applicant may also include supporting information or statements about the circumstances of the offence (and, in South Australia, the circumstances of the applicant) in the application, to assist the decision-maker in deciding whether the conviction meets the criteria for expungement.¹¹

6.10 In Victoria, the application may also include, or be accompanied by, written evidence given by any other person, including a person involved in the conduct constituting the offence, about the matters of which the decision-maker must be satisfied.¹² The applicant may submit their own statement or the written evidence of another person at any time after making the application and before it has been determined.¹³

⁸ Draft Historical Homosexual Convictions Bill 2016 (Tas) cls 5(3), 6(1). For example, the application must include identifying information, details in relation to the eligible offence, and any additional information or documents that the decision-maker requires.

⁹ *Sentencing Act 1991* (Vic) s 105C(1).

¹⁰ *Sentencing Act 1991* (Vic) s 105C(3).

¹¹ *Spent Convictions Act 2000* (ACT) s 19B(2)(c); *Spent Convictions Act 2009* (SA) s 8A(1) and *Spent Convictions Regulations 2011* (SA) reg 5A(2)(d); *Sentencing Act 1991* (Vic) s 105B(6); *Protection of Freedoms Act 2012* (UK) c 9, pt 5 ch 4, s 93(3).

¹² *Sentencing Act 1991* (Vic) s 105B(6).

¹³ *Sentencing Act 1991* (Vic) s 105C(2).

Authority to request information and consent to disclosure

6.11 In Victoria, the legislation requires the applicant to authorise a 'police record check' in relation to the conviction to which the application relates, and give consent to the disclosure to the decision-maker of any official records relating to that conviction created by the courts, the Victorian Civil and Administrative Tribunal, Victoria Police or the Office of Public Prosecutions.¹⁴ The draft expungement legislation in Tasmania similarly provides that an application must be accompanied by a consent, by which the applicant authorises the disclosure to the decision-maker of any records relating to the conviction created by the courts, the Commissioner of Police, or the Director of Public Prosecutions.¹⁵

6.12 The application forms in the Australian Capital Territory, New South Wales and England and Wales note that the personal information collected in the forms will be used to obtain information about the offence from relevant persons and bodies, such as the police and the courts, to enable a decision to be made.¹⁶

Declaration in relation to information provided by the applicant

6.13 The application forms in the Australian Capital Territory, Victoria and England and Wales provide for a declaration to the effect that the information given is correct to the best of the applicant's knowledge.¹⁷

6.14 In New South Wales, the expungement legislation includes a note that it is an offence under Part 5A of the *Crimes Act 1900* (NSW) to knowingly provide false or misleading information or to knowingly produce documents that are false or misleading in an application to a public authority.¹⁸

6.15 Under the draft expungement legislation in Tasmania, it is an offence for a person to give false or misleading information.¹⁹

Provision to withdraw or amend an application

6.16 In Victoria, the expungement legislation provides that an applicant may withdraw their application at any time before it is determined, including after obtaining access to any record of, or proceedings relating to, the offence that the decision-maker obtained from another person or body.²⁰

¹⁴ *Sentencing Act 1991* (Vic) s 105B(5). This consent and authorisation is included in the application form.

¹⁵ Draft Historical Homosexual Convictions Bill 2016 (Tas) cls 3(1) (definition of 'data controller'), 6(2).

¹⁶ See n 5 above.

¹⁷ *Ibid.*

¹⁸ *Criminal Records Act 1991* (NSW) s 19B(2).

¹⁹ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 21.

²⁰ *Sentencing Act 1991* (Vic) s 105H(1). See also s 105D(3)(b), note. The decision-maker may also treat the application as withdrawn, with the ability to reinstate it, if the applicant does not respond to a request for further information within the applicable period: s 105H(2)–(3).

Submissions

General

6.17 A group of academics from the TC Beirne School of Law commented that it is necessary for the scheme to strike the appropriate balance ‘between the need for a simple process for the applicant and ensuring the decision-maker has enough information to make a determination’.

6.18 An academic from Monash University submitted that no significant burden should be placed on, or action expected from, applicants:

Those seeking to be treated fairly under the law should not face procedural hurdles or barriers that are likely to deter them from seeking justice and in righting historical wrongs. The balance and burden of effort should shift to the state to investigate and review the incident.

6.19 The Queensland Council for Civil Liberties submitted that the process should be confidential. The Castan Centre for Human Rights Law noted that ‘a mechanism for receiving applications to have convictions expunged should protect the applicants’ privacy to the greatest possible extent’. A member of the public also noted ‘the sensitive nature of the convictions’.²¹

Form of application and information that must be included

6.20 A number of respondents submitted that an application should be required to be made in writing.²²

6.21 The LGBTI Legal Service Inc and others considered that the application should ‘state information sufficient to establish the identity of the applicant’.²³

6.22 Most of the other respondents who addressed this issue stated that the application should include:²⁴

- the applicant’s name, date of birth and address at the time of application and at the time of the conviction;
- when and where the conviction occurred; and/or
- details of the offence.

21 Submission 12.

22 Submissions 3, 11, 12, 15.

23 The LGBTI Legal Service Inc made a joint submission with Caxton Legal Centre Inc, Human Rights Law Centre, Queensland Aids Council, Queensland Association of Independent Legal Services Inc (now Community Legal Centres Queensland), and Townsville Community Legal Service Inc. In relation to [6.21] above and [6.33] below, see also *LGBTI Discussion Paper (2015)* 21 to the same general effect, and for which the submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support.

24 Submissions 3, 11, 15, 16.

6.23 However, each of those respondents had differing views as to the precise details of the offence that should be incorporated in the application, and whether it should be mandatory to include them.

6.24 In this respect, Queensland State Archives ('QSA') submitted that, to assist in the administration of the scheme, the application should ideally contain the following minimum information relating to the details of the offence:

- details of the other parties involved;
- as far as possible, the date of the court case (that is, the year or better);
- details of the court in which the matter was heard;²⁵ and
- whether a prison sentence was imposed.

6.25 QSA observed that the logistical and resource implications of finding records 'should not be underestimated', as not all criminal records have a searchable index. It considered that the inclusion of details of the offence in the application would therefore be of assistance.

6.26 A group of academics from the TC Beirne School of Law considered that the application should include any details of the offence that the applicant can recall.

6.27 An academic from Monash University submitted that, while the applicant should be empowered to provide details of the offence if they wish, it should not be mandatory to do so.

6.28 Two respondents — an academic from Monash University and a member of the public²⁶ — considered that the applicant should not be required to provide a transcript or sentencing remarks, as is the case in South Australia. The academic commented that such a requirement 'is unduly onerous on an individual and provides a procedural hurdle'.

Whether an application can relate to more than one conviction or charge

6.29 Three respondents — the LGBTI Legal Service Inc and others, several historians from the Griffith Criminology Institute and an academic from Monash University — submitted that a single application should be able to relate to more than one conviction or charge. The historians considered that allowing applications in relation to multiple convictions could potentially save 'time, effort and resources for both applicants and assessors'. The academic stated that an application should be able to detail more than one conviction that the individual would like expunged, but that 'it is reasonable for the relevant information for each offence to be required'.

²⁵ Including, for example, geographical details, and whether it was the Supreme Court, District Court, or Magistrates Court (or, prior to 1965, the Court of Petty Sessions): see further Queensland State Archives, 'Court records' (Brief guide 22, Department of Science, Information Technology and Innovation, Jan 2016), available at <<http://www.archives.qld.gov.au/Researchers/Resources/Pages/BriefGuides.aspx>>.

²⁶ Submission 3.

Other information that may be included in the application

6.30 Some respondents, including a group of academics from the TC Beirne School of Law, submitted that the applicant should have the opportunity to include supporting information or statements.²⁷ A member of the public also considered that the application could include evidence of the other person(s) involved.²⁸

Authority to request information and consent to disclosure

6.31 A member of the public considered that the application should authorise a criminal history check by the police and give 'consent to the disclosure to the decision-maker of official records created by the courts, police, or Office of the Director of Public Prosecutions [the 'ODPP'], relating to the conviction'.²⁹

Provision to withdraw or amend an application

6.32 A number of respondents submitted that provision should be made to allow applications to be withdrawn, additional information to be provided, or the application to be amended.³⁰

6.33 The LGBTI Legal Service Inc and others considered that the application should be able to be withdrawn, or supplemented with additional information, without needing to recommence the application process, 'in the interests of reducing the burden on applicants'.

6.34 A group of academics from the TC Beirne School of Law considered that 'there should be a mechanism available to permit applicants to withdraw their application before it has been decided without prejudice'. They noted that it is 'important at this stage, for the decision-maker to take into account that the applicant may not necessarily remember the event in great detail given the period of time which has passed'.

The Commission's view

6.35 The process for making an application for expungement should be as straightforward for the applicant as possible.

6.36 An application should be made to the decision-maker in writing. An easy-to-use application form, such as has been implemented in other jurisdictions, would be of assistance.

6.37 The application must elicit enough information to enable a search of the relevant records, so that the decision-maker can obtain information relevant to the historical offence. However, given the lapse of time, the applicant may not know or recall what is contained in the records. Balancing these considerations, the proposed

27 Submissions 3, 15.

28 Submission 3.

29 Ibid.

30 Submissions 3, 9, 11, 15.

expungement legislation should require the following information to be included in an application:

- the eligible person's full name and address, date of birth and other contact details;
- if the applicant is not the eligible person, the applicant's full name and contact details;³¹
- the eligible person's name and address at the time of conviction or charge, so far as is known to the applicant;
- the date when and the court where the eligible person was convicted or charged, and the name and statutory provision of the eligible offence, so far as is known to the applicant; and
- a copy of the transcripts or sentencing remarks in connection with the conviction or charge that are in the actual possession of the applicant.³²

6.38 Additionally, the proposed expungement legislation should provide that the decision-maker is not precluded from considering an application that does not contain all the information required to be included in the application, or that is subsequently requested by the decision-maker,³³ if the decision-maker chooses to do so.

6.39 The proposed expungement legislation should also provide that:

- the application may relate to more than one conviction or charge;
- the application must include a declaration that the information provided is, to the applicant's knowledge, correct;³⁴ and
- the application may be withdrawn, without prejudice, at any time prior to the application being decided.

³¹ While it is anticipated that in most cases the applicant will be the person who was convicted of or charged with an eligible offence (the 'eligible person'), in Chapter 3 above, the Commission recommends that the proposed expungement legislation should also provide for an application to be made by another person on behalf of an eligible person who is an adult with impaired capacity, or who has died: see Rec 3-4 above.

³² The applicant should provide copies of any relevant transcripts or sentencing remarks already in their possession, but there should be no obligation for the applicant to obtain these prior to making an application.

³³ As to the decision-maker's power to request information, see [6.89]–[6.90], Recs 6-2 and 6-3 below.

³⁴ In Queensland, it is a misdemeanour for a person to knowingly make a declaration that the person knows is false in a material particular, whether or not the person is permitted or required by law to make the declaration, before a person authorised by law to take or receive declarations: see Criminal Code (Qld) s 194. A declaration includes a statement and an affidavit. The maximum penalty is 3 years imprisonment.

DECIDING AN APPLICATION FOR EXPUNGEMENT

6.40 In the Consultation Paper, the Commission asked what the process for deciding an application should be, including in relation to gathering information and evidence.³⁵

Other jurisdictions

6.41 The expungement legislation in other jurisdictions contains various provisions relating to the decision-makers' powers to gather the information necessary to decide the application.

Gathering additional information from the applicant

6.42 In the Australian Capital Territory and New South Wales, the decision-maker may, by written notice, request or require further information from the applicant.³⁶ If the applicant does not comply with a request for additional information, the decision-maker may refuse to consider the application further or make a decision.³⁷ In the Australian Capital Territory, the applicant is taken to have complied with the request if the applicant satisfies the decision-maker that they are unable to comply with the request.³⁸

6.43 In Victoria, the decision-maker may require the applicant to provide any further information the decision-maker thinks fit in the manner they require within 28 days or any longer period.³⁹

6.44 In Tasmania, the draft expungement legislation provides that the decision-maker may require an applicant to provide additional information or additional documents that the decision-maker considers necessary to determine the application.⁴⁰

Gathering additional information from another person or body

6.45 In the Australian Capital Territory and New South Wales, the decision-maker may, by written notice, require certain entities (including a public employee, a police officer, a court, and the Director of Public Prosecutions) to provide information requested in the notice.⁴¹

6.46 The New South Wales provision states that it is the duty of the person or body to comply with the written notice.⁴² It further provides that neither the *Privacy and Personal Information Protection Act 1998 (NSW)* nor the *Health Records and*

³⁵ QLRC Consultation Paper No 74 (2016), Q-8.

³⁶ *Spent Convictions Act 2000 (ACT)* s 19C; *Criminal Records Act 1991 (NSW)* s 19C(2).

³⁷ *Spent Convictions Act 2000 (ACT)* s 19C(2); *Criminal Records Act 1991 (NSW)* s 19C(2).

³⁸ *Spent Convictions Act 2000 (ACT)* s 19C(3).

³⁹ *Sentencing Act 1991 (Vic)* s 105D(1)(d).

⁴⁰ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 7(2).

⁴¹ *Spent Convictions Act 2000 (ACT)* s 19F; *Criminal Records Act 1991 (NSW)* s 19D(1).

⁴² *Criminal Records Act 1991 (NSW)* s 19D(2).

Information Privacy Act 2002 (NSW) applies to the disclosure of personal information or health information to the decision-maker.⁴³ The decision-maker and any person acting under their direction are exempt from any requirements of those Acts relating to the collection, use or disclosure of personal or health information that is provided.⁴⁴

6.47 In Victoria, the decision-maker may make enquiries to, or request information from, any person or body that they think fit, including any court and the Director of Public Prosecutions.⁴⁵ The person or body must respond to the enquiry or request 'as promptly as possible'.⁴⁶ The legislation also provides that, in responding to an enquiry or request, a person or body is not bound by any duty of confidentiality imposed on the person or body by or under any Act (including the *Judicial Proceedings Reports Act 1958* (Vic)) or agreement, despite anything to the contrary in that Act or agreement.⁴⁷

6.48 In Tasmania, the draft expungement legislation provides that the decision-maker may, by notice to a person who may be able to provide relevant information, require the person to answer specified questions or to provide other information or documents in the time and manner specified in the notice. A person must not, without reasonable excuse, fail to comply with the notice.⁴⁸

Notifying the applicant of information obtained by the decision-maker

6.49 In Victoria, if the decision-maker has obtained any further information from a person or body other than the applicant, the decision-maker must, as soon as reasonably practical after obtaining a record:⁴⁹

- give the applicant access to it, except so far as it contains information relating to the personal affairs of any person other than the applicant,⁵⁰ and
- notify the applicant that they will not proceed to determine the application until at least 28 days (or more as specified) have passed from the date on which the applicant is given access to the record.

6.50 This enables the applicant to determine whether to withdraw the application, or to submit additional supporting evidence, prior to a decision being made.⁵¹

43 *Criminal Records Act 1991* (NSW) s 19D(3).

44 *Criminal Records Act 1991* (NSW) s 19D(4).

45 *Sentencing Act 1991* (Vic) s 105D(1)(c).

46 *Sentencing Act 1991* (Vic) s 105E(1).

47 *Sentencing Act 1991* (Vic) s 105E(3).

48 Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 7(3)–(4).

49 *Sentencing Act 1991* (Vic) s 105D(3).

50 'Information relating to the personal affairs of any person' means information that identifies a person or discloses their address or location, or from which a person's identity, address or location can reasonably be determined: *Sentencing Act 1991* (Vic) s 105D(4).

51 *Sentencing Act 1991* (Vic) s 105D(3)(b), note.

6.51 In the Australian Capital Territory and New South Wales, before a decision-maker refuses to expunge a conviction, they must:

- give the applicant written notice of the proposed refusal (including, in the Australian Capital Territory, the reasons for the proposed refusal);⁵² and
- provide the applicant with a copy of any records (Australian Capital Territory) or historical records (New South Wales) relating to the conviction that are held by or accessible to the decision-maker (Australian Capital Territory), or in the possession of the decision-maker (New South Wales).⁵³

6.52 The applicant then has 14 days from the date of the notice to provide further information in relation to the application.⁵⁴

6.53 In Tasmania, the Anti-Discrimination Commissioner has recommended that the Registrar⁵⁵ be authorised to give the applicant access to any records, in order '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'.⁵⁶ It was noted that provisions would be required to ensure that any information contained within the records related to the identity or personal details of any person other than the applicant are not disclosed. Provisions to this effect are not, however, included in the draft expungement legislation in Tasmania.

Confidentiality

6.54 In Victoria, the expungement legislation provides that a person must not, directly or indirectly, make a record of, or disclose or communicate to any person, any information relating to an application acquired by the person in performing a function or exercising a power in relation to an expungement application.⁵⁷ However, this does not apply if:

- the making of the record or the disclosure or communication is necessary for the purposes of, or in connection with, the performance of a function or the exercise of a power in relation to an expungement application;
- the person to whom the information relates gives written consent to the making of the record or to the disclosure or communication; or

⁵² *Spent Convictions Act 2000* (ACT) s 19D(3)(a), (b)(i); *Criminal Records Act 1991* (NSW) s 19C(3)(a).

⁵³ *Spent Convictions Act 2000* (ACT) s 19B(3)(b)(ii); *Criminal Records Act 1991* (NSW) s 19C(3)(b).

⁵⁴ *Spent Convictions Act 2000* (ACT) s 19D(3)(b)(iii); *Criminal Records Act 1991* (NSW) s 19C(3)(c).

⁵⁵ It was recommended that the Anti-Discrimination Commissioner be appointed as Registrar with overall responsibility for administering the scheme: *ADC Tasmania Report* (2015) 18, Rec 12.

⁵⁶ *ADC Tasmania Report* (2015) 19, Rec 16.

⁵⁷ *Sentencing Act 1991* (Vic) s 105O. The penalty is a fine with a maximum of 120 penalty units.

- the disclosure or communication of information is to a court or tribunal in the course of a legal proceeding, under an order of a court or tribunal, to a legal practitioner for the purpose of obtaining legal advice or representation, or as required or authorised by the expungement legislation or any other Act.

6.55 A similar provision has been included in the draft expungement legislation in Tasmania.⁵⁸

Hearings

6.56 In New South Wales, Victoria and England and Wales, the expungement legislation expressly provides that the decision-maker is not to hold an oral hearing for the purpose of deciding an expungement application.⁵⁹

6.57 In South Australia, the qualified magistrate is not bound by the rules of evidence and may, if appropriate, conduct all or part of the proceedings entirely on the basis of documents without the applicant or any representative attending or participating in a hearing.⁶⁰ An application must be heard in private unless the applicant consents to the hearing being in public or the qualified magistrate considers that, in the circumstances of the case, the hearing should be in public.⁶¹

6.58 Under the draft expungement legislation in Tasmania, applications for expungement are made to the decision-maker, who is empowered to 'take all steps, and make all inquiries, that are reasonable and appropriate to consider the application properly'.⁶² The draft expungement legislation also provides that, if any information or document is obtained by the decision-maker, 'evidence of that information or document, or evidence of the obtaining of that information or document, may be used only for the administration of this Act'.⁶³

⁵⁸ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 10. It provides for a penalty of a fine not exceeding 50 penalty units.

⁵⁹ *Criminal Records Act 1991* (NSW) s 19C(4); *Sentencing Act 1991* (Vic) s 105D(1)(e); *Protection of Freedoms Act 2012* (UK) c 9, s 94(2).

⁶⁰ *Spent Convictions Act 2009* (SA) s 8A(4), sch 2 s 5(1)(a), (2). This does not apply if the Attorney-General or another Minister, or the Commissioner of Police has intervened in the proceedings: sch 2 s 5(3). The qualified magistrate may dismiss the application without holding a hearing if satisfied that the application is vexatious, misconceived or lacking in substance: sch 2 s 5(4).

⁶¹ *Spent Convictions Act 2009* (SA) s 8A(4), sch 2 s 4.

⁶² Draft Historical Homosexual Convictions Bill 2016 (Tas) cls 5(1), 7(1). The decision-maker is the Secretary of the Department of Justice. In contrast, the Anti-Discrimination Commissioner in that jurisdiction recommended the establishment of a panel to make decisions on applications for the expungement of historical gay sex convictions. Under this model, the panel could conduct private inquiries involving relevant parties regarding matters raised within the application, and the Commissioner of Police could have capacity to make representations to the panel. It was observed that '[a]ppropriate safeguards as to the privacy of all proceedings and the protection of information assessed under the scheme would be required': *ADC Tasmania Report* (2015) 17, Recs 11 and 13.

⁶³ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 7(5).

Requirement for decision-maker to consider certain matters

6.59 In Victoria and England and Wales, the decision-maker must consider:⁶⁴

- any available record of the investigation of the offence, and of any proceedings relating to it, that the decision-maker considers to be relevant; and
- any statements or evidence included in the application or subsequently submitted by the applicant.

6.60 Under the draft expungement legislation in Tasmania, the decision-maker 'may have regard to any matter he or she reasonably considers relevant in the circumstances'.⁶⁵

6.61 In Victoria, the decision-maker may be satisfied on the issue of consent only by written evidence touching on that issue from a person other than the convicted person (either another person who was involved in the conduct constituting the offence or, if no such person can be found after making reasonable enquiries, a person who has knowledge of the circumstances in which that conduct occurred).⁶⁶ A similar provision is included in the draft expungement legislation in Tasmania, with the addition that the decision-maker may also be satisfied on the issue of consent by written evidence from the available official criminal records.⁶⁷

Delegation

6.62 The expungement legislation in New South Wales provides that the Secretary of the Department of Justice may delegate the exercise of any of their functions under section 19C (other than the power of delegation) to any member of staff of the department, or any person, or any class of persons, authorised for the purposes of that section by the regulations.⁶⁸ Section 19C includes the power to decide whether a conviction for an eligible offence may be expunged.⁶⁹

6.63 In Victoria, the power to determine an application for expungement may be delegated only to a person or class of person employed as an executive under Part 3 of the *Public Administration Act 2004* (Vic).⁷⁰ Other powers conferred on the

64 *Sentencing Act 1991* (Vic) s 105D(1)(a); *Protection of Freedoms Act 2012* (UK) c 9, s 94(1).

65 Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 8(4).

66 *Sentencing Act 1991* (Vic) s 105G(4).

67 Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 8(3). 'Official criminal record' is defined in cl 3(1) to mean a record containing information about the outcome of criminal proceedings kept by a court of Tasmania, or a government department or State authority within the meaning of the *State Services Act 2000* (Tas).

68 *Criminal Records Act 1991* (NSW) s 19C(5). No provision about delegation is presently made in the regulations under that Act.

69 It also includes the power to request additional information from the applicant by notice in writing, and to inform the applicant of a proposed refusal and provide the applicant with a copy of any historical records relating to the conviction in the possession of the decision-maker.

70 *Sentencing Act 1991* (Vic) s 105N(2).

decision-maker (other than the power of delegation) may be delegated more broadly to any person or class of person employed under Part 3 of that Act.⁷¹

6.64 The draft expungement legislation in Tasmania provides that the decision-maker may delegate any of their functions or powers (other than the power of delegation).⁷²

Power to appoint advisers

6.65 In Victoria, the decision-maker may appoint one or more persons who are legal practitioners of at least five years standing to provide advice on any particular application or on such applications generally.⁷³ In considering the application, the decision-maker must have regard to any advice provided.⁷⁴

6.66 The expungement legislation in England and Wales also gives the decision-maker the power to appoint persons to advise whether, in any case referred to them, the criteria for expungement are met.⁷⁵

Submissions

Gathering additional information

6.67 A number of respondents submitted that the decision-maker should have the power to request or require further information from the applicant, or from another person or body (such as the QPS, the Queensland Courts or the ODPP).⁷⁶

6.68 The LGBTI Legal Service Inc and others considered that the decision-maker should be able to request additional information from the applicant only if it is still required after retrieving the relevant records. They noted that some decisions may be able to be made after reviewing the documentary record without the need for further information from the applicant. They also considered that, if further information is required from the applicant, the applicant should first be given the opportunity to review the records and refresh their memory.⁷⁷

6.69 An academic from Monash University noted that:

If there is insufficient information in official records, it is entirely reasonable for decision-makers to ask for the individual to provide information ... in order for them to make a decision.

⁷¹ *Sentencing Act 1991* (Vic) s 105N(1).

⁷² Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 22.

⁷³ *Sentencing Act 1991* (Vic) s 105F(1).

⁷⁴ *Sentencing Act 1991* (Vic) s 105D(1)(b).

⁷⁵ *Protection of Freedoms Act 2012* (UK) c 9, s 100. See also s 92(3).

⁷⁶ Submissions 3, 9, 11.

⁷⁷ See also, in relation to [6.68] above and [6.71]–[6.72] below, *LGBTI Legal Service Discussion Paper* (2015) 21 to the same general effect, and for which the submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support.

6.70 That respondent also noted that a power to request further information from another person or body ‘should not be used to deter applications or to create further harassment or stigma towards the individual’, but should be done privately and on ‘a strict needs-basis’.

Notifying the applicant of information obtained by the decision-maker

6.71 The LGBTI Legal Service Inc and others submitted that a notification process, similar to that in Victoria, should be adopted. In particular, these respondents considered that, following the initial application, the decision-maker should request information and records from relevant third parties, such as the police, the ODPP and other government bodies holding records or information regarding the offence. This information should then be provided to the applicant before they are required to give further information to the decision-maker.

6.72 Those respondents observed that it is important for the applicant to be provided with the information obtained by the decision-maker ‘given the extended period which will have passed since the offence took place’. They considered that:

Rather than require the applicants to provide statements about their recollection of events from over 20 years ago, applicants should be provided with the relevant records so that they can review and seek assistance to coherently and succinctly state their case, with the benefit of refreshing their memory with the records and with access to independent legal advice and assistance. Without this step, the process has the potential to be costly and time-consuming for all parties. Importantly, the applicants may also inadvertently prejudice the outcome of their future application by making statements without the benefit of reviewing the available documents.

6.73 A member of the public supported the applicant being given an opportunity to provide further information before an application, which is proposed to be refused, is finally decided (as is required in the Australian Capital Territory and New South Wales).⁷⁸

Hearings

6.74 Some respondents submitted that an oral hearing should not be held.⁷⁹

6.75 In this respect, a group of academics from the TC Beirne School of Law observed that:

Since this is an administrative, not judicial, process, the objective is to determine whether it is a relevant conviction under the scheme, not to serve as a retrial. The decision-maker has access to the applicant’s account of the event and statements, as well as the documents from [the] public record in order to make the decision. To require oral hearings would be likely to make the process overly judicial in character and more time-consuming. Given the subject matter in question, an oral hearing may also be [an] invasive and unjustified intrusion into the applicant’s need for privacy in the application and decision-making process.

⁷⁸ Submission 3.

⁷⁹ Submissions 3, 9, 15.

6.76 The LGBTI Legal Service Inc and others similarly considered that:

giving oral evidence may be re-traumatising for applicants and other affected individuals, of little additional benefit given the passage of time, and compromise the applicant's privacy.

6.77 A member of the public noted that this approach would be consistent with the approach in New South Wales, Victoria and England and Wales.⁸⁰

6.78 In contrast, an academic from Monash University considered that it should be possible for further information, both written and oral, to be given to the decision-maker. However, this respondent noted that:

Oral evidence should be the exception and only provided if necessary — remembering that the process should not burden the individual seeking to have the conviction expunged.

6.79 That respondent observed that further information may be necessary in a case where the official records have been lost, or where there is insufficient information in the official records to make a decision.

6.80 The Queensland Council for Civil Liberties submitted that the decision-making process should be informal and confidential.

Requirement for the decision-maker to consider certain matters

6.81 The LGBTI Legal Service Inc and others submitted that the decision-maker should be required to have regard to any available record of the investigation of, or proceedings relating to, the offence. However, they also considered that:

There should be acknowledgement in the decision-making process that, given the prevailing climate of prejudice and discrimination at the time, the accuracy of official records cannot be presumed.

6.82 Similarly, a group of academics from the TC Beirne School of Law observed that the decision-maker should have regard to any available record of the investigation of, or proceedings related to, the offence, but should:

view police documents and other public records in light of the prejudicial mentality towards homosexuality at the time which may affect the validity of the description of events in these documents.

6.83 A member of the public did not support the inclusion of a requirement for the decision-maker to have regard to any available record of the investigation or proceedings.⁸¹

6.84 The LGBTI Legal Service Inc and others submitted that:

⁸⁰ Submission 3.

⁸¹ Ibid.

Unlike Victoria,⁸² in our view the information provided by the applicant should be able to be taken into account in the same manner as official records. (note added)

6.85 Those respondents considered that, where there is an issue of consent raised by the records, the decision-maker should be empowered to consider and assess the credibility of all the available evidence, including the evidence of the other party involved or another person with knowledge of the particular circumstances, as well as the applicant's evidence.⁸³

Power to appoint advisers

6.86 The LGBTI Legal Service Inc and others submitted that, if an administrative scheme is adopted, it should include a provision empowering the decision-maker to appoint advisers to provide independent advice, similar to the provision in the Victorian scheme.⁸⁴ They considered that advisers could include members of the LGBTI legal community, and would enable the decision-maker to 'draw upon the specialist knowledge of former prosecutors of sex offences and administrative law experts'.⁸⁵

6.87 Similarly, an academic from Monash University submitted that, while applications could be made to the Director-General of DJAG, advice could be sought from a panel of experts.⁸⁶

Guidelines

6.88 The LGBTI Legal Service Inc and others considered that:

Given the broad array of issues, decision-making guidelines should be developed and implemented at the commencement of the scheme, to assist the decision-maker in ensuring that all relevant considerations are taken into account.

The Commission's view

Gathering additional information

6.89 Once an application for expungement is made, the burden should be on the decision-maker to gather the relevant information required to make a decision. To enable this, the proposed expungement legislation should authorise the decision-maker to request and receive any information that is reasonably required to make a decision under the scheme.

⁸² In Victoria a decision-maker may be satisfied of the issue of consent only by evidence from the other party involved or, if no such person can be found, from a person (other than the applicant) with knowledge of the circumstances in which that conduct occurred: *Sentencing Act 1991* (Vic) s 105G(4), discussed at [6.61] above.

⁸³ Cf *LGBTI Legal Service Discussion Paper* (2015) 22, in which support was given to the Victorian approach. The submissions from the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support for the proposals in that paper.

⁸⁴ See [6.65] above.

⁸⁵ See [2.79] above.

⁸⁶ See [2.82] above.

6.90 In particular, and without limiting the above, the decision-maker should be authorised to request, in writing, information from the applicant. The decision-maker should also be authorised to request, by written notice, another person or body (such as, for example, the Queensland Police Service (the 'QPS'), the Queensland Courts and the ODPP) to provide the decision-maker with any relevant information that is in their possession, or under their control, and the person or body should be required to comply with the notice as soon as is reasonably practicable.⁸⁷

6.91 The inclusion of provisions to authorise or require the use or disclosure of personal information for the purpose of determining an expungement application is also necessary to overcome the legal limitations on the way government agencies may use and disclose personal information. The *Information Privacy Act 2009* sets out a number of Information Privacy Principles ('IPPs') that govern how Queensland government agencies collect, store, use and disclose an individual's personal information.⁸⁸ Pursuant to that Act, an agency having control of a document containing personal information that was obtained for a particular purpose must not use the information for another purpose, and must not disclose the personal information to another entity (other than the individual the subject of the personal information), unless an exception applies. It is an exception if the use of the information for another purpose or its disclosure is authorised or required by law.⁸⁹

6.92 Another exception to the IPPs is where the individual the subject of the personal information has expressly or impliedly agreed to the use of the information for the other purpose or the disclosure.⁹⁰ If an application form is implemented, it should, among other things, inform the applicant of searches that may be undertaken (including a police criminal history check), and that the use or disclosure of personal information is authorised or required under the proposed expungement legislation for the purpose of determining an application.⁹¹

Hearings

6.93 An oral hearing should not be held. So far as it is possible to do so, the matter should be determined on the papers. However, the decision-maker should have the power to call for or receive information, orally or in writing, where it is appropriate to do so.

87 The decision-maker is not precluded from considering an application that does not contain all the information requested in the notice: see [6.38] above and Rec 6-1(b) below.

88 *Information Privacy Act 2009* (Qld) s 27, sch 3.

89 *Information Privacy Act 2009* (Qld) sch 3 IPP 10(1)(c) and 11(1)(d). The IPPs do not apply to a document that is: a generally available publication; kept in a library, art gallery or museum for the purposes of reference, study or exhibition; a public record under the *Public Records Act 2002* (Qld) in the custody of QSA that is not in a restricted access period under that Act; or a letter, or anything else, while it is being transmitted by post: ss 15–16, sch 1 item 7.

90 *Information Privacy Act 2009* (Qld) sch 3 IPP 10(1)(a) and 11(1)(b).

91 See further *Information Privacy Act 2009* (Qld) sch 3 IPP 2.

Delegation

6.94 In Chapter 2 of this Report, the Commission recommends that the decision-making power under the proposed expungement legislation be conferred on the Director-General of DJAG.⁹² The Director-General is the Department's chief executive officer. Section 103(1) of the *Public Service Act 2008* provides that a chief executive may delegate the chief executive's functions under an Act to any appropriately qualified person.⁹³

6.95 Given the significance of expunging a criminal conviction or charge, the Director-General's power to decide an application for expungement under the proposed expungement legislation should be limited to a person at a high level, with appropriate skills and experience. Accordingly, the proposed expungement legislation should provide that the Director-General's power to expunge a conviction or charge may be delegated only to a person employed under the *Public Service Act 2008* as a senior executive or a senior officer.⁹⁴

Other matters of procedural fairness

6.96 The Commission has considered a number of other matters raised in the submissions, including whether:

- the proposed expungement legislation should require the decision-maker to give the applicant access to any records obtained (such as is provided for in Victoria), or give the applicant written notice of a proposed refusal and provide the applicant with relevant records (such as is provided for in the Australian Capital Territory and New South Wales);
- the decision-maker should be required to have regard to certain matters when making a decision under the proposed expungement legislation; and
- provision should be made for the appointment of advisers.

6.97 The rules of procedural fairness will apply to decisions made under the proposed expungement legislation. Procedural fairness requires, for example, that the decision-maker considers all the relevant information in reaching a decision.

6.98 Subject to the rules of procedural fairness, it is appropriate that the decision-maker has flexibility to adopt the most appropriate method to inform themselves of relevant facts, and make decisions, on a case-by-case basis.

6.99 The Commission is nevertheless of the view that the proposed expungement legislation should expressly provide that, before the decision-maker

⁹² See Rec 2-1 above.

⁹³ A delegation of a function may permit the subdelegation of the function. However, if the function is performed under another Act, the power to delegate or subdelegate is subject to the other Act: *Public Service Act 2008* (Qld) s 103(2)–(3).

See also the *Acts Interpretation Act 1954* (Qld) s 36 sch 1 (definition of 'appropriately qualified'), which relevantly provides that, for a function or power, 'appropriately qualified' means 'having the qualifications, experience or standing appropriate to perform the function or exercise the power'.

⁹⁴ See also [6.148] below.

decides to refuse an application, the decision-maker must give the applicant written notice of the proposed refusal, and a copy of any relevant documents relating to the historical conviction or charge that is in their possession, or under their control, on which they propose to rely. Additionally, if there are any other facts or information on which the decision-maker proposes to rely that are not contained in those documents, the decision-maker must also notify the applicant of those facts or that information.

6.100 This requirement promotes fairness and transparency in the decision-making process by giving the applicant the opportunity to review the information the decision-maker is relying on, before a decision is made to refuse the application. Based on this information, the applicant may decide to withdraw the application, or may take the opportunity to address any adverse or prejudicial information, or provide additional supporting information.

6.101 The documents provided to the applicant may, however, contain personal information about another person, or other information that is not publicly available. The proposed expungement legislation should therefore make provision to protect the confidentiality of information provided to the applicant, except to the extent that it relates to the applicant's personal information. To achieve this, the proposed expungement legislation should provide that the applicant may use or disclose confidential information⁹⁵ provided to the applicant only for the purposes of an expungement application, or a review or appeal of a decision made under the proposed expungement legislation.

6.102 In relation to the confidentiality of information acquired by the decision-maker, or other public service employees, during the expungement application,⁹⁶ section 172 of the *Public Service Act 2008* provides that it is an offence for a public service employee in a department to disclose information, or give access to documents, acquired or gained about someone else's criminal history or police information, to anyone else.⁹⁷ Additionally, the *Information Privacy Act 2009* generally prohibits the disclosure by an agency of an individual's personal information to a third party.⁹⁸

⁹⁵ 'Confidential information' would include the personal information of another person. It would not, however, include the applicant's own personal information.

⁹⁶ Once a conviction or charge is expunged, the offence provision the Commission recommends in Chapter 5 above will apply in relation to the unlawful disclosure of information about an expunged conviction or charge: see [5.66] ff and Rec 5-6 above.

⁹⁷ *Public Service Act 2008* (Qld) s 172(1)–(2). The maximum penalty is 100 penalty units. This does not apply if the disclosure or access is: with the consent of the person concerned; required under an Act; or to a public service employee in the department or a selection panel member for the purpose of assessing the person's suitability to be engaged to perform relevant duties or child-related duties in relation to which the information or documents were acquired: *Public Service Act 2008* (Qld) s 172(3).

⁹⁸ See further [5.96] and [6.91]–[6.92] above.

GIVING NOTICE OF A DECISION ON AN APPLICATION FOR EXPUNGEMENT

6.103 In the Consultation Paper, the Commission asked what processes should be included in the scheme once a decision is made, including:⁹⁹

- what provision there should be about giving decisions and reasons; and
- who should be informed if a conviction is expunged.

Other jurisdictions

6.104 In Victoria, the decision-maker must determine an application as ‘promptly as possible’, consistent with the expungement legislation and the proper determination of the application.¹⁰⁰ Similarly, the draft expungement legislation in Tasmania requires the decision-maker to ‘determine an application as soon as practicable after it is received’.¹⁰¹

6.105 In the Australian Capital Territory, New South Wales and Victoria, the decision-maker must give the applicant written notice of the decision.¹⁰² Written reasons must also be provided in Victoria and, if the application is refused, the Australian Capital Territory.¹⁰³ Under the draft expungement legislation in Tasmania, the decision-maker must, as soon as possible after a decision is made, give the applicant written notice of the decision. If the application is refused, the decision-maker must also inform the applicant of the reasons for the refusal and of the applicant’s right to have the decision reviewed.¹⁰⁴

6.106 In Victoria, notice of the decision must also be given to the relevant record keeper within 14 days after the decision is made.¹⁰⁵ Notice of a decision to expunge a conviction must be given to the chief police officer in the Australian Capital Territory.¹⁰⁶

Submissions

6.107 An academic from Monash University stated that the application should be decided in a timely manner, and some respondents — including the LGBTI Legal Service Inc and others and a group of academics from the TC Beirne School of Law — considered that the decision-maker should be required to determine the application ‘as promptly as possible’.¹⁰⁷ A member of the public supported this

⁹⁹ QLRC Consultation Paper No 74 (2016), Q-8.

¹⁰⁰ *Sentencing Act 1991* (Vic) s 105I(1).

¹⁰¹ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 9(1).

¹⁰² *Spent Convictions Act 2000* (ACT) s 19D(4), *Criminal Records Act 1991* (NSW) s 19C(1); *Sentencing Act 1991* (Vic) s 105I(2). See also *Protection of Freedoms Act 2012* (UK) c 9, s 94(4)(b).

¹⁰³ *Spent Convictions Act 2000* (ACT) s 19D(4); *Sentencing Act 1991* (Vic) s 105I(4)(a), (5)(a).

¹⁰⁴ Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 9(4).

¹⁰⁵ *Sentencing Act 1991* (Vic) ss 105(1) (definition of ‘data controller’), 105I(2).

¹⁰⁶ *Spent Convictions Act 2000* (ACT) s 19D(5). See also *Protection of Freedoms Act 2012* (UK) c 9, s 95(1)–(2), (5) (definition of ‘relevant data controller’).

¹⁰⁷ Submissions 3, 9, 15.

approach given ‘the need to provide justice to people who have already been denied justice for too long’.¹⁰⁸

6.108 The group of academics noted that this requirement is important because ‘one objective of the scheme is to counteract the ongoing discriminating effects of the prior conviction and allow parties to move forward’.

6.109 Several respondents — including the LGBTI Legal Service Inc and others, a group of academics from the TC Beirne School of Law, an academic from Monash University and a member of the public — submitted that there should be a requirement to give written notice of the decision to the applicant.¹⁰⁹

6.110 Those respondents were evenly divided, however, as to whether reasons should also always be given,¹¹⁰ or given only if the application is refused.¹¹¹

6.111 A member of the public suggested that a requirement to give written reasons is dictated by procedural fairness.¹¹²

6.112 The LGBTI Legal Service Inc and others, and a group of academics from the TC Beirne School of Law submitted that notice of a decision to expunge a conviction should also be given to the relevant authorities holding the records, in order to ensure that those records are expunged. An academic from Monash University considered that, if other parties require notification, ‘this should be done on an as-required basis’.

6.113 The group of academics from the TC Beirne School of Law also suggested that applicants ‘should be allowed to elect how they would like to be notified of the decision to avoid the risk of “outing” people’.

6.114 The LGBTI Legal Service Inc and others considered that communication of the decision to the applicant ‘should be handled sensitively and with the object of assisting the applicant to achieve some sense of closure’. They noted that this may be relevant, for example, in cases where an applicant may have thought they were living with a conviction but no corresponding record can be found.

The Commission’s view

6.115 It is not necessary for the proposed expungement legislation to include a requirement that the decision-maker must determine an application for expungement ‘as promptly as possible’ or ‘in a timely way’. This is already a requirement of natural justice.¹¹³

108 Submission 3.

109 Submissions 3, 9, 11, 15.

110 Submissions 11, 3.

111 Submissions 9, 15.

112 Submission 3.

113 If the application takes an unreasonable amount of time to determine, or the decision-maker fails to make a decision, the applicant will be able to seek a statutory order of review under ss 21 or 22 of the *Judicial Review Act 1991* (Qld).

6.116 The proposed expungement legislation should, however, require the decision-maker to give written notice of their decision on an application for expungement to the applicant as soon as reasonably practicable after making the decision. If the application for expungement is refused, the written notice should inform the applicant of their right to have the decision reviewed.¹¹⁴

6.117 In addition, if the application for expungement is refused, the proposed expungement legislation should require the decision-maker to provide the applicant with written reasons for the refusal.¹¹⁵ The provision of written reasons will enable the applicant to have a greater understanding of how and why a decision to refuse the application was made, and will assist them in either accepting the decision, or deciding to apply for it to be reviewed. Although a person may apply for written reasons when seeking review under both the *Queensland Civil and Administrative Tribunal Act 2009* and the *Judicial Review Act 1991*, an express requirement to provide reasons if the application is refused under the proposed expungement legislation will reduce the number of steps the applicant needs to take, and will simplify and expedite the review process.

6.118 Finally, the proposed expungement legislation should provide that, if a decision is made to expunge a conviction or charge the decision-maker must give written notice of that decision to the relevant record keeper as soon as reasonably practicable, so that they may take appropriate action.¹¹⁶

SUBSEQUENT EXPUNGEMENT APPLICATIONS, REVIEWS AND APPEALS

6.119 In the Consultation Paper, the Commission asked whether subsequent applications for expungement should be allowed.¹¹⁷ The terms of reference also require the Commission to consider whether there should be a right of appeal or review regarding decisions under the scheme and, if so, to whom such an appeal should be made.¹¹⁸

Other jurisdictions

Subsequent applications for expungement

6.120 In the Australian Capital Territory and Victoria, the expungement legislation provides that a person whose application has been refused may reapply if the decision-maker is satisfied that other necessary supporting information became available after the earlier application was decided.¹¹⁹ In the Australian Capital

114 See [6.135]–[6.137] and Rec 6-8 below as to review.

115 A statement of reasons must set out the findings on material questions of fact, and refer to the evidence or other material on which those findings were based: see *Acts Interpretation Act 1954* (Qld) s 27B.

116 See Rec 5-10(b), (c) above.

117 *QLRC Consultation Paper No 74* (2016), Q-8.

118 See terms of reference para 5(l).

119 *Spent Convictions Act 2000* (ACT) s 19G; *Sentencing Act 1991* (Vic) s 105M.

Territory, the decision-maker must be satisfied 'on reasonable grounds'.¹²⁰ A similar provision is included in the draft expungement legislation in Tasmania.¹²¹

Right of review or appeal of a decision on an application for expungement

6.121 The expungement legislation in the Australian Capital Territory, New South Wales and Victoria gives the applicant a right to apply for a decision made under the scheme to be reviewed by the relevant civil and administrative tribunal.¹²²

6.122 In the Australian Capital Territory and Victoria, the applicant may apply for review only of a decision refusing the application for expungement.¹²³ In Victoria, the record keeper who has any official records relating to the conviction under their management or control (the 'data controller') may also apply for review of a decision to approve the application.¹²⁴ An application for review must be made within 28 days after the applicant or data controller is given notice by the decision-maker.¹²⁵

6.123 In South Australia, an unsatisfied party may apply for judicial review of the decision.¹²⁶

6.124 In England and Wales, the applicant may appeal a decision refusing the application to the High Court, with permission from the court.¹²⁷

6.125 The draft expungement legislation in Tasmania provides that a person aggrieved by a decision to refuse an application, or a determination that a conviction is no longer an expunged conviction, may apply to the Magistrates Court (Administrative Appeals Division) for review of the decision. The review is to be held in private.¹²⁸

120 *Spent Convictions Act 2000* (ACT) s 19G.

121 Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 5(4).

122 *Spent Convictions Act 2000* (ACT) ss 19K, 19M, sch 1 column 3; *Criminal Records Act 1991* (NSW) s 19E; *Sentencing Act 1991* (Vic) s 105L.

123 *Spent Convictions Act 2000* (ACT) s 19K sch 1 column 3; *Sentencing Act 1991* (Vic) s 105L(1), (2)(a). If the application to extinguish the conviction is refused, the decision-maker is required to give the applicant written notice informing the applicant that they may apply for review: *Spent Convictions Act 2000* (ACT) s 19L, sch 1; *Sentencing Act 1991* (Vic) s 105L(4)(b)–(c).

124 *Sentencing Act 1991* (Vic) s 105L(1), (2)(b). The applicant is entitled to be given notice of an application for review made by a data controller: *Sentencing Act 1991* (Vic) s 105L(4). See also s 105(1) (definition of 'data controller').

125 *Sentencing Act 1991* (Vic) s 105L(3).

126 There is no right to appeal in the *Spent Convictions Act 2009* (SA). Further, it is arguable that there is no right of appeal pursuant to the *Magistrates Court Act 1991* (SA) because decisions made under the *Spent Convictions Act 2009* (SA) are not made by the Magistrates Court, but by qualified magistrates appointed under that Act.

127 *Protection of Freedoms Act 2012* (UK) c 9, s 99(1). On the appeal, the High Court must make its decision only on the basis of the evidence that was available to the original decision-maker: s 99(2). The High Court in England and Wales is similar to the Supreme Court of Queensland.

128 Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 16.

Submissions

Subsequent applications for expungement

6.126 A number of respondents — including the LGBTI Legal Service Inc and others, an academic from Monash University and a member of the public — submitted that the applicant should have a right to reapply, following an earlier refusal, where additional supporting information becomes available after the earlier application was decided.¹²⁹

Right of review or appeal of a decision on an application for expungement

6.127 An academic from Monash University submitted that individuals should ‘be able to access a process to review the decision to ensure that it was made fairly’, and that all applications should be reviewed on the merits.

6.128 The LGBTI Legal Service Inc and others submitted that the applicant should be able to appeal a decision if they are dissatisfied with the outcome. These respondents considered that, initially, ‘the applicant should be entitled to apply for internal review to an appropriate body’, and that ideally this should be a *de novo* review.¹³⁰ They also considered that further appeal rights to the Queensland Civil and Administrative Tribunal (‘QCAT’) should be available.¹³¹

6.129 The Queensland Council for Civil Liberties also submitted that there should be a right to review before QCAT.

6.130 Australian Lawyers for Human Rights and a member of the public considered that there should be a right to apply to QCAT for review of a decision to refuse an application for expungement. The member of the public noted that a right to appeal to QCAT would be consistent with the approach in the Australian Capital Territory, New South Wales and Victoria.¹³² This respondent did not, however, consider that the record keeper should have a right to seek review of a decision to approve an application, as is provided for under the Victorian expungement legislation.¹³³

¹²⁹ Submissions 3, 9, 11.

¹³⁰ A matter heard *de novo* is heard over again from the beginning. The body conducting the hearing *de novo* is not confined to the evidence or materials that were presented in the original hearing, and its powers do not depend on there being demonstrated an error in the original decision. It ‘stands in the shoes’ of the original decision-maker, and makes the decision again: LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* (at January 2011) (definition of ‘*de novo*’).

¹³¹ See further *LGBTI Legal Service Discussion Paper* (2015) 23:

In order to uphold the principles of natural justice we consider that it is preferable for an applicant to have a right to seek administrative review of a decision of the decision-maker as an additional safeguard for ensuring the robustness, transparency and consistency of the decision-making process.

The submissions from the Castan Centre for Human Rights Law and the Australian Lawyers for Human Rights expressed general support for the proposals in that paper.

¹³² Submission 3.

¹³³ See [6.122] above.

6.131 In contrast, a group of academics from the TC Beirne School of Law considered that there should be a limited review capacity:

If an application is refused then an applicant should have means to apply for review, on the basis that the decision-maker is satisfied additional supporting information has become available after the earlier decision was made or there has been an error of law. This limited review capacity will provide for greater certainty and a more efficient process. The requirement to provide reasons for rejecting an application may also provide closure to applicants whose application was not successful without applying for a review. (note omitted)

6.132 Some respondents considered the need for privacy in relation to appeals to QCAT.¹³⁴ The LGBTI Legal Service Inc and others submitted that any hearing in QCAT should be closed and private. Australian Lawyers for Human Rights considered that the applicant should have the right to have their name (and, if the application was made on behalf of another person, the eligible person's name) withheld from publication.

6.133 The Bar Association of Queensland submitted that QCAT should be the decision-maker under the proposed expungement scheme.¹³⁵ However, this respondent noted that proceedings under the scheme should not be public or published, but should preserve the privacy of applicants. It considered that:

this is not contrary to principles of open justice in that the whole purpose of the scheme goes to issues of protecting a person's privacy and reputation against continued disclosure of past convictions and charges.

The Commission's view

Subsequent applications for expungement

6.134 The proposed expungement legislation should provide that, if an application for the expungement of a conviction or charge has been refused, the applicant may make another application for expungement in relation to the same conviction or charge only if new relevant information has become available after the earlier application was decided.¹³⁶ The Commission considers that this strikes the appropriate balance between finality and fairness.

134 Submissions 9, 10.

135 See [2.85] above.

136 Although s 24AA of the *Acts Interpretation Act 1954* (Qld) gives decision-makers a general power to amend or repeal their decisions, it would not be adequate to enable a decision-maker to reconsider a final decision made under the proposed expungement legislation. See further *Pangilinan v Qld Parole Board* [2014] QSC 133; *Firearm Distributors Pty Ltd v Carson* [2001] 2 Qd R 26; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 211.

Right of review or appeal of a decision on an application for expungement

6.135 A decision to expunge a conviction or charge under the proposed expungement legislation will be an administrative decision subject to judicial review in the Supreme Court in accordance with the *Judicial Review Act 1991*.¹³⁷

6.136 Additionally, the proposed expungement legislation should provide that an applicant may apply to QCAT for administrative review of a decision made under the legislation to refuse an application for expungement.¹³⁸

6.137 The process for the review will be governed by the *Queensland Civil and Administrative Tribunal Act 2009*, which provides, among other things, that the review is to be heard and decided by way of a fresh hearing on the merits.¹³⁹

6.138 The Commission has considered whether special provision should be made in the proposed expungement legislation for review proceedings in QCAT to be private and confidential.

6.139 On the one hand, the purpose of the scheme is to expunge historical convictions and charges for consensual homosexual activity between adults from a person's criminal history. This is primarily given effect by the non-disclosure of expunged convictions or charges. Public review hearings would undermine non-disclosure, and applicants may therefore be deterred from making an application for review.

6.140 On the other hand, open justice is a fundamental principle of the common law.¹⁴⁰ There are compelling reasons for court and tribunal proceedings to be conducted in public, including the need for community confidence in, and public and professional scrutiny of, the justice system.¹⁴¹

6.141 QCAT has flexibility as to how it conducts its hearings. The procedure is at the discretion of the tribunal, subject to the *Queensland Civil and Administrative Tribunal Act 2009*, the enabling Act¹⁴² and the *Queensland Civil and Administrative Tribunal Rules 2009*. In conducting a proceeding, the tribunal must observe the rules of natural justice, is not bound by the rules of evidence, may inform itself in any way

¹³⁷ See further *Judicial Review Act 1991* (Qld) ss 4–5, 19–20. Supreme Court decisions may be appealed to the Court of Appeal: *Supreme Court of Queensland Act 1991* (Qld) s 62; *Uniform Civil Procedure Rules 1999* (Qld) ch 18 pt 1. However, to appeal from some orders made under the *Judicial Review Act 1991* (Qld), the leave of the Court of Appeal is required: see, eg, *Judicial Review Act 1991* (Qld) ss 15(4), 48(5), 49(5).

¹³⁸ In relation to QCAT's review jurisdiction, see *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2 pt 1 div 3. In particular, s 17 provides that QCAT's review jurisdiction is 'the jurisdiction conferred on the tribunal by an enabling Act to review a decision made or taken to have been made by another entity under that Act'. Such a decision is referred to in the Act as the 'reviewable decision'. Relevantly, an enabling Act is an Act, other than the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), which confers original, review or appeal jurisdiction on QCAT: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 6(2).

¹³⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 20(2). That Act also provides that there is a 28 day time limit for review applications to be made: s 33(3).

¹⁴⁰ See, eg, *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10; *Hogan v Hinch* (2011) 243 CLR 506, [20] (French CJ); *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs CJ); *Scott v Scott* [1913] AC 417, 445 (Earl Loreburn), 473 (Lord Shaw of Dunfermline).

¹⁴¹ *Hogan v Hinch* (2011) 243 CLR 506, [20] (French CJ).

¹⁴² See n 138 above.

it considers appropriate, and must act with as little formality and technicality as possible.¹⁴³

6.142 A hearing of a proceeding in QCAT must ordinarily be held in public.¹⁴⁴ However, the tribunal may direct a hearing or part of a hearing to be held in private if it considers it is necessary:¹⁴⁵

- to avoid interfering with the proper administration of justice;
- to avoid endangering the physical or mental health or safety of a person;
- to avoid offending public decency or morality;
- to avoid the publication of confidential information or information whose publication would be contrary to the public interest; or
- for another reason in the interests of justice.

6.143 The tribunal may also make non-publication orders including, for example, to prohibit the publication of information that may enable a person who has appeared before the tribunal to be identified.¹⁴⁶

6.144 Given the existing QCAT scheme, the Commission does not consider that it is necessary for the proposed expungement legislation to make special provision for hearings in a review proceeding before QCAT to be private. The Commission can see good reasons both for and against such a proceeding being heard in private, and considers that ultimately this decision should be left to the tribunal's discretion, to be decided on a case-by-case basis.

6.145 It is also noted that an appeal from a QCAT decision may be made to the Court of Appeal in some cases.¹⁴⁷ Appeal hearings are in open court and subject to the ordinary rules of court proceedings.

DECISION TO REVIVE AN EXPUNGED CONVICTION OR CHARGE

6.146 In Chapter 5 of this Report, the Commission recommends that the proposed expungement legislation should provide for an expunged conviction or charge to be revived if the decision-maker is satisfied that it was expunged by reason of an

¹⁴³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(1), (3)(a)–(d).

¹⁴⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 90(1). This applies unless an enabling Act provides otherwise.

¹⁴⁵ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 90(2).

¹⁴⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 66(1)(c). A non-publication order may be made only for the same reasons as are listed in [6.142] above, in relation to hearings held in private: s 66(2).

¹⁴⁷ If a judicial member constituted the tribunal in the proceeding, a party to a proceeding may appeal to the Court of Appeal on a question of fact, or a question of mixed law and fact, with the court's leave to appeal: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 8, 149(2), (3)(b), sch 3 (definition of 'judicial member'). If a judicial member did not constitute the tribunal in the proceeding, the party may appeal to the appeal tribunal: ss 8, 26, 142(1), sch 3 (definition of 'appeal tribunal'). A decision of the appeal tribunal may be appealed to the Court of Appeal only on a question of law, and with the court's leave to appeal: s 150(2)–(3). Appeals made to the appeal tribunal may also be transferred to the Court of Appeal in certain circumstances: s 144.

application that included false or misleading information, or a document that is false or misleading.¹⁴⁸

6.147 In general, the principles that relate to the procedure for a decision on an application for expungement similarly apply to a decision to revive an expunged conviction or charge.

6.148 In particular, given the significance of a decision to revive an expunged conviction or charge, the proposed expungement legislation should provide that the Director-General's power to revive an expunged conviction or charge may be delegated only to a person employed under the *Public Service Act 2008* as a senior executive or a senior officer.¹⁴⁹

6.149 In addition, it is appropriate that the applicant for expungement be notified of a decision to revive an expunged conviction or charge, and have the opportunity to apply for review of that decision. The relevant record keeper will also need to be notified of a decision to revive an expunged conviction or charge.¹⁵⁰

6.150 The proposed expungement legislation should therefore provide that, if the decision-maker decides that an expunged conviction or charge is no longer an expunged conviction or charge, the decision-maker must, as soon as is reasonably practicable after making the decision:¹⁵¹

- give written notice of the decision to the applicant for expungement and written reasons for the decision;
- inform the applicant of the right to have the decision reviewed; and
- give written notice of the decision to the relevant record keeper.

6.151 Further, the proposed expungement legislation should provide that the applicant for expungement may apply to QCAT for administrative review of a decision to revive an expunged conviction or charge.¹⁵²

148 See [5.133]–[5.135] and Rec 5-11 above.

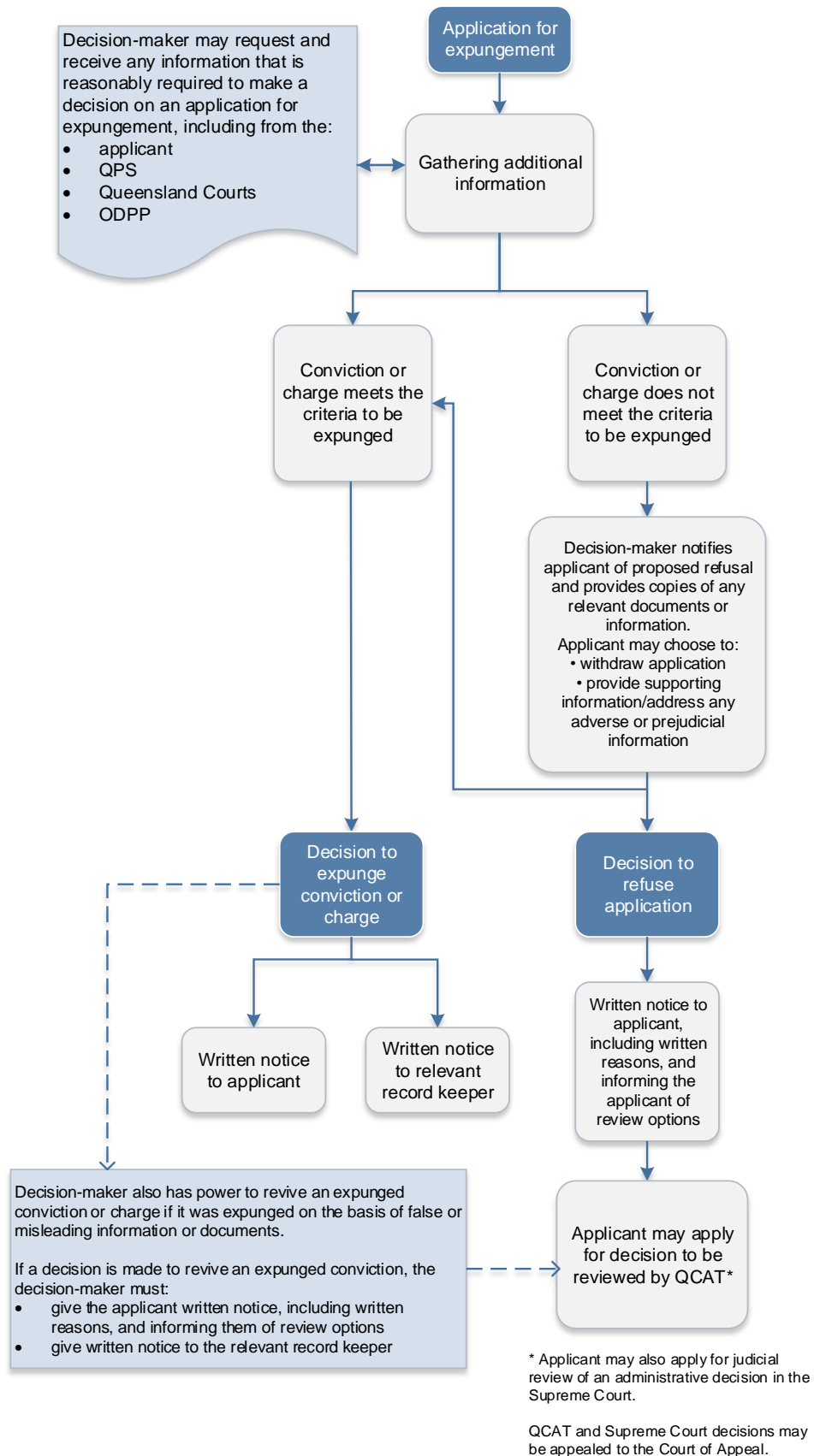
149 This is consistent with the Commission's view about the delegation of the Director-General's power to decide an application for expungement: see [6.95] above.

150 See Rec 5-12 above, which requires a relevant record keeper, as soon as reasonably practicable after receiving notice of a decision to revive an expunged conviction or charge, to annotate any entry that was made as a result of the expungement of the conviction or charge in any relevant official records under the record keeper's management or control, by recording with the entry the details of the decision to revive the expunged conviction or charge.

151 This is consistent with the recommendation about giving the applicant notice of a decision on an application for expungement: see [6.116]–[6.118] above and Rec 6-6 below.

152 See further [6.136]–[6.137] above in relation to the process for review of a decision by QCAT. A decision of the tribunal may, in certain circumstances, be appealed to the Court of Appeal: see [6.145], n 147 above. As is the case with a decision to expunge a conviction or charge, a decision to revive an expunged conviction or charge under the proposed expungement legislation will also be reviewable under the *Judicial Review Act 1991* (Qld): see [6.135], n 137 above.

OVERVIEW OF PROPOSED PROCESS



RECOMMENDATIONS

Making an application for expungement

6-1 The proposed expungement legislation should:

- (a) require an application for expungement to be made to the decision-maker in writing and contain the following information:**
 - (i) the eligible person's full name and address, their date of birth and contact details;**
 - (ii) if the applicant is not the eligible person, the applicant's full name and contact details;**
 - (iii) the eligible person's name and address at the time of the conviction or charge, so far as is known to the applicant;**
 - (iv) the date when and the court where the eligible person was convicted or charged, and the name and statutory provision of the eligible offence, so far as is known to the applicant; and**
 - (v) a copy of the transcripts or sentencing remarks in connection with the conviction or charge that are in the actual possession of the applicant;**
- (b) provide that the decision-maker is not precluded from considering an application that does not contain all the information required to be included in the application, or that is subsequently requested by the decision-maker;**
- (c) provide that a single application may relate to more than one conviction or charge;**
- (d) require the application to include a declaration that the information provided is, to the applicant's knowledge, correct; and**
- (e) provide that an application may be withdrawn, without prejudice, at any time prior to the application being decided.**

Deciding an application for expungement

Gathering additional information

- 6-2 The proposed expungement legislation should authorise the decision-maker to request and receive, orally or in writing, any information that is reasonably required to make a decision on an application for expungement.**

6-3 In particular, and without limiting Recommendation 6-2, the proposed expungement legislation should provide that:

- (a) the decision-maker may, in writing, request that the applicant give the decision-maker additional information or documents;
- (b) the decision-maker may, by written notice, require another person or body (including, for example, the QPS, the Queensland Courts, and the ODPP) to provide the decision-maker with information in their possession, or under their control; and the person or body must comply with the notice as soon as is reasonably practicable.

Notifying the applicant of a proposed refusal

6-4 The proposed expungement legislation should provide that:

- (a) before the decision-maker decides to refuse an application for expungement, the decision-maker must give the applicant:
 - (i) written notice of the proposed refusal; and
 - (ii) a copy of any relevant documents in the decision-maker's possession or under their control, and notification of relevant information or facts not contained in those documents, on which they propose to rely; and
- (b) the applicant may use or disclose confidential information provided pursuant to Recommendation 6-4(a) only for the purposes of an application for expungement, or a subsequent review or appeal.

Delegation

6-5 The proposed expungement legislation should provide that the Director-General's decision-making powers under the proposed expungement legislation may be delegated only to a person employed as a senior executive or a senior officer under the *Public Service Act 2008*.

Giving notice of a decision on an application for expungement

6-6 The proposed expungement legislation should provide that, as soon as is reasonably practicable after an application for expungement is decided, the decision-maker must:

- (a) give written notice of the decision to the applicant; and
- (b) if the application is refused—

- (i) give written reasons for the refusal to the applicant; and
 - (ii) inform the applicant of the right to have the decision reviewed; or
- (c) if a decision is made to expunge a conviction or charge, give written notice of the decision to the relevant record keeper.

Subsequent applications for expungement

6-7 The proposed expungement legislation should provide that, if an application for the expungement of a conviction or charge has been refused, a further application for expungement in relation to the same conviction or charge may be made only if new relevant information has become available that was not available at the time of the refusal.

Review of a decision on an application for expungement

6-8 The proposed expungement legislation should provide that the applicant may apply to QCAT for administrative review of a decision to refuse an application for expungement.

Revival of an expunged conviction or charge

Giving notice of a decision to revive an expunged conviction or charge

6-9 The proposed expungement legislation should provide that, if the decision-maker decides in accordance with Recommendation 5-11 that an expunged conviction or charge is no longer an expunged conviction or charge, the decision-maker must, as soon as is reasonably practicable after making the decision:

- (a) give written notice of the decision and written reasons for the decision to the applicant for expungement;
- (b) inform the applicant of the right to have the decision reviewed; and
- (c) give written notice of the decision to the relevant record keeper.

Review of a decision to revive an expunged conviction or charge

6-10 The proposed expungement legislation should provide that the applicant for expungement may apply to QCAT for administrative review of a decision to revive an expunged conviction or charge (see Recommendation 5-11).

Chapter 7

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INTRODUCTION

7.1 In recommending how Queensland can expunge criminal convictions (and charges) for historical gay sex offences, the terms of reference require the Commission to consider a number of general matters, including the need for supporting legislation, how the proposed expungement scheme should be administered, and the financial implications associated with the scheme.¹

REGULATION-MAKING POWER

7.2 In Chapter 3 of this Report, the Commission recommends that the 'eligible offences' for the proposed expungement legislation should include particular offences prescribed by regulation.²

7.3 For this purpose, the Commission also recommends that the proposed expungement legislation should provide that the Governor in Council may make regulations under the legislation.

¹ See, in particular, terms of reference paras 2 and 5(a), (b), (c), (k).

² See [3.30], [3.57]–[3.59] and Rec 3-1(b) above.

CONSEQUENTIAL AMENDMENTS

7.4 In the Consultation Paper, the Commission sought submissions on whether consequential amendments to other legislation, such as the *Working with Children (Risk Management and Screening) Act 2000*, are required to give effect to the proposed expungement scheme and ensure that expunged convictions are excluded from criminal history checks.³

7.5 A number of Acts authorise or require a person's criminal history (or parts of it) to be disclosed to, and considered by, third parties in various situations.⁴ This includes the following, many of which relate to suitability requirements for particular occupations, roles or licences:

- *Adoption Act 2009*;
- *Criminal Law (Rehabilitation of Offenders) Act 1986*;
- *Education (Queensland College of Teachers) Act 2005*;
- *Health Practitioner Regulation National Law Act 2009*;
- *Jury Act 1995*;
- *Justices of the Peace and Commissioners for Declarations Act 1991*;
- *Legal Profession Act 2007*;
- *Police Service Administration Act 1990*;
- *Prostitution Act 1999*;
- *Public Guardian Act 2014*;
- *Public Service Act 2008*;
- *Security Providers Act 1993*;
- *Tourism Services Act 2003*; and
- *Working with Children (Risk Management and Screening) Act 2000*.

7.6 The extent to which information about a person's criminal history is disclosable under those Acts varies and depends on the terms of the relevant provisions. For example, under the *Working with Children (Risk Management and Screening) Act 2000*, disclosure extends to unrecorded convictions, spent convictions, and charges,⁵ but under the *Public Service Act 2008*, it is limited to recorded convictions that are not spent.⁶

³ QLRC Consultation Paper No 74 (2016), Q-9.

⁴ See also [2.29]–[2.30], [5.22] above.

⁵ *Working with Children (Risk Management and Screening) Act 2000* (Qld) ss 3, 157, 311, sch 7 (definitions of 'police information', 'criminal history', 'conviction' and 'charge'). In particular, s 157 provides that the relevant chapter of that Act (ch 8) applies 'despite anything in the *Criminal Law (Rehabilitation of Offenders) Act 1986*'. Disclosure under that Act may also include investigative information: see s 305.

See also, for example, the *Health Practitioner Regulation National Law Act 2009* (Qld) s 8, sch ss 5 (definitions of 'criminal history' and 'criminal history law'), 77(4), 79(3), 135(3) which provide for the disclosure, despite a law that provides that 'spent or other convictions do not form part of a person's criminal history and prevents or does not require the disclosure of those convictions', of all convictions, pleas of guilty, findings of guilt by a court, and charges.

⁶ *Public Service Act 2008* (Qld) ss 4, 151(4), 154, sch 4 (definition of 'criminal history'); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3 (definition of 'criminal history').

There is also provision for personal information held by Government agencies, including information about a

7.7 There are also a number of Acts that provide for the disclosure of different types of information in particular circumstances ‘despite’ any other Act or law that would otherwise prohibit or restrict the giving of the information.⁷

Other jurisdictions

7.8 The expungement legislation in most other jurisdictions includes broad provisions to the general effect that references in other Acts to a conviction, however expressed, do not include references to an expunged conviction.⁸ In some jurisdictions, express provision is also made for the effects of expungement to apply despite the disclosure obligations imposed under any other Acts,⁹ or despite the provisions of specific Acts.¹⁰

7.9 In addition, in the Australian Capital Territory, consequential amendments were made to several Acts, including the *Working with Vulnerable People (Background Checking) Act 2011* (ACT), to ensure that references in those Acts to a conviction do not include references to an expunged conviction.¹¹

person’s criminal history, to be disclosed to or accessed by a third party in limited circumstances under the *Information Privacy Act 2009* (Qld), the *Right to Information Act 2009* (Qld) and, in relation to archived public records, the *Public Records Act 2002* (Qld). Under the *Information Privacy Act 2009* (Qld), an individual’s personal information is not to be disclosed to a third party except in limited circumstances: see [5.96] above. Access to documents of an agency may also be refused under the *Right to Information Act 2009* (Qld) if, having regard to a number of factors (including whether disclosure is of personal information of a person, whether living or dead, would prejudice an individual’s right to privacy, or is prohibited by another Act), the disclosure would not be in the public interest: see *Right to Information Act 2009* (Qld) ss 47–49 sch 4. Under the *Public Records Act 2002* (Qld), public records are open to access once the relevant restricted access period has ended which, for many of the records relating to criminal matters, is 100 years: see [5.91]–[5.95] above. It is not intended to change the access regimes of those Acts.

⁷ See, eg, *Public Guardian Act 2014* (Qld) ss 22–24 in relation to the disclosure of ‘information necessary to investigate a complaint or allegation, or to carry out an audit, in connection with an adult’; *Mental Health Act 2000* (Qld) s 169K in relation to the disclosure of personal, medical and other information, to facilitate the transfer of a patient from an authorised mental health service to the forensic disability service and the care of the patient in the forensic disability service; and *Police Service Administration Act 1990* (Qld) pt 10 div 1 sub-div 1A in relation to the disclosure of criminal histories of current or former participants of criminal organisations.

Cf *Child Protection Act 1999* (Qld) ch 5A, s 159C(4) in relation to relevant information about a child in need of protection, the child’s family or someone else; and *Family Responsibilities Commission Act 2008* (Qld) pt 8, s 91(4) in relation to relevant information about a relevant person, student, child or family. Information relating to a spent conviction under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) is expressly exempted from those disclosure provisions.

⁸ See *Spent Convictions Act 2000* (ACT) s 19H(1)(c)(i); *Criminal Records Act 1991* (NSW) s 19F(1)(c)(i); *Spent Convictions Act 2009* (SA) s 10(c)(i); *Sentencing Act 1991* (Vic) s 105J(c)(i).

⁹ See, in different terms, *Criminal Records Act 1991* (NSW) ss 19F(2)(b), 19G(5); *Protection of Freedoms Act 2012* (UK) c 9, s 96(6).

¹⁰ See *Spent Convictions Act 2000* (ACT) ss 19H(2), 19I(3); *Criminal Records Act 1991* (NSW) ss 19F(2)(a), 19G(2)(a). Those provisions overcome the effect of ss 77(4), 79(3), 135(3) of, respectively, the *Health Practitioner Regulation National Law (ACT)* and the *Health Practitioner Regulation National Law (NSW)*, which provide that, for the purpose of the disclosure of a person’s criminal history under those Acts, the spent convictions legislation does not apply. Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 13(3) takes a similar approach. See also *Spent Convictions Act 2009* (SA) s 13(5) which provides that the exclusions for other spent convictions do not apply, and to similar general effect *Protection of Freedoms Act 2012* (UK) c 9, s 134.

¹¹ *Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Act 2015* (ACT) sch 1. That Act amended the *Working with Vulnerable People (Background Checking) Act 2011* (ACT) s 24, note, by replacing the words a ‘conviction does not include a spent conviction ...’ with the words a ‘conviction does not include a spent conviction or an extinguished conviction ...’: sch 1 pt 1.9. The other consequential amendments made by the Act were of similar nature.

Submissions

7.10 A group of academics from the TC Beirne School of Law commented that the ‘fundamental element’ of an expungement scheme is ‘the removal of the conviction from a person’s criminal history’ and that, accordingly, ‘an expunged conviction must not form part of any criminal history check, with no exceptions similar to those applied to the spent conviction scheme’. To this end, they suggested that ‘an audit of current Queensland law’ be undertaken to determine the need for consequential amendments to give effect to the expungement scheme.

7.11 The LGBTI Legal Service Inc and others¹² similarly submitted that it should be made clear that the non-disclosure provisions applying to an expunged conviction ‘take effect despite any other law that provides that information relating to spent convictions may be disclosed’. In their view, consequential amendments to other legislation may be needed, ‘depending on how the expungement scheme is effected’.¹³

7.12 It was suggested by an academic from Monash University that, if a conviction is expunged and not treated as a spent or pardoned conviction, ‘there will be no requirement to disclose under the *Working with Children (Risk Management and Screening) Act 2000*’.

7.13 Conversely, a member of the public expressed support for amendments to the *Working with Children (Risk Management and Screening) Act 2000*, and ‘any other scheme that considers historic offences for registration or eligibility’, to ensure that expunged convictions are not able to be disclosed or considered.¹⁴

The Commission’s view

7.14 The Commission intends that the general effect of the proposed expungement legislation is that, once a conviction or charge is expunged, the person is treated for all purposes in law as if the person had not committed the offence or been charged with, prosecuted for, convicted of, or sentenced for the offence (as the case may be).¹⁵

7.15 In Chapter 5 of this Report, the Commission accordingly recommends that the proposed expungement legislation should provide, among other things, that:¹⁶

¹² The LGBTI Legal Service Inc made a joint submission with Caxton Legal Centre Inc, Human Rights Law Centre, Queensland Aids Council, Queensland Association of Independent Legal Services Inc (now Community Legal Centres Queensland), and Townsville Community Legal Service Inc.

¹³ See also *LGBTI Legal Service Discussion Paper* (2015) 4, 23–4, Rec 2.4(c) to similar effect. In their submissions, the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support for the proposals made in that paper.

¹⁴ Submission 3.

¹⁵ See Rec 5-1 above.

¹⁶ See Recs 5-3(e), 5-4, and 5-6(a) above.

- in applying an Act¹⁷ to a person, a reference to a conviction or charge or to the person's criminal history is taken not to refer to an expunged conviction or charge or to the person's criminal history to the extent it relates to an expunged conviction or charge, and a reference to the person's character does not allow or require anyone to take the expunged conviction or charge into account;
- any other Act (including the *Criminal Law (Rehabilitation of Offenders) Act 1986*) which authorises or requires the disclosure of a person's criminal history, convictions or charges, does not apply to an expunged conviction or charge; and
- a person who has access to records kept by or on behalf of a public authority containing information about an expunged conviction or charge must not disclose the information to any person.¹⁸

7.16 Those provisions are generally sufficient — without the need for separate consequential amendments — to ensure that an expunged conviction or charge is not included within any criminal history checks or disclosures authorised or required to be carried out in relation to a person under any Queensland Act, including the *Working with Children (Risk Management and Screening) Act 2000*.¹⁹ The Commission prefers the simplicity of this approach.

7.17 There is a need, however, in addition to those general provisions, to make consequential amendments to some particular provisions of other Acts in order to ensure that the intended purpose of the proposed scheme is achieved.²⁰

AMENDMENT TO THE *ANTI-DISCRIMINATION ACT 1991*

7.18 In the Consultation Paper, the Commission sought submissions on whether expungement should be supported by amendments to the *Anti-Discrimination Act 1991* to prohibit discrimination on the basis that the person has an expunged conviction (or charge).²¹

7.19 The *Anti-Discrimination Act 1991* specifies a number of grounds of prohibited discrimination, including 'sexuality' (meaning 'heterosexuality, homosexuality or bisexuality'), 'gender identity', and 'relationship status'.²² It does

17 Or an agreement or arrangement: Rec 5-3(e).

18 If the person knew, or ought reasonably to have known, that the information was about an expunged conviction or charge, and subject to exceptions, including if the person concerned consents: Rec 5-6(a)(iii), (b).

19 The interpretation of a provision that will best achieve the purpose of the Act is to be preferred to any other interpretation: *Acts Interpretation Act 1954* (Qld) s 14A(1).

20 For example, both the *Child Protection Act 1999* (Qld) and the *Family Responsibilities Commission Act 2008* (Qld) include information disclosure provisions that apply 'despite any other law', with the express exception of information about spent convictions. Consistently with this drafting approach, and the intended effect of expungement, it would be appropriate for those Acts to be amended to also expressly exempt information about an expunged conviction or charge: see n 7 above.

21 *QLRC Consultation Paper No 74* (2016), Q-9.

22 *Anti-Discrimination Act 1991* (Qld) s 7(b), (m), (n), discussed at [2.8] above.

not currently prohibit discrimination on the basis of a person's criminal history or convictions.

Other jurisdictions

7.20 Like Queensland, the anti-discrimination legislation in other Australian jurisdictions prohibits discrimination on the basis of sexuality or sexual orientation, including homosexuality.²³ In addition, discrimination is also prohibited on the basis of:

- a spent conviction — in the Australian Capital Territory;²⁴
- an irrelevant criminal record — in the Northern Territory and Tasmania;²⁵ or
- an expunged conviction for an historical gay sex offence — in the Australian Capital Territory and Victoria.²⁶

Submissions

7.21 All of the respondents who addressed this issue — including the Castan Centre for Human Rights Law, Australian Lawyers for Human Rights, and the LGBTI Legal Service Inc and others — expressed support for an amendment to the *Anti-Discrimination Act 1991* to add an 'expunged conviction' to the list of prohibited grounds of discrimination.²⁷

7.22 The Castan Centre for Human Rights Law submitted that such an amendment is needed 'to bring the Queensland Act into line with its equivalents in the Australian Capital Territory, the Northern Territory and Tasmania'. It suggested that the current position under which discrimination is, in effect, permitted 'in relation to gay sex convictions' is 'contrary to Australia's international obligations'.²⁸

²³ See *Discrimination Act 1991* (ACT) ss 2, 7(1)(b), sch (definition of 'sexuality'); *Anti-Discrimination Act* (NT) ss 4(1) (definition of 'sexuality'), 19(1)(c); *Equal Opportunity Act 1984* (SA) s 5(1) (definition of 'sexuality'), pt 3; *Anti-Discrimination Act 1998* (Tas) ss 3 (definition of 'sexual orientation'), 16(c); *Equal Opportunity Act 2010* (Vic) ss 4(1) (definition of 'sexual orientation'), 6(p); *Equal Opportunity Act 1984* (WA) ss 4(1) (definition of 'sexual orientation'), 35O; *Sex Discrimination Act 1984* (Cth) ss 4(1) (definition of 'sexual orientation'), 5A. See also *Anti-Discrimination Act 1977* (NSW) pt 4C which applies specifically to discrimination on the grounds of 'homosexuality'. 'Relationship' or 'marital' status is also a prohibited ground of discrimination in some jurisdictions: see, eg, *Discrimination Act 1991* (ACT) s 7(1)(d).

²⁴ *Discrimination Act 1991* (ACT) s 7(1)(o).

²⁵ *Anti-Discrimination Act* (NT) ss 4(1) (definition of 'irrelevant criminal record'), 19(1)(q); *Anti-Discrimination Act 1998* (Tas) ss 3 (definition of 'irrelevant criminal record'), 16(q). Those provisions apply, for example, to a record relating to an arrest or charge where no further action was taken, the charge was dismissed, the person was found not guilty, or the finding of guilt was quashed or set aside.

²⁶ *Discrimination Act 1991* (ACT) s 7(1)(o); *Equal Opportunity Act 2010* (Vic) s 6(pa), referring to convictions 'extinguished' or 'expunged' under the expungement legislation in those jurisdictions and inserted by, respectively, *Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Act 2015* (ACT) sch 1 pt 1.3; *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic) ss 6, 7.

²⁷ Submissions 2, 3, 9, 10, 11, 15.

²⁸ This respondent observed that the 'unlawfulness of discrimination on the basis of sexual orientation', and adult consensual sexual activity in private, is 'well-established in international law': see further Chapter 2 above.

7.23 The LGBTI Legal Service Inc and others expressed the view that an amendment to the *Anti-Discrimination Act 1991* 'would be entirely consistent with the principles and purposes of the expungement scheme'.²⁹

7.24 An academic from Monash University suggested that such an amendment would be appropriate as 'best practice', and a group of academics from the TC Beirne School of Law submitted that an amendment may be necessary 'to prohibit discrimination, ridicule or dismissal ... where an employer or co-workers have become aware of an expunged conviction'.

The Commission's view

7.25 It is difficult to envisage a situation in which discrimination on the basis of an expunged conviction or charge would not also amount to discrimination on the basis of one of the existing grounds under the *Anti-Discrimination Act 1991*, such as sexuality, gender identity, or relationship status. Accordingly, an amendment to section 7 of that Act is not necessary.

SUPPORT AND ASSISTANCE

7.26 In the Consultation Paper, the Commission sought submissions on whether, in administering the proposed expungement scheme, legal assistance and support for affected people should be provided.³⁰

Other jurisdictions

7.27 The introduction of expungement schemes in other jurisdictions has generally been accompanied by some form of community information and support.³¹

7.28 In Victoria, free and confidential legal assistance is available for applicants from the Human Rights Law Centre's recently established Expungement Legal Service.³²

7.29 The Human Rights Law Centre has also suggested other steps to publicise the scheme and support affected individuals, including:³³

- developing a community education campaign in partnership with the LGBTI community and, to reach individuals who do not identify as homosexual, other

²⁹ See also *LGBTI Legal Service Discussion Paper* (2015) 4, 24, Rec 2.4(c) in which it was suggested that consideration be given to 'additional broader steps' to give 'full effect' to an expungement scheme, including amendment to the *Anti-Discrimination Act 1991* (Qld). In their submissions, the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support for the proposals in that paper.

³⁰ *QLRC Consultation Paper No 74* (2016), Q-9.

³¹ Including, for example, fact sheets about the scheme: see, eg, Department of Justice and Regulation Victoria, *Information about the application process—Applicant or their delegate* (2015) <<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/criminal+law/expungement+scheme>>; Department of Justice New South Wales, *Extinguishment of historical homosexual offences fact sheet* (2015) <<http://www.justice.nsw.gov.au/Pages/legal-info-services/Historical-homosexual-offences.aspx>>.

³² See Human Rights Law Centre, 'New Expungement Legal Service—free legal help for people found guilty of historic homosexual offences' (News, 8 June 2016) <<http://hrlc.org.au/new-expungement-legal-service-free-legal-help-for-people-found-guilty-of-historic-homosexual-offences/>>.

³³ *Human Rights Law Centre Background Paper* (2014) 55–6, Rec 17.

organisations such as aged care providers, employer and employee associations, and police; and

- adding information about the scheme on the forms and websites for criminal history checks and working with children checks (and, if such a check discloses a conviction that might be eligible for expungement, in the results of the check given to the person).

7.30 They also suggested that funding be provided for independent professional support and counselling services for affected individuals.³⁴

7.31 In Tasmania, the Anti-Discrimination Commissioner has recommended that, in introducing an expungement scheme, resources be made available to develop information materials and provide legal assistance to applicants.³⁵

Submissions

7.32 All of the respondents who addressed this issue agreed that legal assistance and/or other support should be provided to applicants as part of the proposed expungement scheme.³⁶

7.33 A member of the public submitted that there are ‘two distinct needs’: an education campaign, ‘funded by the Government and delivered in partnership with Queensland LGBTI community organisations’; and access to legal advice and assistance and, where relevant, counselling services.³⁷

7.34 The LGBTI Legal Service Inc and others similarly suggested that information, legal assistance, and counselling should be made available:³⁸

It is critical to the effective implementation of the scheme that funding be provided to existing community organisations to disseminate information and to provide assistance and support to applicants and potential applicants. Ensuring that counselling and support is available for applications is vital, both for those that identify as part of the LGBTI community and those applicants that do not. We do not propose that a new organisation is established.

7.35 Australian Lawyers for Human Rights submitted that ‘legal aid and other assistance including counselling should be made available’ to potential applicants.

³⁴ Ibid 58–9, Rec 20.

³⁵ *ADC Tasmania Report* (2015) 29–30, Recs 32 and 33. The Anti-Discrimination Commissioner suggested that arrangements for legal assistance include ‘an application costs reimbursement mechanism’, and that assistance be available from community legal centres in Tasmania and, for applicants who live outside Tasmania, interstate organisations such as the Human Rights Law Centre.

³⁶ Submissions 3, 9, 10, 11, 15.

³⁷ Submission 3.

³⁸ See also *LGBTI Legal Service Discussion Paper* (2015) 4, 18, Rec 2.4(a) to similar effect. In their submissions, the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support for the proposals made in that paper.

7.36 An academic from Monash University explained that:

it may be very distressing for an individual to engage in the process of expunging a conviction. In addition it may be a daunting task for some people and they may wish to be assisted in the process. It is only right that this is the case.

7.37 That respondent also considered that, depending on how burdensome the application process is, legal assistance should also be made available.

7.38 A group of academics from the TC Beirne School of Law similarly referred to the potential distress involved for applicants and submitted that staff administering the scheme should be 'adequately trained to provide assistance' and to 'direct applicants to find [further] support' from other organisations.

The Commission's view

7.39 The Commission agrees with the submissions that steps should be taken, in collaboration with LGBTI and other organisations, to raise awareness and provide information about the proposed expungement scheme,³⁹ and to ensure affected individuals have access to legal assistance and information about other support including, where relevant, the availability of counselling services. Such measures are appropriate to support the introduction and administration of the scheme.

OTHER MATTERS

7.40 Some of the respondents to this review also raised the following matters related to, but not included in, the terms of reference. The Commission acknowledges these matters, but does not make any recommendations about them.

Apology

7.41 A number of respondents to the Consultation Paper suggested that the introduction of an expungement scheme should be accompanied by a formal apology to those affected by the former criminal laws against consensual homosexual activity and to the wider LGBTI community.⁴⁰ Australian Lawyers for Human Rights explained, for example, that:

such an apology would both contribute to the healing process for past injustices and make it clear to the community that the Queensland of today is a far more inclusive and safe place for LGBTI community members.

³⁹ See, for example, the suggestions made in this respect by the Human Rights Law Centre at [7.29] above.

⁴⁰ Submissions 1, 3, 9, 10, 15. See also *LGBTI Legal Service Discussion Paper* (2015) 4, 18, Rec 2.4(b); *Human Rights Law Centre Background Paper* (2014) 56–8, Rec 19. In their submissions, the Castan Centre for Human Rights Law and Australian Lawyers for Human Rights expressed general support for the proposals made in the *LGBTI Legal Service Discussion Paper* (2015).

A group of academics from the TC Beirne School of Law submitted that an apology might be considered as an alternative to the expungement of convictions of persons who are now deceased. As to this, see also *ADC Tasmania Report* (2015) 12, 14, Rec 8.

7.42 In Victoria, the introduction of the expungement legislation was followed by an apology in State Parliament to those affected by historical gay sex offence laws.⁴¹ A formal apology has also been foreshadowed in Tasmania.⁴²

Age of consent

7.43 Several respondents to the Consultation Paper referred to the different age of consent for sodomy, and suggested it should be changed to make it consistent with the general age of consent for lawful sexual intercourse of 16 years.⁴³ The Anti-Discrimination Commission Queensland commented, for example, that:

Although not specified in the terms of reference, the age of consent for anal intercourse should be part of the discussion around criminality for homosexual activity. Under the Criminal Code, the age of consent for anal intercourse is 18 years, whereas the age of consent for non-anal intercourse is 16 years. The differentiation results in discrimination of young male homosexuals. The Anti-Discrimination Commission urges the removal of this discrimination by making one age of consent for any type of intercourse.

7.44 In particular, some respondents observed that such a change should be made prior to, or concurrently with, the introduction of an expungement scheme, to allow those who would otherwise be ineligible on the basis of age to apply for expungement of their convictions.⁴⁴

7.45 On 16 June 2016, the Health and Other Legislation Amendment Bill 2016 was introduced into Parliament. Among other things, the Bill proposes amendments to the Criminal Code to ‘standardise the age of consent for all lawful sexual intercourse to 16 years’, by:⁴⁵

- omitting the current offence of unlawful sodomy in section 208; and
- amending the offences of unlawful carnal knowledge in sections 215 and 216 to extend the definition of ‘carnal knowledge’ to include anal intercourse.

7.46 The proposed amendments implement the recommendations of a panel of health experts and other organisations established to provide advice to the Minister

⁴¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 24 May 2016, 20–23 (D Andrews, Premier); 23–5 (M Guy, Leader of the Opposition). The New South Wales Parliament also made an apology for the discrimination suffered by participants of the first Sydney Gay and Lesbian Mardi Gras in 1978 protesting the State’s gay sex offence laws: New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 February 2016, 2–3, 19–20 (B Notley-Smith).

⁴² Vanessa Goodwin, Attorney-General (Tas), ‘Expunging historic homosexual convictions’ (Media Release, 17 December 2015).

⁴³ Submissions 3, 7, 8, 11, 12. The current age of consent for lawful sexual intercourse is 16 years, but 18 years for offences in relation to sodomy: see Chapter 4 above.

⁴⁴ Submissions 3, 8, 12.

⁴⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 16 June 2016, 2420 (CR Dick, Minister for Health and Minister for Ambulance Services). See Health and Other Legislation Amendment Bill 2016 (Qld) cls 3–4, 6–7. The Bill also makes consequential amendments to other sections of the Criminal Code (Qld) to reflect the change to the age of consent (and the change in terminology from ‘sodomy’ to ‘anal intercourse’): cls 5, 8–12.

for Health. It is also intended to support the draft *Queensland Sexual Health Strategy 2016–2021*.⁴⁶

7.47 The Bill has been referred to the Parliamentary Legal Affairs and Community Safety Committee, which is required to report by 6 September 2016.⁴⁷

7.48 In Chapter 4 of this Report, the Commission recommends that the criteria for expungement should be that the other person consented to the activity and was of or above the relevant age of consent, and that the criteria be applied having regard to the law as at the commencement of the expungement legislation.⁴⁸ The effect of this would be that, if the age of consent for sodomy is changed from 18 years to 16 years prior to or concurrently with the commencement of the proposed expungement legislation, applications for expungement of convictions or charges in relation to sodomy would be determined by reference to the age of consent of 16 years.⁴⁹

RECOMMENDATIONS

Regulation-making power

7-1 The proposed expungement legislation should provide that, for the purpose of Recommendation 3-1(b), the Governor in Council may make regulations under the legislation.

Consequential amendments

7-2 To give full effect to the intended purpose of the proposed expungement scheme, consequential amendments to particular information disclosure provisions of some other Acts should be made, including the following:

- (a) *Child Protection Act 1999*, chapter 5A section 159C(4); and**
- (b) *Family Responsibilities Commission Act 2008*, part 8 section 91(4).**

⁴⁶ See Explanatory Notes, Health and Other Legislation Amendment Bill 2016 (Qld) 2. The expert panel was established following the Government's 2015 election commitment to consider making the age of consent uniform: see Queensland, *Parliamentary Debates*, Legislative Assembly, 20 August 2015, 35 (YM D'Ath, Attorney-General and Minister for Justice and Minister for Training and Skills). The Queensland Health, *Queensland Sexual Health Strategy 2016–2021*, Consultation Draft (2016) is available at <<https://publications.qld.gov.au/dataset/health-strategies/resource/e45a2284-d20d-431d-84bd-9d9111cb77a4>>.

⁴⁷ See generally Queensland Parliament, *Health and Other Legislation Amendment Bill 2016: Inquiry Overview* <<http://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/21-HealthOLAB16>>.

⁴⁸ See Rec 4-1 above.

⁴⁹ However, if the same change to the age of consent were made *after* the commencement of the proposed expungement legislation, such applications would be assessed by reference to the age of consent of 18 years applying at the commencement of the legislation.

Support and assistance

- 7-3 Steps should be taken, in collaboration with LGBTI and other organisations, to raise awareness and provide information about the proposed expungement scheme, and to ensure affected individuals have access to legal assistance and information about other support.**

Appendix A: Terms of Reference

Expunging historical gay sex convictions

Background

On 7 December 1990, the *Criminal Code and Another Act Amendment Act 1990* (the Act) received assent. The Act amended the Criminal Code to:

- repeal the offence of 'Unnatural offences' which prohibited every act of anal intercourse and inserted the offence of 'Unlawful anal intercourse' applicable only to persons under 18 years of age;
- repeal the offence of 'Attempt to commit unnatural offences' and inserted 'Attempt to commit unlawful anal intercourse';
- repeal the offence of 'Indecent practices between males' which prohibited indecency between males in public or private and inserted an offence of 'Carnal knowledge of animal'; and
- make consequential amendments to reflect the amendment that 'carnal knowledge' included 'carnal knowledge by anal intercourse'.

In this respect, Queensland joined a national consensus that had developed throughout all Australian jurisdictions in the 1970s and 1980s recognising that private sexual activity between consenting adults was not an appropriate concern of the criminal justice system.

In recent years a number of Australian jurisdictions have considered whether historical gay sex convictions involving consenting adults should be expunged from a person's criminal record.

Terms of Reference

1. I, YVETTE MAREE D'ATH, Attorney-General and Minister for Justice and Minister for Training and Skills, refer to the Queensland Law Reform Commission (QLRC), for review and investigation the issue of expunging of criminal convictions for historical gay sex offences pursuant to section 10 of the *Law Reform Commission Act 1968*.

Scope

2. The QLRC is requested to recommend how Queensland can expunge criminal convictions for 'historical gay sex offences' from a person's criminal history.
3. In considering this issue, the QLRC should review and consider whether expungement should extend to charges that did not result in conviction.
4. The QLRC should also consider, but is not limited to, the following matters (and with the necessary changes in the event that the QLRC recommends extending expungement to include charges):
 - (a) which criminal offences can be identified as 'historical gay sex offences' since the formation of the State of Queensland in 1901 (identified offences);
 - (b) how a 'conviction' is defined;
 - (c) the likely numbers of persons convicted of identified offences;

- (d) whether the identified offences applied to both consensual and non-consensual sexual activities;
 - (e) whether the identified offences applied to activities that only involved adults;
 - (f) whether there are factual elements in the reported convictions of the identified offences that are still considered to amount to criminal behaviour under the current law (the QLRC's attention is particularly drawn in this respect to the offences contained in section 227 of the Criminal Code and section 9 of the *Summary Offences Act 2005*);¹ (note added)
 - (g) whether there are other records and/or information associated with the criminal conviction for identified offences, who holds such records/information and whether they can be disclosed;
 - (h) the relevant legislation in other jurisdictions; and
 - (i) whether there is a need to change the law or whether there are any other means of addressing the issue under existing laws.
5. If a new expungement scheme is recommended, the QLRC should consider, but is not limited to, the following issues:
- (a) how the scheme should be administered;
 - (b) the financial implications associated with the scheme;
 - (c) whether the scheme must or should be given a legislative basis;
 - (d) what would be the most appropriate existing entity for administering the scheme or whether a new entity should be established for this purpose;
 - (e) what should be the process for expunging historical gay sex criminal convictions;
 - (f) which historical gay sex criminal offences are appropriate to be the subject of applications for expunging a criminal conviction;
 - (g) whether the scheme should be confined to living applicants;
 - (h) how the scheme will ensure that only convictions relating to consensual sexual activity are expunged;
 - (i) how will the scheme ensure that only convictions for acts that would not amount to criminal behaviour under the current laws of Queensland are expunged;
 - (j) whether there are sufficient historical records available for a determining authority to properly assess an application for the expunging of a historical conviction;
 - (k) whether the scheme should be supported by legislation, for example, because of the need to overcome privacy issues in order to allow a determining entity to ask for and receive required information and documentation to verify an application;
 - (l) whether there should be a right of appeal or review regarding decisions under the scheme and, if so, to whom such appeal should be made;

¹ Criminal Code (Qld) s 227 creates offences for wilful indecent acts, including in a place to which the public has access; and *Summary Offences Act 2005* (Qld) s 9 creates offences for wilful exposure in or near a public place.

- (m) whether there should be a provision for reinstating an expunged conviction if it was later determined that the expunging of the conviction occurred as a result of fraud; and
- (n) whether an offence should be created to criminalise the unlawful disclosure of, or the improper obtaining of, expunged conviction and other relevant information.

Consultation

6. The review is to include consultation with:
 - (a) legal stakeholders (including, but not limited to, the Queensland Law Society, Bar Association of Queensland, Queensland Council for Civil Liberties and Queensland Association of Independent Legal Services);
 - (b) the Lesbian, Gay, Bisexual, Transgender and Intersex community and groups;
 - (c) human rights groups and organisations;
 - (d) relevant government departments and agencies;
 - (e) the public generally; and
 - (f) any other body that the QLRC considers relevant having regard to the issues relating to the referral.

Timeframe

The QLRC is to provide a report on the outcomes of the review to the Attorney-General and Minister for Justice and Minister for Training and Skills by **31 August 2016**.

Appendix B: Extracts of Offences

Historical offences¹

208 Unnatural offences

Any person who—

- (1) Has carnal knowledge² of any person against the order of nature; or
- (2) Has carnal knowledge of an animal; or
- (3) Permits a male person to have carnal knowledge of him or her against the order of nature;

is guilty of a crime, and is liable to imprisonment for [seven] years.

[In the case of an offence defined in paragraph (1) or (3) committed in respect of a child under the age of sixteen years, the offender is liable to imprisonment—

- (a) for fourteen years or, if the child is under the age of twelve years, for life; or
- (b) for life if the child is, to the knowledge of the offender, his lineal descendant or if the offender is the guardian of the child or, for the time being, has the child under his care.]³

209 Attempt to commit unnatural offences

Any person who attempts to commit any of the crimes defined in the last preceding section is guilty of a crime, and is liable to imprisonment for [three] years.

[In the case of an attempt to commit a crime defined in paragraph (1) or (3) of section 208, if the offence is committed in respect of a child under the age of sixteen years, the offender is liable to imprisonment—

- (a) for seven years or, if the child is under the age of twelve years, for fourteen years; or
- (b) for fourteen years if the child is, to the knowledge of the offender, his lineal descendant or if the offender is the guardian of the child or, for the time being, has the child under his care.

¹ As in force prior to the date of legalisation.

Until amendments by the *Corrective Services (Consequential Amendments) Act 1988* (Qld) s 5 sch 2, each of ss 208, 209, 211, 336 and 337 of the Criminal Code (Qld) had provided for imprisonment 'with hard labour'. At the date of legalisation, ss 208 and 209 were repealed (and replaced with provisions limited to anal intercourse of a person not an adult, permitting a male person not an adult to have anal intercourse, or attempts to commit either of those offences), and s 211 was repealed (and replaced with a provision dealing with carnal knowledge of an animal) by the *Criminal Code and Another Act Amendment Act 1990* (Qld) ss 5–7.

² 'Carnal knowledge' was generally defined in s 6 to be complete upon penetration. The definition was amended to its current wording by the *Criminal Law Amendment Act 1997* (Qld) and the *Justice and Other Legislation Amendment Act 2004* (Qld): see n 10 below.

³ The term of imprisonment was changed from 14 years (as it was in the Criminal Code (Qld) as passed) to seven years, and the second paragraph inserted, by the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 10.

The offender cannot be arrested without warrant except in a case referred to in the preceding paragraph.]⁴

211 Indecent practices between males

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a misdemeanour, and is liable to imprisonment for three years.

[The offender may be arrested without warrant.]⁵

336 Assault with intent to commit unnatural offence⁶

Any person who assaults another with intent to have carnal knowledge of him or her against the order of nature is guilty of a crime, and is liable to imprisonment for fourteen years.

337 Indecent assaults⁷

Any person who—

- (1) unlawfully and indecently assaults another;
- (2) procures another person, without the consent of that other person or with consent if it is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act of gross indecency or by personating the spouse of that other person—
 - (a) to commit an act of gross indecency; or
 - (b) to witness an act of gross indecency by the offender or any other person,

is guilty of a crime, and is liable to imprisonment for seven years.

⁴ The term of imprisonment was changed from seven years (as it was in the *Criminal Code (Qld)* as passed) to three years, and the second paragraph substituted, by the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989 (Qld)* s 11.

⁵ These words were added by the *Criminal Code Amendment Act 1943 (Qld)* s 3.

⁶ Section 336 was not repealed at the date of legalisation. However, the heading was changed to 'assault with intent to have unlawful anal intercourse' and the words 'against the order of nature' were changed to 'by anal intercourse' by the *Criminal Code and Another Act Amendment Act 1990 (Qld)* ss 11, 12. The section was later amended by the *Criminal Law Amendment Act 1997 (Qld)* s 57 to apply to 'assault with intent to commit rape', and was relocated and renumbered by the *Criminal Law Amendment Act 2000 (Qld)* s 20 as current s 351.

⁷ This provision had been substituted, by the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989 (Qld)* s 28, for the earlier provision in the following terms:

337 Indecent assault on males

Any person who unlawfully and indecently assaults any male person is guilty of a misdemeanour, and is liable to imprisonment with hard labour for [seven] years.

The term of imprisonment had been changed from three years (as it was in the *Criminal Code (Qld)* as passed) to seven years by the *Criminal Code and the Justices Act Amendment Act 1975 (Qld)* s 41 sch.

Section 337 was not repealed at the date of legalisation. However, the words 'against the order of nature' were changed to 'by anal intercourse' by the *Criminal Code and Another Act Amendment Act 1990 (Qld)* s 13. The section was later amended by the *Criminal Law Amendment Act 1997 (Qld)* s 58 to change the heading to 'sexual assault', change the term of imprisonment from seven years to 10 years, and to change the circumstances of aggravation. It was repealed by the *Criminal Law Amendment Act 2000 (Qld)*, which at the same time inserted current s 352 (sexual assaults): ss 21, 26.

In the case of an offence defined in paragraph (1) or (2)(a), if the indecent assault or the act of gross indecency consists (wholly or in part)—

- (i) in an act of carnal knowledge against the order of nature, the offender is liable to imprisonment for life;
- (ii) in penetrating the vagina or anus with any object or with any part of the body other than the penis or in bringing into contact any part of the mouth and the anus or any part of the genitalia, the offender is liable to imprisonment for fourteen years.

The term 'spouse' includes a person living with the person procured as his or her spouse though not lawfully married to him or her.

Current offences

Criminal Code⁸

[208 Unlawful sodomy

- (1) A person who does, or attempts to do, any of the following commits a crime—
 - (a) sodomises a person under 18 years;
 - (b) permits a male person under 18 years to sodomise him or her;
 - (c) sodomises a person with an impairment of the mind;
 - (d) permits a person with an impairment of the mind to sodomise him or her.Maximum penalty—14 years imprisonment.
- (2) For an offence other than an attempt, the offender is liable to imprisonment for life if the offence is committed in respect of—
 - (a) a child under 12 years; or
 - (b) a child, or a person with an impairment of the mind, who is to the knowledge of the offender—
 - (i) his or her lineal descendant; or
 - (ii) under his or her guardianship or care.
- (2A) For an offence defined in subsection (1)(a) or (b) other than an attempt, the offender is liable to imprisonment for life if the offence is committed in respect of a child who is a person with an impairment of the mind.
- (3) For an offence defined in subsection (1)(a) or (b) alleged to have been committed in respect of a child who is 12 years or more, it is a defence to prove that the accused person believed, on reasonable grounds, that the person in respect of whom the offence was committed was 18 years or more.

⁸

As in force at 5 May 2016.

- (4) It is a defence to a charge of an offence defined in subsection (1)(c) or (d) to prove—
- (a) that the accused person believed on reasonable grounds that the person was not a person with an impairment of the mind; or
 - (b) that the act that was the offence did not, in the circumstances, constitute sexual exploitation of the person with an impairment of the mind.
- (5) For an offence defined in subsection (1)(a) or (b) alleged to have been committed with the circumstance of aggravation mentioned in subsection (2A), it is a defence to the circumstance of aggravation to prove that the accused person believed on reasonable grounds that the child was not a person with an impairment of the mind.]⁹

215 Carnal knowledge with or of children under 16

- (1) Any person who has or attempts to have unlawful carnal knowledge¹⁰ with or of a child under the age of 16 years is guilty of an indictable offence.
- (2) If the child is of or above the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for 14 years.
- (3) If the child is under the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for life or, in the case of an attempt to have unlawful carnal knowledge, to imprisonment for 14 years.
- (4) If the child is not the lineal descendant of the offender but the offender is the child's guardian or, for the time being, has the child under the offender's care, the offender is guilty of a crime, and is liable to imprisonment for life or, in the case of an attempt to have unlawful carnal knowledge, to imprisonment for 14 years.
- (4A) If the child is a person with an impairment of the mind, the offender is guilty of a crime, and is liable to imprisonment for life.
- (5) If the offence is alleged to have been committed in respect of a child of or above the age of 12 years, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of 16 years.
- (5A) If the offence is alleged to have been committed with the circumstance of aggravation mentioned in subsection (4A), it is a defence to the circumstance of aggravation to prove that the accused person believed on reasonable grounds that the child was not a person with an impairment of the mind.
- [(6) In this section—
- carnal knowledge*** does not include sodomy.]¹¹

⁹ Section 208 is proposed to be omitted by the Health and Other Legislation Amendment Bill 2016 (Qld) cl 4: see further n 11 below.

¹⁰ 'Carnal knowledge' is generally defined in s 6 to be complete on penetration to any extent, and to include sodomy (but see s 215(6)). Sodomy was first included as part of the general definition of 'carnal knowledge' by the *Criminal Law Amendment Act 1997* (Qld) s 6(2) and later by the *Justice and Other Legislation Amendment Act 2004* (Qld) s 3 sch. Section 6 is proposed to be amended by the Health and Other Legislation Amendment Bill 2016 (Qld) cl 3 to replace the word 'sodomy' with 'anal intercourse'.

¹¹ Section 215(6) is proposed to be omitted by the Health and Other Legislation Amendment Bill 2016 (Qld) cl 6. Relevantly, the Bill proposes to omit ss 208 and 215(6) to standardise the age of consent for sexual intercourse to 16 years, with the effect that unlawful anal intercourse would no longer be subject to a separate offence with a different age of consent: see further Chapter 7 of this Report.

227 Indecent acts

- (1) Any person who—
- (a) wilfully and without lawful excuse does any indecent act in any place to which the public are permitted to have access, whether on payment of a charge for admission or not; or
 - (b) wilfully does any indecent act in any place with intent to insult or offend any person;
- is guilty of a misdemeanour, and is liable to imprisonment for 2 years.
- (2) The offender may be arrested without warrant.
- (3) Subsection (1) does not apply to a person who does an indecent act under the authority of an adult entertainment permit.

349 Rape

- (1) Any person who rapes another person is guilty of a crime.¹²
Maximum penalty—life imprisonment.
- (2) A person rapes another person if—
- (a) the person has carnal knowledge with or of the other person without the other person's consent; or
 - (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or
 - (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
- (3) For this section, a child under the age of 12 years is incapable of giving consent.

350 Attempt to commit rape

Any person who attempts to commit the crime of rape is guilty of a crime, and is liable to imprisonment for 14 years.

351 Assault with intent to commit rape

Any person who assaults another with intent to commit rape is guilty of a crime, and is liable to imprisonment for 14 years.

¹² Prior to amendments made by the *Criminal Law Amendment Act 1997* (Qld) s 62(2), rape was limited to situations where a male had carnal knowledge of a female without her consent and did not apply to non-consensual anal intercourse by a male of another male.

352 Sexual assaults

- (1) Any person who—
- (a) unlawfully and indecently assaults another person; or
 - (b) procures another person, without the person's consent—
 - (i) to commit an act of gross indecency; or
 - (ii) to witness an act of gross indecency by the person or any other person;
- is guilty of a crime.
- Maximum penalty—10 years imprisonment.
- (2) However, the offender is liable to a maximum penalty of 14 years imprisonment for an offence defined in subsection (1)(a) or (1)(b)(i) if the indecent assault or act of gross indecency includes bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person.
- (3) Further, the offender is liable to a maximum penalty of life imprisonment if—
- (a) immediately before, during, or immediately after, the offence, the offender is, or pretends to be, armed with a dangerous or offensive weapon, or is in company with any other person; or
 - (b) for an offence defined in subsection (1)(a), the indecent assault includes the person who is assaulted penetrating the offender's vagina, vulva or anus to any extent with a thing or a part of the person's body that is not a penis; or
 - (c) for an offence defined in subsection (1)(b)(i), the act of gross indecency includes the person who is procured by the offender penetrating the vagina, vulva or anus of the person who is procured or another person to any extent with a thing or a part of the body of the person who is procured that is not a penis.

Summary Offences Act 2005¹³**9 Wilful exposure**

- (1) A person in a public place must not wilfully expose his or her genitals, unless the person has a reasonable excuse.¹⁴
- Maximum penalty—
- (a) 2 penalty units; or
 - (b) if the offence involves circumstances of aggravation—40 penalty units or 1 year's imprisonment.

¹³ As in force at 5 September 2014.

¹⁴ 'Public place' is relevantly defined in s 3 sch 2 of that Act to mean 'a place that is open to or used by the public, whether or not on payment of a fee'.

- (2) A person who is so near a public place that the person may be seen from the public place must not wilfully expose his or her genitals so that the person's genitals may be seen from the public place, unless the person has a reasonable excuse.

Maximum penalty—

- (a) 2 penalty units; or
- (b) if the offence involves circumstances of aggravation—40 penalty units or 1 year's imprisonment.
- (3) It is a circumstance of aggravation for this section for a person to wilfully expose his or her genitals so as to offend or embarrass another person.

Appendix C:

Expungement Schemes in Other Jurisdictions

[1] Expungement schemes have been introduced in the Australian Capital Territory, New South Wales, South Australia, Victoria and England and Wales. Draft legislation for an expungement scheme has also been introduced in Tasmania.¹

[2] The scope and effect of expungement schemes differs among jurisdictions. There are, however, some key similarities. In particular, each scheme operates on a case-by-case basis with the general purpose of expunging convictions for conduct that would not now be treated as an offence.²

[3] In other jurisdictions in which expungement legislation has not been introduced, some historical convictions may be 'spent' under spent convictions legislation. For example, in Western Australia, a person may apply for a conviction to be spent if the relevant prescribed period has expired³ and, in the Northern Territory and New Zealand, provision is made for some types of convictions to be spent if the offence has subsequently been repealed.⁴ However, spent convictions can still be disclosed in many circumstances, and are not 'expunged' from a person's criminal history.⁵

¹ An expungement scheme has also been foreshadowed in Germany, with the announcement by the German Justice Minister in May 2016 of the Government's intention to introduce laws to annul historical convictions for homosexual offences under former Criminal Code §175: see, eg, K Connolly, 'Germany to quash historical convictions of gay men', *The Guardian* (online), 12 May 2016. This followed the publication of an expert report commissioned by the Federal Anti-Discrimination Agency in which 'collective' (rather than case-by-case) annulment of the estimated 50 000 convictions imposed under the former law between 1946 and 1969 was recommended: see Prof Dr M Burgi, 'Rehabilitierung der nach § 175 StGB verurteilten homosexuellen Männer: Auftrag, Optionen und verfassungsrechtlicher Rahmen' (Report, May 2016).

² See also the comparative guide in the Executive Summary above.

³ *Spent Convictions Act 1988* (WA) ss 6, 7. In the case of a 'serious conviction' (where the sentence imposed was imprisonment for more than one year or an indeterminate period, or a fine of \$15 000 or more), an application may be made to a District Court judge who may order the conviction is spent at his or her discretion, having regard to particular matters including the length of time since the conviction was incurred, all the circumstances of the applicant, and the nature and seriousness of the offence: ss 6, 9. That Act generally applies to all convictions other than those for which the penalty was or included a sentence of life imprisonment, and those deemed under certain other Acts not to be 'convictions': s 4.

⁴ In the Northern Territory, a conviction is spent immediately the original provision is repealed, except if a provision, enacted before or in substitution for the original provision, substantially of the same effect is in force or the original provision or a record of the offence is prescribed: *Criminal Records (Spent Convictions) Act* (NT) s 8. (No provisions or records are prescribed for that section.) That Act does not, however, apply to convictions for certain types of 'sexual offences', including gross indecency in public, indecent assault, and sexual intercourse or gross indecency without consent: ss 3(1) (definition of 'sexual offence'), 5(a).

In New Zealand, an application may be made for a conviction to be spent, without completing the usual rehabilitation period, if: the person is otherwise eligible for the conviction to be spent; the offence has subsequently been abolished and the act constituting the offence no longer constitutes an offence; and the person is no longer subject to the last custodial or non-custodial sentence imposed for the offence: *Criminal Records (Clean Slate) Act 2004* (NZ) ss 9(1), 10(1). A conviction is not ordinarily eligible to become spent if it is for a 'specified offence', including a former offence of anal intercourse, indecent assault, or an unnatural offence; however, the District Court may order that this be disregarded: ss 4 (definition of 'specified offence'), 7(1)(d), 10(3)–(4).

⁵ *Criminal Records (Spent Convictions) Act* (NT) pt 3 div 2; *Criminal Records (Clean Slate) Act 2004* (NZ) s 19; *Spent Convictions Act 1988* (WA) pt 3 div 2, sch 3.

Australian Capital Territory

[4] The expungement legislation in the Australian Capital Territory is the most recent to take effect.⁶ It applies to convictions for an 'historical homosexual offence', namely:⁷

- an offence under former sections 79, 80 or 81 of the *Crimes Act 1900* (ACT) (buggery, attempt etc to commit buggery, and indecent assault on male); or
- an offence prescribed by regulation to the extent the offence was:⁸
 - constituted by a person engaging in any form of sexual activity with another person of the same sex; or
 - a 'public morality offence' (being an offence the essence of which is the maintenance of public decency or morality, and by which homosexual behaviour could be punished); or
- an offence of attempting, or of conspiracy or incitement, to commit any such offence.

[5] Under the legislation, a person convicted of an historical homosexual offence may apply to the Director-General of the Justice and Community Safety Directorate for the conviction to be 'extinguished'.⁹ Provision is also made for an application to be made on the person's behalf (for example, by the person's domestic partner, parent, child or sibling) if the person has died.¹⁰

[6] The application is to include, to the extent known to the applicant, the date when and the court where the applicant was convicted and may include other supporting information.¹¹ Before making a decision, the Director-General may request further information from the applicant, and may require a public employee, police officer, court, the Director of Public Prosecutions, or other prescribed entity to provide information to enable a decision to be made.¹²

⁶ The amending Bill was presented to Parliament on 17 September 2015, and the resulting expungement legislation commenced on 7 November 2015.

⁷ *Spent Convictions Act 2000* (ACT) s 19A (definitions of 'historical homosexual offence' and 'public morality offence').

⁸ The regulation-making power was included to capture, in appropriate circumstances, public morality offences with which men were sometimes charged, for example, for 'queer behaviour such as cross-dressing', which are not readily identifiable '[d]ue to the passage of time and amendments to the law': Explanatory Notes, *Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Bill 2015* (ACT) 7. No offences have yet been prescribed.

⁹ *Spent Convictions Act 2000* (ACT) s 19B(1). For that Act, a person is 'convicted' of an offence if the person is: convicted of the offence, whether summarily or on indictment; or charged with the offence and the court finds the person guilty of the offence: *Spent Convictions Act 2000* (ACT) s 6.

¹⁰ *Spent Convictions Act 2000* (ACT) s 19B(3).

¹¹ See *Spent Convictions Act 2000* (ACT) s 19B(2)(b)(iii), (c).

¹² *Spent Convictions Act 2000* (ACT) ss 19C, 19F. No entities have yet been prescribed.

[7] To extinguish a conviction for an offence that involved sexual activity, the Director-General must be satisfied, on reasonable grounds, that any other person involved in the sexual activity:¹³

- consented to the sexual activity; and
- was of the required age.¹⁴

[8] If the conviction is extinguished:¹⁵

- the person is not required to disclose information about the extinguished conviction to anyone;
- a question about the person's criminal history is taken not to refer to the extinguished conviction;
- in applying an Act to the person, a reference to a conviction, however expressed, is taken not to refer to the extinguished conviction, and a reference to the person's character, however expressed, does not allow or require anyone to take the extinguished conviction into account; and
- it is an offence to disclose, or to fraudulently and dishonestly obtain, information about an extinguished conviction from records of convictions kept by or on behalf of a public authority.

[9] For the purposes of the legislation, a reference to a conviction that is extinguished includes a reference to the charge to which the extinguished conviction related.¹⁶ However, nothing in the legislation authorises the destruction, by or on behalf of a public authority, of a record relating to an extinguished conviction.¹⁷

[10] The expungement provisions differ significantly from the provisions applying to a spent conviction. In particular, disclosure is not required when applying for particular jobs or positions. 'This will mean that a person's employment, appointment, licensing or travel opportunities are not affected by having a sexual offence conviction on their criminal record.'¹⁸

¹³ *Spent Convictions Act 2000* (ACT) s 19E. See also s 19D(2)(a). If the offence does not relate to sexual activity, the relevant criteria may be prescribed by regulation: s 19D(2)(b). No criteria have yet been prescribed.

¹⁴ Specifically, either: 16 years or older (the age of consent); 10 years or older and not more than two years younger than the convicted person; or 18 years or older, or under 18 years but not more than two years younger than the convicted person, if the person was under the special care of the convicted person. The criteria 'draws on the elements of the criminal law that point to a consensual sexual activity' and reflect the purpose of the scheme to 'extinguish convictions ... where the offence would not be considered a crime today': Explanatory Notes, above n 8, 8. See also *Crimes Act 1900* (ACT) ss 54, 55, 55A.

¹⁵ *Spent Convictions Act 2000* (ACT) pt 3B. There are a small number of exceptions to the offence for disclosure by a person who has access to records of a public authority in s 19I(2). The Director-General must also inform the chief police officer of the extinguishment: s 19D(5).

¹⁶ *Spent Convictions Act 2000* (ACT) s 7A(2).

¹⁷ *Spent Convictions Act 2000* (ACT) s 22.

¹⁸ Explanatory Notes, above n 8, 10. See also the approved forms (AF2015-149 and AF2015-150) for an application to have a conviction extinguished. Cf *Spent Convictions Act 2000* (ACT) pt 3, especially s 19.

[11] If the Director-General refuses to extinguish the conviction, the applicant or other person whose interests are affected may apply for a review of the decision.¹⁹

[12] No applications for expungement have yet been made under this scheme.²⁰

New South Wales

[13] The framework of the New South Wales expungement legislation is very similar to that in the Australian Capital Territory.²¹

[14] It provides that a person who has been convicted of an 'eligible homosexual offence' may apply to the Secretary of the Department of Justice for the conviction to be 'extinguished'. Applications can also be made on behalf of a person who has died.²²

[15] An 'eligible homosexual offence' is defined to include a number of specific former offences, including the former offence of buggery, any offences prescribed by the regulations, and offences of attempting, or of conspiracy or incitement, to commit such offences. The former public morality offences of riotous, violent or indecent behaviour and offensive conduct are included only to the extent the offences consisted of a person engaging in, or procuring another person of the same sex to engage in, sexual activity with another person of the same sex.²³

[16] A conviction may be extinguished if the Secretary is satisfied that the other person involved in the sexual activity constituting the offence consented to the sexual activity and was of or above the age of consent.²⁴

[17] The effect of a conviction becoming extinguished is generally the same as in the Australian Capital Territory (including that a reference to an extinguished conviction under the legislation includes a reference to the charge to which an

¹⁹ *Spent Convictions Act 2000* (ACT) pt 3C. Applications for review are made to the ACT Civil and Administrative Tribunal ('ACAT').

²⁰ Information provided by the ACT Justice and Community Safety Directorate, 24 February 2016. See also C Knaus, 'Government pledge to erase historical homosexual convictions goes unanswered', *The Canberra Times* (online), 26 May 2016.

²¹ The amending Bill was introduced into Parliament on 18 September 2014, and the resulting expungement legislation commenced on 24 November 2014.

²² *Criminal Records Act 1991* (NSW) s 19B. A 'conviction' is defined to mean a conviction, whether summary or on indictment, for an offence and includes a finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction or resulting in the discharge or release of the offender conditionally on entering into a recognisance to be of good behaviour for a specified period or on other conditions determined by the court: s 4(1), 5(a)–(b). It also includes particular orders that may be made under *Children (Criminal Proceedings) Act 1987* (NSW): s 5(c).

²³ See *Criminal Records Act 1991* (NSW) s 19A (definition of 'eligible homosexual offence'). The specific offences captured by the definition include the former offences under: *Crimes Act 1900* (NSW) ss 78K, 78Q, 79, 80, 81 and 81B (homosexual intercourse with male between 10 and 18, acts of gross indecency, buggery, attempt etc to commit buggery, indecent assault on male, soliciting etc male person in a public place); *Police Offences Act 1901* (NSW) s 12 (riotous, violent or indecent behaviour); and *Summary Offences Act 1970* (NSW) s 7 (offensive etc conduct). No offences have been prescribed by regulation. New South Wales is a common law jurisdiction with some, but not all, offences defined in the *Crimes Act 1900* (NSW).

²⁴ *Criminal Records Act 1991* (NSW) s 19C(1). Specifically, the other person must have been of or above 16 years or, if the other person was under the special care of the convicted person within the meaning of the *Crimes Act 1900* (NSW) s 73(3), 18 years.

extinguished conviction relates).²⁵ Significantly, ‘the exceptions that apply to spent convictions ... will not apply. This means, for example, that extinguished convictions will not be disclosable for applications for appointment as a judge, police officer or teacher, or for court proceedings’.²⁶

[18] The legislation does not authorise the destruction of records.²⁷

[19] Provision is made for an extinguished conviction to be revived if the conviction was extinguished on the basis of false or misleading information or documents.²⁸

[20] Decisions under the legislation about extinguishing a conviction or reviving an extinguished conviction are subject to administrative review.²⁹

[21] A total of 14 applications for expungement have been received since the scheme commenced in November 2014, with a small number relating to offences of buggery or indecent assault, and approximately half relating to wilful and obscene exposure offences.³⁰

South Australia

[22] The South Australian expungement legislation — which was the first to be introduced in Australia — differs from that in other jurisdictions.³¹ It adds to an already-existing scheme for making convictions for particular sex offences ‘spent’ convictions on the exercise of judicial discretion.

[23] Under the South Australian spent convictions legislation, convictions for particular offences, including sex offences, are not eligible to become automatically spent. However, a person convicted of a sex offence for which a sentence of imprisonment was not imposed may apply under section 8A, after the qualification period has ended, to a qualified magistrate for an order that the conviction is spent.³²

[24] An application under section 8A is ordinarily to be heard in private and, unless the Attorney-General, another Minister or the Commissioner of Police has intervened, all or part of the proceedings may be conducted on the basis of the

²⁵ See *Criminal Records Act 1991* (NSW) ss 4(2A), 19F–19H.

²⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 September 2014, 823 (B Notley-Smith).

²⁷ *Criminal Records Act 1991* (NSW) s 23.

²⁸ *Criminal Records Act 1991* (NSW) s 19I.

²⁹ *Criminal Records Act 1991* (NSW) ss 19E, 19I(4). Applications for review are to be made under the *Administrative Decisions Review Act 1997* (NSW) to the NSW Civil and Administrative Tribunal (‘NCAT’).

³⁰ Information provided by the Office of General Counsel (NSW), 26 February 2016.

³¹ The amending Bill was introduced into Parliament on 25 September 2013, and the resulting expungement legislation commenced on 22 December 2013.

³² *Spent Convictions Act 2009* (SA) ss 3(1) (definition of ‘eligible sex offence’, para (a)), 5(2)(b), 8A. The qualification period is 10 consecutive years (or five consecutive years in the case of a juvenile offence) from the day of the conviction: s 7(1). However, if the person is convicted of another offence during that period, the qualification period begins to run again from the date of the later conviction: s 7(2). See s 6A for when a magistrate is ‘qualified’. A ‘conviction’ is defined to mean a conviction, whether summary or on indictment, for an offence and includes a formal finding of guilt by a court and a finding by a court that an offence has been proved: s 3(1), (5). See also s 3(6).

documents without the applicant or any representative attending or participating in a hearing.³³

[25] The expungement legislation extends those provisions to convictions for a 'designated sex-related offence'. This is defined by description rather than by reference to specific named offences, and incorporates consent and age criteria:³⁴

designated sex-related offence means—

- (a) a sex offence [as prescribed by regulation]³⁵—
 - (i) that is constituted by consenting adults engaging in sexual intercourse, or another form of sexual activity; or
 - (ii) that is constituted by an adult procuring another adult to engage in consensual sexual intercourse, or another form of consensual sexual activity; or
- (b) an offence where—
 - (i) the offence is constituted by consenting persons of the same sex engaging in sexual intercourse, or another form of sexual activity; and
 - (ii) at least 1 of them is 16 or 17 years of age (and none of them is younger); and
 - (iii) their actions would not have constituted an offence if they were not of the same sex; and
 - (iv) no person engaged in the activity was in a position of authority in relation to another person engaged in the activity ... (note added)

[26] An application is to include details about the offence, a copy of any transcript or sentencing remarks made in connection with the conviction that are in the applicant's possession, and any other information the applicant wishes to submit in support of the application with respect, for example, to the applicant's circumstances and the circumstances and seriousness of the offence.³⁶

³³ See *Spent Convictions Act 2009* (SA) s 8A(4), sch 2 items 4, 5(2)–(3). The qualified magistrate is not bound by the rules of evidence but may inform himself or herself as he or she thinks fit and must act according to equity, good conscience and the substantial merits of the case: sch 2 item 5(1). The Attorney-General and Commissioner of Police must each be served with a copy of the application and may each intervene in the proceedings: sch 2 item 3(1).

³⁴ *Spent Convictions Act 2009* (SA) s 3(1) (definition of 'designated sex-related offence'). Note that South Australia is a common law jurisdiction with some, but not all, offences defined in the *Criminal Law Consolidation Act 1935* (SA).

³⁵ The offences prescribed as 'sex offences' include offences against the *Criminal Law Consolidation Act 1935* (SA) pt 3 divs 11 (rape and other sexual offences), 11A (child exploitation material and related offences), 12 (commercial sexual services and related offences) and 13 (miscellaneous sexual offences), and *Summary Offences Act 1953* (SA) s 23(2) (gross indecency); substantially similar offences in corresponding previous enactments; and offences of aiding, abetting, counselling or procuring such an offence: *Spent Convictions Act 2009* (SA) s 3(1) (definition of 'sex offence'); *Spent Convictions Regulations 2011* (SA) reg 5.

³⁶ *Spent Convictions Regulations 2011* (SA) reg 5A(2).

[27] The legislation specifies a number of matters to which the magistrate is ordinarily to have regard in the exercise of his or her discretion, including the nature, circumstances and seriousness of the offence, the length of time since the conviction, all the circumstances of the applicant, and whether the spending of the conviction and its non-disclosure might present a risk to the public.³⁷ However, for a designated sex-related offence, the magistrate may make an order without reference to any of the listed matters if satisfied that:³⁸

- the offence is a designated sex-related offence; and
- the conduct constituting the offence has ceased, by operation of law, to be an offence.

[28] The consequences of a conviction for a designated sex-related offence becoming spent relate to non-disclosure and are generally similar to those of an extinguished conviction in the Australian Capital Territory and New South Wales.³⁹ In particular, specific provision is made that the exclusions for other spent convictions do not apply.⁴⁰ As a result, 'these types of convictions are spent for all purposes and are no longer [to] be disclosed in any police history check, no matter the purpose of the check (including care of children)'.⁴¹

[29] Under the legislation, a reference to a spent conviction includes a reference to the charge to which the spent conviction related and 'any investigation or legal process associated with the offence or the conviction'.⁴²

[30] Although a number of applications have been made under section 8A, it does not appear that any have been made in relation to convictions for 'designated sex-related offences'.⁴³

Tasmania

[31] In 2014–15, the Tasmanian Anti-Discrimination Commissioner inquired into options for removing the continuing effects of historical gay sex convictions in that State, and recommended the introduction of a dedicated expungement scheme.⁴⁴

³⁷ *Spent Convictions Act 2009* (SA) s 8A(5).

³⁸ *Spent Convictions Act 2009* (SA) s 8A(6). See also the discussion of s 8A at [4.43]–[4.44] above.

³⁹ *Spent Convictions Act 2009* (SA) ss 10–12. Also, the spent conviction (or its non-disclosure) is not a proper ground for refusing or revoking any appointment, post, status or privilege: s 10(d).

⁴⁰ *Spent Convictions Act 2009* (SA) s 13(5). Cf s 13(1), sch 1.

⁴¹ South Australia, *Parliamentary Debates*, House of Assembly, 25 September 2013, 7103 (JR Rau, Deputy Premier, Attorney-General, Minister for Planning, Minister for Industrial Relations, Minister for Business Services and Consumers).

⁴² *Spent Convictions Act 2009* (SA) s 3(4).

⁴³ Information provided by the Courts Administration Authority, South Australia, 5 April and 24 March 2016; and Crown Solicitor, South Australia, 2 May and 22 March 2016.

⁴⁴ See *ADC Tasmania Report* (2015); and *ADC Tasmania Discussion Paper* (2014).

[32] A draft Bill for an expungement scheme has since been released by the Tasmanian Attorney-General for public consultation.⁴⁵

[33] The draft expungement legislation shares some features in common with the expungement legislation in the Australian Capital Territory, New South Wales and Victoria.

[34] It provides that a person who has been convicted of an ‘historical homosexual offence’ may apply to the Secretary of the Department of Justice for the conviction to be expunged.⁴⁶ The draft legislation also enables particular persons to apply in respect of a convicted person who has died, including the person’s legal personal representative, spouse, parent or child.⁴⁷

[35] ‘Historical homosexual offence’ is defined as being any of the following specific offences:⁴⁸

- an offence under section 122(a), 122(c) or 123 of the *Criminal Code* (Tas) as in force before 14 May 1997 (sexual intercourse against the order of nature and indecent practices between males);
- an offence prescribed by the regulations; or
- an offence of attempting, or of conspiracy or incitement, to commit any of the above offences.

[36] Among other things, an application for expungement is to contain details about the offence and conviction and any additional information or documents that the Secretary requires.⁴⁹ It must also include a consent authorising disclosure to the Secretary of any records relating to the conviction, such as those created by the Commissioner of Police or Director of Public Prosecutions.⁵⁰

[37] The draft legislation provides that, in considering an application, the Secretary may ‘take all steps, and make all inquiries, that are reasonable and appropriate to consider the application properly’. The Secretary may require an applicant or other person to provide additional information or documents, and may require a person to answer specific questions.⁵¹

45 Draft Historical Homosexual Convictions Bill 2016 (Tas) available at <http://www.justice.tas.gov.au/community-consultation/previous_consultations/historical_homosexual_convictions_bill_2016>. See Vanessa Goodwin, Attorney-General (Tas), ‘Expunging historic homosexual convictions’ (Media Release, 4 July 2016).

46 Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 5(1). A ‘conviction’ is defined to mean a conviction recorded against a person for an offence, whether on indictment or summarily, and is taken to include a finding by a court that a person is guilty of an offence, where the court does not record the conviction: cl 3(1), (2).

47 Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 5(2).

48 Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 3(1).

49 Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 6(1).

50 Draft Historical Homosexual Convictions Bill 2016 (Tas) cls 3(1) (definition of ‘data controller’), 6(2).

51 Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 7(1)–(4). Evidence of information or documents obtained under those provisions may be used only for the administration of the Bill: cl 7(5).

[38] Like Victoria, a conviction may be expunged if the Secretary is satisfied that the offence is an 'historical homosexual offence' and that, on the balance of probabilities, both of the following tests are satisfied:⁵²

- the eligible person would not have been charged with the offence but for the fact that the person was suspected of engaging in the conduct for the purposes of, or in connection with, sexual activity of a homosexual nature; and
- the conduct, if engaged in by the person at the time of making the application, would not constitute an offence under Tasmanian law.

[39] In considering whether the second of those tests is satisfied, the Secretary must have regard to the consent and age of the persons involved in the conduct.⁵³

[40] The effect of a conviction becoming expunged is also similar to Victoria. The draft legislation provides for the non-disclosure and disregarding of expunged convictions and for the annotation of official criminal records by the inclusion of a statement to the effect that a relevant entry relates to an expunged conviction.⁵⁴ It also provides that a reference to an expunged conviction includes a reference to the charge to which the conviction related.⁵⁵

[41] Like New South Wales, the draft legislation provides for an expunged conviction to be revived if the Secretary is satisfied the conviction was expunged on the basis of false or misleading information or documents.⁵⁶

[42] Decisions refusing expungement are reviewable by the Magistrates Court (Administrative Appeals Division), with review proceedings to be held in private.⁵⁷

[43] The draft expungement legislation was open for public consultation between 4 and 25 July 2016.⁵⁸

52 Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 8(1).

53 Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 8(2).

54 Draft Historical Homosexual Convictions Bill 2016 (Tas) cls 11–14. 'Official criminal records' are defined as records containing information about the outcome of criminal proceedings kept by a court, Government department or State authority: cl 3(1). Apart from cl 11(2), nothing in the Bill authorises or requires documents containing official records to be destroyed, culled or edited: cl 19.

55 Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 3(3).

56 Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 15.

57 Draft Historical Homosexual Convictions Bill 2016 (Tas) cl 16. A determination that a conviction is no longer an expunged conviction is also reviewable under cl 16.

58 See Goodwin, above n 45; and Department of Justice, Tasmania, *Community consultation — Historical Homosexual Convictions Bill 2016* <http://www.justice.tas.gov.au/community-consultation/previous_consultations/historical_homosexual_convictions_bill_2016>.

Victoria

[44] The Victorian expungement legislation has a number of distinct features.⁵⁹ It does not build on existing spent convictions legislation, which Victoria does not have, and has a generally broader approach than the expungement legislation in other Australian jurisdictions. It has a number of features in common with the expungement legislation in England and Wales.

[45] The legislation provides that a person convicted of an 'historical homosexual offence' may apply to the Secretary to the Department of Justice for the conviction to be 'expunged'. An application may also be made by the person's litigation guardian or guardian if the convicted person is unable to apply because of a disability, or by an appropriate representative if the convicted person has died.⁶⁰

[46] 'Historical homosexual offence' is defined by description only, and not by reference to specific named offences.⁶¹ It is also defined in wide terms, leaving questions of lawfulness, consent and age to the criteria for deciding whether a conviction should be expunged.

[47] An 'historical homosexual offence' means:⁶²

- a 'sexual offence' — being an offence as 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; or
- a 'public morality offence' — being an offence (other than a sexual offence) as in force at any time the essence of which is the maintenance of public decency or morality, and by which homosexual behaviour could be punished; or
- an offence of attempting, being involved in the commission of, or inciting or conspiring to commit, such an offence.

[48] Detailed provision is made for the Secretary to obtain and consider relevant information about the offence, including information given in the application form. In particular, the applicant is required to authorise a police record check and give consent to the disclosure to the Secretary of official records relating to the

⁵⁹ The amending Bill was introduced into Parliament on 16 September 2014, and the resulting expungement legislation commenced on 1 September 2015.

⁶⁰ *Sentencing Act 1991* (Vic) ss 105(1) (definition of 'applicant'), 105B(1)–(3). A 'conviction' is defined to include a finding of guilt made by a court, whether or not a conviction is recorded: s 105(1).

⁶¹ Note that Victoria is a common law jurisdiction with some, but not all, offences defined in the *Crimes Act 1958* (Vic).

⁶² *Sentencing Act 1991* (Vic) s 105(1) (definitions of 'historical homosexual offence', 'public morality offence' and 'sexual offence'). The offences of buggery under the *Crimes Act 1958* (Vic) s 68(2) and indecent assault on a male person under the *Crimes Act 1928* (Vic) s 65(3) are given as examples to the definition of a 'sexual offence'; and the offence of behaving in an indecent or offensive manner under the *Summary Offences Act 1966* (Vic) s 17(1)(d) is given as an example of a 'public morality offence'.

conviction.⁶³ The Secretary may also require the applicant, or another person or body, to provide further information on the application.⁶⁴

[49] When considering an application, the Secretary must have regard to any available record of the investigation of, or proceedings relating to, the offence (and give the applicant access to such records). The Secretary must also have regard to any statements or written evidence provided as part of the application.⁶⁵

[50] Provision is also made for the Secretary to appoint one or more persons to provide advice on an application (or on applications generally), to which the Secretary must also have regard.⁶⁶

[51] An oral hearing is not to be held.⁶⁷

[52] To expunge a conviction, the Secretary must be satisfied that the offence is an 'historical homosexual offence' and that, on the balance of probabilities, both of the following tests are satisfied:⁶⁸

- the convicted person would not have been charged with the offence but for the fact that the person was suspected of engaging in the conduct for the purposes of, or in connection with, sexual activity of a homosexual nature; and
- the conduct, if engaged in by the person at the time of making the application, would not constitute an offence under Victorian law.

[53] In deciding whether the second of those tests is satisfied, the Secretary must consider, where relevant, the consent and age of any other person involved in the conduct.⁶⁹

[54] The effect of a conviction becoming expunged is similar, in relation to non-disclosure, to that of the other Australian expungement schemes. In addition, provision is made that the expunged conviction (or its non-disclosure) is not a proper ground for refusing to a person, or revoking or dismissing the person from, any appointment, post, status or privilege, and that the person may reapply for any licence, permit, approval or other relevant authorisation that was refused solely on

63 *Sentencing Act 1991* (Vic) s 105B(4)(g), (5), (6). 'Official records' are defined as records containing information about convictions held by any court, the Victorian Civil and Administrative Tribunal ('VCAT'), Victoria Police or the Office of Public Prosecutions: s 105(1). The consent provision applies to official records 'created by' those entities (whether held by those entities or by any other entity). See also the Application Forms available at <<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/criminal+law/expungement+scheme>>.

64 *Sentencing Act 1991* (Vic) ss 105C, 105D(1)(c)–(d), 105E.

65 *Sentencing Act 1991* (Vic) s 105D(1)(a), (2), (3)(a). The Secretary is not to determine the application until at least 28 days have passed after giving the applicant access to the record, during which time the applicant may withdraw the application, or submit additional statements or evidence: ss 105D(3)(b), 105H.

66 *Sentencing Act 1991* (Vic) ss 105D(1)(b), 105F.

67 *Sentencing Act 1991* (Vic) s 105D(1)(e).

68 *Sentencing Act 1991* (Vic) s 105G(1).

69 *Sentencing Act 1991* (Vic) s 105G(2).

the basis of the conviction, before it became expunged, without waiting any minimum period.⁷⁰

[55] The Victorian legislation also goes further by providing for entries relating to the conviction in ‘official records’ to be altered by:⁷¹

- annotating any entry about the conviction in official records with a statement to the effect that the conviction is an expunged conviction; and
- either removing the entry, making the entry incapable of being found, or de-identifying the information in the entry in ‘secondary records’ held electronically by Victoria Police and the Office of Public Prosecutions.

[56] For the purpose of the legislation, a reference to an expunged conviction includes a reference to the charge to which the conviction relates and ‘any investigation or legal process associated with that charge or the conviction’.⁷²

[57] The Secretary’s decision on an application is subject to review.⁷³

[58] Internal guidelines to assist in the interpretation and application of the legislation when implementing the expungement scheme have also been developed.⁷⁴

[59] As at 24 May 2016, six applications made under the scheme had resulted in expungement.⁷⁵

England and Wales

[60] The expungement legislation in England and Wales applies to specific former offences of buggery and gross indecency between men, and associated offences of attempting to commit, or aiding or procuring the commission of, those offences.⁷⁶

⁷⁰ *Sentencing Act 1991* (Vic) ss 105J, 105K(6)–(8).

⁷¹ *Sentencing Act 1991* (Vic) s 105K(2)–(3). ‘Secondary records’ are defined as official records that are a copy, duplicate or reproduction of, or extract from, another existing official record, irrespective of whether those records are held by the same entity or by different entities: s 105(1). See n 63 above for the meaning of ‘official record’.

⁷² See *Sentencing Act 1991* (Vic) s 105(4).

⁷³ *Sentencing Act 1991* (Vic) s 105L. Applications for review may be made by the applicant (if expungement was refused) or a ‘data controller’ with official records relating to the conviction under their management or control (if expungement was approved), and are to be made to VCAT.

⁷⁴ Information provided by the Victorian Department of Justice and Regulation, 2 and 8 March 2016.

⁷⁵ See Victoria, *Parliamentary Debates*, Legislative Assembly, 24 May 2016, 1937 (D Andrews, Premier) in which it was also noted that, in addition to the six men whose applications had been approved, ‘many more have begun the process’ of seeking expungement.

⁷⁶ *Protection of Freedoms Act 2012* (UK) c 9, ss 92(1), 101(5), (7). Specifically, it applies to offences of buggery and indecency between men under the *Sexual Offences Act 1956*, 4 & 5 Eliz 2, c 69, ss 12, 13, the *Offences Against the Person Act 1861*, 24 & 25 Vic, c 100, s 61 and the *Criminal Law Amendment Act 1885*, 48 & 49 Vict, c 69, s 11; and includes attempt, conspiracy or incitement to commit such offence, and aiding, abetting, counselling or procuring the commission of such offence (including frequenting public places with intent to commit such offence under the *Vagrancy Act 1824*, 5 Geo 4, c 83, s 4). It also includes related offences under certain Navy, Army and Air Force Acts: s 101(3). The expungement legislation commenced on 1 October 2012.

[61] It provides that a person who has been convicted of — or cautioned for — such an offence may apply to the Secretary of State (in practice, the Home Secretary) for the conviction or caution to become a ‘disregarded’ conviction or caution.⁷⁷

[62] An application is to contain, so far as known to the applicant, particulars about the conviction or caution and the circumstances of the offence. It may also include supporting statements or evidence.⁷⁸

[63] To become a disregarded conviction or caution, the Secretary must decide that it appears that:⁷⁹

- the other person involved in the conduct constituting the offence consented to it and was aged 16 years or over; and
- any such conduct now would not be an offence under section 71 of the *Sexual Offences Act 2003* (UK) (sexual activity in a public lavatory).

[64] In deciding whether to make such a decision, the Secretary must, in particular, consider any representations or evidence included in the application and any available record of the investigation of, and any proceedings relating to, the offence that the Secretary considers relevant. An oral hearing may not be held for the purpose of deciding the application.⁸⁰ The Secretary may appoint advisers.⁸¹

[65] The legislation provides that a person who has a disregarded conviction or caution ‘is to be treated for all purposes in law as if the person has not’ committed the offence or been charged with, prosecuted for, convicted of, sentenced for or cautioned for the offence. In particular:⁸²

- evidence is not admissible in proceedings before a court or other judicial authority to prove that the person has done or undergone any of those things mentioned at [65] above;
- questions about previous convictions, cautions, conduct or circumstances are to be treated as not relating to any disregarded conviction or caution;

⁷⁷ *Protection of Freedoms Act 2012* (UK) c 9, s 92(1). A ‘conviction’ is defined to include: (a) a finding that a person is guilty of an offence in respect of conduct which was the subject of service disciplinary proceedings; (b) a conviction in respect of which an order has been made discharging the person concerned absolutely or conditionally; and (c) a finding in any criminal proceedings (including one linked with a finding of insanity) that a person has committed an offence or done the act or made the omission charged: s 101(1). A ‘caution’ is defined (in s 101(1)) to mean: (a) a caution given to a person in England and Wales in respect of an offence which, at the time of giving the caution, the person has admitted; or (b) a reprimand or warning given to person under 18 years under the *Crime and Disorder Act 1998* (UK) c 37, s 65.

⁷⁸ *Protection of Freedoms Act 2012* (UK) c 9, s 93. See also the Application Form available at <https://www.gov.uk/delete-historic-conviction>.

⁷⁹ *Protection of Freedoms Act 2012* (UK) c 9, s 92(2), (3). The conviction or caution becomes disregarded after such decision is made, notice of the decision is given to the applicant, and 14 days from the day of the notice have passed: s 92(4).

⁸⁰ *Protection of Freedoms Act 2012* (UK) c 9, s 94(1)–(2).

⁸¹ *Protection of Freedoms Act 2012* (UK) c 9, s 100.

⁸² *Protection of Freedoms Act 2012* (UK) c 9, s 96. See also s 98(1) for the meaning of the phrase ‘proceedings before a judicial authority’.

- any disclosure obligation on the person is not to extend to disclosure of a disregarded conviction or caution; and
- a disregarded conviction or caution is not a proper ground for dismissing or excluding a person from, or prejudicing a person in any way in, any office, profession, occupation or employment.

[66] The non-disclosure provisions above also apply to ‘circumstances ancillary’ to the disregarded conviction or caution, including the offence which was the subject of the conviction or caution, the conduct constituting the offence, any process or proceedings preliminary to the conviction or caution, any sentence imposed, and any appeal or review proceedings.⁸³

[67] If a conviction or caution is disregarded, ‘relevant official records’ must also be annotated by recording with the details of the conviction or caution the fact that it is a disregarded conviction or caution and the effect of it being such a conviction or caution. The relevant records include the names database for the use of constables, police records kept locally for the use of constables, and records of the magistrates’ courts (dating from 1992) and of the Crown Court kept by the Courts and Tribunals Service.⁸⁴

[68] The expungement legislation also provides that the spent convictions legislation does not apply to a disregarded conviction or caution.⁸⁵

[69] An unsuccessful applicant under the scheme may appeal to the High Court, with that Court’s permission.⁸⁶

[70] As at 28 July 2014, a total of 193 applications from 153 individuals had been made under the scheme. Of those, 50 convictions or cautions were disregarded, 137 were not disregarded, and 6 were outstanding. Of those that were disregarded, the majority (47) related to the offence of gross indecency between men, while a small number (3) related to the offence of buggery.⁸⁷

⁸³ *Protection of Freedoms Act 2012* (UK) c 9, s 98(2), (3).

⁸⁴ *Protection of Freedoms Act 2012* (UK) c 9, s 95; *Protection of Freedoms Act 2012 (Relevant Official Records) Order 2012* (UK) SI 2012/2279, s 2. The relevant records also include similar records kept by the British Transport Police, Ministry of Defence Police, Royal Navy Police, Royal Military Police, and Royal Air Force Police.

⁸⁵ *Protection of Freedoms Act 2012* (UK) c 9, s 134, amending *Rehabilitation of Offenders Act 1974* (UK) c 53, s 1.

⁸⁶ *Protection of Freedoms Act 2012* (UK) c 9, s 99.

⁸⁷ See Home Office (UK), *FOI Release: Applications to the Home Secretary to have historical convictions or cautions for sexual offences disregarded* (22 October 2014) GOV.UK <<https://www.gov.uk/government/publications/applications-to-have-historical-convictions-for-sexual-offences-disregarded/applications-to-the-home-secretary-to-have-historical-convictions-or-cautions-for-sexual-offences-disregarded>>.

Appendix D: Respondents and Consultees

Submissions

Anti-Discrimination Commission Queensland
Australian Lawyers for Human Rights
Bar Association of Queensland
Bartlett, Dr Francesca, TC Beirne School of Law **
Bell-James, Dr Justine, TC Beirne School of Law **
Bouwman, Vanessa
Bronitt, Prof Simon, TC Beirne School of Law **
Burdon, Dr Mark, TC Beirne School of Law **
Castan Centre for Human Rights Law, Monash University
Caxton Legal Centre Inc *
Civil Liberties Australia Inc.
Clouston, Sarah **
Curnow, Katherine, TC Beirne School of Law **
Derrington, Prof Sarah, TC Beirne School of Law **
Diversity Council Australia Ltd
Douglas, Prof Heather, TC Beirne School of Law **
Finnane, Prof Mark, Griffith Criminology Institute †
Garner, Madison
Goss, Dr Caitlin, TC Beirne School of Law **
Hardy, David
Harpur, Dr Paul, TC Beirne School of Law **
Human Rights Law Centre *
Kaladelfos, Dr Andy, Griffith Criminology Institute †
Lawrie, Alastair
LGBTI Legal Service Inc *
Morris, Erin **
Mullins, Robert, TC Beirne School of Law **
O'Brien, Dr Melanie, TC Beirne School of Law **
Orr, Prof Graeme, TC Beirne School of Law **
Queensland Aids Council *
Queensland Association of Independent Legal Services Inc * (now Community Legal Centres Queensland)
Queensland Council for Civil Liberties
Queensland State Archives
Roffee, Dr James A, School of Social Sciences, Monash University
Sherman, Prof Brad, TC Beirne School of Law **

Smaal, Dr Yorrick, Griffith Criminology Institute †	* Those respondents made a joint submission
Taylor, Monica, TC Beirne School of Law **	** Those respondents made a joint submission
Townsville Community Legal Service Inc *	† Those respondents made a joint submission
Voss, Darrin	
Walsh, A/Prof Tamara, TC Beirne School of Law **	
Widmaier, Chloe **	

Consultation meetings

Department of Justice and Regulation, Victoria	Melbourne	2 March 2016
Human Rights Law Centre	Melbourne	2 March 2016
Queensland Police Service, Police Information Centre, and Public Safety Business Agency	Brisbane	15 March 2016
LGBTI Legal Service Inc, Brisbane Pride, Queensland Aids Council, Parents and Friends of Lesbians and Gays Brisbane, Human Rights Law Centre and Allens	Brisbane	15 March 2016
Queensland State Archives	Brisbane	24 March 2016

Additional consultees

Australian Lesbian and Gay Archives
 Courts Administration Authority, South Australia
 Crown Solicitor, South Australia
 Department of Justice, New South Wales (including Office of General Counsel)
 Justice and Community Safety Directorate, Australian Capital Territory
 Office of the Director of Public Prosecutions, Queensland
 Performance Reporting & Business Application Support Unit, Queensland Courts Service, Department of
 Justice and Attorney-General, Queensland

Appendix E: Select Bibliography

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