



Queensland
Law Reform Commission

**Review of expunging of criminal
convictions for historical gay sex
offences**

Consultation Paper

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WP No 74
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SUBMISSIONS

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Closing date: 29 March 2016

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Abbreviations and Glossary

ACT	Australian Capital Territory
<i>ADC Tasmania Discussion Paper (2014)</i>	Anti-Discrimination Commissioner Tasmania, ‘Treatment of convictions for consensual sexual activity between adult males’ (Discussion Paper, 31 October 2014)
<i>ADC Tasmania Report (2015)</i>	Anti-Discrimination Commissioner Tasmania, ‘Treatment of historic criminal records for consensual homosexual activity and related conduct’ (Report, April 2015)
Courts Service	Queensland Courts Service within DJAG, including the Supreme, District and Land Courts Service and Magistrates Courts Service
DJAG	Department of Justice and Attorney-General, Queensland
Eng	England and Wales
Expungement legislation	<p>Legislation in other jurisdictions providing for the expunging of convictions for historical gay sex offences, namely:</p> <ul style="list-style-type: none"> • <i>Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Act 2015</i> (ACT), inserting new pts 3A–3C in the <i>Spent Convictions Act 2000</i> (ACT) • <i>Criminal Records Amendment (Historical Homosexual Offences) Act 2014</i> (NSW), inserting new pt 4A in the <i>Criminal Records Act 1991</i> (NSW) • <i>Spent Convictions (Decriminalised Offences) Amendment Act 2013</i> (SA), amending the <i>Spent Convictions Act 2009</i> (SA) • <i>Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014</i> (Vic), inserting new pt 8 in the <i>Sentencing Act 1991</i> (Vic) • <i>Protection of Freedoms Act 2012</i> (UK) c 9, pt 5 ch 4
Expungement scheme	Provisions for the expunging 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 Paper.
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The terms of reference for this review refer to ‘historical gay sex offences’, including particular offences that were repealed by the 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> (Qld). Accordingly, that terminology is used throughout this Paper to refer generally to former offences for which homosexual activity could be punished.
Homosexual activity	Used throughout this Paper generally to refer to sexual activity between people of the same sex, regardless of how they identify their sexual orientation or gender.
<i>Human Rights Law Centre Background Paper (2014)</i>	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)
<i>LGBTI Legal Service Discussion Paper (2015)</i>	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
SA	South Australia
Spent convictions legislation	<p>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, namely:</p> <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 Paper are references to Queensland legislation.*

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Introduction

[1] Consensual adult male homosexual activity ceased to be a criminal offence in Queensland in 1991.

[2] In 2015, the Queensland Government 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.¹

[3] 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’.² In doing so, the Commission is to consider a number of specific issues, including what the features of an expungement scheme should be.

[4] This Consultation Paper gives an overview of the relevant legal issues in the review, and asks a number of specific questions. The Commission welcomes submissions on those questions, as well as any other issues relevant to the terms of reference. Details on how to make a submission, including a confidential submission, are set out at the front of this Paper.

[5] The closing date for submissions is **29 March 2016**.

[6] The Commission is required to provide its final report to the Attorney-General by 31 August 2016.

¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 20 August 2015, 35 (Y D’Ath, Attorney-General and Minister for Justice and Minister for Training and Skills). See also Queensland Government, ‘Palaszczyk Government Acts to Expunge Historic Homosexual Convictions’ (Media Statement, 13 January 2016); 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 <<http://www.budget.qld.gov.au/budget-papers/bp5.php>>.

² 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 Paper.

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Expunging of criminal convictions for historical gay sex offences

BACKGROUND AND OVERVIEW

[7] 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 Criminal Code made it a crime for a person to have (or attempt to have) carnal knowledge of another person, or to permit a male person to have carnal knowledge of him or her, 'against the order of nature', and made it a misdemeanour for a male person, whether in public or private, to commit any act of 'gross indecency' with another male person.³

[8] Beginning in 1972 with South Australia, all of the Australian states and territories have now legalised private homosexual acts by consenting adults,⁴ although there remain differences between the jurisdictions, including in relation to the age of consent.⁵

[9] Queensland legalised consensual adult homosexual activity in 1991 with the *Criminal Code and Another Act Amendment Act 1990*. This was prompted by a recommendation in the Fitzgerald Report, and subsequent consideration by the Criminal Justice Commission and the Parliamentary Criminal Justice Committee.⁶

[10] Subsequently, the *Anti-Discrimination Act 1991* also made it unlawful to discriminate against a person on the basis of sexuality.⁷

[11] The repeal of offences for consensual adult homosexual activity is recognised as a significant step in homosexual law reform, by removing the 'threat' of further criminal convictions. However, it is said to have achieved only partial reform because it did not also address the impact of having a criminal record for such activity.⁸

[12] 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 1954.⁹ There may also have been additional cases not identified

³ See Criminal Code (Qld) ss 208(1), (3), 209, 211 (Act as passed).

⁴ See generally G Carbery, *Towards Homosexual Equality in Australian Criminal Law — A Brief History* (Australian Lesbian & Gay Archives Inc, revised ed, 2014) 50–53.

⁵ 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.

⁶ See, respectively, Queensland, *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 186–7, 377 Rec 2 ('Fitzgerald Report'); Criminal Justice Commission Queensland, *Reforms in Laws Relating to Homosexuality*, Information Paper (May 1990); and Parliamentary Criminal Justice Committee, Parliament of Queensland, *Report into the Report of the Criminal Justice Commission entitled 'Reforms in Laws Relating to Homosexuality — An Information Paper'*, Report No 2 (October 1990).

⁷ *Anti-Discrimination Act 1991* (Qld) s 7(n), sch (definition of 'sexuality').

⁸ See, eg, *ADC Tasmania Discussion Paper* (2014) 1.

⁹ 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.

because of the loss of archival material.¹⁰ The researchers also noted that men sometimes appear to have been charged with offences to ‘frighten and intimidate’ them, even if a conviction was unlikely to result.¹¹

[13] It appears that criminal laws against homosexual activity were still being enforced in most Australian jurisdictions until the mid-1970s and, in Queensland, the late 1980s.¹²

[14] Along with most other Australian jurisdictions, Queensland has ‘spent convictions’ legislation to protect convictions from unauthorised disclosure after a certain period of time has elapsed. However, as explained below, that legislation provides a number of exceptions where disclosure is permitted or required, including when applying for certain jobs or positions.

[15] Having a conviction for consensual adult homosexual activity that is no longer considered a criminal offence can be a source of stigma and shame, and of potential unfair discrimination in areas where convictions may be disclosed, including employment.

[16] This has led to calls for reform to expunge convictions for historical gay sex offences, including in Queensland.¹³

[17] On 22 November 2012, the Australian Senate passed a resolution that ‘calls on all Australian states and territories to enact legislation that expressly purges convictions imposed on people prior to the decriminalisation of homosexual conduct’.¹⁴ The resolution also noted that England and Wales have enacted legislation for this purpose.

[18] Since then, expungement legislation has been passed in South Australia, New South Wales, Victoria and, most recently, the Australian Capital Territory.¹⁵ Legislation has been foreshadowed in Tasmania, and calls for similar reform have also been made in New Zealand.¹⁶

¹⁰ Ibid: ‘[t]he vicissitudes of archival practices and management in the nineteenth and early–mid twentieth century, and devastating Brisbane floods of 1974 which affected the State Archives, means that a considerable body of material has been lost to historians forever...’.

¹¹ Ibid 17.

¹² Carbery, above n 4, 3.

¹³ See, eg, M Madigan and A Sandy, ‘State moves to purge convictions of people found guilty of homosexual acts’, *The Courier Mail* (online) 15 September 2013. See also [19] below.

¹⁴ Commonwealth, *Parliamentary Debates*, Senate, 22 November 2012, 9496 (S Hanson-Young).

¹⁵ See the Acts in the list of Abbreviations and Glossary at the beginning of this Paper.

¹⁶ See, eg, Vanessa Goodwin, Attorney-General (Tas), ‘Expunging historic homosexual convictions’ (Media Release, 17 December 2015); W Demchick, *The Campaign to Pardon Gays in Aotearoa* (2015) <<http://www.pardon.nz/>>.

[19] In Queensland, the LGBTI Legal Service Inc released a discussion paper in September 2015 about ‘options for reform to address the ongoing impact of prosecutions under historical homosexual offences’.¹⁷ The Commission subsequently received its terms of reference for this review.

The relevant offences

[20] Prior to legalisation, homosexual activity was the subject of criminal offences in sections 208, 209 and 211 of the Criminal Code.¹⁸ Those offences were repealed in 1991.¹⁹

Criminal Code — these offences were repealed in 1991		
Section 208(1)	Has carnal knowledge of any person against the order of nature — known as ‘sodomy’.	Effectively 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. ²⁰
Section 208(3)	Permits a male person to have carnal knowledge of him or her against the order of nature — known as ‘buggery’.	
Section 209	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, or procures another male for such acts or attempts to procure any such act.	Applied whether 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. ²¹

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

¹⁷ *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, and Brisbane Pride Festival.

¹⁸ The Criminal Code (Qld) 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 Appendix B to this Paper. Anecdotally, it has also been observed that homosexual activity may have been prosecuted under other offences, such as soliciting: see, eg, *LGBTI Legal Service Discussion Paper* (2015) 6, 19. (The *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 5(1)(b) (repealed) made it an offence to ‘[solicit] for immoral purposes or for the purposes of prostitution any person who is in a public place or within the view or hearing of any person therein’.)

¹⁹ See *Criminal Code and Another Act Amendment Act 1990* (Qld) ss 5–7. That Act also amended the Criminal Code (Qld) ss 336 and 337 to change the words ‘against the order of nature’ to ‘by anal intercourse’.

²⁰ RF Carter, *Criminal Law of Queensland* (Butterworths, 7th ed, 1988) [s 208.1]. See also B Lane, ‘Harassment of homosexuals in Queensland: Private Lives, Public “Crimes”’ (1988) 13 *Legal Service Bulletin* 154, 155.

²¹ Carter, above n 20, [s 211.1]. What is ‘indecent’ is to be judged ‘in the light of time, place and circumstance’: [s 210.1]. 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: *R v Dunn* [1973] 2 NZLR 481, 483-5.

[21] Given the range of circumstances covered by these offences, it is possible that some types of behaviour prosecuted under those offences would continue to be an offence today. In particular, sodomy remains an offence if the person sodomised is under 18 years.²²

Legalisation

[22] In Queensland, the *Criminal Code and Another Act Amendment Act 1990*, by which the historical offences in section 208, 209 and 211 of the Criminal Code were repealed, 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 ...

[23] The repeal of homosexual offences by the Australian states and territories was also accompanied by legislation at the federal level entrenching the right to sexual privacy. The *Human Rights (Sexual Conduct) Act 1994* (Cth) provides that:²³

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.

Anti-discrimination laws

[24] Homosexual law reform is also reflected in anti-discrimination laws. In Queensland, the *Anti-Discrimination Act 1991* has prohibited discrimination on the basis of 'sexuality' (meaning 'heterosexuality, homosexuality or bisexuality') and 'gender identity' since 2002.²⁴

[25] 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.²⁵ There are, however, a number of exemptions in the Act, including for acts done in compliance with other legislation.²⁶

²² See Criminal Code (Qld) s 208, set out in full in Appendix B to this Paper.

²³ *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 International Covenant on Civil and Political Rights, art 17: *Toonen v Australia*, UN Doc CCPR/C/50/D488/1992 (4 April 1994).

²⁴ *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.

²⁵ See *Anti-Discrimination Act 1991* (Qld) ch 2 pts 3, 4.

²⁶ *Anti-Discrimination Act 1991* (Qld) s 106. Other exemptions are included throughout the Act.

[26] Similar provisions prohibiting discrimination on the basis of homosexuality apply in the other Australian jurisdictions.²⁷

[27] In some jurisdictions, discrimination is also prohibited on the basis of a spent conviction,²⁸ an irrelevant criminal record,²⁹ or an expunged conviction for an historical gay sex offence.³⁰ There is no equivalent provision in Queensland.

Criminal records

[28] A person's criminal history is a formal record of the convictions that have been recorded against the person in respect of offences.³¹ The courts keep records of criminal cases and their outcomes. In addition, information about a person's criminal history is also held by the police,³² and may be held by the Office of the Director of Public Prosecutions and relevant government entities.³³

The effect of disclosure

[29] There are various circumstances in which the law requires or authorises convictions (and, in some cases, charges) to be disclosed.

[30] These include applying for work in particular professions or occupations (for example, as a health practitioner, teacher, lawyer, police officer, corrective services officer or security provider), obtaining a blue card for working or volunteering with children and young people, applying to adopt a child and applying for an entry visa

²⁷ 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; *Equal Opportunity Act 2010* (Vic) s 6(p); *Equal Opportunity Act 1984* (WA) s 35O. See also *Sex Discrimination Act 1984* (Cth) s 5A.

²⁸ *Discrimination Act 1991* (ACT) s 7(1)(o).

²⁹ *Anti-Discrimination Act* (NT) s 19(1)(q); *Anti-Discrimination Act 1998* (Tas) s 16(r). This applies, 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.

³⁰ *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.

³¹ See generally, *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3 (definition of 'criminal history'). 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). The meaning of 'criminal history' may vary depending on the legislative context in which it is used.

³² *Police Service and Administration Act 1990* (Qld) pt 10 sets out the purposes for which the police may disclose information (including criminal history information) held by the Queensland Police Service.

³³ Public authorities are required to keep full and accurate records of their activities: *Public Records Act 2002* (Qld) s 7(1)(a). See also the *Information Privacy Act 2009* (Qld), under which a Queensland Government agency must not disclose an individual's personal information (such as information about the individual's criminal history) to a third party except in limited circumstances, including where the individual is reasonably likely to be aware that it is the agency's usual practice to disclose that type of personal information to the third party, the individual has expressly or impliedly agreed to the disclosure, or the disclosure is authorised or required under law: sch 3 s 11(1)(a), (b), (d). Particular exceptions also apply to law enforcement agencies. A right to access personal (and non-personal) information held by Queensland Government agencies is created by the *Right to Information Act 2009* (Qld).

to a foreign country.³⁴ 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 conviction may also bar a person from particular civic offices or roles (for example, justice of the peace or jury service).³⁵

[31] People who have a conviction for an historical gay sex offence may also choose to limit their own career choices or participation in community life for fear that their conviction may be revealed, and that they may suffer from associated stigma or discrimination.

Spent convictions legislation

[32] The *Criminal Law (Rehabilitation of Offenders) Act 1986* provides a scheme 'for the notional sealing of criminal records under certain circumstances'.³⁶ It therefore provides an incentive 'to encourage offenders to rehabilitate themselves, to cast aside the social stigma associated with a criminal conviction'.³⁷

[33] The Act does not apply to all convictions, but provides for automatic rehabilitation 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;³⁸ and
- the 'rehabilitation period' (10 years for a person convicted on indictment as an adult, or otherwise five years) has expired;³⁹ and
- the conviction has not been 'revived' (by the person's conviction for another offence).⁴⁰

[34] 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

³⁴ See, eg, *Working with Children (Risk Management and Screening) Act 2000* (Qld) chs 8, 8A, which set out screening requirements and procedures for applicants for a blue card. The blue card screening check assesses a person's eligibility to work or volunteer with children based on an applicant's known past police and disciplinary information. This involves a check of a person's national criminal history (including all spent convictions and charges) and other disciplinary and police information.

³⁵ 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).

³⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 12 March 1986, 4110 (NJ Harper, Minister for Justice and Attorney-General).

³⁷ *Ibid.*

³⁸ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(2).

³⁹ 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 of conviction or, if an order of the court in relation to the conviction is not satisfied within that time, the date the order is satisfied.

⁴⁰ *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.

not disclose the spent conviction,⁴¹ and it is to be disregarded in an assessment of the person's fitness to be admitted to a profession, occupation or calling or for any other purpose.⁴²

[35] However, the Act provides a number of important exceptions to the general rule of non-disclosure.⁴³ Relevantly, a person who is applying for particular professions, occupations or licenses is still required to disclose convictions in relation to all, or certain, offences as specified in the Act.⁴⁴ 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.

[36] Similar legislation applies in most other Australian jurisdictions.⁴⁵

Pardons

[37] It is also possible in some cases for a person's conviction to be pardoned.

[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.⁴⁶ A pardon has the effect of 'discharging the convicted person from the consequences of the conviction',⁴⁷ but does not remove the conviction itself.

[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.⁴⁸ 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.⁴⁹

[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.

41 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.

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

43 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'.

44 See the list in *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9A(1).

45 See the Acts in the list of Abbreviations and Glossary at the beginning of this Paper.

46 See *Constitution of Queensland 2001* (Qld) s 36; *Criminal Code* (Qld) s 18. 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].

47 *Criminal Code* (Qld) s 677.

48 *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.

49 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).

WHETHER THERE IS A NEED TO CHANGE THE LAW

[41] In ordinary usage, to ‘expunge’ something is ‘to strike or blot out; erase; obliterate’ or ‘to efface; wipe out or destroy’.⁵⁰ Accordingly, ‘expungement’ is used to refer to the process of removing a past conviction from a person’s criminal record.⁵¹

[42] 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.⁵² This is commonly taken to have two main aspects: the complete or near complete restriction on disclosure of information about the conviction; and/or the annotation or removal of references to the conviction on official records, such as those held by police.⁵³

[43] These aims go further than existing spent convictions legislation. In particular, 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.

[44] As explained above, there are also limitations to the Governor’s power to pardon an offender. It has been observed, in particular, that the power ‘is exercised on rare occasions and usually in circumstances where mercy and compassion are warranted’, rather than in cases where the relevant conduct is no longer considered a criminal offence.⁵⁴

WHAT AN EXPUNGEMENT SCHEME MIGHT LOOK LIKE

[45] If there is a need to change the law to introduce a new expungement scheme, it is necessary to consider the features of that scheme and how it should operate and be administered.

The approach in other jurisdictions

[46] The scope and effect of expungement schemes differs among jurisdictions. There are, however, some key similarities. In particular, each scheme operates on a

⁵⁰ *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).

⁵¹ 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’.

⁵² 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.

⁵³ As explained further at [46] ff below, the particular effect of expungement differs among jurisdictions, as does the language used in expungement legislation.

⁵⁴ *ADC Tasmania Discussion Paper* (2014) 30. See also *Human Rights Law Centre Background Paper* (2014) 60.

case-by-case basis with the general purpose of expunging convictions for conduct that would not now be an offence.

[47] An outline is provided below. Key features are also highlighted in the questions and issues listed later in this Paper.

Australian Capital Territory

[48] The expungement scheme in the Australian Capital Territory is the most recent to be introduced.⁵⁵ It applies to convictions for an ‘historical homosexual offence’, namely:⁵⁶

- 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:⁵⁷
 - constituted by a person engaging in any form of sexual activity with another person of the same sex; or
 - a ‘public morality 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.

[49] Under the scheme, 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’. 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.⁵⁸

[50] 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.⁵⁹ Before making a decision, the Director-General may request further information from the applicant, and may require a public employee,

⁵⁵ The amending Bill was presented to Parliament on 17 September 2015, and the resulting expungement legislation commenced on 7 November 2015.

⁵⁶ *Spent Convictions Act 2000* (ACT) s 19A (definitions of ‘historical homosexual offence’ and ‘public morality offence’).

⁵⁷ 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.

⁵⁸ *Spent Convictions Act 2000* (ACT) s 19B.

⁵⁹ See *Spent Convictions Act 2000* (ACT) s 19B(2)(b)(iii), (c).

police officer, court, the Director of Public Prosecutions, or other prescribed entity to provide information to enable a decision to be made.⁶⁰

[51] To extinguish a conviction, the Director-General must be satisfied, on reasonable grounds, that any other person involved in the sexual activity:⁶¹

- consented to the sexual activity; and
- was of the required age.⁶²

[52] If the conviction is extinguished:⁶³

- 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.

[53] The scheme extends to the charge to which the extinguished conviction related.⁶⁴ However, nothing in the legislation authorises the destruction, by or on behalf of a public authority, of a record relating to an extinguished conviction.⁶⁵

[54] The scheme differs 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

⁶⁰ *Spent Convictions Act 2000* (ACT) ss 19C, 19F. No entities have yet been prescribed.

⁶¹ *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). These criteria would also apply to sexual offences, to the extent that they are relevant. No criteria have yet been prescribed.

⁶² 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 57, 8. See also *Crimes Act 1900* (ACT) ss 54, 55, 55A.

⁶³ *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).

⁶⁴ See *Spent Convictions Act 2000* (ACT) s 7A(2).

⁶⁵ *Spent Convictions Act 2000* (ACT) s 22.

travel opportunities are not affected by having a sexual offence conviction on their criminal record.⁶⁶

[55] 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.⁶⁷

New South Wales

[56] The framework of the New South Wales expungement scheme is very similar to that in the Australian Capital Territory.⁶⁸

[57] 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.⁶⁹

[58] 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 order 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.⁷⁰

[59] 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.⁷¹

[60] The effect of a conviction becoming extinguished under the scheme is generally the same as in the Australian Capital Territory (including that the scheme also applies to the charge to which an extinguished conviction relates).⁷² Significantly, 'the exceptions that apply to spent convictions ... will not apply. This means, for example, that extinguished convictions will not be disclosable for

66 Explanatory Notes, above n 57, 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.

67 *Spent Convictions Act 2000* (ACT) pt 3C. Applications for review are made to the ACT Administrative and Civil Tribunal.

68 The amending Bill was introduced into Parliament on 18 September 2014, and the resulting expungement legislation commenced on 24 November 2014.

69 *Criminal Records Act 1991* (NSW) s 19B.

70 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 yet 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).

71 *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.

72 See *Criminal Records Act 1991* (NSW) ss 4(2A), 19F–19H.

applications for appointment as a judge, police officer or teacher, or for court proceedings'.⁷³

[61] The scheme does not authorise the destruction of records.⁷⁴

[62] 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.⁷⁵

[63] Decisions under the scheme about extinguishing a conviction or reviving an extinguished conviction are subject to administrative review.⁷⁶

South Australia

[64] The South Australian expungement scheme — which was the first to be introduced in Australia — differs from those in other jurisdictions.⁷⁷ It adds to an already-existing scheme for making convictions for particular sex offences 'spent' convictions on the exercise of judicial discretion.

[65] 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, after the qualification period has ended, to a qualified magistrate for an order that the conviction is spent.⁷⁸

[66] Under those provisions, an application 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 documents without the applicant attending a hearing.⁷⁹

⁷³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 September 2014, 2 (B Notley-Smith).

⁷⁴ *Criminal Records Act 1991* (NSW) s 23.

⁷⁵ *Criminal Records Act 1991* (NSW) s 19I.

⁷⁶ *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.

⁷⁷ The amending Bill was introduced into Parliament on 25 September 2013, and the resulting expungement legislation commenced on 22 December 2013.

⁷⁸ *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. 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'.

⁷⁹ 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)–(2).

[67] 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:⁸⁰

designated sex-related offence means—

- (a) a sex offence [as prescribed by regulation]⁸¹—
 - (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)

[68] 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.⁸²

[69] 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.⁸³ However, for a designated sex-related offence, the magistrate may make an order without reference to any of the listed matters if satisfied that:⁸⁴

⁸⁰ *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).

⁸¹ The offences prescribed as 'sex offences' include offences against *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 (definition of 'sex offence'); *Spent Convictions Regulations 2011* (SA) reg 5.

⁸² *Spent Convictions Regulations 2011* (SA) reg 5A(2).

⁸³ *Spent Convictions Act 2009* (SA) s 8A(5).

⁸⁴ *Spent Convictions Act 2009* (SA) s 8A(6).

- the offence is a designated sex-related offence; and
- the conduct constituting the offence has ceased, by operation of law, to be an offence.

[70] 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.⁸⁵ In particular, specific provision is made that the exclusions for other spent convictions do not apply.⁸⁶ 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)’.⁸⁷

Victoria

[71] The Victorian expungement scheme has a number of distinct features.⁸⁸ It does not build on existing spent convictions legislation, which Victoria does not have, and has a generally broader approach than the schemes in other Australian jurisdictions. It has a number of features in common with the scheme in England and Wales.

[72] The scheme 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 can 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.⁸⁹

[73] ‘Historical homosexual offence’ is defined by description only, and not by reference to specific named offences.⁹⁰ 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.

[74] An ‘historical homosexual offence’ means:⁹¹

⁸⁵ *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).

⁸⁶ *Spent Convictions Act 2009* (SA) s 13(5). Cf s 13(1), sch 1.

⁸⁷ 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).

⁸⁸ The amending Bill was introduced into Parliament on 16 September 2014, and the resulting expungement legislation commenced on 1 September 2015.

⁸⁹ *Sentencing Act 1991* (Vic) ss 105(1) (definition of ‘applicant’), 105B(1)–(3).

⁹⁰ Note that Victoria is a common law jurisdiction with some, but not all, offences defined in the *Crimes Act 1958* (Vic).

⁹¹ *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’.

- 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.

[75] 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 conviction.⁹² The Secretary may also require the applicant, or another person or body, to provide further information on the application.⁹³

[76] 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.⁹⁴

[77] Provision is also made for the Secretary to appoint one or more persons to provide advice on an application, to which the Secretary must also have regard.⁹⁵

[78] An oral hearing is not to be held.⁹⁶

[79] 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:⁹⁷

- 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

⁹² *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, Victoria Police or the Office of Public Prosecutions: s 105(1). The consent provision applies to official records 'created by' those entities. See also the Application Forms available at <<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/criminal+law/expungement+scheme>>.

⁹³ *Sentencing Act 1991* (Vic) ss 105C, 105D(1)(c)–(d), 105E.

⁹⁴ *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: ss 105D(3)(b), 105H.

⁹⁵ *Sentencing Act 1991* (Vic) ss 105D(1)(b), 105F.

⁹⁶ *Sentencing Act 1991* (Vic) s 105D(1)(e).

⁹⁷ *Sentencing Act 1991* (Vic) s 105G(1).

- the conduct, if engaged in by the person at the time of making the application, would not constitute an offence under Victorian law.

[80] In deciding whether the second of those tests is satisfied, the Secretary is to consider, where relevant, the consent and age of any other person involved in the conduct.⁹⁸

[81] The test for expungement reflects the difficulty of the issue. ‘We cannot tell from simply 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.’⁹⁹

[82] The effect of a conviction becoming expunged under the scheme 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 the basis of the conviction, before it became expunged, without waiting any minimum period.¹⁰⁰

[83] The Victorian scheme also goes further by providing for entries relating to the conviction in ‘official records’ to be altered by:¹⁰¹

- 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.

[84] The scheme applies both to the conviction as well as to the charge to which the conviction relates and ‘any investigation or legal process associated with that charge or the conviction’.¹⁰²

[85] The Secretary’s decision on an application is subject to review.¹⁰³

⁹⁸ *Sentencing Act 1991* (Vic) s 105G(2).

⁹⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 2014, 3352 (R Clark, Attorney-General).

¹⁰⁰ *Sentencing Act 1991* (Vic) ss 105J, 105K(6)–(8).

¹⁰¹ *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 92 above for the meaning of ‘official record’.

¹⁰² See *Sentencing Act 1991* (Vic) s 105(4).

¹⁰³ *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 the Victorian Civil and Administrative Tribunal.

England and Wales

[86] The expungement scheme 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.¹⁰⁴

[87] 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.¹⁰⁵

[88] 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.¹⁰⁶

[89] To become a disregarded conviction or caution, the Secretary must decide that it appears that:¹⁰⁷

- 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).

[90] 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 must not be held for the purpose of deciding the application.¹⁰⁸ The Secretary may appoint advisers.¹⁰⁹

[91] The scheme 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:¹¹⁰

¹⁰⁴ *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 Vic, 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.

¹⁰⁵ *Protection of Freedoms Act 2012* (UK) c 9, s 92(1).

¹⁰⁶ *Protection of Freedoms Act 2012* (UK) c 9, s 93. See also the Application Form available at <https://www.gov.uk/delete-historic-conviction>.

¹⁰⁷ *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).

¹⁰⁸ *Protection of Freedoms Act 2012* (UK) c 9, s 94(1)–(2).

¹⁰⁹ *Protection of Freedoms Act 2012* (UK) c 9, s 100.

¹¹⁰ *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’.

- 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 above;
- questions about previous convictions, cautions, conduct or circumstances are to be treated as not relating to any disregarded conviction or caution;
- 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.

[92] The non-disclosure provisions 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.¹¹¹

[93] 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.¹¹²

[94] The expungement legislation also provides that the spent convictions legislation does not apply to a disregarded conviction or caution.¹¹³

[95] An unsuccessful applicant under the scheme may, with permission of the court, appeal to the High Court.¹¹⁴

[96] As at 28 July 2014, there were 193 applications from 153 individuals 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.¹¹⁵

111 *Protection of Freedoms Act 2012* (UK) c 9, s 98(2), (3).

112 *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.

113 *Protection of Freedoms Act 2012* (UK) c 9, s 134, amending *Rehabilitation of Offenders Act 1974* (UK) c 53, s 1.

114 *Protection of Freedoms Act 2012* (UK) c 9, s 99.

115 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>>.

Matters for consideration

[97] Although expungement of convictions is simple in concept, it may not be straightforward in practice.

[98] For example, there are a range of different offences that might be included in an expungement scheme. The challenge is to ensure that any scheme is 'flexible enough to capture ... all offences that criminalised consensual homosexual activity' whilst ensuring that those 'related to non-consensual acts, which remain illegal, are not affected'.¹¹⁶ Historical gay sex offences in Queensland were not limited to private homosexual acts between consenting adults, but extended to non-consensual conduct and conduct in public places. Much will depend on the facts of each case and, in turn, the extent of available historical information.

[99] It will also be relevant to consider the likely numbers of people convicted of historical gay sex offences.¹¹⁷ This may be difficult to determine with accuracy.

[100] It is also necessary to keep in mind the overall purpose of an expungement scheme which, it has been said, is to restore a person's position as if they had never been convicted and 'to work towards repairing the harm caused by historical discriminatory laws'.¹¹⁸ This suggests that any process for seeking expungement should be sensitive to the concerns of those affected, including privacy concerns.¹¹⁹ It will also inform questions about the scope and effect of an expungement scheme.

[101] Some of these matters will also be informed by other practical considerations, including the number and types of records held by different agencies about convictions.

[102] The following part of this Paper sets out the key questions and issues on which the Commission is seeking submissions. These relate to:

- the need for and nature of an expungement scheme (Questions 1 and 5);
- eligibility for such a scheme (Questions 2 to 4);
- the criteria for expungement (Question 6);
- the effect of a conviction becoming expunged (Question 7);
- procedural features (Question 8); and
- other miscellaneous matters (Question 9).

¹¹⁶ *ADC Tasmania Report* (2015) 7.

¹¹⁷ See [12] above, in relation to the period between 1859 and 1954.

¹¹⁸ *LGBTI Legal Service Discussion Paper* (2015) 18. See also the references in n 52 above.

¹¹⁹ See, eg, *LGBTI Legal Service Discussion Paper* (2015) 20; *ADC Tasmania Report* (2015) 15.

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Key questions and issues

Issues	Approaches in other jurisdictions	Considerations and options
Q-1 Is there a need to change the law to introduce a new scheme for expungement?		
<p>The Commission is to consider <i>how</i> convictions for historical gay sex offences can be expunged. The threshold issues are:</p> <ul style="list-style-type: none"> • Whether there are means of addressing the issue under existing laws. • Whether there needs to be a new expungement scheme. 	<ul style="list-style-type: none"> • The expungement schemes in other jurisdictions have each been given effect by legislation (ACT, NSW, SA, Vic, Eng). 	<p><u>Option 1: Rely on existing mechanisms</u></p> <ul style="list-style-type: none"> • There are existing mechanisms to ‘pardon’ a conviction or make a conviction ‘spent’. However, the scope and effect of those mechanisms is limited, eg: <ul style="list-style-type: none"> – A pardon discharges the person from the consequences of the conviction (such as sentence), but does not remove the conviction itself. – A spent conviction is still subject to disclosure when applying for a range of jobs or positions, including (for certain sexual and other offences) as a teacher. <p><u>Option 2: Introduce a new legislative scheme</u></p> <ul style="list-style-type: none"> • This would allow a tailored and comprehensive response. On the other hand, it may introduce unnecessary complexity if an existing mechanism is considered sufficient.
<ul style="list-style-type: none"> • Whether any new expungement scheme should be enacted by amending or adapting existing 	<ul style="list-style-type: none"> • ACT, NSW and SA amended their spent convictions legislation. • Vic, which does not have spent convictions legislation, amended its <i>Sentencing Act 1991</i> (Vic). 	<p><u>Option 1: Amend the spent convictions legislation</u></p> <ul style="list-style-type: none"> • This would build upon an existing framework, with necessary changes for the desired result. It would

Issues	Approaches in other jurisdictions	Considerations and options
<p>legislation, or by a new stand-alone Act.</p>	<ul style="list-style-type: none"> In Eng, new provisions were included as part of the <i>Protection of Freedoms Act 2012</i> (UK) c 9. 	<p>require, for example, exclusion of the provisions that allow disclosure of spent convictions.</p> <ul style="list-style-type: none"> However, the focus of the spent convictions legislation is on rehabilitation of offenders, not the undoing of a conviction that should never have been imposed, and so may not be a suitable place for an expungement scheme. <p><u>Option 2: Introduce separate legislation</u></p> <ul style="list-style-type: none"> This would have greater flexibility but may unnecessarily add to the complexity of the Qld statute book.
<p>Q-2 Which criminal offences should be covered by an expungement scheme, and how should they be defined?</p>		
<p>The types of offences that should be covered, including:</p> <ul style="list-style-type: none"> Whether it should include offences constituted by sexual activity only (or also more general offences). Whether it should include offences related to sexual activity between males only, or also between females. Whether it should include offences of attempting or conspiring to commit, or inciting, an eligible offence. 	<ul style="list-style-type: none"> Generally, the expungement schemes in other jurisdictions cover former offences of ‘buggery’ and indecency between males, and other offences constituted by sexual activity between consenting adults of the same sex. ACT, NSW and Vic also include public morality or public order offences under which homosexual activity may have been punished, even though those offences are not specific to sexual activity. In ACT, NSW, SA and Vic, the eligible offences generally relate to sexual activity between persons of the same sex. In Eng, the eligible offences appear to be limited to activity between males. 	<ul style="list-style-type: none"> A key consideration is the intended purpose of expungement in the context of homosexual law reform. Prior to legalisation, homosexual activity may have been punished under a range of different offences, only some of which were specific to same-sex activity. Although non-sexual offences, such as soliciting, did not make homosexual activity an offence directly, their use to punish persons identified as homosexual may justify their inclusion. It was primarily men engaging in homosexual activity who were prosecuted, as reflected by the

Issues	Approaches in other jurisdictions	Considerations and options
	<ul style="list-style-type: none"> Generally, the expungement schemes also apply to offences of attempting or conspiring to commit, or inciting, any of the eligible offences. 	<p>specific homosexual offences in the Criminal Code.</p>
<ul style="list-style-type: none"> How the offences should be identified or defined. 	<p><u>Specific offences</u></p> <ul style="list-style-type: none"> In ACT, NSW and Eng, the expungement schemes apply to specific offences relevant to homosexual activity. These are restricted by describing particular features that must constitute the offence (NSW) or by the criteria for expungement (ACT, NSW, Eng). <p><u>Regulations</u></p> <ul style="list-style-type: none"> In ACT and NSW, the expungement schemes also apply to offences prescribed by regulation. In ACT, this is restricted by descriptions of particular features that must constitute the offence. <p><u>Description</u></p> <ul style="list-style-type: none"> In SA and Vic, the offences to which the expungement schemes apply are identified by description. In SA, the description includes limiting factors such as age and consent, eg, it applies to an offence where the offence is constituted by consenting persons of the same sex engaging in sexual activity; at least one of them is 16 or 17 years and none of them is younger; and their actions would 	<p><u>Option 1: Identify specific offences</u></p> <ul style="list-style-type: none"> A number of specific offences could be identified, including sections 208 (unnatural offences), 209 (attempt to commit unnatural offences) and 211 (indecent practices between males) of the Criminal Code. This would have the advantage of clearly specifying which offences the scheme applies to. However, some conduct captured by those offences might still be considered an offence today, eg, non-consensual activity. Without additional limitations, this approach might mean that some inappropriate convictions are included. This approach might also have the result that relevant offences are overlooked since it relies on specific identification of the offence. <p><u>Option 2: Provide for specific offences to be identified later by regulation</u></p> <ul style="list-style-type: none"> It may be difficult to identify all the relevant offences under which homosexual activity may have been punished. Allowing offences to be included later by regulation would give some flexibility to the scheme.

Issues	Approaches in other jurisdictions	Considerations and options
	<p>not have constituted an offence if they were not of the same sex.</p> <ul style="list-style-type: none"> In Vic, the description is in wide terms, leaving questions of lawfulness, consent and age to the criteria for expungement. In particular, it applies 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’. 	<ul style="list-style-type: none"> However, this approach may also need additional limitations to ensure that only appropriate convictions are included. <p><u>Option 3: Identify relevant offences by description</u></p> <ul style="list-style-type: none"> Offences could be identified by description including, eg, by reference to sexual or homosexual activity. This approach has the advantage of not restricting the scheme to specific offences only and removing the risk of inadvertently excluding relevant offences. However, it may provide less clarity and be reliant on individual interpretation. This could impact on the efficiency of the scheme. <p><u>Option 4: Combined approach</u></p> <ul style="list-style-type: none"> An alternative is to adopt elements of each of the other options to balance the needs of precision, flexibility and completeness. For example, the scheme could apply to particular specific offences, offences defined by description, and any other offences later provided in a regulation.
<ul style="list-style-type: none"> Whether limiting factors such as consent, age, and lawfulness should be included in the definition of the relevant offences. 	<ul style="list-style-type: none"> Issues relating to consent and age (ACT, NSW, SA and Eng) and lawfulness (Vic and Eng) are dealt with in the criteria for expungement, rather than in limiting the range of offences to which the scheme <i>prima facie</i> applies. 	<ul style="list-style-type: none"> A key consideration is to ensure that any scheme only expunges convictions for an activity that would not presently be considered an offence. This is linked with the related discussion about criteria for expungement in Q-6 below.

Issues	Approaches in other jurisdictions	Considerations and options
	<ul style="list-style-type: none"> In SA, consent and age are built in to the definition of the offences to which the scheme applies. 	<ul style="list-style-type: none"> For some offences, such as sodomy, this will require consideration of whether the relevant activity was consensual and between persons who had reached the current age of consent. In Queensland, the age of consent for sexual activity is generally 16 years, but for sodomy the age of consent is currently 18 years. However, consent and age may not be relevant for all offences brought into the scheme. For those offences, it will nevertheless be necessary to consider the extent to which the behaviour is covered by existing offences. <p><u>Option 1:</u></p> <ul style="list-style-type: none"> Include limiting factors such as consent, age and lawfulness in the definition of the offences to which an expungement scheme applies. This would require definition of the offences by description, at least in part. It would narrow the scheme, but might make it more difficult for people to determine the offences to which the scheme applies. <p><u>Option 2:</u></p> <ul style="list-style-type: none"> Include offences in wider terms but limit the scheme through the criteria for expungement. The criteria could include relevant limiting factors of consent, age and lawfulness.

Issues	Approaches in other jurisdictions	Considerations and options
		<ul style="list-style-type: none"> This would ensure that all relevant offences can be brought into the scheme, <i>prima facie</i>, with an assessment then made about whether the offence is appropriate to be expunged. Such an approach is likely to require a case-by-case assessment, rather than an automatic expungement scheme (see Q-5 below).
<p>Q-3 Should an expungement scheme also apply to charges for an offence or other legal processes related to a conviction?</p>		
<ul style="list-style-type: none"> Whether expungement should extend to charges that did not result in conviction, and/or to any other related circumstances. 	<ul style="list-style-type: none"> In SA, expungement is limited to convictions (including court findings treated as convictions). ACT and NSW expungement schemes apply to both a conviction and the charge to which the conviction relates. In Vic, the expungement scheme applies to the conviction, the charge to which the conviction relates, and ‘any investigation or legal process associated with that charge or the conviction’. The expungement scheme in Eng applies to convictions and cautions. It also extends to ‘circumstances ancillary’ to them, including ‘any process or proceedings preliminary to the conviction’. The person is to be treated in law as if they had not committed or been charged with, cautioned, convicted or sentenced for, the offence. 	<ul style="list-style-type: none"> A relevant consideration is the impact of public disclosure on an individual’s privacy and the extent of existing privacy protections. Whether an expungement scheme should apply to a charge that did not result in a conviction may depend on the extent to which such charges are, or may be, subject to disclosure. A different consideration is the extent to which expungement of a conviction should also expunge records of the charge or other legal processes related to that conviction. This may be necessary to address the full impact of having had such a conviction imposed. However, it may also be impractical to expunge the full range of related records.

Issues	Approaches in other jurisdictions	Considerations and options
Q-4 Should an expungement scheme be confined to living persons?		
<ul style="list-style-type: none"> Whether expungement should be available if the convicted person has died. 	<ul style="list-style-type: none"> The ACT, NSW and Vic schemes allow applications to be made by an appropriate representative (such as a spouse, parent, child or sibling) for a convicted person who has died. 	<p>A deceased person's reputation might suffer on the basis of having been convicted of an historical gay sex offence. By way of comparison, however, there is no cause of action for defamation of a deceased person.</p> <p><u>Option 1: Extend the scheme to deceased persons</u></p> <ul style="list-style-type: none"> This may provide significant comfort to surviving family members or friends. However, it may lead to a greater number of applications being made, with resourcing impacts. It may also be impractical, and would no longer be necessary to overcome legal disadvantage, due to the passage of time and death of the convicted person. <p><u>Option 2: Limit the scheme to living persons</u></p> <ul style="list-style-type: none"> This would avoid the difficulties identified above and ensure priority is given to those people continuing to suffer disadvantage today. Consideration might be given to addressing concerns on behalf of deceased persons by a petition for a pardon. However, there are limitations to the effect of pardons.

Issues	Approaches in other jurisdictions	Considerations and options
Q-5 What type of scheme should it be?		
<ul style="list-style-type: none"> Whether convictions should be expunged automatically or on a case-by-case basis. 	<ul style="list-style-type: none"> The expungement schemes in other jurisdictions operate on a case-by-case basis, rather than automatically (ACT, NSW, SA, Vic, Eng). 	<p><u>Option 1: Automatic scheme</u></p> <ul style="list-style-type: none"> An automatic process would reduce the burden on individuals who wish to have a conviction expunged and would involve fewer resources. However, it would require a high degree of certainty, for example, in identifying the relevant offence and that the particular conduct is not an offence under the current law. For many convictions this is unlikely to be possible. There are also likely to be practical limitations in giving effect to an automatic scheme, eg, in how relevant agencies and individuals would know whether a conviction fits within the scheme and is, by force of law, expunged. <p><u>Option 2: Case-by-case scheme</u></p> <ul style="list-style-type: none"> Case-by-case consideration would allow for greater precision in assessing each conviction (see also Q-6 below). It is also likely to be more practical, given the range of relevant offences and circumstances of convictions. This would, however, involve more resources and time, including for individuals who wish to have a conviction expunged.

Issues	Approaches in other jurisdictions	Considerations and options
<p>If an expungement scheme should operate on a case-by-case basis:</p> <ul style="list-style-type: none"> • Whether the scheme should be an administrative or judicial process. • Who the decision-maker should be. 	<ul style="list-style-type: none"> • ACT, NSW and Vic have administrative schemes — applications are made to the Director-General / Secretary of the justice department (with assistance from advisers in Vic). • In Eng, applications are made to the Home Secretary (with power to appoint advisers). • SA has adapted an existing judicial scheme — applications are made to a qualified magistrate (although hearings are ordinarily held in private and may be conducted on the papers). 	<ul style="list-style-type: none"> • Relevant considerations include accessibility and flexibility, formality, sensitivity and privacy, experience and expertise, independence, and expense. <p><u>Option 1: A judicial scheme</u></p> <ul style="list-style-type: none"> • A judge, magistrate or member of a tribunal could decide applications. Members of the judiciary are experienced in deciding legal questions on the facts of each case. However, this is a formal (and ordinarily public) process. It may not be suitable if a re-trial or formal hearing of evidence is not intended. It would also add to the judicial workload and overall cost of the scheme. <p><u>Option 2: An administrative scheme (Governor or Attorney-General)</u></p> <ul style="list-style-type: none"> • Decision-making power could be conferred on the Governor (who has power to pardon convictions) or on the Attorney-General (the first law officer of the State), with advice from experts. However, this might be perceived as too formal. <p><u>Option 3: An administrative scheme (Director-General DJAG)</u></p> <ul style="list-style-type: none"> • Applications could be made to the Director-General of DJAG, which oversees the ODPP and Courts Service. This would ensure relevant legal expertise and knowledge, greater flexibility and independence. On the other hand, individuals may be deterred from dealing with an agency

Issues	Approaches in other jurisdictions	Considerations and options
		<p>associated with the enforcement of historical gay sex offences.</p> <p><u>Option 4: An administrative scheme (independent panel or committee)</u></p> <ul style="list-style-type: none"> An independent expert panel or committee could be established to decide applications. This could draw from a range of positions, expertise and experience, and provide independence and accessibility. However, it would likely involve significant resources.
<p>Q-6 When should a conviction be expunged under a scheme (the criteria for expungement)?</p>		
<ul style="list-style-type: none"> What criteria should be met for a conviction to be expunged. 	<p>A conviction can be expunged if:</p> <ul style="list-style-type: none"> In ACT and NSW — the other person involved in the conduct consented to the sexual activity, and was of the required age (generally 16 years or older). In SA — the offence is an eligible offence, and such conduct has ceased by operation of law to be an offence. Consent and age are built in to the definition of what is an eligible offence. In Vic — the offence is an eligible offence, and: <ul style="list-style-type: none"> the person would not have been charged but for the fact the activity was of a homosexual nature; and 	<ul style="list-style-type: none"> A key consideration is to ensure that only those convictions for behaviour that would not currently be considered an offence are expunged. Other considerations include: <ul style="list-style-type: none"> The scope of offences to be captured by the scheme, and how eligible offences are to be defined (see Q-2 above). The extent to which historical information may be available for the decision-maker to assess the circumstances of the conviction. <p><u>Option 1: Consent and age</u></p> <ul style="list-style-type: none"> For some offences, such as sodomy, consideration about whether the activity was consensual and between persons of or above the current age of consent will be needed to decide if the behaviour

Issues	Approaches in other jurisdictions	Considerations and options
	<ul style="list-style-type: none"> – such conduct would not now constitute an offence (having regard, if relevant, to consent and age). • In Eng — if the other person consented and was aged 16 years or over, and the conduct would not now be an offence (namely, of sexual activity in a public lavatory). 	<p>would not currently be an offence (see also Q-2 above).</p> <p><u>Option 2: Additional or alternative criteria</u></p> <ul style="list-style-type: none"> • For other offences by which homosexual activity may have been punished, such as soliciting, consent may not be relevant. It may be difficult to assess, in light of contemporary laws and values, whether the behaviour would be considered an offence today. • Additional or alternative criteria may be needed — for example, that the person would not have been charged but for the fact the activity was homosexual. This may also be difficult to assess.
<ul style="list-style-type: none"> • Whether there are other factors the decision-maker should consider. 	<ul style="list-style-type: none"> • In Vic, consent and age are factors to be considered ‘where relevant’ in deciding whether the conduct would not now be an offence. 	<ul style="list-style-type: none"> • This is likely to depend on the way the criteria are expressed. If the criteria are comprehensive and clear, there may be no need for additional factors.
Q-7 What should be the effect of ‘expungement’ under a scheme (the consequences of a conviction becoming expunged)?		
<ul style="list-style-type: none"> • To what extent should an expunged conviction be protected from disclosure. 	<p>Expunged convictions are protected from disclosure in various ways:</p> <ul style="list-style-type: none"> • The person is not required to disclose information about the expunged conviction (ACT, NSW, SA, Vic). • A question about the person’s criminal history is taken not to refer to the expunged conviction (ACT, NSW, SA, Vic, Eng). 	<ul style="list-style-type: none"> • A relevant consideration is how far an expungement scheme should go to restore a person’s position at law as if the conviction had never been imposed. • This will depend on the circumstances in which — and purposes for which — disclosure may presently occur.

Issues	Approaches in other jurisdictions	Considerations and options
	<ul style="list-style-type: none"> • Evidence is not admissible in judicial proceedings to prove the person was charged with, prosecuted for, convicted of, sentenced for or cautioned for the offence (Eng). • In applying an Act to a person, a reference to a conviction is taken not to refer to the expunged conviction (ACT, NSW, SA, Vic). • In applying an Act to a person, a reference to the person's character does not allow or require anyone to take the expunged conviction into account (ACT, NSW, SA, Vic). • 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 (SA, Vic, Eng) and the person may reapply if such was refused solely on the basis of the conviction before it was expunged (Vic). • 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 (Eng). 	
<ul style="list-style-type: none"> • Whether there should be offences for unlawful disclosure, or improper obtaining, of information about an expunged conviction. 	<p>It is an offence to:</p> <ul style="list-style-type: none"> • Disclose information about an expunged conviction, from records kept by or on behalf of a public authority (ACT, NSW, SA) or by a person with access to official records (Vic). 	<ul style="list-style-type: none"> • Offence provisions may strengthen the protections against disclosure.

Issues	Approaches in other jurisdictions	Considerations and options
	<ul style="list-style-type: none"> Fraudulently or dishonestly obtain information about an expunged conviction from records kept by or on behalf of a public authority (ACT, NSW, SA). <p>There are some exceptions, eg:</p> <ul style="list-style-type: none"> If the disclosure is to (ACT, NSW) or with the consent of (SA, Vic) the convicted person. If the decision-maker under the scheme informs a public authority holding information about convictions that the conviction is expunged (ACT, NSW). 	
<ul style="list-style-type: none"> Whether official records should be annotated or deleted. 	<ul style="list-style-type: none"> In Vic and Eng, official records of convictions (eg, those held by courts and police) are to be annotated to record the fact that the conviction is expunged. In Vic, entries about an expunged conviction in electronic duplicates or extracts of official records are to be removed, made incapable of being found, or de-identified. The NSW and ACT schemes do not authorise the destruction, by or on behalf of a public authority, of records relating to expunged convictions. 	<ul style="list-style-type: none"> Relevant considerations include the range of 'official' records relating to convictions held by public agencies, the practicality of altering those records, and the overall purpose of an expungement scheme to 'wipe the slate clean'. Preservation of social and legal historical information for legitimate research purposes is also a relevant consideration. A further consideration is the possibility that an expunged conviction (based on false or misleading information or documents) might be revived.
<ul style="list-style-type: none"> Whether an expunged conviction can be revived. 	<ul style="list-style-type: none"> The NSW scheme provides that a conviction may cease to be expunged if it was expunged on the basis of false or misleading information or documents. 	<ul style="list-style-type: none"> This requires a balance between the need for finality, and the need to ensure that convictions are expunged in appropriate circumstances only.

Issues	Approaches in other jurisdictions	Considerations and options
Q-8 What procedural features should an expungement scheme have, and how should it operate?		
<ul style="list-style-type: none"> The process of making an application, including what information should be included in an application. 	<ul style="list-style-type: none"> The schemes in ACT, NSW, SA, Vic and Eng provide for applications to be made by the person convicted of the relevant offence. Vic also provides for the guardian of the convicted person to apply if the convicted person is unable to apply because of a disability. Applications are usually required to be in writing or in an approved form, and to include particular information: <ul style="list-style-type: none"> The convicted person's name, date of birth, and address at the time of the application and at the time of the conviction (ACT, NSW, SA, Vic, Eng). When and where the person was convicted (ACT, NSW, Vic, Eng) and details of the offence (SA, Vic). Transcript or sentencing remarks relating to the conviction (SA). In ACT, SA, Vic and Eng, applications may also include supporting information or statements and, in Vic, evidence from the other person involved. In Vic, an applicant must also authorise a police record check and give consent to the disclosure to the decision-maker of official records created by the courts, police or office of public prosecutions relating to the conviction. 	<p>If an expungement scheme should be a case-by-case scheme, relevant considerations include:</p> <ul style="list-style-type: none"> The form of an application and what information it should include. This may depend on the type of information likely to be within the applicant's possession (and the information needed to assess the application). Whether an application can relate to more than one conviction. Whether provision should be made for an application to be withdrawn or amended. This may be appropriate to allow an applicant to respond to other information that is obtained by the decision-maker.

Issues	Approaches in other jurisdictions	Considerations and options
	<ul style="list-style-type: none"> In Vic, provision is made for applications to be withdrawn, and in ACT and NSW applicants are given an opportunity to provide further information before an application, which is proposed to be refused, is finally decided. 	
<ul style="list-style-type: none"> The decision-making process, including information and evidence. 	<ul style="list-style-type: none"> In ACT, NSW and Vic, the decision-maker may request or require further information from the applicant, or from another person or body (eg, police, court, director of public prosecutions). In Vic and Eng, the decision-maker must have regard to any available record of the investigation of, or proceedings relating to, the offence, and has power to appoint advisers. In SA, which has a judicial scheme, the Attorney-General or Commissioner of Police may intervene in a proceeding. Applications are to be heard in private unless the magistrate considers otherwise or the applicant consents. In NSW, Vic and Eng, an oral hearing is not to be held. 	<p>Relevant considerations include:</p> <ul style="list-style-type: none"> The need for procedural fairness. The criteria for expungement, and what information is needed or relevant to its consideration. Which agencies hold relevant information, and whether legislative provisions or consents are required to overcome any privacy obligations that would prevent its disclosure to the decision-maker. Whether information or evidence should be received orally and, if so, whether this should be in public or private. Giving oral evidence may be traumatic and, due to the passage of time, of little additional benefit. Privacy is relevant given that part of the impetus for expungement is the stigma associated with having a conviction. The benefits of the decision-maker seeking expert (legal) advice, and any associated costs.
<p>Processes once a decision is made, including:</p>	<ul style="list-style-type: none"> In Vic, the decision-maker must determine the application 'as promptly as possible'. ACT, NSW, Vic and Eng require the applicant to be given written notice of the decision. Written 	<ul style="list-style-type: none"> Key considerations are the need for procedural fairness, transparency and accountability.

Issues	Approaches in other jurisdictions	Considerations and options
<ul style="list-style-type: none"> • What provision there should be about giving decisions and reasons. • Who should be informed if a conviction is expunged. 	<p>reasons are also required in Vic and, if the application is refused, in ACT.</p> <ul style="list-style-type: none"> • Notice of a decision to expunge a conviction must also be given to the chief police officer (ACT) and the ‘data controller’ for official records held by the courts, police and office of public prosecutions (Vic). 	<ul style="list-style-type: none"> • It is also relevant to consider the extent to which other agencies, such as police, may need to be informed of a decision in order to give it effect.
<ul style="list-style-type: none"> • Review processes and whether subsequent applications should be allowed. 	<ul style="list-style-type: none"> • In ACT and Vic, a person whose application is refused may reapply if the decision-maker is satisfied additional supporting information became available after the earlier application was decided. • In ACT, NSW and Vic, the applicant may apply for review of a decision to the relevant civil and administrative tribunal. In ACT, this is limited to a decision refusing the application. In Vic, this applies to a decision refusing the application (applicant may apply) and a decision approving the application (‘data controller’ of official records may apply). • In Eng, the applicant may appeal a decision refusing the application to the High Court, with permission from the Court. 	<ul style="list-style-type: none"> • Key considerations are the need for procedural fairness, accountability and accessibility in providing for a review mechanism. • If provision is made to maintain the privacy of applications in the first instance, consideration might also be given to the privacy of any subsequent review. • In relation to subsequent or multiple applications, there is a need to balance finality and fairness.

Issues	Approaches in other jurisdictions	Considerations and options
Q-9 Are there any other matters that should be considered?		
<p>Whether expungement should be supported by other measures, eg:</p> <ul style="list-style-type: none"> Consequential amendments to other legislation, such as the <i>Anti-Discrimination Act 1991</i>. Funding for legal assistance and support for affected people. 	<ul style="list-style-type: none"> ACT made consequential amendments to other Acts, including the <i>Working with Vulnerable People (Background Checking) Act 2011</i> (ACT), to ensure that an expunged conviction is not included in criminal history checks. ACT and Vic made consequential amendments to their anti-discrimination legislation to include an expunged conviction as a prohibited ground of discrimination. 	<ul style="list-style-type: none"> Consequential amendments to other Acts may be needed to ensure expunged convictions are excluded from criminal history checks. For example, the employment screening provisions of the <i>Working with Children (Risk Management and Screening) Act 2000</i> currently apply despite anything in the spent convictions legislation. Depending on the intended purpose of expungement, it may also be appropriate to amend the <i>Anti-Discrimination Act 1991</i> to prohibit discrimination on the basis that the person has an expunged conviction. Affected people may require support to understand and use an expungement scheme and deal with potential distress. This might require additional resources.

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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*);¹²⁰ (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;

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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**.

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Appendix B: Extracts of Offences

Historical offences

Set out below are the main offences identified as historical gay sex offences in the Criminal Code, prior to their repeal.¹²¹

208 Unnatural offences

Any person who—

- (1) Has carnal knowledge 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.]¹²²

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.

The offender cannot be arrested without warrant except in a case referred to in the preceding paragraph.]¹²³

¹²¹ 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 had provided for imprisonment 'with hard labour'.

¹²² The term of imprisonment was changed from 14 years (as it was in the Criminal Code 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.

¹²³ The term of imprisonment was changed from seven years (as it was in the Criminal Code as passed) to three years, and the second paragraph inserted, by the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 11.

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.]¹²⁴

336 Assault with intent to commit unnatural offence

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 assaults¹²⁵

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.

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.

¹²⁴ These words were added by the *Criminal Code Amendment Act 1943*, 7 Geo 6, s 3.

¹²⁵ This provision was substituted, by the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 28, for the earlier provision which was 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* as passed) to seven years by the *Criminal Code and the Justices Act Amendment Act 1975* (Qld) s 41 sch.

Current offences

Set out below is the current offence in Queensland of 'unlawful sodomy', and the offences of 'indecent acts' and 'wilful exposure' referred to in the terms of reference.

Criminal Code

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.
- (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.

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.

Summary Offences Act 2005**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.¹²⁶
- Maximum penalty—
- (a) 2 penalty units; or
 - (b) if the offence involves circumstances of aggravation—40 penalty units or 1 year's imprisonment.
- (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.

¹²⁶ 'Public place' is relevantly defined in that Act to mean 'a place that is open to or used by the public, whether or not on payment of a fee'.

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