

Submission to the
Queensland Law Reform Commission

Review of expunging criminal convictions for historical
gay sex offences

March 2016

This submission was primarily researched and drafted by senior law students **Erin Morris, Sarah Clouston** and **Chloe Widmaier** under the academic supervision **Professor Heather Douglas**. The submission was initially run as a project through the UQ Pro Bono Centre, with students undertaking this task on a *pro bono* basis - without any academic credit or reward - as part of their contribution to service as future members of the legal profession. Additional academic staff with expertise in criminal law also provided valuable input into the project, with the result being a collaborative submission between senior law students and criminal law academics.

23 March 2016

The Secretary
Queensland Law Reform Commission
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George Street Post Shop
QLD 4003
By email: LawReform.Commission@justice.qld.gov.au

TC Beirne School of Law

CRICOS PROVIDER NUMBER 000258

Dear Sir / Madam

Re: Review of Expunging Criminal Convictions for Historical Gay Sex Offences (WP No 74)

We thank the Queensland Law Reform Commission for allowing us to contribute to its review of expunging criminal convictions for historical gay sex offences. We propose an approach to expungement as set out on page 9 of this submission. Initially however we address a range of relevant considerations.

1.0 Current Procedures

To determine whether an expungement scheme is necessary in Queensland, it is first relevant to examine the effectiveness of the current procedures in place.

1.1 Pardon

Under the *Constitution of Queensland*¹ the Governor may grant pardons for crimes, sparing the convicted person from the consequences of the conviction.² However, a pardon does not remove this conviction from their record.³ An individual may therefore, still face the repercussions of having a criminal record; this is pertinent when an individual seeks employment.⁴

1.2 Spent Convictions

A spent conviction scheme is designed to give people who have committed minor crimes a mechanism to 'relieve that person of the stigmatising effect of his or her criminal conviction'.⁵

In Queensland, individuals may only have their conviction 'spent' if they spent less than thirty months in jail, they were convicted as an adult in either the District or Supreme Court, and after they have waited ten years.⁶

¹ *Constitution of Queensland 2001* (Qld) s 36.

² *Ibid.*

³ *Criminal Code Act 1899* (Qld) s677; LexisNexis, Carter's Criminal Law of Queensland [67-677; *R v Foster* [1985] 1 QB 115; *R v Martens* [2011] 1 Qd R 575; *R v Carkeet* [2009] 1 Qd R 190; *Eastman v Director of Public Prosecutions (DPP) (ACT)* (2003) 214 CLR 318.

⁴ Human Rights and Equal Opportunity Commission, 'Discrimination in Employment on the Basis of Criminal Record' (Discussion Paper, Australian Human Rights Commission, December 2004) 33.

⁵ Jeanette Knowler, 'Living down the past - Spent convictions schemes in Australia' (1994) 1(6) *Privacy Law & Policy Reporter* 103.

⁶ Legal Aid Queensland, *Criminal Convictions*, Legal Aid Queensland <<http://www.legalaid.qld.gov.au/>> (accessed 22 march 2016); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3.

A spent conviction does not remove the conviction from an individual's record entirely - there are circumstances when the conviction must still be disclosed, including some types of employment.⁷ Additionally, where the individual commits a further offence, spent convictions will be revived.⁸

We submit that the current mechanisms for reviewing convictions for historical gay sex offences are inadequate and alternative approaches are preferred.

1.3 Why Amending the Current Procedures is Insufficient.

The first option is to amend the *Constitution of Queensland*. However, it is likely that an amendment to s36 would be over broad, waste substantial resources and also cause undue delay since those applying for expungement would be those waiting for pardons for other crimes.

The second option is that Queensland could follow South Australia (SA) in amending its spent convictions legislation. In SA, the government amended the *Spent Convictions Act*⁹ via the *Spent Convictions (Decriminalized Offences) Amendment Act*¹⁰ - this allowed 'eligible sex offences' to become 'spent' for all purposes and was not subject to the usual exclusions from non-disclosure.¹¹ However, this would require very specific legislation,¹² and may result in some relevant convictions being ineligible to be 'spent'.

Amending the *Constitution of Queensland*¹³ or the current spent conviction schemes¹⁴ would present additional problems regarding specificity, funding and additional wait-listing.¹⁵

2.0 Preferred Approach

It is recommended that Queensland adopt a similar approach to New South Wales (NSW) and Victoria, and develop a new administrative scheme that allows individuals to submit an application to the Director-General or Secretary of the Justice Department to have the relevant conviction(s) expunged from the individual's criminal record. This method has also been recommended by the LGBTI Legal Service Inc., the Human Rights Law Centre, and the Queensland Association of Independent Legal Services.¹⁶

This submission makes the following recommendations as to the types of offences that should fall within the scope of the expungement scheme, and how they should be defined.

2.1 Types of Offences

⁷ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9A; *Ibid*.

⁸ Jeanette Knowler, 'Living down the past – Spent convictions schemes in Australia' [1994] 1(6) *Privacy Law and Policy Reporter* 103.

⁹ 2009 (SA).

¹⁰ 2013 (SA).

¹¹ *Spent Convictions Act 2009* (SA) s 8A.

¹² New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2014, 1749 (Trevor Khan).

¹³ *Constitution of Queensland 2001* (Qld) s 36.

¹⁴ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).

¹⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2014, 1749 (Trevor Khan).

¹⁶ LGBT Legal Service Inc, 'Historical criminal treatment of consensual sexual activity between men in Queensland' (Discussion Paper, LGBT Legal Service Inc, 2 September 2015) available at:

http://www.qails.org.au/dbase_upl/Gay%20discussion.pdf (accessed 22 March 2016).

It is necessary to consider whether the expungement scheme should include offences constituted by sexual activity only, or apply more broadly to include other offences. Generally, other states' schemes cover offences constituted by sexual activity between adults of the same sex. The schemes in NSW, Victoria and the Australian Capital Territory (ACT) also encompass convictions for offences against "public morality" or "public order", which may have also been used to punish homosexual activity.¹⁷ This submission proposes that, *prima facie*, the Queensland scheme should take the broader approach to ensure that all convictions for historical gay activity between consenting adults are eligible for expungement.

It must be determined whether the expungement scheme should relate to sexual activity between males only or, more broadly, between people of the same sex. Although it appears that the legislation mainly affected males due to the wording of ss 208(1), 208(3), 209 and 211 of the *Criminal Code (Qld)*, the possibility that females were also affected means that the scheme should not be limited by gender.¹⁸ This approach has been adopted in ACT, NSW, SA and Victoria.

It must also be determined whether the expungement scheme should encompass offences of attempting or conspiring to commit, or inciting, any of the eligible offences. As the general purpose of the proposed expungement scheme is to expunge convictions for conduct that would now not be an offence, it is recommended that it is consistent with the purpose of the scheme for these offences to be included where they led to a criminal conviction. This would bring Queensland in line with many of the other schemes.¹⁹

2.2 Definitions of Eligible Offences

There are four possible ways in which the offences can be defined within the 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".²⁰

¹⁷ *Spent Convictions Act 2000* (ACT) s 19A; *Sentencing Act 1991* (Vic) s 105(1); *Criminal Records Act 1991* (NSW) s 19A.

¹⁸ Human Rights Law Centre, *Towards Homosexual Equality in Australian Criminal Law – A Brief History* (29 September 2015) <<http://hrlc.org.au/legal-and-community-groups-call-for-leftover-homosexual-convictions-to-be-erased/>>; Graham Carbery, *Legal and Community Groups Call on Queensland to Erase Leftover Homosexual Convictions* (2014) Australian Lesbian and Gay Archives Inc <<http://www.alga.org.au/files/towardsequality2ed.pdf>>.

Graham Carbery; "Legal and Community Groups Call on Queensland to Erase Leftover Homosexual Convictions", Human Rights Law Centre

¹⁹ *Spent Convictions Act 2000* (ACT); *Criminal Records Act 1991* (NSW).

²⁰ Anti-Discrimination Commissioner Tasmania, 'Treatment of historic criminal records for consensual homosexual activity and related conduct' (Report, April 2015) 7.

2.2.1 *Specific Offences*

The expungement scheme may relate to specific offences relevant to homosexual activity.²¹ In Queensland, these specific offences would include unnatural offences, the attempt to commit unnatural offences and indecent practices between males.²² The authors submit that the clarity this method provides is outweighed by the possibility that relevant convictions used to punish homosexual behaviour will be excluded and consequently this approach may be unfair.

2.2.2 *Regulations*

In jurisdictions where the expungement schemes apply to specific offences relevant to homosexual activity, the schemes also apply to offences prescribed by regulation.²³ This provides greater flexibility, ensuring that offences not initially identified as eligible may be included at a later date.

2.2.3 *Description of Offences*

The expungement schemes in SA and Victoria identify the relevant sexual offences by description.²⁴ This wider approach ensures that relevant offences will not be excluded from the scheme. However, naming the offences by description provides less clarity, potentially affecting the efficiency of the scheme.

2.2.4 *Recommended Approach: Combined Approach*

It is recommended that a combined approach to defining the offences should be adopted. For example, the scheme may apply to specific offences, offences defined by description, and other offences later provided by regulation.

2.3 *Limiting Factors*

It must be determined whether limiting factors such as consent, age and lawfulness should be included in the definition of the offences. It is submitted that, in order to ensure the scheme does not *prima facie* exclude relevant offences, these factors should be included in the criteria for expungement. This is consistent with the approach taken in other jurisdictions and we suggest it is the preferred approach.

It should be noted that the SA scheme builds consent and age into the definition of the offences to which the scheme applies. This has the advantage of narrowing the scheme and thus using fewer resources; however, it may result in relevant offences not being eligible for expungement. We suggest this approach could lead to unfairness.

3.0 **Extension of the Scheme to Charges or Other Legal Processes Related to Conviction**

It is relevant to consider whether the expungement should extend to charges that did not result in a conviction, and other legal processes related to a conviction. Only SA has limited the scheme to the conviction, with ACT and NSW schemes applying to both conviction and charge. Victoria takes a

²¹ This is the case in ACT, NSW and England & Wales.

²² *Criminal Code (Qld)* ss 208, 209, 211.

²³ *Spent Convictions Act 2000* (ACT); *Criminal Records Act 1991* (NSW).

²⁴ *Spent Convictions Act 2009* (SA) s 3(1); *Sentencing Act 1991* (Vic) s 105(1).

broader approach, applying to “any investigation or legal process associated with that charge or conviction”.²⁵

It is proposed that the Queensland expungement scheme should apply to convictions, charges and formal cautions, as well as any other legal processes that are subject to mandatory public disclosure. This is consistent with the purpose of the scheme in ensuring that disclosure of activity which would no longer be considered an offence is no longer mandatory in certain situations.

4.0 Confinement of the Expungement Scheme to Living Persons

A fundamental consideration is who the scheme should apply to - whether it should be confined solely to living persons or should extend to include deceased persons.

4.1 Extension to Include Deceased Persons

In NSW²⁶ and Victoria²⁷ family and friends of deceased persons convicted of historical gay sex offences may apply on their behalf to have their record expunged. This is permitted so that the family and friends of the individual may achieve some relief.²⁸ The potential issue with extending the scope of the scheme to include deceased persons is that it may result in a greater number of applications being made, which may lead to a longer application process and a drain on resources.

4.2 Limit to Only Living Persons

By limiting the scheme to living persons it will focus on those who are still suffering the immediate effects of the discriminatory laws. However, if this approach is taken, relatives and close friends of the deceased should have some other option for recourse. In the next section we suggest possible alternatives in the situation where the relevant individual is deceased.

4.3 Alternatives – Apologies & Pardons

One possible alternative would be to issue a mass public apology or posthumous pardons to those convicted now deceased.²⁹ This would allow the expungement scheme to focus on living persons, while using apology and pardons provide comfort to the surviving family and friends of the deceased.³⁰ By issuing a mass apology or allowing applications for pardons to be made for these

²⁵ *Sentencing Act 1991* (Vic) s 105(4)

²⁶ *Criminal Records Act 1991* (NSW) s 19A.

²⁷ *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic) s 105B.

²⁸ ABC News, ‘Homosexual convictions to be expunged by Tasmanian Government’, *ABC News* (Online), 18 December 2015 <<http://www.abc.net.au/news/2015-12-17/homosexual-convictions-to-be-expunged/7037668>>; Farrah Tomazin, ‘Righting the wrongs: Gay community to receive formal state apology’, *The Age* (Online), 31 January 2016 <<http://www.theage.com.au/victoria/righting-the-wrongs-gay-community-to-receive-formal-state-apology-20160129-gmhjvh.html>>.

²⁹ ABC News, ‘Homosexual convictions to be expunged by Tasmanian Government’, *ABC News* (Online), 18 December 2015 <<http://www.abc.net.au/news/2015-12-17/homosexual-convictions-to-be-expunged/7037668>>.

³⁰ Anti-Discrimination Commissioner of Tasmania, *Treatment of historic criminal records for consensual homosexual activity and related conduct* (April 2015) Anti-Discrimination Commission, 11-12 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&cad=rja&uact=8&ved=0ahUKEwi-or6J_rLLAhWIKGMKHQqvAMkQFghIMAY&url=http%3A%2F%2Fequalopportunity.tas.gov.au%2F_data%2Fassets%2Fword_doc%2F0003%2F330807%2F2015-04_FINAL_REPORT-

convictions, it will serve as recognition for the injustices and discrimination suffered by these individuals and attempt to remove the social stigma attached to their conviction.

5.0 Type of Scheme

5.1 *Automatic or Case-by-Case Scheme*

It is relevant to decide whether convictions should be expunged automatically, or on a case-by-case basis. As adopted in all other jurisdictions in which such schemes exist, it is recommended that the expungement scheme should operate on a case-by-case basis.

Although an automatic process would involve less resources and therefore reduce the cost of the system, it involves a serious risk of expunging offences that ought not to be expunged, and rejecting applications for expungement that have merit. The case-by-case assessment system allows for greater accuracy in assessing each conviction and is practical where a broad range of offences are eligible for expungement.

5.2 *Administrative or Judicial Scheme*

The expungement scheme should operate as an administrative scheme following the approach in ACT, NSW and Victoria. A judicial system of expunging offences would add unnecessarily to the complexity for applicants, the workload of judges and the overall cost of the scheme.

In ACT, NSW and Victoria, applications for expungement are made to the Director-General or Secretary of the Justice Department. It is recommended that Queensland follow these schemes, and confer decision making power on the Director-General of Department of Justice and the Attorney-General. This ensures that the decision maker has the relevant expertise, flexibility and independence required to assess the merit of individual applications.

6.0 Criteria for Expungement

6.1 *Test*

This submission proposes that Queensland adopt a test similar to Victoria: in order for an application for expungement to be granted, the decision maker must be satisfied, on the balance of probabilities, that the person:

- (a) would not have been charged with the offence but for the fact that the person was suspected of having engaged in homosexual activity; and
- (b) that the conduct would not constitute an offence at the time of application; taking into account consent and the age of the parties, if relevant.³¹

[Treatment of historic records for consensual homosexual activity.doc&usg=AFQjCNFKIVix0o8sBAzBIB23QhfkVKxDIA&bvm=bv.116274245,d.dGY>](#) (accessed 22 March 2016).

³¹ *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic) s105G.

The first arm of the test aims to ensure the scheme is broad enough to encompass all offences which may have been used to prosecute homosexual conduct, not only specific provisions of the Act.³² An application could be made, for example, for the expungement of a public order offence if the activity involved “would have been found to be lawful if engaged in by two persons of the opposite sex rather than the same sex.”³³ This approach is necessary in order to adequately recognise that homosexuality was formerly prosecuted much more widely than just the specific homosexual or indecency offences in the *Criminal Code*, and to allow the scheme to be an effective means of addressing injustice.

The second arm of the test purports to serve as a check to ensure that the scheme does not expunge convictions for offences which were then, unlawful and remain unlawful, under current Queensland law. Consistent with the proposal that the scheme operates on a case-by-case basis, the decision maker in this instance must assess the offence in question to determine its lawfulness in the circumstances of the specific application. Like most other Australian states and territories, this builds age and consent into the criteria for expungement, rather than into the definition of the offences. This allows more flexibility - it does not prima facie exclude relevant offences and allows for recognition of the elements of various offences.

7.0 Effect of Expungement Under the Scheme

7.1 *Extent of Expungement*

To achieve the purpose of this scheme, where an application is approved, individuals should not have to disclose any information about expunged criminal history.³⁴ Indeed, it should have the effect that their criminal history, with respect to the expungement, disappears.

7.2 *Offences for Unlawfully Disclosing or Improperly Obtaining Information Regarding an Individual's Conviction*

It is recommended that Queensland again follow the approaches taken in other jurisdictions and make it an offence to disclose information regarding an expunged conviction, unless there is consent from the person with the expunged record.³⁵

7.3 *Annotation of Official Records*

Original records should be annotated and any copies should be deleted as per the Victorian approach.³⁶ There would be no need to create a special system, if the Victorian approach is adopted - a simple stamp on the original might be sufficient. Additionally, the original records would be preserved for historical archives.³⁷

7.4 *Revival of Expunged Convictions*

³² *Criminal Code Act 1899* (Qld) ss 208(1), 208(3), 209, 211.

³³ Human Rights Law Centre, ‘Righting Historical Wrongs: Background Paper for a Legislative Scheme to Expunge Convictions for Historical Consensual Gay Sex Offences in Victoria’ (Discussion Paper, HRLC, 12 January 2014) 40.

³⁴ Queensland Law Reform Commission, *Review of expunging of criminal convictions for historical gay sex offences*, Consultation Paper No 74 (2016) 33.

³⁵ LGBT, above n 16, 24.

³⁶ *Sentencing Act 1991* (Vic) s 105K(2)–(3).

³⁷ *Criminal Records Act 1991* (NSW) s 19I.

In expunging a conviction, the intention is to make it as if the crime was never committed. It is recommended that Queensland follow New South Wales, that providing the expunged records should not be revived, unless that individual provided false evidence.

8.0 The Proposed Scheme

Expungement should not be automatic. It must occur through a process to ensure that only relevant offences are expunged, and offences that still remain illegal under Queensland law are excluded.³⁸ This submission makes the following recommendations concerning the form that the scheme should take in order to ensure the process is simple and discreet, and provides determinations in a timely manner.

8.1 Who can make an application under the scheme?

An eligible person, who can bring an application under this scheme, should include the person who is the subject of an eligible offence. This is not confined to individuals against whom a conviction in the strict sense has been entered: this scheme purports to expunge each element of the process - the charge, investigation, prosecution, conviction, sentence or caution - not only cases where a conviction was recorded. Conviction is taken to be used in this broad sense within the scheme.³⁹

The guardian of a convicted person who suffers from a disability should also be eligible to bring an application on behalf of the convicted person if the convicted person is unable to do so because of his or her disability.⁴⁰

The recommendation of this submission is that a representative of a deceased person convicted of an eligible offence under this scheme should not be considered an eligible person to bring an application for expungement of that conviction under this scheme.⁴¹

The aim of this scheme is to recognise injustices committed in the past, but also to avoid exacerbating those injustices by ensuring that the convictions are removed from a person's criminal history. An expungement is required in order to adequately give practical effect to the aim of the scheme and avoid discrimination based on the conviction. Deceased persons do not suffer from the same practical, ongoing issues which justify the need for an expungement. The recommendation of this submission is that an application can be brought on behalf of deceased persons, by a family member or de facto partner, for a pardon under the same criteria as the expungement scheme, and to confine applications for expungement to living persons.

8.2 Form of the Application

Consistent with schemes in ACT, NSW, SA, Victoria and England & Wales, the application should be in writing and include the information necessary to establish the identity of the applicant, including the person's name, date of birth and address at the time of application and at the time of conviction. It

³⁸ LGBT, above n 16, 20.

³⁹ *Ibid* 19.

⁴⁰ *Sentencing Act 1991* (Vic) s105(1)(b).

⁴¹ *Criminal Records Act 1991* (NSW) s19B; *Sentencing Act 1991* (Vic) s105(1)(c); *Spent Convictions Act 2000* (ACT) s19B.

should also include when and where the conviction occurred, and any details of the offence that the applicant can recall. The application may also include supporting information or statements from the applicant. The decision maker may request information and records from the police and Office of the Director of Public Prosecutions relevant to making a decision in the case.⁴² This is consistent with various elements of schemes in other Australian states and in England & Wales - finding a balance between the need for a simple process for the applicant and ensuring the decision maker has enough information to make a determination.

It is important at this stage, for the decision maker to take into account that the applicant may not necessarily remember the event in great detail given the period of time which has passed, and also to view police documents and other public records in light of the prejudicial mentality towards homosexuality at the time which may affect the validity of the description of events in these documents.⁴³

There should be a mechanism available to permit applicants to withdraw their application before it has been decided without prejudice.⁴⁴

8.3 Decision Making Process

The decision maker must determine that it is an eligible offence (*section 2*), brought by an eligible person (*section 8.1*), and that, on the balance of probabilities, the criteria is satisfied (*section 6*) for an expungement order to be made.

In reaching this determination, the decision maker should have regard to any available record of the investigation or proceedings relating to the offence,⁴⁵ while always ensuring that the decision is made in an effective and timely manner.

An oral hearing must not be held.⁴⁶ Since this is an administrative, not judicial, process, the objective is to determine whether it is a relevant conviction under the scheme, not to serve as a retrial.⁴⁷ The decision maker has access to the applicant's account of the event and statements, as well as the documents from public record in order to make the decision. To require oral hearings would be likely to make the process overly judicial in character and more time-consuming. Given the subject matter in question, an oral hearing may also be invasive and unjustified intrusion into the applicant's need for privacy in the application and decision making process.

8.4 Process Once a Decision is Made

A decision maker should make the determination as promptly as possible⁴⁸. This is particularly important in these matters in which one objective of the scheme is to counteract the ongoing discriminating effects of the prior conviction and allow parties to move forward.

⁴² LGBT, above n 16, 21.

⁴³ HRLC, above n 33, 32.

⁴⁴ *Sentencing Act 1991* (Vic) s105H.

⁴⁵ *Sentencing Act 1991* (Vic) s105D; *Protection of Freedoms Act 2012* (UK) s94(2).

⁴⁶ *Criminal Records Act 1991* (NSW) s19C(4); *Sentencing Act 1991* (Vic) s105D(1)(e); *Protection of Freedoms Act 2012* (UK) s94(1).

⁴⁷ Home Office Memorandum on the European Convention of Human Rights [par172]; HRLC, above n 33, 32.

⁴⁸ *Sentencing Act 1991* (Vic) s105I(1).

Once a determination has been made, the applicant should be given written notice of the decision⁴⁹ and written reasons if the application is refused.⁵⁰ Applicants should be allowed to elect how they would like to be notified of the decision to avoid the risk of 'outing' people.⁵¹

If an application is successful then the applicant is to be treated for all purposes in the law as if the charge, investigation, prosecution, conviction, sentence or caution had never occurred.⁵² Notice of this decision should be given to inform the appropriate bodies of the expungement so that the information pertaining to the conviction can be destroyed. There should be a positive duty on the relevant agency to take all reasonable steps to destroy the records in a timely manner, with penalties for failure to do so.

The practical effect of the duty to 'destroy' varies in different jurisdictions - in order to give full effect to the expungement of the conviction, 'destroy' should be taken to mean the complete removal and destruction of the records, not simply an annotation.⁵³ However, this must be balanced with the need to preserve information and records of the treatment of homosexual behaviour.⁵⁴ The primary records therefore, should be annotated and the secondary records destroyed. The primary records should be subject to prohibitions on people accessing and/or disclosing the expunged conviction to protect the applicant's privacy and maintain certainty in expungement process.⁵⁵

8.5 Review Process

If an application is refused then an applicant should have means to apply for review, on the basis that the decision maker is satisfied additional supporting information has become available after the earlier decision was made⁵⁶ or there has been an error of law. This limited review capacity will provide for greater certainty and a more efficient process. The requirement to provide reasons for rejecting an application may also provide closure to applicants whose application was not successful without applying for a review.

⁴⁹ *Spent Convictions Act 2000* (ACT) s19B; *Criminal Records Act 1991* (NSW) s19C; *Sentencing Act 1991* (Vic) s105I(2); *Protection of Freedoms Act 2012* (UK) s19(4).

⁵⁰ *Sentencing Act 1991* (Vic) s105I(4)(a); *Spent Convictions Act 2000* (ACT) s19B.

⁵¹ UK Home Office, 'Privacy Impact Assessment Report re Decriminalised Convictions for Gay Sexual Offences (Report, Government of United Kingdom, 18 January 2011); HRLC, above n 33, 31.

⁵² *Protection of Freedoms Act 2012* (UK) s96.

⁵³ Ohio Revised Code 2953.38 (A)(1); HRLC, above n 33, 37.

⁵⁴ LGBT, above n 16, 23.

⁵⁵ *Ibid* 23.

⁵⁶ *Spent Convictions Act 2000* (ACT) s19G; *Sentencing Act 1991* (Vic) s105M(2).

9.0 Additional Considerations

9.1 *Effect on Other Legislation*

9.1.1 *Criminal History Checks*

The fundamental element of this scheme is the removal of the conviction from a person's criminal history. A spent conviction scheme was found to be inadequate because, under such a scheme, the conviction remains on a person's criminal history and individuals can be required to reveal this information in certain circumstances. This can have significant implications, disqualifying them from certain professions, working with children or in the legal profession for example, and also effects their immigration status and ability to adopt.⁵⁷ An expungement scheme, on the other hand, deletes the conviction and effectively erases it from the applicant's past, for the purposes of the law. In order to give proper effect to this scheme, an expunged conviction must not form part of any criminal history check, with no exceptions similar to those applied to the spent conviction scheme, and individuals must not be required to disclose information about their conviction or expungement.

9.1.2 *Perjury*

Expungement of the conviction has the express intention of making it appear like the conviction did not occur at all - the scheme must therefore, authorise an applicant to not disclose the expunged conviction without the risk of perjuring themselves.⁵⁸

9.1.3 *Anti-Discrimination*

It may be necessary to amend the *Anti-Discrimination Act*⁵⁹ to prohibit discrimination, ridicule or dismissal on the basis that a person has an expunged conviction to deal with cases where an employer or co-workers have become aware of an expunged conviction.

9.1.4 *Evidence*

The scheme provides that a person who has an expunged conviction is to be treated, for the purposes of the law, to not have been convicted of the offence. To ensure expungement achieves this aim and provide finality, then the conviction or expungement must not be admissible as evidence and the applicant must not be required to provide information about the conviction or expungement.

9.1.5 *Information Privacy*

The information in question is highly sensitive. The aim of this scheme is to begin to remove the social stigma and legal obstacles resulting from these convictions. It would undermine the effect of an expungement if information regarding the offence or identifying an applicant were to become public knowledge. It is important that the necessary safeguards are built into the scheme and within Queensland law to provide adequate protection for applicants. The scheme must provide that authorities are not permitted to disclose information about convictions, applications or expungements,

⁵⁷ HRLC, above n 33, 25.

⁵⁸ HRLC, above n 33, 48.

⁵⁹ *Anti-Discrimination Act 1991* (Qld).

and impose a positive duty on people working with this information to not disclose any information about the applicant, conviction or expungement, or any information contained in an application.⁶⁰ Given the sensitivity of the information, it would be appropriate to enforce a penalty for any contravention of this duty.⁶¹ There should also be a duty to ensure the information is adequately protected, and must be anonymised if it is made public.

9.1.6 *Other*

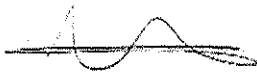
An audit of current Queensland law should be undertaken to determine whether there is any other legislation which would need to be amended to give effect to the expungement scheme and eliminate discrimination based on an expunged conviction.

9.2 *Other*

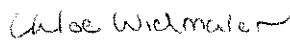
9.2.1 *Support*

Since one process of expungement could be emotional and distressing for applicants, it is important that it is simple and that staff are adequately trained to provide assistance in order to make sure the privacy & dignity of the applicants is respected. Organisations and support networks already established could also be drawn upon to provide further assistance as needed⁶² Staff should be aware of where they can direct applicants to find this support, as well as advertising these services throughout the application process.


Regards



Erin Morris



Chloe Widmaier



Sarah Clouston

We have reviewed this submission, commend the students on their diligent research, and endorse their recommendations.

Professor Heather Douglas



Professor Simon Bronitt



Monica Taylor



⁶⁰ HRLC, above n 33, 47.

⁶¹ *Criminal Records (Clean Slate) Act 2004* (New Zealand) s74.

⁶² HRLC, above n 33, 58.

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