

**Queensland Law Reform Commission review of expunging of
criminal convictions for historical gay sex offences**

Submission of the LGBTI Legal Service and others

29 March 2016



LGBTI
Legal Service Inc



Human Rights
Law Centre

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QAILS
Queensland Association of
Independent Legal Services Inc



Townsville Community
LEGAL SERVICE INC



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Part 1 - Overview and Recommendations

Background

Consensual sexual activity between adult men was decriminalised in Queensland on 29 November 1990. Although decriminalisation removed the threat of further prosecution for these activities, it did not address the impacts of criminal records relating to historical offences. This means that a number of Queenslanders continue to live with ongoing stigma, shame, and practical difficulties presented by a criminal record for conduct that is now legal.

On 4 September 2015, the LGBTI Legal Service Inc submitted a discussion paper to the Queensland Government and the Queensland Law Reform Commission that sought to explore potential ways to address this ongoing injustice (*Discussion Paper*).

On 4 January 2016, the Attorney-General referred the issue to the Queensland Law Reform Commission (*QLRC*), requesting the QLRC to undertake a review to 'recommend how Queensland can expunge criminal convictions for "historical gay sex offences" from a person's criminal history'. The QLRC's terms of reference require the QLRC to consider a number of issues, including what the features of an expungement scheme should be.

On 16 February 2016, the QLRC released Consultation Paper (WP 74) (*Consultation Paper*) seeking the community's input into the review.

We welcome the opportunity to make a submission to the Queensland Law Reform Commission in response to the questions raised in the Consultation Paper. This submission builds on (and should be read in conjunction with) the content of our Discussion Paper.

Structure of this submission

Part 1 gives an overview of the positions and key recommendations in this submission.

Part 2 responds to each of the 'Key questions and issues' set out at pages 23 – 39 of the Consultation Paper.

About LGBTI Legal Service

The LGBTI Legal Service Inc is an organisation run by volunteers that seeks to assist and advocate for LGBTI people. In doing so, the LGBTI Legal Service works closely with other community organisations such as the Queensland AIDS Council. In preparation of this submission, the LGBTI Legal Service has collaborated with the Queensland Association of Independent Legal Services, a state-based peak body representing funded and unfunded community legal centres throughout Queensland, and the Human Rights Law Centre, which has played a key role in securing similar legislative reform in Victoria and NSW in partnership with LGBTI community groups.

Acknowledgements

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Recommendations

A summary of the recommendations made in this submission, in response to the questions posed in the Consultation Paper, are set out below. Further details in relation to each recommendation are set out in part 2 of this submission.

- 1 The need for and nature of an expungement scheme:** An expungement scheme should be effected through new legislation, rather than relying on existing frameworks (such as the spent convictions scheme) which are ill-adapted for the purposes and principles of expungement.
- 2 Type and definition of offences:**
 - 2.1** The scheme should adopt a broad approach to the types of offences for which a person is eligible to make an application, to ensure the full range of offences which could be used to punish, intimidate and discriminate against members of the LGBTI community are covered by the scheme.
 - 2.2** A combined approach to defining eligible offences is recommended, identifying offences by express reference, by description and by regulation.
- 3 Definition of 'conviction':** A broad definition of 'conviction' should be adopted to include all findings of guilt, fines, charges, penalties, court appearances, community service orders, investigations and legal processes.
- 4 Eligible Persons:** Family members and other persons should be able to make an application on behalf of a deceased person or an eligible person lacking capacity.
- 5 Type of scheme:**
 - 5.1 Assessment:** Applications should be considered on a case-by-case basis.
 - 5.2 Decision-maker:** The application process should be overseen by a dedicated independent panel with appropriate expertise and should include a member of the LGBTI community.
- 6 Criteria for expungement:** In deciding whether to expunge a conviction, the decision-maker must be satisfied that the conviction relates to an 'eligible offence' and made by an 'eligible person'. The decision-maker must be satisfied, on the balance of probabilities, that the person would not have been convicted but for the fact they engaged, or were suspected of engaging in, same sex or gender diverse activities, and that behaviour would not result in a conviction today. The decision-maker should take into account issues of consent (if relevant) and on this question be empowered to take into account the evidence of the other party involved or another person with knowledge of the particular circumstances, as well as the applicant.
- 7 Consequences of expungement:**
 - 7.1 Non-disclosure:** The scheme must ensure robust protections against non-disclosure, including making it an offence to disclose information regarding an expunged conviction (except for situations where the applicant consents or the decision-maker informs the record-holder for the purposes of giving effect to an expunged conviction).
 - 7.2 Records:** The scheme should provide for the annotation of primary records, and the destruction or de-identification of all secondary records held by relevant authorities.
 - 7.3 Revival:** Revival of an expunged conviction should be permissible in very limited circumstances only (i.e. is it discovered that fraud was engaged in by the applicant or misleading information was provided in support of an application and that the conviction would not have been expunged had that information not been relied upon by the decision-maker).

8 Procedural Features

- 8.1 **Application process:** A two-stage application process, similar to that in Victoria, should be adopted. Following an initial application by the applicant involving information sufficient to identify the applicant in order to retrieve records, and the retrieval and provision of records to the applicant, the decision-maker should then request additional information from the applicant only after records have been retrieved from relevant third parties and provided to the applicant.
- 8.2 **Information and evidence:** The decision-maker should be able to request further information from the applicant, however no oral hearings should be held.
- 8.3 **Post-decision:** The decision-maker must determine the application 'as promptly as possible' and give written notice to the applicant and (if the conviction is expunged), to relevant authorities.
- 8.4 **Review:** An appeal should be allowed by the applicant where they are dissatisfied with the outcome.

9 Other matters

- 9.1 **Apology:** The reparative nature of this scheme is of critical importance and we recommend the Queensland Government make a public apology for the impact of the discriminatory laws. Not only would this give a level of credence and sincerity to the expungement scheme, it would also be a powerful gesture to those who may not wish to make a formal application, for whatever reason.
- 9.2 **Consequential amendments:** Depending on how the expungement scheme is effected, consequential amendments to other legislation may be needed, for example to ensure expunged convictions are excluded from criminal history checks.
- 9.3 **Anti-discrimination:** The *Anti-Discrimination Act 1991* (Qld) should be amended to prohibit discrimination on the basis of a person having an expunged conviction.
- 9.4 **Funding:** It is critical to the effective implementation of the scheme that funding be provided to existing community organisations to disseminate information and to provide assistance and support to applicants and potential applicants. Ensuring that counselling and support is available for applications is vital, both for those that identify as part of the LGBTI community and those applicants that do not. We do not propose that a new organisation be established.

Part 2 – Responses to key questions and issues in the Consultation Paper

1 Need for and nature of an expungement scheme



Recommendation: An expungement scheme should be effected through new legislation, rather than relying on existing frameworks (such as pardons or the spent convictions scheme) which are ill-adapted for the purposes and principles of expungement.

1.1 Existing mechanism vs new expungement scheme?

Are there means for addressing the issue under existing laws, or does there need to be a new expungement scheme?

- (a) We strongly support introducing a new scheme (Option 2) rather than relying on existing mechanisms to 'pardon' a conviction or make a conviction 'spent'.
- (b) A pardon discharges the person from the consequences of the conviction but does not remove the conviction from the person's criminal record. A petition for pardon must go to the Governor who may refer the case to the Court or seek the Court's opinion on a particular point.¹ The process is non-transparent and purely discretionary, and no guidelines exist on how the Governor's powers are to be exercised.² The regime also operates on the basis that the conviction was appropriate but for exceptional circumstances that warrant the pardon. This is not an appropriate scheme to be used for expunging criminal convictions.
- (c) The spent convictions regime is, as suggested by the both the name and short title of that legislation, directed towards the rehabilitation of persons convicted for offences. The key purpose of an expungement scheme is to reflect the position at law that consensual sexual acts between same-sex attracted adults should never have been criminalised, and the effect to restore the applicant to a position as if the conviction was never recorded in the first place. The discourse and messaging of the existing regime cuts across the reparative aims of an expungement regime.

1.2 Framework – existing vs new legislation

Should a new expungement scheme be enacted by amending or adapting existing legislation?

- (a) We do not consider that the existing spent convictions regime is an appropriate framework for giving effect to expungement for the reasons noted in 1.1(c) above and recommend that separate legislation be introduced (Option 2).
- (b) While the existing spent convictions legislation is already on the statute book and provides an existing 'framework', significant amendments would need to be made to overcome the limitations noted in section 1.1(c) above, as well as provide for the mechanisms and nuances required to deal with some of the issues noted in this submission, such as:
 - (i) consideration of issues of age and consent;
 - (ii) more robust protections against non-disclosure;

¹ *Criminal Code Act 1899* (Qld) s 672A.

² L Weathered, 'Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia', (2005) 17(2) *Current Issues in Criminal Justice* 203, p 212.

- (iii) provisions for the destruction or de-identification of records;
- (iv) an application and assessment process to enable applications to be decided on a case-by-case basis; and
- (v) provisions for review of a refusal to expunge a conviction,
none of which are provided for in the current spent convictions legislation.

These are detailed further below under headings 6 - 9.

- (c) We do not consider that new legislation would unnecessarily add to the complexity of the Queensland statute book, nor do we consider that to be an appropriate objection to achieving this type of specialised law reform.
- (d) New legislation would provide greater flexibility to implement the recommendations contained in this submission. If well drafted and concise, new legislation would be easier for applicants to navigate than substantially amended and piecemeal existing legislation.

2 Type and definition of offences

2.1 Types of offences

What types of offences should be covered?



Recommendation: The scheme should adopt a broad approach to the types of offences for which a person is eligible to make an application, to ensure the full range of offences which could be used to punish, intimidate and discriminate against members of the LGBTI community are covered by the scheme.

- (a) We believe a broad approach should be taken in identifying the types of offences that may be covered by the scheme. It is far more preferable to allow for a wider range of eligible offences at the point of making an application, and introduce relevant limiting factors (discussed in section 2.3) in the decision criteria used to assess an application by the decision-maker. While this may raise the concern of 'opening the floodgates', experience from Victoria and New South Wales suggests that the number of applicants is not likely to be large.
- (b) The scheme should not be limited to offences constituted by sexual activity; anecdotal evidence suggests that a range of offences (including those categorised as 'public order' and 'public morality') have been used to discriminate against and intimidate homosexuals (or persons identified as such, including 'cross-dressers' or 'female impersonators' that might identify as transgender in contemporary Queensland. We understand that prosecutions for homosexual activity were brought against men under a number of sections of the Criminal Code, for example public morality offences such as loitering and soliciting.³ Anecdotal evidence from Victoria suggests that people who dressed in clothing generally worn by persons of a different sex (cross-dressing) may have been convicted of 'being disguised' with 'unlawful intent' or 'without lawful cause', which were offences largely aimed at people who wear a disguise during a robbery.⁴ Without accurate data, it

³ Discussion Paper (page 19).

⁴ Human Rights Law Centre and others, 'Righting historical wrongs: Background paper for a legislative scheme to expunge convictions for historical consensual gay sex offences in Victoria' (12 January 2014)

is impossible to definitively categorise the types of convictions that members of the LGBTI community wish to apply for expungement.

- (c) The scheme should also cover convictions for associated offences which would not have happened but for the primary offence (such as resisting arrest) and inchoate offences (such as attempting or inciting an offence).
- (d) Nor should the scheme be limited to activities between 'males' only. There are suggestions that both sexual and generic offences have been used against same-sex attracted women⁵ and gender diverse people, for example a famous female impersonator was charged with a homosexual offence, and his appeal against his sentence included arguments on the subject of him owning a pair of 'rubber falsies'.⁶ The expungement scheme should accommodate offences used against people who did not conform with traditional gender roles and gender stereotypes, including in dress, mannerism or appearance. It is important to make this diversity explicit in the drafting of the scheme to ensure that LGBTI people do not otherwise assume that the scheme does not apply to them. The drafting of other schemes, which are expressed to apply to convictions related to 'homosexual conduct' (Vic), are not sufficiently inclusive.

2.2 Method of identifying eligible offences

How should offences be identified?



Recommendation: A combined approach to defining eligible offences is recommended, identifying offences by express reference, by description and by later regulation.

- (a) We support taking a combined approach (Option 4) with respect to the definition of eligible offences. This would incorporate:
 - (i) specific historical offences under the Criminal Code (including ss 208, 209 and 211);
 - (ii) offences described by regulation; and
 - (iii) offences identified by description.A proposed definition is included in section 2.4.
- (b) Because of the lack of both quantitative and qualitative data, it is difficult to identify with certainty and precision the full range of offences used against individuals in relation to homosexual and gender-diverse activity. Most criminal justice agencies around the country did not collect data on homosexual convictions, and most court cases in which relevant charges were prosecuted went unreported.⁷ Furthermore, qualitative data is lacking, as the shame and stigma of criminality and fear of adverse repercussions prevents many people from discussing their experiences, campaigning about the issue or consulting with authorities.⁸

⁵ HRLC, *Righting historical wrongs* at [119].

⁶ Noel Tovey, *Little Black Bastard: A story of survival* (2004) at 109.

⁷ Paula Gerber and Katie O'Byrne 'Should gay men still be labelled criminals?' (2013) 38(2) *Alternative Law Journal* 82 at 82.

⁸ Paula Gerber and Katie O'Byrne 'Should gay men still be labelled criminals?' (2013) 38(2) *Alternative Law Journal* 82 at 82.

- (c) The literature suggests that homosexual acts were often charged under a range of generic indecency offences, and less serious summary offences, such as soliciting.⁹ It is possible that ancillary offences (that were not necessarily specific to same-sex activity) were also used, for example, offences relating to fraud or wearing a 'disguise with intent' (an offence relating to robbery) may have been used against individuals who cross-dressed.
- (d) In light of the lack of data on the precise offences that were used to punish homosexual activity and the possibility that ancillary offences (that were not necessarily specific to same-sex activity) were used in this regard, we consider that flexibility of the scheme at the application stage is a priority to avoid the risk of inappropriately excluding potential applicants. We consider this can be achieved by using the definition at section 2.4 below.
- (e) Such an approach is similar to that of Victoria but with some carefully nuanced enhancements that ensure that the scheme is appropriately inclusive of LGBTI people and to avoid injustice that may result from the application of the Victorian test in the different legal context in Queensland.
- (f) The adoption of such a definition should be supported by careful drafting and decision-making criteria and guidelines that would apply at the application assessment stage. Given the very small numbers of applications received in other jurisdictions in the first years of operation, we should not expect large numbers of applications to be made in Queensland if such a definition is adopted.¹⁰

2.3 Limiting factors in the definition of eligible offence

Should limiting factors be included in the definition of the relevant offences?



Recommendation: The definition of 'eligible offence' should not refer to any 'limiting factors' such as consent, age or lawfulness, in order to avoid discouraging applicants or inappropriately excluding applications at an early stage. Rather, these factors should be considered at the assessment stage.

- (a) We believe it is important to avoid imposing limiting factors such as consent, age or lawfulness in the definition of eligible offences (Option 2) to avoid inappropriately excluding applications at an early stage, before all available records and information may be available. To reduce as much as possible the barriers and impact on the applicant, it is important to not place the onus on the applicant to prove, or require them to turn their mind to, these questions at the initial application stage. For similar reasons, the scheme should be accessible to applicants without legal knowledge or legal advisors, and as such, applicants should not be required to address questions of lawfulness in their application.
- (b) In addition, in light of the experience of Victoria and New South Wales, it is important to ensure the eligibility for making an application is clear to encourage potential applicants to make use of the scheme.

¹⁰ As at March 2016, only 15 applications had been made under the NSW scheme, which came into effect on 24 November 2014, and six applications have been successful. The other applications are either ongoing or have had to be withdrawn to be resubmitted once issues with the scheme have been address. As at March 2016 there had been 12 applications received under the Victorian scheme, which came into effect on 1 September 2015, but no decisions have yet been made.

2.4 Suggested definition of 'eligible offence'

We suggest the following as a definition of eligible offences (which is consistent with the above submissions) for the purposes of the expungement scheme:

A person may make an application in respect of the following offences:

- (i) an offence under sections 208(1), 208(3), 209 and 211 of the *Criminal Code 1899* (Qld) as in force immediately prior to 29 November 1990;
- (ii) a sexual or other offence as in force at any time which could be used to punish same sex and gender diverse activities or intimidate or discriminate against a person on the basis of that person's participation in, or association with, same sex or gender diverse activities;
Example: 'loitering or soliciting', 'indecent exposure'
- (iii) an offence of attempting to commit, being involved in the commission of, or inciting or conspiring to commit, an offence the subject of the above paragraphs;
- (iv) an offence which would not have taken place but for an offence the subject of the above paragraphs; and
Example: resisting arrest
- (v) any other offence prescribed by regulation to be an 'eligible offence'.

3 Charges

Should an expungement scheme also apply to charges for an offence or other legal processes related to a conviction?



Recommendation: A broad definition of 'conviction' should be adopted to include any finding of guilt, fines, charges, penalties, court appearances, community service orders, investigations and legal processes.

- (a) In our view, the amending legislation should not be limited to expunging court convictions, but should include a broad definition of 'Conviction' (or similar term) for which applications for expungement can be made.

'Conviction' should be defined broadly so as to include any:

- (i) finding of guilt;
- (ii) fine;
- (iii) charge;
- (iv) penalty;
- (v) good behaviour bond;
- (vi) court appearance;
- (vii) community service order;
- (viii) conviction; or
- (ix) sentence,

or other penalty imposed by a court in a criminal proceeding in accordance with the relevant sentencing legislation in force at the time of the conviction.

Conviction should also include any investigation or legal process associated with a charge or conviction.

- (b) While the eligibility of persons in other jurisdictions to make an application is restricted to court convictions, this broader definition is necessary to ensure that the broader impacts of criminalisation of homosexual activity are to be treated as though they never occurred. Expunging only court convictions will not satisfy this purpose.
- (c) The importance of a broad meaning of conviction is illustrated by the following case studies:¹¹

“On 9 June 1988, two men appeared before a Queensland District Court judge charged with two charges each of sodomy and six of gross indecency under ss 208 and 211 of the Criminal Code...[The] two accused, aged, 29 and 39, were living together in a steady relationship. Ultimately both men were discharged without any convictions being recorded, pursuant to s 657A* of the Code. As Judge Boyce observed, the activities of two consenting adult males in the privacy of their own home is no outrage to public decency. Nevertheless, the judge placed both on 12-month good behaviour bond with a \$200 surety each when they might otherwise have been completely discharged under 657A(1)(e). Not surprisingly, the two men immediately announced their intention to sell up and leave Queensland.”

*Section 657A(1) of the Criminal Code (now repealed) allowed a court to discharge the offender either (e) unconditionally or (f) conditionally upon the offender entering into a recognisance, with or without sureties, to be of good behaviour and to appear for conviction and sentence during such period not exceeding three years as is specified in the order.

In *Dudgeon*, the UK authorities had gone to a person's home in regards to an unrelated matter, but while there, discovered and seized personal correspondence indicating that he was a homosexual. As a result, they took him to the station where he was questioned for over four hours about his sexual life. The file was sent to the DPP with a view to prosecution for gross indecency, however the Director, after consultation with the Attorney-General, declined to proceed.

- (d) We have considered the extent to which expungement of a 'Conviction' should also expunge records of the charge or other legal processes related to that Conviction in section 7.3 of this submission.

4 Eligible persons

Should an expungement scheme be confined to living persons?



Recommendation: Family members and other persons should be able to make an application on behalf of a deceased eligible person, or an eligible person lacking capacity.

- (a) We consider that an application should be able to be made on behalf of deceased persons (Option 1), particularly given the nature and purpose of the scheme, the historical impacts it is intended to address and the higher suicide rate among LGBTI

¹¹ Bill Lane, 'Harassment of homosexuals in Queensland: Private lives, public 'crimes'', *Legal Service Bulletin* 13(4), August 1988, pp 154-155.

people. This should extend to applications on behalf of individuals who lack capacity (i.e. by their attorney).

- (b) In New South Wales and Victoria, persons eligible to bring an application include not only those convicted of the offence but also family members of, and persons in a close personal relationship with a person who would have been eligible but is now deceased. The Queensland amending legislation should include similar provisions, ensuring that they are sufficient to capture de facto partners of eligible persons.
- (c) While it may be argued that the historical discrimination is of no legal effect or practical significance in the instance of deceased persons, the reparative effect on family and community members who wish to clear the person's name may be of greater significance.
- (d) In light of the limited total numbers of such applications in other jurisdictions in Australia (we are not aware of any), we consider that any potential impracticalities and resourcing impacts are not sufficient to justify confining access to the scheme to living persons (or persons with capacity) only.

5 Type of scheme

5.1 Automatic v case-by-case

Should convictions be expunged automatically or on a case-by-case basis?



Recommendation: Applications should be considered on a case-by-case basis.

Given that, according to our preferred approach regarding the definition of eligible offences, issues of consent, age and lawfulness would not need to be established at the application stage, they necessarily would need to be considered as part of a case-by-case approach (at the application assessment stage) (Option 2). While this will necessarily involve more resources and time, it is by far the most appropriate method to ensure that all (and only) relevant convictions are captured.

5.2 Judicial vs administrative

Should the scheme be an administrative or judicial process, and who should the decision-maker be?



Recommendation: The application process should be overseen by a dedicated independent panel with appropriate expertise and should include a member of the LGBTI community.

- (a) Limitations of Options 1, 2 and 3:
 - (i) Judicial – The South Australian model of applying to a magistrate is not the preferred approach. Such a process would potentially be a public,¹² time-consuming process involving court resources, and might raise fears among potential applicants that the process would bring further publicity of the conviction the applicant is seeking to expunge, and the potential distrust of the legal system arising from the original recording of the conviction.

¹² A magistrate may determine that the hearing be held in public: *Spent Convictions Act 2009* (SA) Sch 2; s 4.

- (ii) Administrative (Governor or Attorney-General) – we consider that an application to the Governor would be too formal, and may be seen by the community as too close to an application for an official pardon, which, as discussed above, is not aligned with the values and outcome sought by an expungement scheme. A privately-made application to the Attorney-General in Queensland would arguably risk the appearance of a politically influenced decision-making process and is to be avoided.
 - (iii) Administrative (Director General, Department of Justice and Attorney-General) – A more neutral alternative may be for applications to be made to the Secretary of the Department of Justice (supported by officers and/or specialist advisors), as is the process in NSW and particularly Victoria.¹³ This however remains close to government, the source of the discriminatory laws and trauma for those affected, and is therefore less preferable than an independent model.
- (b) Preferred approach: Option 4 – Independent Panel
- (i) Given the reparative purpose of an expungement scheme, the application process should be made accessible, confidential and minimise impact on applicants. Applicants and the broader public should have confidence in the quality and independence of the decision making process. The decision-making body should have appropriate legal expertise, be culturally competent in relation to LGBTI issues and be independent from government.
 - (ii) The most satisfactory approach in Queensland would be a dedicated, independent panel (***the Panel***) of three or more members, as recommended by the Tasmanian Anti-Discrimination Commissioner and adopted in the United Kingdom. Possible Panel members, at least one of whom should identify as a member of the LGBTI community, could include retired prosecutors or judges, criminal and administrative law practitioners, the Anti-Discrimination Commissioner of Queensland and/or senior government legal officers.
- (c) If Option 4 is not adopted, our recommendation is adopt the Victorian model which includes the provision of independent advice to the Secretary by way of ‘special advisers’. These advisers can include members of the LGBTI community and enables the Department to draw upon the specialist knowledge of former prosecutors of sex offences and administrative law experts.
- (d) We recommend that any decision-maker undertake LGBTI cultural competency training before commencing in their role.

6 Criteria for expungement

What criteria should be met for a conviction to be expunged?



Recommendation: In deciding whether to expunge a conviction, the decision-maker must be satisfied that the conviction relates to an ‘eligible offence’ and made by an ‘eligible person’. The decision-maker must be satisfied, on the balance of probabilities, that the person would not have been convicted but for the fact they engaged, or were suspected of engaging in, same sex or gender diverse activities, and that behaviour would not result in a

¹³ Discussions with Anna Brown, Human Rights Law Centre, September 2015, who has worked closely with the Victorian Government on the development and implementation of the expungement scheme.

conviction today. The decision-maker should take into account issues of consent (if relevant) and on this question be empowered to take into account the evidence of the other party involved or another person with knowledge of the particular circumstances, as well as the applicant.

6.1 Test

- (a) In our view, the preferred test for deciding an application is that the decision-maker must be satisfied that the offence the subject of the application is an 'eligible offence', the application was made by an 'eligible person', and on the *balance of probabilities* that both of the following tests are satisfied:
 - (i) the person would not have been the subject of a Conviction but for the fact the person was suspected of having engaged or did engage in the conduct constituting the offence for the purposes of, or in connection with, same sex or gender diverse activities; and
 - (ii) that conduct, if engaged in by the person at the time of the making of the application, would not today result in a Conviction, including having regard to (where relevant) whether persons involved in the sexual activity constituting the offence consented to the sexual activity and the prevailing social attitudes of the time of the offence as compared to the date of the application.
- (b) If either or both of the above tests are not satisfied, the decision-maker should be required to refuse the application. If satisfied, the decision-maker should be required to expunge the Conviction.
- (c) This test, and in particular part (ii), focuses on the issue of consent and ensures that all appropriate Convictions can be captured.

6.2 Consent and age

- (a) Where there is an issue of consent (including by reason of age of the other party) raised by the records, the decision-maker should be satisfied on the issue of consent by evidence touching on that issue:
 - (i) from a person (other than the applicant) who was involved in the conduct constituting the offence; or
 - (ii) if no such person can be found, from a person (other than the applicant) with knowledge of the circumstances in which that conduct occurred.
- (b) The decision-maker should be specifically authorised to make inquiries if the applicant is unable to identify or locate a relevant other person. We note that it is highly likely that the other party will not be able to be recollected or identified, let alone located, by the applicant, given the nature of the majority of encounters that gave rise to convictions.
- (c) Where the official records do not positively confirm consent (whether age or otherwise) but there is no suggestion of consent being in issue, the decision-maker should nevertheless be able to allow the application on the basis of their assessment of the available evidence, including the applicant's evidence and any additional information provided by third parties.
- (d) The decision-maker should be empowered to consider and assess the credibility of all the available evidence, including the applicant's, in reaching their decision.

6.3 Exceptional circumstances

We recommend against allowing the decision-maker discretion to refuse to expunge records if there are exceptional circumstances as to why the Conviction should not be expunged. The amending legislation in South Australia included a number of prescribed matters to this effect.

6.4 Guidelines

Are there other factors the decision-maker should consider?

Given the broad array of issues, decision making guidelines should be developed and implemented at the commencement of the scheme, to assist the decision-maker in ensuring that all relevant considerations are taken into account. We understand that such guidelines are being developed in Victoria and could be drawn upon in Queensland, noting that the Victorian scheme and legal context may differ from Queensland. The decision-making guidelines should be developed in consultation with the Panel and stakeholders from the LGBTI community.

7 Consequences of expungement

7.1 Non-Disclosure

To what extent should an expunged conviction be protected from disclosure?



Recommendation: The scheme must ensure robust protections against non-disclosure, including making it an offence to disclose information regarding an expunged conviction.

- (a) Expunged records should be treated as if the rehabilitation period has expired in relation to a Conviction recorded against the person and has not been revived within the meaning of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld). In addition, as per the South Australian regime, the exceptions for disclosure of spent convictions in particular circumstances should not extend to expunged Convictions. It should be made clear that the non-disclosure provisions take effect despite any other law that provides that information relating to spent convictions may be disclosed.
- (b) The effect should be that:
 - (i) 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;
 - (ii) the person is not required to disclose to any other person for any purpose information concerning the expunged records;
 - (iii) questions concerning the person's criminal history are taken not to refer to any Conviction of the person which are the subject of expunged records;
 - (iv) 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;
 - (v) in the application to the person of a provision of an Act or statutory instrument:
 - (A) a reference in the provision to Conviction is taken not to be a reference to any Conviction (as the case may be) of the person which are the subject of expunged records; and

- (B) a reference in the provision to the person's character or fitness is not to be interpreted as permitting or requiring account to be taken of expunged records; and
- (vi) the expunged conviction or its non-disclosure is not a proper ground for refusing to a person, or dismissing the person from, an appointment, post, status or privilege and the person may reapply if such was refused solely on the basis of the conviction before it was expunged.

This would be consistent with the New South Wales approach.

7.2 Offences for unlawful disclosure

Should there be offences for unlawful disclosure, or improperly obtaining, information about an expunged conviction?

- (a) It should also be expressly provided that a person who has access to any official records must not, directly or indirectly, disclose or communicate to any person a record of a Conviction, that the person knows, or ought reasonably have known forms the subject of an expunged record (in accordance with the Victorian approach).
- (b) The following should be made offences under the scheme (subject to the exceptions under (c) below):
 - (i) to disclose information about an expunged conviction; and
 - (ii) to fraudulently or dishonestly obtain information about an expunged conviction from records kept by or on behalf of a public authority.
- (c) There should be exceptions if:
 - (i) the person who has the expunged record gives written consent to the disclosure or communication; or
 - (ii) the decision-maker under the scheme informs a public authority holding information about convictions that the conviction is expunged.
- (d) The Anti-Discrimination Act should also be amended to make an expunged conviction a protected attribute.

7.3 Destruction of Records

Should official records should be annotated or deleted?



Recommendation: The scheme should provide for the annotation of primary records, and destruction or de-identification of all secondary records held by relevant authorities.

- (a) It is important that records of societal and legal treatment of homosexual behaviour are preserved for reasons of posterity and to ensure that the information is not lost (particularly in the event that further information comes to light regarding the expunged record). It may also not be practical to destroy records having regard to their form (for example if they are included as one entry in a ledger among a list of convictions).
- (b) Accordingly, we suggest that the Victorian approach should broadly be followed, allowing for variation to accommodate differences in the keeping of records in Queensland. This would mean that, following a successful application, primary records would be annotated as relating to an expunged record and secondary records would be destroyed, deleted or

de-identified. The annotation on the primary record should expressly set out the prohibitions on persons accessing and/or disclosing the expunged record and the Conviction and the consequences for failing to abide by those restrictions. The practical implementation of this scheme may require consultation with the relevant record holders to ensure alignment between the legislative scheme and the record holders' ability to comply, having regard to their respective record holding processes.

- (c) Given the sensitivity of the applicants to the disclosure of their past criminal records, it is particularly important that the expungement scheme does not increase the risk of disclosure of the past conviction. Care must be taken to ensure the utmost security of the records of the expungement process itself.

7.4 Revival

Can an expunged conviction be revived?

We believe that revival of an expunged conviction should be permissible in very limited circumstances only (i.e. it is discovered that fraud was engaged in by the applicant or misleading information was provided in support of an application and that the conviction would not have been expunged had that information not been relied upon by the decision-maker).

8 Procedural features of an expungement scheme

8.1 Process of making an application

What would be the process of making an application, and what information should be included in making the application?



Recommendation: A two-stage application process, similar to that in Victoria, should be adopted. Following an initial application by the applicant involving information sufficient to identify the applicant in order to retrieve records, and the retrieval and provision of records to the applicant, the decision-maker should then request additional information from the applicant, only if still required.

- (a) Applications should state information sufficient to establish the identity of the applicant.
- (b) The decision-maker can then write back to the applicant with details of the convictions recorded against their name and the convictions they propose to consider as eligible offences for the application has been made. As discussed above, the approach to eligible convictions should be expansive.
- (c) An application could relate to more than one offence (particularly given the potential for 'ancillary' offences being relevant) and should be able to be withdrawn or supplemented with additional information (for example, to allow an applicant to respond to information obtained by the decision-maker) without needing to recommence the application process, in the interests of reducing the burden on applicants.
- (d) We recommend a two-stage application process, as has effectively been adopted in Victoria. Following the initial application, the decision-maker or their delegate should request information and records from relevant third parties, such as the police, the Director of Public Prosecutions and other government bodies holding records or information regarding the offence. This information should be provided to the applicant, following which further information can be provided by the applicant, if necessary, to substantively support the application. If the decision-maker is able to make a decision to

allow the applicant on the basis of the official records alone, the correspondence to the applicant inviting further information should indicate as such.

- (e) It is important for this first step to occur given the extended period which will have passed since the offence took place and to avoid any unnecessary burden upon applications, which could include the potential for re-traumatisation. Rather than require the applicants to provide statements about their recollection of events from over 20 years ago, applicants should be provided with the relevant records so that they can review and seek assistance to coherently and succinctly state their case, with the benefit of refreshing their memory with the records and with access to independent legal advice and assistance. Without this step, the process has the potential to be costly and time-consuming for all parties. Importantly, the applicants may also inadvertently prejudice the outcome of their future application by making statements without the benefit of reviewing the available documents.
- (f) It may also be that decisions can be made to expunge certain convictions after verifying the identity of the applicant and reviewing the available documentary record without the need for further information from the applicant. In these cases, a two-stage process would be significantly less intrusive and burdensome for applicants, and less costly in administration.

8.2 Decision-making process, information and evidence

What would the decision-making process be, including information and evidence?



Recommendation: The decision-maker should be able to request further information from the applicant, however no oral hearings should be held.

- (a) The decision-maker should be able to request further information from the applicant, or from another person or entity (e.g. police, court, Director of Public Prosecutions).
- (b) Unlike Victoria, in our view the information provided by the applicant should be able to be taken into account in the same manner as official records.
- (c) The decision-maker must have regard to any available record of the investigation of, or proceedings relating to, the offence. There should be acknowledgement in the decision making process that, given the prevailing climate of prejudice and discrimination at the time, the accuracy of official records cannot be presumed.
- (d) An oral hearing should not be held. As noted, giving oral evidence may be re-traumatising for applicants and other affected individuals, of little additional benefit given the passage of time and compromise to the applicant's privacy.

8.3 Post decision process

Once a decision is made, what should the process be?



Recommendation: The decision-maker must determine the application 'as promptly as possible' and give written notice to the applicant and (if the conviction is expunged), to relevant authorities.

- (a) The decision-maker must determine the application as promptly as possible and give written notice of the decision to the applicant.

- (b) Reasons should be given in the event that the application is refused.
- (c) Communication of the decision to the applicant should be handled sensitively and with the object of assisting the applicant to achieve some sense of closure. For example, in cases where applicants may have thought they were living with a conviction but no record can be found.
- (d) A notice of a decision to expunge a Conviction must also be given to the relevant authorities holding records of the Conviction.

8.4 Review process

What review processes should exist?



Recommendation: An appeal should be allowed by the applicant where they are dissatisfied with the outcome. This should initially be to the full Panel (depending on the decision-maker decided), with further rights of appeal to QCAT.

- (a) 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.
- (b) Depending upon the identity of the initial decision-maker that is decided, the applicant should be entitled to apply for internal review to an appropriate body, which we recommend is constituted by a full Panel. Ideally, that review would be *de novo*.
- (c) Further appeal rights to QCAT should be available, however any hearing should be in closed court and private.

8.5 Further information

Should subsequent applications be allowed?

There should be provision for the applicant to make a further application if fresh evidence or information comes to light, for example if an applicant locates a person with knowledge of the encounter that supports their version of events.

9 Other matters to consider

Should expungement be supported by other measures, i.e. consequential amendments to other legislation and funding?

9.1 Apology

- (a) The reparative nature of this reform cannot be overstated, and a critical part of that is a formal public apology by the Queensland Government. Not only would this give a level of credence and sincerity to the scheme, it would also be a powerful gesture to those who may not wish to make a formal application, for whatever reason. The Human Rights Law Centre's 'Righting historical wrongs' paper discusses this in further detail.¹⁴
- (b) We suggest that the apology be made by the Premier in Parliament. This should also be reiterated in a public press conference.

¹⁴ Human Rights Law Centre and others, 'Righting historical wrongs: Background paper for a legislative scheme to expunge convictions for historical consensual gay sex offences in Victoria' (12 January 2014), paragraphs [186] – [191]. On 24 May 2016, the Victorian Government will issue an apology by way of a motion to be moved in Parliament.

- (c) We recommend that the Queensland Government consult with key stakeholders to provide assistance in the scope and wording of the apology and to publicise the event both within and outside of the LGBTI community.

9.2 Consequential amendments

Depending on how the expungement scheme is effected, consequential amendments to other legislation may be needed, for example to ensure expunged convictions are excluded from criminal history checks.

9.3 Anti-discrimination

We support amending the *Anti-Discrimination Act 1991* (Qld) to insert discrimination on the basis that an expunged conviction as a prohibited ground of discrimination. Doing so would be entirely consistent with the principles and purposes of the expungement scheme.

9.4 Funding

It is critical to the effective implementation of the scheme that funding be provided to existing community organisations to disseminate information and to provide assistance and support to applicants and potential applicants. Ensuring that counselling and support is available for applications is vital, both for those that identify as part of the LGBTI community and those applicants that do not. We do not propose that a new organisation is established.