



**MONASH** University  
Castan Centre for Human Rights Law

## **Expunging Historical Gay Sex Convictions**

**Submission to Queensland Law Reform Commission Review**

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**Prepared by Adam Fletcher**

## Introduction

The Castan Centre for Human Rights Law thanks the Queensland Law Reform Commission (QLRC) for this opportunity to comment on its *Consultation Paper WP 74: Review of expunging of criminal convictions for historical gay sex offences* (Consultation Paper).

We note with appreciation that the terms of reference for this Review specifically require consultation with human rights groups and organisations.<sup>1</sup> The Castan Centre has a long-standing interest in this area. Deputy Director Paula Gerber has been a leading figure in calls for relevant Australian convictions to be expunged.<sup>2</sup>

Given that the Consultation Paper, the Human Rights Law Centre's Background Paper and the LGBTI Legal Service's Discussion Paper cover the field of historical and comparative law (and social) reform relating to the extinguishment of convictions, this submission will focus on consistency with international law.

## Relevant International Human Rights Law

As the Consultation Paper notes, the *Human Rights (Sexual Conduct) Act 1994* (Cth) was passed more than 20 years ago by the Commonwealth Parliament in response to the UN Human Rights Committee's Views in the *Toonen* case.<sup>3</sup> The Committee made its finding of a breach of article 17 of the International Covenant on Civil and Political Rights (ICCPR) on the basis that 'it is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy" ....'<sup>4</sup> However, it also noted that 'in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.'<sup>5</sup> This view was reinforced in the *Young* communication a decade later.<sup>6</sup>

Other UN monitoring bodies responsible for overseeing implementation of the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women have also recognised the right to non-discrimination on the basis of sexual orientation.<sup>7</sup> The

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<sup>1</sup> *Terms of Reference*, para 6.

<sup>2</sup> See eg Gerber, 'Wiping the slate clean: historic convictions for gay sex must be expunged,' *The Conversation*, 26 September 2012: <<https://theconversation.com/wiping-the-slate-clean-historic-convictions-for-gay-sex-must-be-expunged-9768>>.

<sup>3</sup> *Toonen v Australia*, Communication 488/1992, UN Doc CCPR/C/50/D488/1992 (Views of 31 March 1994).

<sup>4</sup> *Ibid*, para 8.2

<sup>5</sup> *Ibid* para 8.7.

<sup>6</sup> *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (Views of 6 August 2003).

<sup>7</sup> See eg Committee on Economic, Social and Cultural Rights, *General Comment No. 20 – Non-Discrimination in Economic, Social and Cultural Rights*, 2 July 2009, UN Doc E/C.12/GC/20, para 32; Committee on the Rights of the Child, *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, 1 July 2003, UN Doc CRC/GC.2003/4, para 6 and Committee on the Elimination of Discrimination against Women, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention*, 16 December 2010, UN Doc CEDAW/C/GC/28, para 18.

unlawfulness of discrimination on the basis of sexual orientation is thus well-established in international law.

In addition, a group of international human rights experts developed the *Yogyakarta Principles* in 2006 to guide the application of human rights law in relation to sexual orientation and gender identity.<sup>8</sup> Although non-binding, these principles constitute an important interpretive aid for rights such as the right to privacy. In addition to decriminalising consensual homosexual relations, they recommend relevantly that governments:

- Establish the necessary legal procedures, including through the revision of legislation and policies, to ensure that victims of human rights violations on the basis of sexual orientation or gender identity have access to full redress through restitution, compensation, rehabilitation, satisfaction, guarantee of non-repetition, and/or any other means as appropriate;
- Ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others, and
- Take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity.

Exceptions to the *Anti-Discrimination Act 1991* (Qld) which effectively permit discrimination (in fields such as employment and assisted reproduction) on the basis of sexual orientation in relation to gay sex convictions<sup>9</sup> are therefore contrary to Australia's international obligations. An amendment to bring the Queensland Act into line with its equivalents in the ACT, the NT and Tasmania, which specifically prohibit discrimination on the basis of irrelevant, spent or gay sex convictions<sup>10</sup> is needed.

A Queensland expungement scheme should take its lead from Victoria (and England/Wales) and include a broad range of eligible offences and persons. As the LGBTI Legal Service's Discussion Paper notes, evidence suggests that charges were often brought against gay men (and their associates) under various generic sections of the *Criminal Code 1899* (Qld), not just the sections targeting gay sex specifically (208-211).<sup>11</sup> A broad scope of application as recommended in the Discussion Paper (with appropriate safeguards, such as discretion on the part of the Panel to exclude acts which would still constitute an offence today) would

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<sup>8</sup> See: <<http://www.yogyakartaprinciples.org>>.

<sup>9</sup> See section 106, whose relevant function is described in the *Consultation Paper*, para 25.

<sup>10</sup> See *Consultation Paper*, para 27.

<sup>11</sup> LGBTI Legal Service Discussion Paper, section 5.4.

help to ensure that no victims of these discriminatory convictions are denied the redress to which they have a right under international human rights law.<sup>12</sup>

In addition, a mechanism for receiving applications to have convictions expunged should protect the applicants' privacy to the greatest possible extent. The LGBTI Legal Service's Discussion Paper states that the preferred approach would be to convene an independent panel (comprising people with relevant experience), rather than having applications dealt with by the courts or the executive.<sup>13</sup> We agree that, given the sensitive personal nature of information in question, this approach would be more likely than the alternatives to be consistent with the right to privacy. Automatic expungement would perhaps be even more protective of applicants' privacy, but since the offences in question did not distinguish between consensual and non-consensual sex, it would be inconsistent with the rights of victims in non-consensual cases.<sup>14</sup>

As for the alteration of court and government records relating to gay sex convictions, the Castan Centre agrees with the approach taken in other jurisdictions not to destroy primary records of the expunged convictions. As the LGBTI Legal Service's Discussion Paper notes, it is important to maintain documentation of rights abuses for research and educational purposes.<sup>15</sup> Annotation of the original record and destruction of secondary records (as is the practice in Victoria) seems to strike an appropriate balance between maintaining privacy/providing redress and preserving the historical record.

## *Conclusion*

Overall, the Castan Centre supports an expungement scheme along the lines recommended in the LGBTI Legal Service's Discussion Paper. Such a scheme would provide redress for wrongs suffered at the hands of the State many years ago, the effects of which are still being experienced in many cases. It would also address an important omission in Queensland's anti-discrimination regime. We hope this submission will assist the QLRC in formulating the detail of a scheme to expunge historical convictions for consensual sex between men in Queensland, which should never have been recorded.

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<sup>12</sup> See eg ICCPR article 2(3).

<sup>13</sup> LGBTI Legal Service Discussion Paper, section 5.7.

<sup>14</sup> This is acknowledged in all three Papers referred to in this submission.

<sup>15</sup> LGBTI Legal Service Discussion Paper, section 5.10.