Castan Centre for Human Rights Law

Submission to the Tasmanian Department of Justice

Draft *Historical Homosexual Convictions Bill 2016*

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Introduction

The Castan Centre for Human Rights Law welcomes the draft Historical Homosexual Convictions Bill 2016 and recommends passage of the law as soon as possible.

It is particularly significant that this law is being proposed in Tasmania, 22 years after the landmark United Nations Human Rights Committee’s Toonen decision found that Tasmania’s criminalisation of consensual homosexual sex was a breach of international human rights law.¹

When preparing our submission, we have taken into account the Yogyakarta Principles,² developed in 2006, to guide the application of international human rights law in relation to sexual orientation and gender identity. The Principles, which are non-binding, recommend 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.

The following recommendations are intended to ensure that the Bill more fully complies with international human rights law.

1. Application for the offence to be expunged

Section 5(1) of the Bill states that a person convicted of a historical homosexual offence may apply to the Secretary for the conviction to be expunged. This approach is the same as the approach taken in Victoria, however, we support the Anti-Discrimination Commissioner’s recommendation³ that the power be vested in a Historic Criminal Records Expert Panel comprising the Commissioner, the Registrar under the Working with Vulnerable People Act 2013 and the Dean of Law at the University of Tasmania. This approach will ensure the greatest possible impartiality and rigor is brought to bear on the process.

The current proposal allows the ultimate decision to be made by a delegate of the Secretary, thereby increasing the number of people privy to information about the original conviction. As this process is designed to expunge the conviction from the record, a process controlled by an independent body with appropriate safeguards is

¹ Toonen v Australia, Communication 488/1992, UN Doc CCPR/C/50/D488/1992 (Views of 31 March 1994). The Committee held that the laws breached Mr Toonen’s right to privacy under Article 17 of the International Covenant on Civil and Political Rights.
the best way to protect an applicant’s privacy. Because an Expert Panel would be made up of relevant experts, it would also ensure that the process is seen to be impartial, thereby improving public trust in it.

This point is amplified by the explanatory information accompanying the draft Bill, which states that the decision not to follow the Commissioner’s recommendation was taken so as to “allow the scheme to be implemented as efficiently and as soon as possible.” Although it is important that there be swift justice in this matter, it should not come at the expense of the best possible procedural process.

**We recommend that the responsibilities given to the Secretary in the draft Bill be given instead to a Historic Criminal Records Expert Panel in line with the Anti-Discrimination Commissioner’s recommendation.**

2. Definition of “historical homosexual offence”

The definition of “Historical homosexual offence” in Section 3(1) is currently too narrowly defined. It specifies “an offence under section 122(a), 122(c) or 123 of the Criminal Code as in force before 14 May 1997”. It further includes “an offence prescribe by the regulations for the purposes of this definition”.

Sections 122 (a) and (c) stated:

Any person who:

(a) has sexual intercourse with any person against the order of nature;

(c) consents to a male person having sexual intercourse with him or her against the order of nature,

is guilty of a crime.

Section 123 stated:

Any male person who, whether in public or private, commits any indecent assault upon, or other acts of gross indecency with, another male person, or procures another male person to commit any act of gross indecency upon himself or any other male person, is guilty of a crime.

These crimes were repealed by the *Criminal Code Amendment Act 1997 (Tas)*. However, the former Section 8 (l)(d) of the *Police Offences Act (Tas.) 1935* has not been included in this list. It criminalised the wearing of female attire by a man between sunset and sunrise.

Although it is unclear how many men were charged under this provision, it is of a similar character to the other offences named. Although its origin appears to have been to criminalise robberies, it was also used to harass and intimidate the transgender community. The inclusion of this historic offence should not be left to regulation.

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We recommend that Section 8(1)(d) be included in the definition of “Historic homosexual offence” in section 3(1).

When determining whether an application for expungement should be approved, Section 8(1) requires the Secretary to not approve an application unless satisfied:

(a) that the offence for which the eligible person was convicted is a historical homosexual offence; and

(b) that, on the balance of probabilities, both of the following tests are satisfied in relation to the eligible person:

(i) the eligible person would not have been charged with the historical homosexual offence but for the fact that the eligible person was suspected of having engaged in the conduct constituting the offence for the purposes of, or in connection with, sexual activity of a homosexual nature;

(ii) the conduct constituting the historical homosexual offence, if engaged in by the eligible person at the time of the making of the application, would not constitute an offence under the law of this State.

Sub-section (ii) is unnecessary and should be removed. It is clear from both the definition of “historical homosexual offence” and the clarification in Section 8(1)(b)(i) that only convictions for consensual homosexual acts between consenting adults will be eligible for expungement.

The only potential effect of Section 8(1)(b)(ii) is to introduce the possibility that the application is rejected for a peripheral reason, such as that the act allegedly occurred in a public place. The criminalisation of consensual homosexual sex was part of a broader stigmatisation of homosexual relationships, resulting in encounters in semi-public locations and harassment by police. It would be inappropriate for an application to be rejected for such a reason.

The definition of “historic homosexual offence” in Section 3(1) plus the stipulations in Section 8(1)(a) and 8(1)(b)(i) ensure that the legislation is sufficiently targeted to achieve its purpose.

We recommend deleting Section 8(1)(b)(ii).

3. Information to be included in an application

Section 6(1) specifies the information that must be included in an application for expungement of a historical conviction. It requires the same information prescribed by section 4 of Victoria’s Sentencing Amendment (Historical Homosexual Convictions Expugement) Act 2014, except that it adds the following two requirements:

(h) any prescribed information;

(i) any additional information or additional documents that the Secretary requires.

We are concerned that these provisions will potentially lead to the application
process being more unwieldy than is necessary. We are not aware of any significant problems with the prescribed process in Victoria.

*We recommend removal of sub-sections (h) and (i) from section 6(1).*

Sub-section (g) requires the applicant to provide information he may not be able to obtain without incurring significant time and cost. Sub-section (g) states that an application must include:

in relation to the historical homosexual offence to which the application relates:

(i) the name and location of the court by which the eligible person was convicted for the historical homosexual offence; and

(ii) the date of the conviction; and

(iii) the name of the historical homosexual offence; and

(iv) details of the historical homosexual offence and the conduct constituting the historical homosexual offence;

This section is modelled on Section 105B(4)(g) of the Victorian Act, which begins:

in relation to the historical homosexual offence to which the application relates, **so far as known to the applicant** [emphasis added].

The words in bold are absent from sub-section (g).

It is appropriate that the onus should fall on the State to find the information where the applicant does not have it. Considering the fact that these convictions occurred many years ago and applicants may not have wanted to keep any record of them, requiring applicants to produce this information is unreasonable.

*We recommend that the words “so far as known to the applicant” be inserted after the words “to which the application relates” in Section 6(1)(g).*

4. Investigation of application

Section 7(3) grants the Secretary the power to require a person “who may be able to provide information relevant to an application” to “answer specified questions or to provide other information or documents...”.

Considering the nature of the application, this requirement is unnecessarily onerous and impacts disproportionately on the privacy of individuals who do not wish to give evidence.

*We recommend that section 7(3) be amended to state that the Secretary may request a person to answer specified questions or to provide other information or documents.*
Conclusion
We welcome the commitment of Tasmania’s Parliament to act swiftly in this matter. We believe that the Bill can be strengthened as outlined above and look forward to seeing the Bill passed into law soon.

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