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Castan Centre for Human Rights Law

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Melbourne

**Submission to the Queensland Department of
Justice on the consultation draft of the**

***Criminal Law (Historical Homosexual
Convictions Expungement) Bill 2017***

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1. Introduction

The Castan Centre for Human Rights Law welcomes the draft *Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017* and recommends the passage of the law as soon as possible.

This submission is informed by the Yogyakarta Principles¹, developed in 2006, to guide the application of international human rights law in relation to sexual orientation and gender identity. The Principles, which are authoritative but 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; and
- 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.

It is important that the proposed Bill comply with international human rights law, particularly in light of the recent announcement that Queensland will be implementing its own *Human Rights Act*. The aim of the recommendations in this submission is to ensure that the Bill more fully complies with international human rights law.

2. Application for the offence to be expunged

Section 10(1) of the Bill states that an eligible person convicted of an ‘eligible offence’ may apply to the chief executive for the offence to be expunged. We suggest that this does not provide the requisite protection of an applicant’s privacy. It is preferable that the eligible person apply to an independent panel, rather than the courts or the executive. This is because a process controlled by an independent body with appropriate safeguards is better able to protect an applicant’s privacy.

We recommend that the responsibilities given to the chief executive in the draft Bill be given instead to a Historic Criminal Records Expert Panel in line with Australia’s anti-discrimination obligations.

¹ See: <http://www.yogyakartaprinciples.org>.

3. Definition of eligible offence and eligible persons

We are pleased to note that the definition of an eligible offence is somewhat broad in scope. While section 8(1)(a) and (b) are narrow in nature, this is slightly countered by 8(2)(b), which allows for an offence to be one that “involved sexual activity of a homosexual nature”.

However the definition should be expanded further, so that the Bill covers various generic sections of the *Criminal Code 1899* (Qld), not just the sections targeting the act of gay sex specifically.

We recommend that s8(1) be amended to include the following subsection:

- d) that, on the balance of probabilities, the following test is satisfied in relation to the eligible person:***
 - i. the eligible person would not have been charged with the 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.***

4. Public records

We are pleased to note that the draft Bill is in line with our recommendation that annotation, and not destruction of the record be made once a conviction has been expunged (s28(2)(a)). Also in line with our recommendation is s20 that prohibits the destruction of a public record.

However, both these sections do not discriminate between primary and secondary records. We recommend that Queensland adopt the Victorian model of annotating the original record and destroying the secondary records as this strikes an appropriate balance between maintaining privacy/providing redress and preserving the historical record.

We recommend that s28(2)(a) be amended to read:

“Annotate each entry into the original record relating to the conviction or charge to – ” and

that s30 be amended to read:

- (1) This Act does not require or authorise a person to destroy an original public record or omit information about an expunged conviction or expunged charge from a public record.**
- (2) The criminal record holder must as far as is reasonably practicable –**
 - a. Destruct all secondary records of the conviction; and**
 - b. Give the chief executive notice that the destruction has taken place.**

5. Conclusion

We welcome the commitment of the Queensland Government to act swiftly in this matter. However, we recommend that the Bill be strengthened as outlined above to ensure it is in line with international human rights laws.

We look forward to seeing the Bill passed into law soon.



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7 February 2016