COMMUNITY
LEGAL CENTRES

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19 December 2014

Leica Wagner
Senior Policy and Projects Officer
Office of the Anti-Discrimination Commissioner
GPO Box 197
Hobart 7001

Via email: antidiscrimination@justice.tas.gov.au

Dear Leica,
Re: Historic Convictions Discussion Paper

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to respond to the consultation into historic convictions.[1]

CLC Tas is the peak body representing the interests of eight community legal centres (CLCs) located throughout Tasmania. We are a member based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

We strongly believe that consensual sex and associated offences between homosexual men should never have been criminalized.[2] As a result of these criminal convictions, an unknown number of homosexual men have had to endure shame, stigma and detriment and concomitant loss of work, volunteer and travel opportunities for conduct that is lawful today. Criminal convictions may also have caused significant damage to a person's reputation, mental health and familial relations. These laws were unjust, discriminatory and a breach of human rights. It should also be acknowledged that these convictions continue to have lasting effects as Lynne Featherstone, the United Kingdom Minister for Equalities has noted:[3]

[1] CLC Tas would like to acknowledge the assistance of Harriet Hall-Pearce who provided the research that underpins our response.

[2] For ease of reference, the term 'homosexual' is used to describe a person subject to a historic conviction, the subject of this paper. However, it is acknowledged that these laws targeted men who have sex with men (MSM) some of whom have not and do not identify as homosexual. The term also covers persons convicted of 'unnatural sexual intercourse' who identify as other than homosexual.

[3] Lynne Featherstone, Public Bill Committee, House of Commons, Protections of Freedoms Bill, 12 May 2011, available at: http://www.publications.parliament.uk/pa/cm201011/cmpublic/protection/110512/am/110512s01.htm (Accessed 10 December 2014).

> That situation might prevent an individual from taking up certain opportunities in life, such as applying for particular occupations, or volunteering — not because they present a risk, but simply because they do not want to risk anyone finding out about their past. They may not have told their family or partner about the matter, and allowing that history to be revealed can have devastating effects on lives.

We do not believe that the expungement of historic convictions for consensual sex between adults is likely to open the floodgates to other offences as community standards change. Unlike other offences, homosexual men were specifically targeted because of their sexual orientation. In other words, homosexual men were convicted on the basis of who they are and not for the actions they had carried out.

We strongly support the introduction of standalone legislation that explicitly addresses the removal of criminal convictions for consensual sex between adults. In our opinion, the adoption of such legislation upholds the right to freedom from discrimination as set out in Article 26 of the *International Covenant on Civil and Political Rights*, to which Australia is a signatory and promotes the recent amendments to the *Sex Discrimination Act 1984* (Cth) which provide that no person shall be discriminated against on the grounds of sexual orientation.[4]

A model that should be considered is the *Protection of Freedoms Act 2012* (UK).[5] In particular, we support the broad nature of the Act, including:

- a definition of 'conviction' that includes a conviction, caution, warning or reprimand; and
- that all parties involved in the conduct constituting the offence must have been a consenting party and aged 16 years or over; and
- consideration of applications to have convictions, cautions, warnings or reprimands disregarded involves a search of all official records (including police records, court records and records held by employing bodies such as the armed forces).

We strongly disagree with the model introduced in other jurisdictions in which historic convictions against homosexuals have been incorporated into spent conviction legislation. In Tasmania, the *Annulled Convictions Act 2003* is specifically targeted at minor offences and was drafted in recognition of the life-long negative effect a criminal conviction can have on employment, volunteer and travel opportunities. Fundamentally, the Act is a mechanism by which the State provides offenders with a second chance with the Long Title stating that it facilitates:

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[4] Section 5A of the *Sex Discrimination Act 1984* (Cth).

[5] See also the *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic).

> the rehabilitation of offenders by providing that in certain circumstances minor convictions are annulled for nearly all purposes, to impose restrictions on obtaining and disclosing information about annulled convictions and to make similar provision for quashed convictions and pardons and for related purposes.

As a result, if the *Annulled Convictions Act 2003* (Tas) were to be amended, a perception may arise in the Tasmanian community that homosexual men should be provided with a second chance, that the historic convictions imposed against homosexuals were of a 'minor nature' or that the expungement of the conviction will 'facilitate the rehabilitation of the offender'.

We strongly reiterate that consensual sex between adults should never have been criminalized. The clearest legislative means by which this can be established is through the creation of standalone legislation, which recognises the significant stigma and detriment suffered by those as a result of this discrimination. In our view this is the best way to ensure that applications to have a conviction disregarded and records expunged are dealt with in a comprehensive manner.

Anecdotally, we have been informed that many homosexual men continue to fear the Tasmanian authorities including the Tasmanian Police, the Legislature and the Judiciary and the significant role these organisations has played in the stigma they have suffered. As a result, in ascending order we do not support the Department of Justice, the Attorney-General or the Judiciary having the authority to make decisions on applications. In our opinion, the Office of the Anti-Discrimination Commissioner is the most appropriate body to assess applications for the expungement of a conviction. As its own website proclaims:[6]

> The Office of the Anti-Discrimination Commissioner seeks to work closely with the Tasmanian community (including the community generally, government and business) in fostering a society free of discrimination, prejudice, bias and prohibited conduct.

If the Office of the Anti-Discrimination Commissioner was the responsible decision maker we would prefer a model to be adopted in which they received applications and were equipped with the power to require persons or bodies (such as the Tasmanian Police, a court or the Director of Public Prosecutions to provide it with information for the purposes of making a decision. Additionally, if it was considered that the Office of the Anti-Discrimination Commissioner was the appropriate decision-maker we believe that either internal staff and/or a retired judicial officer could provide administrative support.

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[6] As found at http://www.antidiscrimination.tas.gov.au/about_us (Accessed 15 December 2014).

In our opinion a decision that a conviction is not eligible to be disregarded should be capable of review to the Anti-Discrimination Tribunal. With almost half of the Anti-Discrimination Tribunal comprised of Magistrates there are a number of judicial officers with the experience and expertise in both discrimination and criminal law to review decisions made by the responsible decision-maker.[7]

From a public policy perspective we do not support the ability of either the administrative or executive arms of Government having the power to overturn criminal convictions. As a result we believe that both the Office of the Anti-Discrimination Commissioner and the Anti-Discrimination Tribunal should be required to have the expungement enforced through a formal order of the Supreme Court. The adoption of such a model guarantees the independence and impartiality of the decision making process. A model that could be adopted is already contained in section 90 of the *Anti-Discrimination Act 1998* (Tas):

> **90. Enforcement of orders**
> (1) A person, or the Commissioner at the request of a person, may enforce an order made under section 89(1) or an agreement to resolve a complaint by filing the following documents, free of charge, in the Supreme Court:
>
> (a) in the case of an order, a copy of the order certified by –
>
> (i) the member who presided over the inquiry, if the Tribunal consisted of more than one person; or
>
> (ii) the member who constituted the Tribunal, if the Tribunal only consisted of one person;
>
> (b) in the case of an agreement, a copy of the record made under section 76 and certified by the Commissioner or an authorised person;
>
> (c) an affidavit stating the extent to which the order or agreement has not been complied with.
>
> (2) If the documents are filed in accordance with this section, the order made by the Tribunal or agreement is enforceable as if it were an order of the Supreme Court.

The legislation should be broadly defined so that all persons convicted of an offence that current laws would deem discriminatory should be entitled to have the conviction expunged. The offence should also be broad enough to cover incidental convictions, that is convictions that would not have taken place had it not been for a

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[7] According to the Department of Justice's Annual Report 2013-2014 there are 12 Anti-Discrimination Tribunal members of which five are Magistrates; Magistrates Glenn Hay, Melanie Bartlett, Michael Brett, Catherine Rheinberger and Simon Brown. As found at http://www.magistratescourt.tas.gov.au/publications/annual_reports (Accessed 15 December 2014)

primary offence, for example resisting arrest, as well as convictions for inchoate offences relating to a primary offence, such as 'attempt'.

Rather than delete permanently we prefer a model in which it is clear that the 'offence' is disregarded. The United Kingdom may be an appropriate model where records are 'deleted' meaning that the details are recorded as being a 'disregarded' offence or caution and the effect of that decision.[8]

As well as applications for expungement being able to be made by persons who have personally suffered from the detriment and stigma associated with historic convictions, we also support the extension to posthumous applications. This is already the case in New South Wales where applications are able to be made posthumously by the legal representative, spouse, de facto partner, parent or child of the convicted person or a person who was in a close personal relationship with the convicted person immediately before their death.[9] However, in our opinion, the posthumous application process should be more broadly worded to include persons or organisations with standing, including next of kin, their estate or any other person who has a 'special interest in the subject matter of the action'.[10]

We recognise that there may be some applications in which legal disputes may arise or where there are issues around privacy. As a result, we support the establishment of appropriate resources so that an advocate is able to act on behalf of applicants as well as receive correspondence relevant to the application. Community Legal Centres (CLCs) are experts in discrimination law and we strongly encourage the appropriate resourcing of the three generalist centres located in Hobart, Launceston and Devonport to carry out this work. Additionally, given that some homosexual men with historic convictions may be living in other Australian States or Territories we support the use of organisations such as the Human Rights Law Centre in Melbourne and the Public Interest Advocacy Centre in Sydney, who have both played significant roles in the introduction of the scheme in Victoria and New South Wales.

If the scheme is to be a success it is imperative that it is widely publicised. In our opinion, there should be a three-pronged approach. First, a community education campaign should be implemented in partnership with the LGBTI community, with the involvement of employer groups, unions, the Tasmanian Police, volunteer groups and aged care providers. Anecdotally, we have been informed that many men convicted of historic convictions have moved to other Australian States or Territories and it is therefore important that the campaign is publicized nationally. Secondly, working with vulnerable people and criminal record checks should be updated so that applicants are made aware of the fact that they can apply for expungement of their historic convictions. Finally, where working with vulnerable

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[8] Section 95 of the *Protection of Freedoms Act 2012* (UK).

[9] Section 19B(3) of the *Criminal Records Act 1991* (NSW).

[10] *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.

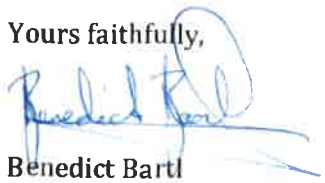
people and police checks discloses a historic conviction, Tasmanian Police should be required to provide information about the expungement scheme.

Finally, it is essential that if the harm caused by many decades of stigmatization, detriment and discrimination is to be truly repaired, an apology must be offered. A formal apology will have the effect of acknowledging that the criminalisation of consensual sex between adults was both unjust and wrong. An apology is also an important symbolic gesture; recognition of the wrongs of the past, a fast tracking of the healing process and an important step forward for the Tasmanian community.

In summary, we strongly support the intent of the Office of the Anti-Discrimination Commissioner to encourage legislation which will expunge the historic convictions of homosexual men. The legislation should be standalone legislation that covers historic convictions that would today be considered discriminatory. In our opinion such legislation will play a significant role in recognising the stigma arising from the criminalization of sexual conduct between consenting adults as well as promoting human rights and reinforcing the right to live free from discrimination.

If we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,



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