TASMANIA

Independent Review of Expungement of Historical Offences Act 2017

REPORT OF THE INDEPENDENT REVIEWERS

Melanie Bartlett

Taya Ketelaar-Jones

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Pursuant to Section 32 of the *Expungement of Historical Offences Act 2017*

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Glossary of Terms and Abbreviations

Act - The *Expungement of Historical Offences Act 2017* (Tas)

ALA – Australian Lawyers Alliance

Bill - The *Expungement of Historical Offences Bill 2017* (Tas)

CBOS – Consumer, Building and Occupational Services

CLA – Civil Liberties Australia

Code – *Criminal Code Act 1924* (Tas)

Department – The Department of Justice

DPAC – The Department of Premier and Cabinet

DPP – The Office of the Director of Public Prosecutions

EHOS – The Expungement of Historical Offences Scheme

ET – Equality Tasmania

Independent Reviewers – The persons appointed to undertake the Review, Melanie Bartlett LLB and Taya Ketelaar-Jones BA LLB (Hons)

LGBTIQ – Lesbian, Gay, Bi-sexual, Transgender, Intersex and Queer community

MC(AAD) Act – *Magistrates Court (Administrative Appeals Division) Act 2001*

Review – The Independent Review commissioned by the Minister for Justice under Section 32 of the Act.

Secretary – The Secretary of the Department of Justice.

Scheme – The Expungement of Historical Offences Scheme (Tas)

UNHRC – United Nations Human Rights Council

1 INTRODUCTION

The *Expungement of Historical Offences Act 2017* (Tas) (the Act) establishes a scheme for the expungement of charges and convictions relating to historic homosexual offences and cross-dressing offences.

The Hon Matthew Groom MP, when he moved that the Expungement of Historical Offences Bill 2017 be read a second time on 13 April 2017, recognised that with the decriminalisation of homosexuality in Tasmania in 1997, and the offence of cross-dressing in 2001, there were ongoing disadvantages, difficulties, distress and stigma that resulted from a criminal record which included these offences.[1] He noted that, 'Despite the repeal of homosexual offences, some men continue to have criminal records that affect various aspects of their lives, such as their work, volunteering and travelling.'[2] Both Mr Groom, and then Premier Will Hodgman, paid tribute to the then Attorney-General, the late Dr Vanessa Goodwin, and acknowledged her extraordinary efforts, hard work and dedication in championing this legislation.[3]

The Act commenced on 9 April 2018. Section 32 of the Act requires that an independent review of the operation of the Act be completed within 6 months of the second anniversary of the commencement of the Act.

> ***32. Review of Act***
>
> *(1) In this section –*
>
> ***independent review** means a review carried out by persons –*
>
> *(a) who, in the Minister's opinion, are appropriately qualified for that task; and*
>
> *(b) the majority of whom are not employees of the State or of any agency of the State.*
>
> *(2) The Minister is to cause an independent review of the operation of this Act to be completed within 6 months after the second anniversary of its commencement.*
>
> *(3) The Minister is to cause a copy of the review to be tabled in each House of Parliament within 10 sitting-days of that House after it is given to the Minister.*

1 Tasmania, Parliamentary Debates, House of Assembly, 13 April 2017, 57 (Matthew Groom).
2 Ibid, 57.
3 Ibid, 59.

The Independent Reviewers, Melanie Bartlett and Taya Ketelaar-Jones, were appointed by the Attorney-General and Minister for Justice on 28 July 2020 to undertake the Review in accordance with section 32 of the Act.

The Terms of Reference for the purposes of assessing and reporting on the operation of the Act are as follows:

1) The number of applications that have been made for expungement under the Act since its commencement and a breakdown of the outcomes of those applications including:

   (a) the number of applications resulting in the expungement of charges;

   (b) the number of applications where the Secretary has refused to expunge a charge and the reasons for the refusal;

   (c) the number of applications that have been withdrawn; and

   (d) the number of applications for review under section 21 of the Act and the outcomes of those applications for review;

2) Whether the provisions of the Act are operating effectively and as intended with a particular focus on:

   (a) the application process;

   (b) the process for the annotation of official criminal records;

   (c) the legal effect of expunged records.

3) Whether there are any deficiencies or unintended consequences of and/or impediments to the implementation of the Act.

4) Whether there are any suggested improvements, including any recommendations for law reform of the Act.

On 12 and 15 August 2020 notices were published in the *Mercury* Newspaper, the *Examiner* Newspaper and the *Advocate* Newspaper inviting submissions relevant to the Review and requiring that they be received by close of business on 31 August 2020. A similar notice was

published at the same time on the website of the Department of Justice and a media release was sent out on 10 August 2020 inviting submissions.

Letters were also sent to a number of stakeholders to alert them to the Review and to invite them to make a submission. Stakeholders included those who had, or were likely to have, an involvement or understanding of the operation of the Act, and those who had been consulted prior to the introduction of the Act.

Written submissions were received from the organisations listed in Attachment 1 to this Review.

2 RECOMMENDATIONS

Having considered the legislation, the submissions received, and the information supplied by CBOS, the Independent Reviewers make the following recommendations:

1. That the Act is amended to allow for the expungement of charges or convictions for resisting, obstructing or assaulting police under section 34B of the *Police Offences Act 1935* (Tas) or failing to comply with the direction of a Police Officer under section 15B of the *Police Offences Act 1935* (Tas), or any equivalent provision as in force at that time. These charges or convictions should only be eligible for expungement where it can be shown that the person would not have been charged or convicted, but for the fact that the person was being dealt with in relation to engaging in alleged conduct of a homosexual nature, or cross-dressing.

2. That printed copies of the application form be available from Service Tasmania, and also a telephone contact number be clearly noted on the EHOS website, and in any other material promoting the Scheme, advising that a copy of the application form can be requested by phone and sent by mail. The copy of the application form which is made available in both these circumstances should also include details of the legal and non-legal support services noted on the website.

3. That information identifying legal and non-legal support services be provided to all parties required to engage with or be involved in the investigation, for example persons being required to provide information under section 8(6) of the Act.

4. That the information on the website, and at the relevant sections in the online and hardcopy application forms, should be clarified to clearly state that the applicant is not required to provide all of the information requested in order to make a valid application. Consideration should be given to including words to the effect that if the applicant is unable to provide any of these details, they are nonetheless encouraged to apply, and that providing their name, date of birth and address will be sufficient to initiate the investigative process.

5. That the Act be amended to delete the word 'applicant' in section 10(3)(c) first occurring and replace it with the word 'Secretary'.

6. That the Secretary consider establishing a formal feedback process to be sent to all applicants following the determination of their application to identify any systemic issues or provide further support to applicants.

7. That section 15 of the Act be amended to provide that the annotation process does not apply to secondary records. It is recommended that a definition of secondary records be inserted in the Act and be framed in similar terms to section 105 of the *Sentencing Act 1991* (Vic). It is recommended that the Act be amended to require data controllers who hold secondary electronic records to either remove the entry, make the entry incapable of being found, or de-identify the information contained in the entry and destroy any link between it and information that would identify the person to whom it referred.

8. That a specific Disposal Schedule be issued which provides for all records collected or created in the determination of the application be disposed of after a period of 6 months from the determination of the application by the Secretary or, in the event of an application for a review of the determination, then 6 months from the date of the review decision.

9. That the Act be amended to provide that any records, documents or material that have been collected or created in the investigation and determination of an application for expungement are exempt from the provisions of the *Right to Information Act 2009* (Tas).

10. That the definition of 'record' in Section 9 of the Act is narrowed. The definition should provide that the records which are required to be provided to the applicant are records relevant to the offences which are the subject of the application for expungement.

11. That the Secretary's obligation under section 12(3)(b) to provide the applicant with copies of relevant records relating to the applicant should be qualified by a provision limiting this obligation in circumstances where there is a possibility that disclosure may have adverse impacts on another person's privacy, safety, wellbeing, rights or interests. Any amending provisions should be framed with due regard to protecting the interests of other parties, without infringing the applicant's right to information relating to their application.

12. That further efforts are taken to promote the Scheme. It is recommended that consultation take place with LGBTIQ community representatives to determine what further promotional activity they suggest should be undertaken. It is anticipated that activities such as interstate promotion, and promotion in aged care facilities and services may be appropriate.

13. That a payment should be made available for those whose records are expunged under the Act. The Independent Reviewers recommend that the Government introduces a one-off ex-gratia payment of a fixed amount as acknowledgement and redress for applicants who have charges and convictions expunged under the Act. This payment should be available automatically on the finalisation of an application in which the Secretary has determined to expunge any charge or conviction. It should not involve a hearing and should be an amount determined by the Government to be appropriate. In considering any such proposal for redress, the Independent Reviewers suggest that the Government consider a two-tiered payment structure; one payment for applicants who have conviction/s or charge/s actually recorded on their official criminal record which is or are expunged, and a second, smaller payment, to applicants who have a charge expunged which did not appear on their criminal record. This distinction recognises that, whilst all applicants whose records are expunged should be acknowledged, a person who has had a conviction or charge recorded on their criminal record is more likely to have encountered discrimination arising from this record than a person who was charged, but the charge did not proceed and consequently does not appear on their official criminal record.

3 BACKGROUND – INCLUDING PURPOSES OF THE ACT

On 20 February 1873, Hendrick Witnalder became the last man in Australia to be executed for committing the crime of sodomy when he was hanged at the Campbell Street gaol (as it was then) in Hobart, Tasmania.[4]

In Australia, criminal laws prohibiting homosexual activity were actively enforced until the mid-1970s, and in some jurisdictions until the late 1980s.[5] In Tasmania, the *Criminal Code Act 1924* (Tas) criminalised homosexual activity between consenting adult males until 1997, targeting sexual activity that was 'against the order of nature'[6] and prohibiting indecent practices between males.[7] Cross-dressing remained an offence under section 8(1)(d) of the *Police Offences Act 1935* (Tas) until 2001.

South Australia was the first Australian jurisdiction to legalise private homosexual acts between consenting adults in 1972.[8] By 1983 all Australian states and territories, other than Tasmania, had also enacted amending legislation to legalise consensual adult homosexual activity.[9] Legislative reform in this area did not take place in Tasmania until over a decade later.

In 2015 the then Anti-Discrimination Commissioner, Robin Banks, described the decriminalisation of homosexuality as a 'pivotal moment in the history of the state',[10] noting that:

> *The removal of criminal sanctions against homosexuality in 1997 was the culmination of a decade-long battle to remove one of the last bastions of discrimination and finally bring Tasmania into line with other Australian jurisdictions.*

In 1991, Tasmanian resident Nick Toonen lodged a complaint with the United Nations Human Rights Council (UNHRC) arguing that the provisions criminalising private consensual homosexual

4 Jo Lennon and George Williams, *'The Death Penalty in Australian Law'* (2012) 34 Sydney Law Review 664.
5 Graham Carbery, *'Towards Homosexual Equality in Australian Criminal Law – A Brief History'* (2014) Australian Lesbian & Gay Archives Inc (revised ed) 2014, 3.
6 *Criminal Code Act 1924* (Tas) s 122(a) and (c), repealed by *Criminal Code Amendment Act 1997*.
7 *Criminal Code Act 1924* (Tas) s 123, repealed by *Criminal Code Amendment Act 1997*.
8 The *Criminal Law (Sexual Offences) Amendment Act 1975* (SA), No. 66 of 1975 amended the principal act, the Criminal Law Consolidation Act 1935 (SA).
9 The *Crimes (Sexual Offences) Act 1980* (Vic) amended the principal act, the *Crimes Act 1958* (Vic); the *Crimes (Amendment) Act 1984* (NSW) amended the principal act, the *Crimes Act 1900* (NSW); the *Criminal Code and Another Act Amendment Act 1990* (Qld) amended the principal act, the *Criminal Code Act 1899* (Qld); the *Law Reform (Decriminalisation of Sodomy) Act 1989* (WA) amended the principal act, the *Criminal Code Compilation Act*, 1913 (WA); *Law Reform (Sexual Behaviour) Ordinance*, 1976 (ACT) amended the principal act, the *Crimes Act 1900* (NSW) in its application to the ACT; *Criminal Code, 1983* (NT).
10 Anti-Discrimination Commissioner (Tas), *Treatment of Historic Criminal Offences for Consensual Homosexual Activity and Related Conduct*, (2015).

sexual adult activity in Tasmania's *Criminal Code Act 1924* violated his rights under the International Covenant on Civil and Political Rights (to which Australia is a signatory), in particular his right not to face unnecessary discrimination,[11] his right to equality before the law,[12] and his right to privacy.[13] The complaint was particularly significant as it was the first time the UNHRC had been requested to consider a complaint against Australia.[14] It was also the first time a complaint relating to discrimination based on sexuality was brought before the UNHRC.[15]

In its landmark decision in 1994, the UNHRC unanimously upheld Mr Toonen's complaint, ruling that the provisions in the Tasmanian *Criminal Code Act 1924* infringed his rights under the International Covenant on Civil and Political Rights (ICCPR).

Despite this ruling, the Tasmanian Parliament refused to repeal the offending provisions, and indicated that it would challenge any attempt by the Federal Government to implement the UNHRC's ruling.[16]

In response, the Federal Government enacted the *Human Rights (Sexual Conduct) Act 1994,* guaranteeing the right to sexual privacy for all adults in Australia aged 18 years or over.

Despite the passage of this Federal legislation, the Tasmanian Government remained fixed in its opposition to any reform, prompting Tasmanian activist Rodney Croome to launch a High Court challenge on the basis that the relevant provisions in Tasmanian *Criminal Code Act 1924* were now inconsistent with Federal legislation and were therefore invalid under section 209 of the *Commonwealth of Australia Constitution Act 1900* (UK).

Tasmanian Greens Party leader Christine Milne introduced the *Criminal Code Amendment Act 1997* before Mr Croome's High Court challenge was heard. The Act, which passed the Legislative Council by a margin of one vote, came into effect on 14 May 1997, and decriminalised private homosexual acts between consenting adult males.

In 2001, the *Police Offences Amendment Act 2001* (Tas) amended section 8 of the *Police Offences Act 1935* (Tas), by omitting subsection (d) which had provided that it was an offence for a male

11 International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 26.
12 Ibid, art 2.1.
13 Ibid, art 17.
14 Carbery, above n 5, 44.
15 Ibid.
16 Ibid, 45.

person to 'be in any public place at any time between sunset and sunrise, dressed in female apparel.'

The history of highly politicised debates and legal challenges relating to LGBTIQ rights and law reform, which ultimately culminated in decriminalisation, provides a Tasmanian specific context to the significance of the expungement Scheme.

The decriminalisation of homosexuality and cross-dressing did not address the implications for those who had already been charged with offences under those sections. A criminal record containing offences for engaging in homosexual activity or cross-dressing exposes a person to ongoing discrimination in respect to employment opportunities, and continuing stigma and disadvantage.[17]

England and Wales introduced the first statutory regimes for the expungement of historical offences through the *Protection of Freedoms Act 2012* (UK). Shortly after, Australia began taking similar steps, starting with the South Australian *Spent Convictions (Decriminalised Offences) Amendment Act 2013* (SA) introduced in 2013. By 2018, all Australian states and territories had enacted legislation to establish equivalent regimes. Overseas jurisdictions including New Zealand, Canada and Scotland also introduced similar regimes in 2018.[18] Table 1 below provides an overview of the statutory reforms in chronological order.

Jurisdiction	**Legislation**
South Australia	*Spent Convictions (Decriminalised Offences) Amendment Act 2013* (SA) amended the *Spent Convictions Act 2009* (SA)
New South Wales	*Criminal Records Amendment (Historical Homosexual Offences) Act 2014* (NSW) amended the *Criminal Records Act 1991* (NSW)
Victoria	*Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic) amended the *Sentencing Act 1991*

17 Anti-Discrimination Commissioner (Tas), *Treatment of Historic Criminal Offences for Consensual Homosexual Activity and Related Conduct*, (2015) 2; Tasmania, Parliamentary Debates, House of Assembly, 13 April 2017, 60 (Matthew Groom).
18 *Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018* (NZ)*; Expungement of Historically Unjust Convictions Act 2018* (Can); *Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018.*

Jurisdiction	Legislation
Australian Capital Territory	*(Historical Homosexual Convictions Extinguishment) Amendment Act 2015* (ACT) amended the *Spent Convictions Act 2000* (ACT)
Tasmania	*Expungement of Historical Offences Act 2017* (Tas)
Queensland	*Criminal Law (Historical Homosexual Convictions Expungement) Act 2017* (Qld)
Western Australia	*Historical Homosexual Convictions Expungement Act 2018* (WA)
Northern Territory	*Expungement of Historical Homosexual Offence Records Act 2018* (NT)

Table 1: Expungement schemes in Australian states and territories

In 2015, the then Anti-Discrimination Commissioner, Ms Robin Banks, released a report entitled 'Treatment of historic criminal records for consensual homosexual sexual activity and related conduct'. The report recommended that an important aspect of 'overcoming these remnants of our homophobic past' is establishing a scheme to enable convictions and charges for these historical offences to be expunged.[19] The Independent Reviewers have found the report to be a useful resource in the course of considering the Act and preparing this Review.

When the Hon Matthew Groom MP moved that the *Expungement of Historical Offences Bill 2017* be read a second time, he identified the Bill as an important step in addressing the legacy of old homophobic laws, acknowledging that:

> *Many Tasmanians have continued to suffer from distress and disadvantage resulting from the criminalisation of conduct that we now accept as lawful.* [20]

During the debate in the Tasmanian Parliament on the *Expungement of Historical Offences Bill* then Tasmanian Premier Will Hodgman stated:

> *…[L]aws criminalising consensual homosexual activity and cross-dressing were unfair and unjust.*

19 Anti-Discrimination Commissioner (Tas),*Treatment of Historic Criminal Offences for Consensual Homosexual Activity and Related Conduct* (2015), 3
20 Tasmania, *Parliamentary Debates*, House of Assembly, 13 April 2017, 60 (Matthew Groom).

> *It is our view the broader Tasmanian community would believe people should never have been charged or convicted in the first place. Even if it was thought at the time that it was the right thing to do, it was not and this Bill seeks to rectify that the best way we now can.*
>
> *We accept also that we cannot change the past, nor can we undo that harm - the distress caused to members of our community. We can apologise for it and we do so today.* [21]

This sentiment underpins the rationale behind the Act, namely recognition that homosexuality and cross-dressing should never have been crimes, and that those who have been charged with, and who have historical convictions for these offences should be afforded the opportunity to have them expunged from their criminal record, in order to remove the ongoing disadvantage and stigma associated with a criminal record which includes those offences.[22]

The *Expungement of Historical Offences Act 2017* (Tas) came into force on 9 April 2018, making Tasmania the fifth Australian jurisdiction to enact legislation for expungement.

21 Tasmania, Parliamentary Debates, House of Assembly, 13 April 2017, 61 (Will Hodgman).
22 Tasmania, Parliamentary Debates, House of Assembly, 13 April 2017, 56 (Matthew Groom).

4 SUBMISSIONS RECEIVED

The Australian Lawyers Alliance, Civil Liberties Australia, and Equality Tasmania made submissions to the Review. The Independent Reviewers thank these organisations for their time and acknowledge their contribution to the review process. It was beneficial to have their input and valuable insights.

Civil Liberties Australia ('CLA') provided a detailed submission, addressing the preliminary question of whether the Act had achieved its objective of removing the ongoing disadvantage and stigma that results from having a criminal record which includes consensual homosexual activity and cross-dressing. CLA concluded that the Act has not achieved those objectives. Equality Tasmania ('ET') also provided a detailed submission. The view of ET is that the State has a responsibility to those it formerly convicted, which it has not yet adequately discharged. It stated, 'The Act was a start, but more is required.'

The issues identified by CLA and ET are summarised as:

- the Annual Reports produced under the Act contain insufficient information
- the information that is required to be provided by the applicant (relating to the date of the offence, and parties to the offence) is too onerous
- the hierarchy of people who may apply on behalf of another person is too onerous
- the Secretary of the Department of Justice is not the appropriate agency in which to locate the decision maker and that applicants may not have confidence in the Secretary as the decision maker
- the method and scope of expungement may not be sufficient
- the absence of compensation for an applicant is not satisfactory
- there is insufficient support available to applicants
- there has been insufficient promotion of the scheme

The Independent Reviewers thank CLA and ET for raising these issues; they are addressed in detail in later chapters of this Review.

The submission received from the Australian Lawyers Alliance ('ALA') proposed that the terms of the Act should be extended to include the expunging of drug possession and use offences and disorderly conduct offences after a period of 10 years has elapsed, if there has been no subsequent offending of a similar nature. The reason for this proposal was stated to be the stigma and difficulties which can be experienced by a person with such offences on their criminal record.

The Independent Reviewers consider that this proposal is beyond the Terms of Reference for the review of the Act as it is suggesting that offences, other than historical homosexual and cross-dressing offences or related offences, should be included within the jurisdiction of the Act. Given that the structure of the operation and administration of the Act is specifically drafted to deal with the confidentiality, privacy and sensitivity required for these particular historic offences, it would seem that this Act is not necessarily the best vehicle to be used to provide for drug possession and use offences and disorderly conduct offences to be expunged. If such an amendment was made it would also likely detract from the purposes of the Act which is intended to acknowledge that 'laws criminalising consensual homosexual activity and cross-dressing were unfair and unjust'.[23]

Without expressing a concluded view, the Independent Reviewers consider that it may be more appropriate for this submission to be made to Government to seek that the *Annulled Convictions Act 2003* (Tas) be amended to include the offences they have noted as part of the annulment process in that Act.

23 Tasmania, Parliamentary Debates, House of Assembly, 13 April 2017, 56 (Matthew Groom).

5 THE OPERATION OF THE ACT

5.1 Scope of the offences covered

The schemes across Australian jurisdictions generally adopt one of two approaches to identifying the categories of offences that may be expunged. The *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017* (QLD) identifies eligible offences by reference to specific offences in the *Criminal Code 1899* as in force before 19 January 1991.[24] In contrast, the *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic) adopts a broad construction, identifying eligible offences by description, being 'sexual or public morality offences'.[25]

The Tasmanian Act is essentially a hybrid of the two approaches. The *Expungement of Historical Offences Act 2017* (Tas) identifies eligible offences by describing sexual and public morality offending, and also referring to the specific offence found in section 8(1)(d) of the *Police Offence Act 1935* (Tas) as in force before 12 April 2001.

The definitional pathway to identifying an eligible offence is determined by the interpretations provided in section 3 of the Act:

Is it an 'historical offence'?

Historical offence means –

(a) a homosexual offence; or

(b) a cross-dressing offence

If so, is it an 'homosexual offence' or 'cross-dressing offence'?

Homosexual offence means –

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24 Section 8(1) of the *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017* (QLD) provides that an eligible offence is:
(a) a Criminal Code male homosexual offence; or
(b) a public morality offence; or
(c) another offence prescribed by regulation.
Section 8(2) qualifies that a regulation under subsection (1)(c) may only prescribe an offence to the extent the offence happened, or allegedly happened, before 19 January 1991. Sections 9 and 10 provide the meaning of 'male homosexual offence' and 'public morality offence' by reference to specific offences in the *Criminal Code 1899* (Qld) as in force before 19 January 1991.
25 *Sentencing Act 1991* (Vic) s 105, as amended by the *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic).

(a) a sexual offence or a public morality offence; or

(b) an offence of attempting to commit an offence referred to in paragraph (a); or

(c) an offence of inciting, instigating, aiding, or abetting, the commission of an offence referred to in paragraph (a)

Cross-dressing offence means –

(a) an offence under section 8(1)(d) of the *Police Offences Act 1935* as in force before 12 April 2001; or

(b) an offence of attempting to commit an offence referred to in paragraph (a); or

(c) an offence of inciting, instigating, aiding, or abetting, the commission of an offence referred to in paragraph (a)

In determining whether the offence was a public morality offence or sexual offence, consideration is given to:

What is a 'public morality offence'?

Public morality offence means an offence, other than a sexual offence, as in force at any time –

(a) the essence of which is the maintenance of public decency or morality; and

(b) by which homosexual behaviour could be punished;

What is a 'sexual offence'?

Sexual offence means an offence under a law as in force at any time by which sexual activity of a homosexual nature, whether penetrative or non-penetrative, could be punished, whether or not heterosexual sexual activity could also be punished by the offence.

In practice, the key offences to which the Act applies are sections 122(a) & (c) and 123 of the *Code,* as in force prior to 1997. These sections read as follows:

> ***122. Unnatural crimes***
>
> *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.*
>
> *Charge: Unnatural sexual intercourse*
>
> ***123. Indecent practices between males***
>
> *Any male person who, whether in public or private, commits any indecent assault upon, or other act of gross indecency with, another male person, or procures another male person to commit any act of gross indecency with himself or any other male person, is guilty of a crime.*
>
> *Charge: Indecent practice between male persons.*

The Act is not limited to these specific offences. The descriptive approach to defining homosexual offences captures the broader range of generic offence provisions under which consensual homosexual activity and related behaviour could be charged. These offences could include indecency,[26] loitering and loitering near children,[27] prostitution offences,[28] public annoyance,[29] or public decency offences. [30]

The Act does not apply to charges or convictions which are not homosexual, public morality, or cross-dressing offences, but which may arise incidental to the charge or conviction of a homosexual, public morality, or cross-dressing offence.

Offences likely to arise include charges or convictions relating to resisting arrest, or obstructing or assaulting police or failing to comply with the direction of a police officer.[31] These offences do not fall within the definition of 'historical offence' in section 3 and therefore cannot be expunged under the Act, even in circumstances where they would not have been charged, but for the fact

26 *Criminal Code Act 1924* (Tas) s 137.
27 *Police Offences Act 1935* (Tas) ss 7 & 7A.
28 *Police Offences Act 1935* (Tas) s 8.
29 *Police Offences Act 1935* (Tas) s 13.
30 *Police Offences Act 1935* (Tas) s 14.
31 *Police Offences Act 1935* (Tas) s 34B and s 15B.

that the applicant was being dealt with in relation to engaging in alleged conduct of a homosexual nature.

5.2 Administration of the Scheme

The Act is administered in the Department of Justice, Consumer, Building and Occupational Services ('CBOS'). The Secretary has delegated functions and power, pursuant to section 27 of the Act, to specific staff working in the Registration to Work with Vulnerable People Unit at CBOS. These staff have experience in dealing with private and confidential information from Tasmania Police, the DPP and the Courts.

The first stage of processing an application is to determine whether the application meets the threshold of relating to an historic offence under section 3 of the Act. This may be evident from the application itself, or there may need to be further enquiry at that stage. If further information is required to enable the nature of the offences to be determined this is sought, for example, by obtaining the Comments on Passing Sentence from the Supreme Court.

Once it is established that the offence(s) sought to be expunged is or are within the jurisdiction of the Act, and initial consideration of the application has occurred, information may be sought from whichever data controllers are relevant to the particular application under consideration.[32] 'Data controllers' are defined as the Registrar of the Supreme Court, the Administrator of the Magistrates Court, the Commissioner of Police, and the person holding the office of the Director of Public Prosecutions. Section 9 requires the Secretary to provide the applicant with a copy of any record 'as soon as reasonably practicable' but not later than 42 days after the record is obtained. 'Record' is defined as 'a record of the investigation of an historical offence or of proceedings relating to an historical offence'.[33] This will include the information received from a data controller.

In determining the application, no oral hearing is to be held.[34]

The Secretary is required to consider the matters set out in section 10 of the Act. The Secretary must first consider whether the offence is a homosexual offence or a cross-dressing offence.[35] In the case of a homosexual offence, the Secretary must be satisfied that the person would not have been charged but for the fact that they were suspected of having engaged in the conduct

32 *Expungement of Historical Offences Act 2017* (Tas) s 8(8).
33 *Expungement of Historical Offences Act 2017* (Tas) s 9.
34 *Expungement of Historical Offences Act 2017* (Tas) s 8(2).
35 *Expungement of Historical Offences Act 2017* (Tas) s 10(1)(a).

constituting the offence for the purposes of, or in connection with, sexual activity of a homosexual nature.[36] The Secretary must also be satisfied that the conduct constituting the homosexual offence would not, if engaged in at the time of making the application, constitute an offence under Tasmanian law.[37] In considering this last element, the Secretary must consider whether any party involved in the conduct consented to the activity, and must also consider the ages of the persons at the time.[38] If consent is an issue in the decision to expunge a conviction or charge, the Secretary 'may only be satisfied by written evidence on that issue –

(a) from the official criminal records, if available; or

(b) from a person, other than the eligible person, who was involved in the conduct constituting the homosexual offence; or

(c) if no person referred to in paragraph (b) can be found after reasonable enquiries are made by the applicant, from a person (other than the applicant) with knowledge of the circumstances in which that conduct occurred.'[39]

The Secretary may, in addition, have regard to any matter he or she reasonably considers relevant in the circumstances.[40]

In receiving and investigating applications, CBOS provides advice to the Secretary at various stages in the form of Minutes, which are noted and signed off by the Secretary, if approved. On the conclusion of the investigation of an application a recommendation is provided by CBOS to the Secretary in the form of a Minute.

Under the Act the Secretary can either expunge the charge or conviction for the offence or refuse to expunge the charge or conviction. If the Secretary determines to expunge the charge or conviction for the offence, he or she must give notice to the applicant of the decision within 28 days. Notice must also be given to any person who made a submission pursuant to section 8(6), together with the reasons for the decision and the right to seek a review of the decision.[41]

If the Secretary intends to make a decision to refuse to expunge, he or she must advise the applicant of that intention in writing and provide his or her reasons, together with a copy of any

36 *Expungement of Historical Offences Act 2017* (Tas) s 10(1)(b(i).
37 *Expungement of Historical Offences Act 2017* (Tas) s 10(1)(b)(ii).
38 *Expungement of Historical Offences Act 2017* (Tas) s 10(2)(a) & (b).
39 *Expungement of Historical Offences Act 2017* (Tas) s 10(3).
40 *Expungement of Historical Offences Act 2017* (Tas) s 10(4).
41 *Expungement of Historical Offences Act 2017* (Tas) s 12(4).

relevant records relating to the applicant in his or her possession, and provide the applicant with 28 days to submit further information to the Secretary regarding the charge.[42]

If, after 28 days no further information is received from the applicant, or the information received does not alter the decision of the Secretary to refuse to expunge the charge or conviction, the Secretary must give notice to the applicant of the decision to refuse to expunge within 28 of the decision, together with the reasons for the decision and the right to seek a review of the decision. Under section 12(4), the Secretary must also give notice of the refusal to expunge to any person who made a submission pursuant to section 8(6).

5.3 The application process

The application can be made online, or an applicant can download an application and submit it by email or post. A printed copy of the application form is not available from Service Tasmania.

The webpage (https://ehos.tas.gov.au) provides detailed information about the meaning of expungement and how to make an application. There is also a Questions and Answers page with further relevant information about the process, how it works and the consequences of a successful application for expungement.

All applicants (or appropriate representatives) need to provide certified identity documents to establish their right to make the application and to access personal information. The consent section of the form must also be completed. This consent allows the Secretary to make enquiries about the matter and request a criminal history check. There is information on the website to advise how applicants can confirm their identity and have their documents certified. There are also contact details to enable members of the public to find out more about the Scheme.

There is recognition on the website that the application process itself may be distressing for some applicants in having to recall past events. There are therefore details provided on the website for support services, including both legal (the Community Legal Centres in Hobart, Launceston and on the North West) and non-legal (Working It Out – Support, QLife – Counselling services, and Lifeline – Crisis support).

42 *Expungement of Historical Offences Act 2017* (Tas) s 12(3).

5.4 Applications to date

Since the EHOS Scheme came into effect on 9 April 2018, there has been a total of 10 applications. Nine of those applications were determined to be ineligible, as the offences were not historical homosexual, public morality, or cross-dressing offences as defined in the Act. These applications included seeking expungement of offences for driving with illicit substance present in the blood, offences related to drug possession and supply, common assault, dishonesty offences, and offences related to the keeping of the peace. Decisions in relation to the eligibility criterion were considered by the Secretary on two occasions, but the balance were determined by CBOS. During the implementation of the Act it was determined that to avoid delay, and given the relatively straight forward nature of the majority of the applications, the eligibility threshold would be determined by CBOS, unless the circumstances of the application required the Secretary to be involved. Three of the applicants in these 9 matters were advised that that their applications did not meet the threshold eligibility within2 months. The other 6 applicants were advised of the outcome within 3 weeks, with 2 of them being advised within 1 day of making the application and another within 2 days.

The only eligible application was refused expungement by the Secretary on 30 January 2020.

This application was received in December 2018 and in April 2019 a request was sent to the applicant for further information and to the data controllers for information. Prior to sending those requests, the Secretary's delegates undertook preliminary investigations including obtaining publicly available records such as the Supreme Court Comments on Passing Sentence. Given that this was the first eligible application, advice was sought on 3 separate occasions from the Solicitor-General regarding the interpretation of the Act.

Consent was an issue in this application, so written information was sought and received from the other parties to the offences, pursuant to 10(3)(b) of the Act. As the secretary intended to make the decision to refuse to expunge the charge, the Secretary provided the applicant with a copy of relevant records relating to the application, in the possession of the Secretary.[43]

In determining the application, the Secretary concluded that she was not satisfied on reasonable grounds that the conduct constituting an homosexual offence, if engaged in by the applicant at the

43 *Expungement of Historical Offences Act 2017* (Tas) s 12(3)(b).

time of making the application, would not constitute an offence under the law of this State at the time of the making of the application for expungement.

5.5 Withdrawals of applications

Section 11 of the Act provides that an applicant may withdraw an application before the Secretary determines it. The section further provides that, where an application has been withdrawn, it may be reinstated if the applicant wishes to proceed,[44] or the applicant may make a further application in respect of that charge in the future.[45]

There have been no withdrawals of applications to date.

5.6 Reviews

The Act provides the opportunity for certain decisions made under the provisions of the Act to be reviewed in the Magistrates Court Administrative Appeals Division.

The three decisions that are able to be subject to a review are: a decision to expunge a charge under section 12(2)(a), a decision to refuse to expunge a charge under section 12(2)(b), or a determination that a charge has ceased to be expunged under section 20(1).[46]

Section 21(3) provides a list of 'interested persons' who may apply for a review. In respect of a decision to expunge a charge under section 12(2)(a), an interested person is a person who has made a submission pursuant to section 8(6) in relation to the charge, and a data controller who has any official criminal records relating to the charge under their management or control.[47] In respect of a decision to refuse to expunge a charge under section 12(2)(b), an interested person is limited the person who made the application to have the charge expunged.[48] In respect of a determination that a charge has ceased to be expunged, an interested person is also limited to the original applicant.[49]

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44 *Expungement of Historical Offences Act 2017* (Tas) s 11(2).
45 *Expungement of Historical Offences Act 2017* (Tas) s 11(3).
46 *Expungement of Historical Offences Act 2017* (Tas) s 21(1).
47 *Expungement of Historical Offences Act 2017* (Tas) s 21(3)(a).
48 *Expungement of Historical Offences Act 2017* (Tas) s 21(3)(b).
49 *Expungement of Historical Offences Act 2017* (Tas) s 21(3)(c).

The reviews are to be held in private,[50] and the applicant for the expungement of a conviction is taken to be a party to any review proceedings.[51]

Section 36(1) of *the Magistrates Court (Administrative Appeals Division) Act 2001* (Tas) (MC(AAD) Act) provides that hearings in proceedings before the Court are to be open to the public. Pursuant to section 36(2) the Court has power to make orders prohibiting or restricting disclosure or publication of certain information and to determine to hold hearings in private. Section 21(4) of the *Expungement of Historical Offences Act 2017* (Tas) provides that, despite the provisions of Section 36(1) of the MC(AAD) Act, hearings of reviews of decisions made under the Act are to be held in private.

No applications have progressed to a review under section 21 of the Act.

5.7 Annotation of official criminal records

Section 15 of the Act outlines the process for the annotation of official criminal records following a decision to expunge under section 12(6) of the Act. That section provides that as soon as possible after a charge has been expunged under section 12(6), the Secretary must notify any relevant data controller of the expunging of that charge and any conviction in respect of that charge. The relevant data controller must then, within 28 days, annotate any entry that includes information about an expunged charge, contained in any official criminal records under his or her management or control, with a statement to the effect that the entry includes information about an expunged charge, and it is an offence to disclose information about an expunged charge.[52] A data controller must notify the Secretary of an annotation made as soon as possible, and the Secretary must give written notice of the annotation to the applicant as soon as possible after being satisfied that all necessary action has been taken.[53]

As the Secretary has made no decision to expunge a charge or conviction since the commencement of the Act, there has been no annotation of official criminal records.

50 *Expungement of Historical Offences Act 2017* (Tas) s 21(4).
51 *Expungement of Historical Offences Act 2017* (Tas) s 21(5).
52 *Expungement of Historical Offences Act 2017* (Tas) s 15(2).
53 *Expungement of Historical Offences Act 2017* (Tas) s 15(3) & (4).

5.8 Legal effect of expunged records

The legal effect of expunged records is outlined in section 16 of the Act which states:

> ***16. Effect of expunging***
>
> *If a charge is expunged under section 12(6) in respect of a person-*
>
> *(a) the person is not required to disclose any information about the expunged charge to any other person, including when giving evidence under oath in legal proceedings; and*
> *(b) any information about the expunged charge is taken not to form part of the person's official criminal record and is not required to be disclosed; and*
> *(c) a question about the person's criminal history, including a question in legal proceedings required to be answered under oath, is taken not to refer to any information about the expunged charge; and*
> *(d) in applying a provision of any legislation, agreement or arrangement to the person –*
> *(i) a reference to a conviction, however expressed, is taken not to refer to an expunged conviction; and*
> *(ii) a reference to a charge, however expressed, is taken not to refer to an expunged charge; and*
> *(iii) a reference, however expressed, to the person's character is not to be taken to allow or require anyone to take account of any information about an expunged charge; and*
> *(e) the disclosure or non-disclosure, of any information about an expunged charge is not a proper ground for –*
> *(i) refusing the person any appointment, office, status or privilege; or*
> *(ii) revoking any appointment, status or privilege held by the person or dismissing the person from any office.*

The important consequence of this section is that a person whose record has been expunged is not required to disclose the existence of that record, including in proceedings which require questions to be answered under oath. It also provides protection to the person whose record has been expunged, so that refusal of an appointment, office, status or privilege, or the revoking of the same on the basis of the disclosure or non-disclosure of the expunged offence cannot occur.

5.9 Charge ceasing to be expunged

Under section 20 of the Act, the Secretary may determine that a charge has ceased to be expunged if he or she is satisfied that a charge became expunged by reason of an application that included information that was false or misleading in a material particular or documents that were false or misleading in a material particular.

There have been no charges ceasing to be expunged since the commencement of the Act.

5.10 Offences relating to giving false or misleading information

Section 26 of the Act makes it an offence for a person to give false or misleading information in providing information or a document under the Act.

There have been no offences relating to false or misleading information at the time of writing this Review.

5.11 Confidentiality and privacy

The Act contains specific requirements in relation to the issues of confidentiality and privacy. The provisions relating specifically to confidentiality are contained in section 13, which provides that a person must not, directly or indirectly, make a record of, or disclose or communicate to another person, any information relating to an application acquired by the person for the purposes of this Act.[54] There are limited exceptions relating to disclosure or communication in the context of legal proceedings, or as otherwise required or authorised by this Act or any other Act.[55]

CBOS has confirmed that all relevant files are collected in person in hardcopy from the relevant data controllers to minimise the risk of accidental or unintentional disclosure of files and/or their content. The information is stored and uploaded in a secure drive, which only those persons delegated under the EHOS Scheme have access to. When documents are disclosed to the applicant in accordance with the provisions of the Act, CBOS has confirmed that the documents are redacted as necessary to remove personal information. Further, when information is sought from data controllers, the request is sent in a letter from the Secretary which provides the applicant's name, the charges being sought to be expunged, and the court in which the matter was heard. No other documents are made available to the data controller.

It is noted that the Act also provides a safeguard in section 8(12) in respect to all the information received by the Secretary under the Act, which limits its use to being only for the purposes of the Act.

5.12 Improper disclosure

Improper disclosure of information is an offence under the Act. Subsection 1 of Section 17 provides that, unless authorised by the Secretary under section 18, a person with access to official

54 *Expungement of Historical Offences Act 2017* (Tas) s 13(1).
55 *Expungement of Historical Offences Act 2017* (Tas) s 13(2).

criminal records must not directly or indirectly disclose any information about another person's expunged charge, or expunged conviction, held in those records without the consent of that other person.

Subsections (2), (3) and (4) provide exceptions to enable disclosure. These include, but are not limited to, disclosure made under the normal procedures of an archive or library, disclosure by the Commissioner for Police relating to the National Police Reference System, disclosure which is necessary for the purposes of the Act, or disclosure of statistical material which could not reasonably be expected to lead to the identification of the person to whom it relates.

There have been no offences under section 17 at the time of writing this Review.

Section 18 relates to the process of obtaining authorisation to access and copy information about an expunged charge for the purposes of research. The section contains specific provisions requiring the Secretary to provide notice to the person who made the application for expungement and that any authorisation may be subject to such conditions as the Secretary thinks fit.

Section 19 provides that a person must not fraudulently or dishonestly obtain, or attempt to obtain, information about another person's expunged charge or conviction from an official criminal record.

There have been no offences under this section at the time of this Review.

5.13 Publicising and promoting the scheme

Prior to the commencement of the Act and at the time it came into effect, over 130 organisations nationally across a diverse range of areas of activity were contacted to promote the Scheme. The Scheme was advertised in state and national publications, including the three Tasmanian papers, and *The Age, Sydney Morning Herald, Courier Mail (Brisbane), The Australian, Star Observer, Q News Directory, Lesbians on the Loose magazine*, and *DNA magazine*.

Since the commencement of the Act there has been no further advertising or promotion of the Scheme. CBOS has advised that it provided additional promotion of the Scheme, including targeted posters and postcards, to the Secretary and DPAC for media approval. However, confirmation was not provided to progress with this.

5.14 Regulations

Section 31 empowers the Governor to make regulations for the purposes of the Act. As at the date of this Review there have been no regulations made. CBOS advised that they did not consider that the regulations were necessary at this stage.

5.15 Compensation

Section 22 provides that if a charge or a conviction for an offence is expunged under section 12(6) , a person is not entitled to compensation of any kind, on account of that charge or conviction becoming expunged.

5.16 Annual Reports

Section 30(1) of the Act requires that the Secretary must, within 3 months after the end of the financial year, prepare a report on the administration and operation of the Act. The table below sets out a summary of the two annual reports prepared by the Secretary since the introduction of the Act, and tabled by the Attorney-General in both Houses of Parliament in accordance with section 30(2) of the Act.

Annual Reports[1]	1/07/2018 to 30/06/2019	1/07/2019 to 30/06/2020
Number of applications	4	6
Number of applications in which historical offences were not eligible for expungement[2]	1	9[3]
Number of applications being determined as at end of financial year	3	0
Number of applications finalised during the period	0	1[4]

1. No Annual Report was prepared for the period from the commencement of the Act on 9 April 2018 to 30 June 2020.

2. All 9 applications were determined to be ineligible as the offences did not meet the definition of historical offence as defined in section 3 of the Act.

3. This figure includes 3 applications from the previous financial year.

4. This application was submitted in the previous financial year but finalised in this financial year.

6 WHETHER THE PROVISIONS OF THE ACT ARE ACTING EFFICIENTLY AND AS INTENDED.

6.1 Scope of offences covered

The Tasmanian Scheme adopts a hybrid approach to identifying eligible offences and describes sexual and public morality offending, as well as referencing the specific offence in section 8(1)(d) of the *Police Offence Act 1935* (Tas), as in force before 12 April 2001.

Other jurisdictions which confine the application of their Schemes to specific listed offences, such as in Queensland, have been criticised for confining the scope of offences too narrowly.[56] The implication of construing the offence provisions by reference to specific 'homosexual' offences is that such a scheme does not capture historical criminal records relating to other 'generic' offences by which homosexual or perceived homosexual conduct could have been charged. The Independent Reviewers received information from the New South Wales Department of Communities and Justice which stated that '[o]ver time, it became evident that it was necessary to include some additional offences in the Criminal Record Regulation as it became clear that not all offences that were relied on to police consensual homosexual activity had been identified.' It was identified that a number of 'indecent, wilful and obscene exposure' offences had historically been used to target consensual homosexual behaviour. Consequently, these offences were prescribed by the Regulation in 2017. It was further noted that there have recently been some additional offences disclosed in applications which are not currently prescribed. The NSW Department is currently considering whether these offences should also be included in the scheme and prescribed by further Regulation. In addition, information was received from the Western Australian Department of Justice indicating that, following investigation of an application for expungement, it was established that the offence being sought to be expunged was not eligible under the current scheme. However, it did occur in the context of historical homosexual offences for which the scheme was intended. The WA Department is therefore drafting a regulation to enable the applicant's conviction to come under their scheme and be eligible for expungement.

56 Isobel Roe, *'Poster boy' for Queensland campaign to expunge historical gay convictions not eligible, lawyer says'*, The ABC (online, 30 July 2018) <https://www.abc.net.au/news/2018-07-30/qld-homosexuality-related-criminal-records-may-not-be-expunged/10041012>

The Tasmanian Act already includes those additional offences which were added by Regulation in NSW. Because the definition in the Tasmanian Act is by description, offences such as indecency,[57] loitering and loitering near children,[58] prostitution offences,[59] public annoyance,[60] or public decency offences,[61] are able to be expunged under the Act. Although there have been no records expunged relating to these offences, the Independent Reviewers are of the view that it is important that the Act enables such applications to be made.

The Tasmanian Act does not apply to charges or convictions for offences such as resist arrest or obstruct or assault police, or fail to comply with the direction of a police officer, which may arise incidental to a charge for a homosexual, public mortality, or cross-dressing offence. The relevance of these offences is that, where a person has been investigated or charged for a homosexual, public morality, or cross-dressing offence, police may have laid additional charges such as obstructing, resisting, or assaulting police or failing to comply with the direction of a police officer. These charges or convictions would not have arisen, but for the fact that the applicant was being dealt with in relation to engaging in alleged conduct of a homosexual nature. Although the relevant charge or conviction for the homosexual, public morality, or cross-dressing offences may be expunged from the person's record, these incidental charges or convictions cannot be expunged under the current terms of the legislation. The person therefore continues to have a criminal record with offences which could give rise to difficulties with employment, travel or volunteering and could face potential discrimination arising from these matters appearing on their criminal record. It is acknowledged that a charge or conviction for resisting, obstructing, or assaulting police, or failing to comply with a direction of a police officer, may not necessarily carry the same stigma as an homosexual, public morality, or cross-dressing charge or conviction. However, given that one of the purposes of the Act was to acknowledge that homosexuality and cross-dressing offences should never have been crimes, it follows that it is in the spirit of the Act that charges

57 *Criminal Code Act 1924* (Tas) s 137.
58 *Police Offences Act 1935* (Tas) ss 7 & 7A.
59 *Police Offences Act 1935* (Tas) s 8.
60 *Police Offences Act 1935* (Tas) s 13.
61 *Police Offences Act 1935* (Tas) s 14.

and convictions which would not have arisen, but for the existence of those homosexuality and cross-dressing offences, ought to be included within the scope of the Act.

Recommendation 1.

The Independent Reviewers recommend that the Act is amended to allow for the expungement of charges or convictions for resisting, obstructing or assaulting police under section 34B of the *Police Offences Act 1935* (Tas) or failing to comply with the direction of a Police Officer under section 15B of the *Police Offences Act 1935* (Tas), or any equivalent provision as in force at that time. These charges or convictions should only be eligible for expungement where it can be shown that the person would not have been charged or convicted but for the fact that the person was being dealt with in relation to engaging in alleged conduct of a homosexual nature, or cross-dressing**.**

The Independent Reviewers acknowledge that there may be some difficulty in determining whether a charge or conviction for an obstruct, resist or assault police offence or failing to comply with the direction of a police officer is an eligible offence for expungement. In particular, there may be circumstances where a person has been charged with such an offence in the course of an investigation for a homosexual, public morality, or cross-dressing offence which has not been proceeded with. In those circumstances, the person's record will only indicate that obstruct, resist or assault police, or failure to comply with a direction of a police officer charge, and it may not be evident from court records that this charge arose as a result of an investigation into a homosexual, public morality or cross-dressing offence which was not subsequently charged. In these circumstances it is anticipated that the Secretary is adequately equipped with investigative powers pursuant to section 8 of the Act to acquire sufficient information from data controllers (for example police files), and from the applicant and other parties to be satisfied whether the charge or conviction is eligible for expungement.

6.2 Administration of the scheme

6.2.1 The decision maker

The scheme provides for a case-by-case, administrative decision-making process, administrated by the Department of Justice, through delegates in Consumer, Building and Occupational Services (CBOS). This is consistent with the schemes in other jurisdictions (excluding South Australia,

which adopts a judicial process). In practice, the administration of the Scheme is delegated to appropriately qualified staff from the Registration to Work with Vulnerable People Unit at CBOS.

Submissions by Civil Liberties Australia and Equality Tasmania raised concerns regarding the administration of the Scheme. These submissions questioned the appropriateness of the Scheme being administered by the same Government agency which was historically connected to the enforcement of the laws under which potential applicants were charged, and suggested that this might operate as a deterrent to potential applicants. The CLA and ET submissions also raised the issue of whether applicants would have confidence in the ability of the Secretary as the decision maker, and questioned whether departmental Secretaries 'typically have expertise or experience in conducting inquiries of this kind as part of other schemes.' There were also concerns expressed that the Act gives the sole power of determining applications to the Secretary and provides him or her with the ability to base their decision on a wide range of complex issues, with significant investigatory powers.

CLA recommended that the Act be amended to provide that applications be considered by an independent panel of decision-makers. This was recommended in the 2015 report of the then Anti-Discrimination Commissioner. The report recommended that this panel be comprised of the Dean of the Law School of Tasmania, the Registrar under the *Registration to Work with Vulnerable People Act 2013* (Tas) and the Anti-Discrimination Commissioner (ADC). The Commissioner would also be the Registrar of the Scheme.

The Independent Reviewers acknowledge the legacy of potential trauma for those subject to criminalisation on the basis of their sexual orientation. They have had regard to the submissions by CLA and ET and have considered the operation of the schemes in other Australian jurisdictions.

The Independent Reviewers note that a search on-line for the Scheme takes a person to the CBOS page and not to the Department of Justice page itself. Therefore, there is a degree of separation from the Department. The Independent Reviewers consider that CBOS is an appropriate body to oversee the administration of the Scheme. The necessary statutory framework already exists, it has the appropriate systems in place, and its staff have expertise and experience in dealing with records of offences, with considering and making decisions based on information received, and has the benefit of good working relationships with the data controllers. The unit is well functioning and well-funded. The cohort of staff is appropriate to deal with these processes, given the other work they are engaged in, and the consequent knowledge and experience they have in dealing with sensitive and confidential information.

Establishing an independent panel to administer the Scheme would be costly, time consuming and require creation of infrastructure which already exists in CBOS. The Independent Reviewers consider that the time and expenditure required would not be justifiable, when regard is had to the number of applications likely to be received. The Independent Reviewers do not consider that there is any certainty that giving the decision-making powers to a panel would necessarily provide any more confidence in the capacity of the panel members to investigate the matter and make the determination. The suggestion that the panel should include the Anti-Discrimination Commissioner, or a person with a similar role, should be considered with caution. The opportunity to scrutinise the process of determining an application in relation to matters of discrimination would be lost if the ADC was a member of the Panel involved.

In light of the above, the Independent Reviewers do not make any recommendation with respect to the general administration of the Scheme.

6.2.2 Eligibility threshold

As noted in Chapter 5.4, at the time the Act was implemented, it was decided that the eligibility threshold for applications would be determined by CBOS, unless the circumstances of the application required the Secretary to be involved. The Independent Reviewers are satisfied that, given the relatively straight forward nature of the initial consideration of the majority of applications, and to avoid unnecessary delay, it is satisfactory that eligibility is assessed and notified by CBOS, in consultation with the Secretary. However, it is noted that CBOS has indicated that in the event of a complex application, consultation with the Secretary would occur, and advice would be sought from the Solicitor-General if necessary.

The Independent Reviewers do not make any recommendation in respect of this.

6.2.3 Oral Hearings

In determining the application, no oral hearing is to be held.[62] The restriction on oral hearings is important. It acknowledges that any oral hearing would likely be traumatic for the parties involved, if they were available, and runs the risk of becoming a re-hearing of the matter particularly. During the debate on the Bill in the Legislative Council, Ruth Forrest MLC raised the issue of the Bill being amended to provide an opportunity for oral hearings. The Independent Reviewers have considered whether the Act should be amended to implement this suggestion.

62 *Expungement of Historical Offences Act 2017* (Tas) s 8(2).

However, the Independent Reviewers have determined that it would not be in the best interests of the applicant or other parties involved in the conduct for oral hearings to be part of the process. It is considered that there could be a number of practical issues in having applicants make oral submissions, including the need to provide a safe and supportive environment for that to occur, with the potential need for a clinician to be present to assist in questioning the applicant in a trauma-informed manner. The Independent Reviewers have concluded that if an applicant has literacy issues or other issues which would make completing the application form or a statement to go with the application difficult, then assistance can be sought from the supports noted on the website, in circumstances where the person does not have appropriate family or friends to assist them.

6.3 The application process

6.3.1 Eligible applicants

The CLA and ET submissions identified that the list of eligible applicants provided for in section 6 of the Act creates a 'hierarchy of applicants' which is 'onerous.' This section sets out a list of persons in order of priority who may apply for expungement of an offence on behalf of a person who has died or a person who, at the time of making the application, lacks capacity. The submission from ET suggests '[s]urely, it is sufficient that there is someone alive today who feels strongly enough to seek expungement.' CLA submit that expungement should be able to occur without regard to a hierarchy of applicants.

The Independent Reviewers note the use of similar lists of eligible applicants in other legislation, for example in the *Testators' Family Maintenance Act 1912* (Tas). The expungement legislation in other Australian jurisdictions also provide for a similar list of eligible applicants.[63] The Independent Reviewers consider that this type of provision is intended to ensure that the applicant is a person with the appropriate standing to make the application, meaning that they are a person with sufficient connection to the person on whose behalf they are applying. It is therefore the opinion of the Independent Reviewers that this provision is not, in and of itself, an onerous provision for potential applicants. The Independent Reviewers consider that it would not be appropriate for a person with no connection to the person with the criminal record to be

63 *Sentencing Act 1991* (Vic) s 105(1); *Spent Convictions Act 2000* (ACT) s 19B(3), *Historical Homosexual Convictions Expungement Act 2008* (WA) s 5(2)(c), *Expungement of Historical Homosexual Offence Records Act 2018* (NT) s 9(2), *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017* (Qld) s 11(3).

able to make an application for expungement. This provision ensures that there is an appropriate link between the applicant and the person with the criminal record requiring expungement.

The Independent Reviewers do not recommend any amendment to this provision.

6.3.2 Availability of application form

The Independent Reviewers acknowledge that the use of the webpage to complete or download an application provides accessibility and anonymity for the applicant. However, not everyone has access to a computer or the ability to download and print an application form. This is particularly relevant when considering the purpose of this Act, the age of potential applicants, and the likelihood that people in that age bracket may not be computer literate and/or may not have access to a computer. The Independent Reviewers are of the view that providing hard copies of the application form at Service Tasmania, including details of support services, would assist in facilitating access.

Additionally, there should be a phone number provided on the website for potential applicants to call and request a copy of the application (and information about support services) be sent to them by mail. This option would be less confronting than attending a Service Tasmania office and would maintain the anonymity of the applicant.

Recommendation 2.

The Independent Reviewers recommend that printed copies of the application form be available from Service Tasmania, and also a telephone contact number be clearly noted on the EHOS website, and in any other material promoting the Scheme, advising that a copy of the application form can be requested by phone and sent by mail. The copy of the application form which is made available in both these circumstances should also include details of the legal and non-legal support services noted on the website.

6.3.3 Support services for applicants

The CLA submission suggested that it is unclear what, if any, supports are provided to applicants seeking expungement of their records. The ET submission refers to the fact that there should be greater support for potential applicants with professional learning for all legal practitioners and the development of dedicated expertise in this area at Community Legal Centres.

The website, where information about the Scheme and the application form are available, includes details of who to contact for assistance or support during the application process. Links to the three Tasmanian Community Legal Centres, as well as several support services are provided. The Independent Reviewers consider that this is sufficient to provide applicants with the ability to access relevant supports before and during the application process, if required. Providing additional professional learning for all legal practitioners and the development of dedicated expertise in this area at CLCs does not appear to be currently necessary. The Independent Reviewers consider that legal practitioners could deal with matters of this nature by reference to the legislation itself and would have the expertise to acquire further information as required.

The Independent Reviewers do not make any recommendation in respect of this issue.

The Independent Reviewers have considered whether information identifying legal and non-legal support services should also be provided to other parties involved in the investigation, for example persons required to provide information under section 8(6). The requirement to provide information relating to the conduct forming the basis of the charge or conviction sought to be expunged may be distressing for these parties, and the Independent Reviewers consider that they should be informed of appropriate support services.

Recommendation 3.

The Independent Reviewers recommend that information identifying legal and non-legal support services is provided to all parties required to engage with the investigative process, for example, a person being required to provide information under section 8(6) of the Act**.**

6.3.4 Contents of the application form

Submissions received by Civil Liberties Australia and Equality Tasmania suggested that the application process may be too onerous for some applicants. Both submissions referred to the information required to be provided in the application, pursuant to section 7, and suggested that some applicants may have difficulty recalling, and hence providing details of the date of conviction and the court by which they were convicted. The submissions also noted that some applicants may be hesitant to provide the name of other persons involved in the conduct, or that this requirement may operate as a deterrent to making an application. It was suggested by ET

that it should be sufficient that someone applying for expungement of a conviction knows they were convicted.

The relevant provisions relating to the contents of the application are contained in section 7 of the Act. That section provides that the relevant information is to be provided *so far as the information is known to the applicant.* The Independent Reviewers sought clarification from CBOS as to what level of information would be sufficient for their purposes in relation to the court and the date of conviction. CBOS confirmed that the applicant's full name and date of birth (and the necessary consents for the Secretary to conduct further investigation) would be sufficient for CBOS to obtain a copy of the applicant's criminal record. Having received that record it may be clear which is the offence or offences which the applicant would want to be expunged, but confirmation would be sought from the applicant in all cases, particularly because there may have been charges brought which were not proceeded with and which do not appear on the applicant's list of criminal convictions. Once this information was confirmed with the applicant, the investigation could continue in the usual manner.

The Independent Reviewers consider that the information on the website and the relevant sections in the application form provide potentially conflicting messages to an applicant in respect of the level of information required to be provided. 'Part 4' of the application form states, 'provide details of the historical offences as best you can.' The form then requests information identifying the offence, the date of the charge and conviction (if applicable), the applicant's name and address at the time of the charge, the court (if applicable), the name of any other person involved (if applicable), and the contact details of the other person involved (if known). By including the words 'if known' only in respect of the contact details of the other person involved, the applicant may be under the mistaken impression that all the other information *must* be provided if applicable, and that the person is unable to apply if the information is unknown.

The only information *required* to be provided under section 7 of the Act, is the applicant's consent for the Secretary to check the eligible person's criminal history and any other information about the eligible person that may be relevant in determining the application.[64] The website and

64 *Expungement of Historical Offences Act 2017* (Tas) s 7(2).

application form should reflect this, and clarify that the applicant is not required to provide all of the information requested in order to make a valid application.

Recommendation 4.

The Independent Reviewers recommend that the information on the website, and at the relevant sections in the online and hardcopy application forms, should be clarified to clearly state that the applicant is not required to provide all of the information requested in order to make a valid application. Consideration should be given to including words to the effect that if the applicant is unable to provide any of these details, they are nonetheless encouraged to apply, and that providing their name, date of birth and address will be sufficient to initiate the investigative process.

In relation to providing the name of other persons involved in the conduct, the Independent Reviewers understand that this may cause an applicant to be hesitant. However, the name of the other person involved in the conduct is required in order for the Secretary to fulfil the investigative processes under the Act. The name of the other person involved is relevant to the processes required in section 8(6) and 10.

Section 8(6) requires the Secretary to give a person who is believed to have been involved in the conduct constituting the historical offence, a reasonable opportunity to make a submission about whether the charge should be expunged. The rationale for this is to ensure that other persons are afforded an opportunity to provide input into a decision which relates to conduct in which they were involved, and to afford those persons natural justice. The ability for the other person involved to provide their input is particularly important when considering the scope of offences to which the scheme potentially applies. As well as criminalising consensual adult male homosexual behaviour, the repealed offence provisions were used to charge male or child rape cases. In these situations, the conduct may have been traumatic and had a lasting impact on the other party, or they may have strong views or opinions which they would want the Secretary to take into account. They may appreciate the opportunity to put their point of view. The Independent Reviewers made enquiries with the delegated staff at CBOS, who confirmed that one of the parties in particular who was involved in the investigation of the eligible application was appreciative of the opportunity to make a submission to the Secretary.

Section 10 sets out the matters that the Secretary must consider in determining the application. This section provides that the Secretary must not decide to expunge a charge unless satisfied that the conduct constituting the homosexual offence would not constitute an offence under Tasmanian law at the time of making the application. In determining whether conduct would be an offence at the time of making the application, the Secretary is required to have regard to the issue of consent and the age of the parties. If consent is an issue in the decision to expunge, the Secretary may only be satisfied by written evidence from three alternative sources. The first is the official criminal records, if available.[65] The second is from the other person involved in the conduct,[66] and thirdly, if that person is not able to be found after reasonable enquires are made by the applicant, then from another person with knowledge of the circumstances in which the conduct occurred.[67] In circumstances where the Secretary cannot be satisfied on the basis of official criminal records, the name of the other person or persons involved becomes a necessary part of the investigative procedure.

In light of the investigative processes required by sections 8(6) and 10, the Independent Reviewers consider that the name of the other person involved in the conduct is required to enable the effective investigation and determination of an application for expungement.

The Independent Reviewers have concerns that section 10(3)(c) requires that it is the applicant who is to make 'reasonable enquiries' to find the other person involved in the conduct. Given the scope of offences to which the definition of historical homosexual offence applies, this could give rise to a situation where the victim of a non-consensual act is being looked for by the perpetrator of the offence, and could result in significant distress to the victim. The Independent Reviewers consider that it is preferable for these enquiries to locate the other party are conducted by the Secretary after the applicant has provided the other party's name and information to assist in locating them, for example providing their last known address. If the Secretary has not been provided with sufficient details by the applicant of the name and/or other contact details for this

65 *Expungement of Historical Offences Act 2017* (Tas) s 10(3)(a).
66 *Expungement of Historical Offences Act 2017* (Tas) s 10(3)(b).
67 *Expungement of Historical Offences Act 2017* (Tas) s 10(3)(c).

other party to enable that person to be located, the Secretary can make a formal request for further information from the applicant under section 8(3).

Recommendation 5.

It is recommended that the Act be amended to delete the word 'applicant' in section 10(3)(c) first occurring and replace it with the word 'Secretary'.

6.3.5 Opportunity for applicant to provide information

The Independent Reviewers considered whether there is sufficient opportunity for applicants to provide information about the circumstances of the case from their point of view. There could be circumstances in which the Office of the Department of Public Prosecution or police file does not accurately reflect the circumstances of the case, for example, a plea of guilty by one party to rape in a consensual relationship to protect the other party, or a response to a police advance to create the offence. It is noted that section 7(3) enables the applicant to provide a statement with the application or a statement from another person. In addition, the Secretary can seek additional information from the applicant under section 8(3).

The Independent Reviewers consider that the application process and investigative process provide sufficient opportunities for applicants to provide all the information that they wish to be considered as part of their application.

6.3.6 Opportunity for applicant to provide feedback

The Act makes no specific provision for the Secretary to request feedback from the applicants. Whilst feedback may be more useful in circumstances where there is a greater volume of matters, this is not the current situation under this Act. However, feedback from applicants may assist the Secretary to ascertain any systemic issues in the application process, and enables staff to provide applicants with alternative avenues they may wish pursue in the event that their application is found to be ineligible for expungement under the Act.

Recommendation 6.

The Independent Reviewers recommend that the Secretary consider establishing a formal feedback process to be sent to all applicants following the determination of their application to identify any systemic issues or provide further support to applicants.

6.4 Applications to date

Prior to the introduction of the Act it was unknown how many persons would seek expungement of historical sexual offences. Before the legislation was drafted, a research paper was instigated by the Strategic Legislation and Policy section of the Justice Department in 2014 and prepared by Ms Lisa Gregg. This paper stated that information received from the Department of Police and Emergency Management indicated that there were 96 people convicted of 'homosexual offences' in Tasmania, and that there were no prosecutions after 1984 in this State. The bulk of the convictions would therefore have occurred before the late 1970's. As a consequence, the paper concluded that a large number of the offenders on record had birth dates in the 1930's and 1940's, and may no longer be alive, or would be aged in their 70's and 80's. The research paper also referred to a spokesperson for the Tasmanian Gay and Lesbian Rights Group who had indicated that there would be at least 10 people alive and of working age in Tasmania at that time who would be potential applicants. Prior to the introduction of the Act, the Department of Justice developed a Communication Plan as part of the Project Management Plan 2018. This Plan relied on the numbers from the 2014 research paper.

The submission from Equality Tasmania referred to information obtained from Victoria and New South Wales on the uptake of the scheme in those jurisdictions. Data it obtained from Victoria indicated that there had been 21 successful applications between the commencement of the scheme and 30 June 2018. Information obtained by ET from NSW indicated that there had been a total of fifteen applications to July 2016, seven of which were successful. ET concluded that, although numbers in Tasmania would be expected to be lower than in the larger jurisdictions where schemes had been in place longer, they would have expected more applications in Tasmania, particularly given the historical laws remained in place for significantly longer in Tasmania.

The Independent Reviewers have noted the information concerning the likely ages of potential applicants and that it is likely that there are few eligible applicants. Consideration of the issue of

the low number of applications is examined further in Chapter 6.13, where publicity and promotion of the Scheme is considered.

The only eligible application under the Tasmanian Act was refused expungement by the Secretary on 30 January 2020. The Independent Reviewers are satisfied that the Department dealt with the application in accordance with the requirements of the Act. A full and thorough investigation was conducted. The Minutes provided to the Secretary are detailed, provide the necessary information, relevant legislative provisions, and advice upon which to make a decision. As consent was an issue in this application, the Secretary undertook further investigations pursuant to 10(3)(b) of the Act. The Secretary complied with all requirements under the Act in respect of obtaining relevant information, providing notices, and providing the outcome of the application to the relevant parties.

Although there was an explained delay in information being provided by one of the data controllers, once that information was received the matter progressed in an appropriate time frame through to determination by the Secretary. The Independent Reviewers are satisfied that all relevant inquiries were undertaken in order for the Secretary to determine the application, ultimately refusing expungement on the basis that she could not be satisfied that the conduct would not constitute an offence under the law of this State at the time of the making of the application for expungement.

6.5 Withdrawals of applications

As there have been no withdrawals of applications pursuant section 11 of the Act, it is not possible to determine with certainty whether this aspect of the legislation is operating as anticipated, or whether there are any particular issues with the process for withdrawal of applications. Having considered the provisions in the Act relating to withdrawals, the Independent Reviewers have concluded that the process appears to adequately provide for an application to be withdrawn, but also for an applicant to re-apply in the future should they wish to. It is considered that it is important for this opportunity to remain open to potential applicants.

6.6 Reviews

There have been no applications for review under section 21 of the Act. The Independent Reviewers are therefore unable to comment on the actual operation of this process under the Act. However, the relevant sections of the Act appear to provide appropriate time frames, safeguards

in relation to the process for applications for review and the necessary mechanisms to enable a review to occur.

It is noted that the applicant for the expungement of a conviction is taken to be a party to a review under section 21(5). This therefore ensures that the original applicant is afforded procedural fairness in an application for review made by an interested party, other than the original applicant.

It is the clear intention of section 21 of the Act that not only the hearing itself is conducted in private, but also that the identities of the parties are protected during the court process. The Independent Reviewers made enquiries with the Magistrates Court of Tasmania to ascertain what procedures were in place to ensure compliance with the confidentiality and privacy provisions of the Act. The Magistrates Court advised that the Court has draft procedures in place which apply when an application for review is made pursuant to section 21 of the Act. Upon receiving an application, it is referred to a magistrate for instructions, as it does not fall within the standard listing practices. After consideration by a magistrate, the matter will be allocated a hearing date and the application would be heard in closed court, ensuring that the applicant's identity and the subject matter are protected from disclosure. As applications fall under the Administrative Appeals Division, the application is recorded in the Civil Registry Management System ('CRMS'), in which the applicant's name and details of the application are supressed. Only court staff have access to the CRMS database and upon searching for a matter the record would show 'case number – name suppressed under the legislation.' All enquiries for a matter with a name supressed are required to be referred to the Team Leader of the Civil Division, the Registrar/Manager of the Civil Division, or the Administrator of Courts for consideration. Any orders made by the magistrate are also supressed, which protects the applicant's identity, the nature of the application and the reasons for decision from publication. The response from the Magistrates Court notes that they consider that the current process ensures the appropriate checks and balances are in place to comply with the privacy requirements under to the Act.

The Independent Reviewers are satisfied that the processes for dealing with applications for reviews in the Magistrates Court adequately protect the identities of the parties and the nature of the application and no recommendations are made in respect of the review procedures.

6.7 Annotation of official criminal records

The sections relevant to the annotation of official criminal records are section 12(6) and section 15 of the Act.

6.7.1 Whether annotation is sufficient

Section 15 provides the process for annotating records. The submission from Civil Liberties Australia suggested that annotation may not be a satisfactory outcome for potential applicants. CLA referred to the report of the Anti-Discrimination Commissioner,[68] which noted that there was a 'strong argument' that annotation of records would not give applicants confidence that their records would truly be disregarded. The submission from ET also questions whether annotated records are an appropriate method. The Independent Reviewers note that the Anti-Discrimination Commissioner indicated a preference that records be retained for historic purposes. The ET submission also indicates they do not support the erasure of records.

The Independent Reviewers have considered the legislation in other jurisdictions. Most Australian jurisdictions provide for a similar annotation process.[69] Like the Tasmanian Act, other jurisdictions (excluding Victoria) do not distinguish between types of records, or authorise the destruction of any records.[70] The Victorian Historical Homosexual Conviction Expungement Scheme, created under Part 8 of the *Sentencing Act 1991* (Vic) distinguishes between ordinary records and 'secondary records.' Section 105K of that Act provides that, upon receiving a notice that a conviction is expunged, a data controller must annotate any entry relating to the conviction contained in any official records under their management or control. The requirement to annotate records does not apply to records that are 'secondary records' held in electronic format by the Victoria Police or the Office of Public Prosecutions. 'Secondary records' are defined as 'an official record that is a copy, duplicate or reproduction of, or extract from, another existing official record, irrespective of whether those records are held by the same entity or by different entities.[71] For those records, the data controller must either remove the entry, make the entry incapable of being found, or de-identify the information contained in the entry and destroy any link between it and information that would identify the person to whom it referred.[72]

Distinguishing between ordinary records and secondary records ensures that only those records necessary for historical purposes are retained, in an appropriately annotated form. Removing or de-identifying secondary records minimises the number of records which refer to an expunged

68 Anti-Discrimination Commissioner (Tas), *Treatment of Historic Criminal Offences for Consensual Homosexual Activity and Related Conduct*, (2015).
69 *Historical Homosexual Convictions Expungement Act 2018* (WA) s 13(3), *Expungement of Historical Homosexual Offence Records Act 2018* (NT), *Criminal Law (Historical Homosexual Convictions Expungement Act 2017* (Qld) s 28, *Sentencing Act 1991* (Vic) s 105K.
70 *Historical Homosexual Convictions Expungement Act 2018* (WA) s 13(3), *Expungement of Historical Homosexual Offence Records Act 2018* (NT), *Criminal Law (Historical Homosexual Convictions Expungement Act 2017* (Qld) s 28, *Sentencing Act 1991* (Vic) s 105K.
71 *Sentencing Act 1991* (Vic) s 105.
72 *Sentencing Act 1991* (Vic) s 105K(3)(b).

conviction, and thereby decreases the risk of unintentional or accidental disclosure. This provides stronger confidentiality protections for a person with expunged convictions.

The Independent Reviewers have considered the submissions by CLA and ET, and the relevant provisions in other jurisdictions. The Independent Reviewers consider that, given the historical significance of such records, complete destruction of the records is not an appropriate option. The Independent Reviewers consider that annotation of records is an appropriate mechanism for retaining the record for historical purposes, whilst also ensuring that the contents of the records cannot be released. The Independent Reviewers consider that the annotation process should only apply to primary records. The Act should authorise the removal or de-identification of secondary records which do not need to be retained for historical purposes.

Recommendation 7.

The Independent Reviewers recommend that section 15 of the Act be amended to provide that the annotation process does not apply to secondary records. It is recommended that a definition of secondary records be inserted in the Act and be framed in similar terms to section 105 of the *Sentencing Act 1991* (Vic). It is recommended that the Act be amended to require data controllers who hold secondary electronic records to either remove the entry, make the entry incapable of being found, or de-identify the information contained in the entry and destroy any link between it and information that would identify the person to whom it referred.

6.7.2 The annotation process

Section 15 does not contain an explicit duty to locate and annotate all relevant records; however, it is implicit in the terms section that this is required. Section 15(2) stipulates that the relevant data controller must annotate 'any entry that includes information about an expunged charge, contained in any official criminal records under his or her management or control' within 28 days of receiving notification of the expungement from the Secretary. It is concluded that the broad-ranging obligation on a data controller to annotate 'any entry' in 'any official criminal records' held by that data controller is sufficient to ensure that all relevant records relating to the subject matter of the application will be appropriately annotated by whichever data controller holds them. Consequently, no recommendation is made in respect of this section.

6.7.3 The meaning of 'criminal record'

The submission by Civil Liberties Australia suggested that the meaning of 'criminal record' under the Act was unclear, and that potential applicants may not be satisfied with the scope of its application. CLA referred to the Anti-Discrimination Commissioner's 2015 report, in which she identified a list of six types of records she considered should be covered by any expungement legislation. Both CLA and ET recommended that the Independent Reviewers consider the extent to which the Act would apply to each of these records. In addressing this submission, the Independent Reviewers have considered the definition of 'criminal records' and 'data controllers' under the Act.

The term 'official criminal record' is defined in section 3 of the Act as 'a record, containing information of criminal proceedings relating to an historical offence, kept by –

(a) a court of this State; or

(b) a Government department, or State authority, within the meaning of the *State Services Act 2000.*'

The Act defines data controllers as the Registrar of the Supreme Court; the Administrator of the Magistrates Court; the Commissioner of Police; the person for the time being holding, or acting in, the office of the Director of Public Prosecutions.

The Independent Reviewers consider that the definitions of data controller, and official criminal records are sufficiently broad to include the majority of the 'records' referred to in the Anti-Discrimination Commissioner's 2015 Report. The Independent Reviewers consider that the Act applies to the first five types of records in that list, being official records of court outcomes, references to official court outcomes on related official records, general police records, records associated with the undertaking of police or criminal records checks, and records relating to the operation of the court.

The last group in the Report refers to other Government records that may disclose information about convictions which include prison records, employment files, conviction check assessment files, child protection files, adoption files and 'other general government records relating to the successful applicant that may include information related to their criminal record.' Whilst it is acknowledged that there may be secondary documents held by one or more of these organisations, it is less likely that they would hold primary documents, and that these organisations generally have relatively strict disclosure protocols. It is also considered that if

there was a requirement that notice of expungement be circulated to a wider cohort than the data controllers, there is an increased risk of breach of privacy and confidentiality for the applicants.

The Independent Reviewers consider that the definitions of 'official criminal records' and 'data controllers', whilst not yet tested by a court or by the benefit of having a large volume of eligible applications to which to refer, appear to be broad enough to cover all necessary record holders.

6.7.4 Time frame for notification of expungement

Section 15(1) requires the Secretary to notify any relevant data controller of the expunging of a charge and any conviction in respect of that charge 'as soon as possible after a charge has been expunged under section 12(6)'. The Independent Reviewers considered whether there should be a specific time frame in which the Secretary should have to notify any relevant data controller or whether the phrase 'as soon as possible' was sufficient. It is clear that the intent is that the decision is notified without delay, and it is therefore concluded that the wording of the Act in this regard is adequate and does not require amendment.

Section 12(6) provides that a charge, and any conviction in respect of that charge, is expunged at the expiration of 90 days after the day on which the Secretary makes the decision to expunge. It is unclear from the text of the Act, however it is anticipated that the expungement takes effect at this time irrespective of whether the records have been annotated. The effect of this is that the applicant is released from any obligation to disclose the prior conviction after the 90 days, irrespective of whether the records of the relevant data controller have been annotated.

6.7.5 Conclusion on annotation

As the Secretary has made no decision to expunge a charge or conviction, there has been no annotation of official criminal records. It is therefore not possible to consider by reference to practice experience whether this aspect of the legislation is operating as anticipated. Having considered the procedure set out in the sections relating to the implementation of the decision to expunge a conviction or charge, the Independent Reviewers are satisfied that annotation is an appropriate means of implementing the expungement, and that the Act provides for the timely implementation of the decision to expunge a conviction or charge.

6.8 Legal effect of expunged records

6.8.1 General effects

Section 16 set outs the legal effect of expunged records. Some jurisdictions, such as England and Wales, include a statement as to what the 'general effects' of expungement are. Those jurisdictions provide that the 'general effect' of expungement is that the person is to be treated for all purposes in law as if they had not committed, been cautioned or charged with, prosecuted for, or convicted of the offence.[73] These 'general effects' are clarified by provisions setting out particular consequences of expungement, including ancillary circumstances (such as employment checks or applications for registrations).[74]

Most Australian jurisdictions (including Tasmania) have no equivalent 'general effects' provision. Instead, the legislation identifies specific consequences for expungement (such as non-disclosure of the charge or conviction thereafter).[75]

The Queensland Law Reform Commission recommended the inclusion of a 'general effects' provision, recognising that doing so provides a clear indication of the general effect of the legal rights created by expungement.[76]

Ultimately, the *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017* (Qld), did include a 'general effects' statement, in s 3(3), providing that:

> *To the extent provided in this Act, if a person's conviction or charge for an offence is expunged, the person is to be treated in law as if the person had not been convicted of, or charged with, the offence.*

The Independent Reviewers consider that the absence of a 'general effects' provision in the Tasmanian Act is unlikely to have any practical consequence. Having had regard to the scope of section 16, the Independent Reviewers are satisfied that the effect of expungement is that the person is to be treated in law as if the person had not been convicted of or charged with the offence, despite the absence of explicit words to that effect.

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73 *Protection of Freedoms Act 2012* (UK) c 9, s 96(1).
74 *Protection of Freedom Act 2012* (UK) c 9, s 96(2)-(5).
75 *See Expungement of Historical Offences Act 2017* (Tas) s 16*; Spent Convictions Act 2000* (ACT) s 7A(2); *Criminal Records Act 1991* (NSW) s 4(2A)*; Spent Convictions Act 2009* (SA) s 3(4)*; Sentencing Act 1991* (Vic) s 105(4).
76 Queensland Law Reform Commission Report No. 74, p 85 – 86, [5.11] – [5.13].

6.8.2 Extra-territorial application

Commentaries in New Zealand have identified potential issues in relation to the extra-territorial operation of the New Zealand *Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018* (NZ).[77] Those commentators query whether the effects of expungement provided for in that Act adequately protect a person from disclosure obligations which may arise interstate or overseas.

The New Zealand Act sets out the 'general effects of expungement' in section 9. Subsection 1 provides that '[i]f a conviction for an historical offence is an expunged conviction, its expungement has, *for the purposes of the laws of New Zealand*, the effects set out in this section' [emphasis added]. Subsections (2) – (7) outline what those effects are, including but not limited to, that criminal history questions are taken not to refer to expunged convictions,[78] and that a convicted person is not required to disclose expunged convictions.[79] The inclusion of the words 'for the purposes of the laws of New Zealand' has potential impacts on, for example, overseas visa applications. A person would presumably be required to qualify any answer in the negative with words to the effect of 'no, for the purposes of the laws of New Zealand.'[80]

Other jurisdictions have taken further steps to attempt to address these issues. The *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017* (Qld) explicitly provides in s 4(1) that the Act 'binds all persons, including the State and, as far as the legislative power of the Parliament permits, the Commonwealth and the other States.' Subsection (2) clarifies that this does not make the State, the Commonwealth, or another State liable to be prosecuted for an offence. Despite the clear intention of this section, the Independent Reviewers question what effect it has in practice.

The Tasmanian Act has no limiting words equivalent to those in the New Zealand Act. Nor does the Tasmania Act contain an express provision regarding its extra-territorial application. The Independent Reviewers have had regard to the provisions in the Act setting out the effects of expungement and are satisfied that these are likely to be sufficient in their application to any disclosure obligations that may arise interstate or overseas.

77 Kris Gledhill, *'Legislation Note: Criminal Records Expungement of Convictions for Historical Homosexual Offences) Act 2018' [2018]* New Zealand Criminal Law Review, 2.
78 *Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018* (NZ) s 9(2).
79 *Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018* (NZ) s 9(3).
80 Gledhill, above n 76.

6.9 Charge ceasing to be expunged

There have been no determinations pursuant to section 20 of the Act that a charge has ceased to be expunged at the time of writing this Review.

The Independent Reviewers consider that section 20 appears to adequately deal with the process to be undertaken if the Secretary considers making this determination and no recommendation is made in respect of this section.

6.10 Offences relating to false or misleading information

The offences relating to false or misleading information provision in section 26 have not been tested. However, the Independent Reviewers are satisfied that the provisions of section 26 would adequately deal with the process to be undertaken in the event false or misleading information having been provided. As a result, no recommendation is made with respect to this section.

6.11 Confidentiality and privacy

6.11.1 Records collected or created by CBOS

The investigation and the determination of an application results in the creation of secondary documents which contain sensitive, private, and confidential information. The Independent Reviewers are concerned that section 13 does not adequately protect the confidentiality of these secondary records.

There is no reference in the Act as to what should happen to those secondary documents. The *Archives Act 1983* (Tas) requires that State and local government organisations must not dispose of records of any type without written approval of the State Archivist. The Tasmanian Archive and Heritage Office is responsible for issuing Disposal Schedules to authorise the disposal of records. There is no Disposal Schedule which applies specifically to the EHOS Scheme. Currently, the only option for disposal of records would be through the generic Disposal Schedule for Source Records, applicable to the Department of Justice. At the date of this Review no records regarding applications under the Act have been disposed of by CBOS through that generic departmental Disposal Schedule.

In other jurisdictions, there are similar processes for the disposal of records collected and created in the assessment of an application for expungement. In accordance with the *Public Records Act 1973* (Vic), the Public Records Authority has issued the *Retention and Disposal Authority for*

Records of the Historical Homosexual Conviction Expungement Scheme, which provides a mechanism for the disposal of public records relating to activities involved in handling and assessing applications for the expungement of historical convictions related to homosexual offences. That Authority requires all documents held by the Department, or created by the Department, during the processing of an application for expungement, to be destroyed 6 months after the determination of the application by the Secretary or, in the event of an application for a review of the determination, then 6 months from the date of the review decision.

The Independent Reviewers are of the view that the Tasmanian Scheme should explicitly provide for disposal procedures for secondary records created in the assessment of applications for expungement. It is considered that a specific Disposal Schedule which applies to EHOS records is an appropriate mechanism. CBOS has advised that they are in the process of seeking such a schedule.

Recommendation 8.

The Independent Reviewers recommend that a specific Disposal Schedule be issued which provides for all records collected or created in the determination of the application be disposed of after a period of 6 months after the determination of the application by the Secretary or, in the event of an application for a review of the determination, then 6 months from the date of the review decision.

The Independent Reviewers have identified a further issue relating to confidentiality of records created in the assessment of applications process held by CBOS. The Act is silent on its interaction with the *Right to Information Act 2009* (Tas). The Independent Reviewers have concerns that, in the absence of exemption provisions in the *Expungement of Historical Offences Act 2017* (Tas), CBOS may be required to disclose documents or records that they have collected or created as part of the investigation of an application for expungement, should they be the subject of a request for information under the *Right to Information Act 2009* (Tas).

Recommendation 9.

The Independent Reviewers recommend that the Act be amended to provide that any records, documents or material that have been collected or created in the investigation and determination of an application for expungement are exempt from the provisions of the *Right to Information Act 2009* (Tas).

6.11.2 Section 9 – definition of 'record'

The Independent Reviewers consider that the requirements of section 9 give rise to potential confidentiality issues for parties other than the applicant, who may be compelled to be involved in the application process. Section 9 defines a 'record' as 'a record of the investigation of an historical offence or of proceedings relating to an historical offence.' Pursuant to section 9(2)(a), if the Secretary obtains a record which relates to the applicant, they must give the applicant a copy of that record, except so far as it contains personal information relating to any person other than the eligible person. 'Personal information' is defined in section 9(1) as 'information that identifies a person or discloses his or her address or location; or from which a person's identity, address or location can reasonably be identified'.

The Independent Reviewers have concerns that the definition of 'record' in section 9 potentially has broader application than is necessary. The definition captures, for example, records obtained from a data controller that include details of complaints or charges which did not proceed. In that instance the applicant may be alerted to the existence of additional complaints or charges which do not relate to the charge or conviction that the applicant is seeking to have expunged. Although the section provides for 'personal information' to be excluded, when considering the types of offences which may be relevant, and in the context of small Tasmanian communities, any amount of detail relating to the circumstances of the offence may be sufficient to potentially identify complainants. There would be difficulty in appropriately redacting records to a sufficient degree to de-identify them. The Independent Reviewers accept that it is necessary for the Secretary to disclose records which relate to the offence the applicant is seeking to be expunged. However they consider that the broad definition of 'record' creates potential breaches of confidentiality of other parties where the record may include information relating to complaints or charges which did not proceed, or other information not relevant to the application for expungement.

Recommendation 10.

The Independent Reviewers recommend that the definition of 'record' in Section 9 of the Act is narrowed. The definition should provide that the records which are required to be provided to the applicant are records relevant to the offences which are the subject of the application for expungement.

6.11.3 Section 12

Section 12(3) requires that, if the Secretary intends to refuse to expunge a charge, then the Secretary is required to inform the applicant of that intention and the reasons for it, and provide the applicant with a copy of any relevant records, relating to the applicant. These records include information obtained from other parties to the conduct, as required by sections 8(6) and 10.

Section 8(6) requires that the Secretary give each person whom the Secretary believes to have been involved in the conduct constituting an historical offence a reasonable opportunity to make a submission in relation to the decision whether to expunge the charge for that historical offence. The Secretary must be take into account any submissions received in considering an application.[81] The requirement for the Secretary to give those parties an opportunity to make a submission is mandatory; however there is no obligation for those parties to make a submission should they not wish to. It is noted, however, that additional obligations may be imposed on 'any person (other than the applicant)' to provide answers to questions, information or documents requested by the Secretary by written notice.[82] Section 8(10) states that a person must not fail to comply with that notice without reasonable excuse.

Section 10 provides the matters that the Secretary must be satisfied of in determining the application. If consent is an issue in the decision to expunge, the Secretary may only be satisfied by written evidence on that issue from the official criminal records, if available, or from a person who was involved in the conduct constituting the homosexual offence. If that person or persons are not able to be found, then information can be sought from a person with knowledge of the circumstances in which the conduct occurred.[83] The Independent Reviewers note that if the Secretary can be satisfied on the basis of the official criminal records, there is no need to seek

81 *Expungement of Historical Offences Act 2017* (Tas) s 8(6)(b).
82 *Expungement of Historical Offences Act 2017* (Tas) s 8(8).
83 *Expungement of Historical Offences Act 2017* (Tas) s 10(3).

evidence regarding consent from any other party; the three subparagraphs (a) to (c) are alternatives, and not all three are required. The Secretary may therefore determine, on a case-by-case basis, whether this additional information should be sought.

Where evidence is sought from parties other than the applicant, pursuant to section 8(6) and 10, this forms part of the material which the Secretary must provide to the applicant if the Secretary intends to refuse to expunge a charge. In these circumstances, this can present significant issues for those other parties. The experience of CBOS, in the one eligible matter dealt with under the Act to date, was that the conduct which formed the subject of the charge sought to be expunged had had profound and continuing impacts on the parties from whom information was sought, and the request for statements caused them to have to relive difficult past experiences. CBOS has indicated that the knowledge that the statements would be provided to the applicant made the other parties uncomfortable and potentially reluctant to provide a statement.

As noted above in the discussion of the section 9 definition of 'record', there are further implications regarding the potential identification of parties involved in the conduct, and the consequent distress this may cause them.

It is acknowledged that there is a difficult balance between the need for natural justice for the applicant, the need for the Secretary to obtain the necessary information to make a determination, the right to confidentiality and privacy of persons who were potentially the victims of the conduct, and the need to endeavour not to re-traumatise these persons. Consideration should be given to amending the Act to adequately protect the rights and interests of other parties who may be compelled to engage with the processes under the Act through no choice of their own, and subsequently have their statements disclosed to the applicant.

Other Tasmanian legislation is instructive on the type of mechanism which could be effective, and the *Registration to Work with Vulnerable People Act 2013* (Tas) provides such an example. Similar to the obligations imposed on the Secretary under section 12(3) & (4) of the *Expungement of Historical Offences Act 2017* (Tas), the *Registration to Work with Vulnerable People Act 2013* (Tas) requires under s 32(3) that:

> *(3) If the Registrar refuses to register a person, the Registrar is to –*
>
> *(a) notify the person, in writing, of that refusal to register the person and the reasons for it; and*
>
> *(b) notify any named employer, in writing, of the provision of a negative notice to the person but not of –*
>
> *(i) the reasons for refusing to register the person; or*
>
> *(ii) any information obtained, or used, in the conduct of the risk assessment.*

However, Sections 32(4) & (5) of the *Registration to Work with Vulnerable People Act 2013* (Tas) qualifies this obligation to notify the person with certain limiting conditions. Those sections read:

> *(4) Despite subsection (3)(a), the Registrar is not required to notify a person of the reasons for a negative risk assessment to the extent that to do so would –*
>
> *(a) prejudice –*
> *(i) the enforcement, or proper administration, of a law in a particular instance; or*
> *(ii) the fair trial of a person for an offence against a law; or*
> *(iii) the impartial adjudication of proceedings relating to an offence against a law; or*
>
> *(b) disclose, or enable the person to ascertain, the existence or identity of a confidential source of information in relation to the investigation of a contravention, or possible contravention, of the law or the enforcement, or proper administration, of the law; or*
>
> *(c) disclose methods or procedures for preventing, detecting or investigating, or dealing with matters arising out of, contraventions or evasions of a law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or*
>
> *(d) endanger the life or physical, emotional or psychological safety of another person, or increase the likelihood of harassment of or discrimination against another person; or*
>
> *(e) disclose information gathered, collated or created for intelligence, including but not limited to databases of criminal intelligence, forensic testing or anonymous information from the public; or*
>
> *(f) hinder, delay or prejudice an on-going investigation of a contravention, or possible contravention, of a law.*
>
> *(5) In subsection (4) – law means law of the Commonwealth, a State or a Territory.*

The Independent Reviewers have concluded that qualifying provisions to this effect provide an appropriate balance to the potentially conflicting interests of the applicant and another party to the conduct from whom information was received. It is therefore recommended that the Act be amended to introduce provisions to this effect**.**

Recommendation 11.

The Independent Reviewers recommend that the Secretary's obligation under section 12(3)(b) to provide the applicant with copies of relevant records relating to the applicant should be qualified by a provision limiting this obligation in circumstances where there is a possibility that disclosure may have adverse impacts on another person's privacy, safety, wellbeing, rights or interests. Any amending provisions should be framed with due regard to protecting the interests of other parties, without infringing the applicant's right to information relating to their application**.**

6.12 Improper disclosure

The Independent Reviewers are of the view that the section 17 offence of improper disclosure contains sufficient safeguards to prevent undue disclosure of information.

The Independent Reviewers also consider that the section 19 provisions relating to improperly obtaining information about expunged convictions will adequately deal with an attempt to improperly obtain information.

6.13 Publicising and promoting the Scheme

6.13.1 General publicity and promotion

The Independent Reviewers acknowledge the efforts made to publicise the scheme when it was first introduced. There has been no further publicity or advertisement of the Scheme since.

Submissions received from CLA and ET raise concerns regarding the lack of promotion of the Scheme. The CLA submission notes that it difficult to ascertain what measures have been taken to promote the Scheme, and to provide information on the application process and the effect of expungement. CLA is of the view that there is limited awareness of the Scheme. The ET submission highlights that promotion of the Scheme is crucial to its success. That submission highlights difficulties reaching people to whom the Scheme may apply, because many may be older persons or people who 'will have become part of the Tasmanian diaspora because of their ill-treatment under our former laws.' ET also noted that promotion of the Scheme interstate in LGBTIQ media outlets does not necessarily resolve this issue, as people who might benefit from the Scheme may not necessarily be closely connected to the LGBTIQ community. Further, ET suggested that given the age of potential applicants, consideration should be given to promoting the Scheme in aged care facilities in Tasmania and interstate. It was also suggested that there be consultation with LGBTIQ community representatives to determine what further promotional activity could be undertaken.

The Independent Reviewers accept the submissions by CLA and ET that there is an overall lack of community awareness of the Scheme. Whilst the webpage is available to provide details of the Scheme, people must know about the existence of the Scheme to know to search for it. The Independent Reviewers have concluded that, despite initial efforts to promote the Scheme, the lack of promotion following the commencement of the Act has resulted in an overall lack of awareness of the existence, scope, and operation of the Scheme. The Independent Reviewers have concluded that this lack of awareness has contributed to the low applications numbers.

Recommendation 12.

The Independent Reviewers recommend that further efforts are taken to promote the Scheme. It is recommended that consultation take place with LGBTIQ community representatives to determine what further promotional activity they suggest should be undertaken. It is anticipated that activities such as interstate promotion, and promotion in aged care facilities and services may be appropriate.

6.13.2 Name of the Act

The Independent Reviewers consider that the name of the Act may also have contributed to a lack of awareness. It is not apparent from its name that the Act is intended to apply specifically to historic homosexual offences, as opposed to a Scheme for the expungement or annulment of historic offences generally. This therefore increases the need for promotion and publicity of the Scheme to make it clear that the Scheme exists and the types of offences to which it applies.

It is not recommended that the name of the Act be amended at this time; further publicity should assist in educating members of the public of its existence and purpose.

6.13.3 Contacting eligible applicants

The Anti-Discrimination Commissioner's 2015 report suggests that, if a person with offences that could be expunged under the Act makes an application for a criminal history check, there should be a requirement to inform that person that they can apply to have those convictions expunged, and that they be provided with appropriate material to do so. This was not suggested as a pro-active requirement to check all records, which may be difficult in any event and raise issues of privacy and confidentiality. It was to be limited to situations where a person had made an unrelated application for their criminal record. The Independent Reviewers considered this

proposal and concluded that, although it would increase public awareness of the Scheme, it was likely to be impractical, given that it would require the holder of the records to read each set of records being made available. Further, it may be seen as discriminatory to be responding to the application for a record in this way, unless information about the Act and its purpose was made available to all applicants for their criminal record.

The Independent Reviewers therefore consider that this is not a viable proposal and no recommendation is made in respect of this issue.

6.14 Regulations

There is power under section 31 for the Governor to make regulations for the purposes of the Act. It has not yet been utilised to date. The Independent Reviewers consider that such regulations are not necessary at this time, but that the Act should retain the ability to make such regulations as may become necessary.

6.15 Compensation

Section 22 precludes a right to compensation of any kind arising from a charge or conviction being expunged. The CLA submission noted that, although the name of the Act refers to the offences as being 'historical', in reality these laws persisted into the second half of the 1990s, which is quite recent. It was submitted that the lack of compensation 'significantly undermines the ability of the Scheme to achieve its objectives of addressing the legacy of these historic laws.' Similarly, the ET submission referred to the issue of compensation and concluded that 'compensation would help our expungement legislation achieve its stated goal, and because compensation is ethically important in and of itself.' The submission refers to the goal of the legislation and states, 'The stigma of conviction and the damage of subsequent discrimination could be rectified more fully if the state were to provide financial compensation to those affected. Compensation would obviously help make good the financial losses of those who suffered conviction, stigma and discrimination. On top of this, it would show, more compellingly than anything else, that the state takes conviction-related stigma and discrimination against LGBTIQ people very seriously, that this stigma and discrimination have no place in today's society, and that they must never be permitted again. Obviously, it would also help encourage those who would benefit from the expungement legislation to avail themselves of its remedies'. It is also noted that simply hiding a criminal record from view does not fulfil the moral obligation of the state to ensure justice is restored to those who were convicted. And the conclusion is that 'this can only be achieved if

financial compensation is available' and that this would send 'a compelling message to the world' if Tasmania was the first jurisdiction to provide financial compensation.

The Independent Reviewers appreciate the significant impact that compensation or redress schemes can have in acknowledging and attempting to rectify past wrongs perpetrated by the State. The Independent Reviewers note that there is no expungement scheme in any Australian jurisdiction which provides for any financial payment. However, the Independent Reviewers agree with the submissions that compensation confirms the expressed wish of Parliament in enacting this legislation that it was intended to send a compelling message that the state is serious in its commitment to remedy, to the extent that it can, the discrimination against, and distress and harm experienced by, Tasmanians in this context. Increasingly, compensation or redress schemes are being used throughout Australia. For example, the Commonwealth National Redress Scheme was created in response to recommendations by the Royal Commission into Institutional Responses to Child Sexual Abuse. The Commonwealth Scheme explicitly acknowledges the suffering experienced by many children who were sexually abused in Australian institutions, holds institutions accountable for this abuse, and affords those individuals who have experienced abuse the opportunity to access counselling, a direct personal response, and a redress payment. It thereby reflects contemporary social policy and thinking.

The Independent Reviewers have concluded that a payment should be made available for those whose records are expunged under the Act. Given the low number of anticipated application, the number of payments that would be made is likely to be limited, but such a payment would be seen as a genuine recognition by the Government of its intention to recognise that these matters should never have been crimes and that there has been harm caused. Given there have been no eligible applications under the Act to date which have resulted in the expungement of any record, there

will be no prejudice to any previous applicant by the introduction of a payment subsequent to the introduction of the Act.

Recommendation 13.

The Independent Reviewers recommend that a payment should be made available for those whose records are expunged under the Act. The Independent Reviewers recommend that the Government introduces a one-off ex-gratia payment of a fixed amount as acknowledgement and redress for applicants who have charges and convictions expunged under the Act. This payment should be available automatically on the finalisation of an application in which the Secretary has determined to expunge any charge or conviction. It should not involve a hearing and should be an amount determined by the Government to be appropriate.

In considering any such proposal for redress, the Independent Reviewers suggest that the Government consider a two-tiered payment structure; one payment for applicants who have conviction/s or charge/s actually recorded on their official criminal record which is or are expunged, and a second, smaller payment, to applicants who have a charge expunged which did not appear on their criminal record. This distinction recognises that, whilst all applicants whose records are expunged should be acknowledged, a person who has had a conviction or charge recorded on their criminal record is more likely to have encountered discrimination arising from this record than a person who was charged, but the charge did not proceed and consequently does not appear on their official criminal record.

6.16 Annual Reports

There have been two annual reports prepared by the Secretary since the introduction of the Act. The annual reports contain limited information, and are limited to identifying: the number of applications, the number of applications in which historical offences were not eligible for expungement, the number of applications being determined as at the end of the financial year, and the number of applications finalised during the period.

Civil Liberties Australia and Equality Tasmania noted in their submissions that they considered the information provided in the Annual Reports was insufficient. CLA recommended that the future Annual Reports should include at least the following:

(a) the number of applications received

(b) the number of applications approved/not approved

(c) the time taken for decisions to be made

(d) the number of applications for review of decisions (under section 21) and the results of those applications for review

(e) details of any delegations of functions and powers made by the Secretary (under section 27)

(f) the number of applications (under section 18) for disclosure of expunged records for research purposes and the number of applications granted

(g) results of feedback from successful and unsuccessful applicants received through a formal feedback process

(h) details of activities undertaken to raise awareness of the scheme.

The Independent Reviewers have had regard to the submissions made by CLA and ET. One of the issues identified by the Independent Reviewers, and also noted by CBOS, was that if additional information is included in the Annual Reports there is a risk that an applicant or other parties involved in an application may be identified. In discussions with the delegated staff at CBOS, it was clear to the Independent Reviewers that considerable thought has been given each year to the issue of what should be included in the Annual Reports to ensure there is sufficient information contained, whilst remaining cognisant of the risk of a breach of confidentiality. This is a particular issue in a jurisdiction such as Tasmania, where there is increased risk of person involved in an application being identified due to the low number of applications likely to be made and the size of the population generally.

It is noted that Western Australia is the only other Australian jurisdiction in which an Annual Report is required to be produced. The one Annual Report prepared in Western Australia contains a similar level of detail as is in the Tasmanian Annual Reports.

The Independent Reviewers are of the view that, whilst it is preferable to include as much information as possible to disclose how the Act is operating, the ability to include more detailed information in the Annual Reports is hindered by the low number of applications to date because of the risk of breaches of confidentiality.

In the event that the number of future applications increased, the Independent Reviewers expect that the Annual Reports will contain more detail.

7 CONCLUSION AS TO DEFICIENCIES, UNINTENDED CONSEQUENCES, SUGGESTED IMPROVEMENTS FOR THE OPERATION OF THE SCHEME AND RECOMMENDATIONS FOR AMENDMENTS TO THE ACT

The Scheme has been in place for two years. During that time there have been 10 applications for expungement. Of those applications, 9 were ineligible as they did not relate to offences which come within the definition of 'historical offences' under the Act. The remaining application was investigated, and the Secretary determined that the application should be refused.

The Independent Reviewers have examined the provisions of the Act, undertaken consultations with CBOS, and considered the written submissions received. The Independent Reviewers have also considered the Schemes in other jurisdictions. Unfortunately, due to the short time frame in which the Review was required to be prepared, it was not possible to undertake in depth consultations with the other jurisdictions. The Independent Reviewers received information from the South Australian Scheme, the New South Wales Scheme and the Western Australian Scheme. In South Australia no applications have been made to expunge historical homosexual offences under section 8A of the *Spent Convictions Act 2009* (SA) over the last 5 years. In NSW, the Department of Communities and Justice advised that since their scheme commenced in 2014 there have been 31 applications, of which 27 were successful. It noted that some applicants had multiple convictions. And in Western Australia there have been two applications under their scheme since it commenced on 1 October 2018. The first was found to be ineligible as it related to a caution and there was no arrest or offence charged. Consequently, there was no conviction to be expunged. The second application was in the context of historical homosexual offences and will be eligible for expungement once there is an amendment to the regulation to enable the conviction to come under their scheme.

As no other Australian jurisdiction (except Western Australia) is required to provide annual reports, it was not possible to obtain information in that way. However, reference has been made in the Review to the legislation in other states where it is regarded as relevant to the Tasmanian situation. The Independent Reviewers note that there have been no amendments to the operative provisions of the other Australian Acts. Any such amendments may have been instructive in highlighting any yet untested provisions of the Tasmanian Act that may benefit from amendment. Under the New South Wales Act the additional offences added (which referred to in Chapter 6.1) were prescribed in the Criminal Records Regulation, as that Act allows additional offences to be included by regulation, which does not require amendment of the Act.

The Independent Reviewers have identified 13 impediments to the effective implementation and administration of the Act, and make recommendations to remedy these as follows:

1. **The scope of charges and convictions which are eligible for expungement is too narrow.**

It is recommended that the Act is amended to allow for the expungement of charges or convictions for resisting, obstructing or assaulting police under section 34B of the *Police Offences Act 1935* (Tas) or failing to comply with the direction of a Police Officer under section 15B of the *Police Offences Act 1935* (Tas), or any equivalent provision as in force at that time. These charges or convictions should only be eligible for expungement where it can be shown that the person would not have been charged or convicted but for the fact that the person was being dealt with in relation to engaging in alleged conduct of a homosexual nature, or cross-dressing.

2. **Potential applicants may not have access to the application form as it is only available online.**

It is recommended that printed copies of the application form be available from Service Tasmania, and also a telephone contact number be clearly noted on the EHOS website, and in any other material promoting the Scheme, advising that a copy of the application form can be requested by phone and sent by mail. The copy of the application form which is made available in both these circumstances should also include details of the legal and non-legal support services noted on the website.

3. **The Act does not adequately recognise the potential distress to parties other than the applicant which may arise by being required to provide information in relation to an application**.

It is recommended that information identifying legal and non-legal support services be provided to all parties required to engage with or be involved in the investigation, for example persons being required to provide information under section 8(6) of the Act.

4. **Potential applicants may be deterred from applying if they are unable to recall information relating to the charge or conviction, such as the date of the offence or the court in which they were convicted**.

It is recommended that the information on the website, and at the relevant sections in the online and hardcopy application forms, should be clarified to clearly state that the applicant is not

required to provide all of the information requested in order to make a valid application. Consideration should be given to including words to the effect that if the applicant is unable to provide any of these details, they are nonetheless encouraged to apply, and that providing their name, date of birth and address will be sufficient to initiate the investigative process.

5. The requirement in section 10(3)(c) that the applicant (as opposed to the Secretary) must make 'reasonable enquiries' to find the other person or persons involved in the conduct, potentially results in a victim of a non-consensual sexual act being looked for by the perpetrator of the offence, which may result in significant distress to the victim.

It is recommended that the Act be amended to delete the word 'applicant' in section 10(3)(c) first occurring and replace it with the word 'Secretary'.

6. Applicants are unable to provide feedback following the determination of their application.

It is recommended that the Secretary consider establishing a formal feedback process to be sent to all applicants following the determination of their application to identify any systemic issues or provide further support to applicants.

7. The annotation process in section 15 of the Act does not distinguish between primary and secondary records. The Act requires that all records are annotated and does not allow for secondary records to be removed or de-identified.

It is recommended that section 15 of the Act be amended to provide that the annotation process does not apply to secondary records. It is recommended that a definition of secondary records is inserted in the Act be inserted in the Act and be framed in similar terms to section 105 of the *Sentencing Act 1991* (Vic). It is recommended that the Act be amended to require data controllers who hold secondary electronic records to either remove the entry, make the entry incapable of being found, or de-identify the information contained in the entry and destroy any link between it and information that would identify the person to whom it referred.

8. There is no specific authorisation for the disposal of records collected or created by CBOS during the investigation and determination of an application for expungement.

It is recommended that a specific Disposal Schedule be issued which provides for all records collected or created in the determination of the application be disposed of after a period of 6

months after the determination of the application by the Secretary or, in the event of an application for a review of the determination, then 6 months from the date of the review decision.

9. Records, documents, or material that have been created in the investigation and determination of an application for expungement are potentially vulnerable to a request under the *Right to Information Act 2009* (Tas).

It is recommended that the Act be amended to provide that any records, documents or material that has been collected or created in the investigation and determination of an application for expungement are exempt from the provisions of the *Right to Information Act 2009* (Tas).

10. The requirement in section 9 that the Secretary must disclose all records obtained in relation to an application for expungement results in the potential disclosure of information relating to complaints which either were never charged, or are the subject of ongoing investigations, and which may identify potential complainants.

It is recommended that the definition of 'record' in Section 9 of the Act is narrowed. The definition should provide that the records which are required to be provided to the applicant are records relevant to the offences which are the subject of the application for expungement.

11. The requirement under section 12(3)(b) that the Secretary must provide the applicant with copies of all relevant records if the Secretary intends to refuse to expunge a charge can cause significant distress to parties other than the applicant who have been required to provide information as part of the investigation process.

It is recommended that the Secretary's obligation under section 12(3)(b) to provide the applicant with copies of relevant records relating to the applicant should be qualified by a provision limiting this obligation in circumstances where there is a possibility that disclosure may have adverse impacts on another person's privacy, safety, wellbeing, rights or interests. Any amending provisions should be framed with due regard to protecting the interests of other parties, without infringing the applicant's right to information relating to their application.

12. Limited promotion and publicity have resulted in an overall lack of awareness of the existence and scope of the scheme.

It is recommended that further efforts are made to promote the Scheme. It is recommended that consultation take place with LGBTIQ community representatives to determine what further

promotional activity they suggest should be undertaken. It is anticipated that activities such as interstate promotion, and promotion in aged care facilities and services may be appropriate.

13. The expungement of a charge or conviction is insufficient, and potential applicants may feel that compensation or redress more adequately acknowledges the harm experienced by them as a consequence of the existence of a conviction or charge on their criminal record.

It is recommended that a payment should be made available for those whose records are expunged under the Act. The Independent Reviewers recommend that the Government introduce a one-off ex-gratia payment of a fixed amount as acknowledgement and redress for applicants who have charges and convictions expunged under the Act. This payment should be available automatically on the finalisation of an application in which the Secretary has determined to expunge any charge or conviction. It should not involve a hearing and should be an amount determined by the Government to be appropriate. In considering any such proposal for redress, the Independent Reviewers suggest that the Government consider a two-tiered payment structure; one payment for applicants who have conviction/s or charge/s actually recorded on their official criminal record which is or are expunged, and a second, smaller payment, to applicants who have a charge expunged which did not appear on their criminal record. This distinction recognises that, whilst all applicants whose records are expunged should be acknowledged, a person who has had a conviction or charge recorded on their criminal record is more likely to have encountered discrimination arising from this record than a person who was charged, but the charge did not proceed and consequently does not appear on their official criminal record.

8. ACKNOWLEDGEMENTS

The Independent Reviewers would like to express their appreciation to the Secretary of the Department of Justice for appointing Tania Lethborg to provide administrative assistance for the Review process. We would also like to thank the delegated members of the staff at CBOS, Peter Graham, George Clarke and Lisa Gregg, for meeting with us, providing us with information on the application process and administration of the Scheme and providing prompt answers to our numerous queries. Thank you also to those entities which provided written Submissions to the Review.

9. ATTACHMENTS

ATTACHMENT 1 - SUBMISSIONS

1. Written submissions were received from the following entities:

   Civil Liberties Australia

   Australian Lawyers Alliance

   Equality Tasmania

2. The written submissions are provided in the annexures to this Attachment:

   Annexure A Civil Liberties Australia

   Annexure B Australian Lawyers Alliance

   Annexure C Equality Tasmania

Civil Liberties Australia Inc. A04043
PO Box 181, New Town TAS 7008
Email: rajan[at]cla.asn.au

The Independent Reviewers
Review of the Expungement of Historical Offences Act 2017
GPO Box 825
Hobart Tasmania 7001

By email to: EHOreview@justice.gov.au

31 August 2020

Dear Independent Reviewers

RE: REVIEW OF THE *EXPUNGEMENT OF HISTORICAL OFFENCES ACT 2017*

Thank you for this opportunity to provide a submission to your review of the above Act. This submission is not confidential and may be published according to usual practice. Civil Liberties Australia (CLA) does not envision the need to provide an oral submission in addition to this written submission, but we are available to discuss any matters arising as required.

The *Expungement of Historical Offences Act 2017* has not achieved its objectives.

Section 32 of the Act requires that this review examine the operation of the Act. Any such examination must seek to determine whether the Act is achieving its objectives. The objectives of the Act are best set out in the second reading speech for the Bill delivered by the Hon Matthew Groom MP. He acknowledged that 'laws criminalising consensual homosexual activity and cross-dressing were unfair and unjust.' He recognised that 'despite the repeal of homosexual offences, some men continue to have criminal records that affect various aspects of their lives, such as their work, volunteering and travelling.' He said that the expungement scheme would 'remove the ongoing disadvantage and stigma that results from having a criminal record.'

So, the question is: Has the scheme created by the Act removed the ongoing disadvantage and stigma that resulted from having a criminal record?

Unfortunately, the annual reports that the Secretary of the Department of Justice is required to prepare on the administration and operation of the Act are not very helpful in assessing the effectiveness of the Act. It seems that only one of these reports has been tabled in parliament and it contains only a bare minimum of information. More detailed reports would have been very helpful to the conduct of this review and we have set out below our recommendation for the content of these reports.

Nevertheless, based on the one annual report table in parliament, it seems very few applications for expungement have been made since the creation of the scheme two years ago and even fewer expungements appear to have been approved. This being the case, it must be concluded that the scheme created by the Act has done little to remove the disadvantage and stigma identified in the second reading speech.

Why has the Act failed to achieve its objectives?

Again, in the absence of more detailed annual reports on the administration and operation of the Act, it is difficult to be definitive about the reasons why the Act has failed to achieve its objectives. **We recommend** that future annual reports submitted as required under section 30 should include at least the following:

(a) the number of applications received
(b) the number of applications approved/not approved
(c) the time taken for decisions to be made
(d) the number of applications for review of decisions (under section 21) and the results of those applications for review
(e) details of any delegations of functions and powers made by the Secretary (under section 27)
(f) the number of applications (under section 18) for disclosure of expunged records for research purposes and the number of applications granted
(g) results of feedback from successful and unsuccessful applicants received through a formal feedback process
(h) details of activities undertaken to raise awareness of the scheme.

In the absence of such details in the one annual report tabled to date, we offer the following possible reasons why the Act has failed to achieve its objectives. These are based on limited anecdotal and second-hand accounts. **We recommend** that the reviewers examine these issues in detail as part of this review.

The requirements for application are too onerous

The required contents of an application are set out in section 7 of the Act. Some applicants may find these requirements too onerous, for example, the requirement to provide details of the date when, and the court by which, the eligible person was convicted (section 7(c)(ii)).

Further, some applicants may be hesitant to provide the name of other persons involved in the conduct constituting the historical offence (section 7(c)(iii)).

For people considering applying for expungement of the records of a deceased person (or of a person lacking legal capacity), the terms of section 6 may likewise be too onerous. It is not clear why section 6 sets up a hierarchy of applicants. If we acknowledge (as per the second reading speech quoted above) that 'laws criminalising consensual homosexual activity and cross-dressing were unfair and unjust,' then surely any criminal records that resulted from these unfair and unjust laws should be capable of being expunged without regard to a hierarchy of applicants.

Applicants may not have confidence in the decision-maker

Potential applicants may lack confidence in the Secretary of the Department of Justice as investigator and decision-maker under the Act. This was an issue identified in the 2015 report of the Tasmanian Anti-Discrimination Commissioner[1]. She found that stakeholder organisations had a 'strong view that location of the scheme within any Agency historically connected with the enforcement of anti-gay laws is likely to deter applicants from seeking to have records expunged.' She, therefore, recommended that applications be considered by a panel comprising three independent members.

This reluctance identified by stakeholder organisations would only be stronger given the final form of the Act. Section 12 gives sole power in the determination of applications to the Secretary of the

[1] Anti-Discrimination Commissioner, Tasmania: 'Treatment of historic criminal records for consensual homosexual sexual activity and related conduct'; April 2015.

Department. Section 10 provides for the Secretary to base his or her decision on a wide range of complex issues.

Applicants would also likely be concerned by exposing other people to the significant investigatory powers vested in the Secretary under section 8, including the power to require any person to answer questions or provide documents relevant to the application with the potential for fines for any person who does not comply with such a requirement. It is not clear that departmental secretaries typically have expertise or experience in conducting inquiries of this kind as part of other schemes.

Similarly, applicants would likely be concerned that the Act solely entrusts the Secretary with managing the sensitivity of information, the confidentiality and the privacy of the applicant, and the confidentiality and privacy of any other person contacted.

As per the Anti-Discrimination Commissioner's 2015 report, these concerns would likely be significantly less if the applications were considered by a panel independent of government.

Applicants may not be satisfied with the method of expungement

Section 15 provides that where a charge has been expunged, the Secretary must notify relevant data controllers and that the data controller must annotate any entry that includes information about an expunged charge contained in any official criminal records with a statement to the effect that the entry includes information about an expunged charge and that it is an offence to disclose information about an expunged charge.

It is not clear that this kind of annotation is a satisfactory outcome for potential applicants. The Anti-Discrimination Commissioner in her 2015 report noted that she had considered the annotation option but she noted a 'strong argument' that this would not give applicants confidence that their records would truly be disregarded.

At the same time, she noted the preference that records be retained for historical purposes. She therefore recommended that the Registrar of the scheme be authorised to hold all expunged records.

Applicants may not be satisfied with the coverage of expungement

It is also not clear that the meaning of 'criminal record' under the Act will be sufficient to satisfy many potential applicants. The coverage of this term is not entirely clear.

In her 2015 report, the Anti-Discrimination Commissioner gave a comprehensive list of the records to be covered by the scheme. We would recommend that the reviewers examine to what extent each of these records would be subject to expungement under the Act.

Expungement may not be enough

As per the second reading speech, Tasmania's historic laws criminalising homosexual activity and cross-dressing were unfair and unjust. They left a legacy of criminal records that affect various aspects of people's lives, such as their work, volunteering and travelling. They created ongoing disadvantage and stigma.

And it is worth recalling here that while we refer to these laws as 'historic', Tasmania was the last jurisdiction in Australia to retain these laws and they persisted into the second half of the 1990s, long after Tasmanian governments should have known better and in the face of national and international criticism. It continues to be shocking just how recently Tasmanian law continued to criminalise homosexuality.

Despite this, under section 22 if a charge or a conviction is expunged under this scheme, a person is not entitled to compensation of any kind. It is not clear why this should be the case and the closing off of compensation significantly undermines the ability of the scheme to achieve its objectives of addressing the legacy of these historic laws.

Along with the possibility of compensation, alternative restorative justice options should be considered by this review.

Limited support for applicants

It is not clear what, if any, support is provided to those seeking to have their records expunged. The Anti-Discrimination Commissioner in her 2015 report identified that such support would be appropriate especially where issues about the law or privacy concerns are evident. She identified possible legal and advocacy organisations that could provide such support and she highlighted that support arrangements should cover applicants in Tasmania and also applicants who do not live in the state.

Limited awareness of the scheme

It is not clear what measures have been taken to promote awareness of the scheme and understanding of the application process and the effect of expungement. Our assessment is that awareness is very limited. Furthermore, since many applicants may live interstate or overseas, it is doubtful that awareness-raising measures have reached a significant proportion of potential applicants.

Comparison with other states and territories

Most other Australian states and territories now have expungement schemes for historic offences. Some of these schemes are similar to Tasmania's, while others have schemes that are different in important ways. We recommend that this review engage with relevant authorities and stakeholders in other jurisdictions to seek information about the operation of those schemes and what lessons learned might be relevant to Tasmania.

Thank you for your consideration of this submission.

Yours sincerely

[signed]

Rajan Venkataraman
Vice-President

Review of the *Expungement of Historical Offences Act 2017*

Submission to Independent Reviewer

31 August 2020

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | **ABN** 96 086 880 499
T +61 2 (02) 9258 7700 | **F** +61 2 9258 7777 | **E** enquiries@lawyersalliance.com.au | **W** www.lawyersalliance.com.au
Protecting and promoting justice, freedom and the rights of the individual.

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the independent review of the *Expungement of Historical Offences Act 2017* ('the Act').

2. This Submission responds to the issue of improvements and law reform (item 4 in the Review terms of reference).

Opportunity for reform of the Act

3. The Act should be extended so that drug possession and use offences and disorderly conduct offences (e.g. drunk in a public place; public annoyance and other petty disorder offences under the *Police Offences Act 1935*) are able to be expunged from a person's criminal record in Tasmania after a period of 10 years has elapsed.

4. The stigma and difficulties attached to having a drug possession and use offence recorded on a person's criminal record are well documented. As one study observed:

> For all drug offenders, however, having a criminal record for drug-related offences may have several severe but unintended effects.[2]

5. These collateral consequences include discrimination in future employment, license applications, visa applications, social interactions, housing. American University law professor Jenny Roberts, argues, rightly: 'there's certainly an economic incentive for allowing people to move beyond their criminal record.'[3]

6. There is increasing recognition in the Tasmanian, and Australian, community that drug use and possession is a health issue, not one suited to the criminal justice system. This is particularly the case in relation to cannabis use where there is an inevitable tide moving

[2] Bretteville-Jensen, Anne Line and Mikulic, Sania and Bem, Pavel and Papamalis, Fivos and Harel-Fisch, Yossi and Sieroslawski, Janusz and Trigueiros, Fatima and Piscociu, Laura and Tsarev, Sergey and Altan, Peyman and Costa Storti, Claudia (2017) Costs and unintended consequences of drug control policies (Strasbourg: Council of Europe, Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs), 42.

[3] NPR (2019) Scrubbing The Past To Give Those With A Criminal Record A Second Chance, 19 February https://www.npr.org/2019/02/19/692322738/scrubbing-the-past-to-give-those-with-a-criminal-record-a-second-chance And Colgate Love, Margaret and Roberts, Jenny and Klingele, Cecelia M., Collateral Consequences of Criminal Convictions: Law, Policy and Practice (2013) American University, WCL Research Paper No. 2014–48.

towards full decriminalisation and legislation across the world, including in the United States. If a person has drug possession and use offences on her/his criminal record in Tasmania which are more than 10 years ago, then there is a compelling argument for expungement if they have not subsequently committed any drug offences.

7. In relation to disorderly conduct offences the same argument can be made. These offences are minor but can have collateral consequences for individuals which far outweigh the gravity of offending. We note that in New Jersey the legislature has recently passed legislation to allow for the expunging of drug and disorderly conduct offences. The law works in this way:

> The statute further provides that a party can have a disorderly person's (misdemeanor) offense expunged after a five-year waiting period. This statute has recently been amended to permit an expungement of a disorderly person's offense within three years. Further, the statute provides that up to three disorderly person's offenses can be expunged at the same time. With regard to township ordinances, the statute has a two-year waiting period from the date of conviction in order to have an expungement.[4]

8. There are other sections of the expungement statute which provide for shorter periods of time, such as if a party is a youthful drug offender, which shortens the time period to get an expungement. Also, if a party completes a pre-trial diversion program the waiting period is only six months. The most important take away from this blog, however, is that once the expungement is granted that the offenses are deemed to have not occurred. This is extremely powerful, as the party may respond on any employment application or other application that the offenses never happened. Imagine that, a statute which permits you to lie. For these reasons, the expungement statute is powerful.

9. The idea of a clean slate and a second chance for persons who are socially and economically disadvantaged, and in Tasmania this is a large swathe of the population, is potent and effective. The New Jersey initiative provides a sense of how much more useful and ambitious the current Tasmanian legislation could be if it was broadened to include expungement for a wider category of offences.

[4] National Law Review (2020) Vol X No 240 Erasing your Mistake, 2 January 2020.

Conclusion

10. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide these comments to the review of the *Expungement of Historical Offences Act 2017*. The ALA is available for further consultation in relation to the issues raised in this submission.

Sebastian Buscemi

Tasmanian President and State Director

Australian Lawyers Alliance

Rodney Croome
President, Equality Tasmania
Lvl 4, 24 Davey Street, Hobart, 7000
0409 010 668

Melanie Bartlett
Independent Review of the Expungement of Historical Offences Act 2017
EHOReview@justice.tas.gov.au

Dear Ms Bartlett,

Thank you for the opportunity to submit our views to the independent review of the Expungement of Historical Offences Act 2017. Thank you also for an extension of the deadline.

We make a number of recommendations including

- The collation of more baseline data
- The establishment of an expert panel to assess and decide on applications
- Improvements to processes under the Act and more support for those seeking expungement
- Improvements to promotion of the Act
- The availability of financial compensation for those who make successful expungement applications

In essence, believe the state has a responsibility to those it formerly convicted which it has not yet adequately discharged. The Act was a start, but more is required.

Please contact us if you have any questions or require an oral submission on the issues we raise.

Best wishes,
Rodney Croome

Baseline data

We have limited data on which to base our submission. We understand that the annual report of the Secretary of the Department of Justice (DoJ) indicates the following: There were four applications between July 1 2018 and June 30 2019. One application was not eligible and three applications were still being determined.

We do not know if there were applications between the commencement of the Act in April 2018 and July 1 that year. We do not know if any of the applications in the 2018/2019 financial year were successful of whether there were any application in the 2019/2020 financial year. We also do not know how many inquiries were made, what processes were undertaken regarding applications, or how and when the expungement scheme was promoted. More data is required to make a thoroughly assessment of the Act's effectiveness. We are disappointed it is not available.

We sought out similar data from Victoria and NSW, where expungements schemes have been in operation since 2015 and 2016 respectively. Unfortunately, the data we were able to access is also scant. According to the annual reports of the Victorian Department of Justice there were twenty one successful applications for expungement between the commencement of the scheme and June 30th 2018[1]. According to information from our counterparts in NSW, there were fifteen application in NSW up until July 2016, seven of which were successful.

What we can say from this data is that the outcomes in Tasmania are disappointing. Naturally, we should expect Tasmanian figures to be below those of larger jurisdictions where schemes have been in existence for longer. However, we should also expect there to have been more applications in Tasmania than there have been given the offending historical laws prevailed for significantly longer than in other Australian jurisdictions.

Improved outcomes

The question becomes, how can the outcomes of the Tasmanian legislation be improved? In answering that question, we need to remind ourselves what the outcomes were meant to be.

Then Attorney-General, Matthew Groom, stated the goals of the legislation in his second reading speech. He said, "laws criminalising consensual homosexual activity and cross-dressing were unfair and unjust". He acknowledged that "despite the repeal of homosexual offences, some men continue to have criminal records that affect various aspects of their lives, such as their work, volunteering and travelling". No less importantly he said, the legislation would "remove the ongoing disadvantage and stigma that results from having a criminal record".

What can be done to achieve these goals?

[1] In 2015–16, there were six successful applications for expungement in Victoria. In 2016–17, there were ten successful applications for expungement. In 2017–18, there were five successful applications for expungement.

Establish an independent panel to assess and decide on applications

The Secretary of the Department of Justice is currently the decision-maker regarding expungement applications. This would be an obvious deterrent for some applicants given the association of the DoJ with enforcement of the offending laws, as well as its defence of these laws before the United Nations and the High Court in the 1990s. The current arrangement profoundly under-estimates the deep trauma inflicted by the Tasmanian state on its own citizens as well as the depth of resentment and anger towards the Tasmanian Government from those this trauma was inflicted on. It is Kafkaesque to think that Tasmanians who were once traumatised by the DoJ would now readily seek a remedy from it.

In 2015 the then Anti-Discrimination Commissioner, Robin Banks, pointed out this problem in her report, following consultation with LGBTIQ community groups. She recommended the establishment of an independent panel to assess and decide on applications. Given the disappointing outcomes from the Tasmanian scheme we strongly recommend the current model be scrapped and Ms Banks' model now be adopted.

Improve the process

The current legislation requires applicants to provide details of convictions including dates and courts. This may be too onerous, especially for the elderly and those who have put all memory of their conviction behind them. It may also be a deterrent that they are required to name the other party to the "crime" for which they were convicted. It should be sufficient that someone applying for expungement of a criminal record knows they were convicted. Regarding expungement for those no longer alive, it also seems onerous there should be a hierarchy for applicants. Surely, it is sufficient that there is someone alive today who feels strongly enough to seek expungement.

It may be a deterrent to applicants that expungement simply results in an annotated record. In her aforementioned report, Robin Banks noted that this may not give applicants confidence their record will be disregarded. We do not support the erasure of records. Instead, we support a designed registrar holding them. Commissioner Banks also recommended a range of official records come under the legislation, not just those related directly to a criminal record. This should also be revisited.

Lastly in this section, there should be greater support for those who may wish to lodge applications for expungement. There should be professional learning for all legal practitioners and the development of dedicated expertise in this area at particular community legal centres such as the Hobart Community Legal Service. Again, Ms Banks' report provides excellent recommendations in this regard.

Promotion of the expungement scheme

Promotion of the expungement scheme is crucial to ensure its success. This is because those who may need it most can be hard to reach. Many will be older. Many will have become part of the Tasmanian diaspora because of their ill-treatment under our former laws.

We understand some promotion has been undertaken. There was a meeting of advocates and DoJ officials to discuss this issue. However, we are not sure exactly what promotion finally occurred and how targeted it was. For example, while it is important to promote the Tasmanian scheme in LGBTIQ media outlets interstate, some of those people who might benefit from the scheme will not be closely connected to the LGBTIQ community. Because of the age of those who might benefit from the scheme, we suggest consideration be given to promoting it in aged care facilities, both in Tasmania and interstate. Consideration could be given to an aged care promotional program that is sponsored by all the Australian jurisdictions with kindred legislation. At the very least, we urge a review of promotional activities and consultation with LGBTIQ community representations to determine what further promotional activity could be undertaken.

Compensation

A logical question raised by the expungement of historical convictions is whether this expungement should be accompanied by financial compensation. It is a question that needs to be asked because compensation would help our expungement legislation achieve its stated goal, and because compensation is ethically important in and of itself.

The purpose of the legislation: As we noted above, the stated goal of the legislation was to "remove the ongoing disadvantage and stigma that results from having a criminal record". It was enacted because, "despite the repeal of homosexual offences, some men continue to have criminal records that affect various aspects of their lives, such as their work, volunteering and travelling". The stigma of conviction and the damage of subsequent discrimination could be rectified more fully if the state were to provide financial compensation to those affected. Compensation would obviously help make good the financial losses of those who suffered conviction, stigma and discrimination. On top of this, it would show, more compellingly than anything else, that the state takes conviction-related stigma and discrimination against LGBTIQ people very seriously, that this stigma and discrimination have no place in today's society, and that they must never be permitted again. Obviously, it would also help encourage those who would benefit from the expungement legislation to avail themselves of its remedies.

The moral imperative: On top of making existing law more effective, compensation is a self-justifying ethical imperative. The expungement legislation was enacted because "laws criminalising consensual homosexual activity and cross-dressing were unfair and unjust". This injustice gives its perpetrator, the state, a moral obligation to ensure justice is restored. Simply hiding a criminal record from view does not fulfil this obligation. Given the dreadful impact of the old laws and conviction under those laws, as acknowledged by the state itself, the state has a moral obligation to ensure those who were convicted are now no more impaired than if conviction had not occurred. This can only be achieved if financial compensation is available.

Given Tasmania was the final Australian jurisdiction to decriminalise sex between men, and cross-dressing, it would send a compelling message to the world if we were the first to provide financial compensation to those people who suffered directly from of the enforcement of those laws.