Submission to the Justice and Electoral Committee

Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill

1. Research for this submission was carried out by Law Reform student volunteers from the Wellington Community Justice Project (WCJP), a law student-lead society and registered charity at Victoria University of Wellington.
2. The WCJP aims to improve access to justice in the wider community, and provide volunteers with opportunities to develop their legal skills through volunteer projects. Law Reform is one of four teams within the WCJP with their primary focus on legislative changes and policy developments.
3. This submission is focused on the possibility that historical homosexual offences could be wiped with a blanket expungement, rather than on a case-by-case basis, and also puts forward compensation as an additional option to support those who were convicted under the now repealed sections of the Crimes Act 1908 and 1961.
4. Questions regarding this submission should be directed to lawreform@wellingtoncjp.com

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18 August 2017

I Introduction

[1] The Wellington Community Justice Project ("WCJP") supports the Bill, as it provides justice to those people who were convicted for homosexual acts, which we now accept and recognise through the Marriage Amendment Act. However, there remain a few points we would like the Select Committee to consider.

[2] First, we do not agree that under some now repealed sections, criminal records for those convictions could be wiped automatically. Rather, we support the notion of requiring the convicted person to apply for his criminal record to be wiped on a case-by-case basis. Second, this Bill has not allowed any compensation to those who were convicted. The WCJP disputes this and strongly recommends that compensation be given as having a criminal record has a strong and lasting effect on an individual.

II Secretary of Justice

[3] In addressing the negative effects of historical convictions for homosexual offences, the Ministry of Justice prefers that individuals apply to the Secretary for Justice ("Secretary") to have their conviction "expunged", for reasons of efficiency and effectiveness.[1] This is flawed for multiple reasons.

[4] Firstly, it is asserted that the Secretary has no other functions or interests other than to assess applications independently and properly. At present the Secretary for Justice is responsible to establish, maintain and purchase high quality legal services and perform any actions conferred on the Secretary.[2] This is large function, which may not impact independent assessment but will affect the amount of time that can be allocated to the decision.

[5] The Secretary for Justice is also the Chief Executive of the Ministry of Justice. To suggest that the status quo will not affect his ability to assess applications is truly misinformed.

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[1] Anna Wilson-Farrell "Regulatory Impact Statement: Expungement scheme for historical homosexual convictions" (9 August 2017) *Treasury* <www.treasury.govt.nz >.

[2] Legal Services Act 2011, s 68.

While this Bill is retrospective, it should take into account that the Secretary may hold more than one role within government and that he may not be an appropriate arbiter for this. To allude that adding this function to the Secretary's role would not also require a pay increase in addition to other resources is somewhat naïve.

[6] Secondly, the WCJP believes that having a committee would achieve the goals, effectively and efficiently, without putting a strain on resourcing. A committee of three people would allow for a more thorough consideration of the decision and a more balanced one. Perhaps it may be more appropriate at the hearing stage if there is oral evidence given. We think it is important to have a diverse panel, to include women, non-binary and especially LGBTQIA+ representation, seeing the nature of the convictions in question. This adheres more to the principles of natural justice. Diversity cannot be achieved by a single person. In terms of resourcing, it is possible to ask for volunteers for the committee within the legal community, which would cut down costs.

III Review Power and Appeal

[7] The reconsideration of decision powers are concerning, especially if only a single person is considering decisions. The benefit of a committee would mean that a wider range of reasoning for a declination would be provided and allow for wider appeal grounds. This is because of the diversity of the committee.

[8] In reconsidering, the main reason is the provision of further information. The fact that these convictions are from so long ago leads to the logical conclusion that there will already be a lack of information available for the initial application, let alone more information for an appeal. It is unclear whether proof of criminal record is sufficient or if it is sufficient to give a name and the offence. Therefore there should be additional grounds for reconsideration.

[9] Clause 19(2)(c) is also extremely broad and unclear. It allows for considerable discretion to the Secretary, which could be beneficial, however it provides little to no practical direction for applicants on how they may be able to apply for a reconsideration.

[10] Clause 19(3) only allows the Secretary to appoint an independent reviewer to assist with a reconsideration. This may provide the Secretary with a lot of discretion to direct the reconsideration process, seeing as they have already made a contrary decision does not provide much incentive for them to do so. A committee would likely avoid the need for that to occur. Alternatively there could be a checklist that the independent reviewer uses. This is similar to Victoria, Australia where the Home Secretary can appoint advisors.[3] That inherently recognises the value of multiple points of view.

[11] The Bill also provides no clear option of further review for applicants. Legally, the decision could be judicially reviewed.[4] However if the appeal process was more open, and with a committee, it is less likely an appeal would go to judicial review. In England and Wales, an unsuccessful applicant, with permission from the court, may appeal to the High Court.[5] It should be clearer if there is a further review process or if the High Court is a more appropriate mechanism.

[12] The recommendations we have suggested for the use of a committee and appeal powers work most effectively in conjunction with each other.

IV Applicable Sentences

[13] The sentences under the expungement scheme are as detailed in cl 5(2). These include ss 141, 142, 146, 153 and 154 of the Crimes Act. They qualify irrespective of the way in which the offence was committed – conspiring, being an accessory after the fact, an attempt or being the sole person involved.

[14] It is an exhaustive list and the Bill does not mention any available avenue to add to the list. One would have to mobilise the use of the entire legislative process to expand the list if another offence, later in time, is deemed appropriate to expunge. This seems excess in terms of time and cost. The issue is also unlikely to have much power to allow it to peak the legislative agenda.

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[3] Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 (Vic), s 105F.

[4] Judicial Review Procedure Act 2016, s 5.

[5] Protection of Freedoms Act 2012 (UK), s 99(1).

[15] Clause 5(1) starts off with the words "unless the context otherwise requires" then lists what a historical homosexual offence means.[6] The wording is ambiguous because it is not clear in the Bill where that context might occur.

[16] One interpretation of that phrase would be "unless another statute or regulation stipulates otherwise." Naturally, if another statute was passed which suggested different, it would overturn part of the Bill. However it seems that it is designed for them to work concurrently, which still seems unusual.

[17] We suggest a more practical alternative of allowing delegation for the purpose of adding further offences to the list. The ability to create delegated legislation must be clear in the statute. Traditionally, the use of "unless the context otherwise requires" may include the ability to make delegated legislation. However, in the department disclosure statement by the Ministry of Justice, it outlines that this Bill does not create powers to make delegated legislation.

[18] The WCJP recommends that ability for delegated legislation to be created and added to the statute for the purpose of adding offences to the list which can be applied to be expunged.

[19] This could occur in two ways:

i. Delegate legislation can repeal sections which are applicable, or
ii. Create a new list of offences which while are not repealed, may be applied under.

[20] Option (i) raises questions of legitimacy and whether regulations can do that, which is unlikely. However, it could indicate a list of crimes that are no longer prosecuted without repealing them, but allow expungement applications on.

[21] Option (ii) is the most viable option but requires a change to the expungement test. The expungement test outlines that if it would not be an offence in the law when the

[6] Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill 2017.

application was made, would not be an offence. In other words, if the offence was repealed and did not exist, the application would be successful. However if an offence that is not repealed is added the Bill, it will fail the expungement test because it would still be illegal.

[22] The test that should be adopted is "that the conduct constituting the offence, if engaged with when the application was made, would not constitute an offence because of the homosexual nature of the conduct". This means an offence, arising out of homosexual conduct that has not been exhaustively listed in the Bill, could be wiped off their conviction history.

[23] This is a practical adjustment to the Bill, which sits itself more in line with Option 1A in the Regulatory Impact Statement by the Ministry of Justice.[7] All of the benefits of that option, such as accessibility and all the benefits of the narrower Option 1, which this Bill is based off will occur.

[24] Option 1A was not preferred because it did not provide a balance of efficiency and safety. We think that efficiency would not be impacted, because while there might be more reliance on examination of official records, it can be done efficiently and that could be achieved by the Secretary or a committee with more experience. The safety element could also be easily mitigated through guidelines, which would remove subjectivity if an objective test was created to assess whether conduct is criminal.

[25] To expunge a conviction, the Secretary must be satisfied that the offence is an "historical homosexual offence" and that, on the balance of probabilities, both of the following tests are satisfied:[8]

a. The convicted person would not have been charged with the offence but for the fact that the person was suspected of engaging in the conduct for

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[7] Wilson-Farrell, above n 1.

[8] Sentencing Act 1991 (Vic), s 105G(1).

the purposes of, or in connection with, sexual activity of a homosexual nature; and

b. the conduct, if engaged in by the person at the time of making the application, would not constitute an offence under Victorian law.

[26] In deciding whether the second of those tests is satisfied, the Secretary is to consider, where relevant, the consent and age of any other person involved in the conduct.[9]The overall layout of the test advanced by the Victorian jurisdiction seems to be a wide-ranging scheme that would be effective in capturing *all* offences that are worthy of expungement, while also providing adequate criteria in order to only expunge those convictions deserving of expungement. Furthermore, by not having a definitive list of offences that are allowed to be expunged, it keeps the whole thing flexible – which progresses the policy initiatives of removing the stigma from all homosexual related offending.

[27] Victoria's framework is more accessible and friendly towards the people this proposed Bill is trying to achieve. It is important to promote justice for these people.

[28] Finally, the WCJP wants to acknowledge the sentiment that this is socially significant legislation and therefore is worthy of being accurately capable of achieving the policy objectives to a full extent. It would be an injustice to have someone with a deserving historical homosexual conviction miss out on expungement simply due to their offence slipping through the cracks of statutory rigidity.

V Compensation for People convicted of Homosexual Acts

[29] This Bill does not allow any possibility of compensation for a previous conviction under sections 141, 142, 146, 153 or 154. We are very supportive of the stance the government is taking in wiping repealed convictions from people's criminal records. However, widening the Bill to allow for compensation would further alleviate the past injustice. Although the

[9] Above n 8, s 105G(2).

people were committing criminal acts at the time, they have had to live for thirty years with a conviction that related to a repealed law.

[30] After the Homosexual Law Reform, being gay was still very stigmatised, and having this conviction would mean gay men would necessarily have to come out to prospective employers, if the employers would consider hiring someone with a criminal record. Even then, being gay may have been off putting enough for the employer to decide not to hire them (especially prior to the passing of the Human Rights Act). This may have resulted in loss of earnings for the person, and may also have prevented these people from travelling or living overseas, as some countries refuse entry or visas to people with convictions. In addition, these people may have faced problems with custody orders as a result of their conviction, and may have been restrained from contact with their children. As previous governments have delayed wiping the conviction off these men's criminal records, they have unnecessarily been burdened with a criminal record for thirty years after the act was no longer a crime.

[31] In other countries such as Germany, homosexual men have access to compensation if they were jailed for being gay after the war. These men only received a pardon from their criminal record last year. Germany is committed to rehabilitating the men who had to suffer with the "black mark of a criminal conviction."[10] Germany is expecting 5000 applications for compensation. In New Zealand, the number of men who were convicted for homosexuality is very small, so compensating these men would have a very minor effect on the government's finances.

[32] The Ministry of Justice provides advice on their website as to quashed convictions and recommends payments for pecuniary losses following conviction.[11] This is because the people who were wrongfully convicted faced a loss of livelihood and future earnings. In the case of people who have been convicted under the homosexuality sections, this may be true. Even though this Bill rightfully removes past convictions that are no longer illegal, it does not acknowledge the monetary losses that may have occurred from these convictions.

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[10] Caroline Mortimer "German government to pay €30m in compensation to gay men convicted under historical sex laws" *The Independent* (online ed, 10 October 2016).

[11] Ministry of Justice "Compensation for wrongful conviction & imprisonment" (2016) <www.justice.govt.nz>.

[33] We recommend that the government reconsiders their stance on no compensation under this Bill. Having a conviction, even if it is no longer an illegal act, can affect an individual's ability to reintegrate back into society, to re-enter the workforce, and result in the individuals facing stigmatisation and ostracisation.[12] Although there is no legal obligation on the government to consider this, the government is already making a moral decision by pursuing this Bill. To ensure justice, these wrongfully convicted people should have compensation if they can prove that they have suffered loss from their conviction.

VI Privacy

[34] Although the government is finally making moves to expunge criminal records, up till very recently homosexuality was still seen as a criminal offence. To this day, stigma surrounds the LGBTQA community. It is the reason why many people who identify as LGBTQA choose to keep it private.

[35] However, the proposal by the Bill of individual, case-by-case application for expungement may lead to issues surrounding privacy and identification, specifically for offences that include activity between two or more partners of the same sex, for example s 141 of the Crimes Act 1961 (indecency between males), and ss 153 and 154 of the Crimes Act 1908 (unnatural offence and attempt to commit unnatural offence), as the test for expungement requires assessment based on the facts of the case.

[36] In the First reading, Hon Amy Adams stated that the application will not be made public, to protect the privacy of those involved.[13] However, in s 20 of the Bill, evidence may be received which would help the Secretary to make a decision.[14] Whether this would infringe on a party's privacy would depend on the manner in which the evidence is submitted.

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[12] Rachel Dioso-Villa "Without legal obligation: compensating the wrongfully convicted in Australia" (2012) 75(3) Albany Law Review.

[13] (6 July 2017) 723 NZPD.

[14] Above n 6, cl 20.

[37] The statement goes on to say "there will be real limitations on the ability to investigate a case without the cooperation of the affected person, as they will often be the primary source of information for the decision maker."[15]

[38] Issues identified would therefore include:

a. Whether the party requesting for expungement would have to receive consent of the other party to do so, unless the other party is able to submit evidence anonymously, and;
b. Once the expungement is established, is the other party who was convicted for the crime also automatically expunged?

[39] It would be beneficial to consider the potential harm and flow-on consequences the Bill could cause to those who wish to keep their sexuality private, due to the years of discrimination the LGBTQA community has consistently faced.

[40] The WCJP proposes a process for submitting evidence that ensures the anonymity of participating parties, as well as the automatic expungement of the other party if the evidence submitted clearly shows both parties having consented to and abided to all other requirements of the expungement procedure.

VII Tikanga Māori

[41] Takatāpui, or takataapui, meaning intimate partner of the same sex, is the contemporary term used by Māori who self-identify as LGBTQA. It has long been acknowledged that missionaries and European colonisers enforced their own moral standards over Māori. Circumstantial evidence exists to show that takatāpui lived without attracting discrimination pre-colonisation – Ngahuia Te Awekotuku, an academic at Waikato University, references historic artwork and literature as examples.[16] This stands in opposition to the misunderstanding that Pakeha bought same-sex relations to New Zealand.

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[15] Above n 10.

[16] Alex Ashton "Tough time still for some takatāpui" *Radio NZ* (New Zealand, 18 November 2014).

[42] Homophobia directed at those who identify as LGBTQA in the Māori community, both institutionally and from within whānau and iwi could therefore be seen as one of the many damaging consequences of colonisation. Ms Kerekere, chair of the Tiwhanawhana Trust, which works with takatāpui, has stated that this rejection from iwi has thus led to some Māori disengaging from tikanga entirely – an incredibly harmful result for which the government is directly responsible, and one which injures not only takatāpui, but their communities overall.[17] The rally led by Destiny Church in protest against the proposed Civil Union Legislation in 2004 is a clear example of this: Paul Diamond stated that this was the first time he could remember Maori tikanga being used to "deny a group that includes Maori."[18] Takatāpui are also particularly at risk of suicidal behavior, due to their position as minorities in both race and sexuality.[19]

[43] As part of the principles of the Treaty of Waitangi, the Crown must in good faith uphold partnership, protection and participation. This involves working together to develop strategies for Maori, the incorporation of Maori at all levels of development, and the safeguarding of cultural concepts, values and practices.

[44] Damage has undoubtedly been done to Maori iwi and whānau. As InsideOut states, we live in Aotearoa, where Maori are tangata whenua, therefore there exists the need to implement systems that account for tikanga Maori when looking at forms of redress– yet this Bill fails to address tikanga Maori.[20] The Bill appears instead to attempt to apply a singular method, test and expungement procedure to all cases, despite the fact that the Bill requires case-by-case analysis, meaning the expungement process in fact has the ability to incorporate more individual elements to each redress.

[45] In the first reading, Marama Davidson talks about acknowledging "the people in Te Ao Māori who have continued to fight to return to our pre-colonised notions of what sexuality,

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[17] Above n 17.

[18] Elizabeth Kerekere "Part of the Whānau: The Emergence of Takatāpui Identity *He Whāriki Takatāpui"* (Philosophy PhD Thesis, Victoria University of Wellington, 2017).

[19] "'Ground-breaking' resource to offer support to Takatāpui" *Maori Television* (New Zealand, 14 December 2015).

[20] InsideOut "Rainbow Youth: Our Vision, Our Mission, Our Values" (2015) <www.insideout.org.nz>.

homosexuality, and whānau actually are. If we had all, as a world, held on to the more inclusive notions that define you, starting from your whakapapa, we would all be better off today. If we had all welcomed the less narrow and restricting definitions of who stands with mana, we would all be better off today—people like Dr Leonie Pīhama, Dr Mera Penehira, and Ngāhuia Te Awekōtuku, alongside so many others who are working so hard to restore those true meanings of whānau, of whakapapa, of sexuality, of gender, and of what the definition of "family" is."[21]

[46] WCJP therefore proposes that the Bill should aim to be more inclusive of Maori concepts. In conjunction with WCJP's other submission ideas, there should be consideration of appropriate compensation, particularly for those who have been estranged from their Whānau and Iwi as a result, as this would have in some cases led to the lack of a support system, including financial help, within young takatāpui lives.

[47] In addition to this, with the proposal of creating a committee to oversee the applications, it would be in line with Treaty principles to ensure the consultation of takatāpui during the process, perhaps as a sitting member of the committee itself in order to avoid a Pakeha dominant viewpoint of compensation and redress.

[48] The Ministry of Justice believes there are around 1000 applicable cases in New Zealand. This means that it would not be difficult to administer each case with the respect to privacy each individual deserves, as well as the addressing of Tikanga Māori in the cases which require such attention, in the manner described above.[22]

VIII Automatic Expungement vs Case-by-Case

[49] The WCJP supports a case-by-case determination of expungement. This is because some of these repealed acts may still be deemed offences now, but they are in different parts of the Crimes Act, for example indecently assaulting any other male (s 141(a) of the Crimes Act 1961), or having intercourse with another male that was not consensual (s 142 of Crimes Act 1961).

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[21] Above n 10.

[22] Henry Cooke "Parliament to formally apologise for homosexual convictions" *Stuff* (New Zealand, 5 July 2017).

[50] In the past, these acts were considered to be abnormal and inappropriate. Judges would not necessarily have determined whether they were consensual or not, because that was no defence to the act. This means that some people who have this on their criminal records could have committed a non-consensual sexual act, which is still illegal and should remain on one's criminal record. Due to this difficulty, a blanket expungement of the repealed sections relating to homosexual behaviour is not appropriate. We support the expungement being determined on a case by case basis.

IX Hierarchy of Applications

[51] Finally, the WCJP would like to propose creating a hierarchy of where applications are considered first based on whether the applicant is alive or deceased. We see some benefit in this as it will allow those who are currently living with the burden of a criminal conviction to enjoy the remainder of their life as they should have been expected to. This reflects a slight utilitarian approach to the matter that could attract criticism. However, in regard to which applications from alive persons are considered first, we believe that should be defaulted to a first come first serve basis. Therefore, we do not propose a complete utilitarian approach but a somewhat balanced one that still reflects fairness in the system.

[52] This proposal does not have the aim of prioritising certain applications over others as more important because we recognise the importance to relatives of having their loved ones being conviction free. The primary purpose of this proposal is instead to promote the policy objective of removing the stigma of homosexual activity by allowing those who are still living and experiencing this stigma first hand to be free, and furthermore to endorse this initiative practically. We do not put this notion forward without acknowledging the potential difficulties with it.

X Conclusion

[53] The WCJP supports the idea and meaning of the proposed Bill and believe it has significant potential. We have thoroughly examined the Bill and put forward our

suggestions on the ways that the policy objective can be achieved better and how the Bill can be clarified for the benefit of the applicants, lawyers and people considering the applications or reviews. Thank you for considering our submission.

[54] A summary of our recommendations is available on the next page.

XI Summary of Recommendations

[55] We recommend a consideration of using a committee or panel to ensure diversity in the decision making process and a more transparent one. In addition to this, we recommend that the review and appeal power for applications be expanded and clarified.

[56] The current sentences applicable to the expungement scheme are very rigid and it is unclear if they can be expanded upon. We recommend that a different expungement test is applied, one that will widen the criteria and amount of people who would qualify for expungement and would conform the aims of the Bill significantly better.

[57] Compensation is a key element we feel has been omitted. There will be people who have experienced pecuniary loss because of their conviction and it not being expunged when the offences were repealed initially. Therefore, where loss can be proven we strongly suggest compensation be given, similar to the German system.

[58] A case-by-case assessment allows for a thorough and individually tailored response to each application and we support this approach. The WCJP thus recommends a procedure that ensures the privacy of each participant, be it an applicant or a submitter of evidence, as well as an automatic expungement where the circumstances make clear the other party also falls within the ambit of the test.

[59] A Tikanga Māori based approach, which would include consultation of takatāpui and compensation that takes into account the damage done to the whānau and iwi overall should be followed for takatāpui applicants. This is in line with our Treaty Principles.

[60] Implementing a hierarchy for which applications are addressed first based on whether the applicant is alive or deceased will not only add to the achievement of the policy

objectives, but will allow for those who have had their convictions expunged to be active ambassadors of the scheme.