



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Mr Bruce Notley-Smith, MP  
Member for Coogee  
80 Bronte Road  
BONDI JUNCTION NSW 2022

By email: [coogee@parliament.nsw.gov.au](mailto:coogee@parliament.nsw.gov.au)

Dear Mr Notley-Smith MP,

### **Criminal Records Amendment (Historical Homosexual Offences) Bill 2014**

I am writing on behalf of the Human Rights Committee of the Law Society of NSW ("Committee") which is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

The Committee has an interest in legislation affecting equality and justice and the associated right to freedom from discrimination. In pursuit of this interest the Committee has examined the private member's Criminal Records Amendment (Historical Homosexual Offences) Bill 2014 ("Bill") introduced to the NSW Parliament to allow for the extinguishment of historical homosexual offences between consenting adult men, women and transgender persons.<sup>1</sup>

The Committee commends the Member for his introduction of the Bill to the House, which seeks to amend the *Criminal Records Act 1991* (NSW) to enable certain convictions for a number of decriminalised homosexual conduct offences to be extinguished, upon application by an affected person.

The United Kingdom<sup>2</sup> and South Australia<sup>3</sup> have all enacted legislation which permits the removal of convictions from a criminal record, for offences involving consensual homosexual conduct between persons aged 16 years or older. Those amendments reflected the expectations of the community that consensual homosexual conduct should no longer be regarded as 'indecent'. It is noted that in early September 2014 the Victorian Parliament introduced legislation analogous to the Private Members Bill, with an expungement scheme due to commence in early 2015<sup>4</sup>.

<sup>1</sup> While the Bill extends to permit an application by women and transgender persons, the majority of those afflicted with such historical convictions were homosexual men.

<sup>2</sup> Chapter 4 of the *Protection of Freedoms Act 2012* (2012 c. 9).

<sup>3</sup> Section 8A of the *Spent Convictions (Decriminalised Offences) Act 2013*.

<sup>4</sup> *Sentencing Amendment (Historical Homosexual Convictions Expungement) Bill 2014* (Vic)

In the Committee's view, this approach upholds the fundamental human rights of equal protection before the law and freedom from discrimination as set out in Article 26 of the *International Covenant on Civil and Political Rights* ("ICCPR") to which Australia is a signatory. It also promotes the protections afforded under the 2013 amendments to the *Sex Discrimination Act 1984* (Cth), such that in Australia no person is treated less favourably, before the law or otherwise, because of that person's sexual orientation towards persons of the same sex<sup>5</sup>.

As you are aware, in 1984 the then Labor Premier Neville Wran introduced a private member's bill, the *Crimes (Amendment) Bill 1984*, removing the criminalisation of homosexual activity from NSW law. However this bill passed with an unequal age of consent of 18 (where it was 16 for heterosexual and lesbian couples). In 2003, the age of consent between consenting adults was later equalised to 16 years under the *Crimes Act 1900* (NSW). NSW was the last State to reform its unequal age of consent law.

By comparison South Australia became the first State to decriminalise consensual sex between men in 1975, with Tasmania the last state to do so in 1997<sup>6</sup>.

In NSW, discrimination against a person based on their sexual orientation<sup>7</sup> is now prohibited.

The Committee notes that in NSW there exists legislation which permits the non-disclosure or annulment of old convictions (spent convictions) if that person has not reoffended for a period of 10 years<sup>8</sup>. However such annulment does not extend to incorporate convictions for sexual offences<sup>9</sup>.

Despite the significant legislative advances in NSW and elsewhere regarding the decriminalisation and advancement of equality before the law for homosexuals, many homosexual men feel discriminated against on the basis of their sexual orientation, as a result of the continued penalisation for conduct that has since been legalised in NSW. Many of those are afflicted by criminal convictions for offences such as indecent assault, sodomy, gross indecency and buggery, which remain largely stigmatised within the community.

The Committee notes that an individual with a record of convictions of this nature is adversely affected in his or her ability to undertake certain types of work, including volunteer work, where it is a requirement that the person not have any recorded criminal convictions, or any convictions of a prescribed nature. A conviction for a sexual offence is a prohibiting factor for any person seeking employment as a police officer, child-care provider, teacher or prison officer<sup>10</sup>. Such convictions would also prohibit any such person from working with children pursuant to the NSW 'working with children' scheme<sup>11</sup> and restricts certain international travel.

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<sup>5</sup> Section 5A of the *Sex Discrimination Act 1984* (Cth).

<sup>6</sup> Paula Gerber and Katie O'Byrne, "Should Gay Men Still Be Labelled Criminals?" *Alternative Law Journal* 38:2 2013 at p 82

<sup>7</sup> Part 4C of the *Anti-Discrimination Act 1977*(NSW).

<sup>8</sup> Section 9 of the *Criminal Records Act 1991* (NSW).

<sup>9</sup> *Ibid.* s 7(1)(b).

<sup>10</sup> Note 6

<sup>11</sup> See *Child Protection (Working with Children) Act 2012* (NSW).

The Committee notes that issues surrounding historical convictions are further aggravated by the expanding use of technology and information sharing between State and overseas police agencies (through information sharing mechanisms such as CrimTrac, the national scheme for provision of Australia wide criminal record checks<sup>12</sup>). As such it is now possible for historical convictions to be detected during a criminal background search conducted in a State or Territory other than where the offence took place.

The Committee also supports the introduction of criminal sanction provisions in proposed s 19G of the *Criminal Records Act 1991* (NSW), making it an offence for a person who has access to records of convictions kept by, or on behalf of, a public authority (without lawful authority) to disclose to any person any information concerning an extinguished conviction. That sanction provides further certainty for the freedom from discrimination that the Bill seeks to promote.

The stigma of convictions for sexual offence related crimes, and the possible public repercussions, has prevented many men charged under those historical criminal provisions from campaigning for reform in this area. The introduction of the Bill is a significant step towards correcting the longstanding historical injustice and discrimination towards the gay community, arising from the criminalisation of sexual conduct between consenting male adults, and promotes the protection of human rights and the right to live free from discrimination.

The Committee consents to the publication of this submission. If your office has any questions, please contact Vicky Kuek, policy lawyer for the Committee, at [victoria.kuek@lawsociety.com.au](mailto:victoria.kuek@lawsociety.com.au) or 9926 0354.

Yours sincerely,



Michael Tidball  
**Chief Executive Officer**

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<sup>12</sup> Note 6 at p 84.