

9 February 2021

Hon Vickie Chapman
Deputy Premier and Attorney General
GPO Exchange 10 Franklin Street
Adelaide SA 5000

Dear Attorney-General

Thank you for your letter to Jackie Wurm, COTA SA Rainbow Hub Project Officer, dated 12 January 2021 advising that the *Spent Convictions (Decriminalised Offences) Amendment Act 2020* (“the Amendment Act”) passed the Parliament on 1 December 2020 and received the Royal Assent on 10 December 2020. We congratulate you for your leadership of this important reform.

Thank you too for the opportunity to comment on the *Spent Convictions (Decriminalised Offences) Variation Regulations 2021* (“the Draft Regulations”).

COTA SA’s Rainbow Hub consults regularly with LGBTI elders. We provide the following feedback based on diverse personal and lived experience and community consultation. We do not purport to be legal experts and thus, while we have raised issues and questions, this feedback does not focus on the mechanisms to achieve them. We have however referenced work done by the Human Rights Law Centre some time ago in commenting on the draft regulations and acknowledge advice from Dr Sarah Moulds from the University of SA.

As advised to Hon Michelle Lensink MLC Minister for Human Services in feedback on the draft *Spent Convictions Act 2009 - Amendment Bill* in June 2020, we are not in favour of requiring individuals to engage proactively with the legal system to argue their individual case in this context. The onus should be on the Justice system, not the individuals unfairly convicted, to identify the cases to whom this proposed intervention applies.

We continue not to favour the onus resting with individuals. It is both appropriate and practical that the onus is on the Justice system. Given the time frame of the convictions for homosexuality and their expungement it is important to recognise that all within this cohort of LGBTI people will be aged over 60 and many are much older.

Before providing specific comment there are 3 foundation principles that the success of this legislative reform will rely upon –

1. That the opportunity to make application is promoted widely among the older LGBTI community of SA along with clear information about how to initiate the application.
2. That the application process is as simple as possible, respecting the very real possibility that it will re-open the trauma that may have been attached to the original conviction. Therefore, the onus should be on the Justice system to provide relevant records once the first step of an application is made.
3. That there is funded, skilled and accessible support for people to undertake an application.

The following is our more detailed feedback -

- The effect of the Legislation and Regulations must be to ensure explicitly that in addition to removal from criminal history checks, expunged convictions are not considered 'relevant' for the purpose of working with children checks and other administrative decisions. Do the prescribed exclusions (Reg 5B) in Schedule 1 clause 9A mean that expunged convictions would continue to be relevant offences for the purposes of working with children checks?
- The expungement process must be as simple and easy for affected people as possible and provide ample support to people to apply to have a conviction expunged. The approach provided for in the legislation seems overly burdensome, relying in all instances on a court application process with a large number of documents required to be collected by the applicant and/or representatives. This will create access barriers for many people and we urge that the Regulations do not create further complications. As already stated, the operation of the Regulations must include adequate resourcing for support, this includes for counselling to be available to prevent a person becoming traumatised from reliving the conviction experience.
- More detail is needed to know how the process would work in practice, but a very formal application process seems to be required including substantial documentary evidence (eg transcripts of proceedings) which can be expensive and difficult to obtain. It is likely that individuals and/or representatives have not kept all the relevant records. Given that the Justice system already has the relevant records, couldn't the applicant be provided with them to confirm they do not contain errors once the first step of an application is made? Will assistance be available to applicants to find any records and avoid costs for this?
- Will the application process be completely free of all costs to the applicant?
- It is important that the Regulations provide for feedback to an applicant about the grounds for any refused application.
- Is there a process for review by the South Australian Administrative Appeals Tribunal legislation? There does not appear to be a process for judicial review of an administrative decision under the scheme. For people already profoundly affected by the historical discrimination this is trying to repair, this is an important provision to protect rights and engender trust.
- The Regulations must include provisions to protect the privacy of all persons applying for expungement or reviewing a decision.
- The Legislation and Regulations must include adequate provision for the applicant to appoint a representative to act on their behalf and receive correspondence relevant to the application.
- Provision for the estate or next of kin of a person who lived with a conviction for a gay sex offence to be permitted to apply for expungement posthumously appears to be covered to some extent by the provisions at Reg 5A(2a) (b). This is very important and again should be as simple as possible.

- It is very important that the information necessary for a guardian, partner, sibling or executor to make application is free and available given they are unlikely to know all the details of the conviction.
- We support the prescribing of the remainder of interstate expungement schemes as “corresponding laws” for the purposes of the *Spent Convictions Act 2009*.
- We urge that the Regulations and operation of the legislation include a review of all possible sources and locations for records to determine which agencies should be requested to provide records to assist the decision-making process. Given the need for timely information to expedite the expungement process, should there be prescribed penalties where information is not provided in a timely manner to an applicant?
- The following steps should be taken to publicise the scheme –
 - develop a community education campaign and communication strategy in partnership with the LGBTI community, aged care providers, volunteer, employer and employee associations and unions and Police (who administer criminal record checks) with information being readily available both online and in other formats and platforms given that applicants may well not have internet access;
 - include a notice on criminal record check and working with children check forms and relevant websites about the scheme and how to apply for expungement if a person thinks they may be eligible; and
 - ensure that where a person’s criminal record check or working with children check discloses a conviction listed in the scheme from the relevant period, South Australia Police should provide information about the scheme to that person with the results.

We congratulate you for championing this legislative reform. We look forward now to working with the State Government to ensure that all of the people who want to make application can do so.

The COTA SA Rainbow Hub, which was established to support and advocate for, by and with LGBTI elders, is willing to assist with both publicity and a support process for applicants notwithstanding a need for some additional resourcing to enable it.

We welcome an opportunity to discuss our feedback further. This can be arranged through Jackie Wurm, Rainbow Hub Project Officer at jwurm@cotasa.org.au or Executive Assistant Ross Atkinson at ratkinson@cotasa.org.au .

Yours sincerely



Dr Christine Davis
Chair, Rainbow Hub Advisory Group



Jane Mussared
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