



Therapeutic Jurisprudence and Homosexual Expungement Law: Lessons from Australia and New Zealand/Aotearoa

Allen George

University of Sydney, Australia

Abstract

Until recently, a historical conviction for a homosexual offence remained on an individual's criminal record until expungement legislation was enacted to facilitate such convictions to be spent. An analysis of parliamentary debates in New Zealand/Aotearoa and across Australia highlights the aim and opinions of lawmakers in their desire to bring about a therapeutic remedy to address the 'criminal stain' of a conviction for a historical homosexual offence. Along with the aim to remedy the effect of a conviction, parliaments used the law reform debate as a broader therapeutic project of inclusiveness for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) communities. The success of expungement is evidenced by the passing of legislation, with most applications to expunge granted. These positive outcomes are countered by a low number of applications to expunge, a refusal by all governments to provide reparations and the use of expungement legislation to garner favour with all members of LGBTIQ communities—a move open to an accusation of government virtue signalling.

Keywords: Historical homosexual offences; expungement legislation; therapeutic jurisprudence; LGBTIQ communities.

Introduction

Equality in the law for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) individuals has advanced markedly in Australia, New Zealand and other common law countries over the past few decades. Beginning with decriminalising sexual activity between males, there is now a broad range of legal protections for LGBTIQ community members that includes anti-discrimination legislation, recognition of de facto relationships (common law marriage) and the recognition of such relationships within family law, to name but a few. A recent marker of inclusion of lesbian and gay couples within the liberal state is the legal recognition of homosexual relationships, which in Australia and New Zealand extends beyond same-sex marriage to recognise marriage between 'two people' regardless of their sex or gender. New Zealand scored this goal well before Australia (Brickell and Bennett 2021). Globally, inclusion of LGBTIQ people in law, particularly lesbian and gay couples and their families, is evidenced by the growing recognition of same-sex marriage, which by early 2023 was formalised in 34 countries.¹ These developments in law, cast in a positive light by supporters of LGBTIQ legal inclusions but questioned critically by others (e.g., Brady and Seymour 2019; Puar 2007; Raj and Dunne 2021; Smith 2019), are a striking departure from the treatment of gay and bisexual men, homosexually active males and transgender people who experienced criminal sanctions for engaging in 'unnatural' sexual activity in private and in public.

Decriminalisation of homosexual sexual activity and the broader legal acceptance of members of LGBTIQ communities is an ongoing project. Advances are made and only later are their limitations—the outcome of political compromises that fell short



of producing legal equality and social justice—realised. Correspondingly, a therapeutic deficit was displayed in the actions of legislators when decriminalising homosexual offences, as legal change did not remove the stigma of homosexuality or the consequences of the life-limiting effects of a permanent criminal record. This paper examines this failure of liberal democracies to utilise therapeutic jurisprudence and counter anti-discriminatory practices to meet social justice goals. Parliamentary debates on homosexual expungement legislation in Australia and New Zealand are analysed and set against a background of trends in other countries where similar law has developed. This paper questions whether the implementation of expungement legislation has met the goals that parliaments expressed and intended. It examines the debates on spent conviction legislation in both countries' parliaments, which display many similarities. While New Zealand looked to Australian jurisdictions in framing its legislation, notable differences are also evident, as New Zealand considered paying financial compensation to those people with criminal records and paired a national apology to LGBTIQ communities with the passing of extinguishment legislation. The discussion of the aims and goals of expungement legislation has resonance with similar debates across Britain and Europe, where similar legislation has been adopted, and in countries where the debate is being conducted, such as Ireland.²

The use of classificatory and identity terms that indicate sex and gender are significant, and rather tricky, in this paper. The historic laws that are the focus of this paper, at face value, were not interested in the self-perceived identity of a person, but rather the activity and/or conduct (illegal or legal) they are accused of committing (Lacey 2007; Moran 1995). In this sense, the law is not interested in whether a man who has sex with a man is gay, bisexual, heterosexual identified or queer; its only interest is whether an offence can be proved. Similar consideration applies to people who were arrested for 'transvestite prostitution' or 'cross dressing', both of which were considered a homosexual offence, or forms of conduct that were seen by the law as 'homosexual', such as actions or deportment by men perceived on a discretionary basis by police as 'effeminate'.³ Relatedly, police officers would target people they considered 'homosexual', 'poofers', 'gay' or 'queer' along with other people who today society may more readily recognise as self-identifying, or being considered, as transgender, genderqueer or gender non-conforming. Police officers could perceive or concoct their identity as a pretext for regulation in public and private spaces (Dwyer 2014). Further, for many people who engaged in same-sex sexual activity, or whose gender did not conform to the gender they were assigned at birth, these 'differences' became a basis of self-identification that, in turn, underpins the development of the group identity, or identities, of the LGBTIQ community. Considering these points, when referring to people who were arrested for historical homosexual offences, for ease of reference the acronym GBTQ will be used to represent gay men, bisexual men, transgender persons and people who identify as queer. It is noted that men who have sex with men might include a range of individuals who do not self-identify as gay or bisexual. However, for simplicity, this paper will include these individuals when referring to GBTQ people.

This paper begins by providing the history to the decriminalisation of homosexual offences and discussing why expungement legislation is required to allow such convictions to be spent. Therapeutic jurisprudence, as a concept through which to analyse the therapeutic and anti-therapeutic actions of legal personnel (in this instance lawmakers), is discussed. An analysis of parliamentary debates highlights the aims of politicians to provide legal relief for people with a criminal record for homosexual offences. It also examines critically a broader political project of using expungement legislation and associated political apologies to further integrate all members of the LGBTIQ communities into the state as citizens with full legal rights. Critics of therapeutic jurisprudence note that reform does not address the structural elements that criminalised particular populations in the first place, and that bias and discrimination can remain (Steele 2020; Stefan and Winick 2005). Alternative approaches to extinguishment schemes are examined along with financial compensation, as has been adopted in England, Canada and Germany. Analysis of this political project, while admirable for attempting to address the hardship experienced by GBTQ people, highlights the shortcoming of relying on law to address wrongs of the past. It also demonstrates the limits of therapeutic jurisprudence in addressing the harms of law and criminalisation. This is particularly the case when using historical homosexual offences as a proxy to counter current homophobic and repressive treatment experienced by all sections of LGBTIQ communities in numerous liberal democracies, in law and socially.

The Recent Past: Decriminalisation to Expungement

Liberal democratic states are characterised, in part, by a move to decriminalise homosexual acts over the past half century. Parliaments across Australia began to decriminalise homosexual offences in 1972, following the lead of England in 1967 and Canada in 1969. This was spearheaded by South Australia, but the project was not concluded until Tasmania was shamed into reforming its law some 25 years later in 1997 (Carbery 2014; Johnson, Maddison and Partridge 2011; Willett 2000, 2013). New Zealand's parliament passed similar law in 1986 following bitter debate (Atmore 1995; McCreanor 1996; Rishworth 2007). While decriminalisation was initiated with the repeal of 'homosexual offences', the move to decriminalise was limited to decriminalisation of homosexual acts between consenting adult males in private. Even though the private space of the bedroom was now relatively free of legal repression, sexual freedom was nonetheless curtailed by an intensification of policing of GBTQ people in public on the pretext of possible or actual sexual behaviour or acts in public spaces (Dalton 2007; Johnson 2008;

Jowett 2017; Weeks 2017) and in quasi-private spaces such as male-only saunas (Hooper 2019). While this beginning marked the end of illegality per se, LGBTQ persons were still not equal to their heterosexual counterparts in matters of sexual activity.

Age of consent law is an example of legal reform that resulted in discriminatory and repressive law that caused consternation across Australia. Unequal age of consent was in place in Victoria until the passing of the *Crimes (Sexual Offences) Act 1991* that equalised the age to 16 years. Similarly, in New South Wales (NSW), the proclamation of the *Crimes Amendment (Sexual Offences) Act* in 2003 was passed almost 20 years after decriminalisation in that state (Willett 2013). New Zealand avoided such delay, as equal age of consent was recognised with the passing of the *Homosexual Law Reform Act 1986* (McKnight 1991). These delays reflect political reticence to provide full equality between heterosexual and homosexual sex. They emerge from the liberal focus on ‘respectable’ consenting adults (NSW age of consent for males in private was 18 years of age) and disapproval of public cruising and casual sex (Bull, Pinto and Wilson 1991; Joseph 1994).

‘Homosexual offences’ is a term applied to a range of laws used to regulate sexual activity between men in numerous Commonwealth countries. It is neither a procedural legal term, nor is it one that standardises sexual offences between males across jurisdictions in Australia, New Zealand or other common law countries, although there are certainly similarities between jurisdictions across the Commonwealth. Further, the range of violations within the homosexual offence category can extend beyond sexual acts to include public order offences. These include behaviour deemed offensive to ordinary members of the public that is not necessarily homosexual by definition. Therefore, it is not surprising that the term ‘homosexual offence’ is described as ‘a phrase that had many different and problematic meanings’ (Moran 1995: 5).

New Zealand and the colonies of Australia prior to federation adopted British laws that proscribed homosexual acts between men. The crime of buggery was imported with the coloniser, carrying with it the penalty of death in England until 1861, in New Zealand until 1866⁴ and in NSW until 1882 when it was reduced to life imprisonment (Carbery 2014: 2). Even though penalties for felony offences were being reduced across common law countries, an expansion of law proscribing all male-to-male consensual sexual activity came into force in the 1880s with the introduction of the *Criminal Law Amendment Act 1883* in NSW; this predated the English *Criminal Law Amendment Act 1885*, also known as the Labouchère Amendments. New Zealand promulgated these activities later in 1893. These new male homosexual offences included lower-order violations such as ‘indecent assault’ and acts to solicit or incite, which often outraged moral sensibilities.

A second range of laws, public offence Acts, allowed police to arrest those who ‘would be likely to cause reasonable persons justifiably in all the circumstances to be seriously alarmed or seriously affronted’ (*Offence in Public Places Act 1979* [NSW] s 5). With the federation of the Australian colonies, these laws were incorporated into new state-based Acts such as the *Crimes Act 1900* (NSW), and in New Zealand homosexual offences were merged into the *Crimes Act 1908* (NZ) and later in the *Crimes Act 1961* (NZ). Convictions for these offences are now mostly available for removal via expungement legislation in all Australian jurisdictions⁵ and New Zealand.⁶

Decriminalisation of homosexual offences removed the fear of arrest and conviction for homosexual activity conducted in private, but it did not remove the ‘criminal stain’ of a conviction. As is the case in common law countries, extinguishment legislation is especially required for a homosexual offence criminal conviction to ‘be spent’, as homosexual offences are deemed to be sexual offences—a category of offence usually unable to be expunged. The usual method for a conviction to be deemed spent requires a specified period to pass (e.g., 10 years for adults and three years for children in NSW, with no new convictions recorded). There are exceptions to gaining a spent conviction: a prison sentence with a duration of more than six months and a conviction for a sexual offence in NSW (Mullany and Lambert 2012), or for a ‘specified offence’ in New Zealand, which includes anal intercourse and unnatural offences (*Criminal Records [Clean Slate] Act 2004*). As such, expungement legislation is required to facilitate removal of a homosexual offence conviction.

This paper builds on the scant research focused on attempts by politicians and members of LGBTIQ communities to address the effects of a conviction for a historical homosexual offence. Initial analysis of the issue conducted in Australia has questioned why such convictions remained, particularly given the negative effect on individuals, and looked at processes underway elsewhere, such as in England and Wales, where reforms to ‘disregard’ such convictions were under consideration (Gerber and O’Byrne 2013). Expungement legislation that was promulgated in parts of Australia was noted to provide some relief via associated administrative schemes, but the aim of the restorative effect was misdirected. The focus was on repairing the reputation of parliaments as institutions that are no longer homophobic while simultaneously refusing to provide reparations to the people argued to have been wronged by homosexual offence laws (George 2019). In New Zealand, legal analysis of the aims, development and effects of such laws was outlined in a legal note (Gledhill 2021). The passing of expungement legislation in relation to human rights provisions was noted to be an ‘easy win’ where ‘us too’ support from all politicians in all of the political parties was easily demonstrated in New Zealand’s parliament (McGregor and Wilson 2019). Several authors have highlighted the negative effect of removing criminal records from the historical documents as forms of erasure and exclusion

of individual and group behaviour and experience (Albion and Russell 2022; Bengry 2016). Extending this line of analysis, Caroli (2018) argues that expungement laws and pardons can be considered instances of ‘memory activism’, a concept that refers to actions that aim to amend the current collective memory as a means to affirm and control current social, political and legal values to both the present and future generations.

Therapeutic Jurisprudence as a Socio-Legal Paradigm

A notable proportion of the parliamentary debate to extinguish past convictions has focused on the psychological and social effects of a criminal record on the lives of those whose behaviour was no longer criminal. A focus on psychological wellbeing affords a suitable ‘field of enquiry’ for the lens of therapeutic jurisprudence (Wexler 2011). The concept of therapeutic jurisprudence has developed from an understanding that ‘mental health law would better serve society if major efforts were undertaken to study, and improve, the role of the law as a therapeutic agent’ (Wexler 1990: vii). Therapeutic has been argued to mean ‘beneficial’ while anti-therapeutic is ‘harmful’ (Slobogin 1995). Roderick and Krumholz (2006) suggest that it should be considered a philosophy rather than a theory, while Wexler (2011) notes that therapeutic jurisprudence was never intended to be a ‘theory’, but a research agenda focusing on an overlooked problem. To this end, therapeutic jurisprudence recognises that ‘legal rules, procedures, and actors are *social forces* that intentionally or unintentionally often produce therapeutic or anti-therapeutic consequences’ (Daicoff and Wexler 2003: 561, emphasis added). This understanding grounds therapeutic jurisprudence in a socio-legal paradigm of analysis.

While the original focus of therapeutic jurisprudence was on mental health law and particularly the role of judges and magistrates in making decisions involving those with mental health claims (Wexler and Winick 1991), the concept now has broader and interdisciplinary applicability. This is reflected in the expansion of therapeutic jurisprudence principles to include the following: specialist problem-solving courts designed to focus on crimes related to drug addiction (e.g., Jeffries 2005); crimes carried out by people with mental health issues (Freiberg 2003; Weller 2018b); magistrates courts (Spencer 2014); neighbourhood justice centres (Chan 2012); Indigenous-focused programs such as Indigenous circle sentencing courts in Australia (e.g., Marchetti and Daly 2007); and reintroducing sex offenders to the community (Birgden 2004). Further, the concept has been adapted to and used within ‘mainstream’ courts (Weller 2018a).

Therapeutic jurisprudence has demonstrably yielded positive outcomes; however, it is also recognised that the law can have an anti-therapeutic effect (Spencer 2014). A therapeutic jurisprudence analysis of mental health law in the United Kingdom has shown that an attempt by a government to ‘fix’ a problem had the opposite effect by producing clinically unworkable and medico-legally flawed legislation (Eastman 1995). Courts with a focus on therapeutic jurisprudence have an array of shortcomings, including a difficulty in calibrating the specialisation of the court, court staff burnout, a lack of career advancement for judges and overlooking the more general benefits of therapeutic jurisprudence (Casey and Rottman 2000). Therapeutic jurisprudence has also been criticised for overlooking structural elements of the law and the criminal justice system (Steele 2020; Stefan and Winick 2005).

To examine the development of expungement legislation and to assess the goals for which it was created, a content analysis of parliamentary speeches and public submissions was conducted through the conceptual lens of therapeutic jurisprudence. All parliaments have debated expungement, providing a detailed set of documents as a sample for qualitative content analysis (Drisko and Maschi 2015; Krippendorff 2013). The data was drawn from debate in 15 parliamentary houses across all eight state and territory parliaments of Australia and in New Zealand, along with a selection of documents submitted to various parliamentary inquiries by community organisations and groups and individuals. The parliamentary transcripts and documents were reviewed by this author and coded into thematic categories (Squires 2023) in a deductive and inductive manner (Creswell and Creswell 2018), as the legislation (the product of debate) pre-existed the commencement of this study. Expanding the data sample to include New Zealand proved useful, as New Zealand has only one parliament with one house (House of Representatives), and a group of New Zealand parliamentarians travelled to Australia on a study tour in 2017 to research spent conviction legislation. In creating the New Zealand legislation, therefore, comparable law from the Australian Capital Territory, NSW, South Australia, Tasmania and Victoria along with the United Kingdom was consulted.⁷ There are similarities in the themes raised in the debates for reasons already noted, but there are also notable differences: these include discussion of providing financial or other forms of compensation to those who have a criminal conviction and to provide a national apology to the men and transgender persons who were arrested for sexual activity with another man, which occurred on 6 July 2017 in the national parliament (Adams [National]: New Zealand House of Representatives 2017: 19394).

A Therapeutic Jurisprudence Analysis of Expungement Legislation

Extinguishment allows for the negative effects of a criminal conviction for a homosexual offence (a sexual offence) to be addressed, albeit belatedly. All parliaments across Australia and the parliament of New Zealand recognised this element of the legal problem and saw their role as righting a historical wrong. In general, there was no opposition to the broad aim of allowing such convictions to be spent. Parliaments and parliamentary committees did discuss vigorously, and with some contention, the range and types of historical offences that should be included in the schemes, along with how to adjudicate arrests for sexual acts that would technically be illegal today, particularly sex in public places such as toilets and beats. The focus of a therapeutic jurisprudence analysis of these debates is conveniently bracketed by both the purpose of the legislation and by parliamentary debate. Sections of new legislation can include direct reference to the stated purpose and intention of lawmakers in their drafting of new law, and this is the case with most expungement law across Australia and in New Zealand. It is also apparent in outlining a legislative purpose whether a particular parliament is attempting to act in a therapeutic manner or if it was focused solely on providing a legal remedy for the problem at hand. The purpose of the New Zealand Act is stated ‘to reduce prejudice, stigma, and all other negative effects, arising from a conviction for a historical homosexual offence’ (*Criminal Records [Expungement of Convictions for Historical Homosexual Offences] Act 2018* [NZ] s 3). This clear therapeutic intention is not matched in many of the Australian parliaments. For example, in Western Australia the perfunctory purpose of the legislation is included in the long title section of the Act: ‘provide for a scheme to enable certain convictions for historical homosexual offences to be expunged’ (*Historical Homosexual Convictions Act 2018* [WA]). The Northern Territory legislation has a similar aim in its ‘Object of Act’ section, though it is expanded to include, ‘treats, as far as practicable in law, a person whose charge and conviction is expunged as if it has not occurred’ (*Expungement of Historical Homosexual Offence Records Act 2018* [NT] s 3[b]). Victoria’s legislation takes a different tact. After noting the legal purpose of creating a scheme to allow expungement, an additional phrase indicates a rejection of past behaviour and attitude: ‘on the basis that it is generally accepted that consensual sex of a homosexual nature between adults should never have been a crime’ (*Sentencing Amendment [Historical Homosexual Convictions Expungement] Act 2014* [VIC] s 1).

These purposes, as well as other desired outcomes, were voiced during parliamentary debates on either side of the Tasman Sea. Analysis of the debates and the text of legislation demonstrates a convergence of three main legislative aims neatly summarised by Denis O’Rourke (New Zealand First). These are applicable to the analysis of both Australian and New Zealand debates and include the following: 1) reconfirm freedoms of sexuality and sexual identity free from prejudice within a state or nation; 2) alleviate the disadvantage and suffering from a conviction in relation to employment, volunteering and other such activity; and 3) restore self-esteem and enhance psychological wellbeing and self-worth of those with convictions and their families (New Zealand House of Representatives 2017: 9404). This ordering of aims, with the state or nation placed in primary position, may be interpreted as preferencing the political aspirations of such legislation above aims two and three; however, they also align with the goal to ‘reduce prejudice, stigma, and all other negative effects’ (*Criminal Records [Expungement of Convictions for Historical Homosexual Offences] Act 2018* [NZ] s 3), with a focus on redressing the harms caused primarily to the individual. The first aim extends beyond a direct application of law for the sake of its positive effect on an individual, to incorporate a view of law as a broad social force (Wexler and Winick 1991) with capacity to produce therapeutic effects, though in this instance on a state-wide or national scale. For the purpose of the analysis that follows, the order of the aims is reversed, beginning with a focus on the individual and expanding to a consideration of the state or national level.

To Address the Psychological and Cultural Effects

At the individual level, an ability to remove the stigma of the conviction of an offence is a notable goal within a therapeutic jurisprudence framework. The devastating effect on the lives of LGBTQ persons and their identity and acceptance as members of the community was evidenced in parliamentary debates and in public submissions. Many parliamentarians made general reference to the negative effects, stigma and shame produced by a conviction and how this affected psychological wellbeing. The consequence for one man, whose experience was outlined by a member of the New Zealand parliament (Robertson, Labour), was considerable:

This conviction still leads, after 53 years, to self-hatred, worthlessness, unjustified guilt and shame. To relieve the anguish and pain, chronic drinking and self-destruction took control over the next 10–15 years, until the realization that I wasn’t a two headed monster, and there were many others like me throughout the world. ... I love my country, but live in fear of being ‘found out’, of further humiliation, panic attacks when I see a uniformed police officer, and a general feeling of being unworthy to be myself, something few others would understand. Should this petition be ... approved, it would allow me at this late point in my life to respect myself, and feel some dignity in my final years. (New Zealand House of Representatives 2017: 19396)

Clearly, the failure to address the ability to remove a criminal conviction has had a profoundly negative and anti-therapeutic effect on this man. Further, the anti-therapeutic effect of not introducing expungement legislation was noted by the same parliamentarian in a stark manner:

Let us be clear. The illegality of homosexuality, the arrests and the imprisonments, and the fear of that happening did not just ruin lives and destroy potential; it killed people. Hundreds, or possibly thousands, of lives have been lost because men could not bear the shame, the stigma, and the hurt caused by this Parliament and the way that society viewed them as criminals. (New Zealand House of Representatives 2017: 19396)

It is not possible to quantify the number of people who may have lost their lives in such a manner, though the psychological harm of homophobic and anti-LGBTIQ sentiment has been found to have negative consequences on mental health and suicide risk (Skerrett, Kølves and De Leo 2015).

To Alleviate the Effect on Employment, Volunteering, and such Activity

Many parliamentary speakers noted the effect of a conviction on a person's ability to function in the community or gain and maintain employment, often with testimony from those directly affected. The experience of one man who made a public submission on the New Zealand bill was described to the House by King (National):

He decided to take some time away from his profession [after 30 years of successful employment] and return to it a few years later. On returning, he applied for two different jobs, and he would have been successful but for a refusal due to failing to pass the background checks, based on his prior conviction. This background check, by an anomaly, included references to sections covering sexual offences which are not relevant today, due to the removal of the offence from the statute law. (New Zealand House of Representatives 2018a: 2609)

Another parliamentarian (Foster-Bell, National) noted the embarrassing and upsetting experience for a 60-year-old male teacher who was required to explain to his school's principal why he had a criminal record for a sexual offence every five years as part of renewing his teacher certificate (New Zealand House of Representatives 2017: 19398–19399). Similar experiences for men in Australia were noted by Michael Gunner, Chief Minister of the Northern Territory, recounting the words of an affected constituent:

I know a lot of people who were held back in jobs and careers because of their convictions. There was awful shame because of the convictions. A lot of people were taking on very mundane jobs somewhere—brilliant, gifted people—all because they were caught expressing their love. (Northern Territory Legislative Assembly 2018: 3773)

Restrictions on employment and travel were not always applied externally; they were also self-imposed, as noted by one man: 'Because of the deep embarrassment I have felt about the conviction, I have never travelled to a country which would require a visa. I have never worked overseas, which I would very much like to do' (King [Labour]: New Zealand House of Representatives 2017: 19400). These examples highlight the economic effects of a homosexual offence conviction along with the restriction of life choices and the ability to engage with one's community in a multitude of ways. These include the requirement for a police check for volunteer roles, particularly if the volunteer organisation assists children and youth, where the construction of the 'homosexual' as 'child molester' is still present.

Acceptance and Inclusion of Sexuality and Sexual Identity within the State or Nation

The broadest aim of the parliamentarians in passing expungement legislation was to demonstrate that all members of the LGBTIQ communities are included in their state or nation as valued citizens. In doing so, legislators on both sides of the Tasman Sea had to acknowledge the negative effects criminal law enacted by their parliamentary predecessors had onGBTQ individuals. Such treatment of this group was noted by Naylor (National) rather graphically as 'stories that would make most people's blood curdle ... [and] as a nation, we have got to stand up now and say that was not OK [sic]. It was never OK that they should ever have been convicted in the first place' (New Zealand House of Representatives 2017: 19405). Notions of correcting a historical wrong were also expressed by a Victorian parliamentarian, Andrews (Labor), who is currently premier of that state:

Every now and then, perhaps too rarely, we in this great chamber and this great Parliament get an opportunity to right a wrong. We get to do the right thing, to do the decent thing, to do the fair thing and to say to every single Victorian that it is never right for you to feel that you do not belong. (Parliament of Victoria 2014: 3529)

Parliaments, no matter how determined or conscientious, cannot change the past, but they can introduce legislation that not only addresses past wrongs, but also aims to be inclusive of sexual minorities in law and throughout the community. The

limitations of parliaments were also noted by Falloon (National), who included in his comments his desire for the legislature to provide a positive therapeutic outcome: ‘I’m conscious that this bill will never make up for the hurt that those men suffered over many decades, and it won’t erase the black stain on this nation’s history. It is, however, the right thing to do, and I hope it brings some sense of closure for those men and their families’ (New Zealand House of Representatives 2018a: 2611).

An aspiration to address what is now interpreted as a discriminatory history of institutional homophobia by previous legislators (Greenwich [Independent]: Parliament of New South Wales 2014: 1295), expressed above as a ‘black stain’, was noted across parliaments. Many members spoke of their sense of shame in serving in a place that had once supported criminalisation of sex LGBTQ individuals. The New Zealand Minister of Justice, Hon Amy Adams (National), when introducing the bill to the House noted that the proposed legislation would support values New Zealand upholds: ‘fairness, freedom and diversity’ (New Zealand House of Representatives 2017: 19394). Such sentiment was also noted by Foster-Bell (National): ‘in the past, people were stigmatised, not just those who were convicted of offences but the entire LGBT community, and that by passing this legislation we may actually give dignity to those people’ (19398). Some politicians were very aware that their current actions had broader ramifications for the institution they served, as further noted by Foster-Bell (National): ‘well, I actually think it will also restore dignity to this House’ (19398). Similar sentiment was expressed in the NSW Parliament when Marshall (National) noted, ‘as a young person growing up in a modern day New South Wales, I cannot fathom such a society’ (Parliament of New South Wales 2014: 1297). Thus, the legislative change was understood to have a broader therapeutic impact beyond the individual who was directly affected by the law—one that potentially extended to benefit legislators and society more generally.

While the passing of expungement legislation restored dignity and provided some relief, very few speakers directly raised the anti-therapeutic jurisprudence effect of their respective parliament and previous members of their own parties in not passing such legislation earlier. Like other common law jurisdictions such as the United Kingdom, Canada and South Africa, the parliaments of New Zealand and Australia did not address the issue of the effect of a criminal record when the decriminalisation process originally began in the early 1970s in Australia and in the 1980s in New Zealand. The vexed issue as to why it required some 32 years to introduce such legislation in New Zealand was seldom addressed. King (National) noted, ‘quite frankly, this legislation is well overdue’ (New Zealand House of Representatives 2018a: 2609). Unfortunately, the member does not elaborate. This theme was echoed throughout debates on both sides of the Tasman Sea with politician after politician from all political parties making the point that expungement legislation is necessary, but almost none offered a reason for the delay, with the exception of a former premier of NSW, O’Farrell (Liberal): ‘the issue had never been raised with me during my 18 years in Parliament but it was an issue that needed addressing’ (Parliament of New South Wales 2014: 1300).

Discussion

The aim of providing relief to people with a criminal record for a historical homosexual offence has been met with the passing of expungement legislation in both Australia and New Zealand. This analysis and evaluation of the multiple aims of this legislation as a form of therapeutic jurisprudence shows, as has been the case so many times previously, that ‘success’ is both partial and illusionary.

It is clear that the principle of therapeutic jurisprudence to not inflict further harm through the law—and in this instance via the criminal justice system—has been met with the establishment of expungement schemes. Discussion of the issue in all parliaments, with unanimous promulgation into law, allowed a long-overlooked consequence of a criminal record to finally be discussed openly, with parliamentarians from all parties considering the issue, often using testimonies provided by people directly impacted. Even though the number of individuals providing testimony was few, they represented the experiences of so many others arrested and treated as criminals and social pariahs. Along with addressing the psychological harm of a criminal record, the legislation also provides some recognition and redress to those same LGBTQ individuals who found their ability to gain fruitful and desired employment blocked, albeit mostly too late now, as many have retired. However, for those who desire to give back to the community through voluntary work or to enjoy international travel, the burden of admitting to a criminal record for a homosexual offence has now been removed. The legislation does fulfil a therapeutic jurisprudence aim of eliminating harm at both a psychological level and in removing impediments for individuals across a range of social institutions that have restricted LGBTQ people ‘following nature’s course’ and engaging in sexual activities and loving relationships on the basis of their sexual orientation and/or gender identity—experiences that others (heterosexuals) would take for granted.

Despite these successes, the extent of the therapeutic effect associated with expungement is nonetheless limited. The overwhelming support by parliamentarians for expungement legislation is amicable; however, in practice, the means of obtaining a spent conviction is not achieving its therapeutic promise. All jurisdictions discussed have implemented an administrative scheme to process expungement application, with the exception of South Australia where a magistrate approves such applications. While it is beyond the scope of this paper to review each scheme, in general, the number of applications for

expungement has been low. For example, the highest number of applications received in NSW was in 2016 with a total of 13, resulting in the expungement of 12 convictions (email to author from Justice & Community NSW, 8 November 2019). In the first year of operation in Queensland, nine applications were received, resulting in two expungements with the remainder 'on foot' for a decision (email to author from PolicyADG–Justice QLD, 21 November 2019). From 2015 until the end of 2022 in NSW, 32 of 46 convictions submitted for consideration were successful (email to author from Justice & Community NSW, 7 December 2022). The total number of applications received in New Zealand since mid-2018, the first year of the scheme, is 21. Thirteen of these were successful, six were declined and two are outstanding (letter to author from Deputy Chief Legal Counsel NZ, 11 November 2022).

The number of applications for expungement appears low, though the number of people with such a conviction can only be estimated. Crime statistics produced on homosexual offences were only published sporadically, and those figures were usually specific to a particular place and time in Australia. McGonigal (1970) focused on court appearances in inner-city Sydney that occurred between 1969 and 1970, noting some 719 offences during this period. By comparison, the Department of the Attorney General and Justice NSW (1978) focused on courts across the greater Sydney area for offences heard primarily in 1975, which found 107 cases, considerably fewer than reported by McGonigal. Such variation in the number of arrests and court appearances reported is a reminder that detection of homosexual offences was very much a function of police effort and resources (Bleakley 2019; Dalton 2012; Hodge 2012; Moore and Jamison 2007). Likewise, it is not known how many people with convictions are currently living. Some media reports have indicated the figure in NSW would be 'in the hundreds' (ABC News 2014), whereas numbers reported in New Zealand range from 'over 1,000' males convicted of indecency between 1965 and 1986 (King [Nationals]: New Zealand House of Representatives 2018b: 2872) to slightly fewer than 200 people over the same period, according to estimates by the Ministry of Justice (NZ Herald 2017).

To address this very low number of expungement applications, one option may be for the state to grant a legal pardon to people with a homosexual offence conviction. Germany has taken this course, pardoning an estimated 50,000 men (deceased and living) convicted of offences under Section 175 of the German Criminal Code (Dearden 2017). Following the passing of the *Policing and Crime Act 2017* (ss 164–172), also known as Turing's Law,⁸ England, Wales and Northern Ireland have granted posthumous pardons (Hopkins 2016) to an estimated 50,000–100,000 men arrested between 1885 and 2003 (Bowcott 2017). In 2018, Scotland passed the *Historical Sexual Offences (Pardons and Disregards) (Scotland) Act* that also provides a pardon. While a pardon is a possibility, it has obvious shortcomings, as it does not remove a conviction or sentence from a criminal record, and as such has limited therapeutic or practical value to people still living.

A dominant aim of the legislation is the political goal of using the issue of expungement to address the broader legal and social repression of all LGBTIQ communities. This aim, while commendable, has proved the least successful in terms of achieving therapeutic jurisprudence outcomes for several reasons. First, the decriminalisation of sex between GBTQ individuals is deployed to make amends for all injustices experienced by all members of LGBTIQ communities. At the centre of expungement is the historical criminalisation of male-to-male sex, with most arrests transpiring for sexual activity conducted in a public space, a detail central to the legal consideration of expungement legislation. To use such sexual activity as a basis for social inclusion for all under the LGBTIQ acronym is to project the treatment of mostly men onto all people in these communities. Further, the specificity of subordination also experienced by each of these communities is ignored and subsequently reduces each community to a singularity, overlooking difference within communities as well as ignoring the effects of intersectionality.

Second, parliamentarians were reticent to acknowledge openly the casual nature of the sexual activities at the centre of the call for expungement legislation, instead discussing such behaviour as 'love', with a common claim being that these men were arrested for having been 'caught expressing their love' (Northern Territory Legislative Assembly 2018: 3773). A reticence to acknowledge homosexual sexual activity that occurred in public spaces throughout these debates demonstrates how liberal ideals for homosexual law reform are unsettled by the carnal (Berlant and Warner 1998; Boucher and Reynolds 2018).

Third, those people still alive with a record were refused individual compensation in every jurisdiction in Australia and in New Zealand. This refusal challenges the credibility of those politicians, particularly those in government, who lamented the unjust treatment of generations of GBTQ people in such a genuine, sincere and heartfelt manner. Germany overcame such reticence with its expungement legislation by including compensation for each of its estimated 5,000 victims with 3,000 euros and an additional 1,500 euros for each year spent in jail (Chase 2017). Even though New Zealand parliamentarians rejected compensation for individuals, discussion did take place. Robertson (Labour) suggested community-based compensation in the form of financial support by:

using some form of funding and money to support those who come out today, and those who grapple with their gender identity, because what we should do on this occasion today is not just apologise for the wrongs of the past but make a

commitment to take the journey from our current tolerance of difference and diversity to one of acceptance, embracing and celebrating diversity. (New Zealand House of Representatives 2017: 19397–19398)

Further, the parliaments that used the passing of expungement legislation as an impetus to provide an apology to LGBTIQ communities (notably New Zealand, the Northern Territory, Victoria and Tasmania) are in general open to accusations of tokenism (Celermajer 2009)—that is, of demonstrating self-serving regret for a homophobic past that also allows for disavowal of a homophobic present (Redd and Russell 2020). This can be seen as akin to a form of ‘memory activism’, where past illegal behaviour is reformed in light of current social and legal beliefs (Caroli 2018), and the use of an apology as a means to avoid paying compensation. More specifically, analysis of Tasmania’s apology—though applicable to parliamentary apologies across all jurisdictions—highlights that the act of apology functions to erase records of the state’s violent and unjust behaviour towardsGBTQ people, continues assumptions of sexual and biological essentialism, and perpetuates a tense division between illegal and legal sexual practices (Albion and Russell 2022: 1). This division between illegal and legal could be addressed by an open and truthful apology by a police force as a sign of political maturity and a step towards healing and justice (Tomsen and Kirchengast 2019). Overall, a focus on remedying the harm inflicted on an individual through extinguishment does meet the goals of therapeutic jurisprudence, though in a limited manner. While it may remove the stain of a conviction, it does not compensate for the harms endured over the long period of carrying a criminal record. Further, the use of expungement legislation as a pretext for a political statement that expresses regret but lacks financial compensation smacks of hypocrisy and continued homophobic and discriminatory behaviour by states.

Conclusion

The passing of expungement legislation in Australia and New Zealand highlights the continuing need to review and evaluate the relationships between the state and its LGBTIQ citizens. Law reform that addresses past repression of sexual minorities is an ongoing process, as extinguishment demonstrates, and the responses of the state to rectify past wrongs has been piecemeal at best; indeed, expungement schemes have provided relief to a very low number ofGBTQ applicants. Further, other forms of relief are still to eventuate as governments refuse to provide financial compensation to those people whose lives were, and continue to be, emotionally, psychologically and financially impacted. A refusal to provide such reparation demonstrates to members of the LGBTIQ communities and their allies that they are still considered second-class citizens, and appeals for justice, even when voiced by those in a position to provide justice, have been scrappy. Therapeutic jurisprudence, as a lens through which to analyse expungement, is useful when focused on the individual and their treatment by the law and, in this instance, the use of spent conviction legislation to remove the harm inflicted by criminal law and to atone for the homophobic behaviour of past parliaments. Critics of therapeutic jurisprudence note that reform does not address the structural elements that criminalised particular populations in the first place, and that bias and discrimination remain, as is evidenced by the refusal to provide any form of financial compensation or pardons. As such, governments are virtue signalling, using easily implemented expungement measures to demonstrate a commitment to LGBTIQ inclusivity but refusing the politically difficult task of providing reparation. Once again, legal reform is partial and spasmodic.

Other practices of addressing past wrongs at the society level may be better suited, with some qualification, than expungement schemes for moving towards delivering justice. These include transitional justice practices, such as localised versions of truth commissions, individual and/or group reparations, monuments and political apologies. However, these must be developed in conjunction with the group targeted by such reconciliatory practices to avoid shortcomings such as those evidenced by the Tasmanian apology. Law reform is still required for members of LGBTIQ communities across Australia in areas such as protection from discrimination. Governments deriving a virtue benefit by passing necessary and long overdue expungement legislation is not a substitute for the lawful discrimination that continues to deny full legal protection to members of LGBTIQ communities.

Acknowledgements

I want to thank the anonymous reviewers for their engagement with, and suggestions for, this paper. I also want to thank Robert van Krieken, Sonja van Wichelen, Dinesh Wadiwel and Amanda Harris for their comments on drafts of this paper. My appreciation goes to Stephen Tomsen for his encouragement to complete this paper.

Correspondence: Allen George, Lecturer in Socio-Legal Studies, School of Social and Political Sciences, University of Sydney, Australia. allen.george@sydney.edu.au

¹ <https://www.hrc.org/resources/marriage-equality-around-the-world>

² <https://lgbtdisregard.ie/>

³ Homosexual offences as a group of laws also criminalised people previously referred to as ‘transvestites’, particularly for engaging in ‘prostitution’ (McGonigal 1970) and ‘cross dressing’, as evident in Tasmania (Gledhill 2021). Further, some of the people arrested may have identified, or now identify, as transgender, as may be reflected by at least one application for expungement in New South Wales (email to author from Justice & Community NSW, 7 December 2022).

⁴ <https://nzhistory.govt.nz/culture/homosexual-law-reform/setting-the-scene>

⁵ The relevant laws in Australia are as follows: *Spent Convictions (Decriminalised Offences) Amendment Act 2013* (SA), *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic), *Criminal Records Amendment (Historical Homosexual Offences) Act 2014* (NSW), *Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Act 2015* (ACT), *Expungement of Historical Offences Act 2017* (Tas), *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017* (Qld), and *Expungement of Historical Homosexual Offence Records Act 2018* (NT).

⁶ The homosexual offences law for which an application of extinguishment can be made in New Zealand under the *Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018* are as follows: section 141 (indecenty between males) *Crimes Act 1961*; section 142 (sodomy) *Crimes Act 1961*; section 146 (keeping place of resort for homosexual acts) *Crimes Act 1961*; section 153 (unnatural offence) *Crimes Act 1908*, but only for offences committed with any other male human being; and section 154 (attempt to commit unnatural offence) *Crimes Act 1908*, but only to the extent that the section covers attempting to commit buggery with any other male, assault with the intent to commit buggery with any other male, and indecently assaulting any other male (Gledhill 2021).

⁷ See Explanatory note for *Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill 2017* (NZ).

⁸ Named after Alan Turing, the mathematician and World War II code breaker who died by suicide after his conviction in 1954 for a homosexual offence of gross indecency, for which he was pardoned posthumously in 2013 by Her Majesty Queen Elizabeth II. Turing, and the film *The Imitation Game* based loosely on his life as a wartime code breaker, was mentioned by numerous speakers in parliamentary debates.

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