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NZ legalised homosexuality 40 years ago – but even today, justice issues remain

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Significant developments in social history sometimes happen through law reform. Arguably, New Zealand's most significant example is that it was the first country to pass legislation to grant all women the right to vote, in 1893.

Often, however, New Zealand was not first but a slow follower.

Homosexual law reform is an example of the latter. Forty years ago, on July 9 1986, the House of Representatives passed – narrowly – the Homosexual Law Reform Act 1986.

It broadly legalised consensual sexual practices between men, as well as consensual anal sex regardless of the partners' gender. It essentially removed the criminal law from a private space where people expressed their sexuality and love.

But it would take decades for the government to recognise that the previous law required an apology to those convicted, and even today issues remain.

History of homosexual law reform

Criminalisation went back to the start of governance of New Zealand by the Crown. At first, English law came across, and then New Zealand began to pass its own statutes.

The Offences Against the Person Act 1867 set life imprisonment for “the unnatural offence”, which covered any form of anal intercourse and also bestiality. Similar offences were re-enacted in the Criminal Code Act 1893 and the Crimes Act 1908.

New Zealand’s main criminal statute now is the Crimes Act 1961. In its original text, what had become called sodomy remained criminal. The maximum sentence was 14 years if it involved a woman or someone under the age of consent. The maximum was seven years for consenting male adults; they could also face five years for other sexual activity.

Offences in other statutes included loitering in a public place in a way that suggested the person was about to commit an imprisonable offence. Ironically, before the homosexual law reform, police officers would themselves loiter in places where homosexual men might meet and arrest them.

The 1986 reform decriminalised consensual anal intercourse – subject, naturally, to the age of consent being respected and with protection for those without capacity to consent. Other forms of male homosexual activity could now occur without the risk of arrest. Female homosexual activity wasn’t mentioned because it had never been criminal.

Celebration and reflection

Most people will likely celebrate the decision by legislators to remove the criminal law from a private matter. But it is worth reflecting on how the reform was both late and partial.

Equivalent reforms took place in the United Kingdom in 1967 as part of the social change of the 1960s. New Zealand was a generation behind. Also, the original bill introduced into parliament in 1985 proposed to make it illegal to discriminate against someone on the basis of their sexual orientation. This did not pass.

As a result, the criminal law was removed from male homosexuality, but discrimination based on sexual orientation – affecting not just gay men – remained permissible. This was despite the fact that 1985 also marked the publication of a white paper that eventually led to the New Zealand Bill of Rights Act 1990.

Discrimination on the basis of sexual orientation was prohibited some years later in the Human Rights Act 1993. Civil unions were permitted in 2005 and, eventually, an amendment to the legal definition of marriage allowed same-sex marriage. The latter was supported by some on the conservative side of politics.

But what of those who were convicted under the old law? The Criminal Records (Clean Slate) Act 2004 required old convictions to be revealed in some circumstances.

Some argued an old conviction under an abandoned law still involved breaking the law at the time. But this is not good enough in relation to a law that was not only anachronistic but wrong. Eventually, a law was passed in 2018 to expunge convictions for historical homosexual offences – the [Criminal Records \(Expungement of Convictions for Historical Homosexual Offences\) Act 2018](#).

Again, New Zealand was a follower rather than a leader. The UK and most Australian states had already passed similar legislation.

The 2018 act started its passage through parliament in 2017, introduced by National Minister of Justice Amy Adams and accompanied by an apology to those who had been convicted. It marked an official acceptance that the old law was improper by modern standards.

Those convicted between 1908 and 1986 can apply to have their convictions expunged. An application can be made on behalf of a dead person, but not one convicted under legislation prior to 1908.

This reveals another limitation. Given the importance of ancestors in New Zealand society, why not go back before 1908? The UK legislation covers convictions going back to a statute in 1553.

Other concerns include that convictions under the commonly used loitering provisions cannot be expunged. Also, applicants have to prove their actions would not be criminal today, for example for reasons of consent. This seems a presumption of guilt unless innocence can be shown, even though it was the state that brought the charge.

The expungement is only for the purposes of New Zealand law. Technically, it does not cover things like visa applications abroad. It also expressly prohibits anyone from seeking compensation, despite the apology in 2017 that the state should never have acted as it did.

So yes, let's celebrate the 40th anniversary of the homosexual law reform, but let's also acknowledge there are still issues to address.

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