

## **The LGBTQIA+ community - *sui generis* rights and issues - a tort law focus**

Many in the LGBTQIA+ community have faced a dark, dark past, and some continue to face a dark present. In other areas, like the plague of sexual abuse against children, especially perpetrated by those in positions of great power, tort law has provided something of a remedy for past wrongs. Sometimes, this has been aided by parliamentary reforms and other times inchmeal judicial common law progress. In an earlier article, I wrote about the legislative changes enabling victims to bring historical sexual and other abuse claims if those events occurred when the victims were minors, when often victims would usually have claims well and truly statute barred.

Historically, although frequently derided, even at times by the snobbery of our own legal fraternity, tort law has been a peaceful vehicle for disenfranchised community members to seek recompense, rather than mete out revenge or even commit suicide. Such civil claims can shine a light on wrongs otherwise left hidden, and aims to prevent recurrence, for example through exemplary damages awards. It helps set public standards of conduct and expectations of community members. It does far more good than it does harm; its derision is often perplexing.

But what role does tort law have to play in the area of LGBTQIA+ wrongs? Having worked in the industry for many years, I have been involved in few such cases, and then only in the context of abuse against LGBTQIA+ students at schools, which is part of what seems a systemic issue of schoolyard bullying which continues today, including sadly through social media. Searching for case law in the area suggests I am not alone in my experience.

Because of the great march of negligence in the last 100 years, give or take, I have written before about how other areas of tort law have perhaps stagnated, in particular intentional tort claims, which are ancient causes of action. For instance, there is no tort of “sex abuse” as such, and we lawyers find ourselves moulding new claims around old nomenclature, “assault and battery” rather than “grooming and sex abuse”.

So the aim of this article is to start a conversation. What can we in the legal community do to use tort law as a vehicle to help overcome past and current wrongs wrought not only by schoolyard bullies, but shamefully also by our legislature, our law enforcers, and the general community, against our LGBTQIA+ citizens? How can victims, primary or secondary, get recognition and recompense through tort law? What role does it have to play? What good could it bring the community?

### **What are some of the past wrongs?**

In a topic this significant, one can only scratch the surface. But let us look at a few of the many injustices and a potential way forward.

A powerful starting point is the State apology by Premier Daniel Andrews in May 2016, a watershed moment.<sup>1</sup> In it, the Premier cited a host of wrongs against the LGBTQIA+, including this:

---

<sup>1</sup> <https://www.premier.vic.gov.au/state-apology-those-convicted-under-unjust-laws-against-homosexual-acts-premiers-speech> (accessed 17 March 2022).

*There was a time in our history when we turned thousands of ordinary young men into criminals.*

*And it was profoundly and unimaginably wrong.*

*That such a thing could have occurred – once, perhaps a century ago – would not surprise most Victorians.*

*Well, I hold here an article that reports the random arrest of 15 men.*

*“Police Blitz Catches Homosexuals”, the headline reads.*

*And said a police officer: “...we just seem to find homosexuals loitering wherever we go.”*

*This was published in Melbourne’s biggest-selling weekly newspaper – in December 1976.*

The full speech is harrowing reading.

## **Go to buggery**

Until 1981, in Victoria it was a crime for two consenting adult males to have sex, under the crime of “buggery”.<sup>2</sup> Not just any old crime, either, but a serious indictable offence. Indeed, until 1949, in Victoria it was even an offense punishable by death.

Thankfully, in Victoria, victims can now apply to have their wrongful convictions expunged, the *void ab initio* of contract law. Parliament finally recognised these laws for what they were, bigoted towards a minority.

---

<sup>2</sup> Which was said first to have been enacted as a punishable crime in England in 1533 as the *Buggery Act*.

And yet, sadly, the same legislation that enables victims to have their convictions expunged also precludes any entitlement to compensation for their long suffering, which really is a life-long sentence, after prison.

Section 105S(1) of the *Sentencing Act 1991* (Vic) provides:

- (1) A person who has an expunged conviction is not entitled to compensation of any kind, on account of that conviction becoming an expunged conviction, in respect of the fact that the person—
  - (a) was charged with, or prosecuted for, the offence; or
  - (b) was convicted of, or sentenced for, the offence; or
  - (c) served a sentence for the offence; or
  - (d) was required to pay a fine or other money (including costs or any amount by way of restitution or compensation) on account of being convicted of, or sentenced for, the offence; or
  - (e) incurred any loss, or suffered any consequence (including, but not limited to, being sentenced as a serious offender in accordance with Part 2A), as a result of any circumstance referred to in paragraph (a), (b) or (c); or
  - (f) has an expunged conviction.

This leads to a more general question about whether tort law should now recognise “wrongful conviction”, not just false imprisonment, as if imprisonment was lawfully

sanctioned, it is no false imprisonment, even if later overturned on appeal or expunged.<sup>3</sup> But that is for another day.

As for those whose convictions have been expunged here, is it good enough to expunge the crime without compensation?

One could make a sensible argument that the law should not compensate those who, at the time, were committing an offence. But is an unjust law a law at all, Thomas Aquinas would ask us?

Should men who have languished in gaol for the crime of loving another man be no less entitled to damages than other victims who've suffered injustices in other areas? Is it time to re-think section 105S of the *Sentencing Act*? Should it be replaced by a provision enabling victims to seek fair and reasonable compensation for the wrongs done to them and the effects these wrongs have had on their families, opening up tort law claims to these men?

A way forward is a drive for legislative change.

---

<sup>3</sup> If legal process is followed, one is not falsely imprisoned. There may be rights in respect of malicious prosecution, but 'malice' is incredibly difficult to prove. For an interesting article on wrongful conviction, see <https://www.bu.edu/pilj/files/2015/09/18-2AverySymposium.pdf> (accessed 17 March 2022).

## Get them, however you can

Section 105S prohibiting compensation for those convicted for same sex lovemaking does not seem to preclude victims seeking compensation for **the manner** in which they may have been arrested or imprisoned.

Examples abound about the mistreatment of gays and others in the manner in which they were arrested and treated by the authorities while under arrest. Entrapment was commonplace.<sup>4</sup>

Seeking justice so many years after the fact will be no easy feat in many cases. Limitation of action laws generally preclude claims for adults to a three-year period from when the events occurred.

Given the powerlessness of the LGBTQIA+ community for so long, no doubt many victims did not even turn their minds to bringing claims against the State for these wrongs.

It may be time to re-visit that, to turn their minds to it, to launch claims against the State. Reforms to limitation periods for personal injury are broad enough to look at each case on its merits to determine whether time may be extended to bring such claims and it may be that, in these special circumstances, limitation periods will be extended.

---

<sup>4</sup> <https://www.abc.net.au/am/stories/s539058.htm> (accessed 17 March 2022).

## The cottaging curse

When gay people were forced to hide in the shadows lest they be condemned to rot in prison or sent to the gallows, they sometimes met in cottages, a euphemism for public bathrooms, another criminal offence in Victoria for “loitering for homosexual purposes”.<sup>5</sup> Unfortunately, homophobes and vigilantes knew that too. Many men were lured into traps and bashed, and sometimes killed in what is known as “gay-hate murders”. The authorities failed the victims and their families, frequently by concluding death by suicide or failing to investigate the crimes in what surely were at least in some cases suspicious deaths.<sup>6</sup>

While, thankfully, coroners have re-opened inquests in some instances,<sup>7</sup> and made appropriate findings, and in some cases police have identified perpetrators, what rights do families have for their long suffering while crimes were not investigated?

Historically, claims against the State for failing to investigate crimes have been near impossible to prosecute.<sup>8</sup> The argument for it is that this would put too great a burden on police to investigate every complaint. To a limit, this surely makes sense. There are only so many resources available to investigate each crime.

---

<sup>5</sup> <https://www.sydneycriminallawyers.com.au/blog/the-historical-offence-of-homosexuality-in-australia/> (accessed 18 March 2022). For an example of such a case, see *Puddy v Borg* [1973] VicRp 61; [1973] VR 626.

<sup>6</sup> <https://www.sbs.com.au/gayhatedecades/> (accessed 17 March 2022).

<sup>7</sup> For example, relating to the shocking case of Scott Johnson.

<sup>8</sup> See *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238, for example.

But in cases where police arguably concluded suicide or did nothing to investigate what was clearly a suspicious death, thinking so lowly of the victim in doing so, a re-think on causes of action for police investigative failures is surely timely. Tort law could assist traumatised families seek justice, not simply answers, the purpose of a coronial inquest, through claims by family members suffering psychiatric injuries from the death of their loved ones and the tragic circumstances.

There is a developing jurisprudence in this area. For example, Justice Dixon in *Smith v State of Victoria*,<sup>9</sup> a case about the failure of Police to take steps prevent family violence, found that that case was arguable and refused the State's summary dismissal. This gives hope to victims in this space to launch similar actions.

### **The 'sport' of harassment**

Traditionally, harassing LGBTQIA+ people was something of a sport and disturbingly still is to some degree.<sup>10</sup>

People no doubt have faced and continue to face this sort of harassment on a constant basis, in school yards or on public transport or by associates. If the person is known to the victim, it can be relentless.

What remedies might be available for this?

---

<sup>9</sup> [2018] VSC 475.

<sup>10</sup> <https://www.abc.net.au/news/2022-02-14/two-teenaged-boys-charged-over-sydney-gay-hate-attacks/100828242> (accessed 17 March 2022).



The tort of harassment has had little attention to date. Australian courts have only looked at it a handful of times.<sup>11</sup> But I think in this area, and no doubt others, it is time to explore causes of action in the tort of harassment. Indeed, the High Court has all but invited the profession to do so.<sup>12</sup>

In intentional tort claims, one need not focus on whether a person has a “significant injury” or even a psychiatric injury, as damage is not the gist of the action.<sup>13</sup> What may then be considered smaller claims can therefore be pursued.

### **None of your business**

Despite how far we have come, understandably, some in the community might prefer not to have their LGBTQIA+ status revealed to others or to the world at large. They may even be someone of high profile who does not want the media delving into their private lives. One feels for the mistreatment of Ian Thorpe in the relentless media coverage he faced on this issue.

A member of the LGBTQIA+ community may tell someone in confidence that they are such a member. If that person breaches their confidence, there may be a legal remedy. Although an equitable remedy, rather than a tort, there may be a cause of action for breach of confidence and a claim for damages for the injury and effects that that

---

<sup>11</sup> Notably *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* per Gummow and Hayne JJ.

<sup>12</sup> *Ibid.*

<sup>13</sup> See my previous article on exceptions to Significant Injury in intentional tort claims.

breach of confidence has had. Where tort law leaves gaps, equity may yet still fill them for victims.

### **A call to writs, not arms**

This article just scratches the surface of the issues that the LGBTQIA+ community have had to overcome.

And while things have come a long way, tort law and legal remedies associated with it may be able to help victims share their stories, receive some recompense, and help in a peaceful way to make our society a stronger and better one, embracing the LGBTQIA+ community. After all, that seems to me to be the noble goal of tort law.

**Peter Hamilton\***

**Barrister – Green’s List**

March 2022

\* the author practises extensively in tort law and has a particular interest in novel torts and tort law claims