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Legal Affairs and Community Safety Committee
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Friday 26 May 2017

Dear Committee

Submission re Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017

Thank you for the opportunity to provide a submission in relation to the above-named Bill.

I support this legislation in principle, given it is aimed at redressing historical injustices experienced by members of the Queensland lesbian, gay, bisexual, transgender and intersex (LGBTI) community.

This Bill builds on the apology, delivered by Premier Annastacia Palaszczuk in Queensland Parliament on 11 May this year, in which she said:

"This Legislative Assembly offers its unreserved and sincere apology to all those persons who suffered from prejudice as a result of the discriminatory laws passed by this House, and we acknowledge that your pain and suffering continues.

"We acknowledge that shame, guilt and secrecy carried by too many for too long.

"Today, in this Legislative Assembly, we place on the record for future generations our deep regret and say to all those affected, we are sorry that the laws of this state, your State, let you down.

"To all those affected we say sorry."

These noble sentiments were also reflected in the second reading speech for the Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017 itself given by Attorney-General Yvette D'Ath:

"As this parliament apologises this afternoon, we should never forget that this abuse, this discrimination and this hatred was within our lifetime, and it was done in our name. We have seen important law reform since that time, over many years, in many stages. That includes significant reforms passed in the current Palaszczuk government, some with bipartisan support. Despite these important legislative changes, the pain and anguish caused by that earlier discrimination has never been removed for those affected Queenslanders. I am very proud to be a Labor Attorney-

General finishing the important work that the Goss government started, and I am determined to get it right."

Unfortunately, while I support both of these statements, on a practical level I cannot support the Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017 in its current form.

That is because the Bill fails to address all relevant historical homosexual convictions, and instead only offers redress for one subset of the people affected by the criminalisation of homosexuality in Queensland.

This failure is based on two key flaws in the proposed expungement scheme.

The first flaw is that the Bill is limited to offences committed before 19 January 1991 – which is when the *Criminal Code and Another Act Amendment Act 1990* came into effect.

As noted in the Explanatory Notes for the Bill, this is intended to "maintain the nexus between the proposed expungement scheme and decriminalisation."

Such a 'nexus' would be appropriate if the legislation that implemented decriminalisation was itself non-discriminatory.

However, as current members of the Queensland Parliament are no doubt aware, the *Criminal Code and Another Act Amendment Act 1990* was fundamentally unjust, in that it continued to subject anal intercourse to a higher age of consent (18 years) than other forms of sex (16 years).

This discriminatory approach primarily affected the gay and bisexual male community, and meant that for the following 25 years young same-sex attracted men in Queensland were disproportionately exposed to potential criminal sanctions for penetrative intercourse.

This discriminatory approach was only remedied in September last year, with the passage of the *Health and Other Legislation Amendment Act 2016*. In introducing that legislation, Minister for Health Cameron Dick stated:

"The Goss Labor government in 1990 decriminalised homosexuality, but that government introduced an anal intercourse law. The age of consent for consensual anal intercourse was set at 18 years.

"The expert panel of health experts asked to consider the implications of the current law advised me that the disparity in the age of consent for different sexual activity has adverse impacts on young people and recommended a consistent age of consent. Queensland cannot continue to discriminate between forms of sexual intercourse, particularly when we know that young people feel compelled to withhold information about their sexual history from health practitioners for fear of possible legal consequences, whether for themselves or their partner. This can have serious implications for their medical treatment, particularly as unprotected

anal intercourse is the highest risk behaviour for transmission of HIV. It also has the effect of stigmatising same-sex relationships which in itself can be harmful for an individual's wellbeing."

Minister Dick concluded his speech by noting that:

"The Palaszczuk government is committed to improving sexual health outcomes for all Queenslanders regardless of their sexual orientation or preferences. The bill demonstrates this by standardising the age of consent for all forms of sexual intercourse, reflecting community expectations and ***removing a source of discrimination against young people on the basis of their sexual orientation…****"* [emphasis added].

The Palaszczuk Government was right to identify that an unequal age of consent specifically discriminated against young people on the basis of their homosexuality and bisexuality. They, and the Queensland Parliament more generally, were also right to remedy this injustice by passing the *Health and Other Legislation Amendment Act 2016* to finally introduce an equal age of consent.

Which makes it all-the-more puzzling why they have made the *wrong* decision in limiting the operation of the historical homosexual convictions expungement scheme to offences that occurred before 19 January 1991.

By tying the Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017 to the 'act' of decriminalisation, they have effectively tied the Queensland expungement scheme to legislation that itself was discriminatory.

In doing so, they have developed a scheme that would deliberately exclude people who were charged or convicted for offences between January 1991 and September 2016 who would not have been were it not for their sexual orientation.

Those charges and convictions were also unjust, and that injustice should be addressed through this expungement scheme. To do otherwise – to exclude people adversely affected by the unequal age of consent which existed for a quarter of a century – is simply to perpetuate this discrimination.

It would also leave Queensland out of step with other Australian jurisdictions – with the equivalent NSW scheme allowing people charged or convicted because of the unequal age of consent which operated there between 1984 and 2003 to apply for those records to be expunged. Queensland should follow suit.

Recommendation 1: The Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017 should apply to charges and convictions that were caused by the unequal age of consent for anal intercourse between January 1991 and September 2016.

The second, related flaw of this legislation is that, even for criminal offences committed prior to 19 January 1991, the right to apply to have these records expunged is limited to acts in which both parties were aged 18 years or over.

The rationale for this decision was explained in Attorney-General Yvette D'Ath's second reading speech in the following way:

"[T]he criteria for the expungement of a Criminal Code male homosexual offence in the bill has regard to the age of consent at the date of decriminalisation on 19 January 1991 – that is, 18 years. This retains the expungement scheme's nexus with the decriminalisation of consensual adult homosexual activity and confirms that the scheme is only applicable to historical charges and convictions. It also ensures that there is no discrimination between people charged or convicted with offences between 1991 and 2016 or people charged before the age of consent for sexual activity other than anal intercourse was changed in Queensland in 1976 from 17 years to 16 years."

The question of what to do about the relevant age of consent prior to 1991 goes to the heart of the purpose of the expungement scheme.

If the purpose is simply to address offences prior to January 1991 that were decriminalised following the passage of the *Criminal Code and Another Act Amendment Act 1990*, then the approach adopted in the legislation, which limits the relevant age of consent to 18 years for all offences, admittedly has some internal consistency.

However, if the purpose of the expungement scheme is instead to provide redress to people who were charged or convicted primarily because of their sexual orientation, then I would argue that it must go further.

On a practical level, if this legislation is aimed at removing the stain of homophobia and biphobia from past laws, and above all from the criminal records of those who bore their impact, then the relevant test should not be how those acts were treated in 26-year-old legislation that, as we have seen above, was itself inherently flawed.

Instead, I believe the test should be whether the relevant act would have been criminalised if it involved consensual intercourse between a man and a woman, and specifically penis/vagina sex. Such a test goes to the core issue, which is *discrimination* – that the law treated gay and bisexual men differently to heterosexual people.

If this principle is adopted, then the scheme would allow people to apply with respect to:

- Charges and convictions where both parties were 17 and over prior to 1976 (when the age of consent for penis/vagina sex was reduced to 16) and

- Charges and convictions where both parties were 16 and over from 1976 onwards.

In this way, the legislation would actually better reflect the view, expressed in the Explanatory Notes, that:

"It is also an acknowledgment that the age of consent has changed over the years in accordance with changing societal values and expectations…"

That is because it would be based on changing societal attitudes to the age of consent for heterosexual, non-anal, intercourse, and therefore removed from discriminatory attitudes towards anal intercourse, and especially intercourse between men.

Further, if this principle was adopted, it would also provide philosophical consistency between those offences before January 1991 and those between January 1991 and September 2016 – provided Recommendation 1 is also adopted, the relevant age of consent would be 16 years for both.

Finally, this approach would also be more consistent with the position adopted by other jurisdictions – with section 105G of Victoria's *Sentencing Act 1991* setting out the relevant test as:

"on the balance of probabilities, both of the following tests are satisfied in relation to the entitled person:

(i) the entitled person would not have been charged with the historical homosexual offence but for the fact that the entitled person was suspected of having engaged in the conduct constituting the offence for the purposes of, or in connection with, sexual activity of a homosexual nature;

(ii) that conduct, if engaged in by the entitled person at the time of the making of the application, would not constitute an offence under the law of Victoria."

Queensland should similarly ensure that the primary purpose of its expungement scheme is to provide redress for gay and bisexual men who were charged or convicted for offences for penetrative intercourse that would not have applied to penis/vagina sex between men and women.

Therefore, the relevant age of consent should be the same as that which applied to heterosexual, non-anal, sex: 17 before 1976, and 16 from that point onwards.

Recommendation 2: The Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017 should apply to charges and convictions for offences where both parties were 17 and over before 1976, and 16 and over from 1976 onwards.

As stated earlier, I support the stated intention of the Queensland Government in developing, and introducing, this legislation: to provide redress for past injustices against members of the LGBTI community.

However, as I have explained above, I believe this admirable objective is imperfectly realised in the Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017 as currently drafted.

That is because it would only achieve justice for *some* of the people adversely impacted by the past criminalisation of male same-sex activity, and *not all*.

If the purpose of the expungement scheme is to provide redress for the homophobic and biphobic application of the criminal law – and I suggest that this is the most appropriate objective – then it should apply to:

- Offences between January 1991 and September 2016 where both people were aged 16 and over
- Offences between 1976 and 1991 where both people were aged 16 and over, and
- Offences before 1976 where both people were aged 17 and over.

In my view, this would be the closest approximation of treating all people – LGBTI and non-LGBTI alike – equally.

It would also ensure that more people, who have been subject to discrimination on the basis of their sexual orientation, and who continue to experience the consequences of this mistreatment, have access to expungement.

As observed by Attorney-General Yvette D'Ath in her second reading speech:

"We know that this is a deeply hurtful and deeply personal issue for many Queenslanders forced to live with the impact of discriminatory laws for far too long. We know that past convictions have meant there are various circumstances in which convictions or charges for criminal offences have been required to be disclosed.

"Forcing the repeated disclosure of those convictions and charges to potential employers, public administrators and others has caused people inconvenience and embarrassment and, worst of all, has forced them to continually relive the trauma associated with their arrest, charge and conviction. This has inhibited people from pursuing employment opportunities, volunteering in their communities and fully participating in civic life right up until today. It hurt those individuals, affected their friends and family, and prevented their full involvement in, and contribution to, our community. In doing so, it not only impacted individuals; it lessened our community more broadly."

I wholeheartedly agree. But I also humbly suggest that these statements don't just apply to 'adults' charged or convicted for offences committed before 19 January 1991 – they also describe the injustice experienced by people who

suffered because of the discriminatory age of consent between January 1991 and September 2016.

Similarly, these sentiments reflect the adverse treatment of gay and bisexual men charged or convicted for penetrative intercourse before January 1991 who would not have been had it involved penis/vagina sex.

Both of these groups deserve justice too. That can and should be delivered through these two amendments to the Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017, changes that strive to fully remove the stain of homophobia and biphobia from Queensland's laws, thereby lessening the awful impact of discrimination on generations of gay and bisexual men.

Thank you for taking this submission into consideration as part of this inquiry. If the Committee would like to clarify any of the above, or to request additional information, please contact me at the details provided.

Sincerely
Alastair Lawrie