ANTI DISCRIMINATION COMMISSION QUEENSLAND

5 June 2017

Acting Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: lacsc@parliament.qld.gov.au

Dear Acting Committee Secretary

CRIMINAL LAW (HISTORICAL HOMOSEXUAL CONVICTIONS EXPUNGEMENT) BILL 2017

Thank you for the opportunity to provide a submission on the Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017, which was introduced in the Queensland Parliament on 11 May 2017 and referred to the Legal Affairs and Community Safety Committee for examination and report.

Background

Human rights principles require that all people are equal before the law and entitled to equal protection of the law, without discrimination. Equality before the law and freedom from discrimination are fundamental rights, and are expressed in Articles 2 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR). The rights and principles under international human rights agreements, including the ICCPR, are the foundation of Australian anti-discrimination legislation, including the Queensland *Anti-Discrimination Act 1991*.

One of the key reasons for passing the *Anti-Discrimination Act* in 1991 is set out in the preamble which states:

> The Parliament considers that … everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination.

Consensual adult male homosexual activity ceased to be criminal offence in Queensland in January 1991. Despite decriminalisation, there has been growing recognition that this reform fails to address the stigma that a historical conviction for consensual homosexual activity carries.

Having a conviction for consensual homosexual activity that is no longer considered a criminal offence can be a great disadvantage where convictions

STATEWIDE
telephone 1300 130 670
teletypewriter 1300 130 680
www.adcq.qld.gov.au
info@adcq.qld.gov.au

BRISBANE
level 20 53 Albert Street
Brisbane Q 4000
City East Post Shop
PO Box 15565
City East Q 4002
FAX 07 3247 0960

CAIRNS
McLeod Chambers
78 Spence St
PO Box 4699
Cairns Q 4870
FAX 07 4039 8609

TOWNSVILLE
PO Box 1566
Townsville Q 4810
FAX 07 4799 7021

ROCKHAMPTON
level 1 James Larcombe Place
209 Bolsover St
PO Box 1390
Rockhampton Q 4700
FAX 07 4938 4459

have to be disclosed, for example, in employment. People who have a conviction for a historical gay sex offence may choose to limit their own career choices or participation in community life, for fear that their conviction may be revealed, and that they may suffer from associated stigma or discrimination.

While Queensland has 'spent convictions' legislation to protect people from unauthorised disclosure of convictions once a certain period of time has elapsed, there are a number of exceptions where disclosure is permitted or required, including when applying for certain jobs or positions.[1]

In 2016, after receiving the report of the Queensland Law Reform Commission (QLRC) into the issue, the Government committed to passing necessary legislation to establish a historical homosexual criminal conviction expungement scheme in Queensland.

The Consultation Bill

The human rights principles of non-discrimination and equality before the law underpin the need for an expungement scheme, and the Commission commends the Attorney-General and the Government for proceeding with legislation to establish such a scheme in Queensland. The Commission is generally supportive of the proposed scheme, and the approach adopted in the Bill.

However, the Commission is concerned that the proposed scheme will not cover criminal convictions since 1991 for consensual anal intercourse with a person between the age of 16 and 18 years. When homosexuality was decriminalised in 1991, the age of consent for anal intercourse was set at 18 years. At the time, the age of consent for non-anal intercourse was 16 years.

One of the general principles that informed the QLRC to its approach in its report was that:

> …convictions for historical gay sex offences should be expunged if the conduct constituting the offence is no longer an offence. In this respect, expungement is a further step in the reform process that began with the legalisation of private homosexual acts between consenting adults by the *Criminal Code and Another Act Amendment Act 1990*.[2]

When considering the offences that should be included in the proposed expungement scheme (the 'eligible offences') the QLRC stated:

> 3.30 Apart from the repealed offences already identified, it does not appear that there were other historical offences in the Criminal Code or otherwise under which homosexual activity between consenting adults in private was prosecuted. However, to provide for the possibility of adding other offences that might later be considered appropriate for inclusion in the scheme, the proposed expungement legislation should provide for other offences,

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[1] This includes, for example, persons applying to be police officers, corrective services officers, justices of the peace, lawyers and (for certain types of sexual and other offences) teachers. See Queensland Law Reform Commission, *Review of expunging of criminal convictions for historical gay sex offences,* Consultation Paper WP No 74 (2016) 9.

[2] Queensland Law Reform Commission, *Expunging criminal convictions for historical gay sex offences,* Report No 74 (2016) i.

> constituted by a person engaging in consensual sexual activity with a person of the same sex, to be made eligible offences.[3]

This recommendation has not been adopted in the Bill. In deciding an application for a Criminal Code male homosexual offence under the proposed scheme, the decision-maker must be satisfied that the other person involved in the conduct was 18 years of age or older at the relevant time, and the conduct would not constitute an offence at the time of the application. In her introductory speech, the Attorney-General explained the departure from the *recommendation as follows:*

> The commencement of the Health and Other Legislation Amendment Act 2016 on 23 September 2016 standardised the age of consent so that, for all forms of sexual intercourses, the age of consent is 16 years. In a departure from the QLRC recommendation, the 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 rationale fails to address the discriminatory impact that the difference in the age of consent laws have had, since 1991, on consensual sexual activity involving people between the ages of 16 and 18 years and their sexual partners, based on their sexuality.

The Commission believes the following matters are relevant to consider when determining the appropriate policy response to this issue:

- The age of consent for sexual intercourse with a female (other than anal intercourse) was reduced from 17 to 16 years in 1976.
- Anal intercourse between consenting adults aged over 18 was decriminalised in 1991.
- The age of consent for consensual anal intercourse was reduced from 18 to 16 years in 2016.
- Compared to other states, Queensland has been slower to take action to reduce the age of consent for anal intercourse.[4]

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[3] Ibid 35.

[4] As at August 2016, the age of consent was 16 years in the Australian Capital Territory, New South Wales, Northern Territory, Victoria, and Western Australia; and 17 years in South Australia and Tasmania. See, respectively, *Crimes Act 1900* (ACT) s 55(2);*Crimes Act 1900* (NSW) s 66C(3); *Criminal Code Act* (NT) s 127(1); *Crimes Act 1958* (Vic) s 45(1); *Criminal Code Act Compilation Act 1913* (WA) s 321(1)–(2); *Criminal Law Consolidation Act 1935* (SA) s 49(3); *Criminal Code Act 1924* (Tas) s 124(1). In Queensland as at August 2016, the age of consent for anal intercourse was 18.

While the Commission does not have access to relevant data, it is very likely that since 1991 more males will have convictions for engaging in consensual same-sex anal intercourse with a male partner aged between 16 and 18 years, than males and females engaging in consensual sexual activity involving anal intercourse where one of the participants is aged between 16 and 18 years.

Not allowing the expungement of post-1991 criminal convictions of persons having anal sex with persons over 16 years of age disproportionally criminalises men who have same-sex sexual relations with other men aged between 16 and 18 years since that date. Arguably, the legislation regulating the age of consent for anal sex between 1991 and 2016 has a much greater impact on men whose sexuality is homosexual, than on men (and women) whose sexuality is heterosexual.

The Commission agrees that it is important to maintain the nexus between the expungement scheme and de-criminalisation in 1991. And while it is important to ensure 'equity between individuals who have been convicted of offences since 1991', the Commission is not convinced that the way to do this is not to expunge any criminal records for anal intercourse involving those aged between 16 and 18 since 1991. Rather, to maintain equity between individuals, the Commission suggests that offences relating to consensual anal intercourse involving any persons over the age of 16 between the years 1991 and 2016 should become an eligible offence (whether involving male or females between the ages of 16 and 18 years.)

The Commission is supportive of other proposals in the Bill, and commends the Government on this proposed legislation.

Yours sincerely

KEVIN COCKS AM
Anti-Discrimination Commissioner Queensland