



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

Protecting Queenslanders' individual rights and liberties since 1967

Watching Them While They're Watching You

Acting Committee Secretary
Legal Affairs and Community Safety Committee
Email: LACSC@parliament.qld.gov.au

Dear Madam,

Criminal Law (Historical Homosexual Convictions Expungement) Bill 2017

Thank for you for the opportunity to make a submission in relation to this Bill.

The QCCL warmly welcomes this initiative by the government which seeks to right an historical injustice. Sexual activity is central to people's lives. Sexual orientation is the core of self-identity. A reasonable person accepting that proposition about himself or herself is required to conclude that it is equally important to those with a different sexual orientation and to accord the same right of sexual expression to all others. In our view, justice dictates the expungement of convictions for consensual homosexual activity.¹

However, we wish to take this opportunity to repeat three ways in which the Bill could be improved.

We prefer the position of the Anti-Discrimination Commissioner of Tasmania that the assessment of claims to have convictions expunged should be conducted by a body removed from the executive government. Those making applications need to have confidence the process will be independent and fair. This can only properly be achieved by a process removed from the government. We say that the process should be managed by the Anti-Discrimination Commission an independent authority. The Commission should act as a registry and delegate the assessment of applications to a panel. That panel could include a senior lawyer, retired Judge or Magistrate, the senior public servant responsible for the administration of the Blue Card program and one other.²

Secondly, we reiterate our preference for the Victorian definition of the relevant offences, rather than the approach taken in the Bill. It is our general position, that the rule of law requires that significant parts of legislation should not be left to regulation.³

¹ See Barry *Justice as Impartiality* Oxford University Press 1995 pp 82-86

² *Treatment of historic criminal records for consensual homosexual sexual activity and related contact* -Final Report April 2015 at page 16

³ Standing Committee for the Scrutiny of Bills, Parliament of Australia, Twelfth Report of 2011, 12 October 2011 at page 502.

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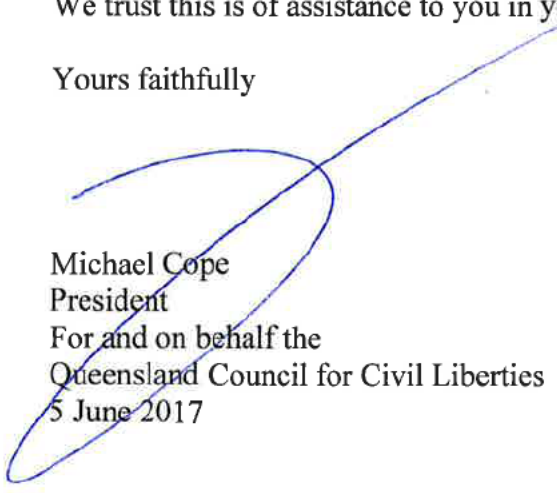
This is particularly so in an area of public policy where subsequent occupants of the relevant office may not be as sympathetic as the current occupant to this program. This may result in unacceptable delays and emotional turmoil for applicants. The flexible definition in the Victorian legislation will avoid such potential problems.

Finally, we are concerned by the exclusion of convictions under sections 336 and 337 of the Criminal Code. This follows the recommendation of the Law Reform Commission, which argued that on their face convictions under those provisions involve a finding of assault that is of nonconsensual sexual conduct. The Commission dismissed the concern of numerous people that some of those convictions maybe as a result of a pragmatic plea of guilty. The Commission firstly says that the mechanism under the legislation is not appropriate for the review of those types of issues. In response to that, we note that the Victorian legislation involves a contrary view. Secondly, the Commission relies upon the principle of finality in the criminal law. In our view that is an entirely misguided application of that principle. The principle of finality in the criminal law is part of the principled asymmetry of the criminal law which favours the accused. Its purpose is to prevent the state from deploying its resources against a person on multiple occasions.

However, in this case, it is clear that the community has decided that a systematic injustice has occurred in the context of these type of offences. The principle of finality must give way to the necessity to ensure the injustice is righted. In fact, this type of legislation is an entirely appropriate extension of that principled asymmetry. The Commission seems to have taken the view that those who assert that the convictions against them under sections 337 and 338 are as a result of a pragmatic plea, need to use the usual process to reopen those convictions. It is our view the Parliament having determined that there is a widespread injustice, the process for reopening such convictions ought to be open to all persons who have suffered or alleged they have suffered that injustice.

We trust this is of assistance to you in your deliberations.

Yours faithfully



Michael Cope
President
For and on behalf the
Queensland Council for Civil Liberties
5 June 2017