29 March 2016

The Secretary

Queensland Law Reform Commission

PO Box 13312

GEORGE STREET POST SHOP QLD 4003

Dear Mrs Manthey

**REVIEW OF EXPUNGING CRIMINAL CONVICTIONS FOR HISTORICAL GAY SEX OFFENCES**

Thank you for the invitation to make a submission to the review and investigation of the issue of expunging criminal convictions for historical gay sex offences. I note the terms of reference require the Queensland Law Reform Commission to recommend how Queensland can expunge criminal convictions for historical gay offences from a person’s criminal history.

Historical gay sex offences are offences relating to adult anal intercourse that were repealed by amendments to the Queensland *Criminal Code* that took effect in January 1991. It was recognised in the preamble to the amending Act that making criminal the private and voluntary sexual acts of adults that affect only the participants and without circumstances of aggravation, is beyond the proper limits, required by democracy, on the right of the State to interfere in the lives of its citizens.

The repeal of the gay sex offences was followed by the passing of the Queensland *Anti-Discrimination Act 1991*, which included a prohibition on discrimination on the basis of lawful sexual activity,[[1]](#footnote-1) in various areas of public life. The prohibition was subsequently broadened to cover a person’s sexuality, defined as meaning heterosexuality, homosexuality and bisexuality.[[2]](#footnote-2)

One of the reasons for enacting the *Anti-Discrimination Act* was 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.[[3]](#footnote-3)

Consistent with that purpose of equality before the law is the expungement of historical gay sex offences so as to restore a person’s position as if they had never been convicted or charged with the relevant offence.

The current options of pardon or spent conviction do not put the person in the position as if they had not been convicted or charged. A pardon only discharges a person form the consequences of the conviction, and a spent conviction still has to be disclosed when applying for a range of jobs, for example, as a teacher.

The principle for spent convictions is based on rehabilitation; it depends on the nature of the offence and the elapsing of sufficient time. Removing the record of a conviction for a repealed gay sex offence should be treated differently to a spent conviction because the conduct that resulted in the conviction is no longer an offence.

Expungement for historical gay sex offences is more appropriate than a pardon or being treated as a spent conviction because the record is potentially discriminatory on one of the attributes that is protected from discrimination (i.e. homosexuality), as opposed to the de-criminalisation of other types of conduct (e.g. prostitution, abortion).

A conviction for doing something that is now not unlawful to do, and which is also a ground for unlawful discrimination, should not form part of an assessment of a person’s character or suitability to hold a particular position role or right.

The consequences of expungement should be broader than for spent convictions: it should be as if there had been no conviction or charge, and no obligation to disclose the conviction or charge. It will be necessary to legislate for a new scheme to expunge the relevant criminal convictions and charges.

Homosexual activity may have been the subject of charges other than those under the *Criminal Code* that were repealed in 1990. With the objective of equality before the law for people with convictions relating to homosexual conduct that is no longer unlawful, it is important that the scheme covers a broad range of offences. Specific offences should be identified, and there should also be a broad definition so that convictions for homosexual conduct that was the subject of more generic offences are captured by the scheme.

Although not specified in the terms of reference, the age of consent for anal intercourse should be part of the discussion around criminality for homosexual activity. Under the *Criminal Code*, the age of consent for anal intercourse is 18 years, whereas the age of consent for non-anal intercourse is 16 years. The differentiation results in discrimination of young male homosexuals. The Anti-Discrimination Commission urges the removal of this discrimination by making one age of consent for any type of intercourse.

Yours sincerely



**KEVIN COCKS AM**

**Anti-Discrimination Commissioner**

1. At the time, lawful sexual activity included gay sex. [↑](#footnote-ref-1)
2. In the 2002 amendments, the term ‘sexuality’ was introduced and ‘lawful sexual activity’ was given a new meaning, namely the status of a lawful sex worker – see *Discrimination Law Amendment Act 2002.* [↑](#footnote-ref-2)
3. Preamble, paragraph 6. [↑](#footnote-ref-3)