

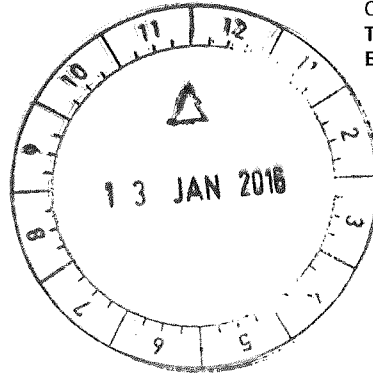


Honourable Yvette D'Ath MP
Attorney-General and Minister for Justice
Minister for Training and Skills

In reply please quote: 565748/1, 3086487

04 JAN 2016

The Honourable Justice David Jackson
Chairperson
Queensland Law Reform Commission
PO Box 13312
BRISBANE QLD 4003



Level 18 State Law Building
50 Ann Street Brisbane
GPO Box 149 Brisbane
Queensland 4001 Australia
Telephone +61 7 3719 7400
Email attorney@ministerial.qld.gov.au

Dear Judge

I ask that the Queensland Law Reform Commission (QLRC), in accordance with its functions under section 10 of the *Law Reform Commission Act 1968* (the Act), conduct a review of the law in the area of expungement of historical gay sex convictions in Queensland. As you would be aware, this referral is an important election commitment that was made by the Queensland Government earlier this year.

I enclose the terms of reference (TORs) for this review. I am advised by the Department of Justice and Attorney-General that the QLRC has been consulted on the TORs.

I look forward to receipt of the QLRC's final report pursuant to the Act advising of its recommendations by 31 August 2016.

I trust this information is of assistance.

Yours sincerely

YVETTE D'ATH MP
Attorney-General and Minister for Justice
Minister for Training and Skills

Enc.

Terms of Reference for the Queensland Law Reform Commission

Expunging historical gay sex convictions

Background

On 7 December 1990, the *Criminal Code and Another Act Amendment Act 1990* (the Act) received assent. The Act amended the Criminal Code to:

- repeal the offence of “Unnatural offences” which prohibited every act of anal intercourse and inserted the offence of “Unlawful anal intercourse” applicable only to persons under 18 years of age;
- repeal the offence of “Attempt to commit unnatural offences” and inserted “Attempt to commit unlawful anal intercourse”;
- repeal the offence of “Indecent practices between males” which prohibited indecency between males in public or private and inserted an offence of “Carnal knowledge of animal”; and
- make consequential amendments to reflect the amendment that “carnal knowledge” included “carnal knowledge by anal intercourse”.

In this respect, Queensland joined a national consensus that had developed throughout all Australian jurisdictions in the 1970s and 1980s recognising that private sexual activity between consenting adults was not an appropriate concern of the criminal justice system.

In recent years a number of Australian jurisdictions have considered whether historical gay sex convictions involving consenting adults should be expunged from a person’s criminal record.

Terms of Reference

1. I, YVETTE MAREE D’ATH, Attorney-General and Minister for Justice and Minister for Training and Skills, refer to the Queensland Law Reform Commission (QLRC), for review and investigation the issue of expunging of criminal convictions for historical gay sex offences pursuant to section 10 of the *Law Reform Commission Act 1968*.

Scope

2. The QLRC is requested to recommend how Queensland can expunge criminal convictions for ‘historical gay sex offences’ from a person’s criminal history.
3. In considering this issue, the QLRC should review and consider whether expungement should extend to charges that did not result in conviction.

4. The QLRC should also consider, but is not limited to, the following matters (and with the necessary changes in the event that the QLRC recommends extending expungement to include charges):
 - (a) which criminal offences can be identified as 'historical gay sex offences' since the formation of the State of Queensland in 1901 (identified offences);
 - (b) how a "conviction" is defined;
 - (c) the likely numbers of persons convicted of identified offences;
 - (d) whether the identified offences applied to both consensual and non-consensual sexual activities;
 - (e) whether the identified offences applied to activities that only involved adults;
 - (f) whether there are factual elements in the reported convictions of the identified offences that are still considered to amount to criminal behaviour under the current law (the QLRC's attention is particularly drawn in this respect to the offences contained in section 227 of the Criminal Code and section 9 of the *Summary Offences Act 2005*);
 - (g) whether there are other records and/or information associated with the criminal conviction for identified offences, who holds such records/information and whether they can be disclosed;
 - (h) the relevant legislation in other jurisdictions; and
 - (i) whether there is a need to change the law or whether there are any other means of addressing the issue under existing laws.
5. If a new expungement scheme is recommended, the QLRC should consider, but is not limited to, the following issues:
 - (a) how the scheme should be administered;
 - (b) the financial implications associated with the scheme;
 - (c) whether the scheme must or should be given a legislative basis;
 - (d) what would be the most appropriate existing entity for administering the scheme or whether a new entity should be established for this purpose;
 - (e) what should be the process for expunging historical gay sex criminal convictions;
 - (f) which historical gay sex criminal offences are appropriate to be the subject of applications for expunging a criminal conviction;
 - (g) whether the scheme should be confined to living applicants;

- (h) how the scheme will ensure that only convictions relating to consensual sexual activity are expunged;
- (i) how will the scheme ensure that only convictions for acts that would not amount to criminal behaviour under the current laws of Queensland are expunged;
- (j) whether there are sufficient historical records available for a determining authority to properly assess an application for the expunging of a historical conviction;
- (k) whether the scheme should be supported by legislation, for example, because of the need to overcome privacy issues in order to allow a determining entity to ask for and receive required information and documentation to verify an application;
- (l) whether there should be a right of appeal or review regarding decisions under the scheme and, if so, to whom such appeal should be made;
- (m) whether there should be a provision for reinstating an expunged conviction if it was later determined that the expunging of the conviction occurred as a result of fraud; and
- (n) whether an offence should be created to criminalise the unlawful disclosure of, or the improper obtaining of, expunged conviction and other relevant information.

Consultation

6. The review is to include consultation with:

- (a) legal stakeholders (including, but not limited to, the Queensland Law Society, Bar Association of Queensland, Queensland Council for Civil Liberties and Queensland Association of Independent Legal Services);
- (b) the Lesbian, Gay, Bisexual, Transgender and Intersex community and groups;
- (c) human rights groups and organisations;
- (d) relevant government departments and agencies;
- (e) the public generally; and
- (f) any other body that the QLRC considers relevant having regard to the issues relating to the referral.

Timeframe

The QLRC is to provide a report on the outcomes of the review to the Attorney-General and Minister for Justice and Minister for Training and Skills by **31 August 2016.**