

24 February 2025

Hon Ruth Forrest
Committee Chair
Joint Sessional Committee on Gender and Equality's
Expungement of Historical Offences Amendment Bill 2024 Inquiry
Parliament of Tasmania

Via Email: genderandequality@parliament.tas.gov.au

Dear Committee Chair,

Re: Quantification of compensation following expungement of historic offences

Thank you for the opportunity to make a submission to the Committee regarding the payment of compensation to those charged or convicted of offences relating to same-sex sexual conduct or cross dressing, from the time when these matters were criminalised.

I am a Professor in the Monash University Law Faculty and part of the Castan Centre for Human Rights Law. I specialise in international human rights law, with a particular focus on the rights of LGBTIQ+ people. I have authored and edited many books and journal articles in this area, including the three-volume collection [*Worldwide Perspectives on Lesbians, Gays and Bisexuals*](#), published by Bloomsbury, in 2021.

Set out below are my responses to the three specific questions posed by the Committee.

1. The determination of a specified one-off payment as redress that recognises the harm experienced by those who were charged or charged and convicted of historic offences related to homosexuality and cross-dressing as proposed under the Bill and what that amount could/should be.

Ideally, compensation should be assessed on an individual basis, according to the harm a person has experienced as a result of the charge or conviction they were subjected to. I understand that the Tasmanian Government favours a fixed, automatic payment of redress following expungement, rather than a scheme involving an assessment of the harm suffered by each individual. Given that background, it is vital that the amount of compensation err on the side of over-compensating, rather than under-compensating. This is because a failure to

recognise the severity of the harm suffered, risks exacerbating the injury already experienced by the individual. Redress of a mere \$5,000, would constitute under-compensation and potentially do more harm than good, because it fails to recognise the severe impact that an individual's encounter with the criminal justice system has, and that the ordeal of being charged and/or convicted has repercussions that last a lifetime. The consequences of a having a criminal record for engaging in conduct that should never have been criminalised are many, and include,

1. Inability to secure employment or change jobs because of the risk of prospective employers undertaking criminal record checks and exposing the conviction;
2. Difficulties securing housing due to the lingering effects of the criminal record;
3. Inability to undertake certain types of volunteer work because of the prospect of not being able to pass the mandatory checks e.g., working with children;
4. Stigma, shame, humiliation and embarrassment;
5. Discrimination and reputational damage;
6. Poor mental health, including post-traumatic stress disorder, anxiety and depression;
7. Self-isolation because of a fear that others will find out that you have a criminal record; and
8. Relationship and trust issues that can lead to strained intimate relationships and difficulties with family members.

In addition, the immediate harmful impacts of being convicted of these crimes, include, having to pay a fine, being fired from their job, being ostracised from family and friends and being evicted from their home. Indeed, for some individuals the experience of being charged and/or convicted was so traumatic that they felt the need to move to another state.

Thus, individuals who were convicted of the "crimes" of cross-dressing and/or engaging in same-sex sexual conduct suffered both economic and non-economic loss, that is, loss of income and earning potential, as well as, intangible harm from psychological pain and poor mental health and well-being.

I have had the opportunity to review the submission made by Equality Tasmania and note that it sets out in detail the compensation schemes in other jurisdictions, particularly Europe and Canada, for homosexuality related "crimes". I endorse their research and submission regarding how these comparators can be used by the Committee as a guide to potential upper and lower ranges of redress.

My submission regarding the precise quantum of redress is set out in section 4 below, following my analysis of the process and factors that should be considered in setting a fixed amount that is payable to all persons who were charged or convicted under these laws.

2. The considerations required when determining such a suitable amount

The determination of a suitable amount should be done with respect for the human rights of the individual at the fore. It has been observed that when it comes to wrongful convictions,

The remedies are of particular importance. They not only aim to compensate the victim for the damage that occurred, but also have a wider impact on shaping the overall perception of how individuals are treated by the state and how the state responds to its malfunctioning. This in turn is crucial for building confidence in state policies and actions.¹

When determining the quantum of compensation to be paid to persons who have lived with having been charged or convicted of cross dressing or engaging in consensual same-sex sexual conduct, it is important to note that,

Beyond that a conviction was wrongful, it is difficult to identify the factors that need to be present for a wrongfully convicted person to be compensated, nor how such compensation will be quantified.²

There are, however, some core principles that should be applied. First, the sum should represent a genuine recognition of the harm suffered. It should not be a tokenistic gesture, which risks adding insult to injury. It has been observed that ‘awarding inadequate compensation undermines the effectiveness and legitimacy of the remedy for wrongfully convicted persons’.³ Thus, the redress provided by the Tasmanian Government should be set at an amount that allows those who were subjected to these egregious laws, to feel a sense of justice and closure.

Guidance on the quantum of compensation payable, can be gleaned from how courts assess general damages payable to persons who have suffered a tortious wrong. Such damages for non-economic loss are calculated according to the severity and impact on quality of life, the pain and suffering they have endured, the loss of enjoyment of life and emotional distress they have experienced. As set out in the response to question 1 above, there are numerous factors that should be considered when calculating the amount of redress payable. Most importantly, there must be recognition of economic, as well as, non-economic loss and damage.

Guidance can also be gained from looking at compensation that has been paid for general wrongful convictions. It has been noted that, ‘the state has a moral and legal obligation to provide compensation for harm, loss or injury that the individual has incurred as a result of the wrongful conviction.’⁴ An analysis of the reasons given for payments to individuals

¹ Wojciech Jasiński and Karolina Kremens, ‘In quest of the optimum model for compensating wrongful convictions’ Chapter 11 in Wojciech Jasiński & Karolina Kremens (eds) *Compensation for Wrongful Convictions A Comparative Perspective* (2023) Taylor & Francis, 200. Accessed at: <https://library.oapen.org/handle/20.500.12657/62228>.

² Adrian Hoel, ‘Compensation for wrongful conviction’ (2008) 356 *Trends & Issues in Crime and Criminal Justice*, 3. Accessed at: <https://www.aic.gov.au/sites/default/files/2020-05/tandi356.pdf>.

³ Above n2 at 222.

⁴ Rachel Dioso-Villa ‘“Out of Grace”: Inequity in post-exoneration remedies for wrongful conviction’ (2014) 37(1) *UNSWLJ* 349, 366.

wrongfully convicted of crimes, include ‘to express regret’ and ‘to correct mistakes of the State’.⁵ These rationales are applicable to the state of Tasmania when determining the quantum of redress to persons charged with, or convicted of, offences relating to cross-dressing or consensual same-sex sexual conduct. That is, the amount should reflect the regret that the state has for these past wrongs, and its commitment to correcting this historic mistake.

The Innocence Project in the US has compiled a table setting out quantum of compensation payable to persons wrongfully convicted of crimes that resulted in them spending time in jail. [This table](#) may be a useful resource for the Committee to consider as a comparator.

Ultimately, charges and convictions arising from the criminalisation of consensual adult behaviour, requires a nuanced and tailored approach, given the sensitive nature of these cases and the lack of an agreed standardised approach.

3. The most appropriate process to determine such a payment amount

The most appropriate process for determining the amount of redress is for each individual to have their situation assessed and the quantum calculated according to their specific circumstances. However, I understand that the number of potential claimants in Tasmania is likely to be small and therefore may not justify the expenditure required to set up a system for individual assessment. In these circumstances, the payment of a fixed amount can be justified, provided that the quantum is not tokenistic, and has been calculated in a way that genuinely recognises the harm inflicted by Tasmania’s historical laws targeting men who engaged in consensual same-sex sexual conduct or cross-dressing.

The payment of a fixed amount, rather than calculating the quantum of redress for each individual, can also be justified on the basis that it will remove the element of discretion which research has found can result in inequitable disparities in terms of the quantum of payments made to persons wrongfully convicted of crimes.⁶

4. Conclusion

Based on all the information and analysis outlined above, it is my opinion that the Committee should recommend that Parliament enact laws providing for the following levels of redress:

1. For persons who were charged but not convicted of offences relating to cross-dressing and/or consensual same-sex sexual conduct and did not serve time in jail: \$15,000
2. For persons who were convicted of offences relating to cross-dressing and/or consensual same-sex sexual conduct and did not serve any time in jail: \$45,000

⁵ Ibid, 358.

⁶ Ibid.

3. For persons who were convicted of offences relating to cross-dressing and/or consensual same-sex sexual conduct and served time in jail or were subjected to other forms of punishment, e.g. conversion practices: \$75,000.

These amounts appropriately reflect the likely harm that individuals in each of the three categories have suffered. They are intended to be a one-off payment to eligible individuals, not a payment per charge or conviction.

Please do not hesitate to contact me if I can be of further assistance to the Committee.

Yours faithfully,



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