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Secretary

Expungement of Historical Offences Amendment Bill 2024 Inquiry

Gender and Equality Committee

Parliament House, Hobart TAS 7000

Via: genderandequality@parliament.tas.gov.au

Dear Committee members,

Thank you for the opportunity to make a submission in respect of the Greens' amendments to the *Expungement of Historical Offences Amendment Bill 2024*.

Background

As Members would be aware, the bill implements several recommendations of the *Independent Review of Expungement of Historical Offences Act 2017*. The government has committed to 12 out of 13 of the recommendations made by the review.

The recommendation they did not support was for compensation payments.

The government's rationale for not supporting compensation is outlined in the Minister's second reading speech. The rationale is, in our view, contradictory and misleading.

The government describes the recommendation as inherently discriminatory, due to being a 'two tiered' system. We are of the view that this is a flawed assessment. In our view, most avenues of compensation vary according to the circumstances, and this is not inherently discriminatory.

Furthermore, the opposition to a two-tiered system does not explain an outright opposition to compensation.

We would further note that the amendment the government eventually proposed offers differing levels of compensation depending on whether a conviction or charge is expunged.

The Greens suggest it is safe to assume this argument was never offered in good faith or sincerity.

The government also describes the compensation arrangements proposed by the review as 'complex' and pointed to unjustifiable administrative costs.

The review recommends that once a charge or conviction is expunged under the existing process, a payment automatically be made to that person. This payment is proposed to be one amount if a charge or conviction is recorded on a criminal record, and another if it is not recorded.

This is, objectively, one of the least complex compensation arrangements that could exist.

It is instructive that the government has also labelled our proposed amendments on compensation arrangements as 'complex' and argued that administrative costs would be excessive.

In our view the label of complex is one of the tools they are using to reject compensation, when the reality is that the government has an ideological opposition to compensation in the proposed circumstances.

While the government has now put forward their own amendment, it is telling that they have only come to the table after amendments providing for compensation have passed, and that they have chosen the lowest compensation amount offered in any jurisdiction.

The government, instead, has suggested there is nothing preventing a person from making an application for an ex-gratia payment through the regular ex-gratia system.

Our view is that there are substantial barriers. Most people would not be aware that this avenue exists. It is also entirely discretionary, and the actions of the government do not make us confident that they would be willing to provide ex gratia payments.

The government's attitude is made very clear in the second reading speech for this bill, which states "the redress provided is in the form of expungement of the charge".

We do not believe this meets the threshold for redress. Expungement is a recognition that these charges and convictions should not have occurred, but it does not provide redress for the fact that they did.

The Greens amendments

The Greens amendments provide for an independent assessment of an appropriate method for calculating compensation for persons who have had charges or convictions expunged.

The process in our amendment comes in two parts, the first is the process for a compensation amount or amounts to be determined, the second is for the payment of compensation.

On passage of the bill, the Premier would be required to, within 3 months, appoint an independent assessor to determine how compensation should be determined.

This assessment is subject to public consultation and must be completed within 6 months. Once completed, the proposal is brought before Parliament in the form of a *draft* order, which is a disallowable instrument.

If the order is approved, a compensation order is tabled within 30 days and takes immediate effect. If the order is rejected, then a further independent assessment takes place.

For clarity, the compensation order is a single order providing for the rules under which all participants compensation is determined, not separate orders for each individual to determine their individual compensation. Unless the order is rejected by Parliament, the process to produce a compensation order will only occur once.

Once the compensation order is in place, any person who has a charge or conviction expunged is compensated in accordance with the compensation order.

The rationale underpinning our amendment is that we are not in a position to determine an appropriate compensation value, and we do not trust the government to come up with an appropriate number themselves.

Our lack of trust in the government has been justified by their insulting proposal to offer the lowest compensation amount in the world.

Our amendments provide for an independent assessment of what appropriate compensation would be, with Parliament rather than the government making the final decision.

Further details regarding our amendments can be found in Appendices 1 and 2. Appendix 1 provides clause notes for our amendments to the *Expungement of Historical Offences Amendment Bill 2024* (clauses 9 and 10). Appendix 2 provides a flowchart of the process for determining compensation amounts.

Government response to Greens Amendments

The government have, as they did with the independent review, portrayed our amendments as complex and costly. We certainly dispute this, and note they have not made much of a case for these claims.

Far from being complex, we believe this to be a reasonably straightforward process. A person is appointed to determine how compensation should be determined. This assessment is subject to public consultation and must be

completed within 6 months. Once completed, the proposal is brought before Parliament, which can either accept or refuse it.

It is true that, if refused, another assessment is conducted. However, we are of the view that if the Parliament supports an independent assessment, they are likely to accept the recommendation of the assessment. Disallowance is a very rare occurrence. This provision has still been included, however, to retain the autonomy of Parliament.

To our mind this is not complex.

There would likely be some costs associated with this. However, as an assessment that cannot take more than 6 months, we consider these costs reasonable. We believe these costs are comparable to statutory reviews – such as the statutory review that resulted in this amendment bill.

The Parliament regularly amends legislation to add statutory reviews, and the cost of such a review rarely deters the Parliament from these amendments. We would also note that Parliamentary inquiries, including this one, do not come without cost.

This is a once-off cost to determine compensation amounts, it is not an ongoing administrative cost.

Once a compensation order is in place, after an expungement is approved a person is compensated in accordance with the order. The most complex element of this is the existing expungement process, which is not impacted by our amendment. After that process is completed, a payment to the person must be made.

Given the expected low volume of expungement, we would be very surprised if any additional departmental finance staff would need to be recruited to facilitate these payments. As such, we do not consider ongoing administrative costs to be high.

Our amendments also provide for a range of other circumstances; overpayment, underpayment, compensation having already been paid, a reversal of expungement, etc.

Most of these provisions are unlikely to be necessary and have been included on a 'better to have it and not need it, than need it and not have it' basis. In our opinion these provisions may increase the length of the amendment, but do not have an appreciable impact on the overall complexity of the compensation process.

We are not in a position to estimate the overall price tag, just as any other non-government Member is not in a position to estimate the price tag of a statutory review amendment they propose.

We do, however, consider the comparisons and assumptions we have made fair and reasonable, and suggest the burden is on the government to provide compelling evidence of excessive costs.

The government has also taken issue with the term 'compensation'. We have no particular attachment to this phrase, nonetheless we are of the view that there is no issue here.

Section 22, as amended by our amendments, make it clear that nobody is entitled to compensation beyond what is provided for in our very specific amendments.

If there was truly any problems created by the use of this language, the government would have no issue pointing to concrete examples, and would not need to resort to innuendo and nebulous criticism.

A note on direct legislation of compensation amounts

The Greens do not believe that the Parliament should be directly setting the compensation amount. Our support for any amendment brought forward by a Member to achieve this would be conditional on that Member attracting stakeholder support for their amendment.

In forming our amendments, we undertook stakeholder engagement. Our understanding is that the approach we present in our amendment remains the preference of stakeholders.

What we can say, however, is that we consider the government's approach of finding the lowest example of compensation they can, and then offering less than that, is offensive.

If the Committee determines they would prefer the legislation to directly set a compensation amount, we urge the Committee to take the opposite approach of the government, err on the side of compassion, and aim to exceed the highest current example of compensation being offered.

The Greens do not profess to know what a just level of compensation is. Thus our preference is for an expert, independent process to make that recommendation, as provided for in our amendments.

Yours sincerely,



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Greens Leader and LGBTIQA+ spokesperson
Member for Franklin

APPENDIX 1 - CLAUSE NOTES

Expungement of Historic Offences Amendment Bill 2024 ***Clauses 9 and 10 (Greens Amendments)***

Clause 9: Part 3A inserted

The new part sets out a process for compensation to be paid to persons who have had their charges expunged and provides a process for Parliament to approve or disallow an independently recommended methodology for compensation.

19A. Interpretation of this Part

Provides definitions for the new Part 3A.

19B. Independent assessor

Subsection (1) provides that the Premier *must* appoint an *independent assessor* within 3 months of the commencement of Part 3A, or within 3 months of a *compensation order* being disallowed by Parliament.

Subsection (2) allows for the Premier, at their own discretion, to appoint an independent assessor at another time, if the Premier considers it necessary to ensure that appropriate compensation is paid under the Act.

Subsection (3) requires the Premier to be satisfied that a person has relevant knowledge, skills and experience before appointing them as an *independent assessor*.

Subsection (4) ensures that the *independent assessor* has the powers that they need in order to conduct an *assessment*, and subsection (5) ensures that appropriate resources are made available for the *independent assessor* to conduct their *assessment*.

19C. Submissions in relation to compensation

Section 19C sets out standard provisions for public consultation.

Subsection (1) requires an appointed *independent assessor* to cause a notice to be published inviting public submissions. Subsection (2) requires this notice to “be published in a newspaper circulating generally in the State”, and requires the consultation period to be for at least 30 days.

Subsection (3) requires the *independent assessor* to consider any submissions made before making their report.

19D. Determination of compensation payable

Subsection (1) requires the *independent assessor* to make a recommendation to the premier for a method to calculate compensation within 6 months of their appointment.

Subsection (2) sets out that the recommendation of the *independent assessor* may vary according to factors or circumstances and may include indexation.

19E. Compensation order

Subsections (1) and (2) require the Premier to prepare a *draft* order to enact the recommendation of the *independent assessor*.

Subsection (3) requires this draft order to be tabled in each House of Parliament.

Subsection (4) stipulates that if a *draft* order is approved by both Houses of Parliament, the Premier must make an order on the same terms as the *draft* order.

The process provides for a *draft* order first because an order, once tabled in Parliament, has effect until such time as it is disallowed. This would mean that, without a process starting with a *draft* order, there would be the potential for a person to be paid a particular amount that ended up being disallowed by Parliament, with future persons being paid a differing amount.

A similar example can be found in the form of draft proclamations under section 18 of the *Nature Conservation Act 2002*.

Subsection (5) sets out that a *draft* order is approved when a motion approving it is passed by both Houses, if no disapproval (disallowance) motion is tabled within 5 sittings days in either House, or, if such a motion has been tabled, and 5 sitting days from the date of the tabling of the *draft* motion, if the motion is withdrawn, negated, or a further five sitting days have passed without the motion being dealt with.

Subsection (6) sets out that the compensation order is a statutory rule, but not an 'instrument of legislative character for the purposes of the *Subordinate Legislation Act 1992*'. This is to ensure that the order is not automatically repealed after 10 years.

Subsection (7) sets out that a compensation order can only be amended or revoked if an independent assessor makes a recommendation to that effect.

19F. Compensation for charges expunged before initial compensation order

Subsection (1) provides that the section applies to persons who have their charge expunged before an initial compensation order is made. This is to ensure that a person is still entitled to compensation if the expungement occurs prior to the initial compensation order being put in place.

Subsection (2) sets out that, after the initial compensation order is made, the Secretary must as soon as practicable (but no longer than 3 months) notify persons who have had their charges expunged that they are entitled to compensation.

Subsection (3) provides that, after notification, if the person confirms their compensation, the compensation must be paid within 3 months. Subsection (4) outlines that the compensation amount must be in accordance with the compensation order.

19G. Compensation for charges expunged after initial compensation order

Subsection (1) sets out that this section applies to expungements that occur after the compensation order is in place. Subsection (2) sets out that compensation must be paid as soon as practicable (but no longer than 3 months). Subsection (4) outlines that the compensation amount must be in accordance with the compensation order in effect at the time.

Subsection (3) provides that compensation need not be paid if a person indicates in writing that they do not wish for compensation to be paid.

19H. Ex gratia payments

This section sets out that if an ex gratia payment has been made in relation to a charge that has been expunged, the amount of this payment is to be deduced from a person's compensation.

As far as we are aware, such an ex gratia payment has not been made. However, as the government has indicated this is a *possible* approach, we considered it prudent to be considered in our amendment.

19I. Cessation of expungement

Subsection (1) provides the secretary with the power to reclaim compensation paid for an expungement, if the expungement is later overturned. Subsection (2) sets out that the compensation to be repaid is a debt payable to the Crown.

19J. Incorrect compensation paid

This section provides for remedying incorrect payments of compensation. Subsection (1) provides definitions for this section.

Subsection (2) requires the secretary to vary a compensation amount, if that compensation amount with incorrect, and to notify the affected person of the variation.

Subsection (3) allows for recovery of overpayments, and subsection (4) requires the payment of any underpayment.

19K. Payment of outstanding amounts

Subsection (1) allows for the secretary to approve instalment payments for debts owed under this Part (under 19J or 19I).

Subsection (2) allows for the secretary to write of debt owed under this Part if recovery of the debt is impracticable or unwarranted.

Clause 10: Section 22 amended (No compensation payable other than under this Act)

Section 22 of the Principal Act outlines that a person is not entitled to compensation in respect of an expunged charge. This amendment provides a carve out for the new Part 3A to ensure that the compensation payable under the new Part is not contrary to the Act.

APPENDIX 2 – PROCESS FOR DETERMINING COMPENSATION AMOUNTS

