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Re: submission on the Expungement of Historical Offences Amendment
Bill 2023

To Whom It May Concern,

Please find below the joint Equality Tasmania's submission to the
Disability Inclusion Bill consultation. Please let us know if you have any
questions or more information is required.

Best wishes,
Rodney Croome

Equality Tasmania

Equality Tasmania (formerly the Tasmanian Gay and Lesbian Rights Group) is Tasmania's leading advocacy group for LGBTIQ+ people and has been since it was formed thirty five years ago. In that time we have advocated successfully for a range of reforms, including the decriminalisation of homosexuality, Tasmania's strong Anti-Discrimination Act, Tasmania's ground-breaking relationship laws, Tasmania's law allowing for the expungement of historic criminal records, improved policies in schools, health and policing, and marriage equality. We regularly consult with the Tasmanian LGBTIQ+ community to determine our campaign priorities and to inform submissions like this one.

The Expungement of Historical Offences Amendment Bill 2023

Equality Tasmania welcomes the Government's Bill. It demonstrates a commitment to ensuring legislation that impacts the LGBTIQ+ community is regularly reviewed and updated.

We also welcome the Government's decision to implement almost all of the recommendations of the Independent Review of the Expungement of Historical Records Act 2017 ("the independent review").

We support the Government's decision to:

- Expand the expungement scheme to include related offices (independent review recommendation #1)
- Further support a victim-centred approach (#5)
- Support effective record disposal (#7)
- Ensure confidentiality of records related to an assessment for expungement (#9)
- Improving confidentiality for other parties (#10)

Our recommendations over and above what the Government already proposes are limited to three areas:

- Expansion of the expungement scheme to more offences and records
- Promotion of the scheme
- A redress scheme for successful applicants

Recommendations:

1. Expansion of the offences and records capable of expungement to those under which LGBTIQ+ people were disproportionately targeted other than laws against homosexuality and cross-dressing
2. Appointment of an expert panel to advise on these offences and records and to assess applications
3. Greater promotion of the expungement scheme
4. An audit of actions already taken in this regard
5. Automatic financial redress for all successful expungement applicants

Expansion of the expungement scheme

We welcome the Government's decision to expand expungement to records of offences that would not have occurred but for police action under our former laws against homosexuality and cross-dressing.

We also seek an expansion of the offences and records capable of expungement to those under which LGBTIQ+ people were targeted other than laws against homosexuality and cross-dressing. We know from anecdotal evidence that offences not specifically aimed at the LGBTIQ+ community were enforced disproportionately against LGBTIQ+ people. We also know there was disproportionate surveillance of LGBTIQ+ individuals and community.

The offences and records we are referring to would include police records regarding moving people on, loitering, intoxication, disorderly houses, public annoyance, public decency, the issuing of warnings, police surveillance of individuals and groups.

We further believe police records related to protests that would not have occurred but for Tasmania's former laws against homosexuality and cross-dressing should also be capable of expungement. An obvious example are records of arrests and charges for trespass against defenders of the Tasmanian Gay Law Reform Group's stall at Salamanca Market at the end of 1988.

For the purposes of determining what offences were disproportionately applied, and what disproportionate surveillance occurred, we propose the formation of an expert advisory panel.

Recommendations:

- *Expansion of the offences and records capable of expungement to those under which LGBTIQ+ people were disproportionately targeted other than laws against homosexuality and cross-dressing*
- *Appointment of an expert panel to advise on these offences and records and to assess applications*

Promotion of the expungement scheme

We call for significantly more promotion of the expungement scheme to ensure all those who were arrested under Tasmania's former laws, or disproportionately targeted under other laws, can take advantage of the scheme.

But before that occurs an audit should be conducted of actions already taken.

Following the enactment of the current expungement law a meeting was held between the Department of Justice and representatives of the LGBTIQ+ community to develop a plan for promoting the new scheme.

There was no follow-up to that meeting and community representatives are not aware which, if any, of their recommendations were acted on.

An audit of actions taken thus far will inform what further actions should be taken.

Recommendations:

- *Greater promotion of the expungement scheme*
- *An audit of actions already taken in this regard*

Unfair and unjust: the case for redress

Equality Tasmania is disappointed that the Government has not included a redress scheme in its draft Bill. Such a scheme was recommended to the independent review by Equality Tasmania and Civil Liberties Australia. That recommendation was accepted by the independent review and included in their report as their thirteenth recommendation. Below, we lay out our case for a redress scheme, respond to objections to it and seek more information from government about its deliberations.

The recommendation of the independent review

The independent review proposed a one-off ex-gratia payment. The payment would be automatic for those who have their historical records expunged. There would be a larger payment for those who had a criminal record expunged and a smaller payment for those who have a charge expunged that did not appear on their record.

A further point not dealt with by the review is redress for close family members if the person convicted is dead. Given the expungement legislation allows close family members to apply for expungement, it seems only fair they should be eligible for redress as well.

Terminology

In submissions to the independent review, Equality Tasmania and Civil Liberties Australia refer to "compensation". In its recommendation the independent review uses two terms, "compensation" and "redress". We recommend the term "redress".

"Compensation" denotes making up for past harm. "Redress" covers that meaning. But it has the additional connotation of rectifying a moral injustice. During Parliamentary debate on the 2016 expungement legislation state leaders noted repeatedly that Tasmania's former anti-gay

and anti-cross-dressing laws were “unfair and unjust”. The terms we use should clearly encapsulate this fact.

The case for redress

Trauma

Charges and convictions under our former laws led to gaol, fines, court-ordered aversion practices, involuntary outing, loss of jobs, loss of family, loss of relationships, exile from the state and suicide. Victims endured humiliation, shame, stigma, discrimination, pain and trauma.

Never rightly a crime

When the Tasmanian Government passed the original expungement legislation in 2016, Premier Will Hodgman apologised to victims of our former laws and said homosexuality and cross-dressing should never have been illegal.

The last state

Tasmania was the last state to decriminalise homosexuality and the only state to previously criminalise cross-dressing. This has left a legacy of stigma and discrimination that is more recent and deeper than in the other states.

The purpose of the legislation

The stated goal of the legislation was to “remove the ongoing disadvantage and stigma that results from having a criminal record”. It was enacted because, “despite the repeal of homosexual offences, some men continue to have criminal records that affect various aspects of their lives, such as their work, volunteering and travelling”. The stigma of conviction and the damage of subsequent discrimination could be rectified more fully if the state were to provide financial compensation to those affected.

Compensation would obviously help make good the financial losses of those who suffered conviction, stigma and discrimination. On top of this, it would show, more compellingly than anything else, that the state takes conviction-related stigma and discrimination against LGBTIQ people very seriously, that this stigma and discrimination have no place in today’s society, and that they must never be permitted again. Obviously, it would also help encourage those who would benefit from the expungement legislation to avail themselves of its remedies.

The moral imperative

On top of making existing law more effective, compensation is a self-justifying ethical imperative. The expungement legislation was enacted because “laws criminalising consensual homosexual activity and cross-dressing were unfair and unjust”. This injustice gives its perpetrator, the state, a moral obligation to ensure justice is restored.

Simply hiding a criminal record from view does not fulfil this obligation. Given the dreadful impact of the old laws and conviction under those laws, as acknowledged by the state itself, the state has a moral obligation to ensure those who were convicted are now no more impaired than if conviction had not occurred. This can only be achieved if redress is available.

Human rights

According to articles 9 and 14 of the International Covenant on Civil and Political Rights anyone unlawfully arrested, detained or convicted is entitled to compensation¹. Article 14 outlines criteria for “unlawful”:

“...when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.”

It can be argued that people charged and convicted under Tasmania’s former laws were not, by definition, unlawfully treated and do not fit within the set of criteria above.

However, given the Government’s view that Tasmania’s laws were manifestly unjust and should never have existed, it can be argued there is at least the same moral imperative for redress. Unjust treatment is not less serious than unlawful treatment. There is also no reason to believe the criteria in article 14 are exhaustive.

The fact that international human rights law provides a useful precedent for redress is clearest in the Yogyakarta Principles which lay out how international human rights law protects the human rights of LGBTIQ+ people.

These Principles refer to the need for legal procedures that ensure victims of human rights violations on the basis of sexual orientation or gender identity have access to redress².

Comparable redress schemes locally

There are a number of Tasmanian compensation and redress schemes which provide precedents for a redress scheme for historical gay and trans convictions. They include:

- The Stolen Generation redress scheme
- Redress for those abused in state care

We are not suggesting that the circumstances of people who obtain redress under these schemes is comparable to that of LGBTIQ+ charged or convicted under Tasmania's former laws. Every act inflicting pain and trauma is different. What we are saying is that the fundamental principle underlying these existing redress schemes is that the state takes responsibility for the harm and injustice its policies or negligence inflicted in the past. This fundamental principle applies equally to the harm and injustice inflicted by the state on those charged or convicted under our former laws against homosexuality and cross-dressing.

The fact redress is available to other groups mistreated by the state, but not those who were mistreated under Tasmania's former anti-gay and cross-dressing laws, sends the message that anti-LGBTIQ+ mistreatment was (and remains) not as serious. The only way to rectify this negative message is to provide redress for those who successfully expunge their historic criminal record.

Comparable schemes globally

The German Government makes redress available for people convicted under that country's former laws against homosexuality. Those convicted are entitled to compensation of €3000 per annulled conviction and €1500 for every year spent in prison³.

No successful applications

The fact there have been no successful applications under Tasmania's existing expungement scheme also has a bearing on the need for redress. It means:

- There are no previous expungements to revisit
- The number of ex-gratia payments will be low
- Redress may encourage more applications

Responding to objections to redress

A number of objections have been made to the proposal for an expungement redress scheme. Below, we state and refute them.

Objection:

No other state has provided redress for expungement of historic criminal records.

Response:

- Tasmania was the last state to decriminalise homosexuality and the only state to previously criminalise cross-dressing. This has left a legacy of stigma and discrimination that is more recent and deeper than other states, both for those charged and convicted, and others. This history means the Tasmanian Government has a greater moral responsibility than other states to act.
- Tasmania has led on LGBTIQ+ law reform and should lead on this reform as well.
- Redress is a moral obligation other states and the Commonwealth will at some stage embrace. Tasmania is in the best position to lead on this reform and thereby encourage the other states and the Commonwealth to act more quickly.

Objection:

The Government can already make ex gratia payments upon application.

Response:

- Those who successfully apply to expunge their historical record should not have to go through a second application process to apply for redress.
- Redress should not depend on the disposition of the Government-of-the-day.
- Redress should not be a gift from the Government, but a right of victims of Government cruelty and negligence.
- If the existing process was sufficient there would not be redress schemes for the stolen generation and for victims of abuse in state care.

Questions for the Government regarding redress

We are disappointed the Government has given no reason for excluding redress and for ignoring the redress recommendation of the independent review. The LGBTIQ+ community is left asking why redress has been omitted. The Government's reasons should be made public so they can be responded to.

In particular, the community deserves to know if the Government has done any modelling on what a redress scheme would look like and what the cost of redress might be.

It is also important for the Government to

- reveal whether it has conducted an analysis of why there have been no successful applications for expungement

- state whether it has a commitment to increasing the numbers of successful applications, and
- explain why, if it has this commitment, it doesn't support a redress scheme

Recommendation:

- *Automatic financial redress for all successful expungement applicants*

[End]

¹ Article 9:

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation

Article 14:

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

² The International Commission of Jurists and the International Service for Human Rights, Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity (2006):

http://yogyakartaprinciples.org/wpcontent/uploads/2016/08/principles_en.pdf (accessed 20 September 2023).

³ A useful overview of the law in Germany and the process for obtaining redress is contained in a report prepared for the Ireland Department of Justice, Working Group to Examine the Disregard of Convictions for Certain Qualifying Offences Related to Consensual Sexual Activity between Men: Final Report (June 2023) at Appendix 6. As found at <https://www.gov.ie/en/publication/50699-final-reportof-the-working-group-to-examine-the-disregard-of-convictions-related-to-consensual-sexual-activitybetween-men/> (accessed 20 September 2023).