

Deputy Premier
Treasurer
Attorney-General
Minister for Justice

Level 10, 15 Murray Street, HOBART TAS 7000
GPO Box 123 HOBART TAS 7001
Phone 03 6165 7678
Email Barnett.correspondence@dpac.tas.gov.au



20 JAN 2025

Fiona Murphy
Secretary
Joint Sessional Committee on Gender and Equality
genderandequality@parliament.tas.gov.au

Dear Ms Murphy

Thank you for your invitation to make a submission to the Expungement of Historical Offences Amendment Bill 2024 Inquiry. I am providing this submission on behalf of the Tasmanian Government.

Independent Review of the *Expungement of Historical Offences Act 2017*

The *Expungement of Historical Offences Act 2017* (the Act) was enacted in recognition that the past criminalisation of consensual homosexual conduct resulted in people experiencing discrimination and disadvantage. The Act, commenced on 9 April 2018, established a scheme to enable the expungement of charges and convictions relating to certain homosexual and cross-dressing offences.

In 2020, an independent statutory review of the Act's operation was undertaken by Ms Melanie Bartlett and Ms Taya Ketelaar-Jones in accordance with the requirements of section 32 of the Act. The reviewers' final report, the *Independent Review of Expungement of Historical Offences Act 2017* (the Independent Review), was tabled in both houses of Parliament in November 2020.

The Independent Review outlined 13 recommendations, and on 1 August 2024 the Government introduced the Expungement of Historical Offences Amendment Bill 2024 (the Bill) in response.

Among other things, the Independent Reviewers "concluded that a payment should be made available for those whose records are expunged under the Act." Recommendation 13 explicitly described the nature of the payment as "a one-off *ex gratia* payment of a fixed amount as acknowledgement and redress for applicants who have charges and convictions expunged under the Act." (emphasis added)

Recommendation 13 went on to say (emphasis added):

"It should not involve a hearing and *should be an amount determined by the*

Government to be appropriate.

In considering any such proposal for redress, the Independent Reviewers suggest that the Government consider *a two-tiered payment structure*; one payment for applicants who have conviction/s or charge/s actually recorded on their official criminal record which is or are expunged, and a second, smaller payment, to applicants who have a charge expunged which did not appear on their criminal record. *This distinction recognises that, whilst all applicants whose records are expunged should be acknowledged, a person who has had a conviction or charge recorded on their criminal record is more likely to have encountered discrimination arising from this record than a person who was charged, but the charge did not proceed and consequently does not appear on their official criminal record.*

As above, the Independent Review recommended an 'ex gratia' rather than 'compensation' model and did not recommend a payment that differed depending on penalty received.

The Government's response to recommendation 13

The Government did not originally address recommendation 13 in the Bill for the following reasons:

- Section 22 of the Act currently precludes a right to compensation of any kind arising from a charge or conviction being expunged, which was the intention of Parliament on passing the Act.
- No other Australian jurisdiction provides for any payments under their respective schemes. There were only limited examples in Europe (discussed below). It was noted that the New Zealand Minister for Justice in debate on the Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill 2018 (which subsequently passed without providing for compensation) observed "There is no general principle that a person who is convicted of a repealed offence is entitled to compensation on the repeal of that offence."
- It was considered that no specific ex gratia scheme needed to be created as the existing ex gratia framework under section 55 of the *Financial Management Act 2016* was the most appropriate compensatory mechanism. Section 55 provides that ex gratia payments can be authorised by the Treasurer 'because of special circumstances...even though the payment would not otherwise be authorised by law or be required to meet a legal liability'. Section 55 of the *Financial Management Act 2016* and an extract of the relevant Treasurer's Instruction FC 13 are attached to this submission.
- At the time of drafting the Bill there had been no successful expungement applications under the Act. It is also understood that there have been no separate ex gratia claims made relating to historical offences of this kind. As at 30 June 2024, six years since the Act's commencement, there had been 15 applications for expungement. Fourteen of those applications were for offences that were not homosexual or cross-dressing offences and were therefore outside the Act's scope. Given this context, it appeared inefficient to establish a new, separate ex gratia mechanism under the Act while its purpose could be served by the existing *Financial Management Act* framework.

- The Independent Review also had noted that the expungement scheme, whilst important, only catered for a small number of people. There had been 96 people in total convicted of homosexual offences, with no relevant prosecutions after 1984. This left the bulk of convictions occurring prior to the late 1970s. Given the anticipated low numbers of eligible applicants, setting up a separate scheme was not considered justifiable.
- The resource implications relating to the legislative, policy and procedural development and ongoing implementation of a separate scheme for few applicants.

Development of amendment Bills in 2023 and 2024

In July 2023 Cabinet approved drafting of the Expungement of Historical Offences Amendment Bill 2023 in response to the Independent Review. A draft Bill was prepared in accordance with the Cabinet decision for public consultation.

In line with the Department's usual consultation policy, targeted and public consultation on the draft Bill occurred between 25 August 2023 and 22 September 2023. The draft Bill was published on the Department's 'Have your say' webpage, the Department's LGBTIQ+ reference group was directly consulted, and stakeholders were invited to a stakeholder briefing session on the draft Bill on 4 September 2023.

On 2 November 2023 the Expungement of Historical Offences Amendment Bill 2023 was tabled in the House of Assembly. The Bill gave effect to the Independent Review's recommendations aside from recommendation 13. The Bill was not debated in Parliament prior to the calling of the 2024 Tasmanian state election.

On 1 August 2024 the Expungement of Historical Offences Amendment Bill 2024 was tabled in the House of Assembly. The provisions included in the Bill were the same as those that had been included in the previously tabled version.

On 6 August 2024, during the second reading speech of the Bill, Parliament supported a motion by Dr Rosalie Woodruff MP to adjourn debate on the Bill, to allow for the Tasmanian Greens to finalise drafting of amendments.

Tasmanian Greens' compensation amendments

On 10 September 2024, the Tasmanian Greens moved amendments to the Bill in the House of Assembly to provide for a formal 'compensation' mechanism under the Act. These amendments were passed by the House of Assembly and are contained in clause 9 of the Bill, which was tabled in the Legislative Council on 11 September 2024.

The amendments require the appointment of an independent assessor three months after the first successful expungement application under the Act. Within six months of their appointment, the assessor must complete a public submission process and report to the Premier on a recommended method for calculating an amount of compensation payable to eligible applicants. Within 30 days of receiving that report, the Premier must then prepare a draft order which specifies the method for calculating the amount of compensation to be paid under the Act to eligible participants for parliamentary approval. There is provision for possible disallowance of the order, which triggers a new appointment of an assessor and repeat of the consultation and recommendation process.

As set out in cl 19D of the amended Bill, the compensation method relates to “calculating the amount of compensation to be paid to eligible participants” and “may vary according to different factors or circumstances”. Clause 19G provides in effect that the amount of compensation payable is to be calculated in accordance with that method.

The Government understands the Greens position, agreed with by Equality Tasmania's submission to Legislative Council at briefings on the Bill, is that these amendments reflect the Independent Reviewer's model and can result in the independent assessor recommending a two-tiered fixed payment amount as recommended.

The Government's concern is that the Greens amendments clearly do not reflect the Independent Reviewer's model. If the Bill is to reflect the recommended model, it should clearly refer to the two-tiered 'ex gratia' fixed payment model; and not a broader 'compensation' model with a method of calculation according to 'different factors or circumstances'.

The amendments do not provide clarity on the grounds the independent assessor would use as the basis for determining a 'compensation' calculation method for historical convictions. A calculation method implies that amounts will not be fixed but vary according to the person. For example, the independent assessor could recommend the method include calculation of loss of income over the person's lifetime. It is the Government's view that 'compensation' of this kind was not part of the Independent Review's intended scope. The recommended ex gratia payment, as that term is commonly understood, is not designed to 'compensate' a person for losses but reflect a non-legal liability of the State such as an expression of regret.

Other concerns with the process proposed by the Tasmanian Greens' amendments are:

- The public interest may not be served, as it is anticipated that setting up the compensatory scheme will cost more in establishment costs than may ever be delivered in compensation (noting that, as at June 2024, none of the applications under the Act have met the criteria for expungement). For example, the remuneration for the independent assessor is undetermined in the Bill but could be expected to be anything from \$30,000-\$100,000 or more depending on negotiations on time required for the assessment process; and further assessment processes following any disallowance motion of a recommendation.
- Whilst the proposed new section 19C creates a process for seeking public submissions as to the payable compensation amount, there are no objective criteria to assess the relevance of any submissions or indicate how they will assist in establishing the method for calculation.
- The proposed new section 19D provides that the method of calculation may vary according to different factors or circumstances and will include indexing. The Government is concerned that this process will be arbitrary, particularly when there have been no successful applicants to consider to date, and the experiences of future applicants may not be the same, even though common characteristics may exist.
- If the initial assessor recommendation is disallowed, more cost and delay results from having the assessment and consultation process repeated by another appointed independent assessor.

The Government notes these issues were raised during briefings with Legislative Council members, and the Government's alternative draft proposed amendments would address these concerns.

The Government's alternative proposed amendments

The Government's proposed alternative amendments and associated clause notes were provided to members of the Legislative Council on 19 November 2024 for their consideration (attached).

These alternative amendments provide for a process for automatic fixed ex gratia payments for eligible persons who have their charges expunged under the Act. This proposal aligns with and gives effect to recommendation 13 of the Independent Review.

Under the Government's proposed amendments, the payment would be \$5,000 per expunged charge that resulted in the annotation of an official criminal record and \$2,500 per expunged charge that did not result in the annotation of an official criminal record. The amounts would be subject to annual increases for CPI.

The proposed amount of these payments has been determined by reference to amounts paid under the existing German scheme that pays compensation to those convicted of consensual homosexual acts under section 175 of the German Criminal Code that have since been decriminalised. The German scheme is discussed further below but includes 3,000 euros per annulled conviction, which is equivalent to \$4,981. As discussed below, a media report indicated the average German payment for the data reported is €3,454 per person, given other features of the German scheme.

The total cost of establishing such a scheme is not known, as there have not yet been any successful applications for expungement in Tasmania. However, as noted in the Independent Review and outlined earlier in this submission, it is expected that the number of people who would be potentially eligible to have charges expunged is very small, and certainly likely to be significantly lower than the total of 96 convictions. It is also expected that the implementation costs of the Government's proposed amendments would be minimal in comparison to the Greens amendments. This is because it would not require the appointment and payment of an independent assessor, or potentially the additional staffing resources that would be required if the assessor's recommended compensation calculation method was complex and involved matters such as economic loss calculations.

On 20 November 2024 Department of Justice officers briefed Legislative Council members on the proposal. Members expressed concern that the alternative amendments had not been subject to a public or targeted consultation process. In line with the Independent Review's recommendation 13, the Government continues to support legislating for fixed ex gratia payments in the Act.

If the Committee disagrees with the amounts in the Government's amendments, the Government recommends that the Committee endorse the Government seeking further advice and input from an independent consultant with relevant expertise, who would also consult with stakeholders, on how to determine what those legislated amounts should be. This would be expected to cost less than the 'independent assessor' model while producing a similar result. The Government could then consult on those amounts with Members of Parliament so that fresh amendments can be prepared.

However, as outlined further below, it appears that there are few existing models in other jurisdictions that can usefully provide guidance as to what the appropriate payment amounts should be. It may be challenging to identify a strong evidence base to support specific payment amounts that differ substantially from those offered under the German scheme.

Compensation in other jurisdictions

While other Australian states and territories have, or are progressing, schemes that allow for expungement of historical homosexual convictions, none of them offer any form of ex gratia payment or compensation that could be used as a model for a scheme in Tasmania.

Outside of Australia, there are very few jurisdictions that provide compensation for those convicted for homosexual offences. Accordingly, the comparative jurisdictional analysis undertaken by the Department of Justice to inform the Government's alternative proposed amendments was unavoidably limited and, due to linguistic challenges, necessarily relied on primary and secondary sources.

The Department noted that Ireland's Department of Justice published a report in June 2023 entitled *Working Group to Examine the Disregard of Convictions for Certain Qualifying Offences Related to Consensual Sexual Activity between Men: Final Report*. That report included overviews of processes to expunge homosexual records in Australia, Canada, England and Wales, Germany, Scotland, Spain and New Zealand. Among those jurisdictions, only Germany and Spain were identified as offering payments in addition to expungement. However, the Tasmanian Department understands Austria does also provide for payments. The Irish report can be downloaded at the following link:

<https://www.gov.ie/en/press-release/9e0e2-minister-mcentee-publishes-report-on-the-disregard-certain-historic-convictions-related-to-consensual-sexual-activity-between-men/>

Germany

The 2017 Act to 'Criminally Rehabilitate Persons Who Have Been Convicted of Performing Consensual Homosexual Acts After May 8, 1945 and to Amend the Income Tax Act' provides for the payment of compensation to persons who, after 8 May 1945, were prosecuted or sentenced for consensual sexual activity with other men.

The 2019 'Guideline regarding the payment of compensation to people affected by the criminal prohibition of consensual homosexual activities' from the German Ministry of Justice provides for compensation for people convicted under criminalising laws. Requests for compensation are open until 21 July 2027 and must be submitted to the Federal Office of Justice by the person who was convicted.

A person who was convicted is entitled to receive €3,000 per annulled conviction as well as €1,500 for each year spent in prison. The Guidelines also provide for compensation in the event of preliminary investigations, detention on remand or other temporary measures involving deprivation of liberty as well as when exceptionally negative impairments occurred outside of criminal prosecution as a result of the existence of criminal provisions (i.e. in the case of exceptional professional, economic, health or other comparable disadvantages).

As noted below, media reports indicate the average German payment for the data reported is €3,454 per person, which would include the additional payments that potentially apply under

this scheme.

The Government's amendments were based on the German amount per annulled conviction, as the number of expunged charges was the basis for the payment recommended by the Independent Reviewers.

Spain

Spain does not appear to have specific laws that provide for compensation for those prosecuted for their homosexuality. However, under the Spanish Budget of 2009, a Compensation Commission for Former Social Prisoners was established to deal with compensation claims made by former social prisoners of the Franco dictatorship. This provided for some limited compensation for persons interned due to their sexual orientation under the Law on Vagrants and Crooks Act 1954 and the Law on Dangerousness and Social Rehabilitation 1970. Compensation was based on the period of time the individual was interned as follows:

- From one month to six months: €4,000
- From six months and one day to less than three years: €8,000
- Three years or more: €12,010.12.
- For each additional three full years from three years: €2,402.02

Austria

Secondary news sources indicate that in November 2023 the Austrian government announced it had set aside €33 million to compensate thousands of gay people who faced prosecution under previous laws, with those convicted able to receive €3,000, and an additional amount if they were jailed or suffered in terms of health, economically or in their professional lives. Around 11,000 applications were expected for criminal rehabilitation and compensation. This would equate to €3,000 per applicant.

News reports indicated that the scheme would be effective from February 2024, subject to the necessary laws passing Parliament late in 2023. While some secondary sources indicate that the scheme is now operating, the Department has been unable to independently verify this.

France

France's National Assembly approved a bill on 6 March 2024 to compensate people convicted of the 'offence of homosexuality' between 1942 and 1982. The proposed scheme would include a mechanism to compensate the victims with a lump sum of €10,000 coupled with an allowance of €150 for each day spent in jail, and the reimbursement of fines. However, the bill appears yet to be approved by the Senate.

Equality Tasmania submission

The Government notes that the Equality Tasmania submission to Legislative Councillors during the briefing on the Bill "supports the recommendation for financial redress proposed by the Independent Review" (page 5).

The Equality Tasmania submission extracted the recommendation's reference to a "one-off payment of a fixed amount" and that "Government consider a two-tiered payment structure" in respect of charges expunged from the record, and charges expunged which did not appear on the record. The submission then noted that:

"In line with this recommendation we seek redress payments that are:

- *A fixed amount*
- *Automatic payment upon successful expungement*
- *Comparable to existing schemes in Europe*
- *Amount decided by an independent process*
- *To acknowledge and redress a historic injustice.*

We believe the redress amendment passed by the House of Assembly achieves this goal."

As above, the Government is concerned that the Tasmanian Greens amendments do not achieve the goal of a fixed ex gratia amount, instead allowing for the possibility of a complex compensation method to be recommended by the independent assessor.

The Government notes Equality Tasmania's submission said "the Independent Review uses the words compensation and redress interchangeably and recommends an ex gratia payment. We understand it is difficult to legislate for an ex gratia payment, hence the use of 'compensation.'"

The Government agrees that the Review recommended an 'ex gratia' payment, and disagrees it is difficult to legislate for an 'ex gratia payment'. The Department of Justice advises that it is in fact significantly easier to implement the Review's recommendation by determining the fixed-amount ex gratia payment and including that amount in the amendments, in comparison to the Tasmanian Greens amendments which have a review and consultation process on 'compensation criteria', a disallowance period, and then the application of a calculation method to individual cases.

The Equality Tasmania submission states that "the base amount in Germany is the lowest in Europe, plus those with historical records will receive more if they were gaoled. Schemes for redress of historical convictions in Austria, France and Spain are more generous. So is the redress scheme for UK veterans discharged because they were gay."

The Government disagrees with this assessment that the Government's basis for setting the amounts is too low. Based on advice from the Department of Justice, the Government considers that \$5,000 is a reasonable payment in line with the Independent Review given the points below but, as noted previously in this submission, the Government is open to reviewing the amounts proposed in its amendments:

- As set out above, the German and Austrian 'base' ex gratia payment is €3000, equivalent to the \$5,000 dollars in the amendments.
- Germany, Austria and Spain provide for amounts for imprisonment which the

Independent Review did not recommend. In any event, media reports¹ indicate the average payment in Germany has been €3,454 per person, so the base amount remains the more significant component of the payment in Germany.

- The Department of Justice understands that the French proposal of €10,000 has yet to pass the Senate, so may be reduced or rejected.
- The UK Veteran scheme is not comparable to the schemes above, given the Department of Justice understands it relates to veterans whose employment was terminated, or other veterans negatively affected by this practice, rather than expungements of criminal charges for the general population. For comparison, the UK does not have a general scheme of payments for persons charged with relevant historical convictions.

Conclusion

The Tasmanian Government recognises the importance of responding to recommendation 13 of the Independent Review, to reflect that ex gratia payments of a fixed amount are appropriate to acknowledge and provide redress for those who have charges and convictions expunged under the Act.

In accordance with that recommendation, it is the Government's view that it is preferable for ex gratia payment amounts to be specified in the Act rather than creating a separate assessment process that is complicated, may lead to inconsistent outcomes, and potentially require resources to establish and administer that are disproportionate to the benefit delivered.

The Government also supports the Independent Reviewer's recommendation that these amounts relate to the number of charges that are expunged, and not to whether imprisonment was involved or not.

The Government strongly urges the Committee to support the Government's proposed alternative amendments as a sensible and reasonable response to recommendation 13 of the Independent Review, in line with comparable features of the currently operational schemes in Europe for ex gratia payments for expungement of charges.

If the Committee does not support those amendments, the Government recommends that the appropriate pathway is for the Government to seek independent advice from a person with appropriate expertise to consult and advise on appropriate amounts.

Yours sincerely



Hon Guy Barnett MP
Deputy Premier
Attorney-General
Minister for Justice

¹ <https://www.nbcnews.com/nbc-out/out-news/germany-compensates-249-persecuted-homosexuality-law-rcna2005>

Attachments:

- A - Government amendments
- B - Government clause notes
- C - Financial Management Act 2016 – relevant material