

COMMUNITY LEGAL CENTRES TASMANIA

22 September 2023

Department of Justice
Office of the Secretary
GPO Box 825
Hobart TAS 7001

via email: haveyoursay@justice.tas.gov.au

To the Department of Justice,

Re: *Expungement of Historical Offences Amendment Bill 2023*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the *Expungement of Historical Offences Amendment Bill 2023* ('the Bill').¹ The Bill is informed by the statutory review of the Act titled the *Independent Review of Expungement of Historical Offences Act 2017* ('the Independent Review') which made a number of recommendations. Of the recommendations that do not require legislative amendment² we encourage the Government to implement them as soon as possible to ensure both a more streamlined process and greater promotion of the scheme.

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

In 2017, Tasmania passed the *Expungement of Historical Offences Act 2017* (Tas). The Act recognises that homosexuality and cross-dressing should never have been crimes and that those who were charged and had historical convictions for these offences should have the opportunity to have them expunged from their criminal record. During his Second Reading Speech, the Attorney-General Matthew Groom MP identified the Bill as an important step in addressing the legacy of old homophobic laws, acknowledging that "many Tasmanians have continued to suffer from distress and disadvantage resulting from the criminalisation of conduct that we now accept as lawful".³

We welcome the Government's intention to expand the expungement scheme to include offences such as resisting arrest and obstructing and assaulting police officers. Broadening

¹ CLC Tas would like to acknowledge those persons and organisations who gave freely of their time in assisting with our submission.

² See recommendations 2, 3, 4, 6 and 8 of the *Independent Review of Expungement of Historical Offences Act 2017* (October 2020).

³ Tasmania, *Parliamentary Debates*, House of Assembly, 13 April 2017 at 54.

the scheme to allow for these incidental offences recognises that the charges laid would not have arisen but for the fact that the person was being dealt with in relation to conduct of a homosexual nature. Whilst it is acknowledged that the stigma attached to these offences is not the same as for offences of a homosexual nature, the *Independent Review of Expungement of Historical Offences Act 2017* ('the Review') recommended their inclusion on the basis of completeness:⁴

... given that one of the purposes of the Act was to acknowledge that homosexuality and cross-dressing offences should never have been crimes, it follows that it is in the spirit of the Act that charges and convictions which would not have arisen, but for the existence of those homosexuality and cross-dressing offences, ought to be included within the scope of the Act.

We also endorse Equality Tasmania's recommendation that a broader range of incidental offences and records capable of expungement be included, such as 'move on' provisions, loitering, intoxication, public annoyance and the like as well as police surveillance records. Finally, we support Equality Tasmania's recommendation that records related to protests seeking to draw attention to Tasmania's discriminatory homosexual and cross-dressing laws also be capable of expungement.

- Compensation

We are concerned that the Bill does not seek to amend the Act and allow compensation to be made payable. As it stands, compensation is expressly precluded with section 22 of the Act providing as follows:

22. No entitlement to compensation

If a charge or a conviction for an offence is expunged under section 12(6), a person is not entitled to compensation of any kind, on account of that charge or conviction becoming expunged, in respect of the fact that –

(a) the person was charged with, or prosecuted for, the offence; or

(b) the person was convicted of, or sentenced for, the offence; or

(c) the person served a sentence for the offence; or

(d) the person was required to pay a fine or other money (including costs or any amount by way of restitution or compensation) on account of being convicted of, or sentenced for, the offence; or

(e) the person has an expunged charge or expunged conviction; or

(f) the person incurred any loss, or suffered any consequence, as a result of an event referred to in paragraph (a), (b), (c), (d) or (e), whether or not that person was the person whose charge or conviction was expunged.

However, compensation was recommended by the independent review which noted that "compensation confirms the expressed wish of Parliament in enacting this legislation that it was intended to send a compelling message that the state is serious in its commitment to remedy, to the extent that it can, the discrimination against, and distress and harm experienced by, Tasmanians in this context".⁵

⁴ Melanie Bartlett and Taya Ketalaar-Jones, *Independent Review of Expungement of Historical Offences Act 2017* (October 2020) at 27-28.

⁵ *Ibid* at 57. Also see recommendation 13.

Although there is no expungement scheme in any Australian jurisdiction which provides for compensation or redress there are a number of compelling reasons why Tasmania should be the first. These reasons include that Tasmania was the last Australian 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 than other states. As the then Anti-Discrimination Commissioner Robin Banks has noted:⁶

The removal of criminal sanctions against homosexuality in 1997 was the culmination of a decade-long battle to remove one of the last bastions of discrimination and finally bringing Tasmania into line with other Australian jurisdictions.

In the six years the Act has been in operation, no eligible applications have resulted in the expungement of any record. As a result, the grant of a one-off financial payment to eligible applicants will not exhaust the state's resources but would send a strong message that conviction-related stigma and discrimination against LGBTQIA+ persons is taken seriously.

We would also note that the provision of compensation or redress is consistent with human rights principles, including the *Yogyakarta Principles* which set out the application of international human rights law in relation to sexual orientation and gender identity. Relevantly, these Principles refer to the need for legal procedures to ensure that victims of human rights violations on the basis of sexual orientation or gender identity have access to redress.⁷ Finally, compensation or redress is available in Germany where persons convicted of consensual homosexual acts are entitled to compensation of €3000 per annulled conviction and €1500 for every year spent in prison.⁸ For all of these reasons, we strongly recommend that the Bill be amended to include a one-off ex-gratia payment to applicants who have charges and convictions expunged under the Act.

If you have any queries, please do not hesitate to contact us.

Yours faithfully,



Benedict Bartl
Policy Officer
Community Legal Centres Tasmania

⁶ Anti-Discrimination Commissioner Tasmania, *Treatment of historic criminal records for consensual homosexual sexual activity and related conduct* (April 2015) at 2.

⁷ 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). As found at http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf (accessed 20 September 2023).

⁸ A good overview of the law in Germany and the process for obtaining compensation 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-report-of-the-working-group-to-examine-the-disregard-of-convictions-related-to-consensual-sexual-activity-between-men/> (accessed 20 September 2023).

