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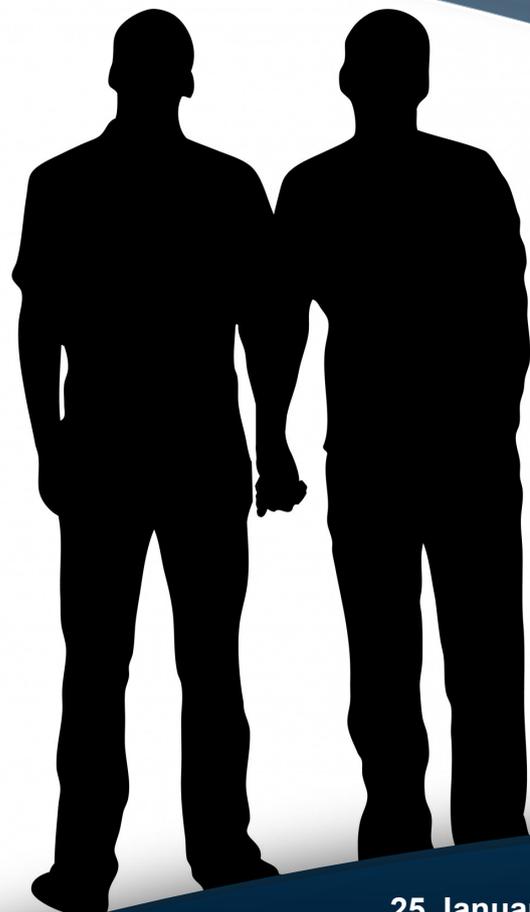
SPICe Briefing

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# Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill

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This briefing provides an overview of the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill. It provides background to the introduction of the Bill, and consideration of the Bill's provisions.



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# Executive Summary

The aim of the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill is to provide a form of redress against the discriminatory effect of convicting men for same-sex sexual offences in the past, for activity that is now legal.

It will do this in two main ways:

- pardoning those convicted of criminal offences for engaging in same-sex sexual activity which is now legal; and
- putting in place a system to enable a person with such a conviction to apply to have it “disregarded” so that information about that conviction held in records, generally maintained by Police Scotland, does not show up in a disclosure check.

The Bill provides a broad definition of historical sexual offences. It covers offences which:

- were directly discriminatory - such as the criminalisation of activity that would be legal if opposite-sex partners engaged in the same activity
- could be used in a discriminatory matter - such as breach of the peace.

The pardon is a symbolic gesture which will apply to all men with a conviction for a historical sexual offence for same-sex sexual activity that is now legal. It will apply automatically so no-one will need to do anything to receive a pardon.

In addition to the pardon, the Bill includes a statement on its purpose, that it acknowledges the “wrongfulness and discriminatory effect of past convictions for certain historical sexual offences”. On the Bill’s introduction, the First Minister issued an apology in the Scottish Parliament, “...for those laws and for the hurt and harm that they have caused so many people.”

Men who have been convicted for a historical same-sex sexual offence will be able to apply to Scottish Ministers to have the conviction disregarded. This would mean that the conviction would never show up on a disclosure check. There will be no fee for the application.

The Bill establishes a test for Scottish Ministers to apply. The presumption is that an application for a disregard is granted unless:

- the offence is not a historical sexual offence, or
- the conduct to which the conviction relates would still amount to an offence on the date of the Bill coming into force.

It is difficult to estimate how many people might apply for the disregard, but based on similar legislation in England and Wales, the numbers are expected to be low. As such, the cost impact of the Bill is expected to be low.

The Scottish Government did not conduct a public consultation on the Bill. However, it has worked closely with the Police Scotland, Crown Office and Procurator Fiscal Service, Stonewall Scotland and the Equality Network.

# Introduction

The [Historical Sexual Offences \(Pardons and Disregards\) \(Scotland\) Bill](#) ('the Bill') was introduced by the Cabinet Secretary for Justice, Michael Matheson MSP, on 6 November 2017 <sup>1</sup>.

The aim of this Bill is to provide a form of redress against the discriminatory effect of convicting men for same-sex sexual offences in the past, for activity that is now legal.

There has been no formal consultation on the Bill, but the Bill's provisions were developed in consultation with Police Scotland, Crown Office and Procurator Fiscal Service (COPFS), Stonewall and the Equality Network. The Equality Network undertook a survey in autumn 2017 on the expected content of the Bill, which 736 people responded to <sup>2</sup>.

Both the [Equality Network](#) and [Stonewall Scotland](#) have welcomed the Bill.

# Scotland's changing laws and attitudes

Same-sex sexual activity between men was an offence in Scotland in all circumstances, for nearly 100 years, until 1980<sup>3 2</sup>. The law applied wherever the activity took place, including in private homes<sup>3</sup>. There were two specific offences that applied to sex between men that were discriminatory and defined in law as 'homosexual offences' - 'sodomy' and 'gross indecency'<sup>i</sup>.

Men could also be prosecuted under laws that were not discriminatory in themselves, but could be used in a discriminatory manner, for example, through breach of the peace, shameless indecency, and local byelaws<sup>3 2</sup>.

There were never any equivalent offences criminalising same-sex sexual activity between women.

The Criminal Justice (Scotland) Act 1980 decriminalised sex between men over the age of 21, as long as it was consensual and in private. The Equality Network said that men under 21 and their male partners could still be prosecuted in a discriminatory way, and men continued to be prosecuted for activities such as kissing in public, and 'chatting up' other men - 'importuning'<sup>2</sup>.

The age of consent for sex between men was reduced from 21 to 18 in 1994<sup>ii</sup>, and then in 2001 the age of consent was further reduced to 16<sup>iii</sup>. This equalised the age of consent for opposite sex sexual activity.

The Scottish Government states that Scotland is a different place, in terms of attitudes towards same-sex sexual activity, compared to 30 or 40 years ago<sup>3</sup>. Evidence for this changing attitude is shown in the 'Scottish Social Attitudes Survey'<sup>4</sup>. In 2000, 39% of the Scottish population said that sexual relations between two adults of the same sex is 'always wrong', compared with 9% of people expressing this view in 2015.

An example of the change in attitudes is the Sexual Offences (Scotland) Act 2009. This set out a framework for sexual offences law in Scotland that does not distinguish between same-sex and opposite-sex activity. The Act uses neutral terminology, and does not use discriminatory terminology such as 'homosexual offences'<sup>3</sup>. It also abolished the terms 'sodomy' and 'gross indecency'<sup>5</sup>.

Despite these changes, the discriminatory effect of these laws continues.

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i This is perhaps an over-simplification. 'gross indecency' was the name given to statutory offences at section 7 of the Sexual Offences (Scotland) Act 1976 and its predecessor offence at section 11 of the Criminal Law Amendment Act 1885, but it is at least arguable that the offences contained at section 80 of the Criminal Justice (Scotland) Act 1980 and section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 are also 'specific offences' in that they specifically criminalise same-sex sexual activity between men, including in circumstances where the same activity involving a man and a woman or two women would be lawful.

ii Under the Criminal Justice and Public Order Act 1994

iii Following commencement of the Sexual Offences (Amendment) Act 2000

“ In addition to the damage done to their lives at the time, by the prosecution and conviction, people who have one of these convictions on their record may find their lives continue to be directly affected today, for example, if they apply for a job or a volunteer post that requires a criminal record check. All criminal convictions with any sexual element are disclosed in checks for working with vulnerable adults or children. The large majority of Scotland's 20th century gay and bisexual men broke these laws in some way – only the unlucky minority were prosecuted. We will never know the total number of people this happened to, but any people's lives have been blighted by criminal convictions that were based purely on sexual orientation discrimination in the law<sup>2</sup> .”

## Scottish Government announces pardons and disregards

On 25 October 2016, Kezia Dugdale MSP asked whether the Scottish Government would “quash the convictions and cautions issued to people for now-abolished gay sexual offences and issue pardons”<sup>6</sup> . The matter had received wide media attention, following the proposal for a private members bill in the House of Commons, by John Nicolson MP<sup>iv</sup> .

In response, Michael Matheson MSP, the Cabinet Secretary for Justice, announced that the Scottish Government would introduce an automatic pardon for people who have been convicted of sexual offences in the past, for activity that is now legal.

“ We want to address the injustice that people experienced—simply because of their sexual orientation—in circumstances that are now legal, and the granting of an automatic pardon is one way of achieving that.”

Michael Matheson also said that the Scottish Government had been working with Police Scotland to establish a scheme that will allow men who were convicted as a result of actions that are now legal, to have those convictions disregarded. The scheme would ensure that convictions are removed from central conviction records.

In addition to the pardon, Kezia Dugdale MSP and Patrick Harvie MSP also raised the matter of a formal apology. They argued that a formal apology was more important for many men than a pardon, because it demonstrates they should never have been convicted in the first place.

## Scottish Government apology

On 7 November 2017, the First Minister, Nicola Sturgeon MSP, issued an apology after describing the introduction of the Bill as a milestone for LGBTI<sup>v</sup> equality in Scotland:

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iv For example, The Independent, 21 October 2016 ‘ [Turing Bill filibustered by Tory minister amid row over how to pardon people convicted under scrapped anti-gay laws](#)’

v Lesbian, gay, bisexual, trans and intersex.

“ ...today, as First Minister, I categorically, unequivocally and whole-heartedly apologise for those laws and for the hurt and the harm that they have caused to so many people. Nothing that Parliament does can erase those injustices, but I hope that this apology, alongside our new legislation, will provide some comfort to the people who have endured them. I hope that it provides evidence of this Parliament's determination to address the harm that was done, as far as we can do so <sup>7</sup> .”

Stonewall Scotland <sup>8</sup> praised the First Minister's apology:

“ The First Minister's apology today is an important moment, both for the LGBT community and for Scotland. Gay and bi men in Scotland were criminalised for a very long time simply for who they were and who they loved. Today's apology will give a great deal of comfort to many who were unjustly prosecuted, and will help draw a line, once and for all, under a dark period in Scotland's history. As well as the hurt and damage that came with being prosecuted for these crimes, many men have carried a criminal record with them their whole lives as a result. We're very pleased to see that this bill includes provision for these unjust convictions to be wiped from criminal records, and a pardon, both for those living and deceased.”

## Purpose of the Bill

The Bill contains a provision stating that its purpose is to acknowledge the wrongfulness and discriminatory effect of past convictions for certain historical sexual offences which criminalised same-sex sexual activity between men that would now be legal. The Bill provides for two distinct but linked procedures by:

- pardoning those convicted of criminal offences for engaging in same-sex sexual activity which is now legal; and
- putting in place a system to enable a person with such a conviction to apply to have it “disregarded” so that information about that conviction held in records, generally maintained by Police Scotland, does not show up in a disclosure check.

## Definition of historical sexual offences

Section 2 of the Bill provides a definition of “historical sexual offences” to which the provisions concerning pardons and disregards apply.

### ***Criminal Law (Consolidation) (Scotland) Act 1995***

Section 2(1)(a) of the Bill provides that this definition includes the following offences concerning same-sex sexual activity between men under section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 (“the 1995 Act”).

- section 13(5)(a), which covered sexual activity otherwise than in private (this was defined in section 13(2) to exclude activity where more than two individuals participated or were present);
- section 13(5)(c), which covered sexual activity with a person under the age of 18 (until the age of consent was equalised at 16 in 2001);
- section 13(6), which covered procuring or attempting to procure the commission of a ‘homosexual act’ between two other male persons; and
- section 13(9), which, prior to being amended by the Sexual Offences (Scotland) Act 2009, covered both soliciting or importuning any male person and living off the earnings of male prostitution.

In its current form, section 13(9) of the 1995 Act continues to criminalise living off the earnings of male prostitution. The Explanatory Notes to the Bill point out that, although this provision comes within the definition of “historical sexual offence” in the Bill, neither the pardon nor the disregard would ever apply to someone convicted under this provision for the specific offence of living off the earnings of male prostitution, precisely because such conduct remains a criminal offence.

### ***Criminal Justice (Scotland) Act 1980***

Section 2(1)(b) of the Bill provides that the definition includes the following offences concerning same-sex sexual activity between men under section 80 of the Criminal Justice (Scotland) Act 1980 (“the 1980 Act”).

- section 80(7)(a), which covered sexual activity otherwise than in private (defined as above);
- section 80(7)(c), which originally covered sexual activity with a person under the age of 21 (later amended to 18);
- section 80(7)(d), which covered sexual activity between men where the act was committed on board a United Kingdom merchant ship and the participants were members of the crew of a United Kingdom merchant ship;
- section 80(9), which covered procuring or attempting to procure the commission of a ‘homosexual act’ between two other male persons; and

- section 80(12), which covered both soliciting or importuning any male person and living off the earnings of male prostitution.

## ***Sexual Offences (Scotland) Act 1976 and the Criminal Law Amendment Act 1885***

Sections 2(1)(c) and (d) of the Bill provide that the definition includes offences under section 7 of the Sexual Offences (Scotland) Act 1976, and its predecessor provision, section 11 of the Criminal Law Amendment Act 1885. These provided that it was a criminal offence for any male person to commit, procure or attempt to procure sexual activity with another male person or between other male persons (whether in public or private).

## ***Common law offence of sodomy***

Sections 2(1)(e) and (f) of the Bill provide that the definition includes the common law offence of sodomy (sexual intercourse between two male persons) and the common law offence of shameless indecency, insofar as the latter offence, which was potentially very broad-ranging, applied to sexual activity between men.

The Policy Memorandum to the Bill points out that, in contrast with the other offences listed at section 2(1), the offence of shameless indecency was not used only to criminalise same-sex sexual activity but also various other conduct that may now be covered by the common law offence of public indecency and by statutory sexual offences. The Policy Memorandum states:

“ The exact scope of the criminal conduct that was covered by the common law offence of shameless indecency is unclear and appears to have changed over time. In recent years, prior to the decision in *Webster v. Dominick*<sup>9</sup>, it was used to prosecute what could best be described as ‘public indecency’ and, separately, to prosecute sexual offences against children in certain limited contexts. It has also been used in the past to criminalise persons selling ‘indecent material’ or showing an indecent or obscene film. Evidence from stakeholders suggests that the offence may in the past have been used to prosecute same-sex activity between men that would not have been prosecuted had those involved been opposite-sex partners. The definition of a ‘homosexual act’ at section 13(4) of the Criminal Law (Consolidation) (Scotland) Act 1995 stated that “‘a homosexual act’ means sodomy or an act of gross indecency or shameless indecency by one male person with another male person. ”

## **Other offences**

Section 2(1)(g), read with section 2(2), provides that the definition also includes any other offence that regulated, or was used in practice to regulate, sexual activity between men which has either been repealed or abolished; or, if it has not been repealed or abolished, once covered sexual activity between men of a type which, or in circumstances which, would not amount to an offence on the day on which section 3 of the Bill comes into force (see below). This could include, for example, any historical use of breach of the peace or

local byelaws to prosecute men for e.g. public displays of affection that would not be criminal if opposite-sex partners engaged in the same behaviour.

## **Sexual activity**

Section 2(4) of the Bill provides that “sexual activity between men” includes:

“ ...any physical or affectionate activity between males of any age which is characteristic of persons involved in an intimate personal relationship, and also conduct intended to lead to such activity<sup>3</sup> .”

As such, the term includes both sexual intercourse and physical displays of affection such as kissing or holding hands.

# Pardons for certain historical sexual offences

The effect of section 3 of the Bill is that any person (including any deceased person) who was convicted of a historical sexual offence as defined above is pardoned for the offence if the conduct for which the person was convicted would no longer constitute any offence under Scots law as it exists on the day on which section 3 comes into force.

Pardons granted under the Bill are given automatically – the Policy Memorandum to the Bill explains that “*in other words, no one needs to do anything to receive a pardon*”<sup>3</sup>. This is different from the disregard scheme which is discussed below.

(The approach taken on pardons in the Bill is also different to that taken by the UK Government in the Policing and Crime Act 2017 concerning people convicted for similar offences in England and Wales, whereby living people could obtain a pardon only by successfully applying for a disregard (the pardon does apply automatically in England and Wales but only to those persons who had died at the time the 2017 Act was commenced). The policy on pardons and disregards in England and Wales is set out further [below](#)).

The Policy Memorandum to the Bill states that the effect of a pardon is symbolic and that it is intended to be a formal acknowledgement that the laws in question were in themselves discriminatory in nature – or, concerning the laws which were of more general application, that these were interpreted or enforced in a discriminatory way – and the pardon is intended to lift the burden of conviction.

The Bill is clear that the pardon will only apply if the relevant conviction is for something which is no longer a crime.

The Bill also provides that the pardon will apply where a person was not prosecuted for an offence but was dealt with by means of an alternative to prosecution. An alternative to prosecution includes a warning given by a constable or procurator fiscal; the acceptance of a conditional offer of a fixed penalty under section 302 of the Criminal Procedure (Scotland) Act 1995; or the acceptance of an offer made by a procurator fiscal to do anything else (e.g. undertake an activity, treatment or receive services) as an alternative to prosecution for an alleged offence.

In addition, the Bill provides that where a child has been referred to a children's hearing on offence grounds and that ground has been established or accepted, that is to be treated as a conviction; and that any disposal of such a case by a children's hearing is to be treated as a sentence.

The pardon does not reverse a conviction and a person with a conviction for same-sex sexual activity that is now legal will have to apply for a disregard if they want to ensure that information about the conviction is disregarded from criminal records information held by the police or other agencies. The disregard process is discussed below.

# Disregards scheme

Although the offences which specifically criminalised same-sex sexual activity between men have been repealed or abolished, there are still some people who have such criminal convictions. This information will be held on official records maintained by Police Scotland. While most of these convictions are likely to be 'spent' under the Rehabilitation of Offenders Act 1974, and would not come up on a basic disclosure, it is possible the convictions could appear on higher level disclosures.

## Disclosure checks

[Disclosure Scotland](#) undertakes checks on your criminal record if you are applying for work, volunteering, or applying to adopt a child.

There are three levels of disclosure:

**Basic** – anyone can apply for a basic disclosure. It includes information on any 'unspent' convictions. Some convictions are treated as 'spent' after a certain level of time, meaning they are no longer relevant to basic disclosure.

**Standard** - this is for specific roles such as solicitors, accountants or providing a care service. It will include information on:

- unspent convictions
- [relevant spent convictions](#)
- unspent cautions.

**Enhanced** – this is for specific roles, such as checking people are suitable for adoption, or applying for certain gaming or lottery licences. It will include information on:

- unspent convictions
- relevant spent convictions
- unspent cautions
- inclusion on [children's or adult's lists](#), if it's relevant to the job (these are lists of people unsuitable to do regulated work with children or protected adults)
- other relevant information held by the police

The Bill aims to ensure that information relating to historical sexual offences for same-sex sexual activity between men, which is now legal, cannot be used against a person in any way. It does this by providing for a statutory disregard scheme. This will allow a person who has been convicted of a historical same-sex sexual offence with a man, to apply to Scottish Ministers to have the conviction disregarded. This would mean, for example, that the conviction would never show up on a disclosure check.

The disregard scheme in the Bill is similar to the approach set out in Chapter 4 of Part 5 of the Protection of Freedoms Act 2012. This put in place a scheme for disregarding certain convictions for same-sex sexual offences in England and Wales.

Only convictions that come under the list of historical sexual offences in Section 2(1) of the Bill can be disregarded. This covers a broad range of offences (as described [above](#)). For a disregard to be accepted, the conduct amounting to the offence must not be an offence on the date the Bill is commenced. Any sexual offence that is currently illegal would not be disregarded, for example, offences relating to the absence of consent or sexual activity in a public place <sup>3</sup>.

The historical sexual offences in Section 2(1) include acts which are now legal and those which are still illegal, for example, where there was the absence of consent. The disregard scheme includes a process to determine whether an application should be granted, depending on whether conduct relating to the conviction would now be legal.

## **Applications to the disregard scheme**

### ***Making the application***

A person who has been convicted of a historical sexual offence can apply to Scottish Ministers to have the conviction disregarded (s.5).

The applicant must provide as much information as they can about the conviction, 'in so far as is known to the applicant' - the time and place, the relevant case number, the nature and circumstances of the offence, and any other information Scottish Ministers may require.

The applicant may also provide other information that they consider would be useful to Scottish Ministers in determining their application.

### ***Further information***

Scottish Ministers may ask any person to make representations, or provide further information, with regard to an application. Such requests are most likely to be made to Police Scotland, the Crown Office and Procurator Fiscal Service, and the Scottish Courts and Tribunals Service <sup>10</sup>. This is because they are most likely to hold information about convictions for same-sex sexual activity.

Any person requested to provide further information is authorised to do so.

### ***Determination of an application***

Scottish Ministers are required to consider all representations and other information provided by the application, or by those to whom a request was made. They must take reasonable steps to obtain any information about the case, such as contacting Police Scotland or other justice agencies.

The exception to this is where it appears that the conviction was not for a historical sexual offence, but for another type of offence, such as theft or fraud.

Sections 7(2) and 7(3) establish a test for Scottish Ministers to apply. The presumption is that an application for disregard is granted unless:

- The offence is not a historical sexual offence, or
- The conduct to which the conviction relates would still amount to an offence on the date of the bill coming into force.

Ministers are then required to:

- record their determination and the reasons for it in writing
- provide notice of their determination and reasons to the applicant, and
- where the application is granted, inform the applicant that references to the conviction will be removed from official records.

Where an application is granted, the disregard takes effect 14 days after notice of the determination has been given.

### **Advisers**

Section 11 provides for Scottish Ministers to appoint independent advisers to advise or help on determinations. The advisers may be people with particular knowledge or expertise in how offences concerning same-sex sexual activity were prosecuted in Scotland. They could provide assistance where information provided by the applicant and that held by the police, courts and COPFS is, on the face of it, insufficient to make a determination. Scottish Ministers will be able to pay advisers allowances and expenses as they consider appropriate.

## **Appeals**

Where Scottish Ministers have refused a disregard, the applicant has a right of appeal to the Sheriff Court, with the permission of a sheriff (s.8). When deciding the appeal, the sheriff may only consider the information that was made available to Scottish Ministers.

On an appeal, the sheriff must either:

- Order the conviction to be disregarded, or
- Dismiss the appeal

The sheriff's decision on an appeal is final.

If a person has new information, they could make a new application for a disregard <sup>2</sup>.

The UK Government's scheme has an appeal mechanism, but there have been no appeals to date <sup>11</sup>.

## **Effect of disregard**

Where a disregard has been granted, the person who was convicted will be treated for all purposes as not having:

- committed the offence
- been charged with, or prosecuted for, the offence
- been convicted of the offence, or
- been sentenced for the offence.

Any details of disregarded convictions cannot be used in any judicial proceedings, nor can the person be asked about any disregarded convictions. Judicial proceedings include, proceedings before a court, a statutory tribunal, arbiter appointed under an arbitration agreement or professional regulatory body <sup>10</sup> .

A person may be asked about past convictions in other contexts, such as by a prospective employer or when applying for a loan. In these situations, the question is to be treated as not relating to any disregarded conviction. Further, a person will not be subject to any consequent liability by not providing details of a disregarded conviction.

## Removal of disregarded convictions from official records

Scottish Ministers must remove all references to a disregarded conviction contained in official records held by a 'relevant record keeper', and require a 'relevant record keeper' to remove such references from records that they hold (s.10). The disregarded conviction must be removed by the relevant record holder as soon as reasonably practicable, (but not until the disregard has taken effect), and notify the applicant when they have done so.

The Bill provides for Scottish Ministers to prescribe in regulations who a 'relevant record keeper' is, and the manner in which disregarded convictions are to be removed from official records. This is likely to be Police Scotland because it operates the Criminal History System (CHS) <sup>11</sup> .

The Bill (s.16) provides that 'official records' only means records containing information about persons convicted of offences. It does not apply to records held by the National Records of Scotland.

“ Such records are never used for the purposes of disclosure checks. The Bill is not intended to 'rewrite' history: it is accepted that these laws existed and men were convicted under them. So the disregard scheme is intended to protect men with such convictions from any further discrimination. This approach is intended to respect the historic value of such records while ensuring at the same time men who were discriminated against through these laws are given new protections <sup>3</sup> .”

# Number of potential applications in Scotland

Everyone with a conviction for a historical sexual offence for same-sex sexual activity with a man in Scotland, which is now legal, will be pardoned. However, not all those who are still alive will apply for a disregard. There are limited statistics on the number of convictions for historical same-sex sexual offences, which means it is not possible to give an accurate estimate of the number of potential applications for a disregard.

The Equality Impact Assessment on the Bill refers to statistics on the number of people convicted for offences categorised as ‘illegal homosexual acts’<sup>12</sup>. This shows that a total of 1,229 people were convicted for these offences between 1969/70 and 2000/01 when the age of consent was equalised. However, many of these convictions are likely to be for acts that are still illegal. There could also be people not included in these statistics because they were prosecuted for common law offences, such as ‘shameless indecency’ that would now be legal.

The Equality Network refers to estimates that around 50,000 offences are covered by pardons and disregards legislation in England and Wales, including offences by up to 15,000 people who are still living<sup>2</sup>.

The Scottish Government has received information from the UK Government on the scheme for England and Wales. In the five years since the disregards scheme came into effect, the Home Office received a total of 514 applications (2012 to mid-August 2017). Of these:

- 187 applications were outwith the scheme, such as offences for fraud or theft
- 53 were rejected, as although relevant offences may have been committed, they were committed outside England and Wales
- 20 applications went no further after it was determined that no relevant conviction was held on central records

This leaves 254 valid applications, of which:

- 155 had been accepted
- 89 had been rejected
- 10 were in the process of being determined.

The Equality Network suggests that the low number of applications in England and Wales may be because some people don't want to relive the experience, and that the number of people requiring a high level disclosure is small. However, although small in number, the effect for individuals will be ‘significant and important’<sup>2</sup>.

The Scottish Government has provided estimates based on the number of applications for a disregard under the UK Government's scheme<sup>11</sup>. The experience in England and Wales is rather different and is not necessarily a perfect comparator for two main reasons.

The first is that the UK Government's disregard scheme is narrower in the scope of convictions it applies to, and it also provides a pardon at the end of the disregard process. The second reason is that different laws on same-sex sexual activity have applied in Scotland and England and have been repealed at different times.

However, it would be a reasonable assumption that Scotland will receive a similar number of applications, relative to its population size. A tenth of the population size would mean there could be around 51 applications in the first five years of the disregard scheme in Scotland<sup>11</sup>. The Equality Network supports this estimate, and suggests the figures could be lower<sup>13</sup>.

On this basis, of the 51 applications, around 24 would be rejected for relating to invalid offences, or for taking place outside Scotland. Of the remaining 27 applications, two will have no convictions held on central records. Of the 25 applications remaining, 16 would be accepted and 9 rejected. The Equality Network is in touch with two men who intend to apply for a disregard<sup>13</sup>.

## Costs of the Bill

It is difficult to estimate the cost impact of the Bill because it is not clear how many people might apply for a disregard in Scotland. There will be no charges for anyone applying for a disregard.

Staff in the Scottish Government will administer the disregard scheme. Estimates of costs have been provided based on the number of hours spent on the 51 applications (referred to [above](#)). The length of time will depend on how far the applications get in the process, and how easily obtainable the conviction information is.

At some stage there is likely to be involvement from Police Scotland, Scottish Courts and Tribunals Service and the Crown Office and Procurator Fiscal Service.

Police Scotland has suggested it would expect the equivalent of a full-time person to operate the scheme, for at least the first year. The expected staff costs for Police Scotland would be £34,000 per annum. Police Scotland will also incur costs for the processing time in any work required to access, verify and contextualise the Criminal History System conviction information.

The Scottish Courts and Tribunals Service has suggested that deleting an electronic record of a conviction on a specified charge may not be straightforward. Finding a solution may incur additional IT costs amounting to between £25,000 and £30,000.

No appeal costs have been estimated on the grounds that there have been no appeals under the UK Government's scheme.

The total estimated costs are as follow:

Year 1 - £64,000

Year 2 - £34,000

Year 5 - £17,000

The Equality Network supports the low cost estimate undertaken by the Scottish Government <sup>13</sup>. It has noted that section 11 of the Bill allows Scottish Ministers to appoint one or more advisers to help determine disregards. There would be a cost implication with this, but the overall impact on total costs would be small.

# England and Wales: a brief legislative history

The information in this section is included in the House of Commons Library briefings: [The Sexual Offences \(Pardons Etc.\) Bill 2016-17](#); and [Policing and Crime Bill - Lords Amendments](#).

Until 1967 in England and Wales, consensual sexual activity between adult men over the age of consent was criminal. Such activity could either be prosecuted as buggery or as gross indecency. The relevant legislation in force at that time was the Sexual Offences Act 1956.

Section 12 of the 1956 Act made it an offence for one person to commit buggery with another. Section 13 of the 1956 Act set out the much wider offence of gross indecency between men, which had first been introduced in the late 1800s.

Under section 13 it was an offence “for a man to commit an act of gross indecency with another man, whether in public or private”. Section 13 also criminalised anyone who was a party to the commission of an act of gross indecency between men, or who procured the commission of such an act. The gross indecency offence, which had become known as the “blackmailer’s charter” following its original introduction in the 1880s, was used to prosecute a wide range of sexual activity between men. It was most famously used to convict playwright Oscar Wilde and mathematician Dr Alan Turing.

In 1967, consensual sexual activity in private between two men over the age of 21 was decriminalised. The age of consent was lowered to 18 in 1994 and to 16 in 2000. However, these changes did not have retrospective effect. Any convictions predating the decriminalisation of consensual sex between men and the lowering of the age of consent therefore continued to remain part of an individual’s criminal record.

Following the 2010 general election, the Coalition Government said that it would be legislating for historical convictions for consensual sex between men aged 16 or over to be treated as spent, meaning they would no longer show up on criminal records checks.

The Home Office estimated that there were approximately 50,000 convictions for section 12 or 13 offences recorded on the Police National Computer, of which approximately 16,000 related to conduct that is now legal (i.e. consensual sexual activity between men aged 16 or over). Legislation was duly brought forward, and in 2012 the Protection of Freedoms Act 2012 introduced a new “disregard” scheme for historic convictions for consensual sexual activity between men.

Following numerous public campaigns, in December 2013 the renowned scientist and World War II code-breaker, Dr Alan Turing received a posthumous pardon from the Queen. Dr Turing had been convicted of gross indecency in the 1950s for activity that would have been legal under today’s laws. The decision to pardon Dr Turing was met with mixed reaction. Some queried whether it represented good legal principle, given that the usual requirements for a pardon (namely morally and technically innocent) had not been met. Others queried why the same remedy was not being extended to all the other men who had been convicted in similar cases.

The [Conservative Party Manifesto 2015](#) (page 46) included a commitment to legislate to “lift the blight of outdated convictions of this nature” by pardoning other men, both living and deceased, in Dr Turing's position <sup>14</sup> .

As mentioned above, in October 2016, John Nicolson MP introduced a Private Member's Bill which would have legislated to automatically pardon deceased and living men with cautions and/or convictions for historic same-sex sexual offences (subject to certain conditions).

The Bill sought to do two separate things:

- grant pardons to anyone (alive or deceased) convicted or cautioned for certain historical sexual offences between men; and
- extend the disregard scheme by enabling relatives of deceased men to apply on their behalf and by adding section 32 of the Sexual Offences Act 1956 (solicitation by men) to the list of offences for which a disregard can be sought

However, the UK Government declined to support the Bill. Justice Minister Sam Gyimah stated that the Government's preferred option was to tie pardons for the living to the disregard process under the 2012 Act rather than making such pardons automatic. John Nicolson's bill was subsequently “talked out”<sup>vi</sup> at Second Reading in the House of Commons.

As pointed out above, the approach to pardons and disregards in England and Wales is different to the approach taken by the Scottish Government.

## ***Policing and Crime Act 2017***

On 31 January 2017, the UK Parliament passed the Policing and Crime Act 2017 (“the 2017 Act”). The 2017 Act contains provisions which will allow persons, both living and dead, who were convicted of or cautioned for certain, repealed offences, to be pardoned.

The 2017 Act provides an automatic posthumous pardon for those persons who had been convicted of, or cautioned for certain repealed offences, and who had died before the relevant section came into force (31 January 2017).

The provisions in the 2017 Act build on the disregard scheme which was introduced by the Protection of Freedoms Act 2012 (“the 2012 Act”) and provide that, where a conviction or caution has been successfully disregarded, the person is also pardoned. This route to a pardon will apply to those who are still living.

Under the UK disregard scheme, men with historic cautions or convictions for certain sex offences (namely buggery and gross indecency) can apply to the Home Secretary to have their convictions disregarded<sup>vii</sup>.

The Home Secretary must be satisfied that the following conditions have been met:

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vi Opposing MPs can stop Private Member's Bills from progressing by “filibustering” or “talking them out” during debates. Mr Nicolson's bill fell after Justice Minister Sam Gyimah used up the allotted time for debating it.

vii The 2017 Act also includes a regulation-making power which would allow the Home Secretary to add further offences to those contained in the 2012 Act.

- the other person involved in the conduct constituting the offence consented to it and was aged 16 or over; and
- any such conduct now would not be an offence under section 71 of the Sexual Offences Act 2003 (sexual activity in a public lavatory)

The aim of these two conditions is to ensure that the only convictions disregarded are those for behaviour that is no longer criminal. If the Home Secretary decides that it appears that the above conditions are met, a conviction becomes disregarded and is deleted or annotated and will no longer be disclosed, including in Disclosure and Barring Service certificates or in court proceedings. In other words, if an application for a disregard is successful, the applicant is treated for all purposes in law as if he had not committed the offence or been convicted for it.

## Criticisms

The approach taken towards pardons and disregards in England and Wales has been criticised for a number of perceived flaws.

The Equality Network has stated that these include that the pardon was only given automatically to people who had died before 31 January 2017 and that those who were still living on that date must apply for the disregard to receive the pardon<sup>2</sup>. The Equality Network states that this is a complicated process that most people do not want to put themselves through and that as a result, “only a tiny minority of people still living have received the pardon”.

In addition, it is pointed out that not all of the discriminatory historical offences for sex-related activity between men are covered. For example, people convicted for “importuning”, for simply chatting up other men, are not covered. Also, many people feel that only giving a formal, symbolic pardon misses the main point:

“ They feel that pardoning a person implies that the person did something wrong in the first place, and that what is needed is a clear acknowledgement that these convictions were wrong and discriminatory, and an apology. ”

The Equality Network has stated that although it has taken longer to develop the Scottish legislation, this means that the Bill has been able to benefit from the debates around the legislation for the rest of the UK, and that as such, the Bill addresses each of these flaws.

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