

This document relates to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 6 November 2017

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

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## Policy memorandum

### Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill ('the Bill') introduced in the Scottish Parliament on 6 November 2017.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 21-EN);
  - a Financial Memorandum (SP Bill 21-FM);
  - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 21-LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

### Policy objectives of the Bill

4. Until relatively recently, the criminal law in Scotland discriminated against same-sex sexual activity between men. The law did this in two ways - by specifically criminalising activity that would be legal if opposite-sex partners engaged in the same activity and by the use of more general laws that were not discriminatory in and of themselves, but could be used to discriminate against same-sex sexual activity. In other words, adult

This document relates to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 6 November 2017

consensual sexual activity was criminalised where it occurred between men.

5. Same-sex sexual activity between men was, in itself, a criminal offence in all circumstances as late as 1980. This law applied wherever the activity took place including in, for example, private homes. And it was only in January 2001 that the age of consent for sexual activity between men and sexual activity between opposite-sex partners was equalised at 16 following the commencement of the Sexual Offences (Amendment) Act 2000. It can be said that the earlier laws were in and of themselves discriminatory.

6. There were also other laws that, although not discriminatory in and of themselves, could be used in a discriminatory manner. It was possible that offences like the common-law offence of shameless indecency (now public indecency, following the High Court judgment in *Webster v. Dominick* 2005 1 J.C. 65<sup>1</sup>) may have been used in a discriminatory way in that it was used to prosecute same-sex sexual activity of a kind that would not be prosecuted where opposite-sex partners engaged in exactly the same activity.

7. Scotland is a quite different place than it was 30 and 40 years ago in terms of the attitudes held by much of the population towards same-sex sexual activity. There is widespread agreement that it was wrong to have criminalised same-sex sexual activity and a general acceptance that the law should treat same-sex and opposite-sex sexual activity in the same way. This change in general attitude can be seen in many ways, including how the criminal law has developed. For example, the Sexual Offences (Scotland) Act 2009 sets out a statutory framework for sexual offences law in Scotland which does not distinguish between same-sex and opposite-sex sexual activity. That Act uses neutral, modern terminology whereas the old law used offensive and discriminatory terminology.

8. However, the discriminatory effect of these laws lingers on. Though the offences which specifically criminalised same-sex sexual activity that would not be criminal if it involved opposite sex partners have been repealed or abolished there are still men in Scotland who have criminal convictions for same-sex sexual activity that is now legal. Information

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<sup>1</sup> [http://www.bailii.org/scot/cases/ScotHC/2003/2005\\_1\\_JC\\_65.html](http://www.bailii.org/scot/cases/ScotHC/2003/2005_1_JC_65.html)

This document relates to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 6 November 2017

about such convictions continues in some cases to be held on records maintained by Police Scotland and while it is overwhelmingly likely that such convictions will be ‘spent’ convictions under the Rehabilitation of Offenders Act 1974, and so would not be disclosed on a basic level disclosure, it is still possible that such convictions could be disclosed when a person applies for a role for which a higher level disclosure certificate is required.

9. Ensuring that the suffering of men convicted under these laws is acknowledged is an important step that should be taken to help correct these historical wrongs. As well as acknowledging the injustice of ever having had such discriminatory laws in the first place and for ever having used other laws in a discriminatory manner, it is also important to ensure that these men cannot be prejudiced in future by the disclosure of such convictions. The Bill also helps to make clear Scotland’s position on LGBTI equality, given that there are still many countries around the world which criminalise all sexual activity between men.

10. The Bill contains a provision stating that its purpose is to formally 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.

11. The policy coverage of this Bill is restricted to convictions relating to same-sex sexual activity between males. There were never any offences in Scots law specifically targeting same-sex sexual activity involving women and it is the Scottish Government’s understanding, following discussions with stakeholder groups, that they are not aware of any cases where more general criminal laws were used to prosecute same-sex sexual activity involving women in circumstances where the same activity, involving opposite-sex partners, would have been legal or not prosecuted.

This document relates to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 6 November 2017

12. There is similar legislation in England and Wales, contained in the Protection of Freedoms Act 2012 and the Policing and Crime Act 2017, which also only applies to offences committed by men.

## Pardons for certain historical sexual offences

13. The Bill provides for an automatic formal pardon for people convicted of the historical sexual offences listed in section 2(1) of the Bill where the conviction was for conduct which is now legal.

14. The pardon is granted automatically. In other words, no one needs to do anything to receive a pardon. This is different from the disregard scheme, which is discussed below.

15. The pardon applies both to living people and posthumously.

16. The effect of the pardon is symbolic. It is intended to be a formal acknowledgement that the laws which people with such convictions were convicted under 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 it is intended to lift the burden of conviction. It does not reverse the conviction, and a person with a conviction for same-sex sexual activity that is now legal would have to apply for a disregard if they wish to ensure that information about the conviction is disregarded from criminal records information held by the police.

17. The list of offences at section 2(1) of the Bill is a list of offences which it is considered were used to prosecute same-sex sexual activity between men in circumstances where the same activity, involving opposite-sex partners, would not have resulted in convictions.

18. They include offences which criminalised same-sex sexual activity between men irrespective of the age of those involved and whether or not all parties consented (such as “gross indecency” under the Criminal Law Amendment Act 1885 and section 7 of the Sexual Offences (Scotland) Act 1976, and the common law offence of “sodomy”<sup>2</sup>. They also include

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<sup>2</sup> The Scottish Government acknowledges that this is offensive terminology however it was until recently the name of a Scots law offence.

This document relates to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 6 November 2017

offences which, after the general decriminalisation of same-sex sexual activity between men in 1980, continued to criminalise it in circumstances where the same activity involving opposite-sex partners would not be criminal, principally by setting a higher age of consent.

19. 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<sup>3</sup>. It has been included in the list of offences because there is evidence from stakeholders to suggest that this offence may have been used to prosecute same-sex sexual activity between men in circumstances where the same activity involving opposite-sex partners would not have been prosecuted.

20. In addition to the specific listed offences, a “historical sexual offence” also includes any other offence which regulated, or was used in practice to regulate, sexual activity between men and which has either been repealed or abolished or which once covered sexual activity between men of a type which, or in circumstances which, would not amount to the offence now. This provision is included because, while efforts have been made to identify the offences which were used to prosecute same-sex sexual activity which is now legal, it is recognised that other common law or statutory offences, such as breach of the peace, or indeed local byelaws, may have been used to prosecute such activity. This ensures that a person with a conviction for

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<sup>3</sup> 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*, 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.”

This document relates to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 6 November 2017

*any* offence which was used to prosecute same-sex sexual activity that is now legal is pardoned and can apply for a disregard.

21. In contrast with the disregard scheme (which is discussed below), a person need take no action in order to receive a pardon. This approach is 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 but only to those who had died at the time the 2017 Act was commenced).

## Disregarding certain convictions for historical sexual offences

22. A key policy aim of the Bill is to ensure information relating to convictions for 'historical sexual offences' cannot be used against a person in any way. So the Bill provides for protections against the use of such information and also taking steps so that such information is never included in disclosure checks.

23. The Bill provides for a statutory scheme which enables a person who has been convicted of a historical sexual offence listed in section 2(1) of the Bill to apply to have that conviction disregarded so that it would never be disclosed on, for example, an Enhanced Disclosure Certificate.

24. In order for an application for a disregard to be accepted, the conduct amounting to the offence for which the applicant was convicted must not constitute an offence on the date this legislation is commenced. This is deliberately drawn sufficiently broadly to cover widely applicable reasons why the conduct may still constitute an offence, such as the absence of consent, the age of the other participant, and sexual activity having occurred in a public place. It is also intended to cover more unusual circumstances, such as consensual sexual activity between an adult and a 16 or 17 year old in respect of whom the adult was in a position of trust. This offence is contained at sections 42-45 of the Sexual Offences (Scotland) Act 2009, and provides that it is an offence for a person in certain positions of trust (such as those looking after children in schools, care homes or hospitals) to engage in sexual activity with a child in their care who is under the age of 18. It is an exception to the general rule that consensual sexual activity with a child over the age of 16 is legal.

This document relates to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 6 November 2017

25. The historical sexual offences listed in section 2(1) criminalised both acts which are now legal and those which would still be illegal, for example because the other party did not consent, or because the conduct constituting the offence involved sexual activity with a child under the age of 16. The Bill therefore puts in place a process for determining whether an application for a disregard in respect of a conviction for an offence listed in section 2(1) should be granted. This depends on whether the conduct to which the conviction related would now be legal.

### Process for applying for disregard

26. It is highly likely that, given the age of many of these convictions, information may be scarce regarding the specific conduct which led to a conviction for a historical sexual offence and so it may not be possible to determine with certainty whether the conviction relates to activity that would now be legal.

27. The Bill approaches this by establishing a test for the Scottish Ministers to apply. The test is that Ministers are to grant the application for a disregard unless it appears to them that the offence for which the applicant was convicted is not a historical sexual offence, or that the conduct to which the conviction relates would still amount to an offence on the date of commencement of this legislation.

28. In cases where it is not possible to be certain whether the acts to which the conviction relates would still be an offence on the date of commencement of this legislation, information such as the sentence that was imposed is likely to be helpful in identifying convictions that relate to acts that are still criminal.

29. The Bill provides that the Scottish Ministers must take reasonable steps to gather in information to assist in consideration of the application. Therefore they may request any person to make representations or provide information in relation to an application, and a person of whom such a request is made is authorised to make such representations or provide such information for the purpose of assisting the Scottish Ministers in determining whether the application meets the test set out above.

30. This reflects the fact that such information as exists about convictions for same-sex sexual activity is likely to be held by bodies such as Police

This document relates to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 6 November 2017

Scotland, the Scottish Courts and Tribunals Service and the Crown Office and Procurator Fiscal Service (COPFS), and ensures that they have legal authority to disclose such information upon a request being made by the Scottish Ministers.

31. In determining an application for a disregard, the Scottish Ministers are required to consider all representations and other information included in the application, all representations and information provided to them following a request made to a third party (such as Police Scotland or COPFS), and any other available record of the investigation of the conduct which led to the conviction and any subsequent proceedings relating to the conduct.

### Appeal

32. Where a disregard application is refused, the applicant has a right of appeal to the Sheriff Court. Where a disregard application is successful, information concerning that conviction will not appear on any background check carried out by Disclosure Scotland and the person convicted of the offence will be treated as not having committed the offence (so they would not be subject to any liability or other prejudice in law by failing to disclose the conviction, or circumstances relating to the conviction).

### Implementation of disregard

33. The Bill provides that where a disregard application is successful, information held by “relevant record keepers” in “official records” about the disregarded conviction must be removed from official records: that information could otherwise appear on a disclosure check. Regulations permit the Scottish Ministers to specify who are the “relevant record keepers” who hold information about convictions that may be used in considering disclosure requests.

34. The Bill provides that “official records” do not include records held in the care of 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



This document relates to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 6 November 2017

men who were discriminated against through these laws are given new protections.

35. In respect of the scheme for disregards, the approach taken is similar to, though not exactly the same as, that contained at Chapter 4 of Part 5 of the Protection of Freedoms Act 2012, which put in place a scheme for disregarding certain convictions for same-sex sexual offences in England and Wales. The UK Government has advised that, in the five years since the scheme came into effect (2012 to mid- August 2017), the Home Office had received 254 valid applications (i.e. excluding those which were clearly outwith the scheme as the applications related to offences like theft or fraud). Of these 254 applications, 155 had been accepted, 89 had been rejected and 10 were in the process of being determined. The most common reason for rejection was that the case related to same-sex sexual activity in a public lavatory<sup>4</sup>.

## Alternative approaches

### Approach in England and Wales

36. The Scottish Government considered the approach taken by the UK Government, in Part 9 of the Policing and Crime Act 2017, to pardoning men with convictions for same-sex sexual activity that is now legal. That Act provides that a person is pardoned only following a successful application for a disregard, unless they had died before the Act came into force, in which case a posthumous pardon was granted automatically.

37. However, the Scottish Ministers' view is that a person should not have to go through the process of applying for a disregard in order to know that they have been pardoned, although the Bill does not preclude them from doing so. Many individuals with convictions for same-sex sexual activity that is now legal may be unlikely to apply for a job or other role for which higher-level disclosure is required, for example, because they are

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<sup>4</sup> In Scotland, prior to the repeal of section 13(5) of the Criminal Law (Consolidation) (Scotland) Act 1995, this could be prosecuted under section 13(5)(a), read with section 13(2)(b), which stated that a sexual act between men was not to be treated as done in private if it occurred in a public lavatory. Such activity would be likely now to constitute the offence of 'public indecency' and therefore would not qualify for the pardon and disregard.

This document relates to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 6 November 2017

retired, and as such, may not wish to go through the process of applying for a disregard. The Bill allows such people to know that they have been pardoned without having to apply for a disregard.

## Non-statutory scheme

38. Consideration was given as to whether the disregard scheme could operate on a non-statutory basis, with people making an application to Police Scotland to have conviction information removed from the criminal history system if the conviction appeared to relate to same-sex sexual activity that is now legal.

39. However, it was considered appropriate that a scheme dealing with such fundamentally important rights – a scheme which enables a person to apply to have information about a criminal conviction disregarded, such that they are treated as not having been convicted of an offence, should be placed in statute. Furthermore, there were concerns that if the scheme did not operate on a statutory basis, it would not be clear what right an applicant would have to challenge a decision to refuse the granting of a disregard and how any appeal against a refusal would be considered by someone independent from the original decision-maker.

## Pro-active records search

40. Consideration was also given as to whether it would be practical to pro-actively go through records held by Police Scotland to disregard convictions for same-sex sexual activity that would now be legal. However, it may in many such cases prove difficult or even impossible to contact those whose convictions are to be disregarded to inform them that this had happened. If an attempt were to be made to exhaustively search for any convictions that *could* relate to same-sex sexual activity that is now legal, this could be unduly expensive and inefficient: especially if it were necessary to consider, for example, convictions for breach of the peace, as a tiny proportion of these (if any at all) could relate to e.g. displays of affection between men in a public place.

41. In addition, the work involved in many cases could be seen as unnecessary in that the person to whom the conviction relates has either passed on or is not interested in receiving a disregard, and may not wish to be contacted to be informed that their conviction has been disregarded.

This document relates to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 6 November 2017

## Consultation

42. There was no formal Scottish Government consultation. However, following the announcement of the intention to legislate in Parliament by the Cabinet Secretary for Justice in October 2016, the Bill's provisions were developed in consultation with Police Scotland, COPFS, Stonewall and The Equality Network.

43. In particular, the Equality Network were asked to contribute to development of the list of "historical sexual offences" at section 2 of the Bill, identifying a number of offences that could be used to prosecute same-sex sexual activity between men in circumstances where the same conduct involving opposite-sex partners would not have amounted to a criminal offence. Police Scotland were involved in consideration of whether the 'disregard' scheme could operate on an administrative basis or required to be placed on statute.

## Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

### Equal opportunities

44. The Bill will advance equal opportunities by ensuring that men with convictions for same-sex sexual activity that would not now amount to a criminal offence are not disadvantaged by having those convictions disclosed in an enhanced disclosure check, or by otherwise being required to disclose them.

45. More generally, the Bill, and in particular, the formal pardon it provides to those convicted of criminal offences for engaging in same-sex sexual activity which was legal between opposite-sex partners, is intended to formally recognise that the laws under which they were convicted were discriminatory and unfair, and to acknowledge the harm that may have been done to those convicted of criminal offences in these circumstances – both as a direct personal consequence of the conviction itself, and the reputational harm they may have suffered as a consequence of having to disclose such convictions.

46. As such, the Bill may also help to advance equal opportunities by sending a clear message that the Scottish Parliament (and Scotland itself)

This document relates to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 6 November 2017

regards these historical laws as discriminatory and emphasising that it is not acceptable to discriminate against people on the basis of their sexual orientation.

47. As outlined in paragraph 11 above, the Scottish Government is not aware of cases involving same-sex sexual activity between women having been prosecuted in circumstances where the same activity involving opposite-sex partners would not have been prosecuted.

## Human rights

48. It is considered that the Bill is fully compatible with the European Convention on Human Rights (ECHR). It will promote compliance with Article 8 (right to respect for private life) by ensuring that old convictions for same-sex sexual activity between men which is no longer criminal are not revealed as part of disclosure checks prior to an individual taking up work or voluntary activity. It should be noted that the former general criminalisation of same-sex sexual activity between men and the former unequal age of consent were both ruled to be in breach of ECHR<sup>5</sup>. While the pardon and disregard scheme apply only to offences relating to same-sex sexual activity between men, the Scottish Government does not believe that this will result in discrimination, given that the Bill's provisions seek to redress a historical situation which was applicable only to sexual relations between men. The Bill is also entirely compatible with, and can be seen as helping to secure compliance with, provisions of other international human rights instruments such as Articles 1, 2, 7 and 12 of the Universal Declaration of Human Rights and Articles 2(1), 17 and 26 of the International Covenant on Civil and Political Rights.

## Island communities

49. The Scottish Government is satisfied that the Bill has no differential effect upon island or rural communities.

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<sup>5</sup> Dudgeon v UK (European Court of Human Rights, Application No. 7525/76); Sutherland v UK (European Commission of Human Rights, Application No. 25186/94- the latter case was withdrawn after equalisation of the age of consent.)

This document relates to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 6 November 2017

## Local government

50. The Scottish Government is satisfied that the Bill has no detrimental effect on local authorities.

## Sustainable development

51. The Scottish Government is satisfied that the Bill has no negative effect on sustainable development. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is, therefore, exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

This document relates to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 6 November 2017

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