POLICY NOTE

THE HISTORICAL SEXUAL OFFENCES (DISREGARDED CONVICTIONS AND OFFICIAL RECORDS) (SCOTLAND) REGULATIONS 2019

SSI 2019/313

The above instrument was made in exercise of the powers conferred by section 10(3) and 10(5) of the Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018 ("the 2018 Act"). The instrument is subject to affirmative procedure.

Purpose of the instrument.

These Regulations prescribe the manner by which convictions that are to be 'disregarded' in terms of the 2018 Act are removed from official records. The Regulations also specify the identities of those bodies who are to be treated as relevant record keepers with responsibility for removing information about such convictions from official records for the purposes of section 10(3) and (5) of the Act.

Policy Objectives

The Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018 puts in place a statutory scheme to enable a person with a conviction relating to same-sex sexual activity between men that is now lawful, as set out in section 2(1) of the Act, to apply to have that conviction 'disregarded' so that it would never be disclosed, for example, on an Enhanced Disclosure Certificate, or in response to a request made to the Police or SCTS for information about a person's spent convictions. The Act further provides that a person who has a disregarded conviction is to be treated for all purposes as someone who has not committed the offence.

Where an application is successful the Act provides that Scottish Ministers must direct 'relevant record keepers' to remove all references to disregarded convictions contained in official records held by them. Section 10(3) of the Act contains a power for the Scottish Ministers to define the manner in which references to disregarded convictions are to be removed from official records by relevant record keepers. Section 10(5) of the Act contains a power for the Scottish Ministers to define the relevant record keepers to which the Act applies.

Records relating to historical convictions held by relevant record keepers are in a range of different formats. Some information about convictions may be held on IT systems where it will be easy to simply delete the record of the conviction. Others may be held on paper records or microfiche. In some of these cases, it might not be possible to 'remove' the record as the relevant documents might also contain information about other convictions which should not be removed from the record. Equally, historical records of trials held by National Records of Scotland, (NRS), may be of future historical interest, for example, to someone wishing to research the prosecution of same-sex sexual activity in Scottish courts in the 20th century. As such, it would not be appropriate that such records be erased from the historical record. This order therefore provides that a disregarded conviction can be removed either by

deleting the record, redacting that part of the record which relates to the disregarded conviction, or annotating the record so as to make clear that the conviction has been disregarded and it should never be disclosed in response to a request for information concerning a person's convictions. This last option is especially important in respect of historical records held by the NRS.

'Relevant record-keepers' are organisations that may hold information concerning disregarded convictions which could, in certain limited circumstances, be disclosed to a third party seeking information about a person's criminal history. The principal source of such information are records maintained by Police Scotland concerning peoples' criminal history. However, in certain circumstances, the Scottish Courts and Tribunals Service (SCTS) could hold information relating to such convictions, either directly or through records which are in the care of the NRS. It is also possible that Disclosure Scotland, which is responsible for administration of the Protection of Vulnerable Groups scheme, could retain information that has been passed to them which relates to a disregarded conviction. Finally, while it is likely that, given the passage of time, any records held by the Crown Office and Procurator Fiscal Service (COPFS) concerning the prosecution would now have been destroyed, there is a possibility that they could still retain records relating to a conviction. This Order therefore provides that Police Scotland, the Scottish Courts and Tribunals Service, the Crown Office and Procurator Fiscal Service and the Scottish Ministers acting in their capacity as the holder of official records maintained by Disclosure Scotland are to be regarded as 'relevant record keepers' for the purpose of the 'disregard scheme' at Part 3 of the 2018 Act.

Impact Assessments

No Impact Assessments have been carried out.

No equality issues arise. The Act 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.

Financial Effects

This instrument makes provision that enables the 'disregard scheme' at Part 3 of the 2018 Act to be commenced. A Financial Memorandum was published with the Bill when it was introduced in Parliament, setting out the financial implications of Part 3 of the Act for the Scottish Administration. That Memorandum set out that it is not considered that there will be any new costs falling on other bodies, individuals, businesses or local authorities as a result of Part 3 of the Act.

Scottish Government
Justice Directorate

June 2019