

EXPLANATORY NOTES

Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018 (asp 14)

£6.90

HISTORICAL SEXUAL OFFENCES (PARDONS AND DISREGARDS) (SCOTLAND) ACT 2018

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018. They do not form part of the Act and have not been endorsed by the Parliament.

2. These Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE ACT

3. The Act 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 Act provides for two distinct but linked areas 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 maintained by Police Scotland does not show up in a disclosure check.

4. A more detailed explanation of the Act's purpose can be found in the Policy Memorandum, which also explains the policy intentions that underpin it.

PART ONE – INTRODUCTORY

Section 1 – Purpose of this Act

5. Section 1 sets out that the purpose of the Act is to acknowledge the wrongfulness and discriminatory effect of past convictions for certain historical sexual offences – as defined by section 2 – by pardoning persons who have been convicted of those offences (in Part 2), and also by providing for a process for those convictions to be disregarded (in Part 3).

Section 2 – Historical sexual offence: definition

6. Section 2(1) provides a definition of "historical sexual offences" to which the provisions concerning pardons and disregards apply.

7. Section 2(1)(a) 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: 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.

8. In its current form section 13(9) still continues to criminalise living off the earnings of male prostitution: so although technically this provision comes within the definition of "historical sexual offence" in the Act, 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 now.

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

10. Sections 2(1)(c) and (d) provide that it 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, which 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 in private).

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

12. Section 2(1)(g), read with section 2(2), provides that this 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 comes into force. 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.

13. Section 2(4) 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. As such this term includes both actual sexual intercourse and lower-level physical displays of affection such as kissing or holding hands – as well as behaviour intended to initiate or lead up to sexual intercourse.

PART TWO – PARDONS FOR CERTAIN HISTORICAL SEXUAL OFFENCES

Section 3 – Pardons for certain historical sexual offences

14. The effect of section 3 is that any person (including any deceased person) who was convicted of a historical sexual offence as defined in section 2 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 this section comes into force.

15. There are a number of reasons people may have been convicted of a historical sexual offence for behaviour that is no longer illegal. Prior to 1980, all same-sex sexual activity between men was illegal in Scotland. Between 1980 and 2001, the age of consent was lower for sexual activity between opposite-sex partners than for same-sex sexual activity between men. Similarly, same-sex sexual activity between men remained criminal in a number of circumstances where the same activity involving opposite-sex partners would not be.

16. For example, where soliciting and importuning would only be criminal in relation to opposite-sex partners where it occurred in the context of prostitution, the same was not true where it related to sexual activity between men. Sexual activity which was treated as occurring in private if it happened between opposite-sex partners was treated as having taken place in public when it happened between men, because there was a restrictive definition of what constituted "private" in this context. Between 1980 and 1995 there was also a specific offence criminalising same-sex relationships between men who were crew members of a UK merchant ship (section 80(7)(d) of the Criminal Justice (Scotland) Act 1980).

17. More generally, it is thought that men may have been prosecuted using common law offences for displays of affection in a public place of a kind that would not have been criminal where they involved opposite-sex partners.

18. As such, if a person was convicted of, for example, an offence under section 13(5)(c) of the Criminal Law (Consolidation) (Scotland) Act 1995 because the person with whom they engaged in sexual activity was aged 16 or 17, they would be pardoned. If a person was convicted of the same offence for engaging in sexual activity with a child under the age of 16, that person is not pardoned.

19. Section 16 provides that, for the purpose of section 3, a "person" includes a deceased person and accordingly the pardon applies posthumously.

Section 4 – Pardons: supplementary

20. This section provides, for the avoidance of doubt, that the pardon is symbolic and does not affect any conviction or sentence or give rise to any right, entitlement or liability.

PART THREE – DISREGARDING CERTAIN CONVICTIONS FOR HISTORICAL SEXUAL OFFENCES

Section 5 – Application to have conviction for historical sexual offence disregarded

21. Section 5(1) provides that a person who has been convicted of a historical sexual offence can apply to the Scottish Ministers to have that conviction disregarded.

22. Section 5(2) sets out the information that a person making an application for a disregard is required to provide. It is intended that guidance for potential applicants will be published when the disregard scheme comes into effect, setting out in more detail exactly what information they are required to provide in an application.

23. Section 5(3) gives discretion to an applicant to include any other information which they wish the Scottish Ministers to consider when determining their application. It would be a matter for the applicant to decide what other information could be useful to Ministers in considering their application. It could include, for example, information from any third person who witnessed the incident which led to the applicant's conviction, or can otherwise confirm or support the applicant's account of what happened.

Section 6 – Application for disregard: further information

24. Section 6(1) provides that the Scottish Ministers may ask any person to provide information or make representations in relation to an application for a disregard. In practice, requests are most likely to be made to Police Scotland, the Crown Office and Procurator Fiscal Service (COPFS) and the Scottish Courts and Tribunals Service (SCTS), though there may be other organisations or individuals who may be consulted in individual cases.

25. Section 6(2) authorises any person to whom such a request is made to provide the information requested.

Section 7 – Determination of application for disregard

26. Section 7 sets out the process for the Scottish Ministers to follow in determining an application for a conviction to be disregarded.

27. Section 7(1) requires the Scottish Ministers to consider all representations and other information provided by the applicant, or provided by persons to whom a request was made under section 6(1); and for Ministers to take reasonable steps to obtain, and where available, to consider, information held about the case (unless it already appears that the conviction was not for a historical sexual offence, for example, because it was a conviction for an offence such as fraud or theft). This may involve contacting Police Scotland or other justice agencies for any information they hold about the applicant's conviction.

28. Sections 7(2) and 7(3), read together, provide that the Scottish Ministers must grant an application for a disregard unless it appears to them either that the offence for which the applicant was convicted was not a historical sexual offence as defined at section 2, or that the conduct constituting the offence would, if occurring in the same circumstances on the day the Act comes into force, still be an offence.

29. Section 7(4) requires Ministers to record their determination and the reasons for it in writing, provide notice of the determination and reasons for it to the applicant and, where the application is granted, to inform the applicant that references to the conviction will be removed as set out at section 10. Section 7(5) provides that where an application for a disregard is granted, it takes effect 14 days after notice of the determination is given to the applicant.

Section 8 – Appeals

30. Section 8 provides that a person whose application for a disregard under section 5(1) has been refused may, with leave, appeal against the decision to the sheriff.

31. Section 8(3) provides that, in deciding an appeal, the sheriff may only take account of representations and information that were available to the Scottish Ministers when determining the application. If the applicant wishes to put new material forward, it would be open to them to submit a fresh application.

32. Section 8(4), read with section 8(5), provides that if it appears to the sheriff that the offence for which the applicant was convicted was not a "historical sexual offence" or that the conduct constituting the historical sexual offence would still be an offence, the sheriff must dismiss the appeal. Otherwise, the sheriff must allow the appeal.

33. Section 8(8) provides that an appeal against a refusal to grant a disregard is to be made in the sheriffdom where the appellant resides; or, where the appellant does not reside in Scotland, in the sheriffdom of Lothian and Borders at Edinburgh.

Section 9 – Effect of disregard

34. Section 9 sets out the effect in law of the granting of a disregard.

35. Section 9(2) provides that where a disregard is granted, the applicant is to 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.

36. Section 9(3) provides that details of disregarded convictions cannot be used in any judicial proceeding, as defined at section 9(6), nor in any such proceedings can the individual be asked about or be required to answer questions about any disregarded conviction, or circumstances ancillary to it, as defined at section 9(7). In addition to court proceedings, judicial proceedings include proceedings before a statutory tribunal, arbiter appointed under an arbitration agreement or professional regulatory body.

37. Section 9(4) provides that questions put to a person in any other context (for example, by a prospective employer or as part of a process for applying for insurance or for a loan) asking about a person's past convictions, offences, or conduct are not to be treated as including any reference to a disregarded conviction and the failure to provide details relating to a disregarded conviction cannot lead to any consequent liability on the part of the individual.

38. Section 9(5) provides that any obligation under any law or other agreement or arrangement to disclose any matters (such as offences) will not apply to such disregarded convictions or associated details.

Section 10 – Removal of disregarded convictions from official records

39. Section 10 sets out the process to be followed for removing a disregarded conviction for a historical sexual offence from official records.

40. Section 10(1) provides that the Scottish Ministers must remove all references to such a conviction contained in official records held by them and require every relevant record keeper to remove all references to the disregarded conviction from records that they hold.

41. Section 10(2) provides that a relevant record keeper must comply with the requirement under section 10(1) to remove records of a disregarded conviction as soon as reasonably practicable (but not until the disregard has taken effect), and notify the applicant when they have done so.

42. Sections 10(3)-(5) provides the Scottish Ministers with a power to make regulations to prescribe the manner in which disregarded convictions are removed from official records and to prescribe who a "relevant record keeper" is for the purposes of this section.

Section 11 – Advisers

43. Section 11(1) provides that the Scottish Ministers can appoint independent advisers to advise on an application for a disregard under section 5. Section 11(2) provides that the advisers can be supplied with such information as is relevant to undertake this function. Section 11(3) enables the payment of expenses and allowances to the advisers.

44. These advisers may be people with particular knowledge or expertise in how offences concerning same-sex sexual activity were prosecuted in Scotland and they may assist in the consideration of cases where the information provided by the applicant and that held by the police, courts and COPFS or others is, on the face of it, insufficient to determine whether the applicant's conviction was for activity that would not be a criminal offence on the day the legislation comes into effect.

PART 4 - GENERAL

Section 12 – Saving for Royal Pardons

45. Section 12 provides that nothing in this Act affects the Royal prerogative of mercy – that is, the common law power of the Crown to issue a pardon, commute a sentence or quash a conviction.

Section 13 – Application of the Act to conduct dealt with otherwise than by prosecution

46. Section 13 makes provision with regards conduct that was dealt with by means of an alternative to prosecution.

47. Section 13(2) provides that references to a "conviction" and to a person being "convicted", or to a sentence, include references to, or a person being given, an alternative to prosecution.

48. Section 13(3) provides that 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.

49. Section 13(4) provides that where a child has been referred to a children's hearing on offence grounds and that ground has been established or accepted in such proceedings, that is to be treated for the purpose of this Act as a conviction; and that any disposal of such a case by a children's hearing is to be treated as a sentence.

50. These provisions ensure that matters which are not convictions before a criminal court but which can show up on a disclosure check as instances of offending behaviour are encompassed within the pardon and disregard scheme.

Section 14 – Regulations

51. Section 14 makes provision concerning the Scottish Ministers' powers to make regulations under this Act.

52. Section 14(1) provides that each power to make regulations in the Act (except section 17 on commencement) includes power to make incidental, supplementary, consequential, transitional, transitory or saving provision and that different provision can be made for different purposes.

53. Sections 14(2) and 14(3) provide that the regulation-making powers at section 10(3), to prescribe the manner in which disregarded convictions are to be removed from official records, and at section 10(5), to prescribe a "relevant record keeper", are both subject to the affirmative Parliamentary procedure; and that the power to make ancillary provision at section 15 is subject to the affirmative Parliamentary procedure if the regulations amend any part of the text of an Act, but otherwise is subject to the negative procedure.

Section 15 – Ancillary provision

54. Section 15 provides a power for the Scottish Ministers to make, by regulations, incidental, supplementary, consequential, transitional, transitory or saving provision relating to the Act or for the purpose of giving full effect to it.

Section 16 – Interpretation

55. Section 16 defines certain key terms used in the Act. For the purposes of section 3 and the pardon only, "person" includes a deceased person. In the remainder of the Act, including for the purposes of Part 3 in relation to an application for a disregard and its effect, "person" refers only to living persons.

Section 17 – Commencement

56. Section 17 provides that this section and sections 15, 16 and 18 come into force on the day after Royal Assent. All other provisions come into force on a day or days appointed by regulations made by the Scottish Ministers, and those regulations may make transitional, transitory or saving provision related to commencement.

PARLIAMENTARY HISTORY

57. The following is a table of the proceedings in the Scottish Parliament on the Bill for the Act and significant documents connected to the Bill published by the Parliament during the Bill's parliamentary passage.

Introduction	
Bill As Introduced – 1 March 2017	SP Bill 21 – Session 5 (2017)
Stage 1	
(a) Equalities and Human Rights Committee	
Meeting on 1 February 2018	Column 1 – 22
Meeting on 8 February 2018	Column 1 – 24
Meeting on 1 March 2018	Column 14 – 34
Stage 1 Report on the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill – 26 March 2018	Report
(b) Delegated Powers and Law Reform Committee	
Meeting on 19 December 2017	Column 4
Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill at Stage 1 – 20 December 2017	Report
(c) Consideration by the Parliament	
Stage 1 Debate – 18 April 2018	Column 21 – 70
Stage 2	
(a) Equalities and Human Rights Committee	
Meeting on 17 May 2018	Column 3 – 28
Bill As Amended at Stage 2 – 18 May 2018	SP Bill 21 – Session 5 (2018)
(b) Delegated Powers and Law Reform Committee	

Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill after Stage 2 – 29 May 2018	Report
Stage 3	
Consideration by the Parliament	
Stage 3 Debate – 6 June 2018	Column 17 – 68
Bill As Passed – 7 June 2018 (no amendments at Stage 3)	SP Bill 21 – Session 5 (2018)
Royal Assent	
11 July 2018	http://www.legislation.gov.uk/asp/2018/14/contents/enacted

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