

# **Equality Impact Assessment - Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill**

November 2017

## EQUALITY IMPACT ASSESSMENT – HISTORICAL SEXUAL OFFENCES (PARDONS AND DISREGARDS) (SCOTLAND) BILL

<b>Title of Policy</b>	Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill
<b>Summary of aims and desired outcomes of Policy</b>	To provide a formal pardon to people convicted of criminal offences for engaging in same-sex sexual activity that is now legal and to put in place a scheme to enable people convicted of these offences to apply to have them disregarded so that they do not show up in disclosure/criminal record checks.
<b>Directorate: Division: Team</b>	Justice Directorate: Criminal Justice Division: Criminal Law & Practice Team

### Executive Summary

The EQIA demonstrates that there are no potentially negative impacts to equality groups resulting from the granting of a pardon to people convicted of criminal offences for engaging in same-sex sexual activity that is now legal or from the creation of a scheme to allow people with such convictions to apply to have them disregarded so that they do not show up in disclosure/criminal record checks.

It will have a positive effect on people who have been convicted of these offences by ensuring that, in future, they can apply to have such convictions disregarded so that they will never appear on, for example, a high-level disclosure check when a person is applying for a job or voluntary position. 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.

### Background

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.

Until relatively recently, the criminal law in Scotland discriminated against same-sex sexual activity between men. It 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.

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.

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 ) 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.

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 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.

### **The Scope of the EQIA**

The likely effects of the policy were informed by discussions with key stakeholders such as Police Scotland, Stonewall and the Equality Network. Discussions have also taken place with officials in the Ministry of Justice regarding their experience of administering the scheme contained in the Protection of Freedoms Act 2012, which enables people with convictions in England and Wales concerning sexual activity between men at sections 12 and 13 of the Sexual Offences Act 1956, or corresponding predecessor offences, to apply to have those convictions disregarded.

Statistical evidence concerning convictions for same-sex sexual activity is somewhat limited, given the age of such convictions. However, statistics concerning the total number of people convicted for offences categorised as 'illegal homosexual acts' show 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.

Many of these convictions are likely to be for acts that are still illegal, for example because they involved non-consensual sexual activity, sexual activity with a child under the age of 16 or sexual activity in a public place in circumstances where it would be illegal, irrespective of whether it involved same-sex or opposite sex partners. In other words, in circumstances where no issue of discrimination arises.

On the other hand, there may be people with relevant convictions that are not included in these statistics involving, for example, behaviour prosecuted as common law "shameless indecency" that would now be legal, or even breach of the peace for public displays of affection that would never have been criminal had they involved opposite-sex partners.

Officials have therefore been reliant to an extent on information provided to them by key stakeholders regarding individuals who have approached them because they were convicted for same-sex sexual activity that would now be legal, and either that information about that conviction *has* been disclosed as part of a criminal history check, or that they are concerned that it may be disclosed.

## **Key Findings**

### Age

We do not have data concerning the age of those affected by having been convicted for same-sex sexual activity that is now legal. However, as the laws under which such activity was prosecuted had either been abolished or reformed by 2001 and, anecdotally, we understand that in the years immediately prior to this, there had been a presumption against prosecuting people for engaging in same-sex sexual activity which would have been legal if it had involved opposite-sex partners. However, it is not clear that this presumption was always applied consistently, and the total number of people convicted for crimes categorised as ‘illegal homosexual acts’ was actually higher between 1990/1 and 1999/2000 than it had been in previous decades. It is not clear to what extent this resulted from increased use of the criminal law to prosecute same-sex sexual activity of a kind that would still be criminal (e.g. sexual activity in public places) rather than

It is therefore reasonable to assume that the majority of people who have convictions falling within the scope of the pardon and disregard will be in their late 40s or older, though the pardon and disregard scheme apply to anyone who has a conviction for a historical sexual offence that relates to same-sex sexual activity between men that is now legal.

### Disability

We have not identified any evidence that the provisions of this Bill have a differential effect on people with physical or mental disability.

### Sex

There were a number of statutory and common law offences which specifically criminalised same-sex sexual activity between men such as, for example, the common law offence of “sodomy”<sup>1</sup> and the now-repealed statutory offences at section 13(5) of the Criminal Law (Consolidation) (Scotland) Act.

There were never any equivalent offences criminalising same-sex sexual activity between women. The Equality Network, a charity which works to promote lesbian, gay, bisexual, transgender and intersex equality and human rights, informed us that they were not aware of any cases where women were convicted of offences concerning same-sex sexual activity which would have been legal between opposite-sex partners. A leaflet produced by the Scottish Homosexual Rights Group in 1991, which detailed the various charges that could apply to men engaging in same-sex sexual activity, including section 80 of the Criminal Justice Act 1980, common law “sodomy”, “shameless indecency” and breach of the peace, simply noted that “the age of consent for lesbians in Scotland is 16”.

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<sup>1</sup> The Scottish Government acknowledges that this is offensive terminology however it was until recently the name of a Scots law offence.

We note that the 'disregard' scheme put in place in England and Wales via the Protection of Freedoms Act 2012 is concerned exclusively with offences involving same-sex sexual activity between men. While there has been criticism that the scheme was not more widely drawn, this has related to the fact that it does not cover convictions for soliciting for same-sex sexual activity between men. Whereas, we are not aware of any criticism from women convicted for same-sex sexual activity that the disregard scheme excludes them.

As such, the issue of people being convicted for same-sex sexual activity that would now be legal, and would have been legal if it had involved opposite-sex partners appears on the basis of the evidence available to us, to have exclusively affected men.

### Pregnancy and maternity

In view of the absence of evidence that the criminal law was ever used to prosecute women engaged in same-sex sexual activity in a discriminatory way, we have not identified any evidence that the provisions of the Bill could have any impact on pregnancy and maternity.

### Gender identity/ Transgender people

Hard data on the number of transgender people who were convicted of offences concerning same-sex sexual activity between men is not available. However it may be the case that at some of the people convicted of these offences would identify as transgender.

The Bill has been drafted so that any person convicted of a historical sexual offence for conduct that would not now be an offence is granted a pardon and can apply for a disregard. This ensures that the pardon and disregard scheme does not inadvertently exclude people who either do not now identify as male, or did not do so at the time they were convicted.

### Sexual orientation

As set out above, the Bill is intended to address the wrongfulness and discriminatory effect of past convictions for certain historical sexual offences which criminalised same-sex sexual activity between men by providing a formal pardon to people convicted of criminal offences for engaging in same-sex sexual activity that is now legal and to put in place a scheme to enable people convicted of these offences to apply to have them disregarded so that they do not show up in disclosure/criminal record checks.

As such, the Bill will affect gay and bisexual men, and men who have sex with men who do not identify as gay or bisexual. As noted above, it is not clear from the available information how many men were convicted of criminal offences in Scotland for engaging in same-sex sexual activity that is now legal. Information provided by the Ministry of Justice concerning a similar 'disregard' scheme operating in England and Wales shows that they have received 514 applications for a disregard over a 5 year period.

There are reasons why the experience in England and Wales may not provide an exact blueprint for estimating the likely numbers of applications in Scotland. Same sex sexual activity between men was not decriminalised until 1980 in Scotland as against 1967 in England and Wales. This means the scope of more recent convictions to result in applications being made is, at least theoretically, higher in Scotland. However, it is also commonly understood that the different evidential requirements under Scots law – namely,

the need for corroboration - meant that prosecutions were less common in Scotland for such offences than in England and Wales.

On the basis of the information provided by the UK Government, it is considered a reasonable assumption that the number of applications received in Scotland will be about one tenth of the number received in England and Wales, in view of relative population size

Of the 514 applications, the UK Government have advised that 187 were 'spurious' (i.e. they related to convictions for offences such as benefits fraud, drugs possession or assault which are irrelevant to the operation of the scheme), leaving a total of 327 applications.

Of these 327 applications, a further 53 were rejected as although relevant offences may have been committed, there were committed outwith England and Wales. A further 20 applications went no further after it was determined that no relevant conviction was held on central records.

This leaves a total of 254 applications. As at August 2017, 10 applications are in the process of being assessed, 155 were accepted and a disregard issued and 89 were rejected due to the conduct in question being assessed as still criminal under the terms of the disregard scheme. It is therefore reasonable to estimate that in Scotland, there might be around 50 applications for a disregard and that just over half of these will be found to relate to historical sexual offences, and about a two thirds of these will be for activity that would be now be legal.

A point that was raised with officials during the development of the policy contained in the Bill was a concern that people who were convicted for engaging in same-sex sexual activity of a kind that would have been legal had the same activity involved opposite-sex partners might see a pardon as something that is granted to someone who has done something 'wrong' that they are being pardoned for. They have highlighted the importance of making clear in communications associated with the Bill that this is not the case.

Another point raised with officials was the importance of explaining to people who have relevant convictions that the pardon, in contrast with the disregard scheme, is of only symbolic effect, and that in order to ensure that information about such convictions does not appear on disclosure checks, it will be necessary to apply for a disregard.

### Race

We have not identified any evidence that the provisions of this Bill have a differential effect on people on the basis of their race or ethnicity.

### Religion and belief

We have not identified any evidence that the provisions of this Bill have a differential effect on people on the basis of their religion or belief.

## **Recommendation and Conclusions**

The Scottish Government has found that none of the proposals are discriminatory and that there are no significant issues that we consider would impact negatively upon the various

groups. The Scottish Government instead considers that the Bill will have a positive equality impact.

The Bill's purpose is to acknowledge the wrongfulness and discriminatory effect of past convictions for certain historical sexual offences concerning same-sex sexual activity between men, and put in place a mechanism to ensure people convicted of these offences are not further discriminated against or otherwise prejudiced by having details of these convictions disclosed in any criminal record/disclosure check.

The exercise has highlighted the importance of being clear in communications work associated with the Bill that the pardon is understood as an acknowledgement of the wrongfulness and discriminatory nature of the way that the criminal justice system dealt with men engaging in same-sex sexual activity, that those who are receiving a pardon are not being pardoned for something that they did wrong and that the difference between the pardon, which is symbolic, and the disregard scheme, which is the mechanism enabling people to ensure information about such convictions is never included on a disclosure check, is clearly explained.



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