



An Roinn Dlí agus Cirt  
Department of Justice

# **Working Group to Examine the Disregard of Convictions for Certain Qualifying Offences Related to Consensual Sexual Activity Between Men in Ireland**

## **Key Issues Paper**



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## Background

### The legal background and context prior to 1993

The statutory provisions that criminalised consensual sexual acts between men in Ireland came into effect during British rule and remained in force following the foundation of the State. As a result, consensual sexual acts between men were effectively criminalised in law from 1634 until decriminalisation in 1993. It is now widely recognised that this criminalisation was an affront to human dignity and represents an historical injustice.

### Criminalising Laws

The Act for the Punishment of the Vice of Buggery (Ireland) 1634 was the first Act of an Irish Parliament to punish sexual acts between adult men.<sup>1</sup> Under this Act, anal sex or ‘buggery’ was a capital offence punishable by death.<sup>2</sup> This Act was repealed by the Offences Against the Person (Ireland) Act 1829 which retained the death penalty upon conviction for ‘buggery’.<sup>3</sup> This 1829 Act was subsequently repealed by the [Offences Against the Persons Act \(Ireland\) 1861](#) which removed the punishment of death upon conviction, instead classifying ‘buggery’ as an offence punishable by penal servitude for life and introducing the offence of ‘attempted buggery’ which was punishable by a sentence of penal servitude of up to ten years.<sup>4</sup> [The Criminal Law Amendment Act \(Ireland\) 1885](#) was the last statutory provision introduced in Ireland proscribing consensual sexual acts between men and criminalised ‘gross indecency’ between adult males with a maximum penalty of two years imprisonment with or without hard labour.<sup>5</sup>

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<sup>1</sup> The offence of ‘buggery’ was a common law offence that applied to both consensual and non-consensual heterosexual and homosexual activity and which was abolished under Section 2 of the Act of 1993. Sections 61 and 62 of the Offences Against the Person Act 1961 provided the sentence for the offence or attempt to commit or procure the offence. See DPP v Judge Devins & Anor [2012] IESC 7 and Section 2 of the Criminal Law (Sexual Offences) Act 1993. It should be noted that the offence of buggery still applies to relevant activity with animals and it is also unlawful to engage in buggery with a person who is under the relevant age of consent or who is mentally impaired. See Sections 3 and 5 of the Criminal Law (Sexual Offences) Act 1993 (since repealed and replaced), sections 2 and 3 of the Criminal Law (Sexual Offences) Act 2006 (as amended), and Part 3 of the Criminal Law (Sexual Offences) Act 2017.

<sup>2</sup> Prior to this such cases were dealt with almost exclusively in ecclesiastical courts who had the power to try and to sentence those accused of buggery to death. The concept of buggery or sodomy in this context was not limited only to men, but applied to men and women as well as bestiality. However, convictions for acts between men were by far the most common. See: Explanatory and Financial Memorandum to the Convictions for Certain Sexual Offences (Apology and Exoneration) Bill 2016. Seanad Éireann. (2016).106 ; Paul Johnson & Robert Vanderbeck. (2014). *Law, Religion and Homosexuality*. Routledge, p.33; Brian Lacey. (2008). *Terrible Queer Creatures: Homosexuality in Irish History*. Wordwell, pp.87-91.

<sup>3</sup> “*And be it enacted, that every Person convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall suffer Death as a Felon.*” Offences Against the Person (Ireland) Act 1829, s 18. Please see: The Statutes of the United Kingdom of Great Britain and Ireland 1829 (10 George IV c34).

<sup>4</sup> Offences Against The Person Act (Ireland) 186.1 ss 61, 62; Paul Johnson. (2019). Buggery and Parliament, 1533–2017. *Parliamentary History*. 38 (3), pp.331-32.

<sup>5</sup> “*Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross*

The 1885 Act explicitly extended criminalisation to all sexual acts between men, as prior to this legislation was largely restricted to punishment of anal sex with other non-penetrative acts not legislated for specifically.<sup>6</sup> The 1861 and 1885 offences dealing with ‘buggery’ and ‘gross indecency’ between men applied to both consensual and non-consensual acts and remained on the statute books following the foundation of the State of Ireland until they were repealed by the [Criminal Law \(Sexual Offences\) Act 1993](#).

## The Private Members’ Bill

The Private Members’ [Convictions for Certain Sexual Offences \(Apology and Exoneration\) Bill 2016](#) was introduced in Seanad Éireann on 6 December 2016. The Bill was sponsored by Senators Ged Nash, Ivana Bacik, Kevin Humphries and Aodhán Ó’Ríordáin. The Bill sought to provide for an apology to and exoneration of persons convicted of consensual same-sex sexual acts.<sup>7</sup> However, the Attorney General noted a number of significant legal issues with the Bill. The Government agreed not to oppose the Bill at second stage on a policy basis, but noted the impediments to the Bill as drafted.

Subsequent legal advices addressed more specifically the options available to give effect to the proposals in the Bill. The options considered were:

- to limit the effect of the Bill solely to those acts which would now be legal; or,
- to go further and establish a scheme similar to that in place in England and Wales whereby individuals could apply to have their conviction disregarded; or,
- to pursue a non-legislative option.

The advices also found that a non-legislative option, such as a motion of apology by the Oireachtas would present little difficulty. Of the legislative options, the advices found that the establishment of a scheme similar to that in England and Wales would be the better approach but highlighted certain legal and practical issues to be addressed in the drafting of any Bill.

Department of Justice officials subsequently engaged with Senator Nash and outlined the concerns around the proposals in the Private Members’ Bill. Senator Nash agreed to take forward an All-Party Motion providing for a public apology to persons convicted of

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*indecently with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.”* Criminal Law Amendment Act 1885. s 11, also known as the Labouchère Amendment.

<sup>6</sup> It is worth noting that prior to the advent of ‘gross indecency’ in the 1885 Act, the offence of ‘buggery’ was largely a gender neutral act, though it was primarily used to criminalise acts between men. And that non-penetrative sexual acts were still liable for prosecution under assault and other non-specific offences, Diarmuid Ferriter. (2009). *Occasions of Sin : Sex and Society in Modern Ireland*. Profile Books, pp.38-39; Lacey, pp. 148-149.

<sup>7</sup> See: Explanatory and Financial Memorandum to the Convictions for Certain Sexual Offences (Apology and Exoneration) Bill 2016. Seanad Éireann. (2016).106.

consensual same-sex sexual acts. The All-Party Motion was passed by both Houses of the Oireachtas on 19 June 2018.<sup>8</sup> The text of this motion is set out in Appendix 1.

Subsequently, to mark the 25th Anniversary of the Decriminalisation of Homosexuality, the then Taoiseach hosted a reception in Dublin Castle on 24 June 2018. At that reception it was confirmed that the Government planned to bring forward legislative proposals for a scheme to enable relevant convictions to be disregarded where the acts involved would now be lawful.

## Department of Justice engagement with An Garda Síochána

Following this, the Department of Justice engaged with An Garda Síochána during late-2018 to mid-2019 with a view to examining possible approaches for the disregard of any historical criminal records involving consensual same-sex sexual acts and the possibility of putting in place a legislative scheme similar to that in place in England and Wales to address this issue.

It soon became evident that the identification of Garda records containing the information necessary to allow for a disregard through a general search would prove a significant challenge and that some of the paper records of criminal investigation and prosecutions may be lost or no longer exist.

In order to better identify relevant records and interrogate their quality and nature, An Garda Síochána established a confidential email system for individuals seeking the disregard of a conviction. The intention was that individuals would provide An Garda Síochána with details of their conviction so that the Gardaí could then use this information to identify the individual files and determine the quality of information contained therein. No emails, however, were received by An Garda Síochána.

It was noted that there may be specific sensitivities due to the circumstances of arrest, prosecution and conviction that may inhibit affected persons from contacting An Garda Síochána. Following discussion it was agreed that the Department of Justice would set up a Working Group comprising representatives from the Department of Justice, An Garda Síochána, the Office of the Attorney General, the Irish Human Rights and Equality Commission (IHREC) and three individuals from the LGBT community with expertise in this area to examine how this issue could be progressed. On 1 March 2021 the Minister for Justice approved the establishment of the Working Group, with membership confirmed in June 2021.

The Working Group is tasked with the following:

1. To examine the feasibility of identifying appropriate records which may support a decision to disregard a record of conviction for consensual same-sex acts prior to decriminalisation in 1993.

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<sup>8</sup> Seanad Éireann. (2018a). *Apology for Persons Convicted of Consensual Same-Sex Sexual Acts: Motion*, 19 June 2018 Vol. 970 No.4; See also: Seanad Éireann. (2018b). *25th Anniversary of Decriminalisation of Homosexuality: Motion (Debate)*, 19 Jun 2018 Vol. 258 No. 11.

2. To examine issues regarding criminal records relating to consensual same-sex relationships prior to decriminalisation in 1993.
3. To consider, define and determine the offences to be included or excluded and to agree standards to meet before the criminal convictions can be disregarded for qualifying offences.
4. To examine the need for and feasibility of establishing a scheme for disregarding qualifying offences relating to consensual acts between adult males.
5. To examine the possibility of putting in place a legislative scheme similar to that in place in England and Wales or any other relevant jurisdictions to address this issue.
6. To make any other recommendations relating to this issue to the Minister for Justice.

## Key Identified Issues

This section of the paper examines the key issues identified from the initial examination of the proposal from the Private Members' Bill to present. In presenting these issues, comparative provisions from similar schemes in Australia, Canada and New Zealand as well as England and Wales, and Scotland have been provided. Each of these jurisdictions has a similar legal system<sup>9</sup> and all had similar criminalising provisions which can help inform a best practice approach to developing recommendations within the Irish context.<sup>10</sup>

### 1. Identifying appropriate records

#### 1.1. Availability and quality of records held by An Garda Síochána

The PULSE system came into operation in 1998, 5 years after decriminalisation in 1993. A preliminary search of the PULSE system identified a total of 608 recorded incidents under the category 'Sexual Offences' for the offences of gross indecency and buggery. These do not, however, provide the detail necessary to decide whether the offence related to consensual sexual acts between adults. A significant proportion of those recorded refer to historical incidents of clerical or institutional sexual abuse of children.

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<sup>9</sup> Australia, England, Wales and New Zealand operate common law systems like Ireland, Scotland and Canada operate a hybrid legal system combining aspects of the common law and civil law traditions.

<sup>10</sup> Schemes for the disregard of some criminal convictions also exist in Germany and Spain but were not included as examples in this paper due to the disparate nature of their legal systems and criminalising provisions as well as the specific contexts in which these schemes were developed.

An Garda Síochána advised that the disregard of criminal records for the offences of gross indecency and buggery could therefore only be facilitated on a case-by-case basis. This is similar to what occurs in England and Wales where under the [UK Protection of Freedoms Act 2012](#) an individual application for a 'disregard' is made to the Home Office.

An Garda Síochána also advised that even where an individual application is made, many investigation files relating to such incidents no longer exist, having been disposed of during the intervening years.<sup>11</sup> In these circumstances it may not be possible to check records to check, for example, whether there was a minor involved. An Garda Síochána advised that in such an incidence an applicant would likely have to provide some supporting documentation themselves.

The practice in respect of records in the other jurisdictions surveyed varies somewhat. In Canada, applicants must provide all of the documentation to support their application for 'expungement' themselves. This has been criticised as overly onerous on the applicant and has resulted in a limited number of applications (41) and expungements (9) since the process was introduced in 2018 (out of an estimated 9000 convictions).<sup>12</sup>

In New Zealand the Ministry of Justice sources official court or police records but applicants may also submit any supporting documentation they may possess to support their application. This might include old court or police documentation that has been kept, personal papers or correspondence, newspaper clippings or statements from others with personal knowledge of the case. The New Zealand guidelines note that the information provided does not need to be in a form that would be admissible in court.

The process in Scotland also allows applicants to submit any other relevant information they may wish the Scottish Ministers to consider when determining an application, and provides the following examples: copies of any original documents from the time of the conviction such as a summary of evidence or court citation issued by the Procurator Fiscal; a fixed penalty notice; or any original court paperwork relating to a conviction.

*Key Considerations:*

- *Will any application be solely based on records held by the State; or*
- *Will applicants be permitted to submit documentation to support their application?*

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<sup>11</sup> Of those records that remain: Crime Recording Forms (C1s and C2s) and/or copies of Investigation Files, i.e. statements and covering reports completed by Investigating Members submitting the investigation file to the relevant District Officer (Superintendent), making recommendations to proffer charges, and for the District Officer to determine whether to direct charges or for that Investigation File to go to the Law Officers (i.e. the State Solicitor outside the Dublin Metropolitan Region (DMR) or the Director of Public Prosecution's (DPP) Office in the DMR). It should also be noted that the DPP's office was only established in 1974.

<sup>12</sup> Figures valid until June 2021. Steven Maynard. (2021, June 17). Pride and prejudice: With only 9 LGBTQ criminal record expungements, what's to celebrate?. *The Conversation*.



Following consideration of these questions the Working Group made the interim recommendations, in their [Progress Report of May 2022](#), that any scheme should seek to minimise the burden placed on applicants as much as is possible and that applicants should be able to submit relevant supporting documentation for consideration with their application.

The Working Group noted that any future disregard scheme must recognise that there was an onus on the State to maintain, preserve and produce records and that this must be a consideration in any application where records are unavailable. The Working Group will consider how it may be possible to grant a disregard in the absence of State records of the conviction or lack of sufficient detail in the relevant records and will make a recommendation in its final report.<sup>13</sup>

## **1.2. Expunging versus disregarding: What happens to records?**

Originally the Terms of Reference for the Working Group referred to the establishment of a process to expunge convictions for certain qualifying offences. To expunge means to obliterate or remove completely.<sup>14</sup> However, across the other jurisdictions studied (England and Wales, Scotland, Australia, Canada and New Zealand) only the process in Canada requires the destruction of records. In all other jurisdictions surveyed records are primarily dealt with through a process of annotation or concealment.

A 'disregard' means that the person who was convicted of the offence is to be treated for all purposes as not having:

- a) committed the offence
- b) been charged or prosecuted for the offence
- c) been convicted of the offence, or
- d) been sentenced for the offence

In general, a disregard involves a removal from records any reference to the particular criminal offence rather than destruction of the record itself. Removal from records in this context may mean annotation of the records (rather than deletion of the records) by recording with the details of the conviction:

- a) the fact that it is a disregarded conviction, and
- b) the effect of it being a disregarded conviction

Records of a conviction which has been disregarded cannot be linked with or cross referenced to the individual. If a person's conviction is disregarded, their conviction will not appear on a criminal history check for any purpose and cannot be linked to them through official records.

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<sup>13</sup> Department of Justice. (2022). *Working Group to Examine the Disregard of Convictions for Certain Qualifying Offences Related to Consensual Sexual Activity between Men A Progress Report*, p. 14.

<sup>14</sup> As defined by Oxford Languages.

Given that key records in respect of convictions may no longer exist, or may be lost, 'expunging' them would in practice be difficult and a disregard system may be more suitable for Ireland. It is also the primary approach taken in the jurisdictions surveyed.

Complete expungement of the relevant records may also prevent any research in the future about those records, which has been raised as a concern considering the wider invisibility of LGBTQI+ populations in the historical narrative. A disregard, on the other hand, could mean that the original record of the conviction is still there, although annotated. This would retain the possibility for certain academic research on these convictions in the future.

Appendix 8 of this paper sets out a table outlining how records are managed across the surveyed jurisdictions.

*Key Considerations:*

- *Expungement or disregard?*
- *What will be the effect of any disregard process on the records relating to a conviction?*
- *Will disregard involve retention and annotation?*

The Working Group has recommended a 'disregard' approach to relevant records similar to that in other jurisdictions rather than the expungement/destruction of the records.<sup>15</sup> As a result the term 'disregard' will be used instead of the term 'expungement' pending the final recommendations of the Working Group.

### **1.3. Points of contact and sensitivity**

Many of those convicted of these qualifying offences may have traumatic and difficult associations with the prosecution process.

A key issue for consideration therefore, is whether An Garda Síochána is the appropriate *first point* of contact for an individual seeking to avail of the disregard procedure. For comparison, within the UK the scheme is administered by the Home Office with decisions taken by the Home Secretary. However, the records do not lie with the Home Office. The Home Office contacts all relevant data controllers (i.e. the Police, HM Courts & Tribunals Service) requesting they review their records and provide copies of any relevant documents to the Home Secretary, to enable a final decision.<sup>16</sup> In New Zealand, applications are submitted to the Ministry of Justice and decisions provided for by the Minister of Justice, and similar to the UK process, while the Ministry of Justice administers the disregard process, it sources documents from the relevant data controllers as required. The process in Canada differs in that applications are made to the Parole Board, with decisions also issued by the Parole Board, but the applicants

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<sup>15</sup> Department of Justice. (2022), p.14.

<sup>16</sup> Where an application raises complex issues, or where the available evidence is unclear or contradictory, it may be passed to an independent advisory panel which will consider the application carefully and make recommendations to the Home Secretary.

must themselves seek the required documentation from the relevant record holders (e.g. police or courts).

The Department of Justice may also not be the ideal first point of contact in Ireland for a disregard scheme. While an individual order to disregard a conviction or convictions will be required to be made by the Minister for Justice, it might be more appropriate for another body to receive applications and act as the first point of contact, liaising thereafter with An Garda Síochána and the Department as appropriate on behalf of applicants.

Another related issue is the language that will be used in any email or correspondence address. While intended only as a trial, it was previously noted by community representatives that the email address used by An Garda Síochána to trial the availability of records, [GNPSB.CriminalRecords@garda.ie](mailto:GNPSB.CriminalRecords@garda.ie) may also have been off-putting for some with its inclusion of the term 'criminal records'.

In all of the other jurisdictions referred to above there is a dedicated application form available, postal address and/or email address. For example, in England and Wales application forms can be submitted by email or post. The email address is [chapter4applications@homeoffice.gov.uk](mailto:chapter4applications@homeoffice.gov.uk) and postal applications can be addressed to 'Chapter 4 Applications'.<sup>17</sup> In Scotland, applications are made to the Scottish Ministers via [section5applications@gov.scot](mailto:section5applications@gov.scot) or in writing to the 'Criminal Law & Practice Team' of the Scottish Government. In New Zealand applications are made to the Ministry of Justice by email to [wiped@justice.govt.nz](mailto:wiped@justice.govt.nz) or by post. While in Canada applications must be printed and submitted by post to the 'Clemency and Record Suspension Division' of the Parole Board of Canada.

#### *Key Considerations*

- *Who or what Department or Agency should manage the process of considering applications to disregard a relevant record?*
- *Should another body receive applications and engage with An Garda Síochána and the Department on behalf of applicants and act as the point of contact for them in relation to the scheme?*
- *Consideration of the language used in email addresses and the title of any future proposed legislative scheme.*

In order to address the first two key considerations above the Working Group decided that input from affected persons and representative groups would be required. A question on the *most appropriate* first point of contact will be included as part of a targeted public consultation to be held in Q3 of 2022.<sup>18</sup>

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<sup>17</sup> Chapter 4 refers to the UK process for Disregarding Certain Criminal Convictions as outlined in Chapter 4 of Part 5 of the Protection of Freedoms Act 2012 (England and Wales).

<sup>18</sup> The Working Group recommended that a targeted public consultation be undertaken to provide an opportunity for affected stakeholders to engage on some key questions related to the development of any scheme. Department of Justice. (2022), p. 15.

## **2. Determination of the offences to be included or excluded and the standards to meet before the criminal convictions can be disregarded for qualifying offences**

### **2.1. Which Offences**

Section 1 of the ‘Convictions for Certain Sexual Offences (Apology and Exoneration) Bill 2016’ sets out the now abolished offences to which the Bill would apply:

- a) Act for the Punishment of the Vice of Buggery (Ireland) 1634,
- b) Section 16 of the Offences Against the Person (Ireland) Act 1829,
- c) Section 61 of the Offences Against The Person Act 1861
- d) Section 11 of the Criminal Law Amendment Act 1885.

The 1634 Act was repealed by the 1829 Act which, in turn, was replaced by the 1861 Act. The 1861 and 1885 offences which dealt with sodomy and gross indecency between men applied to both consensual and non-consensual acts and were repealed by the Criminal Law (Sexual Offences) Act 1993. Advices received indicate that there is no legal bar for the disregard of convictions prior to the foundation of the Saorstát Éireann in 1922. Given that the offences under the 1861 and 1885 statutes remained on the statute book until 1993, however, it is much more likely that convictions under the 1861 and 1885 Acts would be the subject of applications under any disregard scheme. Even if the scheme is designed so that representatives of a deceased person are entitled to make disregard applications, the likelihood of there being an application relating to a conviction imposed pursuant to either the 1634 or 1829 Act would seem remote. The identification and production of records in respect of any convictions made pursuant to statutes dating from 1649 and 1829 would also likely to be a significant challenge. The primary focus of any disregard scheme is likely to be convictions imposed under the 1861 and 1885 Acts.

#### *Were any other offence categories used in practice?*

Across many jurisdictions, including Australia, Canada, England and Wales, and New Zealand it is accepted that certain laws, other than the primary criminalising laws in respect of sexual acts between men, were utilised to target and prosecute gay and bisexual men in a discriminatory manner even for non-sexual activity such as attempting to meet other men, kissing them etc. For example, it is recognised that laws pertaining

to public morality, indecent acts, obscenity, public vagrancy, nudity and immoral theatrical performances among others were applied in a particularly discriminatory manner to gay and bisexual men in these jurisdictions.

In Australia the qualifying offences eligible for expungement are outlined by each state and territory and must meet specific criteria. This criteria provides for the disregard of convictions in incidences where their actions would not have constituted an offence if they were not of the same-sex, effectively providing for a disregard when other laws were utilised as a means of proscribing same-sex sexual activity. These offences (frequently referred to as ‘homosexual offences’) generally appeared in state and territory criminal codes and vagrancy acts either as proscribed sexual activities, such as buggery, attempted buggery or indecent assault, or as a public morality offence which generally included loitering, indecency, ‘riotous’ behaviour, soliciting and cross-dressing.

The Australian State of Queensland also attempted to provide for incidences of undue scrutiny/ discriminatory policing/entrapment by providing that the act:

*“(i) was done, or allegedly done, in a public place; and (ii) would not constitute an offence under the law of Queensland if it were done at the time the application was made, other than in a public place; and (b) a person, other than a person engaging in the act or omission, would not have been able to observe the act or omission without taking abnormal or unusual action. Example of taking abnormal or unusual action—looking under the door of a cubicle in a public toilet”.*<sup>19</sup>

This provision takes into account the historical reality that at the time it was difficult for men to engage in sexual activities in private spaces, such as hotels and homes, and the role of police in actively seeking out such behaviour or acting as agent provocateurs (entrapment). This is in contrast to the Act in England and Wales which specifically states that convictions for sex between men in a public lavatory cannot be disregarded as this remains an offence under the [Sexual Offences Act 2003](#).<sup>20</sup>

The Scottish Act provides specific recognition of the use of other provisions to police same-sex sexual activity in section (2)(a) when referencing offences that were ‘used in practice to regulate sexual activity between men’, as below:

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<sup>19</sup> Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 (Queensland), s 18 (2A).

<sup>20</sup> Sexual Offences Act 2003 (United Kingdom), s 71.

**Historical Sexual Offences (Pardons and Disregards) Act 2018 (Scotland), pt 1, s 2.2-2.4.**

**2 Historical sexual offence: definition**

- (2) An offence falls within this subsection if the offence—
- (a) regulated, or was used in practice to regulate, sexual activity between men, and
  - (b) either—
    - (i) has been repealed or, in the case of an offence at common law, abolished, or
    - (ii) has not been repealed or abolished but once covered sexual activity between men of a type which, or in circumstances which, would not amount to the offence on the day on which section 3 comes into force.
- (3) Where an offence of the type described in subsection (2)(b)(ii) covers or once covered activity other than sexual activity between men, the offence falls with subsection (2) only to the extent that it once covered sexual activity between men.
- (4) In this section, “sexual activity between men” includes—
- (a) any physical or affectionate activity between males of any age which is of a type which is characteristic of persons involved in an intimate personal relationship,
  - (b) conduct intended to introduce or procure such activity.

The Scottish Act also provides a definition of ‘conviction’ that accounts for alternatives to prosecution such as a warning by the police or Procurator Fiscal or a conditional offer of a fixed penalty. It also includes the situation where a case was referred to a children’s hearing on the ground that a child has committed an offence, and that ground of referral was accepted or established.

The Working Group queried whether alternatives to prosecution such as cautions were utilised by An Garda Síochána in relation to these abolished offences. An Garda Síochána noted that prior to the introduction of the Adult Cautioning Scheme in 2006, cautions would not have been formally recorded and would not make up part of an individual’s criminal record. The issue of prosecutions that did not lead to convictions was also raised within the Working Group. The Working Group is currently considering how best to acknowledge this issue.

*Key Considerations:*

- *Identify from the above listed offences those to be retained in any new proposal*
- *Were there any other laws that were utilised to prosecute gay and bisexual men before the decriminalisation of homosexuality that may be included?*
- *Were there other actions taken by the prosecution authorities which should be considered by the Working Group?*

In order to address these key considerations the Working Group decided that input from affected persons and representative groups would be required. Questions on whether any other laws were utilised in practice to prosecute gay and bisexual men for consensual interactions, in addition to whether there were any other actions taken by the

prosecution authorities which should be considered by the Working Group, will be included as part of the targeted public consultation to be held in Q3 of 2022.<sup>21</sup>

## **2.2. Who can apply? Applications on behalf of the deceased and applications from abroad**

There is also the issue that many men who were convicted of the qualifying offences may have emigrated as a result of the legal environment for gay and bisexual men in Ireland and/or may now be deceased.

In England and Wales an application may only be made by the person with a conviction that falls within the scope of the provisions. Applications made on behalf of a third party or deceased person are not accepted. The process in Scotland, however, specifically allows for someone with Power of Attorney to apply on behalf of the person they represent but not on behalf of the deceased. While, in Canada, New Zealand and Australia (with the exception of Southern Australia) representatives may make an application on behalf of someone who is deceased. For example in New Zealand a representative of a deceased person could be a) the executor, administrator, or trustee of, acting on behalf of, the estate of the convicted person: (b) a spouse, civil union partner, or *de facto* partner, of the convicted person: (c) a parent, sibling, or child, of the convicted person: (d) a person who the Justice Secretary has decided under the relevant legislation can represent the convicted person for an application for a disregard of the conviction.<sup>22</sup>

Given the long history of emigration from Ireland, and considering in particular the exodus of gay and bisexual men to the United Kingdom and the United States in the 1960s, 70s and 80s, it may also be apt that an application can be made in respect of a person who moved abroad and is no longer resident in Ireland. From a legal perspective, as the conviction was imposed by an Irish court, the fact of where an application arises from, whether domestically or from abroad, should not represent a barrier.

### *Key considerations:*

- *Will applications be accepted on behalf of a deceased person or will it be limited to living applicants?*
- *If a disregard scheme is limited to living persons, could a letter of comfort be provided to the family members of deceased persons (this is available in Scotland)?*
- *Will applications be accepted from (or made on behalf of) persons not resident in Ireland?*

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<sup>21</sup> The Working Group recommended that a targeted public consultation be undertaken to provide an opportunity for affected stakeholders to engage on some key questions related to the development of any scheme. Department of Justice. (2022), p. 15.

<sup>22</sup> Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018 (New Zealand), pt 1, s 4. Interpretation of 'representative'.

The Working Group has recommended that applications be accepted from living persons or those exercising power of attorney on their behalf, as well as by a representative on behalf of deceased persons. In addition, the Working Group has recommended that applications can be made domestically or from abroad by persons who no longer reside in Ireland and/or are not Irish citizens.<sup>23</sup> The Working Group is currently considering who can act as a representative to progress an application on behalf of a deceased person and will make a recommendation on the matter in its final report.

### **2.3. What Standards?**

What standards will be applied to a disregard? Provisions in the Private Members' Bill applied a disregard to persons convicted of offences for engaging in consensual same-sex sexual activities that would not be a crime today (e.g. were consensual and did not involve a minor).

The following tests are applied in the reviewed jurisdictions:

**England and Wales:** For an eligible conviction to be disregarded it must appear to the Home Secretary that, (a) the other person involved in the conduct constituting the offence consented to it and was aged 16 or over, and; (b) any such conduct would not now be an offence under section 71 of the Sexual Offences Act 2003 (sexual activity in a public lavatory).

**Scotland:** In order for an eligible conviction to be disregarded it must appear to the Scottish Ministers that the conduct involved, if occurring in the same circumstances on the day the Act came into force (being 15 October 2019), would not amount to a criminal offence.

**Australia:** Each State or territory in Australia operates its own scheme to disregard convictions. Across all States the following test is applied:

- a) that the sex act was consensual,
- b) that their actions would not have constituted an offence if they were not of the same-sex
- c) and that no person engaged in the activity was in a position of authority in relation to another person engaged in the activity

**New Zealand:** The standard applied is that the conduct constituting the offence, if engaged in when the application was made, would not constitute an offence under the laws of New Zealand. Applications are assessed and determined by the Secretary for Justice who will need to decide, on the balance of probabilities, that the conduct they were convicted of is no longer illegal – this will generally involve an assessment of whether the activity was consensual and involved adults over the age of 16.

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<sup>23</sup> Department of Justice. (2022), pp.14-15.



**Canada:** That the activity was between persons of the same sex; that it was consensual and that the persons participating in the activity were 16 years of age or older at the time of the activity or could avail of the ‘close in age’ defence. The Canadian law also provides a definition of consent.

#### **2.4. Sex with persons below the age of consent but in proximity of age**

There is a concern that some of the people convicted of qualifying offences could themselves have been only 17 years of age at the time, and who engaged in consensual sexual activity with a person who was 16 years old.

The provisions in the Private Members’ Bill under Section 3 provides that a disregard would not apply if the other person involved in the conduct constituting the offence was under the age of 17 years or did not have capacity to consent to the conduct. This is because in Ireland, the age of consent is 17 years of age. There is, however, a ‘proximity of age’ defence available in proceedings for an offence against a child who at the time of the alleged commission of the offence had attained the age of 15 years but was under the age of 17 years as follows:

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| <b>Criminal Law (Sexual Offences) Act 2017 (Ireland), s 17 (3) (8)</b> |
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| <p>(8) Where, in proceedings for an offence under this section against a child who at the time of the alleged commission of the offence had attained the age of 15 years but was under the age of 17 years, it shall be a defence that the child consented to the sexual act of which the offence consisted where the defendant -</p> <ul style="list-style-type: none"><li>(a) is younger or less than 2 years older than the child,</li><li>(b) was not, at the time of the alleged commission of the offence, a person in authority in respect of the child, and</li><li>(c) was not, at the time of the alleged commission of the offence, in a relationship with the child that was intimidatory or exploitative of the child.<sup>24</sup></li></ul> |
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Canada has provided for this in their Act and other provisions as follows, in cases where the person(s) who participated in the activity would be able to avail of a ‘close in age’ defence under the Criminal Code. Note, however, that the age of consent is 16 in Canada and their proximity defence differs in detail from that legislated for in Ireland:

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| <b>Expungement of Historically Unjust Convictions Act 2018 (Canada), s 25(c)</b> |
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| An application for an expungement order for a conviction in respect of the offences listed in items 1 to 6 of the schedule must include evidence that the following criteria are satisfied: |
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<sup>24</sup> Criminal Law (Sexual Offences) Act 2017, s 17 (3)(8).

- d) the persons who participated in the activity were 16 years of age or older at the time the activity occurred or the person who was convicted would have been able to rely on a defence under section 150.1 of the *Criminal Code*, had that defence been available in respect of the offence.

**Criminal Code (Canada), s 150.1**

**Consent no defence**

150.1 (1) Subject to subsections (2) to (2.2), when an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.

**Exception — complainant aged 12 or 13**

(2) When an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 12 years of age or more but under the age of 14 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused

(a) is less than two years older than the complainant; and

(b) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.

**Exception — complainant aged 14 or 15**

(2.1) If an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 14 years of age or more but under the age of 16 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused

(a) is less than five years older than the complainant; and

(b) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.”

*Key considerations:*

- *What should the eligibility criteria be for a conviction to be disregarded?*
- *Should a person always be ineligible for the scheme if the other person involved in the conduct constituting the offence was under the age of 17 years at the time or should there be a ‘proximity of age’ provision similar in terms to Section 17 (3)(8) Criminal Law (Sexual Offences) Act 2017?*

The Working Group has recommended the following eligibility criteria to date:

- That the act was consensual.
- That the act did not involve a person under the current relevant age of consent.
- That no person engaged in the activity was in a position of authority in relation to another person engaged in the activity.<sup>25</sup>

The Working Group is currently considering if any other eligibility criteria should be applied, including whether there should be a 'proximity of age' provision.

### **3. When no records are available and reversal of a decision to disregard**

#### **3.1 No Records**

Consideration will be required as to what action may be taken in the event that State-held records are not available or do not contain the required detail for the decision-maker to determine that a conviction may be disregarded. The responsibility of retaining and maintaining such records lies with the State. As a result, the onus cannot be placed upon the applicant to provide the necessary documentation to support an application to disregard a conviction. Yet, the case remains that due to limitations reported on available records, the State may not hold the records required to support an application for a disregard based on any final test, yet to be decided (though this test will most likely include the criteria outlined in Section 2.4).

The availability of adequate records has been an issue in other jurisdictions. In England and Wales, 33 applications have been deemed ineligible as there were no police or court records found to disregard.<sup>26</sup> It is not recommended by the Working Group that this approach be replicated due to the psychological distress that may have been experienced by an applicant as a result of the original conviction(s) regardless of the presence of records.

As outlined previously, Canada requires applicants to obtain and submit all relevant documentation to support their application. This places an overly onerous burden on the applicant and has been discounted by the Working Group as a reasonable avenue and is not recommended. With this in mind, what steps can be reasonably taken to ensure a fair consideration of an application to disregard a conviction? It has been noted by the Working Group that any provisions to solicit additional information should be highlighted as 'in aid' of the applicant rather than shifting the burden to the applicant.

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<sup>25</sup> Department of Justice. (2022), p. 10.

<sup>26</sup> Home Office. (2022, June 20). *Transparency data: Disregard process for convictions for decriminalised sexual offences (consensual gay sex)*. Updated 20 June 2022.

In other jurisdictions, the following steps have been taken to improve the probability of the required records being located, or to provide the required additional information. For example, in each other jurisdiction (except Canada) the application requests as much accompanying information as possible to support the locating of records. This would include the applicants name and address, and across jurisdictions applicants may also be requested to provide, *as far as is known*, information in relation to some of the following: the applicants name and address at the time of the conviction, the time and the place of the act that led to a conviction, the name of the other person(s) involved, the relevant case number and the nature and circumstances of the act resulting in the conviction as well as any other information which may support the application. In most of the reviewed jurisdictions, some of this information is a requirement, though the decision-maker may proceed with an application in the absence of some information. In New Zealand and the Australian jurisdictions, further information can also be requested by the decision-maker. In New Zealand this can include written evidence given on oath or affirmation and by affidavit.

**Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018 (New Zealand), pt 2, s 17 (2).**

**17 Further documents, things, or information**

(2) The Secretary may, by written notice given to the person, seek from the person all or any of the following:

- (a) access to, or a copy, duplicate, or reproduction of, or extract from, any document or thing that is or may be relevant to, or to specified aspects of, the decision:
- (b) information or further information (including written evidence given on oath or affirmation and by affidavit) that is or may be relevant to, or to specified aspects of, the decision.

Canada also provides for a sworn statement or solemn declaration. As eligible offences are expected to be historical in nature, a sworn statement or solemn declaration may be accepted as evidence if applicants can demonstrate that court or police records are not available, or if the documentation does not allow the Parole Board to determine if the criteria are satisfied.<sup>27</sup>

**Expungement of Historically Unjust Convictions Act 2018 (Canada), ss 8 (3), 10**

**Sworn statement or solemn declaration**

8 (3) If it is not possible to obtain the documents referred to in subsection (2), the applicant must submit a sworn statement or solemn declaration

- (a) that explains the reasonable efforts made by the applicant to obtain the documents, and the reasons why they could not be obtained, including because they were lost or destroyed; and
- (b) that affirms the evidence referred to in section 25 or in an order that could not otherwise be provided.

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<sup>27</sup> Parole Board of Canada (2020). *What is expungement?*

**Incomplete application**

10 If the Board determines that an application is incomplete, the Board may return it to the applicant at any time.

Written evidence or any other information the applicant may want to include can also be provided in relation to the conviction in most of the other jurisdictions including the Australian jurisdictions of Queensland and Western Australia, as well as New Zealand, England and Wales, and Scotland.

When ascertaining whether the act was consensual, the Australian jurisdictions of Victoria, Tasmania and Queensland specifically allow written evidence from the other person involved in the act resulting in the conviction, and in Victoria and Tasmania if no such person can be found, another person other than the applicant with knowledge of the circumstances.

**Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 amended the Sentencing Act 1991 (Victoria), s 105G**

**105G Mandatory tests**

(3) Subsection (4) applies if—

- (a) consent of a person is a relevant issue in determining whether the test set out in subsection (1)(b)(ii) is satisfied; and
- (b) the Secretary is not satisfied, from the available official records, that consent had been given.

(4) The Secretary may only be satisfied on the issue of consent by written evidence touching on that issue—

- (a) from a person (other than the entitled person) who was involved in the conduct constituting the offence; or
- (b) if no such person can be found after reasonable enquiries are made by the applicant, from a person (other than the applicant) with knowledge of the circumstances in which that conduct occurred.

**Expungement of Historical Offences Act 2017 (Tasmania), ss 7, 10**

**7. Contents of application**

(3) An application may include, or be accompanied by –

- (a) statements by the applicant; or
- (b) written evidence given by any other person (including a person involved in the conduct constituting a historical offence to which the application relates) – about the matters about which the Secretary must be satisfied under section 10.

**10. Matters to be considered in determining application**

(3) If the consent of a person to the conduct is an issue in the decision to expunge a charge for a homosexual offence, the Secretary may only be satisfied by written evidence on that issue –

- (a) from the official criminal records, if available; or
- (b) from a person, other than the eligible person, who was involved in the conduct constituting the homosexual offence; or

(c) if no person referred to in paragraph (b) can be found after reasonable enquiries are made by the applicant, from a person (other than the applicant) with knowledge of the circumstances in which that conduct occurred.

**Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 (Queensland), s 12 (3)**

**12 Requirements for application**

(3) The application may be accompanied by any other information or document the applicant reasonably considers may help the chief executive in deciding whether to expunge a conviction or charge the subject of the application. Examples of other information or a document—

- a statement by the applicant addressing the criteria the chief executive must consider in deciding whether to expunge the conviction or charge
- written evidence of a person involved in the act or omission constituting the eligible offence about the eligible offence

Additionally, in England and Wales, Scotland, Victoria and Queensland advisers may be appointed to support applications that raise complex issues or where evidence is unclear or contradictory.

### **3.2 Reversing a decision to disregard a conviction**

The ultimate aim of any disregard scheme is to ensure that the widest number of eligible applicants may benefit from a scheme to disregard. Such a scheme should operate in good faith and in a non-adversarial manner that reduces the potential for any re-traumatisation. Despite this, consideration must be given to what action to take if a disregard is provided in error to a person who would not have been eligible for a disregard (e.g. the decision was made based on false or misleading information or further information came to light that demonstrated the conviction did not satisfy the test applied). This is a particular consideration due to the fact that the qualifying offences also applied to non-consensual acts and acts involving a minor and the possibility that a disregard could in theory be provided in error to a person who does not satisfy the eligibility criteria due to the availability and quality of records. In designing such a scheme consideration must be given to addressing the situation should it arise.

The ability to determine that a disregarded conviction is no longer a disregarded conviction (that such a decision is revoked or reversed) is possible in New Zealand as well as the Australian jurisdictions of New South Wales, Queensland, Tasmania, Western Australia and the Northern Territory. In order for this to occur the test is generally that the initial decision to disregard was made based on false or misleading information and that the conviction was not eligible for a disregard (e.g. the conviction related to an act that was not consensual). This provision is a valuable provision that may provide added protection in cases where State-held records are unavailable or inadequate and in which a disregard is provided for based on a formal statement such as an affidavit, to ensure that the rights of any potential victims of sexual assault are catered for in any scheme to disregard qualifying convictions in a balanced manner. In

such incidences, when it is determined that a disregarded offence is no longer eligible for disregard, the record holders may be requested to remove any associated annotations and restore the records to their original state/location. For this to be possible, the process to disregard in the relevant jurisdiction does not require the destruction of records. This is the case in all jurisdictions with the exception of Canada as previously noted.

**Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 (Queensland), pt 4, ss 31, 35**

**31 Chief executive may decide to revive expunged conviction or charge**

The chief executive may decide that an expunged conviction or expunged charge is no longer an expunged conviction or expunged charge if the chief executive is satisfied the conviction or charge became an expunged conviction or expunged charge if the chief executive is satisfied the conviction or charge became an expunged conviction or expunged charge because of false or misleading information.

**35 Notice of revival of expunged conviction or charge to criminal record holder**

(1) This section applies if the chief executive decides that an expunged conviction or expunged charge is no longer an expunged conviction or expunged charge and—  
(a) the applicant for the expungement of the conviction or charge has not applied for a review of the decision within the time allowed under the QCAT Act, section 33(3); or

(b) if the applicant for the expungement of the conviction or charge applied for a review of the decision—the review has been finally decided and the expunged conviction or expunged charge is no longer an expunged conviction or expunged charge.

(2) The chief executive must give each criminal record holder notice that the expunged conviction or expunged charge is no longer an expunged conviction or expunged charge.

**Expungement of Historical Homosexual Offence Records Act 2018 (Northern Territory), pt 3, ss 22, 23**

**22 Revoking a determination to expunge**

(1) The Chief Executive Officer may revoke a determination to expunge a charge or conviction, if satisfied that the determination was made because of false or misleading information or documents in the application.

**23 Restoring records**

(1) The holder of a record of a charge or conviction that was expunged who receives notice from the Chief Executive Officer under section 22(6)(b) that the expungement is revoked must, as soon as practicable:

(a) take all reasonable steps to change the record to show that the charge or conviction is no longer expunged; and

(b) remove from the record the warning previously included under section 19(1)(b); and

(c) remove from the record any prescribed statement or information previously included under section 19(1)(c).

The Working Group notes that any scheme for the disregard of qualifying convictions should be victim-centred and non-adversarial. With this in mind a two-step approach to an application process may be most appropriate e.g. that an initial application is made and records are investigated to ascertain if records are available and contain the required detail to support a decision to disregard a conviction. If the records are sufficient and the conviction satisfies the stated eligibility criteria, a decision to disregard can be made. If available records do not provide the detail required, the applicant could then be requested to submit a sworn/affirmed formal statement such as an affidavit, confirming that the acts involved fulfil the eligibility criteria for a disregard.

The Working Group considers that any disregard process should be based on a 'good faith' acceptance of applications in the first instance with any follow-up request for a sworn or affirmed formal statement accepted in the same manner. Should it arise that the disregard was provided in error based on false or misleading information, sworn/affirmed statements or affidavits are subject to the existing legal provisions governing sworn statements in the Criminal Justice (Perjury and Related Offences) Act 2021. This approach may represent an adequately balanced approach when records are unavailable or inadequate in detail. It should not be proposed that those administering the scheme seek to investigate the veracity of an application beyond the investigation of available records relating to the conviction. This approach has been criticised in other jurisdictions as adversarial and potentially re-traumatising for affected persons, for example, Canada provides in its legislation for a perjury investigation, with perjury being an indictable offence carrying a sentence of up to fourteen years imprisonment.

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| <b>Expungement of Historically Unjust Convictions Act 2018 (Canada), s 22</b> |
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| <b>Perjury investigation</b> |
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| 22 The Board may, for the purpose of the investigation or prosecution of any offence under section 131 of the Criminal Code (perjury), disclose any information submitted or produced in respect of an application under this Act. |
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| <b>Criminal Code, RSC 1985, c C-46 (Canada), ss 131(1), 132</b> |
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| <b>Perjury</b> |
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| 131 (1) Subject to subsection (3), every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false. |
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| <b>Punishment</b> |
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| 132 Every one who commits perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. |
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### *Key considerations*

- *Will written evidence relating to the circumstances of the conviction be allowable?*
- *Will a formal statement (such as a sworn/affirmed affidavit or declaration) be sought and accepted in circumstances when records cannot be located or no longer exist?*
- *Should there be a provision for revoking/reversing a decision to disregard in incidences when it emerges that a disregard was provided for based on false or misleading information?*

The Working Group is currently examining these key considerations with related recommendations to be included in its final report.

## **4. Provision of appeals or review process**

The provision of a process to appeal a decision to refuse an application, or to have it reviewed, may provide additional assurance to applicants and may increase trust in the fairness and transparency of the decision making process. Such a process would also benefit applicants if further information came to light at a later date.

The ability to appeal a determination to refuse an application or have it reviewed is provided for in all of the studied jurisdictions with the exception of Canada and South Australia.<sup>28</sup> Within the remaining jurisdictions there are two approaches taken, an appeals system available through the courts and an administrative review process.

The former approach of court-based appeals may be less favourable as it may lead to long delays in awaiting a final decision as well as being potentially re-traumatising for the applicant. The long delay is also of particular concern due to the aging nature of the affected population. As well as the emotional burden of a court-based appeal, there may also be financial barriers to seeking an appeal, hence consideration would also need to be given to the provision of legal aid to applicants should this approach be pursued.

The Acts of England and Wales, and Scotland provide for a court-based appeals system. In England and Wales, an applicant can seek a review of their application from the Home Office and the Criminal Law & Practice Team respectively. If the decision to refuse a disregard is upheld, in England and Wales applicants can apply to the High Court for leave to appeal against the decision, while in Scotland an appeal may be made to the Sheriff's Court. The Scottish Act also specifically includes the provision of legal aid for applicants to progress an appeal. The decisions reached upon appeal in these courts are final.

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<sup>28</sup> In South Australia the process relates to a spent conviction whereby an application is made by the convicted person in accordance with the regulations by a qualified magistrate who then makes an order for the conviction to become a spent conviction if eligible. This is not an administrative process and does not have an appeals or review process unlike the other Australian Acts.

It should be noted that the Acts of England and Wales, New South Wales, Victoria, Tasmania, Queensland, Western Australia and the Northern Territory specifically state that no oral hearing may be held for the purpose of determining an application. In South Australia, the hearing before the qualified magistrate must occur in private unless the applicant provides their consent for a public hearing or the qualified magistrate considers that, in the circumstances of the case, the hearing should be in public.

The alternative approach, an administrative review, may be more appropriate given the time-sensitive nature of the proposal and the sensitivity of the matter itself. Such an approach may reduce the time needed for a final decision to be reached as well as any reducing undue emotional burden for applicants who may have had negative experiences in a court setting as a result of their conviction. Such a review could be undertaken by the initial decision-maker, on the advice of an independent expert or panel of experts or by an independent third party.

For example, in New Zealand, the decision-maker can reconsider an application and decide to confirm, refuse or reverse a decision to expunge. The New Zealand provision also allows for an independent reviewer to be appointed to assist with this consideration.

In New South Wales, Victoria and the Australian Capital Territory applicants may apply to their state Civil and Administrative Tribunal for an administrative review of the decision to refuse an application. Civil and Administrative Tribunals are independent tribunals that among other duties provide for the review of administrative decisions. The remaining jurisdictions (Northern Territory, Tasmania, Queensland and Western Australia) provide for an additional step, the applicant must be notified of the intent to refuse an application and can then submit further information to support their application within 14 (Western Australia) or 28 days (Northern Territory, Tasmania, Queensland). Subsequent to this the applicants may apply for an administrative review at State level by the Magistrates Court (Administrative Appeals Division) in Tasmania, the Queensland or Northern Territory Civil and Administrative as applicable.

Appendix 7 sets out a table of the appeal/review channels available in each jurisdiction.

#### *Key considerations*

- *Should applicants be able to avail of an appeals or review process as part of the scheme?*
- *If so what form should this take? A court based appeal system or an administrative review?*
- *Should an independent expert or panel be appointed for this task?*

The Working Group is currently considering these issues and will make related recommendations in its Final Report.

## **5. Compensation**

Section 2 of the Private Members' Bill that instigated this disregard process specified that no rights are conferred on any person or liability imposed on the State by the provisions of the Bill, apparently precluding compensation.

This is a provision that also exists in the New Zealand law and that of Victoria, Queensland, Tasmania, Western Australia and the Northern Territory in Australia which makes it clear that there is no entitlement to compensation.<sup>29</sup> Of all of the jurisdictions reviewed, most preclude it; and of the remaining, none provide for compensation. See below table for examples of the provisions excluding compensation:

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| <p><b>Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018 (New Zealand), pt 2, s 23</b></p> <p><b>23 No entitlement to compensation</b></p> <p>(1) A person who has an expunged conviction is not entitled to compensation of any kind, on account of that conviction becoming an expunged conviction, in respect of the fact that the person—</p> <ul style="list-style-type: none"><li>(a) was charged with, or prosecuted for, the offence; or</li><li>(b) admitted committing or pleaded guilty to, or was found to have committed, was convicted of, was sentenced for, or had an order or a direction made against the person for, the offence; or</li><li>(c) served a sentence for, or complied with an order or a direction made against the person because of committing, the offence; or</li><li>(d) was required to pay a fine or other money (including costs or any amount by way of restitution or compensation) on account of committing, or being convicted of, or sentenced for, the offence; or</li><li>(e) incurred any loss, or suffered any consequence (including being sentenced, or otherwise dealt with, as an offender, or as a repeat offender, of any kind), as a result of any circumstance referred to in paragraph (a),(b), (c), or (d); or</li><li>(f) has an expunged conviction.</li></ul> <p>(2) Nothing in subsection (1) prevents a person being entitled to compensation in respect of anything that occurred while the person was serving a sentence or complying with an order or a direction.”</p> |
| <p><b>Expungement of Historical Offences Act 2017 (Tasmania), pt 4, s 22</b></p> <p><b>22. No entitlement to compensation</b></p> <p>If a charge or a conviction for an offence is expunged under section 12(6), a person is not entitled to compensation of any kind, on account of that charge or conviction becoming expunged, in respect of the fact that –</p> <ul style="list-style-type: none"><li>(a) the person was charged with, or prosecuted for, the offence; or</li><li>(b) the person was convicted of, or sentenced for, the offence; or</li></ul>   |

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<sup>29</sup> The New Zealand provisions do not preclude compensation being sought for occurrences while the person was serving a sentence or complying with an order or direction. This provides only for proceedings to be taken for actions subsequent to and unrelated to the conviction itself (e.g. assault by a member of prison staff while in prison).

(c) the person served a sentence for the offence; or  
(d) the person was required to pay a fine or other money (including costs or any amount by way of restitution or compensation) on account of being convicted of, or sentenced for, the offence; or  
(e) the person has an expunged charge or expunged conviction; or  
(f) the person incurred any loss, or suffered any consequence, as a result of an event referred to in paragraph (a), (b), (c), (d) or (e), whether or not that person was the person whose charge or conviction was expunged.

**Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 (Queensland), pt 1, s 5**

**5 Act does not affect lawful acts or entitle person to Compensation**

(1) No provision of this Act affects anything lawfully done before a conviction or charge is expunged.  
(2) A person who has a conviction or charge expunged under this Act is not entitled to compensation of any kind because the conviction or charge becomes an expunged conviction or expunged charge.

The Working Group acknowledges that since the time of criminalisation, Irish society has undergone a cultural shift and now recognises that convictions for consensual sexual activity between men were morally unjust and contributed to the widespread harm of gay and bisexual men as well as the wider LGBTQI+ community and their family and friends. From a legal perspective however, these convictions were lawful at the time and the State was acting in accordance with that law, hence there is no automatic right to compensation.

*Key considerations*

- *Should there be a provision for compensation for affected persons in any scheme developed?*
- *Should there be a specific provision precluding compensation?*

Legal advices received by the Working Group note that any decision regarding compensation lies beyond the remit of the Working Group.

## **6. Public Awareness**

A lack of public awareness has been cited as a reason for low uptake of the scheme in Canada. The means by which any process for disregarding is made available must be accessible and the means by which this is publicised should be considered particularly if the scheme is open to persons abroad.

The Working Group is considering recommendations on this matter for inclusion in its final report.

## 7. Additional Considerations

### 7.1. Human Rights Considerations

The Working Group is mindful of the harm experienced by affected men, their families, loved ones and the wider LGBTQI+ community as a result of prosecutions for consensual sexual activity between adults

The Working Group has tried in its work to develop recommendations for a scheme to take a trauma informed approach and to minimise the potential for any re-traumatisation or re-victimisation in its application.

Any scheme must, in the view of the Working Group, be underpinned by the following human rights and equality principles:

- the right to equality and non-discrimination,
- the right to private life, privacy in respect of sexual orientation and sexual life and data protection,
- the right to an effective remedy, and
- the right to redress<sup>30</sup>, transparency, fair procedures, accountability, accessibility and participation.

There may however be other human rights or equality considerations to which the Working Group ought also to have regard.

#### *Key considerations*

- *Are there any additional human rights or equality considerations in respect of the development of a disregard scheme and/or the administration of that scheme?*

### 7.2. Letter of Apology

The disregard process in Scotland is unique as it provides for an automatic formal pardon of persons convicted of certain historical sexual offences as well as the 'disregard' of the conviction. The pardon is purely symbolic and applies to both the living and the deceased. It was included as a formal acknowledgement that the laws used to convict people for same-sex sexual activity were in themselves discriminatory in nature and that laws of more general application were used in a discriminatory way. No steps had to be taken by a person to receive the pardon, and it came into effect from 15 October 2019. A key benefit of this inclusion is that such a pardon, while having no effect on a conviction would apply in retrospect to those who may fall outside of any formal expungement process. There are however, certain technical and practical difficulties in respect of pardons in Ireland. The particular nature of the power of pardon in Irish law means that it would not be constitutionally permissible for the legislature to pardon people by way of the passing of legislation.<sup>31</sup> The power of pardon is provided

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<sup>30</sup> The development of a Disregard Scheme is a form of redress itself.

<sup>31</sup> Advice of Nicola Lowe AGO to Trevor Noonan, DOJ 09/11/2017, paras 10-11 (AGO Ref: NL/2016/05988).

for under Article 13 of the Constitution and is reserved to the President who may only act on the advice of the Government in this context.<sup>32</sup> If a pardon was to be provided to affected persons it would likely have to be done on an individual basis for anyone who obtains a disregard. This would be a new departure in the use of the pardon power as to date the power of pardon has been applied sparingly.

*Key considerations*

- *What provision could be made as further acknowledgement of historical harm?*

The Working Group is currently considering whether a letter of apology should be issued to successful applicants as a means of further acknowledging the harm and impact of such criminalising laws and related convictions.

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<sup>32</sup> *Bunreacht Na hÉireann* (Constitution of Ireland). 1937, arts 13.6, 13.9.

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Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act  
2018

## Appendix 1: Apology for Persons Convicted of Consensual Same-Sex Sexual Acts: Motion

That Dáil/Seanad Éireann

- acknowledges that the laws repealed in the Criminal Law (Sexual Offences) Act 1993 that criminalised consensual sexual activity between men:
- were improperly discriminatory, contrary to human dignity and an infringement of personal privacy and autonomy;
- caused multiple harms to those directly and indirectly affected, namely men who engaged in consensual same-sex activities and their families and friends; and
- had a significant chilling effect on progress towards equality for the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) community, acknowledging in particular the legacy of HIV/AIDS within the context of criminalisation;
- further acknowledges the hurt and the harm caused to those who were deterred by those laws from being open and honest about their identity with their family and in society and that this prevented citizens from engaging in civil and political life and deprived society of their full contribution;
- offers a sincere apology to individuals convicted of same-sex sexual activity which is now legal;
- welcomes the positive progressive measures introduced by successive Governments over the last thirty years and in particular in the 25 years since decriminalisation was introduced by the Criminal Law (Sexual Offences) Act 1993, including inter alia
  - the Prohibition of Incitement to Hatred Act 1989,
  - the Equal Status Acts 2000-2016,
  - the Employment (Equality) Acts 1998-2016,
  - the Civil Partnerships & Certain Rights and Obligations of Cohabitants Act 2010,
  - the Marriage Equality Referendum and the Marriage Act 2015,
  - the Children and Family Relationships Act 2015,
  - the Gender Recognition Act 2015;

And further welcomes the Government's commitment to introduce an LGBTI+ Youth Strategy, followed by an LGBTI Strategy; and

- Reaffirms its commitment to ensuring that:
  - the law fully recognises and protects sexual and gender minorities on an open and inclusive basis;
  - Ireland is a country where lesbian, gay, bisexual, transsexual and intersex individuals are free to fully express their identities without fear of discrimination;
  - all citizens can live in freedom and equality, and participate fully in the social, economic and cultural life of the nation, regardless of sexual orientation or gender identity; and
  - our foreign policy promotes and protects human rights globally, including the rights of lesbian, gay, bisexual, transgender and intersex individuals, who continue to suffer disproportionate levels of violence and face systemic discrimination in many countries.

## Appendix 2: Overview of the Process in England and Wales

Under provisions in the [Protection of Freedoms Act 2012](#), men with historical convictions for consensual same-sex sexual acts may apply to the Home Office to have their convictions disregarded (deleted, or where not possible, annotated) and pardoned. Please note that in this context ‘delete’ means to record with the details of the conviction or caution concerned— (a) the fact that it is a disregarded conviction or caution, and (b) the effect of it being such a conviction or caution.<sup>33</sup>

The offences covered by the Protection of Freedoms Act 2012 are offences under Sections 12 (buggery) and Section 13 (gross indecency) of the Sexual Offences Act 1956, as well as the equivalent military service offences and corresponding offences under earlier legislation. Where eligible, previous cautions, warnings and reprimands for the same offences can also be considered.

The conditions for a disregard are that the activity giving rise to the offence must have been consensual, with a person of 16 or over, and any activity now would not be an offence under section 71 of the Sexual Offences Act 2003 (sexual activity in a public lavatory). Sixteen is the legal age of consent in the UK while in Ireland it is 17.

The statistics regarding applications for consideration received by the Home Office to date, (i.e. from October 2012 to June 2022) are as follows:<sup>34</sup>

|  |   |
|--|---|
| Total number of applicants             | 509   |
| Total number of convictions considered | 756*<br>Some applicants have more than one conviction |
| Number of eligible convictions         | 201   |
| Number awaiting a decision             | 19  |

Applications for a disregard are made to the Home Office rather than the police. Application forms are available to download and can be submitted by email or post. The email address is [chapter4applications@homeoffice.gov.uk](mailto:chapter4applications@homeoffice.gov.uk) and postal applications can be addressed to ‘Chapter 4 Applications’.<sup>35</sup>

An application may only be made by the person with a conviction(s) for a conviction which is within the scope of the provisions. Applications made on behalf of a third party or deceased person are not accepted.

For an eligible conviction to be disregarded it must appear to the Home Secretary that, (a) the other person involved in the conduct constituting the offence consented to it and

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<sup>33</sup> Section 95 (5), Protection of Freedoms Act 2012 (England and Wales).

<sup>34</sup> UK Home Office, *Transparency Date: Statistics on the Disregard and Pardon for historical gay sexual convictions* (11 July 2022).

<sup>35</sup> UK Government, *Delete a Historic Conviction*.

was aged 16 or over, and; (b) any such conduct would not now be an offence under section 71 of the Sexual Offences Act 2003.

To process an application, the Home Office contacts all relevant data controllers (the Police, HM Courts & Tribunals Service and, if relevant, the Armed Forces Service Police) and requests they review their records and provide copies of any relevant documents to the Home Secretary, to enable a final decision to be made. Where an application raises complex issues, or where the available evidence is unclear or contradictory, it may be passed to an independent advisory panel which will consider the application carefully and make recommendations to the Home Secretary. Once the Home Secretary has reached a decision the applicant will be informed of the outcome. If an application is successful, the Home Secretary will also write to the relevant data controllers and require them to delete or annotate their records accordingly. Each data controller will write to the applicant subsequently to confirm that this action has been completed.

If an applicant disagrees with the decision reached by the Home Secretary and either has further evidence to submit or considers that an error was made on their initial application form, they can contact the Home Office so that their application can be reviewed. If the applicant considers that the final decision reached in relation to their application was wrong, they have the right under the provisions of the Protection of Freedoms Act 2012 to seek leave to appeal the decision to the High Court.

### **Effect of a disregard**

Once the Home Secretary has given notice that a conviction has been disregarded and a period of 14 days thereafter has elapsed, a successful applicant will be treated in all circumstances as though the offence had never occurred and will not need to disclose the conviction for any purpose. Official records relating to the conviction that are held by prescribed organisations will be deleted or, where appropriate, annotated to this effect as soon as possible thereafter.

## Appendix 3: Overview of the Process in Scotland

Scotland and Northern Ireland were excluded from the application of the [Sexual Offences Act \(England and Wales\) 1967](#) which saw the partial decriminalisation of homosexuality between men in England and Wales. In 1980 this was extended to Scotland through the [Criminal Justice \(Scotland\) Act 1980](#). Under this Act, consensual same-sex sexual activity between two men, in private, who had reached the age of 21 was legal. This represented an asymmetric age of consent as the age of consent for heterosexual sexual activity was 16. In 1994 the age of consent for sexual activity between men was lowered to 18 under the [Criminal Justice and Public Order Act 1994](#) and equalised in 2000 under the [Sexual Offences \(Amendment\) Act 2000](#). It continued to be a crime if more than two men had sex together or if there were any additional men present and it remained a crime for members of the armed forces or merchant navy to engage in same-sex sexual activity until 1994. Final law reform to repeal the laws criminalising anal sex and ‘gross indecency’ occurred in England and Wales under the Sexual Offences Act 2003 and in Scotland in 2009 under the [Sexual Offences Act \(Scotland\) 2009](#). While until the [Merchant Shipping \(Homosexual Conduct\) Act 2017](#) it remained possible to dismiss a crew member in the merchant navy for ‘homosexual conduct’ under the [Criminal Justice and Public Order Act 1994](#). As a result same-sex sexual activity between men remained a crime in a number of circumstances in which the same activity involving opposite-sex partners was legal until well after 1980.

In 6 November 2017, the Scottish First Minister issued an unqualified apology to those convicted for same-sex sexual activity that is now legal in Scotland.<sup>36</sup> This apology coincided with the introduction of the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill. The Bill became an Act on 11 July 2018. The [Scottish Historical Sexual Offences \(Pardons and Disregards\) Act 2018](#) provides for the automatic formal pardon of persons convicted of certain historical sexual offences and a process for convictions for those offences to be disregarded.

‘Convictions’ under the Act are taken to mean any finding in criminal proceedings that a person has committed an offence, and includes alternatives to prosecution such as a warning by the police or Procurator Fiscal or a conditional offer of a fixed penalty. A conviction also includes the situation where a case was referred to a children’s hearing on the ground that a child has committed an offence, and that ground of referral was accepted or established.<sup>37</sup>

The pardon is symbolic and applies to both the living and the deceased. It was intended to be a formal acknowledgement that the laws used to convict people for same-sex sexual activity were in themselves discriminatory in nature and that laws of more general application were used in a discriminatory way – and it is intended to lift the ‘burden’ of conviction. No steps had to be taken by a person to receive the pardon, and it came into effect from 15 October 2019.

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<sup>36</sup> ‘Nicola Sturgeon makes gay convictions apology’ (*BBC News*, 7 November 2017).

<sup>37</sup> Scottish Government (2019) *Guidance to Applicants*.

The provision of a pardon did not reverse the conviction and the disregard scheme is a separate practical measure in the Act to address the effect that these convictions could continue to have in a person's life.

Living persons can apply to have an eligible offence 'disregarded'. A person can apply on behalf of another person if they have Power of Attorney. However, similar to the process in England and Wales, there is no process in place to apply on behalf of those who are deceased.

### **The process**

A person can apply for a disregard via email or post. A paper application form can be requested via email, phone or post.

The email address is provided as [section5applications@gov.scot](mailto:section5applications@gov.scot) and applications are processed by the Criminal Law & Practice team. A decision on whether an application to have a conviction(s) disregarded is provided by the Scottish Ministers.

In order for an eligible conviction to be disregarded it must appear to the Scottish Ministers that the conduct involved, if occurring in the same circumstances on the day the Act came into force (15 October 2019), would not amount to a criminal offence.

Once a completed application is received the relevant details will be processed. If it is clear that the matters raised in an application are not eligible to be disregarded the applicant will receive a letter to that effect. In all other cases they will receive an acknowledgement that their application has been received and is being processed.

In order to process the application, the Scottish Government may contact relevant record keepers (for example, Police Scotland; the Scottish Courts and Tribunal Service; and Crown Office and Procurator Fiscal Service) and request them to review their records and provide copies of any relevant documents to the Scottish Government to enable a decision to be made.

Where an application raises complex issues, or where the available evidence is unclear or contradictory, it may be passed to specially appointed adviser(s) who will consider the application carefully and advise or assist the Scottish Ministers on the determination of an application.

Once the Scottish Ministers have made a decision, the applicant will be informed of the outcome.

If an application is successful, the Scottish Government will write to the relevant record keepers, for example Police Scotland or the Scottish Courts and Tribunals Service, and require them to delete, or where appropriate, redact or annotate their records containing reference to the disregarded conviction. Where records are annotated, this means recording with the details of the conviction the fact that it is a disregarded conviction (e.g. that it should never be disclosed), and the effect of it being a disregarded conviction. Each record keeper will then write to the applicant to confirm that this has been done.

## **Right to Appeal**

If an applicant disagrees with the decision reached by the Scottish Ministers they may contact [section5applications@gov.scot](mailto:section5applications@gov.scot) or in writing to the Criminal Law & Practice Team, at the first instance to review the application. The applicant can provide clarification on what grounds they believe an error was made in deciding their application and/or provide any additional information on the case that they did not submit in their initial application. Following this step, if the applicant still considers the decision reached to be wrong they have a right of appeal under Section 8 to the Sheriff Court. When deciding an appeal, the Sheriff may not take account of any representations or information which was not available to the Scottish Ministers when determining the application. If new information is available, a new submission can be made to the Scottish Ministers. Where an appeal does take place, the Sheriff's decision on appeal is final. Applicants may apply for Legal Aid to progress an appeal.

## **List of offences**

Under the Act you can also apply for a disregard if you were convicted of any other offence, such as breach of the peace, or a local authority byelaw, which regulated, or was used in practice to regulate, sexual activity between men that would not be a criminal offence today. Examples of the type of behaviour a person may have been criminalised for include any physical or affectionate behaviour between men of any age which is typical of an intimate personal relationship, ranging from kissing or holding hands to sexual intercourse. It also includes behaviour that is intended to initiate or lead to sexual relations, for example chatting up another man. Applications relating to any other convictions will not be accepted. However, if a person does not know what offence they were convicted of, they can still apply and the Scottish Ministers will seek to identify what offence the person received a conviction for.

## **Effect of a disregard**

The Act provides a mechanism to have these convictions 'disregarded', or in other words 'removed', so that information held in records about the conviction(s) would never be disclosed on, for example, a disclosure issued by Disclosure Scotland, ensuring that a person whose conviction has been disregarded cannot be prejudiced in future by the disclosure of information about these convictions. Once the Scottish Ministers have given notice that a conviction has been disregarded and when a period of 14 days from issue of the notice has passed, a successful applicant will be treated in all circumstances as though the offence(s) had never occurred and do not need to disclose it for any purpose, for example, they would not be required to disclose it for job applications or during any court or tribunal proceedings.

## **Letters of Comfort**

An application cannot be made on behalf of someone who has died. However, family members can apply for a 'Letter of Comfort'. This is a formal letter which may be issued that will provide personalised recognition that the person should never have been convicted of the particular offence, based on an assessment of the information provided by the family.

## Appendix 4: Overview of the Process in Canada

The Canadian [Expungement of Historically Unjust Convictions Act](#) came into force in June 2018. This Act allows for the destruction or permanent removal of judicial records of historically unjust convictions from federal databases. Historically unjust convictions includes eligible offences involving consensual sexual activity with a same-sex partner that would be lawful today.

Persons convicted of an offence listed in the [schedule to the Expungement Act](#) are eligible to submit an application to the Parole Board of Canada (PBC) to have the record(s) of their conviction(s) expunged. If the person is deceased, an appropriate representative, such as a close family member or a trustee, can apply on their behalf. When an expungement is ordered, the person convicted of the offence is deemed never to have been convicted of that offence.

### **The Canadian Act:**

- PBC is the official and only federal agency responsible for ordering or refusing to order expungement of records
- Allows spouses, parents, siblings, children or legal representatives to apply for record expungement on the behalf of a deceased person.
- There is no fee for an application. But applicants may incur costs in seeking required documentation. Applicants must supply all of the documentation to seek an expungement.
- Given that most eligible offences are expected to be historical in nature, a sworn statement or solemn declaration may be accepted as evidence if applicants can demonstrate that court or police records are not available, or if the documentation does not allow the PBC to determine if the criteria are satisfied.

### **The following convictions are eligible for an expungement:**

- Gross indecency or attempt to commit gross indecency;
- Buggery or attempt to commit buggery;
- Anal intercourse or attempt to commit anal intercourse; and
- Any offence under the National Defence Act or any previous version of the Act for an act or omission that constitutes an offence listed in the schedule to the Expungement Act.

Applicants need to provide evidence that the conviction meets the following three criteria:

1. the activity for which the person was convicted was between persons of the same sex;
2. the person(s), other than the person convicted, had given their consent to participate in the activity; and
3. the person(s) who participated in the activity were 16 years of age or older at the time of the activity or subject to a 'close in age' defence under the Criminal Code.



If an expungement is ordered, after receipt of the notification from the PBC, the Royal Canadian Mounted Police will destroy or remove any record of conviction in its custody. It will also notify any federal department or agency that, to its knowledge, has records of the conviction, and direct them to do the same. Relevant courts and municipal, provincial and territorial police forces will also be notified of the expungement order.

### **Expungement of Records to Date**

There are an estimated 9,000 historical records of convictions for gross indecency, buggery and anal intercourse in Royal Canadian Mounted Police databases. Canada has experienced a similar difficulty in the quality and identification of records as in Ireland and the ability to distinguish between convictions that were based on consensual same-sex relations between adult men and those that were not consensual.<sup>38</sup>

However, as of June 2021 this approach has reportedly resulted in only 41 applications to date of which only nine have resulted in the expungement of convictions.<sup>39</sup>

Key criticisms against the Canadian process included

- Lack of promotion
- Onerous requirements for documentation - The onus is placed on the individual, or their representative, to gather the correct documents and apply rather than providing the option to provide supporting documentation
- An overly restrictive schedule of eligible offences: For example offences that police historically used to persecute members of the LGBTQ community 'indecent acts, obscenity, nudity and immoral theatrical performances' remain on the statute book.

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<sup>38</sup> Steven Maynard, 'Trudeau's apology to LGBT public servants is straightforward. Expunging criminal convictions is not' *CBC News* (28 November 2017)

<sup>39</sup>Steven Maynard (2021).

## Appendix 5: Overview of the Process in New Zealand

The New Zealand [Criminal Records \(Expungement of Convictions for Historical Homosexual Offences\) Act 2018](#) provides for a statutory scheme that allows people convicted of historical homosexual offences to apply to have their convictions expunged. The Secretary for Justice must be satisfied on the balance of probabilities that the conduct would not be an offence under today's law. In particular, this will include the Secretary being satisfied that all parties involved were 16 years or older and the conduct was consensual. The convicted person, or a representative of the convicted person if they are deceased, can make an application for expungement. Eligibility under the scheme is for people convicted of any of five specific offences. These include offences that were decriminalised under the [Homosexual Law Reform Act 1986](#) and their predecessor offences.

### **The New Zealand Act:**

- Came into force on 10 April 2018, the purpose of this Act is to reduce prejudice, stigma, and all other negative effects, arising from a conviction for a historical homosexual offence
- Enables an application for expungement of a conviction for a historical homosexual offence by an eligible person (before that person's death) or a representative (after the eligible person's death).<sup>40</sup>
- The Secretary for Justice makes a positive decision on the application if, on the balance of probabilities, the conviction meets the test for expungement. The Secretary must decide an application for expungement by making a written decision whether the conviction meets the test for expungement.
- The test is that the conduct constituting the offence, if engaged in when the application was made, would not constitute an offence under the laws of New Zealand.
- If expungement is granted, it entitles the convicted person to declare they have no such conviction for any purpose under New Zealand law, and the conviction will not appear on any criminal history check.

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<sup>40</sup> A representative, for a conviction for a historical offence, after the convicted person's death, means any of the following: (a) the executor, administrator, or trustee of, acting on behalf of, the estate of the convicted person: (b) a spouse, civil union partner, or de facto partner, of the convicted person: (c) a parent, sibling, or child, of the convicted person: (d) a person who the Secretary has decided under section 16 can represent the convicted person for an application for expungement of the conviction.

- The New Zealand Act Expungement does not authorise or require destruction of criminal records “*Section 9 (7) Expungement of a conviction neither authorises, nor requires, destruction of criminal records of the expunged conviction*”.
- Makes it an offence for officials to disclose expunged convictions or to require or request that an individual disregard expungement or to fail to comply with the notice.
- Makes it clear that there is no entitlement to compensation (Section 23). This was rationalised as beyond the purview of the scheme, which was focused on preventing further negative effects from the stigma of conviction. During the debate on the third reading of the then Bill the then Minister for Justice it stated that: “*There's no general principle that a person who's convicted of a repealed offence is entitled to compensation on the repeal of the offence. In this instance, there's no suggestion that the convictions in question were wrongfully imposed, as they were in accordance with the law at the time. The bill sends a clear signal that discrimination against homosexual people is no longer acceptable and that we are committed to putting right the wrongs from the past.*”
- Provides that the Secretary may reconsider a decision.
- The applicant may supply additional documentation and the Secretary has the ability to request further documents, things, or information.
- There's no fee to file the application and there's no time limit on when it should be submitted.

#### **Detailed overview of the application process for expungement:<sup>41</sup>**

The application must be made in the form and manner approved by the Secretary; and must include any supporting information, and supporting submissions, the eligible person or representative wishes the Secretary to consider. The application for expungement is made by filling out a form: [Wiping historical homosexual offences application form](#) . Which can then be sent to the Ministry of Justice by email [wiped@justice.govt.nz](mailto:wiped@justice.govt.nz) or by (free)post.

The scheme is administered by the Ministry of Justice. Applications are assessed and determined by the Secretary for Justice who decides, on the balance of probabilities, that the conduct they were convicted of is no longer illegal – this will generally involve an assessment of whether the activity was consensual and involved adults over the age of 16.

The applicant may provide supporting documentation as the amount of detail in the official records might be limited. This might include old court or police documentation that has been kept, personal papers or correspondence, newspaper clippings, or

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<sup>41</sup> Detailed website: Ministry of Justice (New Zealand) (2018), ‘*Wiping Historical Homosexual Convictions*’.

statements from others with personal knowledge of the case. The information provided does not need to be in a form that would be admissible in court.

An application can be for more than one offence, if they relate to the same individual. Applicants can use a lawyer, or another person, to help prepare or submit your application, or to deal with the Ministry on their behalf but it is not a requirement.

### **The Effect of a Wiped Conviction**

If a person's conviction is wiped, their conviction will not appear on a criminal history check for any purpose in New Zealand. In situations where they have to disclose criminal convictions (such as on job applications), they'll be able to declare they had no such conviction. However, it does not authorise or require destruction of criminal records.

## Appendix 6: Overview of the Process in Australia

Australia has a federal system of government with powers distributed between the national government (the Commonwealth) and six States (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia) and two territories (Australian Capital Territory and Northern Territory). The Australian Constitution defines the boundaries of law-making powers between the Commonwealth and the States/Territories.

As a result of this system, between 2013 and 2018, starting with the South Australian Spent Convictions (Decriminalised Offences) Amendment Act 2013 (SA), eight Acts were enacted at State/Territory level to establish near equivalent regimes for expungement.

The Acts are listed in chronological order in the below table:

| Jurisdiction                  | Legislation  | Type of Scheme          |
|-------------------------------|--|-------------------------|
| South Australia               | <a href="#">Spent Convictions (Decriminalised Offences) Amendment Act 2013 (SA) amended the Spent Convictions Act 2009 (SA)</a>        | Apply to the Magistrate |
| New South Wales <sup>42</sup> | <a href="#">Criminal Records Amendment (Historical Homosexual Offences) Act 2014 (NSW) amended the Criminal Records Act 1991 (NSW)</a> | Administrative          |
| Victoria                      | <a href="#">Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 (Vic) amended the Sentencing Act 1991</a>    | Administrative          |
| Australian Capital Territory  | <a href="#">Historical Homosexual Convictions Extinguishment Amendment Act 2015 (ACT) amended the Spent Convictions Act 2000 (ACT)</a> | Administrative          |
| Tasmania                      | <a href="#">Expungement of Historical Offences Act 2017 (Tas)</a>  | Administrative          |
| Queensland                    | <a href="#">Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 (Qld)</a>  | Administrative          |
| Western Australia             | <a href="#">Historical Homosexual Convictions Expungement Act 2018 (WA)</a>  | Administrative          |
| Northern Territory            | <a href="#">Expungement of Historical Homosexual Offence Records Act 2018 (NT)</a>   | Administrative          |

### Scope of the offences covered

The qualifying offences eligible for expungement are outlined by each state and territory and must meet specific criteria. These offences (frequently referred to as ‘homosexual offences’) generally appeared in state and territory criminal codes and vagrancy acts either as proscribed sexual activities, such as buggery, attempted buggery or indecent assault, or as a public morality offence which generally included loitering, indecency, ‘riotous’ behaviour, soliciting and cross-dressing.<sup>43</sup>

<sup>42</sup> Norfolk Island was previously self-governing but from 1 July 2016 all laws of New South Wales also apply to Norfolk Island, under the Norfolk Island Legislation Amendment Act 2015 and the Territories Legislation Amendment Act 2016.

<sup>43</sup> Allen George (2019), ‘Sex offenders no more: Historical homosexual offences expungement legislation in Australia.’ *Alternative Law Journal*; 44(4):297-301.

The schemes across Australian jurisdictions generally adopt one of two approaches to identifying the offences that may be expunged. For example, the Queensland Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 identified eligible offences by reference to specific offences in the Criminal Code 1899 as in force before 19 January 1991.<sup>44</sup>

The Victoria Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 adopted a broader approach, identifying eligible offences by description, being 'sexual or public morality offences'.<sup>45</sup>

While the Tasmanian Expungement of Historical Offences Act 2017 is essentially a hybrid of these approaches. The Tasmanian Expungement of Historical Offences Act 2017 identifies eligible offences by describing sexual and public morality offending, and also referring to the specific offence found in section 8(1)(d) of the Police Offence Act 1935 (Tas) as in force before 12 April 2001.<sup>46</sup>

### **The test for expungement**

In each of the Australian Acts the existence of consent must be determined by the Secretary of the relevant state or territory justice department, or a magistrate in South Australia, as only homosexual acts consented to by all parties can be expunged. Furthermore, the age or respective ages of persons involved has to be taken into account in respect to the current age of consent law in the relevant jurisdiction.

South Australia, Victoria, Western Australia, Queensland, Tasmania and the Northern Territory include the additional provision that the crime would no longer constitute an offence under the law of State/Territory at the time of the application, and with the exception of Queensland, that the person would not have been charged with the offence but for the fact that the conduct was suspected of being or connected to homosexual activity e.g. that the actions would not have constituted an offence if those involved were not of the same sex.

The Queensland Act provided specific consideration of offences that were conducted in a 'public place'. The Queensland Act noted that an historical charge may still be deemed an offence under current law, however, the decision-maker may still decide to expunge a conviction if taking into account that it would not constitute an offence if it were done other than in a public place under the law of Queensland at the time of the application; and 'another person could only have witnessed the behaviour if they took some form of

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<sup>44</sup> Specifically Section 8(1) of the Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 (QLD) provides that an eligible offence is: (a) a Criminal Code male homosexual offence; or (b) a public morality offence; or (c) another offence prescribed by regulation. Section 8(2) qualifies that a regulation under subsection (1)(c) may only prescribe an offence to the extent the offence happened, or allegedly happened, before 19 January 1991. Sections 9 and 10 provide the meaning of 'male homosexual offence' and 'public morality offence' by reference to specific offences in the Criminal Code 1899 (Qld) as in force before 19 January 1991.

<sup>45</sup> Sentencing Act 1991 (Vic) s 105, as amended by the Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 (Vic).

<sup>46</sup> Melanie Bartlett & Taya Ketelaar-Jones (2020), 'Tasmania: Independent Review of Expungement of Historical Offences Act 2017'.

“abnormal or unusual action” (e.g. looking under the door of a cubicle in a public toilet).<sup>47</sup> This provision takes into account the historical reality that at the time it was difficult for men to engage in sexual activities in private spaces, such as hotels and homes, and the role of police in actively seeking out such behaviour or acting as agent provocateurs (entrapment).

### **Who can apply?**

In all jurisdictions, with the exception of South Australia, applications can be made on behalf of deceased persons. All applications for expungement are dealt with by submission to an administrative process, usually overseen by an Attorney General or their delegated officer, except for South Australia which maintains the requirement of the Spent Convictions Act 2009 for an application before a magistrate.

### **Public Apology**

Some Parliaments, such as Tasmania and Queensland, offered an apology for past anti-homosexual laws when passing expungement legislation which, it was further recognised, had been used as a basis for negative treatment of LGBTQI people.

### **Oral Hearing**

The South Australia Act provides for homosexual offences to be treated as spent convictions rather than expunged convictions and so may require attendance by an applicant at a hearing before the magistrate.<sup>48</sup> The Acts of New South Wales, Victoria, Tasmania, Queensland, Western Australia and the Northern Territory specifically state that no oral hearing may be held for the purpose of determining an application.

### **The effect of expungement**

The effect of the process differs depending on the Jurisdiction. For instance, in the earliest Australian process developed in South Australia such convictions are considered as spent rather than expunged convictions. In this manner such convictions do not appear on a police records check and do not have to be disclosed if you are asked about your criminal history. However, the record of the convictions remain unannotated. This effect is also the case of processes in New South Wales and the Australian Capital Territory.

The Victoria process distinguishes between primary and secondary records, requiring the annotation of primary records and that secondary records held in electronic format by the Victoria Police or the Office of Public Prosecutions are subject to one or more of the following: (i) removal of the entry, (ii) that the entry is made incapable of being found,

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<sup>47</sup> Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 (QLD), s 18 (2A), s 19 (2A).

<sup>48</sup> This hearing should be in private unless the applicant consents to it being in public or the qualified magistrate considers that, in the circumstances of the case, the hearing should be in public. Spent Convictions Act 2009 (South Australia), s 4 (1).

and/or (iii) de-identify the information contained in the entry and destroy any link between it and information that would identify the person to whom it referred.<sup>49</sup>

Tasmania, Western Australia, Queensland and the Northern Territory require that records are annotated. In Western Australia and Queensland this requires annotation with a statement to the effect that the entry relates to an expunged conviction. While in the Northern Territory and Tasmania the annotation must also include a statement notifying that it is an offence to disclose information about an expunged charge. In each of these cases the effect of the process is that the persons are no longer part of a person's official criminal record and persons are no longer required to disclose the conviction.

Tasmania, Queensland, Western Australia and the Northern Territory each include specific reference to the fact that nothing in their Act requires or authorises any person to destroy, cull or edit any documents containing official criminal records. Each of these four territories also allow for expunged convictions to be revived to once again become part of a person's criminal record if a subsequent review finds that the original decision was made based on false or misleading information.

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<sup>49</sup> Sentencing Act 1991 (Vic) s 105, as amended by the Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 (Vic). s 3 105K (3).



## Appendix 7: Table of Appeals and Review Processes

|                                   |   |
|-----------------------------------|---|
| Southern Australia                | No appeals or review provided for in the Act  |
| New South Wales (NSW)             | An administrative review is available through the NSW Civil and Administrative Tribunal.  |
| Victoria                          | An administrative review is available through the Victorian Civil and Administrative Tribunal   |
| Australia Capital Territory (ACT) | An administrative review is available through the ACT Civil and Administrative Tribunal.  |
| Tasmania                          | <p>An applicant must be notified of intent to refuse an application with the opportunity to submit further information within 28 days in support of their application.</p> <p>If the decision is made to refuse the application subsequent to this the applicant may apply to the Magistrates Court (Administrative Appeals Division) for a review of the decision.</p>   |
| Queensland                        | <p>The applicant must be notified of intent to refuse and can make a written submission to the Chief Executive in relation to the proposed refusal. A subsequent application can also be made if new information is available to support the application.</p> <p>If a negative decision is then made an applicant may apply to the Queensland Civil and Administrative Tribunal for an administrative review of the decision.</p>   |
| Western Australia                 | <p>The applicant must be notified of intent to refuse and can make a written submission to the Chief Executive in relation to the proposed refusal within 14 days. If a decision is made to refuse a notice must be issued by the Chief executive.</p> <p>The applicant can then apply, within 28 days of the notice to the State Administrative Tribunal for a review of the decision.</p>   |
| Northern Territory                | <p>Following a refusal the applicant can make a further submission within 28 days.</p> <p>If they remain unhappy they can have their application reviewed by the Northern Territory Civil and Administrative Tribunal.</p>  |
| Canada                            | No appeals or review provided for in the Act  |
| England & Wales                   | <p>If an applicant disagrees with the decision of the Home Secretary and either has further evidence to submit or considers that an error was made in their initial application form they can contact the Home Office for a further review of the application.</p> <p>Subsequent to this applicants have the right under the provisions of the Protection of Freedoms Act 2012 to seek leave to appeal the decision to the High Court. The decision of the High Court is final.</p> |
| Scotland                          | Applicants can contact the Criminal Law & Practice Team to have their application reviewed.   |

|             |   |
|-------------|---|
|             | <p>Subsequent to this, applicants have a right of appeal under Section 8 to the Sheriff Court. When deciding an appeal, the Sheriff may not take account of any representations or information which was not available to the Scottish Ministers when determining the application. If new information is available a fresh application can be made to the Scottish Ministers. Where an appeal does take place, the Sheriff's decision on appeal is final. Applicants may apply for Legal Aid to progress an appeal.</p> |
| New Zealand | <p>A decision can be reconsidered by the Secretary who may confirm, refuse or reverse a decision to expunge. The Secretary can appoint an independent reviewer to assist with this consideration.</p>   |

## Appendix 8: Effect on Records

| <b>Jurisdiction</b>        | <b>Effect on Records</b>  |
|----------------------------|---|
| <i>England &amp; Wales</i> | Annotated. Term “delete” used meaning to record with the details of the conviction or caution concerned— the fact that it is a disregarded conviction or caution. <b>Protection of Freedoms Act 2012, c.4. s 95</b>   |
| <i>Scotland</i>            | Can be 'removed'. All references to a conviction in official records must be removed as soon as reasonably practicable. The record keepers are required to delete, or where appropriate, redact or annotate their records containing reference to the disregarded conviction. Where records are annotated, this means recording with the details of the conviction the fact that it is a disregarded conviction (e.g. that it should never be disclosed), and the effect of it being a disregarded conviction. Scottish Ministers may prescribe the manner in which disregarded convictions are removed from official records. Regulations may provide that removal from records means recording with the details of the conviction, the fact that it is a disregarded conviction, and the effect of it being a disregarded conviction. <b>Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018 s 10.</b>  |
| <i>Canada</i>              | Judicial records of the conviction must be destroyed or removed from repositories or systems. <b>Expungement of Historically Unjust Convictions Act S.C. 2018, c 11</b>   |
| <i>New Zealand</i>         | <p>The Chief Executive of a controlling public office that holds, or has access to, criminal records, must take all reasonable steps to ensure that the office, and any employee or contractor of the office, conceals criminal records of an expunged conviction when requests are made for their disclosure and does not use criminal records of an expunged conviction. Expungement of a conviction neither authorises, nor requires, destruction of criminal records of the expunged conviction. <b>Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018 s 9(7) 11-12</b></p> <p>Conceal means to protect the criminal record or information about the criminal record of an eligible individual from disclosure to a person, body, or agency (including, without limitation, a government department or law enforcement agency) for which there is no lawful authority under this Act to disclose the criminal record or any information about the criminal record, <b>Criminal Records (Clean Slate) Act 2004, s 4</b></p> |
| <i>New South Wales</i>     | Does not detail how records are managed, but destruction of records is not authorised. <b>Criminal Records Amendment (Historical Homosexual Offences) Act 2014 No 69 19F</b>  |
| <i>Queensland</i>          | Annotated. Criminal record holder must annotate the public record by making any necessary changes to show the conviction or charge is an expunged conviction or charge and give the chief executive notice that the annotation has been made. Does not require or authorise a person to destroy a public record or omit information about an expunged conviction or expunged charge from a public record. <b>Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 pt 3, 28</b>   |

|                                     |  |
|-------------------------------------|--|
| <i>South Australia</i>              | Not expungement, records are considered 'spent', they are not annotated and destruction of records is not authorised. A conviction for an eligible sex offence is spent if, on application by the convicted person, a qualified magistrate makes an order that the conviction is spent. <b>Spent Convictions (Decriminalised Offences) Amendment Act 2013 No 88, s 6</b>   |
| <i>Tasmania</i>                     | Annotated. Any entry that includes information of the expunged charge must be annotated with a statement to the effect that the entry includes information about an expunged charge; and it is an offence to disclose information about an expunged charge. <b>Expungement of Historical Offences Bill 2017 pt 3, s 14</b>   |
| <i>Victoria</i>                     | The official records holder must remove the entry; make the entry incapable of being found; and de-identify the information contained in the entry and destroy any link between it and information that would identify the person to whom it referred. Non-electronic records must be annotated with a statement to the effect that it relates to an expunged conviction. The scheme distinguishes between ordinary records and 'secondary records.' The requirement to annotate records does not apply to records that are 'secondary records' held in electronic format by the Victoria Police or the Office of Public Prosecutions. 'Secondary records' are defined as 'an official record that is a copy, duplicate or reproduction of, or extract from, another existing official record, irrespective of whether those records are held by the same entity or by different entities. For secondary records, the data controller must remove the entry or make the entry incapable of being found or de-identify the information contained in the entry and destroy any link between it and information that would identify the person to whom it referred. <b>The Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 pt 2 s 3</b> |
| <i>Western Australia</i>            | Annotated. The relevant data controller must, within 28 days, annotate any entry relating to the expunged conviction contained in any official criminal records under the management or control of the data controller with a statement to the effect that the entry relates to an expunged conviction. <b>Historical Homosexual Convictions Expungement Act 2018 pt 3, 13</b>   |
| <i>Australian Capital Territory</i> | Not specified within the legislation however, records are clearly retained and the legislation notes that: A person commits an offence if they have access to records of convictions kept by or on behalf of a public authority and discloses any information about an extinguished conviction to someone else. <b>Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Bill 2015 s 8, 19I</b>   |
| <i>Northern Territories</i>         | Annotated. Destruction of information or documents is not authorised. Records must be annotated to show that the charge or conviction is expunged; and include a warning in the record that it is an offence to disclose a charge or conviction that is expunged; and include in the record any statement or information prescribed by regulation. If the holder of the record is unable to comply, they must write to the Chief Executive Officer who may give written directions on what further steps the holder is required to take. <b>Expungement of Historical Homosexual Offence Records Act 2018 pt 2, 19</b>   |

