



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

A Progress Report



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Background

The offences of buggery¹ between persons and gross indecency between men were abolished by the Criminal Law (Sexual Offences) Act 1993.²

The laws repealed by this Act are now considered to have been particularly discriminatory, contrary to human dignity and an infringement of the right to privacy and self-autonomy. The impugned legislation caused multiple harms to those directly and indirectly affected, namely, men who engaged in consensual same-sex activities, and to their families and friends. Furthermore, the laws had significant impacts on progress towards equality for the Lesbian, Gay, Bisexual, Transgender, Queer and Intersex (LGBTQI) community and in particular, the legacy of HIV and AIDS within the context of criminalisation of consensual sexual activity between men.³

On 24 June 2018, to mark the 25th anniversary of the decriminalisation, the then Taoiseach announced the Government's plan to bring forward proposals for a scheme to enable the expungement of criminal records for qualifying offences, where the acts involved would now be lawful.

To progress this commitment, the Department of Justice engaged with An Garda Síochána to determine the extent to which such a Scheme could be developed and

¹ 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 in cases when a person is under the relevant age of consent or mentally impaired. See [Sections 3](#) and [5](#) of the Criminal Law (Sexual Offences) Act 1993.

² The offence of Gross Indecency was a statutory offence which previously applied to both consensual and non-consensual activity between men and was abolished under the Schedule of the Criminal Law (Sexual Offences) Act 1993. The 1993 Act retained the offence in relation to acts involving male persons under 17 years of age or of any age if mentally impaired. The Criminal Law (Sexual Offences) Act 2006 repealed the sections containing the offences of gross indecency in the 1993 Act. The offences that related to sexual exploitation and abuse of persons under the relevant age of consent, and of protected persons, are now provided for under the Criminal Law (Sexual Offences) Act 2017.

³ Criminalisation of same-sex sexual activity between men in Ireland impacted upon the availability, accessibility and uptake of information, testing and treatment services for HIV prevention, and further contributed to the stigma and discrimination faced by men who have sex with men (MSM) and people living with HIV in Ireland. i.e. the failure by the Irish Government at the time to fund targeted HIV prevention education for MSM, such as that provided by Gay Health Action, or to undertake such preventative education itself due to the criminalised status of same-sex activity between men. See: Nolan A, "The Gay Community Response to the Emergence of AIDS in Ireland: Activism, Covert Policy, and the Significance of an 'Invisible Minority'" (2018) 30 Journal of Policy History 105; Páraic Kerrigan, 'Remembering Ireland's Early Aids History' (2018)] [Maynooth University](#).

to explore what records would be available to allow for the assessment of appropriate cases which would qualify for expungement.

An Garda Síochána subsequently established a confidential email system for individuals seeking the expungement 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.

Establishment of the Working Group and Membership

Following consultation with relevant stakeholders including Deputy Ged Nash, who had previously brought forward a Private Members' Bill on this issue, it was recommended that a Working Group consisting of representatives of the Department of Justice, An Garda Síochána, the Irish Human Rights and Equality Commission (IHREC), the Office of the Attorney General, and members of the LGBTQI+ community be established.⁴ The Working Group provides a forum for structured engagement to examine issues relating to disregarding relevant criminal records from qualifying offences. On 1 March 2021, Minister McEntee approved the establishment of the group with the membership confirmed in June 2021.

The Working Group is composed of the following members:

LGBTI Community Representatives
<ul style="list-style-type: none">• Bernard Condon, Senior Counsel, Chairperson HIV Ireland• Kieran Rose, Equality and Human Rights Activist, former Commissioner on IHREC and Co-founder, Former Chairperson and Board Member of GLEN• Fergus Ryan, Associate Professor in Law, Maynooth University
The Irish Human Rights and Equality Commission
<ul style="list-style-type: none">• Colm O'Dwyer, Senior Counsel, IHREC Commissioner
Office of the Attorney General
<ul style="list-style-type: none">• Nicola Lowe, Advisory Counsel
An Garda Síochána
<ul style="list-style-type: none">• Barry Walsh, Detective Superintendent, Garda National Protective Services Bureau
Secretariat, Department of Justice
<ul style="list-style-type: none">• Maeve Brett, Principal Officer (Chair)• Jensen Byrne, Acting Assistant Principal Officer• Kayleigh Newcomb, Executive Officer

⁴ The Private Members' [Convictions for Certain Sexual Offences \(Apology and Exoneration\) Bill 2016](#) was introduced in Seanad Éireann on 6 December 2016.

The Working Group is tasked with the following:

1. To examine the feasibility of identifying appropriate records which may support a decision to expunge or disregard a record of conviction for consensual same-sex acts between men prior to decriminalisation in 1993. The Working Group will assess the availability and quality of records held by An Garda Síochána which relate to the offences concerned in order to determine the feasibility of putting in place a scheme to disregard the criminal convictions.
2. To examine issues regarding criminal records relating to consensual same sex relationships prior to decriminalisation in 1993 (e.g. can the disclosure of historic criminal records be facilitated?).
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 expunged or disregarded for qualifying offences.
4. To examine the need for, and feasibility of, establishing a scheme for expunging or disregarding convictions for qualifying offences relating to consensual sexual 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. That would involve a consideration of each individual case, on application by the individual concerned or a representative to determine, for example, whether the acts involved were consensual and whether a person under the current applicable age of consent was involved, with a view to expunging/disregarding convictions for qualifying offences.
6. To compile an interim report of recommendations for the Minister for Justice no later than the end of Q4, or at the earliest date thereafter.
7. To make any other recommendations in relation to the development of any scheme to the Minister for Justice no later than Q3 2022, or at the earliest date thereafter.

Progress of the Working Group to Date

Since its establishment the Working Group has met on four occasions: 16 July, 17 September, 25 November and 30 November 2021.

During these meetings, and in the intervening periods, the Working Group has considered a range of complex issues in relation to the development of any scheme to disregard the criminal convictions of men convicted for consensual same-sex

sexual acts prior to decriminalisation in 1993. The deliberations of the Working Group have been informed by comprehensive research undertaken of existing schemes in other relevant common law jurisdictions (Australia, Canada, England, Wales, Scotland⁵ and New Zealand), all of which had similar criminalising provisions and which could thus help inform a best practice approach to developing recommendations within the Irish context. In each of these jurisdictions a legislative approach was taken to provide for the disregarding of qualifying convictions. The Working Group is currently considering whether the introduction of such a scheme in Ireland would also require a legislative response. Progress made in respect of a number of key issues is described below, along with proposed next steps for the Group:

1. Identifying Appropriate Records

A core issue underpinning the development of any Disregard Scheme relates to the identification of appropriate records.

The primary criminalising laws used to penalise sexual activity between men were set out in Section 61 of the Offences Against the Person Act 1861⁶ and Section 11 of the Criminal Law Amendment Act 1885.⁷ These sections however applied both to consensual and non-consensual acts between men, as well as acts involving a person under the current relevant age of consent, which could not be expunged/disregarded. Other records or background information about a conviction under these Acts would probably be necessary in order to make a decision on expungement/disregard.

The Working Group has therefore undertaken to ascertain the availability and quality of records relating to convictions that may support individual applications to have a conviction disregarded. In the first instance, the Working Group sought a review of what records were held by An Garda Síochána. This action has been completed with a report on this review of records received in October 2021.

The key findings of the An Garda Síochána report are as follows:

- The Garda PULSE system came into operation in 1998, 5 years after decriminalisation in 1993 and will not hold any new convictions for such

⁵ Unlike the other jurisdictions Scotland operates a hybrid legal system combining aspects of the common law and civil law traditions.

⁶“Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be kept in penal servitude for life” Section 61 of the [Offences against the Person Act 1861](#).

⁷ “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 indecency with another male person, shall be guilty of a misdemeanour, 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.” Section 11, [Criminal Law Amendment Act 1885](#).

offences. Recorded incidents under the category 'Sexual Offences' for the offences of 'Gross Indecency' and 'Buggery' likely include historical incidents of clerical or institutional sexual abuse of children. As a result, the records relevant for the purposes of a possible disregard will all be historical criminal records.

- The Pulse system does hold 'legacy records' from the pre-Pulse mainframe recording systems which were operational in the 1970s and 1980s, as well as records from earlier decades. These convictions are recorded under an 'Offence Code' rather than the specified Sections of Acts. In many incidences general Offence Codes may also have been used, leading to a requirement for 'Key Phrase' queries to identify records. This complicates the process of identifying files due to spelling variations. A list of relevant Offence Codes will be required to undertake this search. An Garda Síochána and the Courts Service should be able to identify and recover these historical Offence Codes.
- These pre-Pulse files are not likely to contain the detail necessary to decide if a conviction is liable for expungement or a disregard. However, the Garda National Vetting Bureau (GNVB) in Thurles holds historical papers relating to convictions namely, Dublin Criminal Records (DCRs) which were previously held in the Garda Criminal Records Office in Garda HQ and which were transferred to the GNVB in Thurles in 2005. These records are not searchable by offence, as they are filed according to their DCR File Number. It is estimated that there are over one million of these DCR Paper Records at the GNVB in Thurles, all of which are pre-PULSE records from the early and mid-1900s. It is not possible to conduct a physical search of each of these paper files for specific offences without knowing the relevant DCR File Number.
- It is possible that by identifying and using the Offence Codes to locate the relevant conviction in the pre-Pulse system that this will allow relevant data including DCR file numbers to be extracted and the relevant historical paper records held by An Garda Síochána at GNVB to be recovered.
- An Garda Síochána further advised that many investigation files relating to such incidents may no longer exist, having been lost or disposed of during the intervening years. In these circumstances it may not be possible to check Garda records to see if it is an eligible offence.

As a result of these findings An Garda Síochána cannot provide an advance guarantee that it will be possible to locate specific historic convictions, particularly in the event that any such conviction is held by way of paper record. The Working Group notes that the onus lies with the State to maintain, preserve and produce records and that an application should not be refused only because records are unavailable. The Working Group is now considering, as set out below, if and how it

may be possible to grant a disregard in the absence of State records of the conviction, or a lack of sufficient detail in the records available.

Next Steps

- The Working Group to request An Garda Síochána and the Courts Service to compile a list of relevant Offence Codes.
- The Working Group to write to the Courts Service, Prison Service, Chief State Solicitor's Office, Attorney General's Office and the Office of the Director of Public Prosecutions to request that they ascertain the quality and availability (if any) of any records they may hold of relevant convictions.⁸
- The Working Group to appoint a legal historian to investigate publicly held records to ascertain what documentation may be available in the public sphere to support an application.
- The Working Group to consider what actions may be taken in the event that records are unavailable or are inadequate to support an application to have a conviction disregarded.
- The Working Group to consider whether affidavits or sworn statements might be sufficient where State records are unavailable or inadequate to support an application to have a conviction disregarded.
- Final recommendations in relation to records to be included in the Final Report of the Working Group in 2022.

2. Expunging Versus Disregarding: What Happens to Records?

The original 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.⁹ However, across the other jurisdictions studied (England and Wales, Scotland, Australia, Canada and New Zealand) Canada was the only jurisdiction where the process provides for the destruction of records. In all other jurisdictions surveyed records are primarily dealt with through a process of annotation or concealment.

An approach that involves entirely removing or destroying records of unjustly applied offences would not be considered appropriate. It would involve eliminating records

⁸ It should also be noted that the DPP's office was only established in 1974.

⁹ As defined by Oxford Languages.

and therefore evidence of such injustice. It would also clearly frustrate the efforts of researchers and historians to explore the relevant topic in the future.

For this reason the Working Group strongly recommends a ‘disregard’ rather than ‘expungement’ (destruction) approach to relevant records.

In recognition of this, the Working Group has adopted the term ‘disregard’ in lieu of ‘expungement’ in its considerations and recommends that the term ‘disregard’ replace ‘expungement’ in all future workings of the Working Group.

Next Steps

- The Working Group to develop a Concept Note for a Public Consultation which will seek input on the concept of ‘disregarding’
- Following consultation, the Working Group will consider the issue further and a recommendation will be included in the Final Report of the Working Group in 2022.

3. Points of Contact

It is acknowledged that many of those convicted of qualifying offences may have traumatic and difficult associations with An Garda Síochána and, through association, the Department of Justice. A key issue being considered by the Working Group is which body would be the most appropriate *first point* of contact for an individual seeking to avail of the disregard procedure or whether there should be an independent body operating under the auspices of the Department of Justice.

Next Steps

- The Working Group to develop a Concept Note for a Public Consultation which will include a question in relation to which body should receive any application.
- Following consultation, the Working Group will consider the issue further and a recommendation will be included in the Final Report of the Working Group in 2022.

4. Who can Apply

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. Among the jurisdictions researched, only England and Wales, and Scotland do not allow for applications to be made on behalf of a deceased person. Scotland, however, does allow those with Power of Attorney to apply on behalf of

the person with a conviction. Across the other jurisdictions (Australia, Canada and New Zealand) representatives may make an application on behalf of someone who is deceased. The Working Group recommends that any scheme should allow for applications on behalf of the deceased or by those operating under Power of Attorney.

Additionally, given the long history of emigration from Ireland, and considering in particular the exodus of gay and bisexual men (and LGBTQ+ people more generally) to the United Kingdom and the United States in the 1960s, 70s and 80s, the Working Group recommends that an application for a disregard in respect of a conviction imposed by an Irish Court can be made by or on behalf of a person who moved abroad and is no longer resident in Ireland.

Next Steps
<ul style="list-style-type: none">• The Working Group will consider who can act as a representative to progress an application on behalf of a deceased person and make a recommendation on the matter in its Final Report in 2022.

5. Criteria for a Conviction to be Eligible for a Disregard

The Working Group is currently considering the threshold that must be met for a conviction to be eligible for consideration for a disregard. To date the Working Group has agreed that the following criteria utilised across the other jurisdictions will also be relevant within Ireland:

- 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

Next Steps
<ul style="list-style-type: none">• The Working Group to consider if any other eligibility criteria should be applied.• The Working Group to make final recommendations on the eligibility criteria in the Final Report in 2022.

6. Offences to be Included under the Disregard Scheme

The statutory provisions that criminalised and penalised consensual sexual acts between men in Ireland came into effect under British rule and remained in force following the establishment of Saorstát Éireann and the establishment of the State. As a result, consensual sexual acts between men were effectively criminalised in law from 1634 until decriminalisation in 1993.

These statutory provisions include:

- 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 Working Group will consider whether there is any legal bar to the disregard by the State of convictions imposed prior to the establishment of Saorstát Éireann, or of the State.

It is recognised in other jurisdictions researched that certain other laws were utilised in practice over the years to target and prosecute gay and bisexual men that were not the primary criminalising laws, for example laws pertaining to public morality, public order, indecent acts, obscenity and even public vagrancy. As a result the Working Group will consider the inclusion of offences of general application in any disregard scheme.

It is expected that the Working Group will receive these advices in March 2022.

Next Steps
<ul style="list-style-type: none">• The Working Group will consider whether there is any legal bar to the disregard of convictions imposed prior to the establishment of Saorstát Éireann or of the State.• The Working Group will consider the inclusion of offences of general application in any Disregard Scheme.• The Working Group to develop a Concept Note for a Public Consultation process which will include a question seeking to capture whether any other provisions were utilised to police same-sex sexual activity in Ireland prior to decriminalisation.• Following receipt of advices and the public consultation process the Working Group to consider what offences should be included in any final

scheme and to make a recommendation in the Final Report of the Working Group.

7. Appeals and Review Process

The Working Group is currently considering a recommendation for an administrative review and/or Court appeal process in cases where a decision is made to refuse an application under any disregard scheme. The provision of such a review and/or appeal process may provide additional assurance to applicants seeking a disregard.

Next Steps

- The Working Group is currently considering the approaches taken in other jurisdictions and will make a recommendation in relation to a review and/or appeal process in the Final Report in 2022.

8. Public Consultation

The work currently being undertaken by the Working Group is of clear public interest and the issues it is considering must be considered with great sensitivity and respect to the harmful impact that criminalisation and resulting convictions had on the men affected, as well as their friends and family and the wider LGBTQI community.

As indicated in the body of the report, the Working Group considers that some of the identified key issues require input from representative organisations and affected persons to allow for relevant recommendations to be informed by the experience of affected persons.

Next Steps

- The Working Group to develop a Concept Note for a targeted Public Consultation process on key identified issues for submission to and consideration by the Minister for Justice in the first quarter of 2022.

9. Letter of Apology to Accompany Decisions in Successful Applications

In considering the development of any scheme, the Working Group considered what additional actions may be taken to further recognise the harm caused by the historical criminalisation of consensual sexual activity between men.

Certain other jurisdictions including England and Wales, and Scotland, have provided in legislation for pardons for persons convicted of certain historical sexual

offences. However, those pardons do not affect the convictions themselves, and to that extent they are largely symbolic.

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. The power of pardon is provided 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.¹⁰ If a pardon was to be provided to affected persons, this 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.¹¹ The Working Group is considering whether an individual letter of apology from the Minister for Justice in similar terms to the public apology might be a suitable alternative.

Next Steps

- The Working Group to further consider this issue, particularly in the context of the option of the issuing of a letter of apology from the Minister for Justice as a means of further acknowledging the harm and impact of such criminalising laws and related convictions-with a recommendation to be included in the Final Report of the Working Group in 2022.

10. Final Report

The Working Group is tasked with making recommendations to the Minister for Justice in relation to the development of any scheme to expunge or disregard convictions for certain qualifying offences. The Working Group, following the conclusion of the targeted public consultation and review of records, will consider any outstanding issues and those that may arise in the interim and make recommendations for inclusion in a final report of the Working Group. These recommendations will include consideration of whether a legislative response is required to provide for the disregard of qualifying convictions.

Next Steps

- To consider any other outstanding issues or those that may arise in the interim, for inclusion in the final report.

¹⁰ *Bunreacht Na hÉireann*, Article 13.6 and 13.9

¹¹ To date the power of pardon has been applied sparingly with only six pardons having been granted since the foundation of the State, three of which were granted posthumously.

- A Final Report and recommendations for the establishment of a disregard scheme to be completed and published by Q3 2022 or the nearest date thereafter.

Interim Recommendations of the Group

The Working Group makes the following interim recommendations:

1. Terminology

- *That the term 'disregard' replace the term 'expungement' in all relevant communications, pending final recommendations. The Working Group recommends a process for disregarding rather than expunging/destroying records of relevant convictions.*

2. Establishment of a 'Disregard' Scheme

- *That a scheme is put in place involving a consideration of each individual case, on application by the individual concerned or a representative, to determine whether the convictions involved would be eligible for a disregard. The Working Group will consider whether the introduction of such a scheme in Ireland will require a legislative response with the result of this consideration to be included in the Final Report.*
- *That this scheme should seek to minimise the burden placed on applicants as much as is practical.*
- *That applicants should be able to submit relevant supporting documentation with the application and that this will be considered.*
- *That it will consider how it will be possible to grant a disregard in the absence of State records of the conviction, or lack of sufficient detail in the relevant records. Any future 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.*

3. Applications

- *That applications be accepted from living persons or those exercising power of attorney on their behalf, as well as by a representative (to be defined) on behalf of deceased persons.*

- *That applications can be made domestically or from abroad by persons who no longer reside in Ireland and/or are not Irish citizens.*

4. Public Consultation and Historical Research

- *That a targeted public consultation is undertaken to provide an opportunity for affected stakeholders to engage on some key questions related to the development of any scheme.*
- *That the Working Group procures the services of a legal historian to examine what records may exist in the public domains (e.g. National Archives, Newspaper Archives etc.) which may support an individual application to disregard a conviction in the event that State held records prove inadequate. This will inform final recommendations on what supporting documentation may be admissible in any future scheme.*

