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: Final Report

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Executive Summary

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

On 6 December 2016, a Private Members' Convictions for Certain Sexual Offences (Apology and Exoneration) Bill 2016 was introduced in Seanad Éireann. The Bill sought to provide for an apology to, and exoneration of, persons convicted of consensual same-sex sexual activity. The Government agreed not to oppose the Bill at second stage on a policy basis, but noted a number of problems with the Bill as drafted. Following this, it was recommended that a non-legislative option, such as a motion of apology by the Oireachtas be considered, as well as a legislative option, such as the establishment of a disregard scheme similar to those operated in England and Wales, be pursued in order to meaningfully address relevant convictions.

An All-Party motion providing for a public apology to persons convicted of consensual same-sex sexual acts was passed on 19 June 2018. 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.

Extensive engagement with An Garda Síochána then took place to identify whether records of such offences (which predate the introduction of the PULSE system) were available and were sufficiently detailed to provide the level of information needed to support a disregard scheme. It became clear that there was a difficulty in terms of the existence of Garda records that would contain the information necessary for straightforward disregard and it was not possible to identify historical records through a general search.

An Garda Síochána established a dedicated confidential email system in 2019 through which an application could be made to them for a review of a criminal record. The Garda National Protective Services Bureau undertook to review any such application received/information provided and access any file and records to facilitate the objective of this proposed scheme. The mailbox was monitored on a daily basis by the Garda Victim Liaison Office but no correspondence was received.

Further engagement suggested that many affected persons were probably reluctant to approach An Garda Síochána in the first instance for historical reasons. Instead, a proposal to establish a working group to examine all issues was agreed and Terms of Reference were drafted up in 2020. There was further engagement around membership of the group throughout 2020 and into 2021.

On 1 March 2021 the Minister for Justice, Helen McEntee, approved the establishment of a Working Group to Examine the Disregard of Convictions for Certain Qualifying Offences Related to Consensual Sexual Activity between Men.

The Working Group met eleven times during its tenure with follow up and wider outreach activities occurring between each meeting. In May 2022 the Working Group published a Progress Report outlining the progress on a number of matters raised in their Key Issues Paper.

From 3 November to 9 December 2022, the Department of Justice held a public consultation on key issues related to the development of a scheme to disregard relevant convictions for qualifying offences related to consensual sexual activity between men.

This consultation received 148 submissions from individuals, LGBTQI+ representative organisations, other non-governmental organisations, trade unions and political parties and representatives. The input provided in these submissions was invaluable to the Working Group in their deliberations and has helped shape the final recommendations for a number of key issues in this report.

This report represents the culmination of the Working Group deliberations and includes 95 recommendations across a number of areas, as well as an overview of the status of records held by relevant justice sector bodies and the Defence Forces.

The 95 recommendations are across the following areas:

- Introduction of a statutory scheme to enable the disregard of relevant criminal records
- The 'disregard' rather than the expungement or destruction of relevant criminal records
- Identification of relevant records including an overview of the status of records held by relevant justice sector bodies and the Defence Forces.
- The offences to include in this scheme (including relevant provisions under Military Law)
- The eligibility standards which should apply to this scheme
- That applications for disregard can be made on behalf of deceased persons and that emigrants and citizens of other countries who were affected can apply
- The establishment of an independent first point of contact for applicants and of a panel of assessors
- The effect of a disregard and what happens to relevant records when a disregard is granted
- That formal statements may to be sought and accepted where no records in respect of the conviction are available or the records do not contain the detail required to ascertain if the eligibility criteria have been met
- That an independent review process be available if an initial application is refused, as well as a revocation process should a disregard be provided in error
- The promotion of the scheme and ensuring public awareness of the scheme in Ireland and abroad

- The reiteration of the public apology and the provision of an individualised apology to successful applications
- The human rights and equality considerations that must underpin the operation of a scheme
- The provision of a time limit for a decision on an application for a disregard
- That the first point of contact body assists applicants with applications and reviews, and that transgender, elderly and disabled applicants are specifically catered for

The full recommendations of the Working Group are available at the end of this report on page 73.

Background

The legal background and context prior to 1993

The statutory and common law 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 discriminatory, an affront to human dignity, an infringement of personal privacy and autonomy and represents an historical injustice.

The total number of men prosecuted and convicted for consensual sexual activity and affection with other men is unknown. As the provisions that were used were also used to prosecute non-consensual sexual assault and child sexual abuse, we cannot know the true number of how many overall convictions related to consensual acts. However, based on indicative numbers it is likely that several hundred men were prosecuted and convicted for consensual sexual activity and affection during the period of criminalisation.

The harmful impact of this criminalisation extended beyond those who were directly criminalised and convicted under these laws. These laws underpinned and reinforced wider legal, social and political stigma and discrimination that had a chilling effect on the lives and livelihoods of these men as well as the wider Lesbian, Gay, Bisexual, Transgender, Queer and Intersex + (LGBTQI+) community in Ireland and their families and friends. As a result, many gay or bisexual men were afraid to come out, or to be in any way open about their sexuality, and a large number of LGBTQI+ people felt compelled to emigrate from Ireland. It is also important to recall that these criminalising laws also had a negative impact on the legacy of HIV and AIDS in Ireland by impeding the public health response to the emergence of the HIV epidemic in the 1980s due to a refusal to fund information campaigns targeting men who have sex with men as it was perceived as condoning criminal acts.[1] The far reaching consequences of criminalisation cannot be fully quantified in this report, but it impacted upon every aspect of a person's life including education, employment and family life.

The development of a scheme to disregard the criminal convictions of men for consensual sexual activity and affection seeks to acknowledge this injustice and to meaningfully address some of the harm caused to affected men and the wider LGBTQI+ population, as well as their families and friends, during the period of criminalisation.

[1] Páraic Kerrigan, Remembering Ireland's early AIDS history, available at: https://www.maynoothuniversity.ie/research/spotlight-research/remembering-irelands-early-aids-history

Criminalising Laws

The offence of 'buggery' (anal sex) was a common law offence that applied to both consensual and non-consensual heterosexual and homosexual activity.[2] Buggery was criminalised from 1634 to 1993, with statutes such as the Offences Against the Person Act 1861 setting out the punishment for the common law offence of buggery.[3]

The Act for the Punishment of the Vice of Buggery (Ireland) 1634 was the first Act of an Irish Parliament to punish buggery. Under this Act, 'buggery' was a capital offence punishable by death. Prior to this such cases were dealt with almost exclusively in ecclesiastical courts which also had the power to try, and to sentence, those accused of buggery (also referred to as 'sodomy') to death.[4]

This 1634 Act was repealed by the Offences Against the Person (Ireland) Act 1829 which retained the death penalty upon conviction for 'buggery'.[5] This 1829 Act was itself 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 while also introducing the offence of 'attempted buggery' which was punishable by a sentence of penal servitude of up to ten years.[6]

While the concept of buggery in this context could apply to anal sex with a woman, convictions for anal sex between men were by far the most common and the criminalisation of this 'abominable act' intended to target sexual relationships between men.

[2] The common law offence of 'buggery' was abolished in 1993 under Section 2 and Section 14 of the Criminal Law (Sexual Offences) Act 1993. 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*.

[3] See *DPP v Judge Devins & Anor [2012] IESC 7*.

[4] The offence of buggery or sodomy in this context was not limited only to anal sex between men, but applied to men and women as well as to 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.

[5] "*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).

[6] 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.

The Criminal Law Amendment Act (Ireland) 1885, was more explicit in respect of this aim, criminalising any acts of 'gross indecency' between adult males, with a maximum penalty of two years imprisonment, with or without hard labour.[7]

The 1885 Act explicitly extended criminalisation to all sexual acts between men whereas, before this, the legislation was largely restricted to punishment of anal sex with other non-penetrative acts not legislated for specifically.[8]

The offences under the 1861 and 1885 Acts 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 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.[9] However, there were 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. A number of alternative options were considered by the Minister, both legislative and non-legislative.

Department of Justice officials subsequently engaged with Senator Nash and he agreed to take forward an All-Party Motion providing for a public apology to persons convicted of consensual same-sex sexual acts. The All-Party Motion was passed by both Houses of the Oireachtas on 19 June 2018 and the public apology provided.[10]

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

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[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 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.

[8] As previously noted, prior to the introduction 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. However, 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.

[9] See Explanatory and Financial Memorandum to the Convictions for Certain Sexual Offences (Apology and Exoneration) Bill 2016. Seanad Éireann. (2016).106.

[10] Seanad Éireann (2018). 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

proposals for a scheme to enable relevant convictions to be disregarded where the acts involved would now be lawful.

The Working Group

Following this, the Department of Justice engaged with An Garda Síochána during late 2018 to mid-2019 with a view to examining possible approaches to expungement of any historical criminal records involving consensual same-sex sexual acts and the possibility of putting in place a legislative scheme similar to those in place in the United Kingdom 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 in relation to these records.

It was then 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, Helen McEntee, approved the establishment of the Working Group to Examine the Disregard of Convictions for Certain Qualifying Offences Related to Consensual Sexual Activity between Men (hereafter ‘the Working Group’), with membership confirmed in June 2021.

The Working Group was composed of the following members:

LGBT Community Representatives
• 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
• Colm O’Dwyer, Senior Counsel, IHREC Commissioner
Office of the Attorney General
• Nicola Lowe, Advisory Counsel
An Garda Síochána

• Ian Lackey, Detective Superintendent, Garda National Protective Services Bureau
Secretariat, Department of Justice
• Maeve Brett, Principal Officer (Chair) (replaced by Gerry O'Brien, Principal Officer, May 2023) • Jensen Byrne, Administrative Officer • Kayleigh Newcomb, Executive Officer

The Working Group was 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.

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.

In May of 2022 the Working Group published a progress report outlining the progress on a number of key issues from the establishment of the Working Group and their first meeting on the 16 July 2021 to May 2022 as well as proposed next steps.[11]

Among the next steps proposed in this progress report were the identification of appropriate records, the undertaking of a targeted public consultation on a number of key issues requiring input from affected persons and representative groups and the commissioning of a legal historian.

[11] Department of Justice (2022a) *Working Group to Examine the Disregard of Convictions for Certain Qualifying Offences Related to Consensual Sexual Activity Between Men in Ireland: Progress Report*, available at: https://www.gov.ie/en/publication/eca5d-working-group-to-examine-the-disregard-of-convictions-for-certain-qualifying-offences-related-to-consensual-sexual-activity-between-men-a-progress-report/

The Working Group also produced a Key Issues Paper and, from 3 November to 9 December 2022, the Department of Justice held a public consultation on a number of the key issues related to the development of a disregard scheme.[12]

The consultation questions sought to gather input on the following:

- the most appropriate first point of contact for any scheme
- whether any other legal provisions were used in practice to police affection and sexual activity between men
- whether formal statements should be sought when documentation or records are unavailable
- how participation in a scheme could be encouraged
- whether the scheme should be limited solely to convictions for consensual sexual activity between men or if other actions, such as prosecutions that did not lead to a conviction should be considered
- if there are any additional human rights and equality considerations that the Working Group should consider in the development of a disregard scheme and/or the administration of that scheme
- any additional input in relation to the development of a disregard scheme

This consultation received 148 submissions from individuals, LGBTQI+ representative organisations, other non-governmental organisations, trade unions and political parties and representatives. The input provided in these submissions was invaluable to the Working Group in their deliberations and have helped shape the final recommendations for a number of key issues in this report.

In between these activities the Working Group met eleven times with follow up and wider outreach activities between each meeting. This final report of the Working Group represents the culmination of all outreach and deliberation by the Working Group.

The Working Group has sought at all times to take a 'problem-solving' approach to the complex legal, record-keeping and related issues underpinning the development of a disregard scheme in order to produce final recommendations that adhere to the ultimate policy goal of putting in place a an effective and accessible disregard scheme.

Key Issues

1. Identification of Records

A core issue underpinning the development of a 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 & Section 62 of the Offences Against the Person Act 1861 and Section 11 of the Criminal Law Amendment Act 1885.

[12] Department of Justice (2022b) *Working Group to Examine the Disregard of Convictions for Certain Qualifying Offences Related to Consensual Sexual Activity Between Men in Ireland: Key Issues Paper*, available at: https://www.gov.ie/pdf/?file=https://assets.gov.ie/236995/10b40ce1-d919-4d27-8560-8b5e5df8cff2.pdf#page=null

These sections however applied both to consensual and non-consensual acts between men, as well as acts involving child sexual abuse, which could not be disregarded. Therefore, other records or background information about a conviction under these Acts would be necessary in order to make a decision on disregard.

The first objective of the Working Group was to examine the feasibility of a process to disregard criminal convictions, which includes the assessment of the quality and availability of records held by the State associated with those convictions.

In their May 2022 Progress Report, the Working Group noted that An Garda Síochána had indicated that appropriate historical 'Offence Codes' would need to be identified in order to allow relevant 'legacy records' from the pre-Pulse mainframe recording systems which were operational in the 1970s and 1980s, as well as records from earlier decades, to be identified. These records of convictions are recorded under an 'Offence Code' rather than the specified sections of Acts. Following the publication of the progress report the Working Group requested that An Garda Síochána research and compile a list of relevant Offence Codes.

The Working Group wrote to the Courts Service, Prison Service, Attorney General's Office and the Office of the Director of Public Prosecutions and the Department of Defence and Defence Forces to request that they ascertain the quality and availability (if any) of any records they may hold of relevant prosecutions.

The Department of Justice therefore issued letters to:

- The Courts Service
- The Office of the Director of Public Prosecutions Office (ODPP)
- The Irish Prison's Service
- The Attorney General's Office
- An Garda Síochána
- The Irish Defence Forces

These letters requested that the relevant agencies examine their records to ascertain the availability of any relevant records held by them that may relate to any men convicted and imprisoned for consensual sexual activity with another man under Sections 61 & 62 of the Offences Against the Person Act 1861, and Section 11 of the Criminal Law Amendment Act 1885.

The Working Group also appointed a legal historian to investigate publicly held records to ascertain what documentation may be available in the public sphere to support an application. This report on Convictions for Homosexual Acts in the Irish Courts, 1922-1993 by Dr. Niamh Howlin, Dean and Head of School in UCD Sutherland School of Law, will be published in tandem with this final report.

1.1 Records held by relevant justice bodies

The Working Group initially attempted to investigate the availability of records relating to the convictions under the particular sections of the 1861 or 1881 Acts within the State bodies involved.

However, across all of the State Agencies and Government Departments contacted, it was found that relevant records pre-1993 were primarily paper based and a general scan, with the exception of the Defence Forces, for records of convictions for buggery or gross indecency could not be conducted due to the number of files and the fact that files are not generally filed under the offence codes used by An Garda Síochána.

The Courts Service:

The Courts Service noted that they were unable to provide a general list of convictions or details of those convicted linked to the offences specified. The period of time involved pre-dates the Court Service's computer systems making it necessary to search paper records manually. Records are disbursed across Courthouses in each county, the National Archives and off-site storage. Criminal record data is catalogued/sorted by:

- Court Venue
- Court Time & Date
- Defendant
- Prosecutor

Case records are not catalogued/sorted by offence name/types so there is no ability to search through records for only the offences of interest to the scheme. The Courts Service did indicate that they would expect to be able to locate relevant records if provided with specific information about individual prosecutions including the name of the person prosecuted but noted that the only information that will be available when files are located is what was provided to the court by the prosecutor. They cannot guarantee that records will include details such as whether a sex act was consensual. It is possible though that these individual records could be disregarded as part of any disregard scheme.

The Office of the Director of Public Prosecutions (ODPP):

The ODPP was established in 1974 and took over the prosecution function from the Office of the Attorney General. In relation to prosecutions between 1974 and 1993, it may be possible for the ODPP to retrieve from storage a paper file dealing with the directing decision. To identify a file though, it would be necessary to have some or all of the following:

- The name of a convicted individual.
- Approximate dates of the criminal proceedings. The ODPP records are ordered according to the date of receipt of the file from An Garda Síochána.
- The name of the other party.
- The offence for which the individual was prosecuted.

It is not possible at this time to say how comprehensive the paper records will be. Paper files may contain some or all of the following:

- A copy of the investigation file submitted by An Garda Síochána
- The direction that issued to An Garda Síochána and any correspondence with investigating Gardaí.
- Correspondence, if any, in relation to the trial with the Chief State. Solicitors Office (CSSO) or relevant State Solicitor who will have had carriage of a trial depending on geographical location.
- Trial Outcome (as detailed on the Case Report Form if on file).

It should be noted that files in relation to the trial will not be held by ODPP as the trials will have been conducted by the CSSO or State Solicitors and there may have been no correspondence with ODPP in relation to same. The record of a trial outcome will depend on a case report form which is usually (but not always) sent to the ODPP by the prosecutors.

Therefore, for the period 1974 to 1993, in the event of an application to a scheme by an individual and information to assist in identifying the file, the ODPP could check if there is a paper file available and retrieve it from storage. Subject to the pertinent information being on the file, it may be of assistance in assessing whether the conviction is eligible for a disregard.

The Irish Prison Service:

The Irish Prison Service holds individual prisoner files post-dating 1975. The Irish Prison Service has noted that the following information would be sought to assist in retrieving the file:

- First name and Surname
- Date of Birth
- Home address at time of committal
- Approx. year(s) of detention if known

Files preceding this period are held by the National Archives (files pre-dating 1975) as follows:

Individual Prisoner Files Covering the Years circa 1951 to circa 1975/76:

- These have been accessioned as 3 collections: 2005/170; 2005/171 and 2005/172 and comprise approximately 19,651 files.
- The Irish Prison Service hold an Excel spreadsheet which combines the three collections, arranged alphabetically by prisoner surname to assist with retrieval requests.
- Currently these records are closed to the public and access is only given to the Irish Prison Service.

Individual Prisoner Files, circa 1922 to circa 1950:

- These files are unlisted and comprise Department of Justice files which are closed to the public and access is only given to the Irish Prison Service.
- They can only be individually identified and accessed through consulting Department of Justice prison registers in order to find a relevant file reference number for a specific prisoner.

The National Archive also hold other smaller sets of miscellaneous records such as Department of Justice prison registers (& some indexes) for various prisons, including the Bridewell and county jails (1798 - 1930s); however the National Archives hold registers for Mountjoy prison up to early 1970s.

Where the Irish Prison Services wishes to recall a prisoner file and has the file reference number, the Irish Prison Service Requisitioning Officer emails the national archives citing the prisoner's name and file reference to request the relevant file.

In the case of recalling the files dating from the 1920s to 1950, as they are Department of Justice files and were deposited by the Department of Justice in the National Archives, the practice has been that the Irish Prison Service contacts the Department of Justice Requisitioning Officer and the latter recalls the files from the National Archives and sends it on to the Irish Prison Service.

Attorney General's Office (AGO):

Prior to records being computerised, hard copy ledgers were used in the AGO to record incoming files and correspondence between 1922 and 1973. When a file was opened in the AGO, it was entered into a hard copy ledger and given a file number. A scoping exercise was carried out, to ensure the most thorough search possible taking the 1973 ledger as a sample. A full 12 months period of entries were reviewed and 20-25 entries were identified that would probably be of relevance.

The main features to note from the sample review were as follows:

- The entries in the ledger are sequential which means that someone reviewing the ledger would have to go through each entry starting at the beginning of the year

- All entries are hand written and there may be issues deciphering the various types of handwriting in the ledger

- How entries are recorded is varied even in the one sample ledger

- All of the prosecutions files identified in the sample review have a file number recorded e.g. P 5234 which may aid in the file's subsequent retrieval from the National Archives

- For criminal prosecutions, the names of the defendants are recorded, the section of the Act is not recorded but the following terms are, which can be used to identify potential cases:

  - buggery,
  - gross indecency,
  - indecency,
  - indecent assault

- In order not to exclude potential cases, entries in the ledger for indecency and indecent assault which have male names in the ledger entry, would have to be reviewed

Using a very rough metric, if there were an average of 25 cases per year, that would result in over 1,200 cases of potential relevance. The AGO cautioned however that until they have sight of the prosecution files themselves, it won't be possible to assess the utility of the information contained on those files – i.e. they can't know if there will be sufficient information on the file to establish whether the sexual activity involved was consensual until they see the files, however, relevant records may be subject to a disregard.

An Garda Síochána:

An Garda Síochána indicated to the Working Group that conducting a general search to identify all Garda records that contain information in relation to prosecutions for the relevant offences would be complex and, due to the number of files, prohibitively time consuming.

However, they examined their records to determine the type of information that does exist, the content of these types of records, as well as accessibility.

Findings in relation to PULSE:

- The Garda PULSE system came into operation in 1998, five years after decriminalisation in 1993 and will not hold any new convictions for such 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 holds convictions from the mainframe recording systems (three different systems originating from the 1970's / 1980's). There are also convictions from earlier decades in the 1900's recorded on PULSE, along with person records which would include Dublin Criminal Record Numbers.
- 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 is required to undertake this search.
- These pre-Pulse files alone are not likely to contain the detail necessary to decide if a conviction is liable for a disregard. But 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 Dublin Criminal Record (DCR) File Numbers to be extracted and the relevant historical paper records held by An Garda Síochána at Garda National Vetting Bureau (GNVB) to be recovered.

Findings in relation to paper based records:

- The GNVB in Thurles holds historical papers relating to convictions namely, DCRs, which were previously held in the Garda Criminal Records Office in Garda Headquarters and which were transferred to the GNVB in Thurles in 2005. These paper records are not searchable by offence, as they are filed according to their DCR File Number.
- It is estimated that there are over 1 Million of these DCR File Paper Records at the GNVB in Thurles, which are all Pre-PULSE records from the early / mid 1900's.
- These records are not searchable by offence as they are filed according to their DCR File Number. 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 may be possible to identify the relevant DCR File Number via the Pre-PULSE system.
- Additionally, prior to PULSE numbers, the DCR File Number was allocated to a person when they were first convicted. By way of example, if someone's first conviction was for an assault in 1959, the DCR Number allocated to them would be 0059/1234. This number would remain with them even if there were subsequent convictions in following years.
- To help identify an individual's DCR File Number, An Garda Síochána would also require their name and date of birth as a minimum.

One of the primary challenges emerging from the progress report was the need to identify the relevant historical offence codes. These codes were provided for in 'Summons and Charging Manuals' which are no longer published. Following a great deal of effort a copy was eventually secured by An Garda Síochána via the Garda Retired Members Association and the relevant Offence Codes have now been identified.

The identification of these Offence codes, along with name and date of birth should allow An Garda Síochána to focus searches in order to identify relevant pre-Pulse files and DCR File Numbers for the purposes of a disregard scheme.

The Defence Forces:

The Military Archives is the official place of deposit for government records on Defence and the Defence Forces pursuant to the National Archives Act 1986. Following consultation with the staff in the Military Archives it was identified that there are 14 Court Martial files relating to 'buggery' which are relevant to this proposed scheme. A sample of seven of those files was reviewed with the assistance of archival staff and the required information as it relates to prosecutions at Court Martial is capable of being retrieved from those files. There may be further files related to 'gross indecency' but these were not located or examined for the purpose of this response but may be identified as required under any disregard scheme.

It is not presently possible to ascertain the availability or quality of records for matters dealt with at summary investigation level (or summary trial as it has previously been referred to). Personnel files are retained by the Military Archives, with thousands of files catalogued from microfilm to digital. An example where a case may have been dealt with summarily by the unit commander officer, and thus did not proceed to Court Martial was not within the remit of this initial scoping exercise without conducting a full review of all personnel files. That being the case, if such a summary trial did occur, reference would be made to this on the personnel file. A note of evidence would have been taken at the summary investigation/summary trial proceedings on an AF275 (Army Form) and AF 278 and as such, the necessary level of detail

required to determine whether an individual case falls within the scope of the scheme may be present if the AF275/AF278 was appended to the file. Where files have no additional references, these cases may also be cross referenced with the files held by Office of the Provost Marshal (also in the Military Archives) where there may be military police investigation reports related to specific cases which did not result in a formal charge for buggery and the mandatory court martial.

Archival Staff have advised that the Military Service Number, name and date of birth will be required. An approximate geographical location of where the member served or last known address would also be advisable in the event that there is a mistake in the identifying information provided above or in the event that a file has not been delivered to the Military Archives correctly from the Unit in question.

1.2 Recommendations: Statutory Scheme and Identification of Records

- That a legislative scheme is established to enable the disregard of relevant criminal records.
- That the operation of any legislative scheme is subject to review not later than two years after it comes into operation.
- That application forms for a disregard are simple and accessible requiring only the information required to locate the relevant files. This may include each applicant’s name, date of birth, address, year of conviction, military service number (where relevant) etc.
- That additional information, records and documentation can be provided by a scheme applicant to aid record identification but that this would be optional.

2. The effect of a disregard? Effect on criminal 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.[13] 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 – i.e. a disregard system.

A disregard system is the primary approach taken in the jurisdictions surveyed. Complete expungement of the relevant records may 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

[13] As defined by Oxford Languages (OED).

annotated. This would retain the possibility for certain academic research on these convictions in the future.

In their May 2022 progress report the Working Group recommended a 'disregard' approach to relevant records similar to that in other jurisdictions rather than the expungement (destruction) of the records.[14]

The Working Group then considered the practical and material effects of a disregard for an applicant and how relevant records will be dealt with upon a conviction being disregarded.

In other relevant jurisdictions 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 arrested, charged or prosecuted for the offence
c) been convicted of the offence, or
d) been sentenced for the offence.

On a practical level this would mean that the affected person, who has been granted a disregard, would not be obliged to disclose this historical conviction in any context. This includes as part of any job application and any court or tribunal proceedings. Additionally, records of a conviction which has been disregarded cannot be linked with or cross referenced to the individual and their conviction will not appear on a criminal history check (e.g. Garda vetting) for any purpose and cannot be linked to them through official records. In some jurisdictions (Australian Capital Territory, Northern Territories, Tasmania) 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 a disregarded conviction to someone else. In the Irish context this may be adequately covered by existing GDPR provisions, though this may need to be considered in relation to deceased persons as GDPR does not apply to deceased persons.

It must be noted that this would not preclude a person granted a disregard from raising the conviction themselves for any purpose, legal or otherwise. This is in recognition of the reality of the conviction occurring as part of the person's historical narrative, while ensuring that the conviction itself cannot be used against them.

The Working Group recommends that this approach is also undertaken in the Irish context.

2.1 The effect of a disregard: What happens to records?

Two approaches, annotation and deletion/redaction of records were considered by the Working Group.

Annotation

[14] Department of Justice. (2022a), p.14.

In general, across the surveyed jurisdictions a disregard involves a removal from records of any reference to the particular criminal offence rather than destruction of the record itself (please see Appendix 1 for further information on the effect of records in other jurisdictions). 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

When the working group discussed whether an expungement or a disregard approach was more appropriate it was agreed that complete expungement (e.g. the destruction of the relevant records) may prevent future research on the criminalisation of consensual sexual activity between men, something already exacerbated by the wider invisibility of LGBTQI+ populations in the historical narrative. As a result, was also considered that the physical redaction of details within the file may cause a similar issue.

Based on these considerations and the process employed in other jurisdictions, it was considered that the most practical approach is for such records to be physically or where appropriate, digitally, annotated, to declare:

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

This would 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, and provide for the possibility of revoking any disregard that may be provided based on false or misleading information.

The process of annotation could be done through a number of methods, for instance the inclusion of a cover sheet on physical records detailing the above points a) and b); the inclusion of written or stamped annotation upon physical records, or the inclusion of a cover note at the beginning of any digital files. Other means of annotating records may also be considered as appropriate i.e. based on the nature of the file concerned, such as whether it is in a fragile condition. It was deemed as most appropriate for the process for annotation to be decided later by regulation subject to the type of records involved in order to meet the objectives of the disregard scheme.

2.2 Recommendations: Effect of a disregard

- That the effect of a 'disregard' shall mean 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 arrested, charged or prosecuted for the offence

c) been convicted of the offence, or
d) been sentenced for the offence.

- That it should be an offence if a person having access to records of convictions kept by or on behalf of a public authority knowingly discloses any information about a disregarded conviction to someone else.
- That the records identified are not expunged or destroyed as a result of a disregard and that relevant records are physically or where appropriate, digitally, annotated to reflect that they relate to a disregarded offence and the effect of this disregard.
- That as well as records of a conviction, relevant records of investigation, arrest, charge, prosecution, conviction, use of Probation Orders and records related to cautions received via any historical juvenile diversion programmes that may be held by the Department of Justice, other relevant justice sector bodies (e.g. An Garda Síochána, the Courts Service, the Prison's Service, Director of Public Prosecutions, Office of the Attorney General) and the Department of Defence and Defence Forces, may be annotated to reflect the fact that those records should be disregarded.
- That, when relevant records are no longer in existence or cannot be found in respect of a particular prosecution or conviction, a disregard should nonetheless be possible.
- That, when relevant records in respect of a particular prosecution or conviction are no longer in existence or cannot be found, that applicants are informed of this fact and that annotation has been undertaken as far as is possible.

3. Which Offences to Include

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 buggery and gross indecency between men applied to both consensual and non-consensual acts and were repealed by the Criminal Law (Sexual Offences) Act 1993.

Legal advices received by the Department indicate that there is no legal bar to including convictions imposed prior to the foundation of *Saorstát Éireann* in 1922 in a disregard scheme. This is with the exception of convictions for Northern Ireland and military convictions within the British Army prior to the foundation of the Defence Forces, this is

due to the fact that such records and convictions remain under the jurisdiction and ownership of the United Kingdom. Given that the offences and punishments under the 1861 and 1885 statutes remained on the statute book until 1993, however, it is much more likely that convictions under these 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 be a significant challenge. The primary focus of any disregard scheme is therefore likely to be convictions imposed under the 1861 and 1885 Acts.

A key issue explored by the Working Group was whether there were any other laws used in practice to target gay or bisexual men through prosecution. 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 up with other gay or bisexual 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 Australia, the qualifying offences eligible for disregard are outlined by each state and territory and must meet specific criteria. The criteria provides for the disregard of convictions in incidences where their actions would not have constituted an offence if the people involved 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 such as loitering, indecency, 'riotous' behaviour, soliciting and cross-dressing.

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

Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 (Queensland), s 18 (2A).
(a) the act or omission— *(i)* *was done, or allegedly done, in a public place; and* (ii) *(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*

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.[15]

It should be noted in this regard that the provisions of 62 of the Offences Against The Person Act 1861 and Section 11 of the Criminal Law Amendment Act 1885 in respect of gross indecency did not apply to consensual sex acts between a man and a woman as they were specifically addressed to sexual activity between men regardless of whether these occurred in public or in private. The Working Group recognises that due to the legal, social and cultural attitudes which prevailed at the time, there was an absence of 'safe spaces' for gay and bisexual men to meet each other. Consequently, many gay and bisexual men had to resort to meeting in parks and other public spaces and sought seclusion and privacy in respect of their relationships and particularly sexual relations.

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

Historical Sexual Offences (Pardons and Disregards) Act 2018 (Scotland), pt 1, s2.2-2.4.
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,

[15] Sexual Offences Act 2003 (United Kingdom),s 71.

(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 also 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. However, cautions may have been used as part of the youth diversion programme that was in operation prior to decriminalisation and the creation of the now formalised Garda Youth Diversion Programme and where such records remain, they should be included in a disregard scheme.

The Working Group was tasked with identifying from the below listed offences those to be retained in any new proposal.[16]

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 also explored whether there were any other laws that were utilised to prosecute gay and bisexual men before the decriminalisation of homosexuality that may be included. In order to address these key considerations the Working Group decided that input from affected persons and representative groups would be required and a question on other legislation used in a discriminatory manner was included in the public consultation.

In total only 26% of submissions responded to this question. Several respondents indicated that they were unsure or not aware of any other provisions used in practice to police affection or sexual activity between men. Others indicated that other provisions were used in practice in a discriminatory manner but didn't reference specific provisions, with the majority simply identifying general areas of law such as obscenity, public order, vagrancy or soliciting, while stating that further research was required on the matter.

One respondent referenced provisions under the Vagrancy Act of 1824, for being a suspected person or reputed thief found loitering in public. Another referenced the

[16] Noting that 'buggery' was a common law defence the punishment for which was laid out in the relevant statutes.

Vagrancy Act of 1898, specifically provisions which aimed to prevent soliciting and which, they state, were used to criminalise gay men who were cottaging.

The Working Group has considered these submissions along with complementary research and communication with the Department of Defence and the Defence Forces in formulating their recommendations.

As mentioned earlier, prior to drafting this final report the Working Group had recommended the inclusion of the following list of offences in any disregard scheme:

- Act for the Punishment of the Vice of Buggery (Ireland) 1634,
- Section 18 of the Offences against the Person (Ireland) Act 1829,
- Section 61 of the Offences against the Person Act 1861,
- Section 62 of the Offences against the Person Act 1861,
- Section 11 of the Criminal Law Amendment Act 1885

Consideration is now given to what other statutory provisions may be included in a disregard scheme.

3.1 Public Order type offences

Having examined the issue, the Working Group has noted that there would be significant difficulties with broadening out a disregard scheme to include public order offences of general application, most of which are not explicitly connected to sexual activity. It is unlikely that it could be adequately established at this juncture that a conviction for a public order offence or common law offence was directed at a person solely by reason of their sexual orientation.

However, a problem solving approach has been taken by the Working Group to maximise accessibility to the disregard scheme as much as is legally practicable. With this in mind, further research was undertaken by the Secretariat in relation to provisions within the Vagrancy Act of 1824 and the Vagrancy Act of 1898 as these Acts had been raised in the public consultation. This research concluded there was little supporting evidence for inclusion of provisions from the 1824 Act but that but that there may be a case for inclusion of section 1(1)(b) of the Vagrancy Act 1898 as it appears to have applied to men for actions which today would not be an offence e.g. intent by a male to importune (approach) another male for sexual purposes.[17]

Section 1(1) of the Vagrancy Act 1898[18] provided that:

> *"Every male person who –*
>
> *a) knowingly lives wholly or in part on the earnings of prostitution; or*
> *b) <u>in any public place persistently solicits or importunes for immoral purposes,</u>*

[17] LRC 11 (1985) Report on Vagrancy and Related Offences, available at: https://www.lawreform.ie/_fileupload/Reports/Report%20Vagrancy.pdf

[18] Repealed by the Criminal Law (Sexual Offences) Act 1993.

shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly."

The overall scope of Section 1(1)b applied more broadly and included:

- the solicitation of males by males for sexual activity,
- the solicitation of males for the purposes of immoral relations with females (for example, 'touting' on behalf of prostitutes),
- the solicitation of females by males for immoral purposes

Persons found guilty of these offences were liable on summary conviction to imprisonment for a term not exceeding six months, with trial on indictment resulting in a maximum penalty of up to two years imprisonment.

While the offence was directed at males, it was not directed exclusively at male to male sexual activity. Therefore, while it seems likely that there would be convictions under Section 1(1) for sexual activity between men, there would also have been convictions for heterosexual sexual activity. It should be noted however that, while Section 1(1) generally related to pimping and prostitution, it also applied to sexual activity between men that was not transactional.

The marginal note pertaining to section 1(1) of the 1898 Act read *"Persons trading in prostitution."* However, the Law Reform Commission, Report on Vagrancy and Related Offences makes it clear that in the case of a male opportuning (approaching) another male for 'immoral' purposes that this did not necessitate that the act leading to the offence needed to be transactional and so was not limited to males procuring other males for sexual activity in exchange for money.[19]

"In the case of solicitation of males by males for the purpose of homosexual acts, it is not necessary that this is for reward".[20]

"The existing offence under section 1(1) of the Vagrancy Act 1898 applies to the solicitation of males by males for the purposes of homosexual acts, irrespective of whether there is prostitution involved" [21]

Under current law, the buying of sex remains a criminal offence and so such convictions could not be included in a disregard scheme. However, in incidences in which a man was charged for 'importuning' another man for sexual purposes but it was not for any reward, it may be possible to include such convictions in a disregard scheme. This is in recognition of the discriminatory nature and application of this provision which also criminalised the act of one man approaching another man for sexual purposes alone without requiring it to be transactional.

[19] LRC 11 (1985), p. 255.
[20] LRC II, pp. 100 -101, paras 16.7 – 16.8
[21] LRC II (1985), p. 111, para 16.20

In order for the Section 1(1)(b) Vagrancy Act 1898 offence to be included in a disregard scheme on the same proposed basis as the primary criminalising provisions it would have to be shown that:

- the act giving rise to the conviction related to the soliciting or importuning of a male by a male.
- If there was sexual activity involved, that the act was consensual.
- The act did not involve a person under the current 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.

And any additional criteria recommended by the Working Group as part of this report under Section 5.

This rationale may also provide scope to include more provisions under the scheme as more data is collected and new information arises from men accessing the scheme. Specifically, it may allow for a distinction to be made between ‘public order’ and ‘public morality’ offences. The term ‘public morality offences’ which is not a term in Irish law, is used here as an umbrella term for provisions which contained words such as “immoral” or “indecent”, in order to distinguish such offences from ‘public order offences’ which is used to describe offences of general application which were not necessarily connected to sexual activity or sexual morality. There is no clear path for including ‘public order’ offences in a disregard scheme. However, there may be a pathway for the inclusion of ‘public morality offences’. While both may have been used in practice, public morality offences may fit more easily within a disregard scheme in a manner that protects the overall intent and integrity of the scheme.

To date, no other specific provisions have been identified that may fall within the category of public morality offences.

In the circumstances, the Working Group is suggesting that ‘public morality-type offences’ such as the Section 1(1)(b) of the Vagrancy Act of 1898 offence be included in the disregard scheme. The precise parameters of this would then need to be worked out during the preparation of a General Scheme for any Disregard Bill, and other statutory provisions would still have to be specifically identified for inclusion as “public morality-type offences” which could, potentially, be disregarded.

The approach adopted in Queensland, Australia in the Criminal Law (Historical Homosexual Convictions Expungement) Act 2017, with regard to the treatment of public morality offences may provide guidance as to a way forward. The core purpose of the Queensland Act is set out very clearly in section 3(1) noting that “This Act establishes a scheme for the expungement, on application, of convictions and charges for particular offences involving homosexual activity.” The Act then proceeds to define an “eligible offence” as:

a) a Criminal Code male homosexual offence; or
b) a public morality offence; or
c) another offence prescribed by regulation.

A “Criminal Code male homosexual offence” is the equivalent of the primary criminalising provisions in Ireland. The Queensland Act also outlines the specific statutory offences which amount to “public morality offences” within the meaning of the Act (Section 10), and the criteria which apply in order for a public morality offence to benefit from a disregard (Section 19). These criteria include that the decision maker must be satisfied on the balance of probabilities that the offence involved homosexual activity, and that the act constituting the offence would not be an offence if done now.

This Queensland model could potentially provide a route to including public morality (as opposed to public order) offences in a disregard scheme in Ireland. Including a regulation making power (as provided for in section 8(1)(c) of the Queensland 2017 Act) in legislation providing for a disregard scheme could allow the Minister for Justice to include other offences in the scheme at a later date, provided that those offences clearly came within the principles and policies set out in any Disregard Act.

Based on this, it was considered by the Working Group that an additional eligibility criteria is required in relation to such Public Morality Offences -

- That the decision maker must be satisfied on the balance of probabilities that the offence involved sexual activity between men.

3.2 Military Law

The Department of Justice wrote to the Department of Defence in relation to this matter and the Secretariat of the Working Group met with the Department of Defence and the Office of the Court-Martial Administrator of the Defence Forces to discuss this matter in depth. The Department of Justice received a formal response from the Department of Defence in relation to their queries. The queries and the responses are summarised below to aid understanding of how the scheme may operate in relation to Military Law and the particular distinctions between convictions under military law and general civilian law.

Following a review of Court Martial files, the following statutory provisions/regulations were found to have been used to:

- Disgraceful conduct contrary to section 48 (6) of the Defence Forces (Temporary Provisions) Act 1923.
- Offences Punishable by ordinary law of *Saorstát Éireann* contrary to section 69 (5) of the Defence Forces (Temporary Provisions) Act 1923, specifically:
  - Section 61 of the Offences against the Person Act 1861.
  - Section 62 of the Offences against the Person Act 1861.
- Offences punishable by ordinary law contrary to section 169 of the Defence Act 1954, as amended, specifically:
  - Section 61 of the Offences against the Person Act 1861.
  - Section 62 of the Offences against the Person Act 1861.
  - Section 11 of the Criminal Law Amendment Act 1885.

Further clarification was sought with regard to the general provisions that may yet remain on the statute book but which were used in practice historically to prosecute men for relationships or sexual activity that would now be lawful/not subject to court martial:

- Conduct to the prejudice of good order and discipline contrary to section 168(1) of the Defence Act, 1954.

Activities which may remain as an offence

This query referenced the 1998 Court Martials Appeal Case of C. v Convening Authority which relates to a Court Martial under Section 168(1) of the Defence Act, 1954 of a company quartermaster sergeant for sexual activity with a private in the same unit while off-duty and off-barracks. This Court Martial had occurred in 1994/1995. However, the appeal was denied as the specific circumstances of the case demonstrated an abuse of power that remains subject to Court Martial under Military Law. The decision was based on a marked differentiation of rank within the same unit (a quartermaster with decades of experience versus a trainee) and with the original complaint being raised by the other party who later voluntarily discharged from the Army. It was asserted that such a case would also have been brought had the case related to heterosexual sex in the same circumstances and that the man was off-duty and off-barracks at the time was not an unlawful or unconstitutional invasion of any alleged right of privacy.

As witnessed in *C. v Convening Authority*, it is possible that rank/an abuse of a position of authority (i.e. two consenting adults – an instructor and a student) was/is a factor in charging an individual under Section 168 or another provision, and such conduct may still be unlawful today under military law. That is not to say that all instances where a rank differential or an instructor and a student relationship are contrary to military law, there may be instances where persons are lawfully married and due to the nature and size of the organisation, cross paths in training/operational environments. Induction training, where military socialisation occurs is one instance where there is an acute power imbalance and instances listed in a training environment should be treated with the greatest of caution. Ultimately a qualitative assessment will have to be made on a case by case basis regarding the application of the scheme to individual cases. Section 168 of the Act of 1954 is, in its essence, an indefinite article and attempting to provide an exhaustive list of circumstances that may fall within the scheme, may actually have the effect of removing access to a scheme by persons who would otherwise be included.

Other than via Courts Martial, were there related disciplinary actions or charges not resulting in Court Martial that would be recorded on an individual's service record?

The service records of those persons convicted by court martial reflected the finding of the Court Martial and provided enough information to find the referenced Court Martial files.

However it must be noted that the material that was available for review does not include instances where an individual may have discharged by purchase (buying oneself out of service) etc. prior to the commencement of disciplinary proceedings arising out of accusations or innuendo. The material which was accessible will also not include those

persons who were successfully charged, but who then discharged prior to the commencement of their Court Martial but this may be on a service record if proper administration of the service file was kept.

What was the practice in relation to members of the Defence Forces who were found guilty of such offences via Court Martial as well as those who may have been convicted of the same offences in the general Criminal Courts? What punishment did they face? e.g. fines, imprisonment, dismissal from the Defence Forces with ignominy, revocation of medals awarded etc?

A sample of 7 Courts Martial files were reviewed with the assistance of archival staff and the general punishment was a term of imprisonment with penal servitude, and discharge from the Defence Forces with ignominy. The revocation of medals is not generally a punishment awardable by Court Martial, but rather comes as a collateral consequence of being dismissed with ignominy with the Defence Forces pursuant to Defence Forces Regulation A9.

In one instance, where an individual was found guilty in a civilian court, the Garda investigation file was appended to the personnel file and a discharge was completed on that basis.

There were no disciplinary records found in the initial review relating to commissioned ranks (e.g. Officer ranks rather than enlisted ranks). However, as only seven files were reviewed it cannot yet be ascertained if there was a distinction in practice to how officer versus enlisted ranks were treated in relation to such historical offences.

Due to the historic nature of the cases and the self-contained legal and disciplinary framework in the command/brigade structure it is not possible to say with certainty how individual cases were dealt with at summary investigation level, or if administrative steps were taken to discharge an individual following a conviction in the civilian court. From a review of the papers held in the Military Archives it appears that discharge with ignominy and penal servitude was a sentencing combination used most frequently, although that is not to say that this occurred in every instance.

In their response the Office of the Court Martial Administrator of the Defence Forces recommended further consultation with regard to additional eligibility criteria when referring to the disregard of convictions by summary trial to ensure that they are in line with current law, especially with regard to convictions registered under Section 168 of the Defence Act 1954, as amended.

Based on this, it was considered by the Working Group that an additional eligibility criteria is required in relation to Military convictions being that -

- The act resulting in a conviction would not have led to a conviction under current Military Law

This could be done based for instance upon examination of the relevant records by the Court Martials Administrators Office as to whether such a conviction would be a crime resulting in Courts Martial under current Military Law. Based on this examination a recommendation in relation to the conviction could be provided to the decision making body in this regard as to

whether the relevant conviction would fall within the disregard scheme based on the stated criteria. Such a recommendation would outline the reasoning behind any recommendation to approve or refuse an application to have a conviction Disregarded.

3.3 Recommendations: Which Offences to include

- That relevant convictions under civilian law that predate the foundation of the State are included in the disregard scheme
- That the following offences are included in a disregard scheme:
  - The common law offence of 'buggery'.
  - Act for the Punishment of the Vice of Buggery (Ireland) 1634.
  - Section 18 of the Offences against the Person (Ireland) Act 1829.
  - Section 61 of the Offences against the Person Act 1861.
  - Section 62 of the Offences against the Person Act 1861.
  - Section 11 of the Criminal Law Amendment Act 1885.
  - Public morality-type offences such as Section 1 (1)(b) of the Vagrancy Act of 1898.

- That relevant offences applied in a court or court martial established by or under the Constitution or the Constitution of *Saorstát Éireann*, that would not be an offence under current Military Law, are included in a disregard scheme namely:

  - Disgraceful conduct contrary to section 48 (6) of the Defence Forces (Temporary Provisions) Act 1923.
  - Offences Punishable by ordinary law of *Saorstát Éireann* contrary to section 69 (5) of the Defence Forces (Temporary Provisions) Act 1923, specifically:
    - Section 61 of the Offences against the Person Act 1861.
    - Section 62 of the Offences against the Person Act 1861.
  - Conduct to the prejudice of good order and discipline contrary to section 168(1) of the Defence Act, 1954.
  - Offences punishable by ordinary law contrary to section 169 of the Defence Act 1954, as amended, specifically:
    - The common law offence of 'buggery'
    - Section 61 of the Offences against the Person Act 1861.
    - Section 62 of the Offences against the Person Act 1861.
    - Section 11 of the Criminal Law Amendment Act 1885.

- That the provisions included in the disregard scheme are also subject to review and that further provisions may be included as appropriate, through the provision of a regulation making power in any legislation providing for disregards.
- That, taking into account the individual nature of Military Law in Ireland, that further consultation with regard to any additional eligibility criteria is undertaken with the Department of Defence when referring to the disregard of convictions by summary trial to ensure that they are in line with current Military law, especially

with regard to convictions registered under Section 168 of the Defence Act 1954, as amended.

- That should a person have been discharged with ignominy from the Defence Forces as a result of any of the above offences, subject to the eligibility criteria, that the Department of Defence and Defence Forces consider whether any medals awarded that were withdrawn as a result of this discharge with ignominy may be returned to the affected person, or their family if deceased.
- That the Department of Defence and Defence Forces consider any other actions as appropriate that may be taken to restore the dignity and reputation of affected men, and when deceased, their memory.
- That the following additional eligibility criteria is included:
    - That the decision maker must be satisfied on the balance of probabilities that the offence involved homosexual activity
    - That the act resulting in a conviction would not have led to a conviction under current Military Law

4. Who can apply?

The Working Group was also tasked with considering who may apply for a disregard. In the May 2022 Progress Report of the Working Group it was acknowledged 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. 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.

In this Progress Report, the Working Group provided the interim recommendation that any scheme should allow for applications on behalf of the deceased or by those operating under Power of Attorney. That recommendation is affirmed.

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 also recommended 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. That recommendation is also affirmed.

The Working Group also committed to considering who may act as a representative on behalf of a deceased person and to make a recommendation on the matter in this final report.

4.1 Who may act as a representative on behalf of a deceased person?

Across the jurisdictions that operate a disregard scheme allowing applications on behalf of deceased persons (Australia, Canada, New Zealand)[22] the following categories of persons may apply for a disregard on behalf of a deceased person[23]:

- their personal legal representative
- their spouse, *de facto* or domestic partner
- a parent
- an adult child
- an adult sibling
- an adult niece or nephew
- a person who was in a close personal relationship with the convicted person immediately prior to the convicted person's death
- if another person was involved in the activity that constituted the offence—the other person
- the executor or administrator of the person's estate
- the person's agent or mandatary, attorney, guardian, trustee, committee, tutor or curator, or any other person who was appointed to act in a similar capacity before his or her death
- a person determined (by the deciding body) to be an appropriate representative of the person
- the deciding body may make a determination *ex* officio if a legitimate interest is demonstrated and if all those entitled to apply have died or their whereabouts are unknown

In relation to familial connections the Western Australian *Historical Homosexual Convictions Expungement Act 2018 (WA)* clarifies that a parent, child or sibling of the eligible person applies whether the relationship is whole or half blood, established by, or traced through, marriage, a written law or a natural relationship.

In the context of 'a person determined to be an appropriate person' this has been determined in the relevant jurisdictions upon consideration of:

- the closeness of the person's relationship with the deceased person immediately before the deceased person's death; or
- upon written request to the decision maker, to represent the convicted person for an application for expungement. A decision is made based on whether the representation concerned would be in the interests of the deceased person.

The majority of convictions eligible for a disregard will likely relate to men who are now deceased. As a result, the decision regarding who may make a representation on behalf of a deceased persons is of the utmost importance in the development of any scheme.

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[22] Provisions in the more general schemes (e.g. not focused on convictions for consensual sex between men) in Germany and Spain are also included here.
[23] Note that such representation may only occur in these jurisdictions when the person is deceased or incapacitated e.g. the person operates under power of attorney or guardianship etc.

With this in mind, and considering the historical nature of many of these convictions the Working Group considered if representation could, in certain circumstances, be made on behalf of a deceased person by persons outside of the above category of persons.

Some other jurisdictions provide for a 'hierarchy of representation' in which certain categories of persons must be unavailable for the next person to make an applications. e.g. in Victoria, Australia "*(b) if the person immediately before death did not have a spouse or domestic partner or if the spouse or domestic partner is not available—a son or daughter of the person of or over the age of 18 years; or (c) if a spouse, domestic partner, son or daughter is not available—a parent of the person; or*"[24] and in Germany "*If all those entitled to apply have died or their whereabouts are unknown, the public prosecutor's office must make the determination ex officio if a legitimate interest can be demonstrated.*"[25]

Overview of existing legislative provisions for representation on behalf of a deceased person

In all Australian jurisdictions, with the exception of South Australia, applications can be made on behalf of deceased persons.

Jurisdiction	Legislation
New South Wales[26]	**Criminal Records Amendment (Historical Homosexual Offences) Act 2014 (NSW) amended the Criminal Records Act 1991 (NSW), s. 19B (3)**
	19B Application to have eligible homosexual offence convictions extinguished (3) If the convicted person has died, an application under this section may be made on behalf of the person by: (a) the convicted person's legal personal representative, or (b) a spouse, de facto partner, parent or child of the convicted person or a person who was in a close personal relationship with the convicted person immediately before the convicted person's death.
Victoria	**Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 (Vic) amended the Sentencing Act 1991 s*. 105B (2); 105***
	105B Application to Secretary for convictions for historical homosexual offences to be expunged

[24] See also Tasmania.
[25] See also Spain whereby an institution may apply in specific contexts if the person did not have a spouse or a relative of the type referred to in the above paragraph. Further information on this scheme can be found below.
[26] 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.

	(2) In addition, an appropriate representative of a person who was convicted of a historical homosexual offence and is deceased may apply to the Secretary for the person's conviction to be expunged. **105 Definitions** appropriate representative, of a person who was convicted of a historical homosexual offence and is deceased, means— (a) if the person, immediately before death had a spouse or domestic partner—the spouse or domestic partner of the person; or (b) if the person immediately before death did not have a spouse or domestic partner or if the spouse or domestic partner is not available—a son or daughter of the person of or over the age of 18 years; or (c) if a spouse, domestic partner, son or daughter is not available—a parent of the person; or (d) if a spouse, domestic partner, son, daughter or parent is not available—a sibling of the person of or over the age of 18 years; (e) if a spouse, domestic partner, son, daughter, parent or sibling is not available—a person named in the will of the person as an executor; or (f) if a spouse, domestic partner, son, daughter, parent, sibling or executor is not available—a person who, immediately before the death, was a personal representative of the person; (g) if a spouse, domestic partner, son, daughter, parent, sibling, executor or personal representative is not available—a person determined to be the appropriate representative under subsection (3); (3) For the purposes of paragraph (g) of the definition of appropriate representative, a person is the appropriate representative if the Secretary determines that the person should be taken to be the appropriate representative of the deceased person because of the closeness of the person's relationship with the deceased person immediately before his or her death.
Australian Capital Territory	**Historical Homosexual Convictions Extinguishment Amendment Act 2015 (ACT) amended the Spent Convictions Act 2000 (ACT) s. 19B (3)**
	19 B Application to have conviction extinguished (3) If the person has died, an application may be made on behalf of the person by— (a) the person's legal personal representative; or (b) a domestic partner, parent, child or sibling of the person; or (c) a person who was in a close personal relationship with the person immediately before the person's death; or (d) if another person was involved in the activity that constituted the offence—the other person.
Tasmania	**Expungement of Historical Offences Act 2017 (Tas) s. 6 (3-4)**
	6. Application to have historical offence expunged (3) If the person referred to in subsection (2) has died or lacks legal capacity to make an application, an application under this section may be made in respect of that person by –

	(a) if the person – (i) has died and immediately before death had a spouse and the spouse is available, the spouse of the person; or (ii) lacks legal capacity to make an application and has a spouse that is available, the spouse of the person; or (b) if no spouse is available, a son or daughter of the person if the son or daughter has attained the age of 18 years; or (c) where no person referred to in paragraph (a) or (b) is available, a parent of the person; or (d) where no person referred to in paragraph (a) , (b) or (c) is available, a sibling of the person if the sibling has attained the age of 18 years; or (e) where no person referred to in paragraph (a) , (b) , (c) or (d) is available, a niece or nephew of the person if the niece or nephew has attained the age of 18 years; or (f) where no person referred to in paragraph (a) , (b) , (c) , (d) or (e) is available, the legal personal representative of the person; or (g) where no person referred to in paragraph (a) , (b) , (c) , (d) , (e) or (f) is available, a person determined to be an appropriate representative under subsection (4) . (4) For the purposes of subsection (3)(g) , a person is an appropriate representative if the Secretary determines that the person should be taken to be an appropriate representative of – (a) a deceased person because of the closeness of the person's relationship with the deceased person immediately before the deceased person's death; or (b) a person who lacks legal capacity to make an application because of the closeness of the person's relationship with the person who lacks legal capacity.
Queensland	**Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 (Qld) s. 11(3)**
	11 Who may apply (3) If the eligible person died after 19 January 1991, the application may be made by the first of the following who is available— (a) the personal representative of the eligible person; (b) a person who was the eligible person's spouse on the day the eligible person died; (c) a parent of the eligible person; (d) an adult child of the eligible person; (e) an adult sibling of the eligible person; (f) an adult who was in a close personal relationship with the eligible person immediately before the eligible person died.
Western Australia	**Historical Homosexual Convictions Expungement Act 2018 (WA) s.5 (2)(c)**
	5. Application for convictions for historical homosexual offences to be expunged

	(c) if the eligible person has died — (i) a person who was the spouse or de facto partner of the eligible person, immediately before the eligible person's death; or (ii) a parent, child or sibling of the eligible person, whether the relationship is of the whole or half blood, established by, or traced through, marriage, a written law or a natural relationship; or (iii) the executor of the will, or administrator of the estate, of the eligible person; or (iv) a person who maintained a close personal relationship, within the meaning of that phrase in the Guardianship and Administration Act 1990 section 110ZD(5), with the eligible person immediately before the eligible person's death; or (v) if another person was involved in the conduct that constituted the offence — the other person.
Northern Territory	**Expungement of Historical Homosexual Offence Records Act 2018 (NT) s. 9(2)**
	9 Application to expunge records (2) An application may be made on behalf of a deceased person by: (a) the executor or administrator of the person's estate; or (b) the person's surviving spouse or de facto partner; or (c) the person's parent, child or sibling; or (d) a person who was in a close personal relationship with the person before the person died; or (e) a person who was involved in the conduct that was the subject of the charge or conviction.

The Canadian Expungement of Historically Unjust Convictions Act allows spouses, parents, siblings, children or legal representatives to apply for record expungement on the behalf of a deceased person.

Expungement of Historically Unjust Convictions Act (Canada), S.7 (2)
Application on person's behalf (2) If a person who has been convicted of an offence listed in the schedule is deceased, any of the following may apply for an expungement order on the person's behalf: (a) the person's spouse or the individual who, at the time of the person's death, was cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year; (b) the person's child; (c) the person's parent; (d) the person's brother or sister; (e) the person's agent or mandatary, attorney, guardian, trustee, committee, tutor or curator, or any other person who was appointed to act in a similar capacity before his or her death; (f) the person's executor or the administrator or liquidator of the person's estate;

(g) any other individual who, in the opinion of the Board, is an appropriate representative of the person.

The New Zealand Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018 allows a person to make a written request to the Secretary, who decides if a conviction can be expunged, to represent the convicted person for an application for expungement. The Secretary will make a decision based on whether the representation concerned would be in the interests of the deceased person.

Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018. s. 16

16 Request to represent deceased convicted person

(1) This section applies to a conviction for a historical offence if the convicted person has died and a person wishes to make an application for expungement of the conviction as a representative under paragraph (d) of the definition of that term in section 4.

(2) The person may, by a written request made to the Secretary, ask the Secretary to decide that the person can represent the convicted person for an application for expungement of the conviction.
(3) If a person makes a request under this section, the Secretary must decide as soon as is reasonably practicable whether the person can represent the convicted person for an application for expungement of the conviction.
(4) The Secretary's decision must be based on whether the representation concerned would be in the interests of the deceased convicted person.
(5) The decision must be in writing copied promptly to the requester.

Other schemes

Germany operates a more general scheme for the repeal of certain criminal judgements during the Nazi Regime (1935-1945) which since 2002 has included the primary provision criminalising consensual sex between men.[27] This allowed applicants to request the public prosecutor's office to determine whether a judgment has been set aside and issue a certificate thereof. If the person was deceased his relatives and brothers-in-law of the direct line, his siblings, spouse and fiancée are entitled to apply. If all those entitled to apply have died or their residence is unknown, the public prosecutor's office can make the determination of its own motion if a legitimate interest is demonstrated to set aside a conviction.[28]

In 2012, another law was promulgated that specifically focused on convictions for consensual homosexual acts after the Nazi Regime which follows a similar format, upon

[27] *Gesetz zur Änderung des Gesetzes zur Aufhebung nationalsozialistischer Unrechtsurteile in der Strafrechtspflege* (2002) added the primarily criminalising provision Strafgesetzbuch (StGB), German Federal Penal Code, s. 175 (now repealed) to eligible convictions.
[28] *Gesetz zur Aufhebung nationalsozialistischer Unrechtsurteile in der Strafrechtspflege* (1998), s.6.

request, the public prosecutor's office may determine if a judgement has been annulled and may issue a 'rehabilitation' certificate in that regard.[29] In this case, when a person has died, his spouse, partner, fiancé or the person with whom they had made a promise to establish a civil partnership as well as the parents, children and siblings of the convicted person may apply.

In Spain, no general disregard scheme is in operation. There was a scheme under the Ley de Memoria Histórica de España (Historical Memory Law of Spain) targeted toward and restricted to persecution during the Franco period/dictatorship from 1939-1975 for which all convictions, punishments or other forms of personal violence which took place for reasons of politics, ideology or religious belief, during this period were recognised and declared to be completely unjust in nature and illegitimate. This reasons for which includes conduct related to sexual orientation. [30]

While this recognition is automatic, affected persons and representations can apply for *a Declaration of Person Reparation and Personal Recognition*. Those who can apply for a declaration on behalf of a deceased person include spouses or persons with a similar emotional connection, their ascendants, descendants and collateral relatives to the second degree (siblings including half siblings, nieces, nephews, aunts, uncles). In additional, certain public institutions may apply on behalf of a person, with the prior agreement of their governing body, in respect of those who carried out a relevant office or activity within such institution but who did not have a spouse or a relative of the type referred to in the above paragraph.[31] This law was repealed and replaced in 2022 by the Law of Democratic Memory (Ley de Memoria Democrática) which includes similar provisions.

Germany
Act on the annulment of unjust sentences imposed by the National Socialist Criminal Justice System (1998) *[Gesetz zur Aufhebung nationalsozialistischer Unrechtsurteile in der Strafrechtspflege]*
Unofficial translation: 6. (1) Upon application, the public prosecutor's office shall determine whether a judgment has been set aside and issue a certificate in this regard. Eligible to apply are the convicted person, after his death his relatives and direct relatives by marriage, his siblings, spouse or fiancé. If all those entitled to apply have died or their whereabouts are unknown, the public prosecutor's office must make the determination *ex officio* if a legitimate interest can be demonstrated.

[29] All translations are unofficial.
[30] *Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura. (Ley de Memoria Histórica de España) Art. 2 (1-2), 3.*
[31] This provision likely arose for those who had died while part of listed persecuted groups including political parties, unions, religious or military organizations, secret societies, Masonic lodges and resistance groups, Ley 52/2007. Art. 2 (2).

***Act on the criminal rehabilitation of persons convicted of consensual homosexual acts after May 8, 1945* (2017)** , *Gesetz zur strafrechtlichen Rehabilitierung der nach dem 8. Mai 1945 wegen einvernehmlicher homosexueller Handlungen verurteilten Personen*
3 Determination of the annulment of judgments; rehabilitation certificate (1) Upon application, the public prosecutor's office shall determine whether a judgment pursuant to Section 1 (1) has been set aside. In the cases of Section 2 Paragraph 1, it determines the partial annulment of the judgment and its scope. The public prosecutor's office shall issue the applicant with a rehabilitation certificate based on the findings pursuant to sentences 1 and 2. (2) For the determination according to subsection 1 sentences 1 and 2, it is sufficient to substantiate a conviction according to § 1 subsection 1. A sworn statement by the convicted person may also be permitted for credibility. The public prosecutor's office is responsible for accepting the affidavit. (3) Eligible to apply 1.the convict, 2. after the death of the convict, his spouse or life partner and the fiancé or the person with whom the convict made a promise to establish a civil partnership, as well as the parents, children and siblings of the convict.

Spain
Historical Memory Act (2007) [Ley de Memoria Histórica de España]
Unofficial translation: **Article 2. General recognition.** 1. As an expression of the right of all citizens to the moral redress and the restoration of their personal and family memory, all convictions, punishments or other forms of personal violence which took place for reasons of politics, ideology or religious belief, whether during the Civil War or during the Dictatorship, are recognised and declared to be completely unjust in nature. 2. The reasons referred to above include the membership of or collaboration with political parties, unions, religious or military organizations, ethnic minorities, secret societies, masonic lodges and resistance groups, as well as conduct connected with cultural or linguistic choices or those of sexual orientation. 3. Similarly, the injustice caused by the exile of many Spaniards during the Civil War and the Dictatorship is hereby recognised. **Article 3. Declaration of illegitimacy.** 1. The courts, tribunals and other criminal or administrative organs of whatever nature which were constituted during the Civil War to impose penalties or punishments of a personal nature for reasons of politics, ideology or religious beliefs, are hereby declared illegitimate together with all their decisions. 2. As they were contrary to Law and violated the most fundamental requirements of the right to a fair trial, the Court of Repression of Masonry and Communism, the Court of Public Order, the Courts of Political Responsibilities and the Courts-Martial, all of which were constituted for reasons of politics, ideology or religious belief are declared illegitimate pursuant to article 2 of this Law,

3. Also declared illegitimate herewith, given that they were defective in form and substance, are the penalties and punishments ordered for reasons of politics, ideology or religious belief by any court or administrative organ of whatever type during the Dictatorship against those who defended the previous institutional legality, attempted to re-establish a democratic regime in Spain, or tried to live pursuant to those choices afforded by the rights and freedoms recognised today by the Constitution.

Article 4. Declaration of redress and individual recognition.

1. The right to obtain a declaration of reparation and individual recognition is hereby acknowledged for those who during the Civil War and the Dictatorship suffered the effects of those decisions referred to in the preceding article. This right is fully compatible with the other rights and compensating measures recognised in preceding laws as well as the institution of any legal proceedings that may occur before the courts of justice.
2. Those persons affected, and, in the event that they have already died, spouses or persons with similar emotional nexus, their ascendants, descendants and collateral relatives to the second degree shall have the right to request the said Declaration.
3. Similarly the said Declaration may be requested by public institutions, subject to the prior consent of their appropriate government body, in respect of those who carried out a relevant office or activity within such institution but who did not have a spouse or a relative of the type referred to in the above paragraph.

4. The persons or institutions referred to above can require the issue of the said Declaration of the Ministry of Justice. To that end, they can bring all documentation relating to the facts or proceeding as is in the possession of the petitioners as well any relevant background information.
5. The Declaration referred to in this Law shall be compatible with any other indemnifying or compensating measure provided for in the legal system and shall not constitute an entitlement to recognition of patrimonial responsibility of the State or of any office of the Public Administration, nor will it give rise to any consequence, damages or reparation, whether economic or professional in type. The Ministry of Justice shall deny the issuance of a Declaration where the provisions of this Law are not complied with.

Having researched the approaches taken in other jurisdictions the Working Group considers that a hierarchical approach should be taken as to who may act as a representative on behalf of a deceased person with provision for an un-related person to be appointed as a suitable.

The following hierarchy for representation on behalf of a deceased person was explored and is proposed as appropriate subject to any required adaption of language to the Irish context:

- their personal legal representative (instructed by them before they died)
- their spouse, civil partner, *de facto* or cohabiting partner
- a parent
- an adult child
- an adult sibling
- an adult niece or nephew

- a person who was in a close personal relationship with the convicted person immediately prior to the convicted person's death
- if another person was involved in the activity that constituted the offence—the other person
- the executor or administrator of the person's estate
- the person's guardian, trustee, or any other person who was appointed to act in a similar capacity before the person's death (different from their personal legal representative above)
- a person determined (by the deciding body) to be an appropriate representative of the person, with a legitimate interest
- the deciding body may make a determination *ex* officio if a legitimate interest is demonstrated and if all those entitled to apply have died or their whereabouts are unknown

Determination of an appropriate representative

In the context of 'a person determined to be an appropriate representative' this has been determined in the relevant jurisdictions upon consideration of:

- the closeness of the person's relationship with the deceased person immediately before the deceased person's death; or
- upon written request to the deciding body, to represent the convicted person for an application for a disregard. A decision is made based on whether the representation concerned would be in the interests of the deceased person.

This approach is recommended in the Irish context by the Working Group.

Potential Conflict between representatives

The Working Group also considered what approach to take when there was disagreement between potential representatives, particularly in the case when relatives may still be living, for example between a partner and parents or a historian and family. Due to the stigma and rejection that may have been faced by some men in a familial context it was deemed appropriate to have a means to overcome such disputes. It was agreed that providing the deciding body with the discretion to decide, if circumstances arise, whether to notify other persons and if so and objection is raised, whether an application should proceed, would be appropriate.[32] Applicants who are applying on the behalf of a deceased person may also be asked to indicate on any application form whether there are any potential conflicts with other potential applicants in the hierarchy. This would be relevant for instance when a person in a close personal relationship with the affected person prior to their death, e.g. a close friend may be seeking to apply, but there may be a potential conflict with a parent. The language of such an order can be dealt with at legislative drafting stage but underpinned by the policy purposes of the

[32] The ultimate decision maker will be the Minister for Justice. However an independent panel of assessors will make a recommendation to the Minister for Justice. It is envisioned that this independent panel would be the body with the discretion to solve such disputes. See Section 6 for relevant recommendations on the application process.

disregard scheme, which is ultimately to exonerate affected persons and for the scheme to be as accessible as possible.

4.2 Recommendations: Who can apply?

- That any scheme should consider each individual case, on application by the individual concerned or a representative, to determine whether the convictions involved would be eligible for a disregard and should be disregarded.
- 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.
- That applications can be made domestically or from abroad by persons who no longer reside in Ireland and/or are not Irish citizens.
- That representatives can apply on behalf of a deceased person in accordance with the proposed hierarchy.
- That in the context of 'a person determined to be an appropriate representative' that this is determined by the independent panel[33] upon consideration of:
    - the closeness of the person's relationship with the deceased person immediately before the deceased person's death; or
    - upon written request to the independent panel, to represent the convicted person for an application for a disregard. A decision is made based on whether the representation concerned would be in the interests of the deceased person.
- That applicants applying on behalf of deceased persons are asked to confirm if there are any possible conflicts with other potential representatives in the hierarchy.
- That any dispute between potential representatives is dealt with by the independent panel who has the discretion to decide if other parties must be notified and if an objection is raised, whether an application should proceed.

5. What standards should apply? Eligibility criteria for a disregard

The Working Group was also tasked with considering what standards must be met before a criminal conviction for the qualifying offences can be disregarded.

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

[33] Please see section 6 for recommendations on the application process.

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.

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.

In their May 2022 Progress report, the Working Group agreed the following interim eligibility criteria that is utilised across other jurisdictions studied:

- 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

The Working Group further committed to considering if any other eligibility criteria should be applied and to include any further recommendations in this final report.

5.1 Person in position of Authority

The inclusion of this recommendation ensures that a disregard is not provided for in respect of sexual activity where one person was in a position of authority over the other person. A person who was in a position of authority would not be able to apply for a disregard if the other party was under the age of 18 or if the other party was a “relevant person” as defined in section 22 of the Criminal Law (Sexual Offences) Act 2017. The inclusion of this criteria is in line with current law, and is intended to protect those who were subject to exploitation by an adult in a position of authority over them while under the age of 18. It is also intended to protect persons with a mental/intellectual disability/mental illness which is of such a nature or degree as to severely restrict the

person's ability to guard him/herself against serious exploitation (i.e. "relevant persons" as defined in section 22 of 2017 Act). .

The Working Group has considered this eligibility criteria having regard to section 15 and section 22 of the Criminal Law (Sexual Offences) Act 2017.

Under the Criminal Law (Sexual Offences) Act 2017, a person in a position of authority, in relation to a child, is defined as:

Criminal Law (Sexual Offences) Act 2017, S. 15.
15. Section 1 of the Act of 2006 is amended— (a) by the substitution of the following definition for the definition of "person in authority": " 'person in authority', in relation to a child against whom an offence is alleged to have been committed, means— (a) a parent, grandparent, uncle or aunt whether of the whole blood, of the half blood or by affinity of the child, (b) a current or former guardian or foster parent of the child, (c) a current or former step-parent of the child, (d) a current or former partner of a parent of the child who lives or has lived in an enduring family relationship with the parent, (e) any person who is for the time being, or has been, in loco parentis to the child, or (f) any other person who is or has been responsible for the education, supervision, training, care or welfare of the child;", and (b) by the insertion of the following definition: " 'foster parent' means a person other than a relative of a child who is caring for the child on behalf of the Child and Family Agency in accordance with regulations made under the Child Care Act 1991 ;".

Under the Criminal Law (Sexual Offences) Act 2017, a person in authority in relation to a "relevant person" is defined as:

Criminal Law (Sexual Offences) Act 2017, S. 22(8)
(8) In this section—

> "person in authority", in relation to a relevant person against whom an offence is alleged to have been committed, means any person who as part of a contract of service or a contract for services is, for the time being, responsible for the education, supervision, training, treatment, care or welfare of the relevant person;
>
> "relevant person" means a person who has—
>
> (a) a mental or intellectual disability, or
>
> (b) a mental illness,
>
> which is of such a nature or degree as to severely restrict the ability of the person to guard himself or herself against serious exploitation.

The Working Group recommends that these definitions are applied when reviewing the eligibility of an application.

5.2 Proximity of Age Defence

The Working Group also agreed to examine whether to recommend the inclusion of a 'proximity of age' provision.

In Irish law this provision allows a teenager who is charged with engaging in a sexual act with a person aged between 15 and 17 years old to rely on a 'proximity of age' defence.

Specifically, if a defendant is younger than, or less than two years older than a child who has attained the age of 15 years but is under 17 years, it is a defence that the child consented to the sexual act. This would apply:

- when the defendant is also under the age of 17 years,
- when the defendant is 17 and the other child is 15 or 16,
- or when the defendant is 18 and the child is 16.

It is not a defence if the defendant was a person in authority in respect of the child or in a relationship that was intimidatory or exploitative of the child at the time of the offence. That this may be applied as a defence does not mean that it will be accepted as it is dependent on the particular circumstances of the case.

Criminal Law (Sexual Offences) Act 2017 (Ireland), s 17 (3) (8) (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 – (a) is younger or less than 2 years older than the child,

(b) was not, at the time of the alleged commission of the offence, a person in authority in respect of the child, and (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.
Criminal Law (Sexual Offences) Act 2017 (Ireland),s 15
15. Section 1 of the Act of 2006 is amended— (a) by the substitution of the following definition for the definition of "person in authority": " 'person in authority', in relation to a child against whom an offence is alleged to have been committed, means— (a) a parent, grandparent, uncle or aunt whether of the whole blood, of the half blood or by affinity of the child, (b) a current or former guardian or foster parent of the child, (c) a current or former step-parent of the child, (d) a current or former partner of a parent of the child who lives or has lived in an enduring family relationship with the parent, (e) any person who is for the time being, or has been, in loco parentis to the child, or (f) any other person who is or has been responsible for the education, supervision, training, care or welfare of the child;",
Criminal Law (Sexual Offences) Act 2017 (Ireland),s 48
48. The Act of 1990 is amended by the substitution of the following section for section 9: "9. (1) A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act. (2) A person does not consent to a sexual act if— (a) he or she permits the act to take place or submits to it because of the application of force to him or her or to some other person, or because of the threat of the application of force to him or her or to some other person, or because of a well-founded fear that force may be applied to him or her or to some other person, (b) he or she is asleep or unconscious, (c) he or she is incapable of consenting because of the effect of alcohol or some other drug, (d) he or she is suffering from a physical disability which prevents him or her from communicating whether he or she agrees to the act, (e) he or she is mistaken as to the nature and purpose of the act, (f) he or she is mistaken as to the identity of any other person involved in the act,

(g) he or she is being unlawfully detained at the time at which the act takes place,

(h) the only expression or indication of consent or agreement to the act comes from somebody other than the person himself or herself.

(3) This section does not limit the circumstances in which it may be established that a person did not consent to a sexual act.

(4) Consent to a sexual act may be withdrawn at any time before the act begins, or in the case of a continuing act, while the act is taking place.

(5) Any failure or omission on the part of a person to offer resistance to an act does not of itself constitute consent to that act.

(6) In this section—

'sexual act' means—

(a) an act consisting of—

(i) sexual intercourse, or

(ii) buggery,

(b) an act described in section 3(1) or 4(1) of this Act, or

(c) an act which if done without consent would constitute a sexual assault;

'sexual intercourse' shall be construed in accordance with section 1(2) of the Principal Act.".

It is unlikely under current law that many prosecutions of 17 or 18 year olds would be brought where the other party involved was 15 or 16, or that a prosecution would result, subject to the circumstances of the case, in a conviction. Therefore, it would be appropriate that such convictions and other relevant records be considered as part of any disregard scheme.

This matter was discussed by the Working Group and it was generally agreed that the provision of a proximity of age defence should apply if the scheme is to be as accessible as possible. The Secretariat has during their background research noted that a number of prosecutions, including those resulting in a conviction, were secured against teenagers who engaged in consensual sexual activity with other teenagers that would fall within the parameters of the 'proximity of age' defence. Their exclusion from a disregard scheme would undermine the policy goal of a disregard scheme and potentially prevent living applicants from availing of a disregard. This is particularly significant due to the likely advanced age profile of living applicants, as 30 years have passed since decriminalisation the majority of those who are still living may have been quite young at the time of their prosecution.

The Working Group recommends in circumstances where the sexual activity was consensual and satisfies the definition of consent under Section 48 of the Criminal Law (Sexual Offences) Act 2017 and one or both parties were below the current age of consent (17 years) and one or both parties would now be able to avail of the 'proximity

of age' defence as provided for under Section 17 of the Criminal Law (Sexual Offences) Act 2017, that such a conviction and other relevant records could be disregarded under the proposed disregard scheme.

There are, however, a number of complexities to this matter, and while the Working Group is in favour of an approach that would allow for the possibility to disregard the criminal convictions of men (who would have been adolescents at the time) for consensual sexual activity with their peers in a manner consistent with today's legal norms, this key issue will require further consideration by Government and during legislative drafting.

One of the complexities that should be noted is that while a disregard scheme will focus solely on criminal convictions related to consensual sexual activity and affection between males, and an age of proximity provision would provide for adolescents who were criminalised under these provisions, similar convictions for heterosexual pairings in which one or both parties were below the age of consent under similar circumstances and which led to a conviction would not be disregarded as they would not fall within the ambit of the scheme.

It must be acknowledged in this context though that the provisions which criminalised sexual activity between men did not include an age of consent. Until 1993, when an equal age of consent was introduced for consensual sexual activity between people of the same sex in the Criminal Law (Sexual Offences) Act 1993, sex between men was considered a crime in all circumstances. As part of their task to look at disregarding certain criminal convictions the Working Group has, therefore, had to 'retroactively' apply an age of consent of 17 to activity involving men to ensure consistency with today's legal framework. The key tension to balance is that there are likely heterosexual couples that might have availed of the defence had it been in place earlier, or applied retroactively, but who would not be able to avail of a disregard through the disregard scheme. The Working Group recommends that the Government consider how such a provision can be provided for in keeping with the wider policy goal of the establishment of a disregard scheme.

It is important too, that the rights of any adolescent victims of sexual abuse are respected as part of any disregard process. It cannot be presumed simply because the person convicted was below the age of 17, or in proximity to that age, that such a prosecution and conviction was the result of a consensual act. It may not be the case that the relevant level of detail is contained in available records to ascertain that an act was consensual in all cases.

It was suggested that the application form could require that applicants declare that there was consent, in addition to there being space for applicants to include additional supporting documentation that might include a declaration from the second party or parties involved. It might also be built into the application form that applicants declare if minors (under 17) were involved.

Other Jurisdictions

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 and age ranges from that legislated for in Ireland.

Expungement of Historically Unjust Convictions Act 2018 (Canada), ***s 25(c)***
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: 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." Section 8(2) of the same act requires that any application must include documents that provide evidence that those criteria are satisfied. 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."

The Secretariat of the Working Group liaised with the responsible team within the Parole Board of Canada (PBC) to ascertain how they assessed that a conviction satisfies the

criteria for their scheme and the age of proximity defence. The PBC noted that under their disregard scheme the onus is placed on the applicant to demonstrate to the PBC that all criteria are met, including the 'close-in-age' defence if relevant. To demonstrate that the 'close-in-age' defence is met, the applicant must try to obtain official documentation from the court, police and/or military as appropriate. If the applicant could not obtain the official documentation (e.g. documents are destroyed, access to information request is refused), or if the official documentation does not demonstrate that the criteria is met, a sworn statement or solemn declaration must be submitted. Throughout its investigation, PBC may also contact the court, police and/or military directly to confirm if the criteria is met by obtaining the official documentation. When an affidavit is submitted it is dealt with as follows:

1. If the official documentation was purged or cannot be located, PBC will rely on the information provided by the applicant in the sworn statement or solemn declaration.
2. If the official documentation was obtained but does not address the age of the parties involved in the activity, PBC will rely on the information provided by the applicant in the sworn statement or solemn declaration.
3. If the official documentation contradicts the information provided by the applicant in the sworn statement or solemn declaration, PBC will rely on the information found in the official documentation.

Please note that as per Section 13 of the Canadian Act, if the PBC's review reveals no evidence that the relevant criteria are not met or that the offence is not currently prohibited, the disregard of the conviction for which the application was made will be ordered. This applies to both applications from individuals applying on their own behalf and applications for individuals who are now deceased.

Based on the above overview and example from Canada, it is suggested that if the disregard scheme ultimately provides for the inclusion of convictions in respect of which a proximity of age defence would have been applicable if the sexual activity occurred now, the following approach is adopted -

- That an age of proximity defence can be utilised to allow for a disregard when an application satisfies the criteria for such a defence under section 17 of the Criminal Law (Sexual Offences) Act 2017. In order for a disregard to be provided for in these circumstances the following approach would be undertaken:
- Available records would be examined to ascertain if they contain the detail required to demonstrate that the relevant conviction satisfies the age of proximity defence criteria e.g. the act was consensual within the provisions provided for under section 17.
- If the records are not of suitable quality to demonstrate that the act was consensual that a formal statement could be submitted by the applicant noting that it fulfils the criteria for a disregard including the provision for an age of proximity defence.
- The applicant may submit supporting documentation at their own discretion, this can include testimony from the other party.

- Reasonable efforts must be made to inform the second party to the acts that resulted in the conviction of the application for a disregard. The second party would be able to object to the application on the grounds that it does not meet the relevant criteria e.g. that the act was not consensual or that the person was in a position of authority over them at the time of the act.
- That the application form require that applicants declare that there was consent and the option to indicate if they were a minor or if a minor was involved.
- Such a disregard would only be possible on behalf of deceased persons in cases where the relevant records provide adequate detail to ascertain that the act was consensual or in which the application includes testimony from the second party that the act was consensual.

5.3 Recommendations: What standards should apply? Eligibility criteria for a disregard

The Working Group recommends that the following eligibility criteria apply to a disregard scheme:

- That the sexual act between the parties was consensual
- That (subject to the proximity of age defence option noted below) the sexual act between the parties did not involve a person under the current relevant age of consent (17)
- That no person engaged in the activity was in a position of authority in relation to another person engaged in the activity (within the meaning of the term as provided for in the Criminal Law (Sexual Offences) Act 2017).
- That the decision maker must be satisfied on the balance of probabilities that the offence involved sexual activity between men.
- That the act resulting in a conviction would not have led to a conviction under current Military Law.
- That the Government closely consider the introduction of a 'proximity of age' defence provision as part of a disregard scheme.
- That if a 'proximity of age' defence provision is introduced that it follows the following process:
    - i. Available records would be examined to ascertain if they contain the detail required to demonstrate that the relevant conviction satisfies the proximity of age defence criteria as set out in the Criminal Law (Sexual Offences) Act 2017.
    - ii. If the records are not of suitable quality to demonstrate that the act was consensual that a formal statement could be submitted by the applicant noting that it fulfils the criteria for a disregard including the provision for a proximity of age defence.
    - iii. The applicant may submit supporting documentation at their own discretion, this can include testimony from the other party.
    - iv. Reasonable efforts must be made to inform the second party to the acts that resulted in the conviction of the application for a disregard. The second party would be able to object to the application on the grounds that it does not meet the relevant

criteria e.g. that the act was not consensual or that the person was in a position of authority over them at the time of the act.

v. That the application form require that applicants declare that there was consent and the option to indicate if they were a minor or if a minor was involved.

vi. Such a disregard would only be possible on behalf of deceased persons in cases where the relevant records provide adequate detail to ascertain that the act was consensual or in which the application includes testimony from the second party that the act was consensual.

6. Application Process

As outlined previously, due to the nature of the criminalising provisions it is not possible to simply disregard all relevant convictions at once because the same legal provisions used to prosecute men for consensual sexual activity were also used to criminalise and prosecute incidences of sexual assault and child sexual abuse. So the only approach available to the State is to provide for a disregard based on individual application and investigation of available records. With this in mind the Working Group has sought to craft recommendations that would create as open and accessible scheme as possible within these limitations.

6.1 Points of contact and decision making

The Working Group acknowledges that many of the men convicted for consensual sexual activity and affection with other men may have traumatic and difficult associations with the prosecution process. An initial key issue for consideration by the Working Group was, therefore, whether An Garda Síochána or the Department of Justice would be an appropriate first point of contact for an individual seeking to avail of any disregard process. An order to disregard a conviction or convictions will be made by the Minister for Justice but it is possible that the initial application for a disregard could be made to an alternative body and that this body could liaise with the Department of Justice in relation to the application for a disregard.

A question on what body would be the most appropriate 'first' point of contact for applicants to a disregard scheme was included in the public consultation.

In response, 48% of respondents indicated that an independent body should be the 'first' point of contact for applicants to a disregard scheme. While 28% selected the Department of Justice and 11% selected An Garda Síochána as their preferred first point of contact, a general sentiment across a significant number of the responses providing additional information reiterated the importance of ensuring that affected persons do not have to deal directly with agencies that were responsible for their prosecution.

Several respondents also recommended wider referral options to a disregard scheme, i.e. that as part of its remit the first point of contact permit third party referrals from

LGBTQI+ representative organisations and other service providers such as healthcare providers to help vulnerable people in requesting a disregard.

It was also clear from the received responses that there would be a need for some kind of assistance and support for individuals making an application. It is suggested that the first point of contact's role should incorporate advocating on behalf of and support for applicants.

The Working Group has considered the input provided through the public consultation and has deliberated on what the most effective and accessible approach to receiving applications and decision making may be.

The Working Group recommends a collaborative application process that is robust and accessible. This involves three components: (1) an Independent Body to provide information to potential applicants, liaise with applicants, advocate on their behalf and receive applications, (2) the Department of Justice to coordinate the collection of records from Justice Sector agencies and (3) an Independent Panel of experts to review the application and make a recommendation to the Minister for Justice to approve or refuse an application. The final decision to approve or refuse an application rests with the Minister for Justice and it is the Minister who grants the disregard. The process is envisioned as follows:

i. The independent body, would be the first point of contact for information regarding the scheme and would liaise with and advocate on behalf of the applicant. The independent body would support the applicant in developing their application and receive the completed application from the applicant.
ii. The independent body would then submit the completed application to the Department of Justice so that the Department, as the appropriate channel, could gather the relevant records from the relevant agencies. The Department would then transfer the relevant records to an independent panel for assessment.
iii. An independent panel of independent experts would be established consisting of relevant legal and community expertise.
iv. For the purposes of assessing an independent application, a panel of three persons would be drawn from the independent panel. This three person panel would assess any relevant material, against the stated criteria, and make a recommendation to the Minister. In the case of an administrative appeal, the application, and any additional material could be passed over to three different members of the independent panel for review. The panel should outline their reasons for a decision clearly and compile a report.
v. As decisions will be made based on set criteria, there should be limited room for interpretation and error, however, some cases may be more complex, with decisions made in such cases on the balance of probabilities.
vi. The Minister for Justice is the final decision maker in all cases.

6.2 Should the application of the scheme be limited to convictions?

The Working Group considered whether the application of the scheme should be limited to convictions. The Working Group included a question on this matter in the public consultation.

Over 115 people responded to this question with 94% of respondents indicating that prosecutions that did not lead to convictions should also be included in a scheme. A significant number of respondents also favoured consideration by the Working Group of wider policing activities including investigation, arrest, charge and use of Probation Orders.

It should be noted that in other jurisdictions including Scotland, Queensland, Spain and Germany the scheme may apply to additional records. The Scottish Act provides a definition of ‘conviction’ that accounts for alternatives to prosecution such as a warning by the police or a conditional office of a fixed penalty.[34] In Queensland, Australia, the process applied to records related to charges as well as convictions while in Spain and Germany they process applies to any relevant records.

It is, therefore, also recommended that all relevant records including those relating to arrests, charges and prosecutions that did not lead to a conviction are also included in a disregard scheme and are also annotated accordingly to declare:

a) the fact that this record applies to a disregarded offence,
b) the effect of it being disregarded

While the language may be adjusted, such annotation should serve to acknowledge that the arrest, charge, prosecution or convictions has been disregarded and relates to activities that are no longer classified as an offence.

It may be the case that relevant records no longer exist or cannot be found. In such circumstances the relevant files could not be annotated, however, the applicant should be informed that as far as possible annotation has taken place.

6.3 Recommendations: Application Process Points of contact and decision making

- That a suitable independent body, such as IHREC or a new administrative body set up for this purpose, act as the ‘first’ point of contact for applicants to a disregard scheme. This body would provide information and liaise with interested parties and applicants, assist applicants with the application if necessary, receive the applications from the applicants, or their

[34] Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018, Section 13.

representatives, and transmit the completed applications to the Department of Justice.

- That this body receives adequate resource support to enable them to provide this service to applicants.
- The Department of Justice would then coordinate the review of available records liaising with the applicant as required through the independent body regarding their application. The applicant may also seek to liaise or submit an application directly to the Department of Justice at their own discretion. The Department of Justice will then transmit the application and related records to an independent panel of assessors.
- That an independent panel of assessors is established. This panel should include relevant legal and community expertise. The panel will be responsible for reviewing applications and making a recommendation to the Minister to approve or refuse an application as appropriate.
- That applicants are not obliged to engage directly with An Garda Síochána or the Department of Justice as part of the application or information seeking process.
- That applicants may nominate a representative or third party to act on their behalf when seeking information or submitting an application.

7. No Records

In their Key Issues Paper the Working Group considered 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 Working Group noted that the responsibility of retaining and maintaining such records lies with the State and that, 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 it remains the case that due to the historical nature of the records concerned that the State may not hold the records required to support an application for a disregard based on the stated eligibility criteria.

The availability of adequate records has been an issue in other jurisdictions. As of November 2022 in England and Wales, 33 applications have been deemed ineligible as there were no police or court records found to disregard.

It was not recommended by the Working Group that this approach be replicated due to the psychological distress that may have already been experienced by an applicant as a result of the original conviction(s) regardless of the presence of records. As outlined previously, in Canada the burden and cost of locating and securing all relevant documentation is borne by the applicant rather than the State. This seems to place an overly onerous burden on the applicant and was discounted by the Working Group as a reasonable avenue and was not recommended. The Working Group has recommended that an applicant should be able to provide records documentation in respect of the

conviction themselves but that they are not required to do so. The Working Group also noted that any provisions to solicit additional information in support of an application must be highlighted as 'in aid' of the applicant rather than shifting the burden to the applicant.

The Working Group then considered different steps which could be taken to ensure a fair consideration of an application to disregard where there are few if any records of the prosecution or conviction available.

7.1 Formal Statements

The Working Group has considered whether any lack of records could be addressed by the ability for applicants to submit formal statements (which could include affidavits, sworn/affirmed statements or statutory declarations) in support of their application.

A question on whether formal statements should be sought where there isn't any documentation or records available in respect of convictions was included in the public consultation.

There was a clear division in responses to this question in the public consultation with 51% of respondents in favour of accepting sworn statements while 47% were not in favour.[35] Among those who were not in favour it emerged that the primary concern was that such a process would be unnecessarily re-traumatising and onerous and that there may be a cost associated with the process. These respondents reiterated that the provision of documentation should rest with the State and that when such documentation is not available that the testimony of the person involved should be accepted.

However, in the absence of such a provision allowing formal statements to be sought, it may not be possible to provide for a disregard when records are absent. The Working Group notes that such a provision would be necessary due to the nature of the primary criminalising provisions, and the need to ensure that any disregarded conviction satisfies the stated eligibility criteria. In cases where records are not available it will not be possible to show from the historical record that the applicant satisfied the criteria.

The seeking of formal statements is a proposed safeguarding measure allowing for added robustness to the disregard process. It is proposed in order to facilitate wider accessibility while ensuring that the rights of victims of sexual assault are also safeguarded.

The provision of formal statements such as affidavits, sworn/affirmed statements, statutory declarations which serve as statements of fact may be accepted as evidence. This is a regular practice underpinning general legal processes.

When relating to Deceased Persons

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[35] The remaining respondents did not indicate directly whether or not they were in favour of formal statements being sought.

The Working Group also notes that such formal statements can by their nature only be made by living applicants, and that a disregard would not be possible in the above mentioned manner in relation to deceased persons when the historical record does not contain the details necessary to ascertain if an application satisfies the eligibility criteria. This will be the case particularly for historical cases in which no parties remain living and it cannot be ascertained that the individuals involved consented to the acts involved. However, other Jurisdictions, such as in the Australian jurisdictions of Victoria, Tasmania and Queensland, specifically allow written evidence from the other person involved in the act resulting in the conviction. In this context the other party involved in the conduct that led to arrest and/or prosecution, if still living, may submit a statement in support of an application. While in Victoria and Tasmania if no such person can be found, another person other than the applicant with knowledge of the circumstances may make a submission.

In keeping with the aim that any disregard scheme should be as wide ranging as is practicable under current law, and the need to find a balance between meeting the needs of those who were unjustly convicted under criminalising provisions for consensual sexual acts which are no longer a crime, and those who were subjected to sexual abuse via non-consensual acts, the seeking and acceptance of a formal statement in such incidences would appear to be the best approach to finding that balance.

It is, therefore, recommended that formal statements may be sought where there isn't any or any sufficient documentation or records available in respect of relevant prosecutions or convictions. It is proposed that this formal statement would not be required as part of an initial application but would only be sought following initial review of records when it is ascertained that records are unavailable, or that the records that are available do not allow it to be ascertained that the conviction meets the eligibility criteria for the scheme. It is proposed that such a sworn/affirmed affidavit would be template based and would seek to confirm that the circumstances of the conviction were consensual, did not involve a person under the current age of consent as well as meeting the other criteria of the scheme.

7.2 Recommendations: No Records

- That formal statements (which could include affidavits, sworn/affirmed statements or statutory declarations) be sought from living applicants where there isn't any or any sufficient documentation or records available in respect of prosecutions or convictions for relevant offences.
- That such statements may also be provided by the 'other party' involved in the circumstances resulting in the arrest, charge, prosecution or conviction in support of a disregard application.
- That if the 'other party' cannot be found after reasonable enquiries are made by the applicant, statements may be considered by the independent panel for acceptance from a person (other than the applicant) with direct knowledge of the circumstances in which that conduct occurred e.g. a legal representative or similar.

- Such statements should only be sought when it is ascertained that records are insufficient to establish if a conviction satisfies the eligibility criteria for the scheme.
- That there is no cost incurred by the applicant or the 'other party' in this process or that the receiving body is provided with resources to cover such costs on behalf of applicants.
- That applicants are provided with information regarding all steps involved in processing a disregard application including that should records prove inadequate that they will be requested to sign a sworn/affirmed statement. A template for this statement should be included in the information provided so that applicants are put at ease regarding what this requirement entails.
- That this process is mindful of the trauma experienced by affected persons and seeks to reduce the risk of re-traumatisation to applicants as much as possible.

8. Review and Revocation Process

8.1 Reviewing a refusal for a disregard

Based on the current recommendations from the Working Group regarding the eligibility criteria for a disregard, a recommendation that an application be refused would only be made for the following reasons:

- Failure to satisfy the stated criteria:
    - That the act was consensual
    - That the act did not involve a person under the current relevant age of consent (17)
    - That no person engaged in the activity was in a position of authority in relation to another person engaged in the activity
    - That the decision maker must be satisfied on the balance of probabilities that the offence involved sexual activity between males
    - That the act resulting in a conviction would not have led to a conviction under current Military Law
- It relates to a conviction that falls outside the scope of the scheme.
- In the case where no suitable records are available and the living applicant did not submit a formal declaration.
- In the case of deceased persons where no suitable records are available and in which no suitable living person with knowledge of the events (e.g. the second party, a legal representative etc.) is identified.

It is in fact considered unlikely, based on this criteria and the general low number of applications that are likely to be received, that many applications will be refused in the first instance.

When an application is refused however, it has been agreed that an appeal or review process should be available.

The provision of a process to appeal a decision to refuse an application, or to have the refusal reviewed, would 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 majority of jurisdictions with disregard legislation provide for an appeal or review system. Only Canada, Spain and Southern Australia fail to directly provide for an appeal or review mechanism in their legislation. Within the remaining jurisdictions there are two approaches taken, an appeals system available through the courts and an administrative review process. In the majority of incidences an administrative review process is undertaken either by an external body or internally within the particular government department.

The former approach of court-based appeal, to the Circuit Court, was explored by the Working Group and it was deemed that this would be less favourable than an administrative review process as it could lead to long delays in the court process as well as being potentially re-traumatising for the applicant. The potential for a 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 through the courts, hence consideration would also need to be given to the provision of legal aid to applicants should this approach be pursued.

The alternative approach, an administrative review, was initially discussed as 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 reducing any undue emotional burden for applicants who may have had negative experiences in a court setting as a result of their conviction.

It was, however, noted that administrative review processes may also be time-consuming with long processing and decision making times for some administrative review processes. One means of addressing this would be to have a time limited and specialised review process for a disregard included in any legislation that seeks to maximise the efficiency of any review process and limit the waiting time as much as is practicable. Such a review could be undertaken by different members of the independent panel of assessors and a new recommendation made to the Minister for Justice whether to approve or once again refuse the application for a disregard.

Other Jurisdictions:

In England & Wales, Scotland, and New Zealand applicants may apply to the original decision maker for a review of the original decision. In New Zealand, when reviewing an application, the Secretary may appoint an independent reviewer to assist with this consideration.

The Acts of England and Wales, and Scotland, also provide for a Courts-based appeal process if this review is unsuccessful (to the High Court, or Sheriff’s Court respectively).

The decisions reached upon appeal in these courts are final. In Scotland this appeal cannot consider any newly submitted information but must be based on the original information provided. If new information is discovered a new application must be submitted. In Scotland applicants may also apply for legal aid to progress this appeal. In a number of other instances following a refusal the applicant is provided with the opportunity to make a written submission to the deciding body and/or submit additional new information for consideration in support of their application.

A table of the different appeal/review processes is provided in Appendix 2 for reference.

Irish examples

Reviews under the Health (Regulation of Termination of Pregnancy) Act 2018 ss. 13-17 are provided for via the establishment of a review panel. Under this Act when the provision of a medical opinion is refused or the opinion does not meet the requirements the person seeking a termination, or a person acting on their behalf, can apply to the Executive for a review of the decision. For this purpose the Executive has established a panel of medical practitioners, appointed for such term and on such conditions as the Executive determines, for the purposes of the forming a review committee in relation to a relevant decision. Under this Act, the review committee may request any relevant documents in the possession or control of relevant medical practitioners as the committee may reasonably require in order to make a decision. A time limit is provided for as part of this process, which due to the time sensitive nature of termination, is no later than 7 days from the establishment and convening of the review panel. This may represent a positive model to emulate for a disregard scheme due to its availing of independent expertise and provision of a time limit.

Ireland's Immigration Law also provides for a number of appeal and review options. In relation to visa decisions applicants are provided with a letter of refusal informing them if they are allowed to appeal the decision. Appeals are considered by an appeals officer who examines all documentation submitted as part of the appeal as well as the documentation from the original application. If the appeal is successful, then a notification is sent to the applicant stating that the decision has been reversed and the next steps to undertake to receive their visa. If the appeal is unsuccessful another letter of refusal will be sent reiterating the original visa decision and noting that the appeal has been refused.

Applicants for Refugee or Subsidiary Protection can also appeal a number of decisions in relation to a recommendation to refuse an application by the International Protection Office, which is part of the Department of Justice, to the International Protection Appeals Tribunal (IPAT), which is an independent body. When a person applies for an EU Treaty Rights Residency Card or a visa as the third country national spouse or child of an EU citizen (a qualifying family member) or to be treated as a permitted family member of an EEA national, they must receive a reasoned decision and they can seek an internal

review of the decision to refuse if they believe the decision maker made an error in fact or law, but they can also submit new or updated information for consideration.[36]

The Working Group has considered the options available for an appeal or review mechanism for a disregard scheme and believe that an administrative review process, rather than a court based appeal process, should be built into a disregard scheme in a manner that seeks to be as efficient and as accessible as possible. With this in mind it is proposed that a review mechanism whereby an applicant can seek a review of their original application or in which applicants may also supply additional material which might not have been available at the time of the original application (similar to an EU Treaty rights review decision) and that the independent assessors can make a different recommendation on that basis.

8.2 Revoking 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. However, 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 eligibility test applied). This is a particular consideration due to the fact that the qualifying offences also applied to non-consensual acts and child sexual abuse 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 and Germany 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 or which fell outside of the scope of the scheme). 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

[36] Please see Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance). These rights are provided for in Irish law under the under the European Communities (Free Movement of Persons) Regulations 2015, as amended, or the European Union (Withdrawal Agreement) (Citizens' Rights) Regulations 2020.

requested to remove any associated annotations and restore the records to their original state/location.

It was previously discussed that such instances requiring a revocation or a reversal would only occur when evidence of false or misleading information are provided. It would not be within the remit or design of the scheme to 'seek out' any such information beyond the required review of available records or attempts to contact second parties who were minors at the time of the conviction in relation any 'proximity of age' defence provision that may be facilitated. But the possibility should remain for those with knowledge of the circumstances in which an approved applicant did not satisfy the stated criteria to come forward and present this information to the decision maker or other relevant party e.g. the independent body, An Garda Síochána etc.

8.3 Recommendations: Review and Revocation Process

Reviewing a refusal for a disregard

- Initial review of applications will be undertaken by the Independent Panel with a recommendation made to the Minister for Justice. The Minister for Justice is the final decision maker.
- That a negative recommendation can only be made based on failure to meet the stated criteria, failure to submit a formal statement where there are no records available and/or the offence being outside the scope of the scheme.
- That the applicant is informed in writing of the refusal of their application and the reasons for the refusal.
- Upon refusal, that the applicant is provided with information regarding their right to have the decision reviewed.
- If the applicant wishes have the decision reviewed, the independent 'first point of contact' will support the applicant and advocate on their behalf as part of this process.

Upon receipt of a request to review a decision:

- That receipt of this review request is acknowledged within two weeks by the Department of Justice.
- That a further review is undertaken by the Independent Panel, featuring three new panellists, and if the recommendation remains to refuse an application that the reason for the proposed refusal and any relevant supporting document for the decision are provided to an independent panel for review and final recommendation to the Minister for approval or refusal of an application.
- That new additional information can be submitted as part of this review process.
- That the affected person, or a person acting on their behalf, is entitled to be heard by the review panel.
- That there is a time limit for a decision to issue from the Department of Justice/ independent review panel following receipt of the request to appeal/review. That this is set at three months.

- That applicants are informed in writing of the outcome of their appeal/review and if refused again, the reasons for that refusal.

Revoking a decision to disregard a conviction

- A decision to disregard a criminal conviction may be reversed/revoked.
- This may only occur based on the review of credible evidence/testimony submitted that demonstrates that the relevant conviction did not meet the criteria for a disregard or was beyond the scope of the disregard scheme.
- When it is determined that a disregarded offence is no longer eligible for disregard, the record holders will be requested to remove any associated annotations and restore the records to their original state and location. The relevant conviction will cease to be a disregarded conviction (it will be reinstated).
- A decision to revoke a disregard may also be appealed/reviewed subject to the same process as the general appeal process for a disregard decision.

9. 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 scheme to disregard is made available must be accessible and the means by which this is publicised must be considered particularly if the scheme is open to persons abroad. The Working Group committed to considering recommendations on this matter for inclusion in this final report.

In response to this commitment, the Working Group included a question on how access to a disregard scheme could be encouraged as part of the public consultation. There were over 80 responses to this question. A number of respondents highlighted the importance of ensuring that the process is not onerous, that there is multi-faceted promotion of the scheme including a media campaign involving advertisement in print media including LGBTQI+ targeted print media such as Gay Community News (GCN), and on television and radio at national and regional level. The promotion of the scheme through in person information days was also suggested as well as the use of localised promotion, for instance in rural and urban post offices, health and community centres, family resource centres and citizen's advice centres.

A number of respondents recommended online approaches and advertisement but several respondents also highlighted the importance of not adopting a 'digital only' or 'digital first' approach. This is especially significant due to the age profile of affected persons which will most likely range from late-middle aged onwards. Respondents also recommended a dedicated phone line for information about the scheme and advising that local radio and newspapers advertisements should run ads with phone numbers people can contact for more information rather than referring just to a website or email address. A number of respondents highlighted the history of emigration by Irish people and specifically by LGBTQI+ people seeking more open and free societies during the time of criminalisation. These respondents highlighted the importance of advertising that could reach affected men and their families who may live abroad, with particular focus

on the countries with large Irish diaspora communities such as the United Kingdom, United States, Canada, Australia and New Zealand. A number of respondents noted the importance of ensuring that responsible staff are adequately trained and sensitised on LGBTQI+ issues and how to handle applications and assist applicants in a non-adversarial manner, including signposting to points of contact who can respond to queries and support applicants. Respondents also highlighted the importance of ensuring that any additional staffing and other resources are made available to ensure there is capacity to process applications in a timely manner. Several respondents also noted the mental health burden this process may impose on some applicants and recommended working alongside a counselling body or the provision of counselling and other similar supports to men making applications if needed.

The promotion of the Birth Information and Tracing Act 2022 by the Department of Children, Equality, Disability, Integration and Youth when advertising access to the scheme was highlighted by the Working Group as a positive advertising model.

9.1 Recommendations: Public Awareness

- That the scheme is non-adversarial, trauma informed and situated within a human rights framework.
- That the application process is as simple and accessible as possible and that administration of the scheme will seek to minimise the burden placed on the applicant as much as is practicable.
- That there is no cost associated with accessing the scheme.
- That the process has due regard for the sensitivity of the information provided and the importance of guaranteeing and reassuring of confidentiality and privacy for applicants.
- That a primarily digital approach is avoided in promoting or in facilitating access to the scheme. Advertisement of the scheme should include promotion in person, in print, on radio and television, as well as online, where appropriate.
- That multiple avenues of contact and for accessing information are facilitated such as via a dedicated webpage, email address, phone number and postal address.
- That the scheme is promoted and that information and application forms are made available in publicly accessible spaces such as LGBTQI+ Community Resource Centres, Citizen’s Advice Centres, health and community centres, rural and urban post offices, family resource centres, local libraries, local Garda stations, the Consulates and Embassies of Ireland and any other relevant areas where people may access such information.
- That the scheme is advertised abroad particularly through consular and embassy networks and Irish expatriate networks, including LGBTQI+ networks.
- That there is direct consultation with rights-holders and organisations that work with the LGBTQI+ community including those representing older persons in the development of a communication strategy for the scheme and on the content of any public information campaign.

- That LGBTQI+ civil society organisations are supported and resourced to undertake outreach and promotion of the scheme.
- That adequate training and any additional resources that may be required are provided to ensure that applications are processed in a sensitive and timely manner.
- That applicants are offered counselling supports and that other appropriate supports are clearly signposted for applicants and that it is considered how such supports may also be extended to applicants now residing abroad.
- That applicants are provided with information regarding all steps involved in processing a disregard and are informed of the outcome of their application in writing.
- That a decision to refuse an application is accompanied by the reasons for the proposed refusal, a copy of the information or document the decision maker is relying on to support the proposed refusal and a statement explaining the applicant's right to review/appeal.
- That should An Garda Síochána National Vetting Bureau become aware of a relevant conviction while processing an individual's request for Garda Vetting that they inform the applicant of the scheme should they wish to avail of it, and that the scheme is signposted on all relevant webpages and information documents including those related to Garda Vetting and Spent Convictions.

10. Apology

10.1 State Apology

The State issued an apology to those affected by the criminalisation of same-sex activity in 2018. This apology, provided by the Taoiseach, encompasses an apology on behalf of all parts of the State that were used to enforce this criminalisation. A number of respondents to the consultation welcomed this apology. However, a number of other participants appeared to be unaware of this State apology.

It is recommended by the Working Group that this apology is reiterated upon launch of the disregard scheme to increase public awareness of the State apology.

10.2 Letter of Apology

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. Two respondents referred to the consideration by the Working Group of letters of apology.

The Working Group has previously discussed this issue and committed in the May 2022 Progress Report to consider what additional actions may be taken to further recognise the harm caused by the historical criminalisation of consensual sexual activity between men, 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.

It is suggested that a letter of apology be issued to successful applicants. It is envisioned that this letter of apology would reiterate the content of the State apology in an individualised manner. This letter should be issued to all successful applicants including those who were arrested, charged and prosecuted but which did not lead to a conviction. Additionally, a formal certificate/declaration document confirming the granting of a disregard and its effect may also be of benefit. The style could be informed by the content of the existing template text used when a Presidential Pardon is provided e.g. that it acts as a Certificate of recognition that a disregard has been provided and the effect of this disregard. Please see the current template text utilised for a Presidential Pardon at the end of this document. Similar 'letters of comfort' are provided in Scotland while successful applicants to a broader scheme in Spain have received letters of apology along with a 'Declaration of Reparation and Individual Recognition', a formal declaration that their sentence was unjust and that their criminal record has been rehabilitated.

10.3 Recommendations: Apology

- That the State apology is reiterated upon launch of the disregard scheme to increase public awareness of the State apology.
- That the State consider what further steps could be taken to recognise and address the wider impact of criminalisation upon affected men and the wider LGBTQI+ community.
- That individualised letters of apology from the Minister for Justice are provided to successful applicants to a disregard scheme.
- That a formal and standardised certificate is issued to successful applicants confirming the disregard of the conviction and the effect of this disregard.
- That the Department of Justice engage with other relevant justice sector agencies involved in the criminalisation and prosecution of affected men to see if there is scope for further acknowledgement of the harm experienced by these men.

11. Human Rights Considerations

The Working Group has previously noted that any disregard scheme should 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[37] , transparency, fair procedures, accountability, accessibility and participation.

[37] The development of a disregard scheme is a form of redress itself.

As part of the public consultation the Working Group asked if there were any additional human rights and equality considerations that the Working Group should consider in respect of the development of a disregard scheme and/or the administration of that scheme.

Five respondents provided input to this question. Of these, the human rights and equality principles listed above were broadly accepted. While one respondent placed a particular emphasis on ensuring understanding of how such rights manifest for older persons.

Respondents also suggested that any legislation should be based on human rights and equality principles as set out by the:

- Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. United Nations General Assembly Resolution (UNGA) 60/147 (2005)[38]
- Reports of the Special Rapporteur on the Promotion of Truth, Justice, Reparation
- Reports by international human rights and equality bodies to Ireland on issues of redress for human rights violations
- Reports by Non-Governmental Organisations such as Justice for the Magdalenes Research
- Reports of IHREC on other human rights violations such as the 'Advisory Paper to the Interdepartmental Group on the Government's Planned Development of a 'Restorative Recognition Scheme for former residents of Mother and Baby Homes and County Homes'[39]
- And learning from research on redress and memorialisation and from redress programmes such as those in response to the Magdalene Laundries
- The Constitution of Ireland

One respondent outlined several additional principles from these sources. These included:

From UNGA Resolution 60/147 above:

- Article 7: Victim' Right to Remedies
- Article 8: Access to Justice
- Article 9: Reparation for harm suffered
- Article 5: Victims of gross violations of international human rights law and serious violations of international humanitarian law – specifically the adoption of a wide definition of 'victims'

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[38] While UN General Assembly Resolutions are not legal binding upon Member States they serve as recommendations and guiding principles for Member States.
[39] Irish Human Rights and Equality Committee (2021) *Advisory Paper to the Interdepartmental Group on the Government's Planned Development of a 'Restorative Recognition Scheme for former residents of Mother and Baby Homes and County Homes'*, available at https://www.ihrec.ie/documents/advisory-paper-to-the-interdepartmental-group-on-the-governments-planned-development-of-a-restorative-recognition-scheme-for-former-residents-of-mother-and-baby-homes-and-county-home/

It is also important to consider how such rights may relate to a disregard scheme. For example, the right to access to justice, the right to equality and non-discrimination, the right to redress, transparency, fair procedures, accountability, accessibility and participation must take into account the socio-economic background of applicants including the impact that criminalisation and conviction may have had on educational and employment opportunities and consequently the capacity to engage with a disregard process, specifically that any financial burden may undermine accessibility and exercising of these rights. As a result consideration should be given to the resourcing provided to administer a scheme including ensuring that there is no cost to the applicant associated with any aspect of the scheme.

While the right to access relevant information concerning violations and any reparation mechanisms would necessitate access to relevant records and reports by decision makers upon request and in accordance with GDPR, while also having adequate avenues for access to information regarding the disregard scheme.

In terms of a guarantee of non-repetition, these are measures that serve as safeguards against the repetition of a human rights violation. In the case of a disregard scheme, the decriminalisation of sexual activity between men, the development of protective laws and policies and support of schemes in support of LGBTQI+ rights and inclusion and the development of a disregard scheme and public apology are all measures contributing to the guarantee of non-repetition.

Ultimately, the development of a disregard scheme will be underpinned by the State's human rights obligations and any legislation will be compliant with the State's domestic, European and International human rights obligations.

11.1 Recommendations Human Rights Considerations

The Working Group has considered the input to the public consultation and has made the following recommendations:

- That any scheme is underpinned by the following human rights and equality considerations:
    - the right to access to justice
    - 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,
    - the right to redress, transparency, fair procedures, accountability, accessibility and participation.
    - the right to access relevant information concerning violations and any reparation mechanisms
    - the principle of proportionality

    - respect for the principle of consent in sexual activity and protection of underage persons from exploitation
    - guarantee of non-repetition

- That the State considers any other obligations to which the State is subject under the Constitution, domestic law, and binding international and regional human rights treaties ratified by the State in relation to this matter.
- That particular consideration is placed on how such rights manifest for older persons.
- That applicants may have access to their personal records as held by agencies of the State and receive copies of reports and recommendations in relation to their personal application subject to any GDPR requirements.
- That following the publication of draft proposals for a disregard scheme or legislation, that the Minister engage with the Irish Human Rights and Equality Commission regarding the human rights and equality dimensions of the proposed scheme

12. Additional Considerations

The Public Consultation provided the opportunity to respondents to outline additional considerations for the Working Group to consider as part of their remit. These additional considerations and related recommendations are outlined below.

12.1 Restorative Justice Approach

A number of respondents to the public consultation utilised the language of restorative justice and recommended a restorative justice approach that takes stock of and addresses the wider impact that criminalisation, stigma and discrimination had on the LGBTQI+ community in Ireland. Respondents also highlighted the wider ongoing legal and policy issues that are relevant to LGBTQI+ people in Ireland today and the importance of addressing these as part of such a restorative justice approach.

12.2 Other Jurisdictions

As part of the public consultation several respondents noted the importance of looking at other countries which have already introduced such schemes when developing an Irish Scheme, as well as learning from National Commissions of Inquiry into Clerical and other forms of abuse in Ireland.

A thorough review of existing schemes in other jurisdictions was undertaken at the outset of the Working Group and has informed the deliberations of the Working Group and the development of a Key Issues Paper that can be found on the website of the Department of Justice. Schemes were identified and surveyed in Australia, Canada, England and Wales, Germany, Scotland, Spain and New Zealand. These schemes were regularly reviewed by the Working Group Secretariat for any new developments. Overviews of the schemes in Australia, Canada, England and Wales, Scotland, and New Zealand were included in the appendices of the Key Issues Paper and have also

been included in the appendices of this report. There have been some limited updates in the schemes in England and Wales, and Canada since the publication of the Key Issues Paper which have been updated in the appendices while an overview of the schemes operational in Spain and Germany has also been included in the appendices.

12.3 Time Limit

Several respondents to the public consultation recommended that a time limit is placed on the process for a disregard, an indicative time limit of three months was suggested. The same time limit was proposed in relation to any appeals process.

The Working Group acknowledges that there are practical difficulties in providing for a time limit. It is currently unknown how long it will take to identify and investigate relevant records across the relevant justice sector bodies. The need to coordinate across these record holding bodies, the archival nature of records and human resource limitations across bodies may lead to unpreventable delays. However, at the same time, in adopting a trauma informed approach and due to the age of some applicants it would be ideal to provide for a time limit to maximise the time benefit and minimise the risk of re-traumatisation to affected persons who are liable for a disregard.

In line with this consideration, the best approach may be to recommend an initial time limit, which can be extended in writing when there are difficulties. This is the approach taken with Freedom of Information requests where the period is four weeks with a possible extension of up to four weeks. Such a short time limit would not be advisable due to the coordination required related to the number of bodies that are required to source, investigate records and potentially annotate records.

12.4 Transgender Applicants

Several respondents to the public consultation highlighted the need for this scheme to be accessible to transgender people. An unknown number of transgender women, trans feminine and non-binary people may have been impacted under criminalising laws that did not distinguish between men engaging in consensual activity with men and transgender people who may have had their arrest, prosecution or conviction recorded in accordance with their sex assigned at birth. Others may have since had their legal gender marker changed in accordance with the Gender Recognition Act 2015 or via similar gender recognition processes in other jurisdictions. Others yet may not have availed of gender recognition processes but may be transgender or non-binary and a disregard process should be designed in a manner that it allows them to access the scheme in a dignified manner.

12.5 Recommendations - Additional Considerations

Restorative Justice

- That a disregard scheme is clearly situated within a wider whole of government approach to recognising and addressing stigma, discrimination, violence and marginalisation experienced by LGBTQI+ people in Ireland both historically and in the present day.

Other Jurisdictions

- That existing schemes from other jurisdictions are examined in conjunction with the final report of the Working Group, to inform the proposals for a disregard scheme and any related legislative drafting process.

Time Limit

- That submission of an application is acknowledged within two weeks.
- That applications are processed in a timely manner e.g. within three months.
- This time limit should begin once the Department of Justice receives the complete application rather than when a prospective applicant first makes contact.
- That this period can be extended by, for example, four weeks, via notification in writing to the applicant if, for example, there are a lot of documents to consider. It cannot be extended beyond this period except for in the most extenuating of circumstances which must be detailed in writing.
- That applicants are informed of the outcome of their application as soon as is reasonably practicable.

Transgender Applicants

- That the scheme is accessible to transgender and non-binary people who may have been prosecuted or convicted by the relevant criminalising provisions.
- That the language of any legislation, application forms and supporting information documents consider and are inclusive of any transgender people who may have been prosecuted or convicted by the relevant criminalising provisions.
- That there is direct consultation with rights-holders and organisations that work with transgender people in the development of application forms and supporting information to ensure they are fit for purpose in this regard.

Summary of Recommendations

Statistory Scheme

1. That a legislative scheme is established to enable the disregard of relevant criminal records.
2. That the operation of any legislative scheme is subject to review not later than two years after it comes into operation.

Identification of Records

3. That application forms for a disregard are simple and accessible requiring only the information required to locate the relevant files. This may include each applicant's name, date of birth, address, year of conviction, military service number (where relevant) etc.
4. That additional information, records and documentation can be provided by a scheme applicant to aid record identification but that this would be optional.

The effect of a disregard? Effect on criminal records

5. That the effect of a 'disregard' shall mean 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 arrested, charged or prosecuted for the offence
    c) been convicted of the offence, or
    d) been sentenced for the offence

6. That it should be an offence if a person having access to records of convictions kept by or on behalf of a public authority knowingly discloses any information about a disregarded conviction to someone else.
7. That the records identified are not expunged or destroyed as a result of a disregard and that relevant records are physically or where appropriate, digitally, annotated to reflect that they relate to a disregarded offence and the effect of this disregard.
8. That as well as records of a conviction, relevant records of investigation, arrest, charge, prosecution, conviction, use of Probation Orders and records related to cautions received via any historical juvenile diversion programmes that may be held by the Department of Justice, other relevant justice sector bodies (e.g. An Garda Síochána, the Courts Service, the Prison's Service, Director of Public Prosecutions, Office of the Attorney General) and the Department of Defence and Defence Forces, may be annotated to reflect the fact that those records should be disregarded.
9. That, when relevant records are no longer in existence or cannot be found in respect of a particular prosecution or conviction, a disregard should nonetheless be possible.

10. That, when relevant records in respect of a particular prosecution of conviction are no longer in existence or cannot be found, that applicants are informed of this fact and that annotation has been undertaken as far as is possible.

Which Offences to Include

11. That relevant convictions under civilian law that predate the foundation of the State are included in the disregard scheme.
12. That the following offences are included in a disregard scheme:

    - The common law offence of 'buggery'
    - Act for the Punishment of the Vice of Buggery (Ireland) 1634
    - Section 18 of the Offences against the Person (Ireland) Act 1829
    - Section 61 of the Offences against the Person Act 1861
    - Section 62 of the Offences against the Person Act 1861
    - Section 11 of the Criminal Law Amendment Act 1885
    - Public morality-type offences such as Section 1 (1)(b) of the Vagrancy Act of 1898

13. That relevant offences applied in a court or court martial established by or under the Constitution or the Constitution of *Saorstát Éireann*, that would not be an offence under current Military Law, are included in a disregard scheme namely:

    - Disgraceful conduct contrary to section 48 (6) of the Defence Forces (Temporary Provisions) Act 1923.
    - Offences Punishable by ordinary law of *Saorstát Éireann* contrary to section 69 (5) of the Defence Forces (Temporary Provisions) Act 1923, specifically:.
        - Section 61 of the Offences against the Person Act 1861.
        - Section 62 of the Offences against the Person Act 1861.
    - Conduct to the prejudice of good order and discipline contrary to section 168(1) of the Defence Act, 1954.
    - Offences punishable by ordinary law contrary to section 169 of the Defence Act 1954, as amended, specifically:
        - The common law offence of 'buggery'
        - Section 61 of the Offences against the Person Act 1861.
        - Section 62 of the Offences against the Person Act 1861.
        - Section 11 of the Criminal Law Amendment Act 1885.

14. That the provisions included in the disregard scheme are also subject to review and that further provisions may be included as appropriate, through the provision of a regulation making power in any legislation providing for disregards.
15. That, taking into account the individual nature of Military Law in Ireland, that further consultation with regard to any additional eligibility criteria is undertaken with the Department of Defence when referring to the disregard of convictions by summary trial to ensure that they are in line with current Military law, especially with regard to convictions registered under Section 168 of the Defence Act 1954, as amended.

16. That should a person have been discharged with ignominy from the Defence Forces as a result of any of the above offences, subject to the eligibility criteria, that the Department of Defence and Defence Forces consider any medals awarded that were withdrawn as a result of this discharge with ignominy may be returned to the affected person, or their family if deceased.
17. That the Department of Defence and Defence Forces consider any other actions as appropriate that may be taken to restore the dignity and reputation of affected men, and when deceased, their memory.
18. That the following additional eligibility criteria is included:
    - That the decision maker must be satisfied on the balance of probabilities that the offence involved homosexual activity
    - That the act resulting in a conviction would not have led to a conviction under current Military Law

Who can apply? Who may act as a representative on behalf of a deceased person?

19. That any scheme should consider each individual case, on application by the individual concerned or a representative, to determine whether the convictions involved would be eligible for a disregard and should be disregarded.
20. 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.
21. That applications can be made domestically or from abroad by persons who no longer reside in Ireland and/or are not Irish citizens.
22. That representatives can apply on behalf of a deceased person in accordance with the proposed hierarchy.
23. That in the context of 'a person determined to be an appropriate representative' that this is determined by the independent panel upon consideration of:
    - the closeness of the person's relationship with the deceased person immediately before the deceased person's death; or
    - upon written request to the independent panel, to represent the convicted person for an application for a disregard. A decision is made based on whether the representation concerned would be in the interests of the deceased person.
24. That applicants applying on behalf of deceased persons are asked to confirm if there are any possible conflicts with other potential representatives in the hierarchy.
25. That any dispute between potential representatives is dealt with by the independent panel who has the discretion to decide if other parties must be notified and if an objection is raised, whether an application should proceed.

What standards? Eligibility criteria for disregard

26. That the sexual act between the parties was consensual.
27. That (subject to the proximity of age defence option noted below) the sexual act between the parties did not involve a person under the current relevant age of consent (17).

28. That no person engaged in the activity was in a position of authority in relation to another person engaged in the activity (within the meaning of the term as provided for in the Criminal Law (Sexual Offences) Act 2017).
29. That the decision maker must be satisfied on the balance of probabilities that the offence involved sexual activity between men.
30. That the act resulting in a conviction would not have led to a conviction under current Military Law
31. That the Government closely consider the introduction of a 'proximity of age' defence provision as part of a disregard scheme.
32. That if a 'proximity of age' defence provision is introduced that it follows the following process:
    1. Available records would be examined to ascertain if they contain the detail required to demonstrate that the relevant conviction satisfies the proximity of age defence criteria as set out in the Criminal Law (Sexual Offences) Act 2017.
    2. If the records are not of suitable quality to demonstrate that the act was consensual that a formal statement could be submitted by the applicant noting that it fulfils the criteria for a disregard including the provision for a proximity of age defence.
    3. The applicant may submit supporting documentation at their own discretion, this can include testimony from the other party.
    4. Reasonable efforts must be made to inform the second party to the acts that resulted in the conviction of the application for a disregard. The second party would be able to object to the application on the grounds that it does not meet the relevant criteria e.g. that the act was not consensual or that the person was in a position of authority over them at the time of the act.
    5. That the application form require that applicants declare that there was consent and the option to indicate if they were a minor or if a minor was involved.
    6. Such a disregard would only be possible on behalf of deceased persons in cases where the relevant records provide adequate detail to ascertain that the act was consensual or in which the application includes testimony from the second party that the act was consensual.

Application Process - Points of Contact and Decision Making

33. That a suitable independent body, such as IHREC or a new administrative body set up for this purpose, act as the 'first' point of contact for applicants to a disregard scheme. This body would provide information and liaise with interested parties and applicants, assist applicants with the application if necessary, receive the applications from the applicants, or their representatives, and transmit the completed applications to the Department of Justice.
34. That this body receives adequate resource support to enable them to provide this service to applicants.
35. The Department of Justice would then coordinate the review of available records liaising with the applicant as required through the independent body regarding their application. The applicant may also seek to liaise or submit an application directly to the Department of Justice at their own discretion. The Department of Justice will then transmit the application and related records to an independent panel of assessors.

36. That an independent panel of assessors is established. This panel should include relevant legal and community expertise. The panel will be responsible for reviewing applications and making a recommendation to the Minister to approve or refuse an application as appropriate.
37. That applicants are not obliged to engage directly with An Garda Síochána or the Department of Justice as part of the application or information seeking process.
38. That applicants may nominate a representative or third party to act on their behalf when seeking information or submitting an application.

No records

39. That formal statements (which could include affidavits, sworn/affirmed statements or statutory declarations) be sought from living applicants where there isn't any or any sufficient documentation or records available in respect of prosecutions or convictions for relevant offences.
40. That such statements may also be provided by the 'other party' involved in the circumstances resulting in the arrest, charge, prosecution or conviction in support of a disregard application.
41. That if the 'other party' cannot be found after reasonable enquiries are made by the applicant, statements may be considered by the independent panel for acceptance from a person (other than the applicant) with direct knowledge of the circumstances in which that conduct occurred e.g. a legal representative or similar.
42. Such statements should only be sought when it is ascertained that records are insufficient to establish if a conviction satisfies the eligibility criteria for the scheme.
43. That there is no cost incurred by the applicant or the 'other party' in this process or that the receiving body is provided with resources to cover such costs on behalf of applicants.
44. That applicants are provided with information regarding all steps involved in processing a disregard application including that should records prove inadequate that they will be requested to sign a sworn/affirmed statement. A template for this statement should be included in the information provided so that applicants are put at ease regarding what this requirement entails.
45. That this process is mindful of the trauma experienced by affected persons and seeks to reduce the risk of re-traumatisation to applicants as much as possible.

Reviewing a refusal for a disregard

46. Initial review of applications will be undertaken by the Independent Panel with a recommendation made to the Minister for Justice. The Minister for Justice is the final decision maker.
47. That a negative recommendation can only be made based on failure to meet the stated criteria, failure to submit a formal statement where there are no records available and/or the offence being outside the scope of the scheme.
48. That the applicant is informed in writing of the refusal of their application and the reasons for the refusal.

49. Upon refusal, that the applicant is provided with information regarding their right to have the decision reviewed.

50. If the applicant wishes have the decision reviewed, the independent 'first point of contact' will support the applicant and advocate on their behalf as part of this process.

Upon receipt of a request to review a decision:

51. That receipt of this review request is acknowledged within two weeks by the Department of Justice.

52. That a further review is undertaken by the Independent Panel, featuring three new panellists, and if the recommendation remains to refuse an application that the reason for the proposed refusal and any relevant supporting document for the decision are provided to an independent panel for review and final recommendation to the Minister for approval or refusal of an application.

53. That new additional information can be submitted as part of this review process.

54. That the affected person, or a person acting on their behalf, is entitled to be heard by the review panel.

55. That there is a time limit for a decision to issue from the Department of Justice/ independent review panel following receipt of the request to appeal/review. That this is set at three months.

56. That applicants are informed in writing of the outcome of their appeal/review and if refused again, the reasons for that refusal.

Revoking a decision to disregard a conviction

57. A decision to disregard a criminal conviction may be reversed/revoked

58. This may only occur based on the review of credible evidence/testimony submitted that demonstrates that the relevant conviction did not meet the criteria for a disregard or was beyond the scope of the disregard scheme.

59. When it is determined that a disregarded offence is no longer eligible for disregard, the record holders will be requested to remove any associated annotations and restore the records to their original state and location. The relevant conviction will cease to be a disregarded conviction (it will be reinstated).

60. A decision to revoke a disregard may also be appealed/reviewed subject to the same process as the general appeal process for a disregard decision.

Public Awareness

61. That the scheme is non-adversarial, trauma informed and situated within a human rights framework.

62. That the application process is as simple and accessible as possible and that administration of the scheme will seek to minimise the burden placed on the applicant as much as is practicable.

63. That there is no cost associated with accessing the scheme.

64. That the process has due regard for the sensitivity of the information provided and the importance of guaranteeing and reassuring of confidentiality and privacy for applicants.

65. That a primarily digital approach is avoided in promoting or in facilitating access to the scheme. Advertisement of the scheme should include promotion in person, in print, on radio and television, as well as online, where appropriate.
66. That multiple avenues of contact and for accessing information are facilitated such as via a dedicated webpage, email address, phone number and postal address.
67. That the scheme is promoted and that information and application forms are made available in publicly accessible spaces such as LGBTQI+ Community Resource Centres, Citizen’s Advice Centres, health and community centres, rural and urban post offices, family resource centres, local libraries, local Garda stations, the Consulates and Embassies of Ireland and any other relevant areas where people may access such information.
68. That the scheme is advertised abroad particularly through consular and embassy networks and Irish expatriate networks, including LGBTQI+ networks.
69. That there is direct consultation with rights-holders and organisations that work with the LGBTQI+ community including those representing older persons in the development of a communication strategy for the scheme and on the content of any public information campaign.
70. That LGBTQI+ civil society organisations are supported and resourced to undertake outreach and promotion of the scheme.
71. That adequate training and any additional resources that may be required are provided to ensure that applications are processed in a sensitive and timely manner.
72. That applicants are offered counselling supports and that other appropriate supports are clearly signposted for applicants and that it is considered how such supports may also be extended to applicants now residing abroad.
73. That applicants are provided with information regarding all steps involved in processing a disregard and are informed of the outcome of their application in writing.
74. That a decision to refuse an application is accompanied by the reasons for the proposed refusal, a copy of the information or document the decision maker is relying on to support the proposed refusal and a statement explaining the applicant’s right to review/appeal.
75. That should An Garda Síochána National Vetting Bureau become aware of a relevant conviction while processing an individual’s request for Garda Vetting that they inform the applicant of the scheme should they wish to avail of it, and that the scheme is signposted on all relevant webpages and information documents including those related to Garda Vetting and Spent Convictions.

Apology

76. That the State apology is reiterated upon launch of the disregard scheme to increase public awareness of the State apology.
77. That the State consider what further steps could be taken to recognise and address the wider impact of criminalisation upon affected men and the wider LGBTQI+ community.

78. That individualised letters of apology from the Minister for Justice are provided to successful applicants to a disregard scheme.

79. That a formal and standardised certificate is issued to successful applicants confirming the disregard of the conviction and the effect of this disregard.

80. That the Department of Justice engage with other relevant justice sector agencies involved in the criminalisation and prosecution of affected men to see if there is scope for further acknowledgement of the harm experienced by these men.

Human Rights Considerations

81. That any scheme is underpinned by the following human rights and equality considerations:

- the right to access to justice
- 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,
- the right to redress, transparency, fair procedures, accountability, accessibility and participation.
- the right to access relevant information concerning violations and any reparation mechanisms
- the principle of proportionality
- respect for the principle of consent in sexual activity and protection of underage persons from exploitation
- guarantee of non-repetition

82. That the State considers any other obligations to which the State is subject under the Constitution, domestic law, and binding international and regional human rights treaties ratified by the State in relation to this matter.

83. That particular consideration is placed on how such rights manifest for older persons.

84. That applicants may have access to their personal records as held by agencies of the State and receive copies of reports and recommendations in relation to their personal application subject to any GDPR requirements.

85. That following the publication of draft proposals for a disregard scheme or legislation, that the Minister engage with the Irish Human Rights and Equality Commission regarding the human rights and equality dimensions of the proposed scheme

Other Considerations

Restorative Justice

86. That a disregard scheme is clearly situated within a wider whole of government approach to recognising and addressing stigma, discrimination, violence and marginalisation experienced by LGBTQI+ people in Ireland both historically and in the present day.

Other Jurisdictions

87. That existing schemes from other jurisdictions are examined in conjunction with the final report of the Working Group, to inform the proposals for a disregard scheme and any related legislative drafting process.

Time Limit

88. That submission of an application is acknowledged within two weeks.
89. That applications are processed in a timely manner e.g. within three months.
90. This time limit should begin once the Department of Justice receives the complete application rather than when a prospective applicant first makes contact.
91. That this period can be extended by, for example, four weeks, via notification in writing to the applicant if, for example, there are a lot of documents to consider. It cannot be extended beyond this period except for in the most extenuating of circumstances which must be detailed in writing.
92. That applicants are informed of the outcome of their application as soon as is reasonably practicable

Transgender Applicants

93. That the scheme is accessible to transgender and non-binary people who may have been prosecuted or convicted by the relevant criminalising provisions.
94. That the language of any legislation, application forms and supporting information documents consider and are inclusive of any transgender people who may have been prosecuted or convicted by the relevant criminalising provisions.
95. That there is direct consultation with rights-holders and organisations that work with transgender people in the development of application forms and supporting information to ensure they are fit for purpose in this regard.

Appendices

Appendix 1: Effect on Records across relevant jurisdictions

Jurisdiction	***Effect on Records***
England & Wales	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. **Protection of Freedoms Act 2012, c.4. s 95**
Scotland	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. **Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018 s 10.**
Canada	Judicial records of the conviction must be destroyed or removed from repositories or systems. **Expungement of Historically Unjust Convictions Act S.C. 2018, c 11**
New Zealand	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. **Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018 s 9(7) 11-12** 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, **Criminal Records (Clean Slate) Act 2004, s 4**
New South Wales	Does not detail how records are managed, but destruction of records is not authorised. **Criminal Records Amendment (Historical Homosexual Offences) Act 2014 No 69 19F**
Queensland	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. **Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 pt 3, 28**
South Australia	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. **Spent Convictions (Decriminalised Offences) Amendment Act 2013 No 88, s 6**
Tasmania	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. **Expungement of Historical Offences Bill 2017 pt 3, s 14**
Victoria	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. **The Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 pt 2 s 3**
Western Australia	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. **Historical Homosexual Convictions Expungement Act 2018 pt 3, 13**
Australian Capital Territory	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. **Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Bill 2015 s 8, 19I**
Northern Territories	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. **Expungement of Historical Homosexual Offence Records Act 2018 pt 2, 19**

Appendix 2: Overview of appeals and review processes in other jurisdictions

Southern Australia	No appeals or review provided for in the Act
New South Wales	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	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. 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.
Queensland	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. 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.
Western Australia	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. The applicant can then apply, within 28 days of the notice to the State Administrative Tribunal for a review of the decision.
Northern Territory	Following a refusal the applicant must be notified of intent to refuse and can make a further submission within 28 days. If they remain unhappy they can have their application reviewed by the Northern Territory Civil and Administrative Tribunal.
Canada	No appeals or review provided for in the Act
England & Wales	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. 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.
Scotland	Applicants can contact the Criminal Law & Practice Team to have their application reviewed.

	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.
New Zealand	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.
Spain	This is a more general scheme applying to convictions during the period of the Franco dictatorship and Civil War. Under the Law of Historical Memory 2007 recognition was automatic for affected persons including those criminalised due to their sexual orientation. However, under Article 4 affected persons and representatives could apply for a Declaration of Reparation and Individual Recognition. This law was repealed and replaced by the Law of Democratic Memory in October 2022 and though the automatic process remains, and much of the provisions were carried over or expanded many of the processes, which relate to the wider remit of the law as a whole and are not limited to convictions (e.g. addressing forced disappearances) have yet to be defined and implemented. Under Article 57 a Council of Democratic Memory will be established which will be made up of representatives of the General State Administration, those from relevant bodies and experts in the field. The Council will inform the proposals of regulatory provisions related to the development of this law and will prepare at the proposal of the presidency or on its own initiative, reports and recommendations on the policy of democratic memory. Currently no dedicated review/appeal process is provided for under the Law of Democratic Memory in relation to the provision of a Declaration of Reparation and Individual Recognition.
Germany	All relevant convictions are repealed automatically under law (Act on the repeal of National Socialist Injustice in the Criminal Justice System ("NS-AufhG") 1998; Act on the Criminal Rehabilitation of Persons Convicted of Consensual Homosexual Acts after 8 May 1945 ("StrRehaHomG") 2017 and Law on the Rehabilitation of Soldiers discriminatws against under service law for consensual Homosexual Acts, on the grounds of their sexual orientation or gender identity ("SoldRehaHomG") 2021. However, persons may apply to the Public Prosecutor's Office who will determine if a conviction is set aside and issue a certificate in this regard. If it is determined that a conviction is set aside, the Public Prosecutor's Office will write to the Federal Central Register to delete the relevant entry. A rehabilitation certificate may also be withdrawn and the Federal Central Registry informed and the entry reinstated. Disputes in relation to these acts are subject to administrative recourse. In Germany disputes under administrative law are generally assigned to special administrative courts which decide on disputes concerning administrative legal processes. Administrative recourse is available in all public law disputes of a non-constitutional nature for which there is no separate allocation (Code of Administrative Court Procedure ("VwGO") 1991.

Appendix 3: 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	Spent Convictions (Decriminalised Offences) Amendment Act 2013 (SA) amended the Spent Convictions Act 2009 (SA)	Apply to the Magistrate
New South Wales[40]	Criminal Records Amendment (Historical Homosexual Offences) Act 2014 (NSW) amended the Criminal Records Act 1991 (NSW)	Administrative
Victoria	Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 (Vic) amended the Sentencing Act 1991	Administrative
Australian Capital Territory	Historical Homosexual Convictions Extinguishment Amendment Act 2015 (ACT) amended the Spent Convictions Act 2000 (ACT)	Administrative
Tasmania	Expungement of Historical Offences Act 2017 (Tas)	Administrative
Queensland	Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 (Qld)	Administrative
Western Australia	Historical Homosexual Convictions Expungement Act 2018 (WA)	Administrative
Northern Territory	Expungement of Historical Homosexual Offence Records Act 2018 (NT)	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

[40] 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.

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.[41]

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.[42]

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'.[43]

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.[44]

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

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[41] Allen George (2019), 'Sex offenders no more: Historical homosexual offences expungement legislation in Australia.' *Alternative Law Journal*; 44(4):297-301.
[42] 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.
[43] Sentencing Act 1991 (Vic) s 105, as amended by the Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 (Vic).
[44] Melanie Bartlett & Taya Ketelaar-Jones (2020), 'Tasmania: Independent Review of Expungement of Historical Offences Act 2017'.

law of Queensland at the time of the application; and 'another person could only have witnessed the behaviour if they took some form of ''abnormal or unusual action'' (e.g. looking under the door of a cubicle in a public toilet).'[45] 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.[46] 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, and/or (iii) de-identify the information contained in

[45] Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 (QLD), s 18 (2A), s 19 (2A).
[46] 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).

the entry and destroy any link between it and information that would identify the person to whom it referred.[47]

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.

[47] Sentencing Act 1991 (Vic) s 105, as amended by the Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 (Vic). s 3 105K (3).

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. In February 2023 this Act was expanded to expand the list of offences to include ‘indecent acts’ which occurred in a ‘bawdy-house’ as well as abortion related offences that allow women and abortion providers to have their convictions related to having or assisting in an abortion disregarded.[48]

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.
- Offences relating to a common bawdy-house
- The offence of doing an indecent act
- The offence of publicly exhibiting a disgusting object or an indecent show
- The offence of openly exposing or exhibiting an indecent exhibition in a public place
- The offences relating to an immoral, indecent or obscene play, opera, concert, acrobatic, variety or vaudeville performance, performance, entertainment or representation in a theatre

[48] Criteria Related to Certain Offences Listed in the Schedule to the Expungement of Historically Unjust Convictions Act, Order Establishing (SOR/2023-29) (Canada)

- Offences relating to nudity
- The offence of procuring a miscarriage of a woman or female person
- The offence of a pregnant woman or female person procuring her own miscarriage
- Offences relating to a means or method for preventing conception or causing an abortion or miscarriage
- The offence of supplying or procuring any drug or other noxious thing, instrument or thing, to procure a miscarriage of a woman or a female person

The amended Schedule for the Expungement of Historically Unjust Convictions Act provides a list of the specific sections of Acts that relate to the above listed offences.[49]

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. [50]

However, as of March 2023 this approach has reportedly resulted in only 70 applications to date of which only nine have resulted in the expungement of convictions.[51]

Key criticisms against the Canadian process included

- Lack of promotion

[49] Expungement of Historically Unjust Convictions Act (S.C. 2018, c. 11), Schedule.
[50] Steven Maynard, 'Trudeau's apology to LGBT public servants is straightforward. Expunging criminal convictions is not' *CBC News* (28 November 2017)
[51]Steven Maynard (2021);Steven Maynard et al. 'Sex Workers are left out in the cold in Ottawas unjust conviction amendments', *The Conversation*, (20 March 2023), available at: https://theconversation.com/sex-workers-are-left-out-in-the-cold-by-ottawas-unjust-conviction-amendments-201810

- 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 were only recently added to the schedule. It is hoped this will increase access, however, activity that occurred in public parks or toilets is not included and the vast majority of indecency convictions stem from police surveillance of public parks and washrooms.

Appendix 5: Overview of the Process in England and Wales

Under provisions in the Protection of Freedoms Act 2012, men with historical convictions for consensual gay sex may apply to the Home Office to have their convictions disregarded (i.e. deleted, or where not possible, annotated) and pardoned.

The offences covered by the legislation are offences under Sections 12 (buggery) and Section 3 (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 be considered.

Originally the 2012 Act applied only to a list of nine former offences largely centred around the now repealed offences of gross indecency and bugger. Under the Police, Crime, Sentencing and Courts Act 2022. This scheme was expanded to include any repealed or abolished civilian or military offence that was imposed on a man solely because of consensual sexual activity with another man.[52]

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 October 2022) are as follows[53]

Total number of applicants	522
Total number of convictions considered	785* Some applicants have more than one conviction
Number of eligible convictions	208
Number awaiting a decision	8

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 and postal applications can be address to 'Chapter 4 Applications'.[54]

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 will not be accepted. However, via the 2022 amendment to the Police, Crime, Sentencing and Courts Act

[52] Police, Crime, Sentencing and Courts Act 2022, Part 12, Ss. 194-195.
[53] UK Home Office, *Transparency Date: Statistics on the Disregard and Pardon for historical gay sexual convictions* (17 November 2022), available at, https://www.gov.uk/government/publications/statistics-on-the-disregard-and-pardon-for-historical-gay-sexual-convictions/statistics-on-disregards-and-pardons-for-historical-gay-sexual-convictions
[54] UK Government, *Delete a Historic Conviction*, available at: https://www.gov.uk/delete-historic-conviction

2022 those who have died prior to the amendment coming into force, and within 12 months after the amendment coming into force, will be posthumously pardoned.

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.

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 is 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 your 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.

According to the most recently updated statistics relating to the scheme, no appeals have been granted to date.

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 need not disclose it 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 6: Overview of the Process in Germany

An overview of the historical context and current disregard process in Germany is provided below. The disregard process in Germany emerged from a distinct historical context and the German legal system operates a civil law system that is distinct from the common law system in Ireland.

The legal context in Germany

The *Strafgesetzbuch für das Deutsche Reich 1871 (StGB)* [Criminal Code for the German Empire (1871)] introduced Paragraph 175 which criminalised sexual acts between men as an offence against morality.[55] This paragraph would endure in different forms in the German Criminal Code under the German Empire (1871–1918), the Weimar Republic (1918–1933), the Nazi regime (1933–1945), and continued into the post-war era until 1994 when it was repealed by the German Bundestag.[56]

The 1871 version of Paragraph 175 criminalised sexual acts or 'fornication' between men and bestiality in the same provision. Punishment for sexual acts with men under this provision included imprisonment and loss of civil rights.[57] This version endured until 1935 when it was replaced under the Nazi regime who broadened it and made it more punitive. This new version of paragraph 175 retained criminalisation of sexual acts between men, without inclusion of bestiality in the same section, and provided for punishment to be waived for persons under 21 in cases that were seen as light. [58] Following World War II, the young Federal Republic of Germany adopted the stricter version of Section 175 of the Criminal Code (StGB), as amended by the Nazis. This version retained the same provisions as the 1935 version but set a punishment up to five years imprisonment and also included reference to those who engaged in sexual acts for commercial purposes and who abused positions of authority to engage in sexual acts with other men.[59] While the German Democratic

[55] The German Crimina Code was regularly amended from 1871 onwards. The 1871 version contained the following language: '*Die widernatürliche Unzucht, welche zwischen Personen männlichen Geschlechts oder von Menschen mit Thieren begangen wird, ist mit Gefängniß zu bestrafen; auch kann auf Verlust der bürgerlichen Ehrenrechte erkannt warden.'* [The Unnatural fornication committed between males or between humans and animals is punishable by imprisonment; loss of civil rights can also be recognized] *Strafgesetzbuch für das Deutsche Reich vom 15. Mai 1871* [Criminal Code for the German Empire of the 15 May 1871], paragraph 175.

[56] Holocaust Encyclopaedia, *What was paragraph 145*, available at: https://encyclopedia.ushmm.org/content/en/article/paragraph-175-and-the-nazi-campaign-against-homosexuality

[57] '*Die widernatürliche Unzucht, welche zwischen Personen männlichen Geschlechts oder von Menschen mit Thieren begangen wird, ist mit Gefängniß zu bestrafen; auch kann auf Verlust der bürgerlichen Ehrenrechte erkannt warden.'* [The Unnatural fornication committed between males or between humans and animals is punishable by imprisonment; loss of civil rights can also be recognized], para. 175.

[58] ' *(1) Ein Mann, der mit einem anderen Mann Unzucht treibt oder sich von ihm zur Unzucht mißbrauchen läßt, wird mit Gefängnis bestraft. (2) Bei einem Beteiligten, der zur Zeit der Tat noch nicht einundzwanzig Jahre alt war, kann das Gericht in besonders leichten Fällen von Strafe absehen.'* [(1) A man who commits fornication with another man or allows himself to be used by him for fornication shall be punished with imprisonment. (2) In the case of a participant who was not yet twenty-one years old at the time of the act, the court may waive punishment in particularly light cases.] StGB 1935, Art. 6 Nr. 1, 14 des Gesetzes of 28 Juni 1935, para. 175.

[59] *'(1) Mit Freiheitsstrafe bis zu fünf Jahren wird bestraft 2. ein Mann, der einen anderen Mann unter Mißbrauch einer durch ein Dienst-, Arbeits- oder Unterordnungsverhältnis begründeten Abhängigkeit bestimmt, mit ihm Unzucht zu treiben oder sich von ihm zur Unzucht mißbrauchen zu lassen, 3. ein Mann, der gewerbsmäßig mit Männern Unzucht treibt oder von Männern sich zur Unzucht mißbrauchen läßt oder sich*

Republic (DDR) reinstated the provision as it applied before 1935. As a consequence, many of the men who were interned because of their sexuality and then liberated from concentration camps after the war were returned to prison in order to serve out the rest of their sentences. The repression of these men continued unchanged until 1969 in the Federal Republic of Germany and in 1969 in the DDR when both introduced more restricted versions of the provisions. The Federal Republic of Germany would amend this provision once more in 1973 to apply only to male persons over the age of 18 who engaged in sexual activity with a male under the age of 18. Punishment would not apply if the offender was under 21 or the offence was considered minor in nature. This was despite the age of consent for heterosexual sexual activity being set at 14 years of age. The DDR would abolish the relevant provision following a ruling by the constitutional court after which sexual activity between men was treated in the same manner as heterosexual sexual activity. Following the fall of the Berlin Wall in 1989 and reunification of the East Berlin (DDR) and West Berlin in 1990, the laws of the Federal Republic of Germany now also applied in East Berlin. It was not until 1994 that the remaining criminal provision of the Federal Republic of Germany was abolished.

The disregard process in Germany

The 1998 Act to Annul Unlawful Criminal Verdicts of the National-Socialists automatically annulled all judgements which were made after 30 January 1933 to enforce or maintain the ideology of the Nazi regime. This included judgements made based on a list of applicable laws as well as on a case by case basis. However, Section 175 was not explicitly included in this list and so required an individual application. A 2002 amendment to the Act explicitly provided for the annulment of convictions for consensual sexual acts between men between 1933 and 1945 during the Nazi era.[60]

The 2017 Act to Criminally Rehabilitate Persons Who Have Been Convicted of Performing Consensual Homosexual Acts After May 8, 1945 and to Amend the Income Tax Act automatically annulled the criminal convictions of men convicted for consensual homosexual acts in the Federal Republic of Germany and in the former German Democratic Republic (East Germany) after 8 May 1945. [61] This Act provided for the inclusion of convictions after the National Socialist era.

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dazu anbietet. (2) In den Fällen des Absatzes 1 Nr. 2 ist der Versuch strafbar. (3) Bei einem Beteiligten, der zur Zeit der Tat noch nicht einundzwanzig Jahre alt war, kann das Gericht von Strafe absehen." [(1) The penalty is imprisonment for up to five years 1. a man over the age of eighteen who commits fornication with another man under the age of twenty-one or allows himself to be used by him for the purpose of fornication, 2. a man who, by abusing a relationship based on a relationship of service, work or subordination, induces another man to commit fornication with him or to allow himself to be abused for fornication by him, 3. a man who engages in fornication with men for commercial gain or allows himself to be used by men for fornication or offers to do so. (2) In the cases of paragraph 1 number 2, the attempt is punishable. (3) In the case of a participant who was not yet twenty-one years old at the time of the act, the court may dispense with punishment.], There was a short lived version of this paragraph from 1 September 1969 – 1 April 1970 which did not explicitly state the duration of imprisonment as up to five years. 1 September 1969, Art. 106 para. 1 no. 2, 105 no. 1 letter b of the law of June 25, 196, available at: https://lexetius.com/StGB/175,5

[60] Gesetz zur Aufhebung nationalsozialistischer Unrechtsurteile in der Strafrechtspflege (NS-AufhG) vom 25. August 1998 (BGBl. I S. 2501), das zuletzt durch Artikel 1 des Gesetzes vom 24. September 2009 (BGBl. I S. 3150) geändert worden is

[61] *Nutzung des Bundesgesetzblatt, Teil 1* (2017), *Nr. 48 vom* 21.07.2017 (German Federal Law Gazette Online, Part I (2017)No. 48 of 07/21/2017, available at: https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl117s2443.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl117s2443.pdf%27%5D__1672243442367

The 2021 Act on the Rehabilitation and Compensation of Soldiers Discriminated Against in Service Law on the grounds of Consensual Homosexual Acts, on the grounds of their homosexual orientation or on the grounds of their gender identity was introduced, which repealed military service court verdicts related to consensual homosexual acts issued before 3 July 2000.[62]

The effect of a disregard

Under the relevant acts, convictions are automatically annulled by law. However, an individual or a representative can request confirmation that their criminal record has been set aside and the prosecutor's office will issue a certificate that this record has been 'rehabilitated' (German: Rehabilitierung).

If the affected person is deceased, the process allows for designated representatives to submit a posthumous request to the prosecutor's officer for a certificate stating that the convicted person has been criminally rehabilitated. Under this provision, a person's registered life partner or spouse, his fiancé, his parents, his children or his siblings may submit a request for this certificate.[63]

The effect on records

When a relevant conviction is set aside and a certificate is issued, the entry into the Federal Central Registry of Germany (*Bundeszentralregister*) is deleted.

Compensation

The 2017 Act to Criminally Rehabilitate Persons Who Have Been Convicted of Performing Consensual Homosexual Acts After May 8, 1945 and to Amend the Income Tax Act, provides for the the payment of compensation to persons who after May 8, 1945 who were prosecuted or sentenced for consensual sexual activity with other men.

The 2019 Guideline regarding the payment of compensation to people affected by the criminal prohibition of consensual homosexual activities by the German Ministry of Justice provided for compensarion for people convicted under criminalising laws. In order to access this compensation the person has to submit a request for compensation to the Federal Office of Justice up until July 21, 2027. The compensation request must be submitted by the person who was convicted. A person who was convicted under these laws is entitled to receive €3000 per annulled convictions as well as €1,500 for each started year spending in prison.[64] The Guidelines also provides for compensation in the event of preliminary investigations , detention on remand or other temporary measures involving deprivation of liberty as well as when exceptionally negative impairments occurred outside of criminal prosecution as a result of the existence of criminal provisions (i.e. in the case of exceptional professional, economic, health or other comparable disadvantages).[65]

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[62] *Gesetz zur Rehabilitierung der wegen einvernehmlicher homosexueller Handlungen, wegen ihrer homosexuellen Orientierung oder wegen ihrer geschlechtlichen Identität dienstrechtlich benachteiligten Soldatinnen und Soldaten*

[63] § 3, para.3

[64] *Richtlinie zur Zahlung von Entschädigungen für Betroffene des strafrechtlichen Verbots einvernehmlicher homosexueller Handlungen aus dem Bundeshaushalt*

[65] *Bundessamt fur justiz, Entschädigung nach dem StrRehaHomG und der Richtlinie* [Compensation according to the StrRehaHomG and the guidelines], available at: https://www.bundesjustizamt.de/DE/Themen/Entschaedigung/Homosexualitaet/Homosexualitaet_node.html

Appendix 7: 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.[66] 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.[67]

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.

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.

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[66] 'Nicola Sturgeon makes gay convictions apology' (*BBC News*, 7 November 2017).
[67] Scottish Government (2019) *Guidance to Applicants*.

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 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 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 8: Overview of the Process in Spain

Spain operates a civil law legal system based upon comprehensive legal codes and laws rooted in Roman Law, unlike Ireland which operates a common law legal system based on judicial precedents.[68] The legal framework criminalising consensual sex between men in Spain is also more complex than in Ireland due to the specific historical context in Spain including periods of dictatorship, civil war and democratic transition in the 20th century.

The legal context in Spain

The first Criminal Code of the Kingdom of Spain which was enacted in 1822 decriminalised 'sodomy' and as a result the provision criminalising sexual activity between men.[69] This 1822 code was short lived and was abrogated in 1823.[70] From 1823 to the promulgation of the next criminal code in 1848 criminalisation was reinstated under the rule of King Ferdinand VII of Spain. Decriminalisation occurred once more under the Criminal Code of 1848 and was not re-enacted in the subsequent Criminal Codes of 1850, and 1870. It was not until the Criminal Code of 1928 that sexual activity between men was recriminalized during the dictatorship of Miquel Primo de Rivera (1923-1930).

The Criminal Code of 1928 reintroduced criminalisation of consensual sexual activity between men.[71] Under Article 616, a person who 'habitually' or with 'scandal' commits acts contrary to 'modesty' with a person of the same sex may be punished with a fine and prohibition on performing any public position from six to twelve years. [72] The 1928 Code was replaced under the rule of the Second Spanish Republic (1931-1939) by the Criminal Code of 1932. The Criminal Code of 1932 did not contain provisions directly criminalising consensual sexual activity between men, but the Spanish courts did continue to punish such activity under Article 33 with fines, disqualification from holding public office and also with imprisonment indirectly on the grounds of 'offending modesty' or 'good customs' with acts of 'serious scandal or importance' not covered elsewhere in the code.[73]

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[68]Antonio Tapia and Amalia del Campo,' Legal System in Spain: Overview', *Thompson Reuters Practical Law*, 1 Feb 2018 available at: https://uk.practicallaw.thomsonreuters.com/7-634-0207?transitionType=Default&contextData=(sc.Default)&firstPage=true

[69] The crime of 'sodomy' was specifically named as a crime under the Ancient Regime in the *Novísima Recopilación de las Leyes de España* [Latest Compilation of Laws in Spain] of 1805, Law 1, Title XXX, Book XII, pp. 427-428, available at: https://www.boe.es/biblioteca_juridica/abrir_pdf.php?id=PUB-LH-1993-63_5

[70] The 1822 Criminal Code was published at the end of the rule of the 'Liberal Triennium', three years of rule under a liberal government, before the return of absolutist rule under King Ferdinand VII of Spain restoring the criminal law of the *Ancien Regime*. Cleminson, RM and Vazquez Garcia, F (2007) "Los Invisibles": a history of male homosexuality in Spain, 1850-193*9*.' *Iberian and Latin American Studies*. p.34.

[71] The laws referred to in this section generally applied to 'persons of the same-sex' but in practice men and transgender women were punished under these laws.

[72] '*El que, habitualmente o con escándalo, cometiere actos contrarios al pudor con personas del mismo sexo será castigado con multa de 1000 a 10.000 pesetas e inhabilitación especial para cargos públicos de seis a doce años'* [Whoever habitually or with scandal, commits acts against modesty with persons of the same sex will be submitted to a fine of 1,000 to 10,000 pesetas and will not be allowed to perform any kind of public role for six to twelve years]. *Código Penal 1928* [Criminal Code of Spain 1928], *Gaceta de Madrid* [Madrid Gazette]. Number 257, Chapter 3, Section 2, p. 1460, available at: https://www.boe.es/datos/pdfs/BOE/1928/257/A01450-01526.pdf).

[73] '*Arresto mayor'* means imprisonment from one month and a day to six months. '*Incurrirán en las penas de arresto mayor, multa de 500 a 5.000 pesetas e inhabilitación para cargos públicos: 1 Los que de cualquier modo; ofendan al pudor o a las buenas costumbres con hechos de grave escándalo o trascendencia, no*

The Criminal Code of 1932 was once more replaced by the Criminal Code of 1944 during the dictatorship of Francisco Franco (1939-1975). This code criminalised consensual sex between men in a similarly indirect manner to the Criminal Code of 1928 as 'offences of public scandal' and applied punishments of fines, disqualification from holding public office and also imprisonment under Article 431.[74] Later the Supreme Court of Spain would only deem consensual activities between men a criminal offence when there was a 'public scandal' i.e. when offences were conducted in a crowded public space, but this appears to have been a later interpretation.[75]

Under the Franco regime other laws were amended or enacted to persecute homosexuality and gay and bisexual men were subjected to repression, violence, and murder.[76] Such provisions included the *Ley de vagos y maleantes* [Law of Vagrants and Crooks] of 1933 which was amended in 1954 to specifically include the category of homosexuals so that they may be interred in forced labour concentration camps or in special institutions were they were kept separate from other internees.[77] Specific forced labour 're-education' camps existed in Huelva, Badajoz and Fuerteventura.[78] Prior to this modification, this law may have been used in practice to persecute consensual sexual activity between men as an 'anti-social' activity. However, this occurred in earnest following the Spanish Civil War under the Franco regime. This law did not include penalties, but measures of removal,

comprendidos expresamente en otros artículos de este Código' [They will incur the penalties of major arrest (imprisonment from one month and a day to six months), a fine of 500 to 5,000 pesetas and disqualification from public office: 1 Those who in any way; offend modesty or good customs with acts of serious scandal or importance, not expressly included in other articles of this Code],Criminal Code of Spain 1928, Art. 433.

[74] *'Incurrirán en las penas de arresto mayor, multa de 1.000 a 5.000 pesetas e inhabilitación especial: 1 Los que de cualquier modo ofendan a pudor o a las buenas costumbres con hechos de grave escándalo o trascendencia.'* [They will incur the penalties of major arrest, a fine of 1,000 to 5,000 pesetas and special disqualification:1 Those who in any way offend modesty or good customs with acts of serious scandal or importance], *Código Penal* 1933 [Criminal Code of Spain 1933], Art. 431. *Boletín Oficial del Estado* (B.O. E) [Official State Bulletin] Number 13, Title 9, Chapter 2, p. 459, available at: https://www.boe.es/datos/pdfs/BOE/1945/013/A00427-00472.pdf

[75]See: Judgment 750/1985 issued by the Spanish Supreme Court on 13 May 1985. For more information see: Gay Project (2022) *Disregard campaign and Expungement: Survey on Expungement Legislation for Spain*, available at: https://gayproject.ie/special-projects/expungement/

[76] Arturo Arnalte (2003) *Redada de violetas: la represión de los homosexuales durante el franquismo*, (Madrid: Esfera de los Libros), 90-1.

[77] *'A los homosexuales, rufianes y proxenetas, a los mendigos profesionales y a los que vivan de la mendicidad ajena, exploten menores de edad, enfermos mentales o lisiados, se les aplicarán, para que las cumplan todas sucesivamente, las medidas siguientes: a) Internado en un establecimiento de trabajo o Colonia Agrícola. Los homosexuales sometidos a esta medida de seguridad deberán ser internados en Instituciones especiales, y en todo caso, con absoluta separación de losdemás. b) Prohibición de residir en determinado lugar o territorio y obligación de declarar su domicilio. c) Sumisión a la vigilancia de los Delegados'* [Homosexuals, ruffians and procurers, professional beggars and those who live on the begging of others, exploit minors, the mentally ill or the disabled, will be applied, so that they all comply successively, the following measures: a) Interned in a work establishment or Agricultural Colony. Homosexuals subjected to this security measure must be admitted to special institutions, and in any case, with absolute separation from others. b) Prohibition of residing in a certain place or territory and obligation to declare their domicile. c) Submission to the surveillance of the delegates.] *Ley de 15 de julio de 1954 por la que se modifican los articulos 2ª y 6ª de la Ley de Vagos y Maleantes, de 4 de agosto de 1933,* B.O.E. Number 198, Art 6; Los Delgados were State agents who supervised behaviour after release. See: Javier Fernández Galeano (2016) "Is He a "Social Danger"?: The Franco Regime's Judicial Prosecution of Homosexuality in Málaga under the Ley de Vagos y Maleantes." *Journal of the History of Sexuality* 25 (1), pp. 1-31.

[78] Luca Gaetano Pira, 'Outlawed queers: A cultural history of the Spanish Pink Triangles', *Archer Magazine*, 13 July 2013, available at: https://archermagazine.com.au/2018/07/outlawed-queers-spanish-pink-triangles/

control and retention of allegedly dangerous individuals until it was deemed that they no longer posed any 'danger' to society following 're-education'.

The *Ley de Peligrosidad y Rehabilitación Social* [Law of Dangerousness and Social Rehabilitation] of 1970 replaced the amended 1954 Law with a focus on those the regime considered socially dangerous, including 'those who perform acts of homosexuality'. [79] This law established penalties including fines and imprisonment in prison or in psychiatric centres.[80] It also provided for the creation of new specialised establishments for the internment of persons categorised as dangerous including men who engaged in same-sex relationships or sexual activity.[81] As a result specialised prisons for these men were established in Huelva in Andalucía and in Badajoz in Extremadura with a focus on 'curing' homosexuality through harmful aversion therapies.[82]

Following the death of Franco and the end of the dictatorship in 1975, this law remained in force during the Spanish transition until January 1979 when the Law of Dangerousness and Social Rehabilitation was reformed to remove reference to homosexuality.[83] However, the provisions

[79] '*Son supuestos del estado peligroso los siguientes:Primero. Los vagos habituales. segundo. Los rufianes y proxenetas. Tercero. Los que realicen .actos de homosexualidad. Cuarto. Los que habitualmente ejerzan la prostitución. Quinto. Los que promuevan o fomenten el tráfico, comercio o exhibición de cualquier material pornográfico o hagan su apología.'* [The following are assumptions of the dangerous state: First. The habitual vagrant.Second. Ruffians and procurers. Third. Those who perform acts of homosexuality. Four. Those who habitually engage in prostitution. Fifth. Those who promote or encourage the traffic, trade or display of any pornographic material or make their apology. *Ley 16/1970*, *de 4 de agosto, sobre peligrosidad y rehabilitación social* [Law 19/1970 of 4 August, on dangerousness and social rehabilitation] B.O.E. Number 197, Chapter 1, p. 12553, available at: https://www.boe.es/boe/dias/1970/08/06/pdfs/A12551-12557.pdf.

[80] *'A los que realicen actos de homosexualidad y a las que habitualmente ejerzan la prostitución se les impondran, para su cumplimiento sucesivo, las siguientes medidas: a) Internamif'nto en un establecimiento de reeducación. b) Prohibición de residir en el lugar o territorio que se designe o de visitar ciertos lugares o establecimientos públieos y sumisión a la vigilancia de los delegados.'* [Those who perform acts of homosexuality and those who habitually engage in prostitution will be imposed, for their successive fulfilment, the following measures: a) Internment in a re-education establishment. b) Prohibition of residing in the place or territory that is appointed or visit certain places or public establishments and submission to the surveillance of the delegates.], *Ley 16/1970* , B.O.E. Number 197 Chapter 3, Third, p.12553.

[81] '*Finalmente, la Ley se preocupa de la creación de nuevos establecimientos especialízados donde se cumplan las medidas de seguridad, ampliando los de la anterior legislación con los nuevos de reeducación para quienes realicen actos de homosexualidad, ejerzan la prostitución y para los menores así como los de preservación para enfermos mentales; estabiecimientos que, dotados del personal idóneo necesario, garantizarán la reforma y rehabilitación social del peligroso, con medios de la más depurada técnica y mediante la intervención activa y precisa de la autoridad judicial especializada. Estos son los fines humanos y sociales que persigue la Ley, no limitados a una pragmática defensa de la sociedad, sino con los propósitos ambiciosos de servir por los medios más eficaces a la plena reintegración de los hombres y de las mujeres que, voluntariamente o no hayan podigo quedar marginados de una vida ordenada y norma*l.' [Finally, the Law is concerned with the creation of new specialised establishments where security measures are complied with, expanding those of the previous legislation with the new ones for re-education for those who perform acts of homosexuality, engage in prostitution and with minors, as well as those for preservation for the mentally ill; establishments that, equipped with the necessary suitable personnel, will guarantee the reform and social rehabilitation of the dangerous, with use of the most refined techniques and through the active and precise interventions of the specialised judicial authority. These are the human and social purposes pursued by the Law, not limited to a pragmatic defence of society, but with the ambitious purposes of serving, by the most effective means, the full reintegration of men and women who, voluntarily or not, have been able to remain marginalized from an orderly and normal life.] Ley 16/1970, B.O.E. Number 197,Preamble, p. 12252.

[82] Luca Gaetano Pira (2013).

[83]*Ley 77/1978, de 26 de diciembre, de modificación de la Ley de Peligrosidad y Rehabilitación Social y de su Reglamento* [Law 77/1978 of 26 December, modification of the law of dangerousness and social rehabilitation

against 'public scandal' in the 1944 code would not be repealed until 1989.[84] Additionally, the Spanish Military Act of 1945 punished sexual activity between men within the Army. This was not repealed until 1985.[85]

The disregard process in Spain

In Spain, no dedicated disregard scheme for convictions for consensual sexual activity between men is in operation. There was a scheme under the Ley de Memoria Histórica (Historical Memory) which was targeted toward and restricted to persecution during the Civil War (1936-1939) and subsequent dictatorship (1939-1975).[86] This law broadly covered all convictions, punishments or other forms of personal violence that took place due to political, ideological or religious belief, during this period and declares them to be completely unjust in nature and illegitimate. Article 2.2 of this law specifically recognises persecution that occurred as a result of sexual orientation.[87] Article 3 of this law also declared the tribunals, juries and bodies of any administrative nature created in violation of the right to due process illegitimate. This law was repealed by with effect from 21 October 2022 on enactment of the Law of Democratic Memory.[88]

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and its regulation] B.O.E. Number 10, available at: https://www.boe.es/buscar/doc.php?id=BOE-A-1979-700; Pichardo Galán, José Ignacio (2004) Same-sex couples in Spain. Historical, contextual and symbolic factors. Documents de Travail. Institut national d'études démographiques. (124). pp. 159-160.; the Law on Dangerousness and Social Rehabilitation would not be fully repealed until 23 November 1995 though as of 1986-1987 it was no longer applied in practice. See: Gay Project (2022).

[84] *Ley Orgánica 5/1988, de 9 de junio, sobre modificación de los artículos 431 y 432 y derogación de los artículos 239, 566.5º, 567.1.º y 3.º y 577.1.º del Código Penal* [Organic Law 5/1988 of 9 June, about the modification of articles 431 and 432 and repeal of articles 239, 566.5º, 567.1.º y 3.º y 577.1.º of the Penal Code] , B.O.E. 140, available at: https://www.boe.es/buscar/doc.php?id=BOE-A-1988-14327

[85] '*Ley de 17 de Julio de 1945 por la que se aprueba y promulga el Código de Justicia Militar*' [Law of the 17 July of 1945 by which the Code of Military Justice is approved and promulgated], B.O.E. 201, available at: https://www.boe.es/datos/pdfs/BOE/1945/201/A00472-00483.pdf

[86] *Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura* [Law 52/2007, December 26, which recognizes and expands the rights of, and establishes measures in favor of, those who endured persecution or violence during the Civil War and the Dictatorship.], B.O.E. 310, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2007-22296

[87] " *Las razones a que se refiere el apartado anterior incluyen la pertenencia, colaboración o relación con partidos políticos, sindicatos, organizaciones religiosas o militares, minorías étnicas, sociedades secretas, logias masónicas y grupos de resistencia, así como el ejercicio de conductas vinculadas con opciones culturales, lingüísticas o de orientación sexual*." [The reasons referred to above include the membership of or collaboration with political parties, unions, religious or military organizations, ethnic minorities, secret societies, masonic lodges and resistance groups, as well as conduct connected with cultural or linguistic choices or those of sexual orientation.] *Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura. (Ley de Memoria Histórica de España)* [Law 52/2007, of December 26, which recognizes and expands rights and establishes measures in favor of those who suffered persecution or violence during the civil war and the dictatorship. (Law of historical memory) B.O.E. 310, Art. 2 (1-2), 3.

[88] *Ley 20/2022, de 19 de octubre, de Memoria Democrática* [Law 20/2022, of 19 October on Democratic Memory]. B.O.E 252, sole repealing provision 2a, available at: BOE-A-2022-17099 Law 20/2022, of 19 October, on Democratic Memory.

The effect of a disregard

Under the Law of Historical Memory recognition was automatic but under Article 4 affected persons and representatives could apply for a Declaration of Reparation and Individual Recognition. Applications could also be submitted on behalf of a deceased person by spouses or persons with a similar emotional connection, their ascendants, descendants and collateral relatives to the second degree (e.g. siblings including half siblings, nieces, nephews, aunts, uncles). In addition, certain public institutions could apply on behalf of a person, with the prior agreement of their governing body, in respect of those who carried out a relevant office or activity within such institution but who did not have a spouse or a relative of the type referred to in the above.[89]

Article 4 also states that the Declaration of Reparation and Individual Recognition will be compatible with any other formula of restitution available in the legal system. However, it also states that it does not represent admission of liability by the State and does not constitute a right to claim compensation from the State, or a right to obtain economic compensation from the Administration.

The Law of Historical Memory 2007 was repealed and replaced by the Law of Democratic Memory published in October 2022. This law contains the same provisions as outlined above. The law also specifically expands the recognition to include those who suffered repression due to their sexual orientation as well as gender identity.[90] It also reiterated the illegitimacy of the prosecutions and sanctions that occurred during these periods and looks at wider issues of memorialisation in the Spanish context and contains.

The effect on records

The 2007 Law of Historical Memory did not provide for the retention or destruction of criminal records from the Spanish Civil War and subsequent dictatorship. The management of historical records in Spain is currently governed by Royal Decrees 1164/2002 and 937/2003. These decrees provide for the destruction of old records. However Article 1 of Royal Decree 1164/2002 provides control over the conservation and destruction of documents with historical value to the General State Administration and its public agencies. In practice records relating to the Vagrancy and Crooks Act and the Public Dangerousness and Social Rehabilitation Act were preserved due to their historical value and records are approached on a case-by-case basis. However, under the Ley Orgánica [Organic Law] 7/2021 relating to data protection, individuals have the rights to access their data and to rectify or delete records. [91] In 2000 an individual undertook legal action alleging a violation of his

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[89] This provision likely arose for those who had died while part of listed persecuted groups including political parties, unions, religious or military organizations, secret societies, Masonic lodges and resistance groups, See: Law 52/2007. Art. 2 (2).

[90] *'Las personas LGTBI que sufrieron represión por razón de su orientación o identidad sexual'* [LGBTI persons who suffered repression for reasons of their sexual orientatioin or gender identity], Law 20/2022, Art. 3 (1)f.

[91] *Ley Orgánica 7/2021 de 26 de mayo, de protección de datos personales tratados para fines de prevención, detección, investigación y enjuiciamiento de infracciones penales y de ejecución de sanciones penales* [Organic Law 7/2021 of 26 Mayo, on the protection of personal data processed for the purposes of prevention, detection, investigation and prosecution of criminal offenses and execution of criminal sanctions] B.O.E. 126, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2021-8806#:~:text=Ayuda-,Ley%20Org%C3%A1nica%207%2F2021%2C%20de%2026%20de%20mayo%2C%20de,de%2027%2F05%2F2021.

right to privacy, in order to have his criminal record for 'homosexuality' under these provisions deleted. The individual's complaint was upheld and the records were destroyed.[92]

The Law of Democratic Memory 2022 provides further detail on records management and specifically provides for the establishment of a Democratic Memory Archive and under Article 26 requires the acquisition, protection and dissemination of archive documents and other documents from the period of the Civil War and subsequent dictatorship. However the tenth additional provision governing personal data protection, notes that this law will be carried out in accordance with the provisions of the General Data Protection Regulation (EU) 2016/679 of the European Parliament and of the Council and Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights.[93] In the same provision the Law of Democratic Memory provides that the possibility of deletion the data is limited based on the public interest of this treatment, and in particular, the right of the victims and society in general, to guarantee the verification of the facts and the complete and public disclosure of the data.

Spent Convictions

Spain also operates a spent convictions scheme under Article 136 of the Spanish Criminal Code of 2005.[94] Under this provision, anyone who has a conviction for any crime has the right to ask the Ministry of Justice to delete their criminal records from the Central Register subject to the requirements that they have not reoffended for the following time periods:

(a) Six months for light sentences.

(b) Two years for sentences not exceeding twelve months and for reckless offences.

(c) Three years for the remaining less severe sentences of less than three years.

(d) Five years for the remaining less severe penalties equal to or greater than three years.

(e) Ten years for severe penalties.

However, according to Royal Decree 95/2009, a copy of deleted data is be kept but only available to the Spanish courts, though it cannot be used, published or transferred at any time. A version will also be kept for the purpose of preparing statistics though personal identifying information is removed information[95]

[92] For more information see: Gay Project (2022) Disregard campaign and Expungement: Survey on Expungement Legislation for Spain, available at: https://gayproject.ie/special-projects/expungement/, pp. 11-14.
[93] Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation); Law of Democratic Memory, Art. 26, Additional Provision 10.
[94] *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal* [Organic Law 10/1995, of 23 of November, Penal Code], Art. 136, available at: BOE-A-1995-25444 Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal.
[95] Article 19.3

However, the deletion of any criminal conviction under Article 135 does not provide recognition that the conviction was unjust and it also applies to acts that remain unlawful. The process only provides the opportunity for an individual to have a 'clean slate' to allow them to move on with their lives and only affects records in the Central Register. The effect of the deletion of criminal records is that the offence is treated as if it had never occurred and will not be disclosed for any purpose.

In order to avail of this applicants must fill an application form and can submit it in person, by post or online to the General Registry of the Ministry of Justice, or any authorised body. This application requests the name, parent's name, address, contact details, place of birth, national identification number and date. The Ministry of Justice also recommends including a copy of a sentence completion certificate in order to expedite the deletion procedure. There is a three month time limit on this process and if the Ministry of Justice has not formally issued a decision within three months following submission of the application, the application will be deemed as granted. [96]

Compensation

Neither the Law on Historical Memory nor the Spanish Criminal Code specifically provide for compensation for those prosecuted under provisions governing 'homosexuality'.[97] The Law of Historical Memory specifically states that right to obtain a declaration of reparation and individual recognition does not represent admission of liability by the State and does not constitute a right to claim compensation from the State, or a right to obtain economic compensation from the Administration.

However, within the context of the Law on Historical Memory, under the Spanish Budget of 2009 a Compensation Commission for Former Social Prisoners was established to deal with compensation claims made by former social prisoners of the Franco dictatorship.[98] As a result this budget provided for some limited compensation for persons interned due to their sexual orientation under the Law on Vagrants and Crooks Act 1954 and the Law on Dangerousness and Social Rehabilitation 1970. This provision provided compensation based on the period of time the individual was interned as follows:

- From one month to six months: €4,000
- From six months and one day to less than three years: €8,000
- Three years or more: €12,010.12.
- For each additional three full years from three years: €2,402.02

In the cases of deceased persons this compensation may be claimed by a spouse not legally separated or in the process of separation or marriage annulment or, where appropriate, the person who had been living with the beneficiary or beneficiary with a relationship of similar affect to that of

[96] Gay Project (2022) p.15.
[97] Compensation is provided specifically for in the Law on Historical Memory for those who died in defence of democracy as well as in certain other cases but no specific provision covering convictions for 'homosexuality' are included in the Law as drafted.
[98] '*La Comisión de indemnizaciones a ex presos sociales'* was established in March 2009 under the Ministry of Economy and Finance of Spain. See' *Real Decreto 710/2009, de 17 de abril, por el que se desarrollan las previsiones de la Ley 2/2008, de 23 de diciembre, de Presupuestos Generales del Estado para 2009, en materia de pensiones de Clases Pasivas y de determinadas indemnizaciones sociales'* [Royal Decree 710/2009, of April 17, which develops the provisions of Law 2/2008, of December 23, on the General State Budget for 2009, regarding pensions for Passive Classes and certain social compensation.]

the spouse for, at least, the two years prior to the time of death, unless they had children in common, in which case mere cohabitation will suffice.

In order to claim this compensation individuals, or if deceased their beneficiary, must submit an application accompanied by a document proving the judicial decision or administrative resolution that imposed the measures, as well as the certification proving the period of their internment. [99]

This budgetary measure was limited in the budget of 2013 to require all such applications be submitted by the end of 2013.[100] After this, between 2013 and 2022, no further applications were accepted. However, in October 2022, this provision in the 2013 budget was repealed by the *2022* Law of Democratic Memory, reinstating entitlement to this compensation.[101]

A total of €2,000,000 was budgeted in 2009 for this provision and it was reported that by the end of 2013 a total of €624,000 of this budget had been expended to 116 persons affected by these provisions.[102] Following the enacting of the 2022 Law of Democratic Memory the remaining balance of the 2009 budgeted is once more eligible to be disbursed subject to application.

Appendix 9: Overview of the Process in New Zealand

[99] See *Ley 2/2008, de 23 de diciembre, de Presupuestos Generales del Estado para el año 2009*. [Law 2/2008, of December 23, of the General State Budget for the year 2009.], B.O.E. number 309. Section 18, '*Indemnización a «ex» presos sociales'* [Compensation to "former" social prisoners], p.51847 & Royal Decree 710/2009, Art. 18.

[100] Patricia Campelo, 'Fin a las indemnizaciones para homosexuales represaliados', *Público*, 10 February 2012,available at: https://www.publico.es/espana/indemnizaciones-homosexuales-represaliados.html; See Additional Provision 33, *Ley 17/2012, de 27 de diciembre, de Presupuestos Generales del Estado para el año 2013*[Law 17/2012, of 27 December, on the General State Budget for 2013], B.O.E. 312, p.145, https://www.boe.es/buscar/act.php?id=BOE-A-2012-15651.

[101] Fernando H.Valls, 'El Gobierno recupera la indemnización por haber sido preso en el franquismo', *La Información*, 13 September 2021, available at: https://www.lainformacion.com/espana/memoria-democratica-ley-presos-pensiones-franquismo-guerra-civil/2848635/; '*Disposición derogatoria única. Derogación normativa. 2. Quedan derogadas expresamente las siguientes disposiciones: b) Las disposiciones adicionales trigésima tercera y trigésima sexta de la Ley 17/2012, de 27 de diciembre, de Presupuestos Generales del Estado para el año 2013.'* [Single repealing provision. Regulatory repeal. 2. The following provisions are expressly repealed b) The thirty-third and thirty-sixth additional provisions of Law 17/2012, of December 27, on General State Budgets for the year 2013], See Law of Democratic Memory. Single Repealing Provision.

[102]Enrique Anarte, 'LGBT+ victims of Spain's Franco regime fight for compensation', *Reuters,* 11 February 2019, available at: https://www.reuters.com/article/us-spain-lgbt-lawmaking-feature-idUSKCN1Q015Y.

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).[103]

- 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.

- 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.

[103] 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.

- 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.

Overview of the application process for expungement:[104]

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 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 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

[104] Detailed website: Ministry of Justice (New Zealand) (2018), *'Wiping Historical Homosexual Convictions'*.

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 10: Available data on prosecutions and convictions

Prosecution and policing of consensual sexual activities between men

It is not possible to provide an accurate or complete enumeration of the number of prosecutions or convictions for consensual sexual activity between men since the foundation of *Saorstát Éireann*. As noted, the primary laws used to prosecute men for sexual activity with other men did not distinguish between consensual and non-consensual sexual activity. As a result available prosecution and conviction tallies do not distinguish between consensual sexual acts between men and sexual assault perpetrated against men and male children (paedophilia).

Where estimates and statistics are available for prosecutions and convictions under the 1861 and 1885 provisions they have been collated below for reference. These figures are available both for individual years and by range of years. A large number of these prosecutions and convictions are likely to fall outside of the remit of any process to disregard a conviction, but it is also evident from available records and research undertaken by the Working Group that a sizable number of convictions would be liable for a disregard as they would not be a crime today (sexual acts between consenting adults).

The available primary historical figures outlined below demonstrate that there is an inconsistency in how figures were reported. For instance figures in the Reports of the Commissioner of the Garda Síochána on Crime do not necessarily tally with figures used by the State in the European Court of Human Rights Case *Norris v Ireland.* Additionally, the fields and types of data reported upon were subject to change over the years making comparison, in many cases, impossible. However, as these figures are derived from a multitude of diverse historical and archival records an attempt has been made to collate these figures below in order to provide some vision of the scope of historical criminalisation and to enable researchers to identify sources and provide figures for further research.

Available figures for prosecutions and convictions under the 1861 and 1885 Acts Return of Sexual Offences –Criminal Law Commission 1924-1929[105]

Breakdown by county 1924 – 1929																								
	1924				**1925**				**1926**				**1927**				**1928**				**1929**			
	Sodomy*		Indecent** Assault		Sodomy		Indecent Assault		Sodomy		Indecent Assault		Sodomy		Indecent Assault		Sodomy		Indecent Assault		Sodomy		Indecent Assault	
County	P	C	P	C	P	C	P	C	P	C	P	C	P	C	P	C	P	C	P	C	P	C	P	C
Carlow																								
Cavan																								
Clare																								
Cork E.R	1	1	1	1	1	1			2	2			1	1	1	1	1	-	1	-	2	2	3	3
Cork W.R							1	1																
Donegal																					12	12	14	14
D.M.D	3	3	3	3	6	5	1	1	12	12	4	4	13	13	7	5	6	6	17	15			5	5
Dublin					1	1																		
Galway E.R	1	-											1	1										
Galway W.R																					1	-		
Kerry																								
Kilkenny	1	1			1	-	1	-							1	1								
Kildare	1	1			1	-													1	-				
Leitrim																								
Leix (Laois)											1	1							2	2				
Limerick									1	1					1	1			4	3				
Longford																								
Louth													1	-										
Mayo	1	1					1	1	1	-	1	-												
Meath																								
Monaghan																								
Offaly	1	-													1	1								

[105] NAI, Criminal Law Amendment Act, Department of Justice 1925-1935, 90/8/50

Roscommon																			1	1			1	1
Sligo																								
Tipperary	1	1																	1	-				
Waterford	1	1	1	-															7	7				
West Meath							1	1			1	1												
Wexford							1	-			1	1												
Wicklow	1	1																						
Total	9	7	4	4	13	9	5	3	16	15	8	6	16	15	13	11	7	6	34	28	15	14	25	24

*Sodomy Regardless of Age
**Indecent Assault on boys or men
(P) Prosecuted
(C) Convicted

Based on these figures, between 1924-1929, there were 75 prosecutions for sodomy (regardless of age) and 66 convictions, and 89 prosecutions and 76 convictions for Indecent Assault on boys or men. This represents a total of 164 prosecutions and 142 convictions.

Prosecutions and Convictions for Male on Male Sexual Activity 1928-1929[106]		
County	**Prosecutions**	**Convictions**
Dublin City	47	45
Waterford	16	15
Cork	10	7
Dublin County	5	5
Limerick	2	1
Carlow-Kildare	1	0
Leix(Laois)-Offaly	1	1
Mayo	1	1
Roscommon	1	1
Galway	1	1
Kilkenny	1	1
Other Counties	Nil	Nil
Total for Saorstat.	**86**	**78**

[106] In relation to proposed revision of Section 11: Male with Male of the Criminal Law Amendment Act. NAI 90/8/50, Criminal Law Amendment Act, 1935, Department of Justice 1925-1935, 90/8/50, pp. 8-9.

The 1931 Report of the committee on the Criminal Law Amendment Acts (1880-85) and juvenile prostitution also known as the 'Carrigan Report' included the following figures for prosecutions related to 'offences between males between 1924 and 1930'.[107] The number of convictions resulting from these convictions are not available.

Prosecutions for offences against or between males (including children)	
1924-1926	76
1927-1929	174
1930	69

[107] This report also recommended that power should be given to a District Justice to deal summarily with the offences under Section 11 of the Criminal Law Amendment Act 1885, as well as on indictment as it was believed this would lead to further prosecutions. It was also recommended that the offences under Section 11 of the Criminal Law Amendment Act be made a felony rather than misdemeanours. This report was presented to Government in August 1931 but the Government of the day decided not to publish the report and the recommendations were not implemented. *Report of the Committee on the Criminal Law Amendment Acts (1880-85) and juvenile prostitution* (Dublin, 1931) [The Carrigan Report]. An online version of the report is available at: https://the-knitter.blogspot.com/2005/06/full-carrigan-report_24.html

Statistics from the Annual Reports of the Commissioner of the Garda Síochána on Crime

Unnatural Offences - Selected data transcribed from the Reports of the Commissioner of the Garda Síochána on Crime 1947-1993																	
Year	Reported or known	# where criminal proceeding were			Result of proceedings in cases										Still pending in the district court	Crimes for which the perpetrators were detected but for which no proceedings are shown	Nature of Offence
					Dealt with on indictment and						Dealt with summarily and						
		Commenced[108]	Shown Pending Previous return	Information Refused	Convicted	Acquitted	Found insane and incapable of pleading	*Noelle Prosequi* entered	Adjourned *Sine Die* or otherwise disposed of	Committed for Trial and still awaiting trail	Convicted	Dismissed	Charge proved and order made without conviction	Charge withdrawn	Adjourned Sine Die or otherwise disposed of			
1947	29	27	n/a	-	4	2	-	-	-	-	11	3	4	2	-	1	-	Unnatural Offences and Attempts[109]
1948	58	49	n/a	3	8	5	-	-	-	2	22	5	4	-	-	-	6	Unnatural Offences and Attempts

[108] From the years 1947- 1957 as represented in this transcription, these figures were included under the heading 'Number of Offences in which criminal proceedings were taken'

[109] It is not clear what offences were contained under the term unnatural offences, it likely refers to 'homosexuality and attempts' 'bestiality and attempts, and 'other unnatural offences' as disaggregated in later reporting from 1976-79 and as contained under the heading 'Unnatural Offences' in the Offences Against The Person Act, 1861 (Sodomy and Bestiality). However, it does not distinguish between consensual and non-consensual sexual acts and sexual abuse involving male children. Offences involving the sexual assault of women and girls where categorised separately under 'Rape', 'Indecent Assault on Females', 'Defilement of Girls under 15 years', 'Defilement of Girls between 15-17 years' as well as other offences such as 'incest' and 'indecent exposure (public indecency)'.

1949	53	50	n/a	1	14	1	-	-	-	1	20	5	6	-	2	-	1	Unnatural Offences and Attempts
1950[110]	83	71	n/a	1	41	1	-	3	-	2	15	1	5	1	1	-	8	Unnatural Offences and Attempts
1951	36	30	n/a	2	4	2	-	-	-	-	17	1	3	-	-	1	2	Unnatural Offences and Attempts
1952	43	39	n/a	2	8	5	-	-	-	2	14	3	3	-	2	-	3	Unnatural Offences and Attempts
1953	49	44	n/a	-	7	5	-	-	-	-	24	1	6	1	-	-	3	Unnatural Offences and Attempts
1954	45	32	n/a	-	1	3	-	-	-	3	13	6	3	-	2	1	8	Unnatural Offences and Attempts
1955	40	38	n/a	-	5	4	-	-	-	-	21	3	1	-	2	2	1	Unnatural Offences and Attempts
1956	48	42	n/a	1	7	-	-	-	-	-	21	-	7	2	-	4	1	Unnatural Offences and Attempts
1957	33	27	n/a	-	8	-	-	-	-	-	16	1	2	-	-	-	2	Unnatural Offences and Attempts
1958	39	33	-	-	1	2	-	-	-	1	17	1	11	-	-	-	2	Unnatural Offences and Attempts
1959	42	33	1	-	6	5	-	-	-	2	13	-	5	-	-	3	1	Unnatural Offences and Attempts
1960	56	46	5	1	11	2	-	-	1	-	17	2	6	1	7	3	3	Unnatural Offences and attempts

[110] Data from the 1947- 1957 is until year ending 31 December, while from years 1958 – 1974 it follows the financial year ending 30 September before returning to year ending 31 December for the remaining years.

1961	55	48	3	-	4	1	-	-	-	5	27	4	3	-	2	5	4	Unnatural Offences and attempts
1962	75	66	10	1	11	7	-	-	-	2	37	1	10	2	3	2	2	Unnatural Offences and attempts
1963	62	58	4	1	7	2	-	-	-	3	30	1	5	-	6	7	1	Unnatural Offences and attempts
1964	57	53	10	2	9	2	-	-	9	2	22	3	2	-	2	10	1	Unnatural Offences and attempts
1965	63	55	12	3	-	1	-	-	1	2	30	3	10	1	4	12	1	Unnatural Offences and attempts
1966	68	56	14	-	5	-	-	3	-	3	33	1	12	-	4	9	9	Unnatural offences and attempts
1967	71	65	12	1	5	-	-	1	-	-	43	2	3	1	2	19	1	Unnatural offences and attempts
1968	63	53	19	-	2	-	-	-	-	2	44	3	10	-	2	9	6	Unnatural offences and attempts
1969	72	68	11	-	5	-	-	-	-	2	29	1	14	-	4	24	1	Unnatural offences and attempts
1970	88	77	26	2	35	3	-	10	-	1	15	3	19	-	4	11	1	Unnatural offences and attempts
1971[111]	37	31	12	-	2	-	-	-	-	3	17	1	8	1	-	11	2	Unnatural offences and attempts
1972	45	37	14	-	2	-	-	-	-	3	26		5	1	1	13	6	Unnatural offences and attempts

[111] The reports from 1971-1974 include data up until end of September of that year. Data on cases still pending in the district court and for crimes for which the perpetrators were detected but for which no proceedings are shown were not included as fields in the 1971 report.

1973	56	45	16	-	5	1	-	2	-	6	18	7	8	3	1	10	2	Unnatural offences and attempts
1974	53	44	16	-	5	2	-	1	-	6	25	4	4	-	3	10	2	Unnatural offences and attempts
1975[112]	22	14	18	-	1	2	-	-	-	3	10	2	-	1	4	9	4	Unnatural offences and attempts
1976	24	21	n/a	-	-	-	4	-	-	-	5	-	-	-	-	12	2	Homosexuality and attempts[113]
1977	17	11	n/a	-	-	-	-	-	-	1	9	1	-	-	-	-	-	Homosexuality and attempts
1978	16	12	n/a	-	-	-	-	-	-	-	5	-	-	-	1	6	-	Homosexuality and attempts
1979	7	7	n/a	-	-	-	-	-	-	-	-	-	-	1	1	5	-	Homosexuality and attempts
1980	37	33	n/a	-	-	-	-	-	-	-	4	-	5	-	-	24	3	Unnatural Offences and attempts
1981	48	43	n/a	-	3	-	-	-	-	3	21	-	-	-	-	16	1	Unnatural offences and attempts
1982	54	31	n/a	-	-	-	-	-	-	-	11	-	-	-	1	19	14	Unnatural offences and attempts
1983	33	19	n/a	-	-	-	-	-	-	-	6	-	-	-	1	12	7	Unnatural offences and attempts

[112] From 1975 onwards the reporting is valid until 31 December of that year.

[113] This category was only provided for in the years 1976 – 1979 and does not distinguish between consensual and non-consensual sexual acts and those involving male children. For these years there was also the inclusion of categories for 'bestiality and attempts, and other unnatural offences' which may provide further indication of what was contained under previous categories of 'unnatural offences and attempts'.

1984	61	52	n/a	-	1	3	-	-	-	-	16	-	-	1	-	31	3	Unnatural offences and attempts
1985	40	33	n/a	-	-	-	-	-	-	5	10	1	-	-	-	17	1	Unnatural offences and attempts
1986	36	29	n/a	-	-	-	-	-	-	3	1	1	-	-	-	24	3	Unnatural offences and attempts
1987	61	47	n/a	-	1	-	-	-	-	5	5	-	-	3	-	33	8	Unnatural offences and attempts
1988	55	23	n/a	-	6	-	-	1	-	1	2	-	1	-	-	12	30	Unnatural offences and attempts
1989	43	25	n/a	-	2	-	-	2	-	4	5	-	-	-	-	12	17	Unnatural offences and attempts
1990	48	29	n/a	-	2	-	-	-	-	3	5	-	-	-	-	19	13	Unnatural offences and attempts
1991	63	44	n/a	-	2	-	-	-	-	3	1	-	-	-	-	38	12	Unnatural offences and attempts
1992	31	17	n/a	-	-	-	-	-	-	1	1	-	-	-	-	15	9	Unnatural offences and attempts
1993[114]	27	10	n/a	-	4	-	-	-	-	3	-	-	-	-	-	3	7	Unnatural Offences
1993	Buggery	Offences Known: 12 Offences Detected: 10																
	Gross Indecency	Offences Known: 1 Offences Detected: 1																

[114] June 1993, Now retitled "Annual Report of An Garda Síochána 1993, available at: https://www.garda.ie/en/about-us/publications/annual%20reports/1993-annual-report.pdf

Unnatural Offences – Number (by aged groups) of persons convicted or against who the charge was held proven without conviction. Selected data transcribed from the Reports of the Commissioner of the Garda Síochána on Crime 1958-1973					
Year	**Under 14 years**	**14 – 17 years**	**17 – 21 years**	**Above 21 years**	**Total**
1958	-	5	4	18	27
1959	-	4	2	16	22
1960	-	3	-	29	32
1961	-	4	8	22	34
1962	-	5	11	32	48
1963	1	1	4	29	35
1964	-	4	3	26	33
1965	-	5	9	35	49
1966	1	6	5	39	51
1967	2	4	10	40	56
1968	-	5	6	39	50
1969	1	3	5	36	45
1970	-	2	7	27	36
1971	-	1	4	20	25
1972	**-**	2	6	18	26
1973	**-**	2	8	18	28

Statistics from the Annual Report of the General Prison Board

Particulars of the Offences of Criminal Male Prisoners Committed on Conviction to Prisons, Annual Report of the General Prison Board 1925, 1926, 1928-1982					
Year	**Offence**	**Number Committed**	**Year**	**Offence**	**Number Committed**
1925-1926	Indecency with Males	11	**1955**	Indecency with Males	7
				Gross Indecency	6
1928	Indecency with Males	15	**1956**	Indecency with Males	11
				Gross Indecency	4
1929	Indecency with Males	14	**1957**	Indecency with Males	13
				Gross Indecency	2
1930	Indecency with Males	15	**1958**	Indecency with Males	6
				Gross Indecency	6
1931	Indecency with Males	32	**1959**	Indecency with Males	8
				Gross Indecency	1
1932	Indecency with Males	19	**1960**	Indecency with Males	4
				Gross Indecency	9
1933	Indecency with Males	19	**1961**	Indecency with Males	7
				Gross Indecency	5
1934	Indecency with Males	24	**1962**	Indecency with Males	3
				Gross Indecency	13
1935	Indecency with Males	34	**1963**	Indecency with Males	7
				Gross Indecency	4
1936	Indecency with Males	28	**1964**	Indecency with Males	4
				Gross Indecency	3
1937	Indecency with Males	32	**1965**	Indecency with Males	7

				Gross Indecency	4
1938	Indecency with Males	15	**1966**	Indecency with Males Gross Indecency	8 2
1939	Indecency with Males	8	**1967**	Indecency with Males Gross Indecency	8 1
1940	Indecency with Males Gross Indecency	10 2	**1968**	Indecency with Males Gross Indecency	2 1
1941	Indecency with Males Gross Indecency	8 25	**1969**	Indecency with Males Gross Indecency	3 5
1942	Indecency with Males Gross Indecency	5 12	**1970**	Indecency with Males Gross Indecency	5 4
1943	Indecency with Males Gross Indecency	10 11	**1971**	Indecency with Males Gross Indecency	4 0
1944	Indecency with Males Gross Indecency	9 22	**1972**	Indecency with Males Gross Indecency	2 4
1945	Indecency with Males Gross Indecency	13 3	**1973**	Indecency with Males Gross Indecency	2 4
1946	Indecency with Males Gross Indecency	10 5	**1974**	Indecency with Males Gross Indecency	6 6
1947	Indecency with Males Gross Indecency	7 11	**1975**	Indecency with Males Gross Indecency	2 1
1948	Indecency with Males Gross Indecency	6 10	**1976**	Indecency with Males Gross Indecency	2 5
1949	Indecency with Males Gross Indecency	11 13	**1977**	Indecency with Males Gross Indecency	5 2
1950	Indecency with Males Gross Indecency	- 44	**1978**	Indecency with Males Gross Indecency	4 1
1951	Indecency with Males Gross Indecency	1 9	**1979**	Gross Indecency	1
1952	Indecency with Males Gross Indecency	4 7	**1980**	No specific figures provided	
1953	Indecency with Males Gross Indecency	7 3	**1981**	Indecent Assault on a Male	2
1954	Indecency with Males Gross Indecency	5 5	**1982**[115]	Indecent Assault on a Male	2

[115] Specific figures were no longer provided for Gross Indecency or for Indecency/Indecent Assault on a Male after 1982.

Statistics provided by An Garda Síochána to the Department of Justice and Department of Foreign Affairs as part of the Norris v Ireland case at the European Court of Human Rights.[116]

While these figures don't fully coincide with those provided in the Reports of the Commissioner of the Garda Síochána on Crime, they do provide some insight into the number of convictions in each category under 'Unnatural Offences' per year.[117]

1973[118]					
Unnatural Offences					
Unnatural Offences	**Offences**	**Prosecutions**	**Crimes for which perpetrators were detected but for which no proceedings**	**No. of convictions (a) On indictment (b) Summarily**	**No of persons convicted**
Total	**56**	**45**	**2**	**(a) 5** **(b) 18**	**28**
1974					
Unnatural Offences					
Unnatural Offences	**Offences**	**Prosecutions**	**Crimes for which perpetrators were detected but for which no proceedings**	**No. of convictions (a) On indictment (b) Summarily**	**No of persons convicted**
Total	**60**	**51**	**2**	**(a) 5** **(b) 29**	**24**
1975					
Unnatural Offences					
Unnatural Offences	**Offences**	**Prosecutions**	**Crimes for which perpetrators were detected but for which no proceedings**	**No. of convictions (a) On indictment (b) Summarily**	**No of persons convicted**
Total	**22**	**14**	**4**	**(a) 1** **(b) 10**	**11**
1976					
Type of Offence and Classification	**Offences**	**Prosecutions**	**Crimes for which perpetrators were detected but for which no proceedings**	**No. of convictions (c) On indictment (d) Summarily**	**No of persons convicted**

[116] Department of Justice, 'Re:No. of Convictions – Per Sergeant M. McLoughlin, Garda Headquarters'. 7 September 1984'; See files transferred from Department of Justice to National Archives in 2023. Department of Justice, Law Re: Homosexual Offences (Norris Case), European Court of Human Rights. (April 1986 – October 1987) References: 116/1305/3 Parts 1-7,specifically parts 3 & 4;, Department of Justice, Law Re: Homosexual Offences/ General (October 1983-1993) Reference: 116/1305/7 Part 1. As these files have only recently transferred the National Archives they have not been catalogued and a National Archives reference is not available at this time.
[117] These figures were stated as accurate as of 17 August 1984.
[118] These figures are updated figures provided by An Garda Síochána for the period of 1973-1983. For the years 1973-1975 An Garda Síochána could not provide updated figures for total convictions and disaggregated figures for 'Unnatural Offences' as the Garda records were not available as these figures were not available on the computers of the time so only the total numbers within that category are provided. The figures for 'homosexuality and attempts' for the years 1976 and 1977 were updated but the figures for 'bestiality and attempts' and 'other unnatural offences' were not updated.

Homosexuality and attempts	24	21	2	(a) - (b) 9	9
Bestiality and attempts	1	1	-	(a) - (b) -	-
Other Unnatural Offence	27	22	-	(a) -1 (b) -6	7
Total	**52**	**44**	**2**	**(a) -1** **(b) -15**	**16**
			1977		
Type of Offence and Classification	**Offences**	**Prosecutions**	**Crimes for which perpetrators were detected but for which no proceedings**	**No. of convictions** **(a) On indictment** **(b) Summarily**	**No of persons convicted**
Homosexuality and attempts	17	11	-	(a) - (b) 10	5
Bestiality and attempts	1	1	-	(a) - (b) -	-
Other Unnatural Offence	24	19	-	(a) 1 (b) 8	8
Total	**42**	**31**	**-**	**(a) 1** **(b)18**	**13**
			1978		
Type of Offence and Classification	**Offences**	**Prosecutions**	**Crimes for which perpetrators were detected but for which no proceedings**	**No. of convictions** **(a) On indictment** **(b) Summarily**	**No of persons convicted**
Homosexuality and attempts	16	12	-	(a) - (b) 7	10
Bestiality and attempts	-	-	-	(a) - (b) -	-
Other Unnatural Offence	16	13	2	(a) 2 (b) 5	7
Total	**32**	**25**	**2**	**(a) 2** **(b) 12**	**17**
			1979		
Type of Offence and Classification	**Offences**	**Prosecutions**	**Crimes for which perpetrators were detected but for which no proceedings**	**No. of convictions** **(a) On indictment** **(b) Summarily**	**No of persons convicted**
Homosexuality and attempts (1260)	7	7	-	(a) - (b) 2	2
Bestiality and attempts (1279)	-	-	-	(a) - (b) -	-
Other Unnatural Offence (1287)	15	13	-	(a) - (b) 11	13
Total	**22**	**20**	**-**	**13**	**15**
			1980		

Type of Offence and Classification	Offences	Prosecutions	Crimes for which perpetrators were detected but for which no proceedings	No. of convictions (a) On indictment (b) Summarily	No of persons convicted
Homosexuality and attempts	3	3	-	(a) - (b) -	-
Bestiality and attempts	-	-	-	(a) - (b) -	-
Other Unnatural Offence	34	30	3	(a) - (b) 10	10
Total	**37**	**33**	**3**	**(b) 10**	**10**
			1981		
Type of Offence and Classification	**Offences**	**Prosecutions**	**Crimes for which perpetrators were detected but for which no proceedings**	**No. of convictions (a) On indictment (b) Summarily**	**No of persons convicted**
Homosexuality and attempts	13	12	-	(a) 4 (b) 5	9
Bestiality and attempts	1	1	-	(a) - (b) 1	1
Other Unnatural Offence	34	30	1	(a) 4 (b) 16	22
Total	**48**	**43**	**1**	**(a) 8** **(b) 22**	**32**
			1982		
Type of Offence and Classification	**Offences**	**Prosecutions**	**Crimes for which perpetrators were detected but for which no proceedings**	**No. of convictions (c) On indictment (d) Summarily**	**No of persons convicted**
Homosexuality and attempts	32	18	12	(a) 1 (b) 9	10
Bestiality and attempts	1	1	-	(a) - (b) -	-
Other Unnatural Offence	21	12	2	(a) - (b) 8	8
Total	**54**	**31**	**14**	**(a) 1** **(b)17**	**18**
			1983		
Type of Offence and Classification	**Offences**	**Prosecutions**	**Crimes for which perpetrators were detected but for which no proceedings**	**No. of convictions (a) On indictment (b) Summarily**	**No of persons convicted**
Homosexuality and attempts	10	8	1	(a) - (b) 3	3
Bestiality and attempts	-	-	-	(a) - (b) -	-
Other Unnatural Offence	23	11	6	(a) - (b) 3	3
Total	**33**	**19**	**7**	**(a) -**	**6**

				(b) 6	
Overall 1978-1983					
Type of Offence and Classification	**Offences**	**Prosecutions**	**Crimes for which perpetrators were detected but for which no proceedings**	**No. of convictions (a) On indictment (b) Summarily**	**No of persons convicted**
Homosexuality and attempts	81	60	13	(a) 5 (b) 26	34
Bestiality and attempts	2	2	-	(a) - (b) 1	1
Other Unnatural Offence	143	109	14	(a) 6 (b) 53	63
Total	**226**	**171**	**27**	**(a) 11 (b) 80**	**98**

Archival files from the Department of Justice in relation to decriminalisation also provided a breakdown of related offences for 1991. As these figures relate to the final years of criminalisation the offences most likely related to non-consensual acts. A breakdown for reported offences of ‘buggery’ indicates that reported incidences involved nonconsenting partners and that the majority involved children.[119]

Reported Unnatural Offences 1991	
Buggery	14
Gross Indecency	45
Bestiality	0
Gross Indecent Assault[120]	4
Total	**63**
Detected Unnatural Offences 1991	
Buggery	12
Gross Indecency	42
Bestiality	0
Gross Indecent Assault[121]	2
Total	**56**
Prosecutions Initiated Unnatural Offences 1991	
Buggery	9
Gross Indecency	33
Bestiality	0
Gross Indecent Assault[122]	2
Total	**44**

Buggery	
Offences Reported	14
Age of Victim	**Age of Culprit**

[119] Department of Justice, Law Re: Homosexual Offences (Norris Case), European Court of Human Rights. (April 1986 – October 1987) References: 116/1305/3, part 3.
[120] This is a new category included from 1991.
[121] This is a new category included from 1991.
[122] This is a new category included from 1991.

12	51[123]
10	51
12	51
14	15
4	14
23[124]	24
18	21
17	26
16	undetected
17	50
19	34
12	52
12	51
12	undetected

This is in line with available information regarding prosecutions between 1979-1987 in which the majority of prosecutions related to non-consensual sexual acts.

Tabular Statement of updated statistics of prosecutions for homosexual offences in Ireland from 1979 to the end of 1987.[125]				
Year	**Prosecutions**	**Involvin g Minors**	**Non-Consensual Adult**	**Unknown[126]**
1987	22	18	3	1
1986	25	20	-	5
1985	33	26	-	7
1984	54[127]	44	-	10
1983	19	14	-	5
1982	22	21	-	1
1981	41	28	-	13
1980	34[128]	30	-	4
1979	13	12	-	1
Total	**263**	**213**	**3**	**47**

[123] The same person is responsible for the first three offences.
[124] This individual is described as 'mentally handicapped' and under current law would be a 'protected person' as provided for under Section 21 of the Criminal Law (Sexual Offences) Act 2017.
[125] NAI, Appendix II, Memorial of the Government of Ireland submitted to the European Court of Human Rights, Norris v Ireland; Prosecutions in respect of homosexual offences for the period of 1 September 1987 to 31 December 1987, DFA/2019/101/1171
[126] Unknown indicates that the circumstances of the charges are unknown as the details provided only indicate that both parties were above the age of consent. If these prosecutions resulted in convictions then these may be liable for disregard depending on whether the circumstances fulfil the final disregard criteria.
[127] Officially tabulated as 52, but one listing included the prosecution of 3 men.
[128] Officially tabulated as 33, but one listing included the prosecution of 2 men.