

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

EXPLANATORY NOTES

THE ACT

Part Three – Disregarding Certain Convictions for Historical Sexual Offences

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

21. **Section 5(1)** provides that a person who has been convicted of a historical sexual offence can apply to the Scottish Ministers to have that conviction disregarded.
22. **Section 5(2)** sets out the information that a person making an application for a disregard is required to provide. It is intended that guidance for potential applicants will be published when the disregard scheme comes into effect, setting out in more detail exactly what information they are required to provide in an application.
23. **Section 5(3)** gives discretion to an applicant to include any other information which they wish the Scottish Ministers to consider when determining their application. It would be a matter for the applicant to decide what other information could be useful to Ministers in considering their application. It could include, for example, information from any third person who witnessed the incident which led to the applicant's conviction, or can otherwise confirm or support the applicant's account of what happened.

Section 6 – Application for disregard: further information

24. **Section 6(1)** provides that the Scottish Ministers may ask any person to provide information or make representations in relation to an application for a disregard. In practice, requests are most likely to be made to Police Scotland, the Crown Office and Procurator Fiscal Service (COPFS) and the Scottish Courts and Tribunals Service (SCTS), though there may be other organisations or individuals who may be consulted in individual cases.
25. **Section 6(2)** authorises any person to whom such a request is made to provide the information requested.

Section 7 – Determination of application for disregard

26. **Section 7** sets out the process for the Scottish Ministers to follow in determining an application for a conviction to be disregarded.
27. **Section 7(1)** requires the Scottish Ministers to consider all representations and other information provided by the applicant, or provided by persons to whom a request was made under section 6(1); and for Ministers to take reasonable steps to obtain, and where available, to consider, information held about the case (unless it already appears that the conviction was not for a historical sexual offence, for example, because it was a conviction for an offence such as fraud or theft). This may involve contacting Police

*These notes relate to the Historical Sexual Offences (Pardons and Disregards)
(Scotland) Act 2018 (asp 14) which received Royal Assent on 11 July 2018*

Scotland or other justice agencies for any information they hold about the applicant's conviction.

28. Sections 7(2) and 7(3), read together, provide that the Scottish Ministers must grant an application for a disregard unless it appears to them either that the offence for which the applicant was convicted was not a historical sexual offence as defined at section 2, or that the conduct constituting the offence would, if occurring in the same circumstances on the day the Act comes into force, still be an offence.
29. Section 7(4) requires Ministers to record their determination and the reasons for it in writing, provide notice of the determination and reasons for it to the applicant and, where the application is granted, to inform the applicant that references to the conviction will be removed as set out at section 10. Section 7(5) provides that where an application for a disregard is granted, it takes effect 14 days after notice of the determination is given to the applicant.

Section 8 – Appeals

30. Section 8 provides that a person whose application for a disregard under section 5(1) has been refused may, with leave, appeal against the decision to the sheriff.
31. Section 8(3) provides that, in deciding an appeal, the sheriff may only take account of representations and information that were available to the Scottish Ministers when determining the application. If the applicant wishes to put new material forward, it would be open to them to submit a fresh application.
32. Section 8(4), read with section 8(5), provides that if it appears to the sheriff that the offence for which the applicant was convicted was not a “historical sexual offence” or that the conduct constituting the historical sexual offence would still be an offence, the sheriff must dismiss the appeal. Otherwise, the sheriff must allow the appeal.
33. Section 8(8) provides that an appeal against a refusal to grant a disregard is to be made in the sheriffdom where the appellant resides; or, where the appellant does not reside in Scotland, in the sheriffdom of Lothian and Borders at Edinburgh.

Section 9 – Effect of disregard

34. Section 9 sets out the effect in law of the granting of a disregard.
35. Section 9(2) provides that where a disregard is granted, the applicant is to be treated for all purposes as not having committed the offence, been charged with, or prosecuted for, the offence, been convicted of the offence, or been sentenced for the offence.
36. Section 9(3) provides that details of disregarded convictions cannot be used in any judicial proceeding, as defined at section 9(6), nor in any such proceedings can the individual be asked about or be required to answer questions about any disregarded conviction, or circumstances ancillary to it, as defined at section 9(7). In addition to court proceedings, judicial proceedings include proceedings before a statutory tribunal, arbiter appointed under an arbitration agreement or professional regulatory body.
37. Section 9(4) provides that questions put to a person in any other context (for example, by a prospective employer or as part of a process for applying for insurance or for a loan) asking about a person's past convictions, offences, or conduct are not to be treated as including any reference to a disregarded conviction and the failure to provide details relating to a disregarded conviction cannot lead to any consequent liability on the part of the individual.
38. Section 9(5) provides that any obligation under any law or other agreement or arrangement to disclose any matters (such as offences) will not apply to such disregarded convictions or associated details.

Section 10 – Removal of disregarded convictions from official records

39. **Section 10** sets out the process to be followed for removing a disregarded conviction for a historical sexual offence from official records.
40. **Section 10(1)** provides that the Scottish Ministers must remove all references to such a conviction contained in official records held by them and require every relevant record keeper to remove all references to the disregarded conviction from records that they hold.
41. **Section 10(2)** provides that a relevant record keeper must comply with the requirement under section 10(1) to remove records of a disregarded conviction as soon as reasonably practicable (but not until the disregard has taken effect), and notify the applicant when they have done so.
42. **Sections 10(3)-(5)** provides the Scottish Ministers with a power to make regulations to prescribe the manner in which disregarded convictions are removed from official records and to prescribe who a “relevant record keeper” is for the purposes of this section.

Section 11 – Advisers

43. **Section 11(1)** provides that the Scottish Ministers can appoint independent advisers to advise on an application for a disregard under section 5. **Section 11(2)** provides that the advisers can be supplied with such information as is relevant to undertake this function. **Section 11(3)** enables the payment of expenses and allowances to the advisers.
44. These advisers may be people with particular knowledge or expertise in how offences concerning same-sex sexual activity were prosecuted in Scotland and they may assist in the consideration of cases where the information provided by the applicant and that held by the police, courts and COPFS or others is, on the face of it, insufficient to determine whether the applicant’s conviction was for activity that would not be a criminal offence on the day the legislation comes into effect.