

ICCL submission to the Department of Justice on Key Issues Related to the Disregard of Convictions for Certain Qualifying Offences Related to Consensual Sexual Activity Between Men

December 2022

Introduction

1. 2023 will mark the 30th anniversary of the decriminalisation of consensual sexual acts between men in Ireland. Criminalisation had a significant harmful impact on the lives of those directly and indirectly affected, as well as on the progress towards equality for the whole lesbian, gay, bisexual, transgender and intersex (LGBTI+) community. At least 941 men were convicted of “homosexual acts” under legislation which no longer exists, and the number goes up to over 2100 if reported or known crimes are considered¹. Unjust criminalisation is widely recognised as a significant historic injustice.
2. The Irish Council for Civil Liberties welcomes the opportunity to take part in the public consultation process on the introduction of a scheme to disregard convictions for certain qualifying offences related to consensual sexual activity between men (the “Disregard Scheme”). The public consultation was recommended by a working group appointed by the Department of Justice to examine how to progress the issue². We note with appreciation the diverse composition of the working group – which includes representatives of the Department of Justice, An Garda Síochána, the Irish Human Rights Equality Committee, the Office of the Attorney General and individuals from the LGBT Community with expertise on the matter – and welcome the supporting documents provided.

The Scheme

3. ICCL strongly welcomes the development of a Disregard Scheme in Ireland. Similar schemes already exist in several jurisdictions with a history of criminalisation, including England and Wales, Scotland, Canada, New Zealand, and Australia³.

¹ Jade Wilson, “Criminal records for homosexuality to be overturned under new Government plans”, The Irish Times, 19 November 2022. Available at: <https://www.irishtimes.com/crime-law/2022/11/19/gay-men-may-be-pardoned-for-criminal-proceedings-brought-against-them-before-homosexuality-decriminalised-in-ireland/>.

² The Working Group to Examine the Disregard of Convictions for Certain Qualifying Offences Related to Consensual Sexual Activity between Men, established in 2021. In May 2022 the Working Group published their Progress Report available here: <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/>.

³ A multi-jurisdictional analysis on the nature and scope of Expungement Legislation in Australia, Canada, England, Germany, New Zealand, Scotland and Spain has been conducted by the Gay Project and is available here: <https://gayproject.ie/special-projects/expungement/>.

4. It is essential that the Disregard Scheme is developed adopting a human rights-based approach and is underpinned by human rights and equality principles. These include the right to equality and non-discrimination, the right to private life, the right to an effective remedy, the right to redress, transparency, accountability, accessibility, participation, and procedural rights. We note that it is a human rights-based approach that found Irish law in breach of the European Convention on Human Rights in the landmark *Norris v. Ireland* 1988 case, which constituted an invaluable push in the direction of decriminalisation⁴.
5. The availability of adequate records is a key element for the success of the Scheme, however this has been identified as an issue in other jurisdictions. The fact that records might have been lost or destroyed, or do not carry the amount of detail requested, should not be an obstacle to accessing the scheme, as the harm experienced by impacted men is the same. We agree with the approach suggested by the Working Group in their Progress Report that any scheme should seek to minimise the burden placed on applicants and that applicants should be able to submit relevant written evidence or other supporting documentation for consideration with their application. The Working Group noted that any future scheme must recognise that there was an onus on the State to maintain, preserve and produce records and that this must be a consideration in any application where records are unavailable. To mitigate the potential lack of State-held records, further consideration should be given to accepting sworn formal statements.
6. ICCL favours the disregard approach over expungement. Disregard involves the removal from records of any reference to the criminal offence, while expunging entails the destruction of the record itself. The full destruction of records would prevent any future research on the issue and the preservation of memory for the LGBTI+ community.
7. An Garda Síochána might not be the most appropriate first point of contact for an individual seeking to access the procedure, having experienced discrimination by the State and in the criminal justice system. We note that AGS previously established a confidential email system for individuals who might have intended to seek the disregard of a conviction and no emails were received⁵. ICCL considers that it would be more appropriate for another body to act as first point of contact, liaising with AGS and the Department of Justice on behalf of the applicants. The Irish Human Rights and Equality Commission might be the most appropriate body to involve at this stage, and the setting up of a civil society third party referral mechanism should be evaluated.

⁴ *Norris v. Ireland*, 26 October 1988, no. 10581/83.

⁵ As referred to in the Guidance Note to this public consultation, available at: <https://assets.gov.ie/236994/3e0d9556-3921-4261-8386-0072507845cd.pdf>.

8. The rationale for the inclusion and exclusion of offences and the standards to meet before criminal convictions can be disregarded should be made clear. The scheme should apply to the offences identified under Section 1 of the Convictions for Certain Sexual Offences (Apology and Exoneration) Bill 2016⁶.
9. As highlighted by the Working Group, in other jurisdictions it has been accepted that other than the primary criminal laws, other provisions were used to target and prosecute gay and bisexual men in a discriminatory way even for non-sexual activity. We point at the Scottish scheme, which in the definition of historical sexual offences specifies that:

An offence falls within this subsection if the offence— (a) regulated, or was used in practice to regulate, sexual activity between men.

The list of offences to which the scheme applies should be subject to review in light of the collection of data and emergence of new information from men accessing the scheme.

10. As reported in the *Norris v. Ireland* case, when under the care of a psychiatrist, Senator Norris was advised to leave Ireland and live in a country where the laws relating to same-sex behavior had been reformed. It is no surprise that many men might have emigrated due to the legal situation, and for this reason applications should be accepted from persons residing abroad. Criminalising laws were in place from 1634 until decriminalisation in 1993, and many people that would have qualified to have their convictions disregarded are deceased. No differential treatment should be made, especially as impacted men might have lived all their life in a context of discrimination. The Scheme should therefore not be limited to living persons, and measures should be in place for family and other people or organisations to act as third parties in applying.
11. We endorse the eligibility criteria identified by the Working Group in the Progress Report, namely that:
 - a. the act was consensual;
 - b. the act did not involve a person under the current age of consent;
 - c. no person engaged in the activity was in a position of authority in relation to another person engaged in that activity.

We note that one of the limbs of the test applied in Australia - that their actions would not have constituted an offence if they were not of the same-sex - might also be added to clarify the scope

⁶ Act for the Punishment of the Vice of Buggery (Ireland) 1634, Section 16 of the Offences Against the Person (Ireland) Act 1829, Section 61 of the Offences Against The Person Act 1861, Section 11 of the Criminal Law Amendment Act 1885.

of the scheme. The addition of a “proximity of age” provision might be evaluated, in line with existing provisions in the Criminal Justice (Sexual Offences) Act 2017.

12. The provision for a process to appeal a decision to refuse an application or to have it reviewed should be included.
13. As highlighted by the Working Group, the scheme should be victim-centred and operate in a matter that reduces re-traumatisation.
14. We strongly recommend that letters of apology are issued to successful applicants. Apologies are part of a holistic approach to providing reparation for miscarriages of justice.
15. A public awareness campaign should be launched and properly resources to ensure eligible people access the Scheme. If the Scheme is open to non-Irish residents, as we recommend, specific consideration should be given on how to reach eligible applicants abroad. In order to ensure accessibility, plain English information on how to access the Scheme should be provided.

Beyond the Scheme

16. The Disregard Scheme is a key step for State recognition and reparation for the damage criminalisation inflicted upon members of the LGBTI+ community. Additional measures outside of the remit of the Working Group – which is limited to the Scheme – should be considered in close cooperation with affected individuals and representatives of the LGBTI+ community.
17. Under the UN 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, remedies include the victim’s right to equal and effective access to justice, adequate, effective and prompt reparation for harm suffered and access to relevant information on violations and reparation mechanisms. A wider restorative justice programme could be put in place to acknowledge the direct impact of such laws, as well as the collective community harms of members of the LGBTI+ community with impacts which last till today⁷. A wider approach would also provide some form of redress to those who were prosecuted but not convicted, including through apology.
18. Memorialisation measures – including a State-funded historical study of criminalisation in Ireland – should be put in place.

⁷ See LGBT Restorative Justice Campaign, Disregard and Redress – Restorative Justice for people impacted by Ireland’s anti-gay laws, November 2022. Available at: <https://lgbtdisregard.ie/publications/>.