



An Roinn Dlí agus Cirt
Department of Justice

Public Consultation on Key Issues pertaining to the Disregard of Convictions for Certain Qualifying Offences Related to Consensual Sexual Activity between Men

Guidance Note

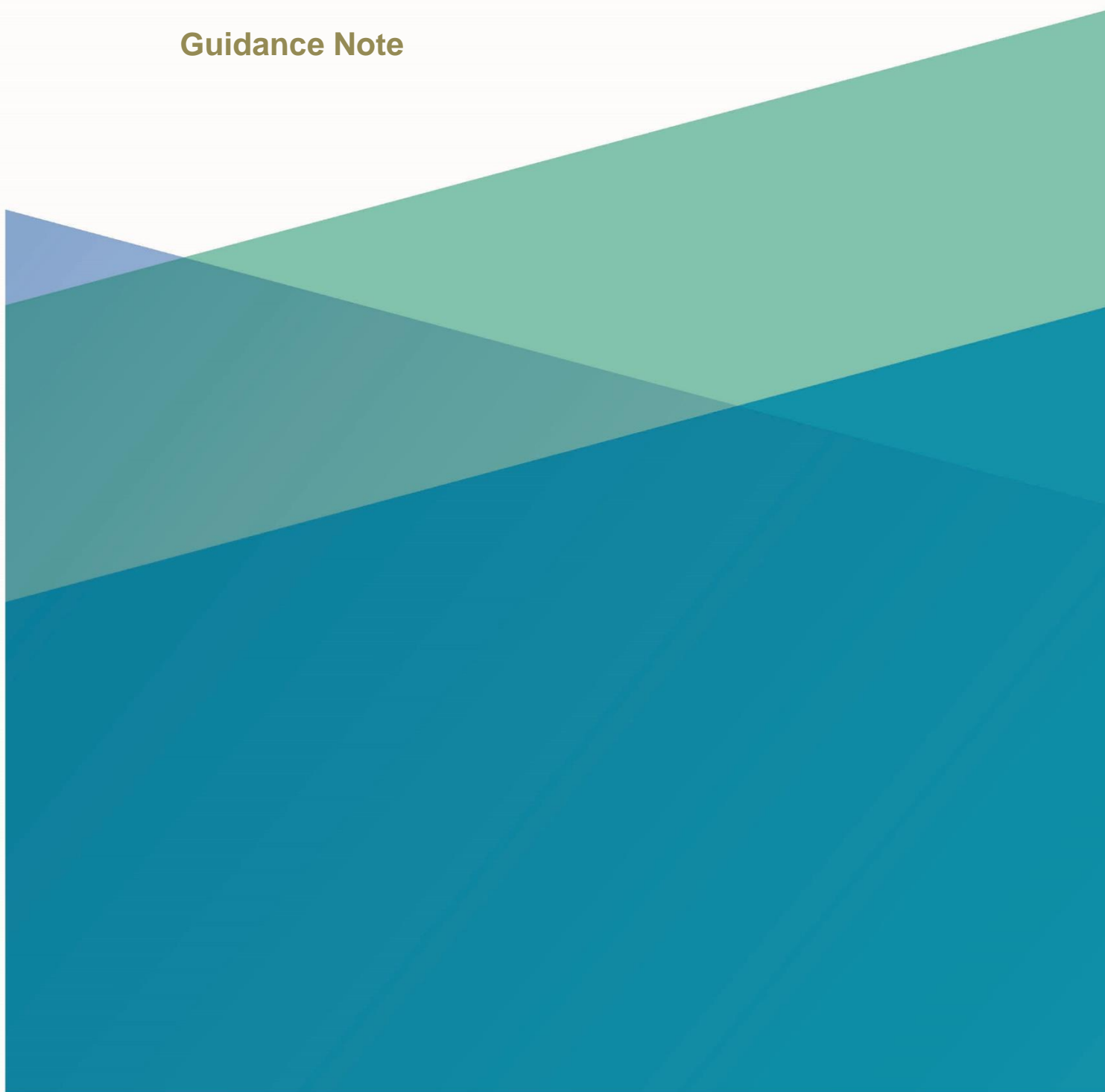


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1. Introduction

This guidance note is a supplementary document to the Public Consultation by the Department of Justice on Key Issues related to the Disregard of Convictions for Certain Qualifying Offences Related to Consensual Sexual Activity between Men. The purpose of this document is to act as a guide when completing the Public Consultation, and to provide additional context for each of the questions included therein.

A more detailed exploration of the key issues considered by the Working Group is documented in the Key Issues Paper compiled by the Working Group.

2. Background

The statutory provisions that criminalised consensual sexual acts between men in Ireland came into effect during British rule and remained in place following the foundation of the State. Consensual sexual acts between men were thereby effectively criminalised in law from 1634 until decriminalisation in 1993.

It is now widely recognised that the criminalisation of consensual sexual acts was an affront to human dignity and a significant historic injustice.

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

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

In order to identify relevant records and interrogate their quality and nature, An Garda Síochána established a confidential email system for individuals who might intend to seek 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.

Following discussion, it was agreed that the Department of Justice would set up a Working Group consisting of representatives from the Department of Justice, An Garda Síochána, the Office of the Attorney General, the Irish Human Rights

and Equality Commission (IHREC) and individuals from the LGBT community with expertise in this area to examine how this issue could be progressed.

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 between men prior to decriminalisation in 1993. The Working Group will assess the availability and quality of records held by An Garda Síochána which relate to the offences concerned in order to determine the feasibility of putting in place a scheme to disregard criminal convictions for those offences.
2. To examine issues regarding criminal records relating to consensual same-sex relationships prior to decriminalisation in 1993 (e.g. can the disclosure of historic criminal records be facilitated).
3. To consider, define and determine the offences to be included or excluded and to agree standards to meet before the criminal convictions can be disregarded for qualifying offences.
4. To examine the need for, and feasibility of, establishing a scheme for disregarding convictions for qualifying offences relating to consensual sexual acts between adult males.
5. To examine the possibility of putting in place a legislative scheme similar to that in place in England and Wales or any other relevant jurisdictions, to address this issue
6. To make any other recommendations in relation to the development of any scheme to the Minister for Justice no later than Q3 2022, or at the earliest date thereafter.

3. Interim Report

On 5 May 2022 the Department of Justice published the Progress Report of the Working Group.¹ That report contained the recommendation that a targeted public consultation be undertaken to provide an opportunity for affected persons to engage on some of the key questions related to the development of the

¹ Department of Justice (2022a), Working Group to Examine the Disregard of Convictions for Certain Qualifying Offences Related to Consensual Sexual Activity between Men: A 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/>.

disregard scheme. In line with this recommendation, the Department of Justice has launched this Public Consultation.

4. Public Consultation

The objective of the Working Group is to make recommendations for the development of a disregard scheme for qualifying convictions related to consensual sexual activity between men. As a result, this consultation is targeted towards affected persons and representative groups who may be able contribute based on lived experience of prosecutions and convictions. This input will inform the final deliberations of the Working Group, and ensure robust policy decisions.

5. Consultation Questions and Context

Question 1

What body would be the most appropriate ‘first’ point of contact for applicants to a disregard scheme?

- ***Department of Justice*** ☐
- ***An Garda Síochána*** ☐
- ***Irish Human Rights and Equality Commission (IHREC)*** ☐
- ***Other:***

Context

Many of the men convicted for consensual sexual activity with other men may have traumatic and difficult associations with the prosecution process. A key issue for consideration is whether An Garda Síochána is the appropriate *first point* of contact for an individual seeking to avail of any disregard process.

An order to disregard a conviction or convictions will have to 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 would liaise with An Garda Síochána and the Department of Justice in relation to the application for a disregard.

Those submitting are asked to choose their preference from the choices listed above and/or make any additional suggestions or comments in the ‘Other’ field.

Question 2

Other than the provisions which explicitly criminalised consensual sexual activity between men, are there any other provisions which were utilised to police consensual same-sex activity in Ireland prior to decriminalisation in 1993, and gave rise to convictions?

(Note: Section 61 of the Offences Against The Person Act 1861 & Section 11 of the Criminal Law Amendment Act 1885 were the primary criminalising laws that were repealed by the Criminal Law (Sexual Offences) Act 1993)

Context

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

The Working Group is trying to ascertain whether any laws **other than Sections 61 of the Offences Against The Person Act 1861 & Section 11 of the Criminal Law Amendment Act 1885**) may have been used ‘in practice’ in Ireland to target and prosecute men for being gay or bisexual. The Working Group is particularly seeking input from persons with personal knowledge of such incidences and particularly of prosecutions and convictions for engaging with other gay or bisexual men.

Question 3

Should formal statements (which could include affidavits, sworn/affirmed statements or statutory declarations) be sought where there isn’t any documentation or records available in respect of convictions?

Context

The Working Group is considering what action may be taken in the event that State-held records are not available or do not contain the required detail for the decision-maker to determine that a conviction may be disregarded. The responsibility of retaining and maintaining such records lies with the State. As a result the onus cannot be placed upon the applicant to provide the necessary

documentation to support an application to disregard a conviction including for example Court Orders.

The availability of adequate records has been an issue in other jurisdictions. In England and Wales, 33 applications have been deemed ineligible as there were no Police or Court records found to disregard.² It is not recommended by the Working Group that this approach be replicated due to the long-term psychological distress that may have been experienced by an applicant as a result of the original conviction regardless of the fact that records of that conviction may have been lost or destroyed.

The Working Group is currently considering whether a sworn/affirmed statement, statutory declaration or affidavit will be accepted from an applicant if adequate documentation or records cannot be located in order to provide for a disregard. Such a sworn/affirmed statement, statutory declaration or affidavit would likely require that the applicant declare that the conviction meets the eligibility criteria for a disregard. To date the Working Group has agreed that the following criteria utilised across the other jurisdictions are also relevant to Ireland:

- That the act was consensual
- That 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 that activity

The Working Group will consider if any other eligibility criteria should be applied for a formal statement and will make recommendations on the eligibility criteria in their final report. The Working Group will also consider what identifying information will need to be submitted by an applicant in order that records can in fact be sought and whether other documentary evidence such as contemporaneous newspaper reports can be submitted.

The Working Group seeks the input from affected persons and representative groups on whether a formal statement should be sought *if or when records are unavailable in respect of the conviction*

Question 4

How can participation in the scheme be encouraged?

(How can the process be made user friendly and accessible while ensuring that the dignity of applicants is respected and minimising any potential discomfort or re-traumatisation of those affected in the application process)

² UK Home Office, Statistics on the disregard and pardon for historical gay sexual convictions, 19 November 2021, available at: <https://www.gov.uk/government/publications/statistics-on-the-disregard-and-pardon-for-historical-gay-sexual-convictions>.

Context

The Working Group is considering how a disregard process could be made as user friendly and accessible as possible in order to encourage the greatest number of applications. The Working Group acknowledges that any process should be designed to ensure that the dignity of applicants is respected and to minimise any potential discomfort or re-traumatisation of those affected in the application process and is seeking practical input to inform their recommendations to the Minister for Justice on this matter.

Question 5

Should the application of the scheme be limited to convictions for consensual sexual activity between men or were there other actions employed in policing sexual activity or affection between men that should be considered by the Working Group?

Should records of prosecutions which were not successful (i.e. no conviction) also be considered by the Working Group?

Context

The Working Group is seeking to ascertain if any other actions were employed by the prosecuting authorities that it should consider within its remit.

Question 6

Are there any additional human rights or equality considerations that you would like the Working Group to consider in respect of the development of a disregard scheme and /or the administration of that scheme?³

Context

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

³ The remit of the Working Group is limited to making recommendations in respect of a scheme to disregard convictions for qualifying offences relating to consensual sex acts between adult males. The Group is concerned with rights engaged by the operation and administration of a scheme to disregard convictions.

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

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

- the right to equality and non-discrimination,
- the right to private life, privacy in respect of sexual orientation and sexual life and data protection,
- the right to an effective remedy, and
- the right to redress⁴, transparency, fair procedures, accountability, accessibility and participation.

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

Question 7

Are there any other issues that fall under the remit of the Working Group in developing a disregard scheme that you would like considered?

Context

If you have any additional comments or general feedback in relation to the development of a disregard scheme please include.

⁴ The development of a disregard scheme is a form of redress itself.

