

# Pardons for persons convicted of homosexual acts

Enquiry No. 2021/560

Rebecca Halpin, Parliamentary Researcher (Law)

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## Abstract

This briefing paper provides the following information:

- legislation that prohibited homosexual acts in Ireland.
- statistics showing how many crimes of this nature were reported; how many were prosecuted; and how many men were convicted.
- details about pardon schemes in a selection of countries.



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## Introduction

This briefing paper provides the following information:

First, the legislation that prohibited homosexual acts in Ireland.

Secondly, statistics relating to the following:

- how many crimes of this nature were reported,
- how many were prosecuted, and
- how many men were convicted.

Thirdly, details about pardon schemes in the following countries:

- England and Wales
- Scotland
- Northern Ireland
- Canada
- Australia
- New Zealand
- Germany

## Legislation and statistics in Ireland

### Relevant legislation

The following provisions rendered all sexual relations between men, adult or minor, and with or without consent,<sup>1</sup> a criminal offence:

- Sections 61 and 62 of the [Offences against the Person Act 1861](#)
- Section 11 of the [Criminal Law Amendment Act 1885](#)

Sections 61, 62 and 63 of the 1861 Act provided for the crime of “unnatural offences”:

#### **Unnatural Offences**

##### Sodomy and bestiality.

61. Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable . . . to be kept in penal servitude for life . . .

##### Attempt to commit an infamous crime.

62. Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person,

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<sup>1</sup> See *Charleton & McDermott's Criminal Law and Evidence* (Bloomsbury Professional, 2020) paras. [27.19] - [27.21].

shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding ten years . .

#### Carnal knowledge defined.

63. Whenever, upon the trial for any offence punishable under this Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only.

Section 11 of the 1885 Act provided for “**Outrages on decency**”:

11. 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.

The Supreme Court noted the following in relation to the operation of these provisions:

“It is to be noted that the offences dealt with in Sections 61 and 62 of the 1861 Act can, in relation to mankind, be committed with or upon a male or female person, but can only be committed by a male. It is also to be noted that the offence dealt with in Section 11 of the 1885 Act only applies to male persons, that the Section applies irrespective of the ages of the male persons involved and irrespective of whether the act is committed in public or private or with or without consent. While the impugned legislation does not expressly deal with homosexual practices and conduct it is accepted that the effect of the three Sections taken together is to prohibit and criminalise such conduct between male persons. No similar prohibition exists in relation to such practices and conduct between females.”<sup>2</sup>

#### **Historical legislation**

In addition to the 1861 and 1885 Acts, there are two historical Acts that are unlikely to be of relevance to a modern pardon system but will be referenced here for the sake of completeness. The post-medieval statutory interventions on the topic of homosexual acts appear to have begun in 1634, with the *Punishment of the Vice of Buggery (Ireland) 1634*. The Act did not define the crime of buggery but assimilated it to felony at Common Law in terms of procedure and penalty, and made it a “felony without benefit of clergy”.

The *Offences against the Person (Ireland) Act 1829*, applicable to Ireland, was passed for the purpose of “consolidating and amending the Statutes.....relating to Offences against the Person.” To that end it repealed a large number of enactments, including the Act of 1634 “for the Punishment of the Vice of Buggery,” but replaced them. Amongst other provisions, it enacted section 18, which stated:

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<sup>2</sup> [Norris v Attorney General](#) [1984] IR 36, per O’Higgins CJ (Supreme Court)

“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.”

In 1861, the Act of 1829 was repealed and replaced by the provisions of the 1861 Act (for a discussion of these Acts, see the judgments of the Supreme Court in *DPP v Judge Devins & O'M (M)*).<sup>3</sup>

## Legal challenge to the constitutionality of the 1861 and 1885 Acts

In 1983, Senator David Norris sought a declaration that sections 61 and 62 of the 1861 Act and section 11 of the 1885 Act were inconsistent with the Constitution, i.e. the provisions “are so irreconcilable with his personal rights under the Constitution that they cannot be said to have been carried forward into the post-Constitutional era”.<sup>4</sup> The constitutionality of the provisions was upheld by both the High Court and Supreme Court<sup>5</sup> (with a minority dissenting in the Supreme Court).

In 1988, Senator Norris was ultimately successful in an action before the European Court of Human Rights,<sup>6</sup> with the Strasbourg Court holding by a majority of 8:6 that his right to privacy under Article 8 of the European Convention on Human Rights had been infringed.<sup>7</sup>

The [Criminal Law \(Sexual Offences\) Act 1993](#) decriminalised homosexual acts between consenting adult males. It abolished the common law offence of buggery between persons but made it an offence to commit an act of buggery with persons of either sex under 17 years of age or a mentally impaired person. The Act also replaced the offence of gross indecency with a new offence of gross indecency by a male with a male under 17 years of age and it updated the law in regard to the protection of the mentally impaired from sexual abuse.<sup>8</sup>

## Arrests and prosecution numbers

It is difficult to ascertain the exact numbers of persons prosecuted and convicted of homosexual offences in the State.<sup>9</sup> Senator David Norris, writing on the subject in 1976, stated:

“It is extremely difficult to elicit exact up-to-date figures in this area [...] data is released in the Garda Report on Crime in such a diffuse and inexact way as to make interpretation hazardous.”<sup>10</sup>

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<sup>3</sup> [DPP v Judge Devins & O'M \(M\)](#) [2012] IESC 7

<sup>4</sup> [Norris v Attorney General](#) [1984] IR 36, *per* McWilliam J (High Court)

<sup>5</sup> O'Higgins CJ (Finlay and Griffin JJ concurring); Henchy and McCarthy JJ dissenting

<sup>6</sup> [Norris v Ireland](#) (1991) 13 EHRR 186.

<sup>7</sup> See Tom O'Malley, 'Norris v Ireland—An Opportunity for Law Reform', *Irish Law Times* 1988, 6, 279

<sup>8</sup> Law Reform Commission, [Discussion Paper on the Law on Sexual Offences](#), 1998, p. 20-21.

<sup>9</sup> [Convictions for Certain Sexual Offences \(Apology and Exoneration\) Bill 2016: Second Stage – Seanad Éireann \(25th Seanad\) – Wednesday, 1 Feb 2017 – Houses of the Oireachtas](#)

<sup>10</sup> David Norris, 'Homosexual Law Reform in Ireland: A Progress Report' (1976) 1 *Dublin U*

*LJ* 27, p. 27

In this article, Senator Norris discusses the number of persons who have been prosecuted or convicted of homosexual offences during a ten-year period (1962-1972) and discusses in detail the figures from 1973 and 1974. This data is provided by the annual Garda Report on Crime for the corresponding years, and referred to persons prosecuted and convicted of “unnatural offences”.

There are no recent academic publications that provide new data regarding historical prosecution and conviction numbers. Prof. Diarmaid Ferriter’s 2009 book *Occasions of Sin: Sex and Society in Modern Ireland*<sup>11</sup> cites statistics that had previously been provided by Senator Norris. When discussing these statistics, Prof. Ferriter references the information provided in a book by Chrystel Hug,<sup>12</sup> which also primarily references the earlier statistics provided by Senator Norris. These are the figures that have been cited in modern discourse on this issue<sup>13</sup> (see for example the 2018 [Statement of the Taoiseach 25th Anniversary of Decriminalisation of Homosexuality](#)).

This data provided by these two books and article shows the following:

- The annual reports on prisons from the Department of Justice show that, between 1940 and 1978, an average of six men per year were jailed for “indecency with males”, and an average of seven for “gross indecency”; an average of thirteen men per year in total.
- Based on the annual Garda Report on Crime, between 1962 and 1972, there were a total of 455 convictions for homosexual activity.
- The total number of prosecutions for the period between 1978 and 1986 is 238 prosecutions.

## Calculation of statistics 1950-1993

When preparing of this Briefing Paper, it was possible to refer to the annual Garda Reports on Crime, as discussed by Senator Norris in his 1976 article on the subject, and to calculate, approximately,

- how many crimes of this nature (i.e. “unnatural offences”) were reported,
- how many were prosecuted, and
- how many men were convicted.

In the table below I have provided a summary of the statistics provided in the Reports on Crime for each decade, beginning in 1950, and concluding in 1993 when the law was repealed.

For a full table of statistics that was prepared for this paper, see Annex 1.

<sup>11</sup> Diarmaid Ferriter, *Occasions of Sin: Sex and Society in Modern Ireland* (Profile Books, 2009), p. 490.

<sup>12</sup> Chrystel Hug, [The Politics of Sexual Morality in Ireland](#) (Macmillan, 1998), pp. 207-211.

<sup>13</sup> [Apology for Persons Convicted of Consensual Same-Sex Sexual Acts: Motion](#), Dáil Éireann debate - Tuesday, 19 Jun 2018 Vol. 970 No. 4; ['Lives were ruined': State moves closer to exonerating men convicted of homosexual 'offences'](#), *The Journal*, 05 January, 2022

Years	Number of crimes <sup>14</sup> reported or known	Number of criminal proceedings commenced	Number of men convicted (on indictment)	Number of men convicted (summarily)	Total number of men convicted
1990-1993	169	83	9	23	32
1980-1989	468	335	13	81	94
1970-1979	383	315	54	135	189
1960-1969	642	568	55	312	367
1950-1959	458	389	88	171	259
<b>Totals</b>	<b>2120</b>	<b>1690</b>	<b>219</b>	<b>722</b>	<b>941</b>

Source: Garda Report on Crime (1993-1950)

The following caveats should be borne in mind regarding the figures provided.

As noted by Senator Norris, the data regarding these crimes was recorded and reported imprecisely. Also, while the large majority of acts recorded under “unnatural offences” were homosexual acts, it is possible that a certain number were other crimes prohibited by the relevant legislative provision (e.g. s. 61 of the 1861 Act prohibiting unnatural offences also criminalised bestiality). Thus the figures are approximate, not exact.

Reasonably precise figures are available showing the number of men jailed each year for “indecency with males” and “gross indecency” (as reported in the annual Report on Prisons). However, this would only represent a percentage of those who might avail of a pardon. Some defendants who were convicted were imprisoned, while others were ordered to pay fines, were given suspended sentences or were ordered to see a psychiatrist.<sup>15</sup>

There is no distinction between consensual and non-consensual homosexual activity in the 1861 and 1885 Acts, as all such activities were criminalised. Thus, the totals do not represent the total number of men who would be able to avail of a pardon, as this would not be offered in cases where the criminalised act was non-consensual or involved a minor.

Finally, it was indicated by the Director of Public Prosecutions in his report to the European Court of Human Rights in the *Norris* case that, from 1974 onwards, the only prosecutions for such offences either involved minors or concerned acts that were committed in public.<sup>16</sup>

<sup>14</sup> Recorded in the Reports as “unnatural offences”.

<sup>15</sup> On the historical role of psychiatrists in prosecutions for homosexual acts in Ireland see: Kelly, B. (2017). [Homosexuality and Irish psychiatry: Medicine, law and the changing face of Ireland](#), *Irish Journal of Psychological Medicine*, 34(3), 209-215. doi:10.1017/imp.2015.72

<sup>16</sup> Leo Flynn, 'Cherishing All Her Children Equally: The Law and Politics of Irish Lesbian and Gay Citizenship' (1997) 6 *Soc & Legal Stud* 493, p. 497.

## Convictions for Certain Sexual Offences (Apology and Exoneration) Bill 2016 (PMB)

The [Convictions for Certain Sexual Offences \(Apology and Exoneration\) Bill 2016](#), sponsored by Ged Nash, Kevin Humphreys, Ivana Bacik, and Aodhán Ó Ríordáin, has passed the First and Second stages in Seanad Eireann.<sup>17</sup>

The Bill's [Explanatory Memorandum](#) provides the following information on the provisions of the Bill:

"The Bill is described in its long title as an Act to provide for an apology to and exoneration of persons convicted of consensual same-sex sexual acts, on the grounds that prosecutions for such offences were improperly discriminatory, contrary to human dignity and in breach of personal privacy and autonomy.

**Section 1** lists the Acts containing the repealed offences to which this Bill applies:

- the 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 11 of the *Criminal Law Amendment Act 1885*.

The section applies to convictions by a court or court martial established by or under the Constitution or the Constitution of Saorstát Éireann or, prior to the establishment of Saorstát Éireann, by a court or court martial sitting in a place that is now within the State.

**Section 2** provides that a person convicted of any such offence receives an apology and exoneration and an acknowledgement that the offences concerned and prosecutions for those offences were improperly discriminatory, contrary to human dignity and infringed personal privacy and autonomy"

## Formal apologies

In 2018, the then Minister for Justice, Charlie Flanagan extended a "sincere apology" to people who were affected by the criminalisation of homosexuality in Ireland prior to 1993. He was speaking in the Seanad during the debate on an all-party motion<sup>18</sup> acknowledging the harm caused by criminalisation and apologising to those affected.<sup>19</sup>

Also in 2018, during a reception in Dublin Castle marking the 25th anniversary of the decriminalisation of homosexuality in 1993, then Taoiseach Leo Varadkar made the announcement the Government intended bring forward legislation by the end of 2018 to expunge convictions for homosexuality.<sup>20</sup>

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<sup>17</sup> See [Seanad Éireann debate - Wednesday, 1 Feb 2017: Convictions for Certain Sexual Offences \(Apology and Exoneration\) Bill 2016: Second Stage](#)

<sup>18</sup> [25th Anniversary of Decriminalisation of Homosexuality: Motion](#) Seanad Éireann debate - Tuesday, 19 Jun 2018 Vol. 258 No. 11

<sup>19</sup> [Flanagan apologises to gay and bisexual men over historic convictions](#), *Irish Legal News*, 20 June 2018

<sup>20</sup> [Government to 'expunge' historic convictions for homosexuality](#), *Irish Legal News*, 25 June 2018

## International pardon schemes

The standard scheme applied in the jurisdictions surveyed involves a process whereby persons convicted of historic homosexual offences may apply to have their conviction expunged or disregarded, if the nature of the conviction accords with certain requirements set out in legislation (e.g. the act was consensual and did not involve a minor).

In addition to the removal of past convictions, Germany has established a compensation scheme for those unjustly convicted.

### Why disregards or expungements are not usually automatic, and must be assessed on a case-by-case basis

Commenting on the UK law, Prof. James Chalmers noted that it would be very difficult to operate an automatic disregard system as the law did not distinguish between consensual and non-consensual homosexual activity.<sup>21</sup>

"The practical problem here is that there never was an offence of "consensual adult homosexual activity". If there was, we could simply remove all these convictions from the records. But the old law simply did not distinguish between consensual and non-consensual sex, or have a concept of "underage sex" – before 1967, gay sex was criminal regardless of consent and regardless of age. This means that if someone has a conviction for – for example – "gross indecency", you cannot tell from the fact of the conviction whether they were convicted for doing something which would still be an offence today or not. They might have been convicted for doing something which would now be prosecuted as sexual assault or a child sex offence."<sup>22</sup>

### Difficulties in the operation of expungement/pardon schemes

In compiling the information on the schemes discussed below, certain common difficulties in the operation of disregard schemes became apparent. These include:

- A lack of awareness on the part of potential applicants that an expungement/pardon scheme exists. This is problematic as most schemes place the onus on the person who has been unjustly convicted to apply for expungement.
- A lack of monetary compensation for harm caused by unjust convictions.<sup>23</sup>
- A small number of potential applicants apply for expungement/pardons under their countries' scheme.<sup>24</sup>

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<sup>21</sup> Though the following has been noted by Prof. Fergus Ryan on the crime of "gross indecency":

"[Consent] was an essential constituent of the offence of gross indecency, as then constituted, that the parties thereto "act in concert", that is, co-operate in the venture". Fergus Ryan, 'Queering' the Criminal Law: Some Thoughts on the Aftermath of Homosexual Decriminalisation, *Irish Criminal Law Journal* 1997, 7(1), 38-47

<sup>22</sup> James Chalmers, "[Schrödinger's pardon: the difficulties of the Turing Bill](#)", October 2016.

<sup>23</sup> Only Germany offers some form of financial compensation for harm caused by conviction under anti-gay laws.

<sup>24</sup> For example, very few people have applied under the scheme in place in Canada (as of last year, 9 convictions have been expunged, out of a potential 9000 applicants). Concerns have also been raised in

- The scheme is too narrow, and only offers disregards for a select number of offences.<sup>25</sup>

## England and Wales

### The difference between a disregard and a pardon

Before addressing the current schemes, it may be of assistance to note the difference between a disregard and a pardon. The House of Commons Library has provided the following information on the difference between a disregard and a pardon in the context of the 2012 UK legislation.

"The disregard system introduced by the 2012 Act is a different legal process to a pardon. [...] The aim of a **disregard** is to treat the individual concerned for all purposes in law as if he had not committed the offence or been convicted for it. In the words of the then Justice Minister Lord Faulks:

The objective of the Protection of Freedoms Act, in disregarding certain offences, is that they should no longer affect a person's life or career. The intention is to support living people who are disadvantaged when they apply for work, rather than to set the record straight.

**A pardon**, by contrast, is used to recognise that a person was unjustly convicted. Pardons are issued by the Queen (on the recommendation of the Justice Secretary) under the royal prerogative of mercy.

In practice the Justice Secretary will usually recommend a pardon only where there are convincing reasons for believing a person to be both morally and technically innocent: general doubts about someone's guilt may not be sufficient. A pardon removes the "pains, penalties and punishments" which are consequent upon a person's conviction. It does not, however, remove the conviction itself. A pardon is not, therefore, equivalent to an acquittal; only the courts have the power to quash convictions altogether.

The 2012 Act specifically preserves the existing power of the Queen, under the Royal prerogative, to issue a free pardon, quash a conviction or sentence, or commute a sentence. These actions are therefore still available in respect of disregarded convictions or cautions."<sup>26</sup> (emphasis added)

## 2012 disregard scheme

The [Protection of Freedoms Act 2012](#) introduced a new "disregard scheme" for men with historic convictions for certain gay sex offences (buggery and gross indecency).<sup>27</sup> Such men can apply to

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Northern Ireland that few people will want to revisit their previous convictions due to past stigmas (see the relevant country sections below for further details).

<sup>25</sup> See the current proposal for reform in England and Wales, and the operation of the Canadian Act.

<sup>26</sup> House of Commons Library, "[The Sexual Offences \(Pardons Etc.\) Bill 2016- 17 \[Bill 6 of 2016-17\]](#)" Briefing Paper, Number 07441, 20 October 2016

<sup>27</sup> In 1967, consensual sexual activity in private between two men over the age of 21 was decriminalised. The age of consent was lowered to 18 in 1994 and again to 16 in 2000. However, these changes did not

the Home Secretary to have their convictions disregarded. The Home Secretary must be satisfied that the following conditions have been met:

- the other person involved in the conduct constituting the offence consented to it and was aged 16 or over; and
- any such conduct now would not be an offence under section 71 of the *Sexual Offences Act 2003* (sexual activity in a public lavatory).

The aim of these two conditions is to ensure that the only convictions disregarded are those for behaviour that is no longer criminal under present day law.

If an application for a disregard is successful, the applicant is treated for all purposes in law as if he had not committed the offence or been convicted for it. Where the convictions are disregarded they will no longer be disclosed on Disclosure and Barring Service certificates or in court proceedings.

A [Guidance Note](#) provides details regarding the application process, eligibility, and the relevant legislation under which the applicant may have been convicted. The offences covered are mainly sections 12 (buggery) and 13 (gross indecency) of the [Sexual Offences Act 1956](#) as well as corresponding offences under earlier legislation, and equivalent military offences. Cautions, warnings and reprimands can also be disregarded.

The activity must have been consensual, with a person of 16 or over, and must not be an offence today - in particular sexual activity in a public lavatory is not eligible as that remains an offence under the UK [Sexual Offences Act 2003](#).

The process is free of charge, and the applicant is required to complete an application form, provide proof of identity and address.

The disregard scheme was only available to living applicants. Following numerous public campaigns, in December 2013 mathematician Alan Turing received a posthumous pardon from the Queen.<sup>28</sup> Turing had been convicted of gross indecency in the 1950s for activity that would have been legal under the current UK laws. The subject of posthumous pardons was then addressed by the *Policing and Crime Act 2017*, known as 'Turing's Law' (see below).

### **Policing and Crime Act 2017 ('Turing's Law') – posthumous pardons**

[Section 166](#) of the [Policing and Crime Act 2017](#) granted approximately 49,000 deceased gay and bisexual men a posthumous pardon for offenses they were convicted of under former sexual offenses legislation that had provided that homosexuality was a crime. The Act also states that any living person who was convicted of these offenses may apply for a statutory pardon to remove the convictions from their records.<sup>29</sup>

There were some criticisms that the law did not go far enough.<sup>30</sup>

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have retrospective effect. Any convictions predating the decriminalisation of consensual gay sex and the lowering of the age of consent therefore continue to remain part of an individual's criminal record.

<sup>28</sup> [Enigma codebreaker Alan Turing receives royal pardon](#), *Guardian*, 24 December 2013.

<sup>29</sup> [England and Wales: Thousands Receive Posthumous Pardon for Homosexuality Convictions](#), United States Library of Congress

<sup>30</sup> Sir John Dermot Turing, '[Alan Turing's Law](#)', *The Royal Society*, 28 February, 2017.

## Current proposed reform

It has very recently been proposed that the current Disregards and Pardons scheme be extend to ensure that anyone convicted or cautioned for consensual same-sex sexual activity, under discriminatory laws that have since been abolished, can apply to have them 'disregarded'.<sup>31</sup>

Present laws (as described above) set out a specified list of offences that can form the basis of an application, which are largely focused on the repealed offences of buggery and gross indecency between men. Currently anyone with a conviction or caution for an offence which isn't specified in the legislation is excluded from applying. The UK government will introduce an amendment to the [Police, Crime, Sentencing and Courts Bill](#) which will scrap this list and broaden eligibility to include anyone convicted or cautioned for an abolished civil or military offense related to consensual same-sex sexual activity. Those eligible would have the convictions wiped from their records.

The amendment would apply to civilians in England and Wales and people convicted of military offenses anywhere in Britain. Northern Ireland and Scotland retain their separate disregard and pardon schemes.<sup>32</sup>

## Scotland

In 2018, the [Historical Sexual Offences \(Pardons and Disregards\) \(Scotland\) Act 2018](#) provided an automatic pardon to all to all men, living or dead, who were convicted of having consensual sex with men before decriminalisation. The pardon is a purely symbolic acknowledgement that the laws were discriminatory and does not reverse the conviction.<sup>33</sup> An apology had previously been made in 2017 by first minister, Nicola Sturgeon.<sup>34</sup>

There is also an option to apply to have convictions for same-sex sexual activity that is now legal removed from central criminal conviction records and to apply for a formal "disregard" in order to prevent the information being included in disclosure checks. A successful disregard application means the conviction will not appear on any background check carried out by Disclosure Scotland, and the person will be treated as not having committed the offence.<sup>35</sup> It is for Scottish ministers to decide, based on the available evidence about the specific case, whether the disregard is granted.<sup>36</sup>

The Scottish government stated that it expects about 25 men to make such an application between 2018 and 2023.

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<sup>31</sup> See: [More people to be pardoned and have their historical convictions for same-sex sexual activity disregarded](#), PolicyMogul, 04 January, 2022; [Past convictions for homosexual activity to be wiped from records, Patel to announce](#), *Guardian*, 04 January, 2022; [All gay sex convictions to be pardoned in plan to 'right wrongs of the past'](#), *Independent*, 04 January, 2022

<sup>32</sup> [Britain to wipe from records past convictions for consensual same-sex activity](#), *The Washington Post*, 04 January, 2022

<sup>33</sup> [Pardon for gay men convicted under discriminatory laws](#) Scottish Government, 15 Oct 2019

<sup>34</sup> [Nicola Sturgeon makes gay convictions apology](#), *BBC News*, 7 November 2017

<sup>35</sup> [Thousands of gay Scots to be pardoned](#), *BBC News*, 06 June, 2018

<sup>36</sup> Information on the procedures for obtaining a disregard are available here: [Pardons and disregards for convictions for sexual activity between men](#)

## Northern Ireland

The Northern Ireland Assembly agreed in November 2016 to bring the law in Northern Ireland in line with England and Wales.<sup>37</sup>

The new law facilitates the removal of convictions from police and court records of historic offences where the activity was consensual, with a person aged 17 or over, and is no longer an offence today.

Disregarded convictions will be considered as never having happened and will no longer appear on criminal records or in any criminal record checks. There will be no requirement to disclose the abolished offence, for example on job application forms or in court cases.

To have historic convictions disregarded, an application must be made to the Department of Justice. If an application is successful, the person is also, by law, pardoned for the offence.

Anyone who was convicted of an abolished homosexual offence and who has since died is also, by law, pardoned for the offence.<sup>38</sup>

It has been suggested that many people who might avail of a pardon or expungement might choose not to do so.<sup>39</sup>

## Canada

In 2017, a formal apology was made on behalf of the Government of Canada to the lesbian, gay, LGBTQ community in Canada for historical discrimination and oppression.<sup>40</sup>

In 2018, the [Expungement of Historically Unjust Convictions Act](#) established a procedure for expunging certain historically unjust convictions, which includes eligible offences involving consensual sexual activity with a same-sex partner that would be lawful under current Canadian law.

The legislation allows for the destruction or permanent removal of judicial records of historically unjust convictions from federal databases. When an expungement is ordered, the person convicted of the offence is deemed never to have been convicted of that offence.<sup>41</sup>

The Parole Board of Canada (PBC) is the official federal agency responsible for ordering or refusing to order expungement of a conviction. Persons convicted of an offence listed in the schedule to the Expungement Act are eligible to submit an application to the PBC to have the

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<sup>37</sup> [NI: Department of Justice launches disregard scheme for homosexual offences](#), *Irish Legal News*, 29 June 2018.

<sup>38</sup> Information on the procedures for obtaining a disregard are available here: [Pardons and disregards for homosexual offences](#)

<sup>39</sup> [Concerns over pardons for convicted NI gay men](#), *BBC News*, 10 November 2016

<sup>40</sup> House of Commons, [Debates](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 28 November 2017.

<sup>41</sup> See: Chloé Forget, [Legislative Summary of Bill C-66: An Act to establish a procedure for expunging certain historically unjust convictions and to make related amendments to other Acts](#), Parliament of Canada (2018).

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.<sup>42</sup>

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*.

### Criticism of the Act

The Act was criticised by the Canadian HIV/AIDS Legal Network as "[fundamentally flawed](#)." The Network proposed [a series of amendments](#) to Bill C-66 (the 2018 Expungement Act), which were not subsequently adopted.<sup>43</sup>

Additionally, very few people have applied under the new law. Almost three years after the establishment of the new system, just 9 people have had their record expunged. It had been estimated that there were approximately 9000 people who were eligible to apply under the scheme.<sup>44</sup> Out of the 9,000 people the bill was supposed to help, that represents just 0.1 per cent whose records were expunged.

### Australia

In November 2012, the Australian Senate passed a resolution calling on its states and territories to purge convictions for homosexual conduct.<sup>45</sup>

Responsibility for criminal law in Australia is divided between the state and territory governments and the federal government. The criminal law system differs across Australian States, with distinctions regarding criminal offences, sentencing, and criminal procedure.<sup>46</sup> In the period from 2013 to 2018, a series of expungements took place in the Australian states, some with and some without apologies. South Australia (2013), New South Wales (2014), Victoria (2015), the Australian National Territory (2015), Queensland (2017), Western Australia (2018), the Northern Territory (2018), and Tasmania (2018) have expunged criminal convictions, accompanied by an apology in the cases of Western Australia and the Northern Territory.<sup>47</sup>

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<sup>42</sup> Government of Canada, [What is expungement?](#)

<sup>43</sup> [Queer activists disappointed by gay conviction expungement law](#), Xtra, May 17, 2018

<sup>44</sup> [Law to wipe LGBT criminal records has deleted just nine crimes](#), iPolitics

<sup>45</sup> Commonwealth, Parliamentary Debates, Senate, 22 November 2012, 9496 (S Hanson-Young).

<sup>46</sup> There are nine criminal jurisdictions in Australia; a federal, six states and two territories. David Lanham et. al, *Criminal Laws in Australia* (Federation Press, 2006). The federal code is the only general criminal law that applies throughout Australia. Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2016), p. 9.

<sup>47</sup> Smith M. 'Homophobia and Homonationalism: LGBTQ Law Reform in Canada'. *Social & Legal Studies*. 2020;29(1):65-84. doi:[10.1177/0964663918822150](https://doi.org/10.1177/0964663918822150)

An overview of many of these schemes is provided by the 2016 [Consultation Paper](#) produced by the Queensland Law Reform Commission, which reviewed the expungement of criminal convictions for historical gay sex offences.<sup>48</sup> The paper considered how such schemes in Australia should operate in practice, the effect of expungement, the conditions for application etc.

One example of the change in policy is New South Wales where, on 24 November 2014, the [Criminal Records Act 1991](#) was amended to allow historical homosexual offences to be "extinguished".<sup>49</sup> The effect of the extinguishment is set out in [s.19F](#) of the 2014 Act, which states:

- (1) If a conviction of a person is an extinguished conviction—
  - (a) the person is not required to disclose to any other person for any purpose information concerning the extinguished conviction, and
  - (b) a question concerning the person's criminal history is taken not to refer to any convictions of the person which are extinguished convictions, and
  - (c) in the application to the person of a provision of an Act or statutory instrument—
    - (i) a reference in the provision to a conviction is taken not to be a reference to any convictions of the person which are extinguished convictions, and
    - (ii) a reference in the provision to the person's character or fitness is not to be interpreted as permitting or requiring account to be taken of extinguished convictions.

These amendments allow a person with an eligible historical homosexual conviction to apply to the Secretary of the Department of Justice to have the conviction extinguished. The Secretary has the authority to decide that an eligible conviction should be extinguished but only if he or she is satisfied that the other person involved in the sexual activity consented to the sexual activity and was above the age of consent. The Secretary has powers under the Act to require certain persons or bodies to provide information for the purposes of making a decision under the Act.

Applications may be made to the Department of Justice to have certain offences extinguished. The list of offences is available [here](#).

### Criticism of the reforms

While the legislative developments have been broadly viewed as positive, there are certain criticisms regarding the scope and operation of the schemes, which are summarised below:

- The Victorian legislation creates an absolute bar to any state compensation.
- As the onus is on the affected person to apply to have previous convictions extinguished, affected persons must be aware that they have a right to apply. It is recommended that a comprehensive notification scheme be put in place.
- Not many people have submitted applications under the scheme thus far. It is unclear as yet why this is the case.<sup>50</sup>

<sup>48</sup> Queensland Law Reform Commission (2016), [Review of expunging of criminal convictions for historical gay sex offences: Consultation Paper](#), WP No74 (2016)

<sup>49</sup> [Extinguishment of Historical Homosexual Offences Factsheet](#)

<sup>50</sup> Egale Canada Human Rights Trust, [The Just Society Report: Confronting the Legacy of LGBTQ2SI Discrimination in Canada](#), pp 90-92

## New Zealand

The [Criminal Records \(Expungement of Convictions for Historical Homosexual Offences\) Act 2018](#) came into force on 10 April 2018. The Act establishes a scheme to expunge convictions for men for specific offences. This means that men who were convicted of specific offences that have since been decriminalised can apply to be treated as if they had never been convicted.

[The scheme](#) is administered by the Ministry of Justice. 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.

If a person's conviction is expunged, 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.

For a detailed overview of the legislation, see Kris Gledhill, "[Legislation Note: Criminal Records \(Expungement of Convictions for Historical Homosexual Offences\) Act 2018](#)", *New Zealand Criminal Law Review*, May 2020

## Germany

Germany appears to have been the first country to debate the expungement of past criminal convictions against gay men.<sup>51</sup> An official apology was made in 2000.<sup>52</sup> In 2002, the [Act on the Annulment of National Socialist Unjust Judgments in Criminal Justice](#) of 25 August 1998 (NS-AufhG), which repealed criminal court decisions that "were issued in violation of elementary ideas of justice, after 30 January 1933", was amended to include Nazi-era convictions of homosexuals.

In 2017, Germany formalized the policy [in legislation](#) that overturned all convictions under an 1871 law that criminalized sex between men.<sup>53</sup> Those affected by the pardon can apply for a "vindication/rehabilitation certificate" free of charge from the competent public prosecutor's offices. If a convicted person has already died, this should also be possible for relatives or other people "if they have a legitimate interest in establishing the annulment of the judgment".<sup>54</sup>

The 2017 legislation also provided for a compensation scheme, which provided payments of €3,000 (£2,600) for each conviction, as well as €1,500 (£1,300) for every year started in prison by the convicted men.<sup>55</sup> In cases where victims had died still bearing a conviction, the government will instead make payments to gay rights groups.<sup>56</sup> The amount was challenged as insufficient by the

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<sup>51</sup> Smith M. 'Homophobia and Homonationalism: LGBTQ Law Reform in Canada'. *Social & Legal Studies*. 2020;29(1):65-84. doi:[10.1177/0964663918822150](https://doi.org/10.1177/0964663918822150)

<sup>52</sup> Eva Küblbeck, "[Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: Germany](#)", January 2014, German Institute for Human Rights.

<sup>53</sup> [Gesetz zur strafrechtlichen Rehabilitierung der nach dem 8. Mai 1945 wegen einvernehmlicher homosexueller Handlungen verurteilten Personen und zur Änderung des Einkommensteuergesetzes](#) [translation: Law on the criminal rehabilitation of persons convicted of consensual homosexual acts after May 8, 1945 and amending the Income Tax Act]

<sup>54</sup> [Verurteilte Homosexuelle sollen Entschädigung erhalten](#), *Zeit*, 21 October 2016 [translation: [Convicted homosexuals to receive compensation](#), *Zeit*, 21 October 2016]

<sup>55</sup> [Germany to overturn convictions of gay men prosecuted after war](#), *The Guardian*, 22 March 2017

<sup>56</sup> [Germany to quash historical convictions of gay men](#), *The Guardian*, 11 May 2016.

German Lesbian and Gay Federation.<sup>57</sup> As of September 2021, the German Federal Office of Justice has indicated that it had paid out compensation worth nearly €860,000 in a total of 249 cases.<sup>58</sup>

In addition to victim compensation, a €500,000 annual grant was provided to the Magnus Hirschfeld gay history research centre in Berlin.<sup>59</sup> Also, in 2008, the German government opened a monument to gay victims of the Holocaust.<sup>60</sup>

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<sup>57</sup> “[Germany Wipes Slate Clean for 50,000 Men Convicted Under Anti-Gay Law](#)”, *New York Times*, June 23, 2017

<sup>58</sup> [Germany compensates hundreds convicted under Nazi-era homosexuality law](#), *EuroNews*, 14 September, 2021

<sup>59</sup> [Germany to overturn convictions under Nazi-era anti-gay laws](#)’, *The Irish Times*, 22 March 2017

<sup>60</sup> [Gay Reparations Are Past Due](#), *Foreign Policy*, 29 May, 2021

## Annex 1 – Complete table of statistics

Year	Number of crimes reported or known	Number of criminal proceedings commenced	Number of men convicted (on indictment)	Number of men convicted (summarily)	Total number of men convicted
1993	27	10	4	0	4
1992	31	0	1	17	18
1991	63	44	2	1	3
1990	48	29	2	5	7
1989	43	25	2	5	7
1988	55	23	6	2	8
1987	61	47	1	5	6
1986	36	29	0	1	1
1985	40	33	0	10	10
1984	61	52	1	16	17
1983	33	19	0	6	6
1982	54	31	0	11	11
1981	48	43	3	21	24
1980	37	33	0	4	4
1979	15	13	0	6	6
1978	16	13	2	4	6
1977	24	19	1	8	9
1976	27	22	1	6	7
1975	22	14	1	10	11
1974	53	44	5	25	30
1973	56	45	5	18	23
1972	45	37	2	26	28
1971	37	31	2	17	19
1970	88	77	35	15	50
1969	72	68	5	29	34
1968	63	53	2	44	46
1967	71	65	5	43	48
1966	68	56	5	33	38

Year	Number of crimes reported or known	Number of criminal proceedings commenced	Number of men convicted (on indictment)	Number of men convicted (summarily)	Total number of men convicted
1965	63	55	0	30	30
1964	57	53	9	22	31
1963	62	58	3	30	33
1962	75	66	11	37	48
1961	55	48	4	27	31
1960	56	46	11	17	28
1959	42	33	6	13	19
1958	39	33	1	17	18
1957	33	27	8	16	24
1956	48	42	7	21	28
1955	40	38	5	21	26
1954	45	32	1	13	14
1953	49	44	7	24	31
1952	43	39	8	14	22
1951	36	30	4	17	21
1950	83	71	41	15	56

Source: Garda Report on Crime (1950-1993)

## **Contact:**

Houses of the Oireachtas

Leinster House

Kildare Street

Dublin 2

D02 XR20

[www.oireachtas.ie](http://www.oireachtas.ie)

Tel: +353 (0)1 6183000 or 076 1001700

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