

HISTORICAL SEXUAL OFFENCES (PARDONS AND DISREGARDS) (SCOTLAND) BILL

FINANCIAL MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.2 of the Parliament's Standing Orders, this Financial Memorandum is published to accompany the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill, introduced in the Scottish Parliament on 6 November 2017.
2. The following other accompany documents are published separately:
 - Explanatory Notes (SP Bill 21-EN);
 - a Policy Memorandum (SP Bill 21-PM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 21-LC).
3. This Financial Memorandum has been prepared by the Scottish Government to set out the costs associated with the measures introduced by the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.
4. Until relatively recently, the criminal law in Scotland discriminated against same-sex sexual activity between men. The law did this in two ways - by criminalising activity that would be legal if opposite-sex partners engaged in the same activity and by the use of more general laws that were not discriminatory in and of themselves, but could be used to discriminate against same-sex sexual activity.
5. The Bill will ensure that people convicted under these laws will receive a pardon and will separately be able to apply to the Scottish Ministers to seek to have such criminal conviction information removed ("disregarded") from specific sets of official central records if certain criteria are met. Both the pardon and the "disregard" will apply where the same activity would now be lawful.
6. The Bill will help correct an historical wrong in terms of how certain criminal laws in the past were used to discriminate against same-sex sexual activity where the same activity if undertaken between people of different sexes was not criminalised. It follows a commitment given to Parliament by the Cabinet Secretary for Justice in October 2016.

Part 2 of the Bill - sections 3 and 4 – pardons for certain historical sexual offences

COSTS ON THE SCOTTISH ADMINISTRATION

7. These provisions provide for a pardon to be issued to a person if the criteria listed in section 3 of the Bill are met. The issuing of a pardon in any given case is automatic if the criteria is met and involves no direct consideration of a case (unlike the disregard process discussed below).

8. There will be no written communication to those who receive the pardon. It will be a matter for individuals to consider whether their conviction meets the terms of the criteria in section 3 and if so, they should consider themselves pardoned.

9. Given the terms of how the operation of pardons will take place, it is not anticipated that any new costs will fall on the Scottish Administration.

COSTS ON LOCAL AUTHORITIES

10. It is not anticipated that there will be any new costs falling on local authorities as a result of Part 2 of the Bill.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

11. It is not anticipated that there will be any new costs falling on other bodies, individuals or businesses as a result of Part 2 of the Bill.

Part 3 of the Bill – sections 5 to 11 – disregarding certain convictions for historical sexual offences

COSTS ON THE SCOTTISH ADMINISTRATION

12. These provisions provide for a system to allow people to apply to the Scottish Ministers for a conviction to be disregarded i.e. removed from certain specified central records held by the state. These records are likely generally held on the Criminal History System (CHS) operated by Police Scotland. The effect of disregarding the conviction is that it would no longer be disclosed when a disclosure certificate is issued by Disclosure Scotland for employment and other purposes. In addition, the Bill will provide legal protection for people not to be discriminated by the use of such information.

13. The process provided for in the Bill will allow people to apply to the Scottish Ministers. There will be no charge for applying. There will be some costs falling on the Scottish Ministers in terms of administering the operation of the disregard scheme.

14. These costs will relate to staff resources. While it is difficult to give a specific estimate as to how many applications there may be under the proposed disregard scheme, there is data available from England and Wales as to how many applications have been made there under their (broadly comparable) disregard scheme.

Experience of disregard scheme in England and Wales

15. Under the disregard scheme as provided for in the Protection of Freedoms Act 2012, the UK Government Home Office has advised the Scottish Government that, as of August 2017, they had received a total of 514 applications since the introduction of the scheme in 2012.

16. Of these 514 applications, the UK Government has advised that 187 were “spurious” (i.e. they related to convictions for offences such as benefits fraud, drugs possession or assault which are irrelevant to the operation of the scheme), leaving a total of 327 applications.

17. Of these 327 applications, a further 53 were rejected as although relevant offences may have been committed, they were committed outwith England and Wales. A further 20 applications went no further after it was determined that no relevant conviction was held on central records.

18. This leaves a total of 254 applications. As at the time of writing, 10 applications are in the process of being assessed, 155 were accepted and a disregard issued and 89 were rejected due to the conduct in question being assessed as still criminal under the terms of the disregard scheme.

Estimating for the Scottish disregard scheme

19. There are reasons why the experience in England and Wales may not provide an exact blueprint for estimating the likely numbers of applications. For example, same sex sexual activity between men was not decriminalised until 1980 in Scotland as against 1967 in England and Wales. This means the scope of more recent convictions to result in applications being made is, at least theoretically, higher in Scotland. However, it is also commonly understood that the different evidential requirements under Scots law – namely, the need for corroboration - meant that prosecutions were less common in Scotland for such offences than England and Wales.

20. On the basis of the information provided by the UK Government, it is considered a reasonable assumption that the number of applications received in Scotland will be about one tenth of the number received in England and Wales, in view of relative population size.

21. Using this methodology, it is expected that over a 5 year period¹, approximately 51 applications will be made.

22. Of these 51 applications, a little less than half (24) would be estimated to be rejected at an initial sift for relating to an invalid offence or for relating to conduct that took place outwith Scotland. This is based on the experience in England and Wales.

¹ In view of the relevant offences being repealed at various times but none later than 2001, it can be expected that there will be an initial number of applications following the introduction of the scheme which then reduce in number and, at some point, may well cease. This is because no new flow of convictions are being imposed in Scottish courts which would prompt an ongoing stream of applications indefinitely into the future.

23. Of the 27 applications that are estimated to remain, upon investigation with Police Scotland, it is estimated that 2 will have no convictions held on central records.

24. From the remaining 25 estimated to remain, it is therefore suggested that a total of 16 would be accepted and 9 rejected. This again is based on the experience in England and Wales.

Assessment of disregard scheme applications: costs on the Scottish Government

25. Staff in the Scottish Government will administer the terms of the scheme. While the exact processes for administering applications will be developed as part of implementation planning, it is likely that where an application is received, initial consideration will be given to check whether it is a valid application, i.e. the conviction(s) relate to valid offences.

26. It is expected that some applications (estimated to be 24) will be rejected following a sifting process. For some of these cases, there will be no need to involve any other organisation in the sifting as the application will provide sufficient information to make the rejection decision, i.e. the application will reveal that the conviction was for an irrelevant offence. However, some applications will not and will require the involvement of Police Scotland and potentially other agencies before a rejection decision is made i.e. Police Scotland are able to confirm the nature of the offence is outwith the terms of the scheme.

27. It is likely that approximately 1 hour work time will be necessary on each of these 24 applications. This relates to 40 minutes for a B band member of staff within the Scottish Government to assess the application (and potentially write to Police Scotland in respect of some of the cases), and 20 minutes for a C band member of staff to check and agree with the recommendation to reject it (either without any engagement with other bodies such as Police Scotland or only once information has been received from Police Scotland).

28. The average hourly cost of a B2² member of staff in the Scottish Government is approximately £20.17³. 960 minutes of work time (24 applications spending 40 minutes on each) equates to 16 hours and a cost of £322.72.

29. The average hourly cost of a C1⁴ member of staff in the Scottish Government is approximately £35.23⁵. 480 minutes of work time (24 applications spending 20 minutes on each) equates to 8 hours and a cost of £281.84.

² While a B2 member of staff has been chosen for illustrative purposes, it may be a lower graded member of staff who undertakes this initial checking role e.g. a B1.

³ As at 2016/17, B2 staff are paid in the range £27,755 to £31,811. For the purposes of these estimates, a B2 staff member receiving a salary of £29,107 (second pay step of four steps) has been chosen for illustrative purposes. Other pay costs such as pensions costs etc. have been added amounting to an additional approximate one-third set of costs. Total salary costs are therefore £38,809. This equates to an hourly cost of £38,809/52 (weeks of the year) / 37 (hours per week) = £20.17 per hour.

⁴ While a C1 member of staff has been chosen for illustrative purposes, it may be a lower graded member of staff who undertakes this role of considering the recommendation of the other member of staff e.g. a B3.

⁵ As at 2016/17, C1 staff are paid in the range £46,424 to £55,275. For the purposes of these estimates, a C1 staff member of £50,850 (third pay steps of five) has been chosen for illustrative purposes. Other pay costs such as pensions costs etc. have been added amounting to an additional approximate one-third set of costs. Total salary

30. Of the 27 applications expected to be remaining, further work will be required to consider whether a disregard should be issued both within the Scottish Government and by other agencies.

31. Part of that work will involve engaging with Police Scotland, Scottish Courts and Tribunals Service (SCTS) and the Crown Office and Procurator Fiscal Service (COPFS) to seek any information held by them that can assist in consideration of the application.

32. In terms of Scottish Government staff time, it is expected that a B band member of staff who will be leading on considering applications will spend an average of 3 hours' work time on each case. This amounts to a cost of £1,633.77 (3 hours multiplied by 27 applications which equates to 81 hours at £20.17 per hour).

33. A band C member of staff will spend an average of 2 hours' work time on each case. This amounts to a cost of £1,761.50 (2 hours multiplied by 25 applications which equates to 50 hours at £36 per hour).

Assessment of disregard scheme applications: costs on Police Scotland

34. The Scottish Government will seek information held by Police Scotland in respect of these estimated further 27 applications that have passed the initial sift. The Scottish Government will also seek some further information from Police Scotland in some cases as part of their initial sift to confirm whether the conviction is for a relevant offence. Both of these scenarios will result in some staff resource costs for Police Scotland.

35. Police Scotland has advised that each application may have varying degrees of additional work that will be carried out and where a conviction and relevant background information is easily obtainable this could be processed and replied to in a very short time period, possibly with 2-3 hours of research. In other cases it is possible that further checks will be required and this may take many hours. This reflects the age of the information and the number of different systems used in the past to record information. As is the case with the estimates given in this Financial Memorandum, a great deal is dependent on the volume of applications too.

36. Police Scotland has suggested that it would expect the equivalent of one full-time person to be utilised to operate the scheme from their perspective. This approach would operate for at least the first year of operation of the scheme and would include establishing what the appropriate procedures would be within Police Scotland for when the Scottish Ministers seek information and also operating such procedures i.e. dealing with requests that are made. The position would be re-assessed after the first year (i.e. when it will be clearer what level of applications have been made). The expected staff costs would be £34,000 per annum (including pension costs etc).

37. Police Scotland has indicated that it would incur costs for the processing time in any work required to access, verify and contextualise the CHS conviction information. This would

costs are therefore £67,783. This equates to an hourly cost of £67,783/52 (weeks of the year) / 37 (hours per week) = £35.23 per hour.

involve searching both CHS and other historical records and if such are available researching and assessing whether the historical information supports or negates the case for deletion. This would be in line with the decision-making responsibility lying with the Scottish Ministers and Police Scotland being required to compile the information and report findings to enable a decision to be made by the Scottish Ministers.

Assessment of disregard scheme applications: costs on Scottish Courts and Tribunals Service, the Crown Office and Procurator Fiscal Service and National Records for Scotland

38. Any request involving SCTS will involve administrative staff in the identification of the case and the retrieval, copying and sending of relevant material to staff in the Scottish Government. This will give rise to minimal additional resource costs to the SCTS. The same applies to the COPFS and potentially also any other relevant agencies such as National Records of Scotland.

39. Once an application has been considered and information sought from Police Scotland (and potentially other agencies), there will be a decision made as to whether to grant a disregard. Once a decision is made, the Scottish Government will write to the applicant advising them of the outcome. The staff time taken to do this is included within the overall amount time estimated to process each case (see paragraphs 32 and 33 above).

Implementing disregard: costs on Scottish Government

40. Where a disregard is authorised, the Scottish Government will write to the relevant record keeper (likely to generally be Police Scotland, as it oversees the operation of the CHS) so that the information relating to the relevant conviction(s) can be disregarded. Again, the staff costs associated with this part of the process are included in the estimates above for both the Scottish Government and Police Scotland.

Implementing disregard: costs on Police Scotland

41. Where Police Scotland is required to carry out the subsequent work required to amend, annotate or delete information in any and all Police Scotland? systems on the basis of decisions taken by the Scottish Ministers, recording the activities and ensuring the provenance and security of the data and systems in the course of these investigations and consequent changes will represent additional costs to Police Scotland.

42. Police Scotland advises that where conviction information stored in CHS requires to be disregarded, it is possible it has also been shared with Police National Computer (PNC). The PNC is the computer system used by law enforcement agencies across the UK for storing and accessing information for law enforcement purposes. There will be a need to resource the work involved in ensuring PNC information is disregarded too. The costs associated are discussed in paragraph 36.

Implementing disregard: costs on Scottish Courts and Tribunals Service

43. Where the SCTS is a relevant record holder, relevant paper records will have to be identified for the purposes of marking the conviction as disregarded in such a way as to prevent future disclosure. Such records may consist of court sheets or the hard copy minute in the original proceedings.

44. If the SCTS holds a relevant paper record which requires to be redacted or annotated in such a way as to prevent future disclosure, the SCTS will incur costs. Any search and retrieval and redaction or annotation of a relevant paper record will be carried out by an administrative member of staff of the SCTS. Based on the assumption on the number of successful applications (16) over 5 years, this will give rise to minimal additional resource costs to the SCTS.

45. Where a relevant paper record has been transmitted from the SCTS to the National Records for Scotland for preservation, minimal costs will be incurred by the SCTS to retrieve the relevant papers to redact or annotate the records.

46. The SCTS may also hold a relevant electronic record on its criminal database (COP II). Deletion of a conviction on a specified charge may not be straightforward, for example, where the sentence has been imposed *in cumulo* or where the sentence is to run consecutively to other charges. The SCTS will incur additional IT costs in finding a solution to such issues and to make the necessary deletions, redactions or annotations. If records require to be deleted from the SCTS electronic system it is estimated that IT costs amounting to £25,000-£30,000 may arise.

47. This relates to the fact that the system SCTS currently use to record information on its criminal database does not contain provision to remove that conviction information from the system or otherwise mark a conviction as not to be disclosed. This figure is SCTS' best estimate of the cost of changes required to systems to ensure that a disregarded conviction is not disclosed.

Appeal costs

48. There is an appeal mechanism contained in the Bill for an applicant to appeal against a decision not to grant a disregard. This would be through the sheriff court.

49. The UK Government scheme also has an appeal mechanism and there have been no appeals made so far. On that basis, no costs are estimated given the Scottish scheme will have considerably fewer applications in the first place so the strong likelihood is that no appeals will be made.

50. However, for illustrative purposes, an indication of costs for any appeals is as follows. Based on the estimate of 9 rejected cases, the leave to proceed (with the appeal) application will incur additional minimal resource costs to the SCTS. Administrative staff will be involved with the checking and "registering" of applications. If all 9 rejected cases were to be appealed and were successful, this will give rise to minimal additional resource costs.

51. With court fees set to effect full cost recovery, it is expected that the relevant Fees Orders may need to be amended accordingly by Scottish Ministers to take account of the relevant changes introduced by the Bill. In particular, an appropriate fee may require to be introduced to cover the additional cost of a sheriff considering the leave to proceed applications.

COSTS ON LOCAL AUTHORITIES

52. It is not anticipated that there will be any new costs falling on local authorities as a result of Part 3 of the Bill.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

53. It is not anticipated that there will be any new costs falling on other bodies, individuals or businesses as a result of Part 3 of the Bill.

54. For illustrative purposes however, some further information is included in respect of costs falling on individuals if appeals are taken up. Such an appeal would fall within the general provisions under Chapter 2 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999.

55. Court fees are as detailed in the relevant court fee orders, with the fees for lodging the writ, and for the fixing and hearing of the appeal would apply⁶. A person may also apply for exemption from paying a court fee if certain circumstances apply such as being in receipt of income support or income based job-seekers allowance – this is covered in the current fees order and may have a bearing on actual court fees payable by an individual. The total costs to the person would of course also depend on whether the person decided to instruct legal representation, and would include the cost of service of the writ.

56. There may also be costs to the Scottish legal aid fund (“the fund”). The Sheriff has only very limited scope in considering appeals against a decision to refuse to grant an application for a disregard. Such appeals will therefore be relatively inexpensive to the fund and it is considered that the costs will be similar to those for appealing a decision to refuse a taxi licence. The average cost to the fund of the 26 taxi licence appeals to the Sheriff court since 2010 has been £536 including VAT. There may be some Advice & Assistance (a type of legal aid which does not include representation) costs in some cases. Where an applicant qualifies, they would be likely to be allocated up to £500 to apply for legal aid although the actual cost is likely to be lower.

SUMMARY OF COSTS

57. There is a considerable degree of uncertainty about the number of applications that may be received. While the estimates included in this Financial Memorandum are an attempt to provide a best estimate using known information such as the experience of a broadly comparable system in England and Wales, it is accepted that the eventual cost impact may be quite different to that suggested if case volumes are much higher than estimated.

⁶ <http://www.scotcourts.gov.uk/taking-action/court-fees>

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58. The overall costs estimated are as follows⁷:

OVERALL SUMMARY OF ESTIMATED COSTS FOR THE BILL			
	Year 1	Year 2	Year 5
Scottish Government	£800	£800	£800
Police Scotland	£34,000	£34,000*	£17,000**
Scottish Courts and Tribunal Service	£30,000	£0	£0
Total	£64,800	£34,800	£17,800
Applications 50% higher than expected	SG - £1,200 Police Scotland - £51,000 (1.5 full time persons) SCTS - £30,000*** Total - £82,200	SG - £1,200 Police Scotland - £51,000 (1.5 full time persons) Total - £52,200	SG - £1,200 Police Scotland - £25,500 (0.75 full time persons) Total - £26,700
Applications 100% higher than expected	SG - £1,600 Police Scotland - £51,000 (1.5 full time persons) SCTS - £30,000 Total - £82,600	SG - £1,600 Police Scotland - £51,000 (1.5 full time persons) Total - £52,600	SG - £1,600 Police Scotland - £25,500 (0.75 full time persons) Total - £27,100
Applications 200% higher than expected	SG - £2,400 Police Scotland - £78,000 (2 full time persons) SCTS - £30,000 Total - £110,400	SG - £2,400 Police Scotland - £78,000 (2 full time persons) Total - £80,400	SG - £2,400 Police Scotland - £34,000 (1 full time person) Total - £36,400
<p>* Police Scotland would review need for this resource after year 1 of the scheme. For purposes of these estimates, it is assume this level of resource continues to be needed in year 2.</p> <p>**By year 5, all scoping of internal Police Scotland processes will have been undertaken and costs relate to dealing with individual application requests for information.</p> <p>*** One-off costs to SCTS would not change with higher than expected case volumes as these costs relate to development of an IT solution to allow for deletion/removal of relevant records and as such the level of case volumes is irrelevant to the level of these costs</p>			

⁷ It has been assumed for the purpose of this estimate that the number of applications received by the Scottish Government will be spread evenly over 5 years. While it could be the case that the majority of applications will be received in the first two years, as anyone wishing to obtain a disregard would want to do so at the earliest opportunity, the Home Office figures for the equivalent scheme in England and Wales showed a fairly steady number of applications received in each of the 5 years the scheme has been in operation.

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