

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

EXPLANATORY NOTES

THE ACT

Part One – Introductory

Section 2 – Historical sexual offence: definition

6. **Section 2(1)** provides a definition of “historical sexual offences” to which the provisions concerning pardons and disregards apply.
7. **Section 2(1)(a)** provides that this definition includes the following offences concerning same-sex sexual activity between men under section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995: section 13(5)(a), which covered sexual activity otherwise than in private (this was defined in section 13(2) to exclude activity where more than two individuals participated or were present); section 13(5)(c), which covered sexual activity with a person under the age of 18 (until the age of consent was equalised at 16 in 2001); section 13(6), which covered procuring or attempting to procure the commission of a ‘homosexual act’ between two other male persons; and section 13(9), which, prior to being amended by the Sexual Offences (Scotland) Act 2009, covered both soliciting or importuning any male person and living off the earnings of male prostitution.
8. In its current form section 13(9) still continues to criminalise living off the earnings of male prostitution: so although technically this provision comes within the definition of “historical sexual offence” in the Act, neither the pardon nor the disregard would ever apply to someone convicted under this provision for the specific offence of living off the earnings of male prostitution, precisely because such conduct remains a criminal offence now.
9. **Section 2(1)(b)** provides that it includes the following offences concerning same-sex sexual activity between men under section 80 of the Criminal Justice (Scotland) Act 1980: section 80(7)(a), which covered sexual activity otherwise than in private (defined as above); section 80(7)(c), which originally covered sexual activity with a person under the age of 21 (later amended to 18); section 80(7)(d), which covered sexual activity between men where the act was committed on board a United Kingdom merchant ship and the participants were members of the crew of a United Kingdom merchant ship, section 80(9), which covered procuring or attempting to procure the commission of a “homosexual act” between two other male persons and section 80(12), which covered both soliciting or importuning any male person and living off the earnings of male prostitution.
10. **Sections 2(1)(c)** and (d) provide that it includes offences under section 7 of the Sexual Offences (Scotland) Act 1976, and its predecessor provision, section 11 of the Criminal Law Amendment Act 1885, which provided that it was a criminal offence for any

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

male person to commit, procure or attempt to procure sexual activity with another male person or between other male persons (whether in public or in private).

11. [Sections 2\(1\)\(e\)](#) and (f) provide that this definition includes the common law offence of sodomy (sexual intercourse between two male persons) and the common law offence of shameless indecency, insofar as that latter and potentially very broad-ranging offence applied to sexual activity between men.
12. [Section 2\(1\)\(g\)](#), read with section 2(2), provides that this definition also includes any other offence that regulated, or was used in practice to regulate, sexual activity between men which has either been repealed or abolished; or if it has not been repealed or abolished, once covered sexual activity between men of a type which, or in circumstances which, would not amount to an offence on the day on which section 3 comes into force. This could include, for example, any historical use of breach of the peace or local byelaws to prosecute men for e.g. public displays of affection that would not be criminal if opposite-sex partners engaged in the same behaviour.
13. [Section 2\(4\)](#) provides that “sexual activity between men” includes any physical or affectionate activity between males of any age which is characteristic of persons involved in an intimate personal relationship, and also conduct intended to lead to such activity. As such this term includes both actual sexual intercourse and lower-level physical displays of affection such as kissing or holding hands – as well as behaviour intended to initiate or lead up to sexual intercourse.