

Reflections on the criminalisation of sex between men in England and Wales

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Progress and setbacks on the path to equality

The past 30 years have seen substantial change and improvement in both the law on and the state's treatment of men who have sex with men in England and Wales. Men were still imprisoned for consensual, adult homosexual offences into the 1990s – David Bonney, for example, was incarcerated in a military prison for four months in 1993 for homosexual conduct while serving in the Royal Air Force (RAF).¹

Today, it is possible to apply for their convictions and cautions for most homosexual offences to be disregarded. Yet, this three-decade transformation, while significant and praiseworthy, has also been painfully incremental for many men and remains incomplete for others. Their lives continue to be impacted by convictions that are outside the disregards scheme and therefore also unpardonable.

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THE HISTORY OF THE CRIMINALISATION OF SEX BETWEEN MEN IN ENGLAND AND WALES (1533–2003)

Sex between men was first criminalised in England in 1533 (and extended to Wales in 1542):² The Buggery Act, passed during the reign of Henry

1 BBC News (2022) ‘Pardons extended to all abolished same-sex crimes’, BBC News website, 4 January 2022. <https://www.bbc.co.uk/news/uk-59863140>

2 Scotland and Northern Ireland have their own related but also distinct histories of (de) criminalisation

VIII, made “the detestable and abominable vice of buggery committed with mankind or beast” a capital offence, and while the meaning of buggery has its own history, in practice it was used to punish anal sex between men. Buggery remained punishable by death until 1861, although the last executions were in 1835.

Even as the threat of execution loomed over queer men for more than 300 years, an even more pernicious law from 1885 affected many more men: the infamous ‘Labouchere amendment’. Added to the Criminal Law Amendment Act 1885, this created the new crime of ‘gross indecency’, criminalising all sexual acts between men short of buggery while leaving the precise definition of this term undefined.

While the Sexual Offences Act 1967 decriminalised private, consensual sex in England and Wales between adult men aged 21 and over (at least partially – it excluded the armed forces and merchant navy), convictions for consensual sex between men actually increased after decriminalisation due to increased policing of queer men.

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Gross indecency remained on the books from 1885 until 2003. Some movement towards ameliorating the damage done to men convicted of this and other offences was further initiated by the Sexual Offences Act 2003, which, in addition to removing the crime of gross indecency, also removed the notification requirement for anyone convicted of abolished homosexual offences. Even if the law no longer required reporting to the police, convictions for these same abolished offences nonetheless remained intact.

Later legislation began the process of redressing this injustice, with the Protection of Freedoms Act 2012 creating the possibility that men convicted of abolished crimes – primarily consensual buggery and gross indecency – could have them disregarded, effectively erased, by application to the Home Office.

THE DISREGARDS AND PARDONS SCHEME: PROGRESS TO AN EXTENT

The disregards scheme, operational since 2012, is a good idea executed poorly. It lacks sufficient sensitivity to the ways in which the police have long targeted queer men, the laws used most against them, and the realities of queer lives lived against the law when many men were forced into furtive sexual encounters and meeting each other in public places. The scheme instead has long focused on the kind of private inoffensive acts that people might imagine taking place in a long-term, committed, monogamous relationship between men in the safety of their own homes.

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Of course, the opportunity to have convictions disregarded has had an enormous impact on a small number of men. But it left those convicted of ‘importuning’ for sex (which could include making eye contact, chatting someone up or even just loitering suspiciously), or of consensual acts committed in a public toilet, with their criminal records intact because those offences remained crimes. Aside from the important work that the Sexual Offences Act 2003 initiated, it had also newly criminalised sex in public toilets. Convictions for both importuning and offences in a public toilet were often the result of entrapment and surveillance tactics that would not be permitted today.

Momentum for further change increased with the 2009 state apology and subsequent royal pardon in 2013 of mathematician and Enigma code breaker Alan Turing.³ Turing had been convicted in 1952 for gross indecency with another man, after which he was subjected to hormone treatments to reduce his libido, and later died in 1954 in what the coroner determined to be a suicide. Why, many asked, should one need to be a war hero or subject of a Hollywood blockbuster to be eligible for a pardon for consenting same-sex acts that were no longer criminal offences? A major

3 Ministry of Justice (2013) ‘Royal pardon for WW2 code-breaker Dr Alan Turing’, GOV.UK website, 24 December 2013. <https://www.gov.uk/government/news/royal-pardon-for-ww2-code-breaker-dr-alan-turing>

petition called on the state to pardon the further 49,000 men convicted under ‘anti-gay’ laws.

The 2017 amendment to the Policing and Crime Act 2009 did finally extend a new statutory pardon to many more men than Turing, but it continued to be overwhelmingly exclusionary, restricted to those who had first received a disregard – itself still a flawed form of restitution due to its limited scope. Indeed, the 2017 pardon has been criticised on several fronts. For the living, it required first securing a disregard, after which a pardon was automatic if also entirely symbolic. For the dead, a pardon was automatic without application. The state simply deemed an unknown number of deceased men who had been found guilty of an unknown number of crimes across the previous five centuries, which would go unresearched and unconfirmed, to be pardoned. For the living, the fact of the pardon first requiring a disregard meant that only a very limited number of crimes were eligible. It still excluded importuning and crimes that took place in a public toilet.

We might ask why so many men resorted to public toilets for sexual encounters, or to meet other men to have sex elsewhere. Too often they are characterised as ‘perverts’ and criminals who ‘abused public conveniences’ for their own purposes. But many queer men had few safe places where they might meet other men. Some resorted to toilets because their homes offered no privacy or were unsafe. Many lived with parents or wives, flatmates or landlords – to bring someone home could be dangerous in many cases. While some feared losing their housing or being subject to violence, others simply could not afford the private spaces that the state required for homosexual acts to fall within the law. In effect, then, the disregards scheme as it currently stands reinforces the criminalisation of poverty and of marginalisation that many queer men experienced.

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As for measuring the ‘success’ of the scheme, the numbers speak for themselves. Despite the government’s own estimates in 2010 that records were held for more than 50,000 cases of buggery and gross indecency (some 16,000 of which were for homosexual offences then proposed to be

abolished),⁴ only 522 people have subsequently applied for a disregard over the past 10 years (as of November 2022), with even fewer – 208 – succeeding.⁵ While it is true that a number of men once eligible for a disregard will have aged and died, many of them are still living. At the same time, the number of eligible crimes have been expanded thereby increasing the number of men whose convictions may now be disregarded and therefore also pardoned.

So what are the reasons behind the relatively small number of pardons? First off, while many men may not know that they are eligible or that their crimes can be disregarded, others no doubt wish only to put these episodes beyond them. They may have experienced humiliation and violence at the hands of a homophobic police force and state that criminalised them. Returning to those experiences, even to secure a disregard and pardon, may simply be too painful to contemplate. This could partially explain the low overall number of applications to the scheme. The low applicant rates could also suggest poor communication of the scheme. Indeed, a surprising number of rejected applications are for crimes unrelated to homosexuality such as fraud and theft, suggesting the government's messaging is not fully working.

A separate – and perhaps the most troubling – element of the scheme are the rejected applications from men convicted for consensual homosexual offences with parties of legal age whose convictions for importuning or for activity in a public toilet still remains outside the scope of the scheme. Westminster's disregards and pardons schemes have been so unfair, in fact, that I have heard them cited outside the UK as a cautionary example: a model of what *not* to do.

PLANNED REFORMS TO THE DISREGARDS AND PARDONS SCHEME – WHERE ARE WE NOW?

These failings seemed finally to have been resolved when it was announced earlier this year that further changes to the disregards and pardons schemes

4 Home Office (2010) 'Home Office Full Equality Impact Assessment Template: to remove decriminalised offences for consensual gay sex with those aged 16 and over from the Police National Computer (PNC)', GOV.UK website, 21 December 2010, p 2. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/98420/removal-consensual-gay-sex-eia.pdf

5 GOV.UK (2022) 'Disregard process for convictions for decriminalised sexual offences (consensual gay sex)', GOV.UK website, updated 17 November 2022. <https://www.gov.uk/government/publications/statistics-on-the-disregard-and-pardon-for-historical-gay-sexual-convictions/statistics-on-disregards-and-pardons-for-historical-gay-sexual-convictions>

would be achieved through an amendment to the Police, Crime, Sentencing and Courts Act 2022, to add further offences that are no longer crimes to those eligible for disregard. This is a positive development and ensures that a well-intentioned but flawed system to offer some redress to victims of state homophobia can be extended to many more people than previously had access to it. It seems now that men convicted of importuning will finally be eligible to have their crimes disregarded and receive a pardon.

But, significantly, anyone convicted for offences committed in a public toilet still remains ineligible. So even if these men were convicted for gross indecency – a crime that has been abolished for nearly 20 years – they now find themselves subject to other newer legislation today, and so their conviction will not be disregarded. Worse still, men whose crimes were for importuning, which itself involved no sexual contact, may still also fall outside the scheme if their offences were committed in a toilet. Lawyers are currently requesting clarification from the Home Office on precisely this issue, but to date it remains unresolved in part because they are still waiting for the provisions of the amendment to the Police, Crime, Sentencing and Courts Act 2022 to come into force.⁶ It remains unclear when this will happen.

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Overall, the past 30 years have seen a transformation in the law’s treatment of men who have sex with men. Within this period of time, many men who previously faced imprisonment can now have their convictions disregarded and receive a statutory pardon – this is important and must be commended. But even as we rightly celebrate the achievements of the past three decades, we must also recognise that they remain incomplete. Too often, the most marginalised among us remain outside the law, criminalised and therefore subjected to reduced

6 Personal correspondence with Katy Watts, lawyer, Liberty Human Rights, 17–19 October 2022

opportunities that come with the record of conviction for sexual crimes. More remains to be done.

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