

# PROTECTION OF FREEDOMS ACT 2012

---

## EXPLANATORY NOTES

### THE ACT

#### *Commentary on Sections*

#### **Part 5: Safeguarding vulnerable groups, criminal records etc.**

#### *Chapter 4 of Part 5: Disregarding certain convictions for buggery etc.*

#### *Section 92: Power of Secretary of State to disregard convictions or cautions*

360. *Subsection (1)* provides that a person convicted of, or cautioned for, an offence under:
- section 12 of the Sexual Offences Act 1956 Act (“the 1956 Act”) for the offence of buggery,
  - section 13 of the 1956 Act for the offence of gross indecency between men, or
  - section 61 of the Offences against the Person Act 1861 or section 11 of the Criminal Law Amendment Act 1885 (which contained the corresponding pre-1956 offences).
- may apply to the Secretary of State (in practice, the Home Secretary) to have the conviction or caution disregarded.
361. By virtue of section 101(3) to (7), these provisions also cover persons with a conviction for a corresponding offence under military service law, or for the inchoate offences of attempting, loitering with intent, conspiring to commit, or inciting the commission of, an offence of buggery or gross indecency; or aiding, abetting, counselling or procuring the commission of an offence of buggery or gross indecency.
362. *Subsection (2)* provides that a caution or conviction can only be disregarded if the conditions set out in *subsections (3) and (4)* are both met.
363. *Subsection (3)* sets out the first condition, which is that it appears to the Secretary of State that the other person involved in the conduct which amounted to the original offence consented to it and was aged at least 16 years old at the time. The offence must also be one which would not fall within the provisions of section 71 of the Sexual Offenders Act 2003 (that is, sexual activity in a public lavatory) as the intention is that these provisions should only apply to behaviour that is no longer criminal. (As well as consensual gay sex with a person over the age of consent, the offence in section 12 of the 1956 Act also encompasses non-consensual buggery, bestiality and under-age buggery, and the section 13 offence also includes gross indecency with somebody under the age of consent, all of which remains criminal behaviour today.)
364. *Subsection (4)* sets out the second condition, namely that the Secretary of State has given notice to the applicant of the decision to disregard the conviction or caution; such notice takes effect 14 days after that notice has been given.

365. The effect of a relevant conviction or caution being designated as a disregarded conviction or caution is explained in sections 95 to 98 (*subsection (5)*).

***Section 93: Applications to the Secretary of State***

366. *Subsection (1)* provides that an application under section 92 has to be made in writing.
367. *Subsection (2)* sets out the information that must be contained in an application.
368. *Subsection (3)* provides that an applicant may supply additional information to evidence that his conviction satisfies the first condition in section 92, namely that the relevant offence involved consensual gay sex with another person over the age of 16.

***Section 94: Procedure for decisions by the Secretary of State***

369. *Subsection (1)* requires the Secretary of State in coming to a decision on an application to consider the evidence supplied by the applicant, together with any available relevant police, prosecution or court records of the investigation and prosecution of the offence in question.
370. *Subsection (2)* provides that oral hearings will not be held when deciding whether or not to accept an application; in effect the Secretary of State will come to a decision on the basis of the written information available (subject to section 92).
371. *Subsections (3) and (4)* require the Secretary of State to record in writing the decision on an application and to notify the applicant of that decision in writing.

***Section 95: Effect of disregard on police and other records***

372. *Subsection (1)* provides that where a conviction or caution is disregarded, the Secretary of State must direct the relevant data controller to delete the details of the disregarded caution or conviction from all official records. The term ‘relevant data controller’ is defined in *subsection (5)* augmented by an order made under that subsection; in most cases this will be the chief officer of police of the force which investigated the offence.
373. *Subsection (2)* provides that notice of deletion can be given at any time once the Secretary of State has made a decision to disregard a conviction or caution, but that deletion will not be effective until the applicant has been informed and 14 days have elapsed since that notification.
374. *Subsection (3)* requires that, subject to subsection (2), the data controller must delete the relevant records as soon as reasonably practicable.
375. *Subsection (4)* provides that the data controller must notify the applicant in writing that deletion has taken place.

***Section 96: Effect of disregard for disclosure and other purposes***

376. *Subsection (1)* provides that a person with a disregarded conviction or caution is to be treated in law as if he had not committed the offence or been subject to any legal proceedings in respect of the offence (that is, he had not been charged with or prosecuted for the offence or convicted, cautioned or sentenced for the offence) .
377. *Subsection (2)* provides that details of disregarded cautions and convictions cannot be used in any judicial proceedings (as defined in section 98) nor, in any such proceedings, can the individual be asked about or be required to answer questions about any disregarded conviction or caution or any circumstances ancillary to it (see section 98).
378. *Subsection (3)* provides that questions put to a person in any other context (for example, by a prospective employer) asking about that person’s past convictions or cautions are not to be treated as including any reference to a disregarded conviction or caution and

that failure to provide details of such a disregarded matter will not lead to any liability on the part of the individual.

379. *Subsection (4)* provides that any obligation under any law or other agreement to disclose offences will not apply to such disregarded convictions or cautions.
380. *Subsection (5)* provides that a disregarded caution or conviction is not grounds for dismissal from any office, employment, occupation or profession, nor can it prejudice an individual in any such connection.

***Section 97: Saving for Royal pardons etc.***

381. This section preserves the power of Her Majesty, under the Royal prerogative, to issue a pardon, commute a sentence or quash a conviction. Accordingly, a person with a disregarded conviction or caution might still receive a Royal pardon in respect of the offence despite the operation of section 96.

***Section 98: Section 96: supplementary***

382. *Subsection (1)* defines the term ‘proceedings before a judicial authority’ for the purpose of section 96.
383. *Subsections (2) and (3)* define the terms ‘circumstances ancillary to a conviction’ and ‘circumstances ancillary to a caution’ respectively for the purpose of section 96.

***Section 99: Appeal against refusal to disregard convictions or cautions***

384. This section provides for a right of appeal to the High Court against a decision by the Secretary of State not to grant an application for a relevant conviction or caution to become a disregarded conviction or caution (*subsection (1)*). On hearing such an appeal, the High Court cannot hear any new evidence and must reach a decision on the basis of the evidence available to the Secretary of State (*subsection (2)*). If the appeal is granted, the High Court must make an order to the effect that the relevant conviction or caution is to be treated as a disregarded conviction or caution; such an order takes effect after 14 days (*subsections (3) and (5)*). There is no further appeal from the High Court’s decision (*subsection (6)*).

***Section 100: Advisers***

385. *Subsection (1)* enables the Secretary of State to appoint independent advisers to advise on an application from a person under section 93. The advisers can be supplied with such information as is relevant to enable them to undertake their function (*subsection (2)*). The decision on the application will rest with the Secretary of State, who can accept, or not, the advice provided. *Subsection (3)* provides for the payment of expenses and allowances to the advisers.

***Section 101: Interpretation: Chapter 4***

386. This section defines various terms used in this Chapter.