



Law Society
of Scotland

Call for Evidence

Historic Sexual Offences (Pardons and Disregards) (Scotland) Bill Stage 1

19 January 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Criminal Law Committee welcomes the opportunity to consider and respond to the Call for Evidence in respect of the Historic Sexual Offences (Pardons and Disregards) (Scotland) Bill (The criminal law committee has the following comments to put forward for consideration.

Background

On 7 November 2017, a historic step was taken with the introduction of the Bill seeking to right the wrongs which have involved discrimination against generations of men convicted in Scotland of consensual same-sex sexual activities. The Bill, deliberately, does not include a statutory apology. That was dealt with verbally. It provides for two distinct but linked procedures that involve (i) pardons and (ii) a system to deal with disregards so that a conviction does not show up in any future disclosure check (Disclosure Scotland).

An apology was made by Nicola Sturgeon as First Minister on behalf of the Scottish Parliament when introducing the Bill as she recognised that:

*'Those individuals deserve an unqualified apology, as well as a pardon. That apology can only come from the government and from Parliament - not from the justice system. After all, the courts, prosecutors and the police were enforcing the law of the time....So today, categorically and wholeheartedly, as First Minister I apologise for those laws, and for the hurt and the harm that they caused.'*¹

¹ <https://news.gov.scot/speeches-and-briefings/statement-on-historical-sexual-offences-pardons-and-disregards-scotland-bill>

1. What are your views on the automatic pardon granted by the Bill;

The apology and the Bill being introduced have taken some time to be achieved in Scotland. The introduction of the Bill follows the UK Government's legislation to allow men previously convicted for consensual same-sex relationships to be formally pardoned. Sections 164-172 of the Policing and Crime Act 2017 and Section 92 of the Protection of Freedoms Act 2012 provide pardons for those convicted of consensual same-sex relationships. In effect Turing's² Law has become reality for England and Wales and is now to become the case for Scotland.

Scotland was much later than England and Wales in progressing legislation. Sexual activity between consenting adult males continued to be a criminal offence in Scotland until the commencement of the Criminal Justice (Scotland) Act 1980. It took until 1994 for the age of consent for gay men to be reduced from 21 to 18 and until 2001 for full legal equality when the age of consent was lowered to 16. Sexual activity between women was never criminalised in the United Kingdom so the Bill does not apply to women.

Scotland is a tolerant society and is fully committed to respecting, protecting and implementing human rights and demonstrating equality, dignity and respect. The introduction of the Bill endorses that position.

The Bill of course has a posthumous effect as well as for those that are living. It recognises that the laws under which men were prosecuted in the past were by their very nature discriminatory or were interpreted or enforced in a discriminatory manner and that is extremely important for the relatives of those who have since died.

The number involved as estimated in the Financial Memorandum to the Bill³ appear not to be high, though of course such an estimate can only be just that. The UK has overall apologised for convicting more than 50,000 men for homosexual sex acts⁴. That has been followed in England and Wales, there were 254 applications being considered under 'disregards' since 2011. The numbers are not the issue as the introduction of the Bill will have a highly significant and life changing effect on those to whom it applies and the attitude of society towards them. It will not reverse their conviction but will provide the means to ensure that their conviction is disregarded if they are required to produce a criminal record.

We fully welcome and support the Scottish Government's apology and the introduction of the Bill. The Bill provides the way forward to correct historic wrongs affecting men convicted of historic sexual offences that no longer have any place in the laws of Scotland. Our members in their work are fully committed to achieving a fairer and more just society in the interests of the public and protecting and promoting the rule of law. This Bill as introduced appears to achieve exactly that.

² 'Turing's law' builds on the case of World War II Enigma codebreaker Alan Turing after whom some have referred to it in this Bill context. Alan Turing received a personal posthumous pardon in 2013.

³ [http://www.parliament.scot/Historical%20Sexual%20Offences%20\(Pardons%20and%20Disregards\)%20\(Scotland\)%20Bill/SPBill21FMS052017.pdf](http://www.parliament.scot/Historical%20Sexual%20Offences%20(Pardons%20and%20Disregards)%20(Scotland)%20Bill/SPBill21FMS052017.pdf)

⁴ <http://www.telegraph.co.uk/news/2017/01/31/turings-law-thousands-convicted-gay-bisexual-men-receive-posthumous/>

The Bill employs neutral terminology similar to that employed by the Sexual Offences (Scotland) Act 2009 which we support. Language used in the past to refer to convictions for same sex activities has no place now in Scotland as the terms were both offensive and discriminatory.⁵

Importantly, the Bill sets out clearly the Scottish attitudes to same sex relationships and behaviour. That is of benefit to all in Scotland as not all countries take a similar view of same sex practices.

2. What are your views on the automatic pardon granted by the Bill;

Section 1 of the Bill sets out its purpose. That is to acknowledge the wrongfulness and discriminatory effect of past convictions for certain historic sexual offences by pardoning those convicted and providing a process for convictions to be disregarded.

Section 2 of the Bill sets out the definition of historic sexual offences. This definition does seem quite wide. It is essential that all relevant offences are included within the definition. In calling for evidence, we note that a specific appeal has been made to those affected by such convictions to come forward to ensure that all the relevant offences are included in this definition. It is vital to obtain any examples of gaps within the definition of historic sexual offences. Where such persons come forward, their confidentiality and sensitivity must be respected.

There is a difference between the policy positions taken by England and Scotland in that Scotland is seeking to ensure that circumstances such as when men were convicted of common law offences such as 'loitering'⁶ are covered. These might have included actions including chatting up other men or kissing in public where the provisions of the Bill will apply to such convictions.

We welcome that there is no requirement for such persons to apply for a pardon in contrast to our understanding of the position in England and Wales. In Scotland, the pardon will happen automatically. However, the legislation will not apply to behaviour that is still illegal today.

3. The system proposed in the Bill is that individuals convicted of historical offences can apply, in writing, to the Scottish Government for those offences to be 'disregarded' (e.g. ignored for all intents and purposes). Do you think there are any barriers in adopting this approach?

This part refers to those who may wish to have any relevant historic sexual offence disregarded. This is important in these days of heightened requirements for disclosure in a highly competitive job market.

⁵ Paragraph 7 of the Policy Memorandum to the Bill

⁶ Derek Ogg QC

Having to reveal a historic sexual conviction could hinder or prevent future employment opportunities. Though many of the historic sexual convictions might well be 'spent' under the Rehabilitation of Offenders Act 1974, some such convictions may still require to be disclosed.

We understand why such provisions should require positive action by those involved to apply rather than to take effect automatically. However we do have some concerns that those affected need to be made aware of their rights and that the process for making an application to have a conviction disregarded is as simple and straightforward as possible.

There may be a question as to what publicity or guidance the Scottish Government intends to generate when the Bill comes into effect, though we recognise that the policy intention of the Bill has been very well trailed to date. Presumably, predominantly but not exclusively, the LGBT groups active promotion and representation of such interests, will ensure that their members are aware of the policy and processes. Of course awareness building should not be left to LGBT organisations and would ultimately be the responsibility of the Scottish Government. Where relevant and appropriate, we would want to ensure that legal aid is available to support the provision of guidance on making an application and appeal if required.

Clearly each conviction to be considered in respect of any disregard will be dealt with on a case by case basis. There is an appeal process to a sheriff but not beyond, to bring finality to the proceedings. Whether there should be any further appeal process to the Sheriff Appeal Court might be considered though if English practices provide a model, there may not be any requirement to invoke such an appeal mechanism.

What is important is that times have moved on and such offences should not be relevant when seeking employment or a voluntary role.

The Bill deliberately does not apply to women. Some feel that the apology should extend to them because of historic attitudes of discrimination and violence that applied to women. That is a matter best addressed with those that specifically represent such rights. However this Bill set out a process of pardons. There is no purpose to be achieved by any unnecessary extension.

4. Do you feel the Bill goes far enough to address the impact on the life outcomes and wellbeing of men who were convicted under past discriminatory laws in Scotland?

We have no comment to made and welcome the policy objectives of the Bill.

5. Do you have any other comments regarding the Bill?

We have not further comments to make. We are of course happy to answer any questions in relation to this response as required.



For further information, please contact:

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