



Law Society  
of Scotland

# Stage 1 Briefing

## Historic Sexual Offences (Pardons and Disregards) (Scotland) Bill

16 April 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 together with the Equalities Law Sub-Committee has had the opportunity to consider the Historic Sexual Offences (Pardons and Disregards) (Scotland) Bill (the Bill) as introduced<sup>1</sup> along with the associated documentation and the Stage 1 report (Stage 1 report).<sup>2</sup> We refer to our evidence submitted to the Equalities and Human Rights Committee on 19 January 2018.<sup>3</sup> We have the following observations to make:

## General

When the Bill was introduced on 7 November 2017, this marked a major and much welcomed step forward in ensuring that Scotland becomes a '*more just, equal and fair society*'.<sup>4</sup> Our members are fully committed to working in the public interest to protect and promote the rule of law in establishing this vision of society. Section 1 of the Bill defines its purpose:

*'to acknowledge the wrongfulness and discriminatory effect of past convictions for certain historical sexual offences (our emphasis) by (a) pardoning persons who have been convicted of those offences, and (b) providing for a process for convictions for those offences to be disregarded'*.

There is no place in Scotland for the laws under which men were convicted of historic sexual offences that involved sexual activity between consenting adult males. These laws were, by their very nature, discriminatory or were interpreted and enforced in such a manner. Acknowledging this is extremely

<sup>1</sup> [http://www.parliament.scot/Historical%20Sexual%20Offences%20\(Pardons%20and%20Disregards\)%20\(Scotland\)%20Bill/SPBill21S052017.pdf](http://www.parliament.scot/Historical%20Sexual%20Offences%20(Pardons%20and%20Disregards)%20(Scotland)%20Bill/SPBill21S052017.pdf)

<sup>2</sup> <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2018/3/26/Historical-Sexual-Offences--Pardons-and-Disregards---Scotland--Bill-Stage-1-Report/EHRiC-S5-18-R2.pdf>

<sup>3</sup> [https://www.lawscot.org.uk/media/359559/lss\\_-call-for-evidence-historic-sexual-offences-pardons-and-disregards-scotland-bill-stage-1.pdf](https://www.lawscot.org.uk/media/359559/lss_-call-for-evidence-historic-sexual-offences-pardons-and-disregards-scotland-bill-stage-1.pdf)

<sup>4</sup> Christina McKelvie MSP <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2018/3/26/Historical-Sexual-Offences--Pardons-and-Disregards---Scotland--Bill-Stage-1-Report/EHRiC-S5-18-R2.pdf>

important for the relatives of those who may since have died. This has been recognised by the apology made by the First Minister when introducing the Bill who recognised that:

*‘..categorically and wholeheartedly ... I apologise for those laws and for the hurt and harm that they caused.*

Scotland is a tolerant society which recognises, protects and implements human rights as well as demonstrates equality, dignity and respect. The Bill, as it has been introduced, achieves exactly that. What was originally and informally described as ‘Turing’s law’<sup>5</sup> is now becoming the reality for Scotland. We endorse the sentiment that the Bill is *‘an important and symbolic statement of principle of the kind of society Scotland seeks to be in the 21st century.’*<sup>6</sup>

It must be recognised though that the introduction of this Bill is ‘long overdue.’<sup>7</sup> Whatever the factors, this has provided Scotland with an opportunity to learn from the English and Welsh experiences. They have enacted similar legislation providing a scheme by which pardons are available for those convicted of consensual same-sex relationships. What the Bill sets out involves two distinct and related procedures which include: a ‘pardon’ apology; and a process for disregarding relevant convictions where the Bill seeks to address the wrongs of the past on the lives of those men who suffer from the effects of historical offences in Scotland.

It is important to note that there is *‘unequivocal cross-party support in the Parliament for the apology, and for the legislation’*<sup>8</sup>. In addition, Scotland is following the example already set by other governments in *‘dismantl[ing] a wide variety of discriminatory laws’*<sup>9</sup>. The Bill sets out publicly what Scottish attitudes are to same-sex relationships and behaviour which is important both for those who live here and those that may seek to do so in the future. This is especially true where not all countries take this enlightened approach.

We would also consider, given the overwhelming consensus supporting the policy intentions (as others to have fully recognised in their evidence), that the process has to be administratively simple to operate. The process has to be *‘user friendly secure and as efficient as possible’*<sup>10</sup>.

## **Part 2 – Pardon for Historical sexual offences - automatic**

<sup>5</sup> This Bill builds on the case of World War 2 Enigma codebreaker Alan Turing after whom some refer this type of legislation. Alan Turing received a posthumous pardon for his 1952 conviction in 2013.

<sup>6</sup> Paragraph 18 of the Stage 1 Report

<sup>7</sup> Paragraph 13 of the Stage 1 Report

<sup>8</sup> Paragraph 17 of the Stage 1 Report

<sup>9</sup> Paragraph 6 of the Stage 1 Report

<sup>10</sup> Paragraph 54 of the Stage 1 Report

**Scope of the legislation:** Section 2 of the Bill sets out the range of the historic offences to be included. It appears to be pretty comprehensive. The Committee heard evidence in confidence from persons who had been affected by their convictions. This seems to have been in response to a direct appeal for those affected to come forward with evidence and examples of relevant convictions that should fall into the scope. It is vital for any gaps to be identified now as the historic sexual offences are defined. We have no specific additional suggestions to include. We do reflect that there is a difference in the policy position between Scotland and England in that Scotland is seeking to ensure that in circumstances where men were convicted of 'loitering'<sup>11</sup> are included. The confidentiality and sensitivity of all concerned and involved at all steps of these processes must be observed at all times.

**Posthumous disregard:** We understand fully why the introduction of a system of any posthumous disregard could present a similar set of challenges to that discussed in relation to any automatic disregard scheme. Not only would there be problems with the administrative processes in locating the actual records of such convictions, but relatives of any deceased person may have insufficient knowledge of the exact circumstances of their deceased relative's conviction to allow identification to be made.

We do encourage the idea of exploring whether the relatives of the deceased might be able to apply for a type of certificate or other letter of acknowledgement<sup>12</sup> in cases where posthumous pardons were relevant. It may provide a '*means of providing comfort, a sense of redress and closure*'<sup>13</sup> as described. It would seem relatively straightforward to include that possibility within the publicity and guidance regarding the scheme to be issued and specifically discussed below. Given the relatively few numbers estimated to be involved directly<sup>14</sup>, there would not appear to be many that would require such recognition. But for those that do, the possibility of providing that mechanism seems important and in keeping with the spirit of this important legislation.

### Part 3- The Disregard Process

Sections 5 to 11 of the Bill set out the establishment of the disregard scheme, and the ways in which men may apply to Scottish Ministers for such. Ample evidence exists as supplemented at the Committee by the evidence provided by witnesses where having a historic sexual conviction may have hindered or prevented employment opportunities:

*'Witness A told ...how his conviction had hindered his career because he feared applying for jobs which required a disclosure check...'*<sup>15</sup>

<sup>11</sup> Derek Ogg QC <https://www.theguardian.com/uk-news/2017/nov/07/scotland-to-pardon-gay-men-with-historical-convictions>

<sup>12</sup> Paragraph 94 of the Stage 1 Report

<sup>13</sup> Paragraph 94 of the Stage 1 Report

<sup>14</sup> Estimated in the Financial Memorandum to the Bill

<sup>15</sup> Paragraph 13 of the Stage 1 Report

This is especially true given the heightened requirements for disclosure in the current competitive job market. A number of these offences may not be self-explanatory when all the disclosure will note is the conviction and sentence. There may be a call for an explanation as to exactly what the circumstances were to allow a judgment regarding employment to be made.

**Other record keepers:** This highlights a possible extension of the policy in relation to other record keepers who do not hold criminal records but still hold extensive records that may contain reference to historic sexual offences. This includes the National Records of Scotland, the NHS and the Scottish Prison Service as well as employer groups.

We would encourage further consideration of how other organisations should consider the impact of this legislation with regard to their records. There may be an opportunity provided within the public awareness campaign to support the implementation of the legislation to include suitable guidance recommending the procedures and practices that such organisations could bring into force to apply to any records which disclose historic sexual offences. Records must not be deleted but annotation may be possible on a request from an affected person.<sup>16</sup>

**Publicity of the scheme:** Enactment of legislation is only the first step and success will lie in the design and implementation of the disregards scheme. We welcome the suggestion of a pilot<sup>17</sup> scheme to test the process in advance in order to avoid some of the problems that have arisen in England and Wales where only two per cent are understood to have applied.<sup>18</sup> Cooperating with stakeholders<sup>19</sup> on the design and roll-out in advance of the system as well as obtaining the appropriate feedback and evaluation in advance of it coming into force would be highly desirable. We would also support the legislation coming into force as soon as practically possible after royal assent<sup>20</sup>.

Public awareness of the Bill is essential. As<sup>21</sup> stated, there are a number of issues which individuals require further support which include the need for:

- any applicants to be aware of their rights under the legislation
- the process for making an application to have a conviction disregarded is as simple and straightforward as possible
- '*where relevant and appropriate*' for legal aid to be available for those making an application and any application fails resulting in an appeal to the Sheriff Court.

<sup>16</sup> Paragraphs 79 and 80 of the Stage 1 Report

<sup>17</sup> Paragraph 56 of the Stage 1 Report

<sup>18</sup> Paragraph 56 of the Stage 1 Report

<sup>19</sup> Paragraph 77 of the Stage 1 Report

<sup>20</sup> Paragraph 135 of the Stage 1 Report

<sup>21</sup> Paragraph 101 of the Stage 1 Report

Awareness of the legislation and the relevant procedures are the direct responsibility of the Scottish Government. There is a support role for third sector organisations to assist in highlighting the implementation and effect of the legislation. We would support the development of an ‘appropriate framework of support’ to assist individuals to engage with the disregard scheme.<sup>22</sup>

By what means that publicity may be best achieved will be considered in due course. It needs to include online and printed materials, publicity campaigns and include actions undertaken by other organisations which include the other record keepers referred to above. Such guidance needs to make it clear what the legislation refers to.

The questions for the applicant are twofold:

- Does the conviction fall within section 2 of the Bill?
- Has it been obtained from a Scottish court?

The Bill refers to relevant convictions obtained in Scotland. The system of disregards outlined in the Bill then applies. However, confusion may arise as those affected living in England with a Scottish conviction can apply but need to understand that the system is not identical. Those living in Scotland with an English conviction need to apply under the English and Welsh procedures.

How best to target the more remote areas of Scotland should also be considered.<sup>23</sup>

**Legal aid:** An update from the government on any legal aid provision to secure access to justice if required should be obtained. The process should be as simple and well publicised as possible but some affected may well be ‘vulnerable’ or indeed representative of the ‘protected characteristics’ under the Equality Act. If legal advice, assistance or representation is required, it should be made clear how that can and should be made available.

We support the suggestion, given the importance of guidance and regulations required to be made under the Bill, that it would be appropriate for guidance and regulations to be subject to the affirmative procedure.<sup>24</sup>

## Conclusion

The Bill does not affect women as there is no evidence to suggest that women have been similarly affected by such discrimination. However, we would stress our support for the use of neutral terminology similar to

<sup>22</sup> Paragraph 107 of the Stage 1 Report

<sup>23</sup> Paragraph 133 of the Stage 1 Report

<sup>24</sup> Paragraph 115 of the Stage 1 Report

that employed by the Sexual Offences (Scotland) Act 2009. Language used previously in relation to same sex activities should not be used as such terms were both offensive and discriminatory.<sup>25</sup>

<sup>25</sup> Paragraph 7 of the Bill Policy Memorandum



**For further information, please contact:**

Gillian Mawdsley  
Policy Executive  
Law Society of Scotland  
DD: 0131 476 8206  
[gillianmawdsley@lawscot.org.uk](mailto:gillianmawdsley@lawscot.org.uk)