



Law Society
of Scotland

Stage 3 Briefing

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

June 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.

We provide the following comments in relation to the Historic Sexual Offences (Pardons and Disregards) (Scotland) Bill (Bill) which we hope will assist the Parliament's scrutiny at the Stage 3 Debate scheduled for 6 June 2018.

Comments

This Bill was introduced on 7 November 2017 which we welcomed as a major and vital step forward in ensuring that Scotland becomes a '*more just, equal and fair society*'.¹ Our members are fully committed to working in the public interest to protect and promote the rule of law and access to justice. Both aspirations are fully addressed by this Bill where it acknowledges:

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

We recognise that the laws under which adult men were convicted of consenting historic sexual offences were discriminatory or were interpreted and enforced in such a manner.

The UK Government acknowledged this publicly in 2013 when it made the posthumous pardon to Alan Turing, the Bletchley code-breaker. The introduction of 'Turing's law', to which this issue is referred to informally, has ensured that we have come a long way. Legislation has now been passed in England and Wales. Scotland has had an opportunity to study and learn from their experiences. Though arguably long overdue, this Bill makes Scotland's own 'Turing's law' a reality.

¹ Christina McKelvie MSP Stage 1 Report http://www.parliament.scot/S5_Equal_Opps/Reports/EHRiC_SP_Paper_300.pdf

Scotland has this important opportunity to ensure that such laws have no further place within 21st century Scottish legislation. It is against that background that we cannot ‘delete our history and expunge it from our records. We must remain mindful and aware of it’².

When the Bill was introduced, the First Minister ‘*categorically and wholeheartedly apologised*’ for these laws and the hurt and harm that these laws had caused. That was the first step in achieving initially, a ‘pardon’ apology. Now, through the Bill, it introduces a process for disregarding relevant convictions and addressing the wrongs of the past on the lives of those men who suffered and continue to suffer from the effects of historic sexual offences in Scotland.

The Bill covers two distinct kinds of offences. There are the statutory offences that were themselves discriminatory such as section 7 of the Sexual Offences (Scotland) Act 1976 and those that were generic under common law such as shameless indecency and breach of the peace that discriminated against men who engaged in same-sex sexual activity.

The Bill provides a pardon to people who were convicted of historical sexual offences that criminalised sexual activity between men for activity that is now legal. It also creates a means for those persons who were convicted of a historical sexual offence to apply to have that conviction disregarded. Though we welcome the introduction of the actual statutory process by which a person can apply for a disregard, we have the following observations about the practical application process.

Enactment: Early enactment of legislation is the first but vital step. Implementation of this legislation as soon as possible after the parliamentary processes have been completed would be most welcomed. There seems to be no reason for further delay especially in view of the overwhelming consensus that support the Bill’s policy intentions which was noted fully in the all parliamentary debates.

Design of the system: Success of this Bill lies in its practical effect. Its design and how the disregards system will work must be simple, transparent and capable of being easily understood. It needs to be ‘*user friendly, secure and as efficient as possible*’.³ Confidentiality of applicants must be respected at all times as well as the speed of the process. As Christina McKelvie MSP⁴ recognised, the application form must not be off-putting. This is a great policy but it must be able of being put into effect when the applicants require.

Administration process: This must be simple. Applicants must also be made aware of their rights to apply by relevant social media platforms as well as information being made publicly and also available by appropriate groups. Applicants should be encouraged to apply where relevant as we have stressed earlier when considering ‘*the heightened requirements for disclosure in today’s highly competitive job market*’⁵. This theme supports other areas of parliamentary work going forward such as the Management of

² Daniel Johnson (Edinburgh Southern) (Lab)

³ Paragraph 54 of the Stage 1 Report

⁴ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11467&mode=pdf>

⁵ https://www.lawscot.org.uk/media/359559/lss_-_call-for-evidence-historic-sexual-offences-pardons-and-disregards-scotland-bill-stage-1.pdf

Offenders (Scotland) Bill where the Cabinet Secretary Michael Matheson recognised albeit in a separate context of the importance of convictions in people's lives where:

*'Changes to the length of time people will have to disclose their convictions can make a huge difference to those who genuinely want to turn their lives around'*⁶.

Working with others: We would encourage and support the reference to *'collaborative relationships that ...[have] built with the LGBT communitycontinu[ing] and extend[ing] as far as the detail and that no form will be introduced without the community's full support for it'*⁷

We welcome the amendment made at Stage 2 of the Bill where section 14⁸ (Regulations) to being subject to the affirmative parliamentary procedure and to the commitment about trying to ensure that the process is correct.

Legal aid: We consider that legal aid should be available if and when required. The process to apply for disregard should be as open and simple as possible so that engagement of a lawyer to make an application for a disregard should not be required. But many of those applying for disregards may be from the most vulnerable in society. Access to legal advice may well be required. We would wish to ensure that legal aid should be available when and where required."

Gender neutral: We would again reiterate our support the nature of the actual legislation. Though there is no suggestion that women have been affected by discrimination, neutral terminology avoids terms that may be offensive and discriminatory⁹.

Conclusion: The strongest evidence for change came when *'witness A told ...how his conviction had hindered his career because he feared applying for jobs which required a disclosure check'*¹⁰. As Gail Ross MSP¹¹ said:

Every time that he has thought about applying for a new job or an internal promotion, he has had to ask himself, "Do I want to explain this all over again? Do I want to discuss my sexuality and my unjust conviction?" He and others in his position deserve to be able to get on with their lives without worrying about when they will next have to open up about a historical wrong that was enacted on them by the state'.

Whether to apply for a disregard is a matter of choice for the individual. What the Bill does is make sure that the process exists for that individual to make the application. What must support 'Witness A' is a

⁶ <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-43153462>

⁷ Kezia Dugdale MSP <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11467&mode=pdf>

⁸ [http://www.parliament.scot/Historical%20Sexual%20Offences%20\(Pardons%20and%20Disregards\)%20\(Scotland\)%20Bill/SPBill21AS052018.pdf](http://www.parliament.scot/Historical%20Sexual%20Offences%20(Pardons%20and%20Disregards)%20(Scotland)%20Bill/SPBill21AS052018.pdf)

⁹ Paragraph 7 of the Bill's Financial memorandum

¹⁰ Paragraph 13 of the Stage 1 Report

¹¹ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11467&mode=>



system fit for purpose to allow the applicant to understand how to go about obtaining and how to obtain the disregard, where relevant, without delay.

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