

Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill – what does it do?

Equality Network

www.equality-network.org

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The Equality Network is a national organisation working for lesbian, gay, bisexual, trans and intersex equality in Scotland.

We very much welcome the introduction of the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill in the Scottish Parliament on 6th November 2017. This fulfils a commitment made by the Scottish Government in October 2016.

The bill provides a pardon for people who were convicted of the historical discriminatory “homosexual offences” related to relationships between men, which are no longer crimes. It also provides a way for people with these convictions to have them removed from their criminal records (called a “disregard”) so that they do not appear on PVG checks or disclosures for jobs and volunteer posts.

The bill is a very important statement that the Scottish Government recognises and regrets the discrimination of the past, and now considers Scotland’s LGBTI people to be fully equal citizens who deserve equal respect. By providing a pardon, the bill symbolically expresses that respect and regret, although nothing done now can ever compensate for the hugely negative effects of past discrimination. The bill will also be of direct practical importance to people who currently have one of these convictions show up on criminal record checks.

The bill and related documents can be found here:

<http://www.parliament.scot/parliamentarybusiness/Bills/106236.aspx>

We welcome three particular aspects of the bill:

It starts with a very clear “purpose section”, stating that the past convictions for these “offences” were wrong and discriminatory, and that that is why the pardon is provided. Together with the apology from the First Minister in the Scottish Parliament on 7th November 2017, this makes clear that it was the law and the prosecutions that were wrong, and not the relationships which that law criminalised.

The bill gives an automatic pardon to all people who were convicted in Scotland under these discriminatory offences, including posthumously to those who have died, and to those who are still living. This is in contrast to the legislation for the rest of the UK, which only gave a pardon automatically to those who had died before 31st January 2017. As a result, an estimated 98% of people still living who have these discriminatory convictions in other parts of the UK have not received the pardon.

The bill covers all of the offences that were used in a discriminatory way to prosecute sex and related activity between men in Scotland. That includes convictions for “importuning” – where men were prosecuted simply for chatting up other men. This is a significant improvement over the legislation for the rest of the UK, which does not cover those convictions.

What are the historical sexual offences?

For nearly 100 years, up to 1981, all sexual acts between men were crimes in Scotland. In contrast, sex between women was not criminalised. There were two specific “homosexual offences” that only applied to sex between men, called “sodomy” (an old offence that had applied for centuries) and “gross indecency” (an offence introduced in 1885). Men were also prosecuted in a discriminatory way for sexual and related activity with other men, under other laws (including shameless indecency, breach of the peace, and local byelaws).

In 1981, sex between men over 21 was decriminalised in Scotland, so long as it was consensual and in private. This change was modelled on the 1967 change to the law in England and Wales. But men under 21 and their male partners could still be prosecuted, and men also continued to be prosecuted for activities such as kissing in public, and chatting up other men (“importuning”).

In 1994, the age of consent for sex between men was reduced from 21 to 18, and finally, in 2001, it was made equal to that for sex between other gender mixes, at 16. The same year, the special rule that made sex in private between adult men a crime if more than two people took part or were present, was also removed.

From 2001 onwards, the legal rules for sex between men were similar to those for other gender mixes. But the remaining parts of the offence of

gross indecency continued on the statute book until 2010, and the offence of sodomy was only finally abolished in 2013. Scotland's main sexual offences law is now found in the Sexual Offences (Scotland) Act 2009, and it is sexual orientation neutral.

The earlier laws meant that many men, including many who are still living today, were convicted for activity related to sex with another man, that would not have been a crime if it had happened with a woman, and that is not a crime between men today. During the 1950s, people were sent to prison for private, consensual sex between men aged over 21. Private consensual sex involving those between 16 and 21 continued to be prosecuted until the 1990s. Others were convicted, and typically fined, for importuning, or acts such as kissing another man in a public place, and this continued into the 1990s also.

In addition to the damage done to their lives at the time, by the prosecution and conviction, people who have one of these convictions on their record may find their lives continue to be directly affected today, for example, if they apply for a job or a volunteer post that requires a criminal record check. All criminal convictions with any sexual element are disclosed in checks for working with vulnerable adults or children.

The large majority of Scotland's 20th century gay and bisexual men broke these laws in some way – only the unlucky minority were prosecuted. We will never know the total number of people this happened to, but any people's lives have been blighted by criminal convictions that were based purely on sexual orientation discrimination in the law.

The cost to those prosecuted, and to all gay and bisexual men, and trans people, who lived in Scotland in the shadow of possible prosecution, and to their families and friends, is incalculable. And the criminalisation of relationships between men contributed to and legitimised wider discrimination against all LGBT people.

What are pardons and disregards?

A very well-known case under the similar laws in England was that of the founder of computer science, and World War Two code-breaker, A.M. Turing. He was convicted in 1952 of gross indecency, for consensual sex in private in his home with another man. He was sentenced to "treatment" with oestrogen, supposedly to reduce sex drive. In 1954, he

committed suicide. In 2013, he was granted a posthumous pardon for the conviction.

This led to calls for a pardon for the many thousands of other people across the UK with similar historical “homosexual offences” convictions, including those who have died, and those who are still alive.

A pardon is a formal, symbolic measure. It does not in itself change records that are on file, and which are a problem for people who require criminal record checks. A system is therefore needed so that convictions can be removed from people’s records, so that they do not continue to show up in criminal record checks – this is called a disregard.

Disregards for historical “homosexual offences” in England and Wales have been available, on application, since 2012, and legislation granting a pardon for convictions in England, Wales and Northern Ireland came into effect early in 2017. That legislation has however been criticised for a number of flaws.

These include that the pardon was only given automatically to people who had died before 31st January 2017. People who were still living on that date must apply for the disregard to receive the pardon. That is a complicated process that most do not want to put themselves through. As a result, only a tiny minority of people still living, who were convicted of these historical offences in England, Wales or Northern Ireland, have received the pardon.

Secondly, not all the discriminatory historical offences for sex-related activity between men are covered by the pardon and disregard in the rest of the UK. For example, people convicted for “importuning”, for simply chatting up other men, are not covered.

Thirdly, many people feel that only to give a formal symbolic pardon misses the main point. They feel that pardoning a person implies that the person did something wrong in the first place, and that what is needed is a clear acknowledgement that these convictions were wrong and discriminatory, and an apology.

Although it has taken longer to develop the Scottish legislation, this means that the bill has been able to benefit from the debates around the legislation for the rest of the UK, and the Scottish bill addresses each of these flaws.

How the bill works

The Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill starts with a very clear statement that these historical convictions were wrong. Section 1 of the bill states:

“The purpose of this Act is to acknowledge the wrongfulness and discriminatory effect of past convictions for certain historical sexual offences by pardoning persons who have been convicted of these offences, and providing a process for convictions for those offences to be disregarded.”

How the bill handles pardons

Sections 2 and 3 of the bill provide a pardon automatically to everyone convicted for historical offences that regulated sexual activity between men, if what they did is no longer a crime. The pardon will apply to all such cases, whether the convicted person has died, or is still living. The pardon will apply to anyone convicted for these offences, including trans women and non-binary people who were prosecuted as men.

The pardon will also apply where a person was not prosecuted for the offence, but instead was given a warning by police or the Procurator Fiscal (PF), or agreed an offer from the PF such as a fiscal fine or “treatment”, or was referred to the children’s panel. And it will apply where the person was found to have committed the offence, but was not sentenced (for example they received an absolute discharge).

Sexual activity is defined broadly in section 2 to include affectionate activity (like kissing), and conduct intended to introduce or procure sexual activity (covering “importuning”). The bill includes a list of the main “homosexual offences”, but also includes a “catch-all” to ensure that convictions for sexual activity between men under other laws such as breach of the peace and local byelaws, are covered. This means that there should be no gaps in the coverage of the pardon or the disregard.

The pardon only applies if the conviction is for something that is no longer a crime. This means that it does not apply to non-consensual sexual activity, or to sexual activity involving a person under 16 (or under 18 if the convicted person was in a position of trust over them). Nor does it apply to activity which would constitute the modern offence of public

indecent (sexual activity that would be likely to be witnessed by members of the public and reasonably cause them offence).

How the bill handles disregards

Under the sections 5 to 11 of the bill, anyone covered by the pardon can also apply for the disregard, if they want to remove the conviction from their criminal record. This will involve filling in an application form, giving as much detail as the applicant can remember from: what happened and when and where, their address at the time, what the charge was, which court dealt with it, and what the sentence was, and any other information the applicant wants to provide in support of their application.

Scottish Government officials will then examine the relevant court record, police record, and any other relevant information, to check that the conviction was for sexual activity between men that is no longer a crime. All official records will then be updated, and the conviction is effectively wiped out and cannot be used against the applicant in any circumstances.

If an application for a disregard is turned down (which can only happen on the basis that the conviction was for something that did not relate to sexual activity between men, or was for something that is still a crime), the applicant is free to apply again with additional information, or alternatively to appeal to the sheriff court.

How many people will be affected?

It is impossible to accurately count the number of convictions under these historical sexual offences, for things that are no longer offences today. It is simply not practical to proactively identify all these convictions from court and other records.

It has been estimated that around 50,000 offences are covered by the pardons and disregards legislation in England and Wales, including offences by up to 15,000 people who are still living.

There is evidence that prosecution policy was somewhat less harsh in Scotland. During the 1950s to 80s, the rate of prosecution (adjusted for population size) for the main “homosexual offences” in Scotland varied between 20% and 50% the rate in England. This would suggest that the total number of offences that will be pardoned by the Scottish bill will be

a small number of thousands, with the number of people still living who are covered by the pardon likely to be hundreds.

In England and Wales, despite thousands of living people being covered by the legislation, only around 150 disregard applications have been approved, so far. The small number appears likely to be because most people would rather not have to relive their experience of prosecution and conviction, to make a disregard application. In addition, the proportion of people who are working or volunteering in posts that require a full criminal record disclosure is small.

This suggests that the number of disregard applications in Scotland is likely to be small. However, for each person granted a disregard, the effect will be significant and important.

The views of LGBTI people

In early autumn 2017, the Equality Network consulted LGBTI people about the expected content of the bill, via an online survey. At that time, we did not know that the bill would include a statement that the convictions were wrong and discriminatory, or that the First Minister would make an apology.

736 people responded to the survey. The very large majority of respondents did not have convictions which will be pardoned by the bill – only four respondents said they had such convictions, of whom two said they would probably apply for the disregard. This reflects the fact that there are of the order of 100,000 gay and bisexual men in Scotland, but the number living with these convictions is likely to be in the hundreds.

630 of the survey respondents expressed an opinion about the expected coverage of the bill. 76% (479 respondents) of those said the pardon and disregard system expected to be in the bill appeared to be about right. 17% (104 respondents) made specific suggestions for things they thought the bill should cover.

The issue mentioned most often, by 7% (45 respondents), was that the disregard (the removal of the conviction from a person's criminal record) should happen automatically, instead of requiring the person to apply for it. However, we agree with the Scottish Government that this is an impossible task.

It is not possible to tell, from the name of the offence, whether a conviction was for something that is no longer a crime, or for something that is still a crime, such as a sexual assault. It would therefore be necessary to examine in detail the court, prosecutor and police records for every prosecution for any of the offences that were used to prosecute sexual activity between men. Even then, decisions on some of those cases will require seeking further information from the person prosecuted, because of the lack of detail in official records. The checks would need cover all these prosecutions back to the 1930s to ensure that everyone still living is included. Because a number of different offences, including breach of the peace, were used to prosecute sex-related activity between men, this would involve examining the details of hundreds of thousands of cases. This completely impractical task would still not identify all cases, because of the lack of detail in some records.

Operating the disregard via an application process means that those who wish their record to be updated can apply, confidentially, supplying information on what happened, to assist with the checks. Those who do not apply will nevertheless be covered by the pardon and the apology, and the wrongfulness and discriminatory nature of their conviction is declared in the law.

6% (37 respondents) said that a pardon on its own is not enough. Many of them said that an apology is needed also, and that the bill should make it clear that the old laws were wrong, and that people receiving the pardon are not being forgiven for wrongdoing. The bill provides such an acknowledgment, in section 1 (see page 5 above). On 7th November 2017, the First Minister apologised in the Scottish Parliament to those convicted of these offences.

1% (8 respondents) of those who expressed an opinion on the bill said that financial compensation should be provided to those who have these convictions. One of those added that there should be compensation for all past discrimination against LGBTI people, not just discriminatory convictions.

Five respondents said that the bill should cover all discriminatory convictions related to relationships between men, including importuning. These are in fact all covered by the published bill.

Two respondents said that the bill should cover armed forces offences – this is not within the power of the Scottish Parliament, and is included in the (albeit flawed) pardons legislation passed at Westminster.