

This document relates to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 6 November 2017

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

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill ('the Bill'). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill. It does not form part of the Bill and its contents have not been endorsed by the Parliament.

Outline of Bill provisions

2. The Bill is in four parts. Part 1 contains introductory provision, Part 2 provides for a pardon for certain historical sexual offences, Part 3 provides for a scheme whereby certain historical sexual offences can be disregarded from appearing in disclosure checks and Part 4 includes a number of general provisions.

Rationale for subordinate legislation

3. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, we have carefully considered the importance of each matter against the need to achieve the appropriate balance between the importance of the issue and the need to provide flexibility to respond to changing or unforeseen circumstances quickly, in light of experience, without the need for primary legislation; and against the need to ensure the proper use of parliamentary time.

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Section 10(3)-(4) – Prescribing the manner in which references to disregarded convictions are to be removed from official records when a disregard has effect

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative

Provision

4. Section 10(3) of the Bill allows the Scottish Ministers to prescribe the manner in which references to disregarded convictions are to be removed from official records where a disregard has taken effect, under either section 7(5) (after a decision by Ministers) or section 8(7) (on appeal). Section 10(4) provides that these regulations can, in particular, provide that removal of a conviction may include retaining recorded details of a conviction with new details added advising the conviction is a disregarded conviction, and provide for what effect this has.

Reason for taking power

5. This power will allow flexibility for the Scottish Ministers to respond to the circumstances of different ways in which details of convictions have been recorded over many years. In particular, it is understood that some records of convictions may be kept in such a way whereby the physical removal of details of a conviction may be very difficult e.g. information is kept on a microfiche showing scanned copies of hundreds of convictions. It also enables the Scottish Ministers to provide that any records relating to disregarded convictions which may, at a later date, be passed to the Keeper of the Records of Scotland (such as court records) are annotated, rather than being deleted, so as to preserve the accuracy of historical records.

Choice of procedure

6. Regulations made under this section are subject to the negative procedure. It is considered that this level of scrutiny is appropriate as the power provides for limited flexibility to define what is meant by 'removal' within the confines of the disregard scheme: it could not be used to change the fundamental scope of that scheme,

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Section 10(5) – Prescribing who ‘relevant record keepers’ are for the purposes of the disregard scheme

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative

Provision

7. Section 10(5) of the Bill provides the Scottish Ministers with a power to prescribe who is a “relevant record keeper” that can be required under section 10(1)(b) to take action to remove records relating to a ‘disregarded’ conviction from records that they hold. It also provides that a “relevant record keeper” may include the Scottish Ministers acting in their capacity as holders of official records of any particular kind.

Reason for taking power

8. Section 10(1) of the Bill provides that where a disregard has taken effect, the Scottish Ministers must remove all references to the disregarded conviction contained in those official records in respect of which they are the relevant record keeper and require every other relevant record keeper to remove all references to the disregarded conviction contained in official records that they hold.

9. The primary source of information concerning criminal convictions which is used by Disclosure Scotland to respond to requests for disclosure certificates is Police Scotland’s Criminal History System. However, it is also possible that the Crown Office and Procurator Fiscal Service, the Scottish Courts and Tribunals Service and others may hold details of disregarded convictions stored in other local databases and this power will enable other bodies to be prescribed as relevant record keepers either on commencement or in the future, if changes in the way in which the disclosure system operates require this.

10. This power will enable the Scottish Ministers to ensure that all records relating to criminal convictions which are used by Disclosure Scotland (or any successor organisation) to inform disclosure checks are covered by the scheme, and enable updates to be made to reflect any future changes to the way such information is organised without the need for primary legislation.

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11. The power enables the Scottish Ministers to designate themselves as ‘relevant record keepers’ when acting in their capacity as holders of official records of a prescribed type. This ensures that if, for example, Disclosure Scotland, which is an executive agency of the Scottish Government, hold any information concerning disregarded convictions, this can be brought within the ambit of the disregard scheme.

Choice of procedure

12. Regulations made under this section are subject to the negative procedure. It is considered this level of scrutiny is appropriate as the power provides for limited flexibility to define who is a ‘relevant record keeper’ within the confines of the disregard scheme. It would not, for example, be possible to use this power to extend the removal of convictions information to offences not related to same-sex sexual activity, or to use it to remove purely historical information held by the Keeper of the Records of Scotland.

Section 15 – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: affirmative if amends primary legislation, otherwise negative

Provision

13. Section 15(1) of the Bill enables the Scottish Ministers to make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with or for giving full effect to the Bill.

Reason for taking power

14. This power is necessary to allow flexibility when it comes to implementation of the Bill or to address issues that may arise in light of experience on the operation of the Act. While the Scottish Government has given careful consideration to the content of the legislation, there may be unforeseen matters, for example, regarding the legislation’s interaction with systems and legislation about disclosure checks, preservation of official records and the rehabilitation of offenders, which require the assistance of this ancillary power in order to ensure the proper effect of the Bill is realised. That is particularly so given this is a new (disregard) scheme where unexpected issues may arise that require minor changes to the

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legislative framework. The power is framed by reference to what is appropriate for the purposes of, in connection with or for giving full effect to the Bill. It is therefore expressly limited to that extent.

Choice of procedure

15. Regulations made under this section which contain a provision which adds to, omits or replaces any part of an Act are subject to affirmative procedure. Otherwise, regulations made under this section are subject to negative procedure. This approach is typical for ancillary powers of this type.

Section 17 - Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: laid only

Provision

16. Section 17 of the Bill enables the Scottish Ministers to make regulations appointing days on which the provisions in the Bill come into force (other than this section, section 15, 16 and 18, which come into force on the day after Royal Assent). Regulations may include transitional, transitory or saving provision.

Reason for taking power

17. The power is necessary to enable the Scottish Ministers to commence the provisions in the Bill appropriately to allow for the new disregard scheme to be brought into force once the necessary planning has been completed. This planning will involve co-ordination with a number of stakeholders affected by the new scheme and the exact timing when the scheme comes into force will be determined following engagement with these stakeholders. It should be noted that the power to make transitional, transitory or saving provision under subsection (3) is not a substantive one but is dependent on commencement.

Choice of procedure

18. The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. This is typical for commencement regulations, which bring into force provisions whose underlying policy has already been considered by the Parliament during the passage of the Bill.

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