Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018

2018 asp 14

The Bill for this Act of the Scottish Parliament was passed by the Parliament on 6th June 2018 and received Royal Assent on 11th July 2018

An Act of the Scottish Parliament to pardon persons convicted of certain historical sexual offences and to provide a process for convictions for those offences to be disregarded.

PART 1

INTRODUCTORY

1 Purpose of this Act

The purpose of this Act is to acknowledge the wrongfulness and discriminatory effect of past convictions for certain historical sexual offences 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.

Commencement Information

I1 S. 1 in force at 15.10.2019 by S.S.I. 2019/205, **reg. 2**

2 Historical sexual offence: definition

(1) In this Act, "historical sexual offence" means—

(a) an offence under section 13(5)(a) or (c), (6) or (9) of the Criminal Law (Consolidation) (Scotland) Act 1995,

(b) an offence under section 80(7)(a), (c) or (d), (9) or (12) of the Criminal Justice (Scotland) Act 1980,

(c) an offence under section 7 of the Sexual Offences (Scotland) Act 1976,

(d) an offence under section 11 of the Criminal Law Amendment Act 1885,

(e) the common law offence of sodomy,

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(f) the common law offence of shameless indecency, in so far as that offence covered sexual activity between men,

(g) any other offence which falls within subsection (2),

(h) an offence of attempting, inciting or conspiring to commit any of the offences mentioned in paragraphs (a) to (g).

(2) An offence falls within this subsection if the offence—

(a) regulated, or was used in practice to regulate, sexual activity between men, and

(b) either—

(i) has been repealed or, in the case of an offence at common law, abolished, or

(ii) has not been repealed or abolished but once covered sexual activity between men of a type which, or in circumstances which, would not amount to the offence on the day on which section 3 comes into force.

(3) Where an offence of the type described in subsection (2)(b)(ii) covers or once covered activity other than sexual activity between men, the offence falls with subsection (2) only to the extent that it once covered sexual activity between men.

(4) In this section, "sexual activity between men" includes—

(a) any physical or affectionate activity between males of any age which is of a type which is characteristic of persons involved in an intimate personal relationship,

(b) conduct intended to introduce or procure such activity.

Commencement Information

I2 S. 2 in force at 15.10.2019 by S.S.I. 2019/205, **reg. 2**

PART 2

PARDONS FOR CERTAIN HISTORICAL SEXUAL OFFENCES

3 Pardons for certain historical sexual offences

A person who has been convicted of a historical sexual offence is pardoned for the offence if the conduct constituting the offence, if occurring in the same circumstances, would not be an offence on the day on which this section comes into force.

Commencement Information

I3 S. 3 in force at 15.10.2019 by S.S.I. 2019/205, **reg. 2**

4 Pardons: supplementary

A pardon under section 3 does not—

(a) affect any conviction or sentence, or

(b) give rise to any right, entitlement or liability.

Commencement Information
I4 S. 4 in force at 15.10.2019 by S.S.I. 2019/205, **reg. 2**

PART 3

DISREGARDING CERTAIN CONVICTIONS FOR HISTORICAL SEXUAL OFFENCES

5 Application to have conviction for historical sexual offence disregarded

(1) A person who has been convicted of a historical sexual offence may apply to the Scottish Ministers for the conviction to be disregarded.

(2) An application made under subsection (1) must be in writing and must include—
- (a) the applicant's name, address and date of birth,
- (b) in so far as known to the applicant, the applicant's name and address at the time of the conviction,
- (c) in so far as known to the applicant, the time when and place where the conviction took place and the relevant case number,
- (d) in so far as known to the applicant, the nature and circumstances of the offence and the sentence imposed,
- (e) any other information which the Scottish Ministers may require.

(3) An application made under subsection (1) may also include any other information which the applicant wishes the Scottish Ministers to consider when determining the application.

Commencement Information
I5 S. 5 in force at 15.10.2019 by S.S.I. 2019/205, **reg. 2**

6 Application for disregard: further information

(1) The Scottish Ministers may request any person to make representations, or to provide further information, in relation to an application made under section 5(1).

(2) A person so requested is authorised to make such representations or, as the case may be, to provide such information for the purposes of assisting the Scottish Ministers to determine the application.

Commencement Information
I6 S. 6 in force at 15.10.2019 by S.S.I. 2019/205, **reg. 2**

7 Determination of application for disregard

(1) When determining an application made under section 5(1), the Scottish Ministers must in particular—

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(a) consider all representations and other information included in the application,
(b) consider all representations made or other information provided in pursuance of section 6 in relation to the application, and
(c) except where it appears to them that the offence to which the application relates is not a historical sexual offence, take reasonable steps to obtain (and, where available, consider) any record of—
(i) the investigation of the conduct which led to the conviction, and
(ii) any subsequent proceedings relating to the conduct.

(2) Having done so, the Scottish Ministers must—
(a) unless subsection (3) applies, determine that the conviction in respect of which the application is made is to be disregarded, or
(b) where subsection (3) applies, determine that the conviction is not to be disregarded.

(3) This subsection applies if it appears to the Scottish Ministers—
(a) that the offence for which the applicant was convicted is not a historical sexual offence, or
(b) that the conduct constituting the historical sexual offence, if occurring in the same circumstances, would have been an offence on the day on which section 3 came into force.

(4) The Scottish Ministers must—
(a) record their determination, and the reasons for it, in writing,
(b) provide notice of their determination, and the reasons for it, to the applicant, and
(c) where they have determined that a conviction for a historical sexual offence is to be disregarded, inform the applicant that references to the conviction will be removed in pursuance of section 10.

(5) Where the Scottish Ministers determine that a conviction for a historical sexual offence is to be disregarded, the disregard takes effect from the day falling 14 days after notice of their determination is given.

Commencement Information
I7 S. 7 in force at 15.10.2019 by S.S.I. 2019/205, **reg. 2**

8 Appeals

(1) This section applies where the Scottish Ministers have determined that a conviction in respect of which an application is made under section 5(1) is not to be disregarded.

(2) The applicant may, with the permission of the sheriff, appeal against the determination.

(3) When deciding an appeal, the sheriff may not take account of any representations which were, or other information which was, not available to the Scottish Ministers when determining the application.

(4) On an appeal, the sheriff must—
(a) unless subsection (5) applies, order that the conviction in respect of which the appeal is made is to be disregarded, or

(b) where subsection (5) applies, dismiss the appeal.

(5) This subsection applies if it appears to the sheriff—

(a) that the offence for which the appellant was convicted is not a historical sexual offence, or

(b) that the conduct constituting the historical sexual offence, if occurring in the same circumstances, would have been an offence on the day on which section 3 came into force.

(6) The sheriff's decision on an appeal is final.

(7) Where the sheriff orders that a conviction for a historical sexual offence is to be disregarded, the disregard takes effect from the day falling 14 days after the sheriff's order is made.

(8) An appeal under this section is to be made—

(a) to a sheriff of the sheriffdom in which the appellant resides, or

(b) where no sheriff has jurisdiction under paragraph (a), to a sheriff of the sheriffdom of Lothian and Borders at Edinburgh.

Commencement Information

I8 S. 8 in force at 15.10.2019 by S.S.I. 2019/205, **reg. 2**

9 Effect of disregard

(1) This section applies where a disregard for a conviction for a historical sexual offence has taken effect (see sections 7(5) and 8(7)).

(2) The person who was convicted of the offence is to be treated for all purposes as not having—

(a) committed the offence,

(b) been charged with, or prosecuted for, the offence,

(c) been convicted of the offence, or

(d) been sentenced for the offence.

(3) In particular—

(a) no evidence is admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Scotland to prove that the person has done, or undergone, anything within subsection (2), and

(b) the person is not, in any such proceedings, to be asked (and, if asked, is not to be required to answer) any question relating to the person's past which cannot be answered without acknowledging or referring to the conviction or any circumstances ancillary to it.

(4) Where a question is put to a person, other than in such proceedings, seeking information with respect to the previous convictions, offences, conduct or circumstances of any person—

(a) the question is to be treated as not relating to any disregarded conviction, or any circumstances ancillary to it (and the answer to the question may be framed accordingly), and

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(b) the person questioned is not to be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose that conviction or any circumstance ancillary to it in answering the question.

(5) Any obligation imposed on any person by any enactment or rule of law, or by the provisions of any agreement or arrangement, to disclose any matters to any other person is not to extend to requiring the disclosure of a disregarded conviction or any circumstances ancillary to it.

(6) In this section, "proceedings before a judicial authority" includes, in addition to any court proceedings, proceedings before any tribunal, body or person having power by virtue of any enactment, rule of law, arbitration agreement, rules, custom or practice—

(a) to determine any question affecting the rights, privileges, obligations or liabilities of any person, or

(b) to receive evidence affecting the determination of any such question.

(7) For the purposes of this section, circumstances ancillary to a conviction are any circumstances of—

(a) the offence which was the subject of the conviction,

(b) the conduct constituting the offence,

(c) any process or proceedings preliminary to the conviction,

(d) any sentence imposed in respect of the conviction,

(e) any proceedings (whether by way of appeal or otherwise) for reviewing the conviction or sentence,

(f) anything done in pursuance of, or undergone in compliance with, any such sentence.

Commencement Information

I9 S. 9 in force at 15.10.2019 by S.S.I. 2019/205, **reg. 2**

10 Removal of disregarded convictions from official records

(1) Where a disregard for a conviction for a historical sexual offence has taken effect (see sections 7(5) and 8(7)), the Scottish Ministers must—

(a) where they are the relevant record keeper in relation to any official records held by them, remove all references to the disregarded conviction contained in those official records (and, where the disregard has effect by virtue of section 8(7), give notice of the removal to the person who has the disregarded conviction), and

(b) require every other relevant record keeper to remove all references to the disregarded conviction contained in official records held by the keeper.

(2) A relevant record keeper issued with a requirement under subsection (1)(b) must—

(a) comply with the requirement as soon as reasonably practicable (but no earlier than the day on which the disregard takes effect), and

(b) give notice of the removal to the person who has the disregarded conviction.

(3) The Scottish Ministers may, by regulations, prescribe the manner in which references to disregarded convictions are to be removed from official records in pursuance of this section.

(4) Regulations may, in particular, provide that removal from records means recording with the details of the conviction—

(a) the fact that it is a disregarded conviction, and

(b) the effect of it being a disregarded conviction.

(5) A "relevant record keeper" means such person as may be prescribed in regulations made by the Scottish Ministers (and may, in particular, include the Scottish Ministers acting in their capacity as the holder of official records of a type so prescribed).

Commencement Information

I10 S. 10 in force at 15.10.2019 by S.S.I. 2019/205, **reg. 2**

11 Advisers

(1) The Scottish Ministers may appoint persons to advise or assist them on the determination of applications made under section 5(1).

(2) The Scottish Ministers may provide to an appointed person, or authorise that person to access, such information contained in or relating to such applications as they consider relevant.

(3) The Scottish Ministers may pay an appointed person such allowances and expenses as they consider appropriate.

Commencement Information

I11 S. 11 in force at 15.10.2019 by S.S.I. 2019/205, **reg. 2**

PART 4

GENERAL

12 Saving for Royal Pardons

Nothing in this Act affects the Royal prerogative of mercy.

Commencement Information

I12 S. 12 in force at 15.10.2019 by S.S.I. 2019/205, **reg. 2**

13 Application of Act to conduct dealt with otherwise than by prosecution

(1) This Act applies in relation to any conduct constituting a historical sexual offence in respect of which an alternative to prosecution has been given as it applies to conduct in respect of which a person is convicted.

(2) Accordingly—

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(a) references in this Act to "conviction" and "convicted" are to be read as including references to, or to being given, an alternative to prosecution,

(b) references to a sentence imposed include a reference to the giving of an alternative to prosecution.

(3) For the purposes of this Act, an alternative to prosecution has been given in respect of conduct constituting an offence if a person—

(a) has been given a warning in respect of the conduct by a constable or a procurator fiscal,

(b) has accepted, or is deemed to have accepted, a conditional offer issued in respect of the conduct under section 302 of the Criminal Procedure (Scotland) Act 1995, or

(c) has accepted an offer made by a procurator fiscal in respect of the conduct to undertake an activity or treatment or to receive services or do any other thing as an alternative to prosecution.

(4) For the purposes of this Act—

(a) any ground for referral of a child's case under section 32(2)(g) of the Social Work (Scotland) Act 1968 or section 52(2)(i) of the Children (Scotland) Act 1995 that has been accepted or established (or deemed established) is to be treated as a conviction, and

(b) any disposal of such a case by a children's hearing is to be treated as a sentence.

Commencement Information

I13 S. 13 in force at 15.10.2019 by S.S.I. 2019/205, **reg. 2**

14 Regulations

(1) Any power of the Scottish Ministers to make regulations under this Act includes power to make—

(a) incidental, supplementary, consequential, transitional, transitory or saving provision,

(b) different provision for different purposes.

(2) Subject to subsection (3), regulations under section 15(1) are subject to the negative procedure.

(3) Regulations under the following provisions are subject to the affirmative procedure—

(a) section 10(3) or (5),

(b) section 15(1), if the regulations add to, replace or omit any part of the text of an Act.

(4) This section does not apply to regulations under section 17.

Commencement Information

I14 S. 14 in force at 15.10.2019 by S.S.I. 2019/205, **reg. 2**

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15 Ancillary provision

(1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purposes of, in connection with or for giving full effect to this Act.

(2) Regulations under subsection (1) may—
- (a) modify any enactment (including this Act),
- (b) make different provision for different purposes.

16 Interpretation

In this Act—

"alternative to prosecution" is to be construed in accordance with section 13(3),

"conviction", in addition to being construed in accordance with section 13(2) and (4), includes any finding in criminal proceedings that a person has committed an offence or done the act or made the omission charged (including a finding linked with mental disorder or in respect of which an admonition or absolute discharge is made),

"disregarded conviction" is a conviction for a historical sexual offence in respect of which a disregard has taken effect by virtue of Part 3 (see sections 7(5) and 8(7)),

"historical sexual offence" has the meaning given by section 2,

"official records" means records containing information about persons convicted of offences kept by any relevant record keeper for the purposes of its functions (but does not include any records in the care of the Keeper of the Records of Scotland),

"person", for the purposes of section 3 only, includes a deceased person,

"proceedings before a judicial authority" has the meaning given by section 9(6),

"relevant record keeper" means a person prescribed in regulations made under section 10(5).

17 Commencement

(1) This section and sections 15, 16 and 18 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

(3) Regulations under subsection (2) may—
- (a) include transitional, transitory or saving provision,
- (b) make different provision for different purposes.

18 Short title

The short title of this Act is the Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018.

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Changes to legislation:
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