Notes

From: Paul Johnson <paul.johnson@york.ac.uk>

Sent: 25 November 2016 14:08

To: Jeffrey Dudgeon

Subject: Northern Ireland pardons and disregard scheme

Dear Jeff,

I understand the issue we discussed, one that has been raised in particular by Jim Allister MLA, regarding how those convicted of or cautioned for “heterosexual offences” (if I can use that term) may be excluded from the proposed legislation (contained in Lord Lexden’s amendments) relating to pardons and the disregard scheme. The principal issue is whether those convicted of or cautioned for opposite-sex acts with a 16 year old female, before the “age of consent” was lowered from 17 to 16 years in Northern Ireland by the 2008 Order, should be included in the pardons and disregard scheme.

In one sense, of course, opposite-sex acts are included within the pardon and disregard scheme as proposed for Northern Ireland because this will cover the offence of buggery. The offence of buggery always applied to opposite-sex as well as same-sex sexual acts until its repeal in Northern Ireland in 2008. The other principal offence covered by the pardon and disregard scheme – gross indecency – did apply only to same-sex sexual acts committed between men.

However, should the pardon and disregard scheme go ahead, as proposed, then those convicted of or cautioned for the now abolished offences of buggery and gross indecency involving a person over 16 but under 17 would - when the conduct in question fulfilled the specified criteria (that it involved two or more consenting persons over the age of 16 and did not take place in a public lavatory) - be eligible to be pardoned and, if living, have a conviction or caution disregarded, whereas those convicted for other offences involving a person over 16 but under 17 would not.

I am not an expert in Northern Ireland criminal law, but it appears to me that the principal cause of concern is that men convicted of or cautioned for the offence of “unlawful carnal knowledge” involving a female over 16 but under 17 would not be eligible within the terms of the proposed pardon and disregard scheme. I think that would include any man convicted or cautioned for such conduct between 1950 (when the age of consent was raised in Northern Ireland from 16 to 17 years) and 2008 (when the age of consent was lowered from 17 to 16). I have indicated the legislative provisions on the chart I produced.

I can certainly see the dilemma: the proposed legislation would pardon/disregard those convicted or cautioned for one set of sexual acts that are now lawful, but leave intact another set of convictions and cautions for sexual acts that are now also lawful.

How could this dilemma be addressed? You mentioned the notion of limiting the disregards/pardons to those over the age of 17 on the grounds that, once the age of consent was lowered for buggery and gross indecency to 17, discrimination ended between same-sex and opposite-sex acts.

To be frank, I think setting the age at 17 is a really bad idea for the following reasons:

In essence, that means that anyone convicted of or cautioned for an offence of buggery or gross indecency involving a partner who was 16 will not be eligible for a disregard and/or a pardon. In respect of posthumous pardons this makes no sense because it imposes an “age of consent” that was only in operation for 58 years in the time frame covered (1634-2008).

It goes against the policy principle that those who were convicted of, or cautioned for, offences involving conduct that would now be lawful (with a 16 year old) should be given a form of redress. And, crucially, any 16 year old person that was convicted of or cautioned for conduct that would now be lawful will not be eligible for a disregard and/or pardon.

The point that setting the age at 17 makes sense in respect of discrimination (and Section 75) is, I think, also problematic. The legal situation is more involved than simple discrimination against gay and bisexual men. For instance, heterosexual buggery was completely illegal for 21 years (between 1982 and 2003) when homosexual buggery was (progressively in age terms) decriminalised and, as such, the pardons and disregards that could be granted do not merely address discrimination against gay men but also discrimination against heterosexuals. The fact is, buggery law had nothing to do with “sexual orientation discrimination” – although the effects of its enforcement were discriminatory – and disregards/pardons will apply equally to opposite-sex and same-sex acts.

In my view, setting the age at 17 is wrong because you have to start from where you are, in the present time. Northern Ireland has an age of consent of 16 and wants to address the fact that, historically, people were wrongly treated by laws that criminalised consensual sexual acts. It should, therefore, in my view, disregard and/or pardon those convicted of or cautioned for offences involving consenting persons over the current age of consent (16).

I understand that, as my chart indicated, this involves looking at the “unlawful carnal knowledge” issue. That issue certainly raises some complexities, but it should not, in my view, inhibit giving people who were convicted of or cautioned for conduct that would now be lawful access to justice. Setting the age at 17 would do just that, and would probably necessitate “complaints” and calls for further legislation down the line to address it.

To my mind, the best way forward would be to leave the proposed (Lexden) legislation as it stands, on the basis that its principal aim is to “right historic wrongs” created by the criminalisation of consensual sexual activity that would now be lawful. Then, in the future, the Assembly, should it be minded, can go forward to address the “unlawful carnal knowledge” issue separately through other legislative channels. That would seem appropriate to me, because it would give time to think through all of the issues relating to “unlawful carnal knowledge” that need to be addressed.

So, in short, if I was a legislator (which I am obviously not) I would:

Take the opportunity to deal with historic offences of buggery and gross indecency via the Policing and Crime Bill and, in doing so, bring Northern Ireland into line with England and Wales, and then

In the future examine the Northern Ireland-specific issue of how to address convictions or cautions for sexual activity with a female aged 16 years during the period when the age of consent was 17 years.

Hope this helps.

Best,

Paul.

Setting the age at 17 is a really bad idea.

In essence, it means that anyone convicted of or cautioned for an offence of buggery or gross indecency involving a partner who was 16 will not be eligible for a disregard and/or a pardon.

In respect of posthumous pardons this makes absolutely no sense because it imposes an “age of consent” that was only in operation for 58 years between the time frame covered (1634-2008).

It betrays the principle that those who were convicted of or cautioned for offences involving conduct that would now be lawful with a 16 year old will not be eligible. And, crucially, since the 16 year old partner could have been convicted of or cautioned for conduct that would now be lawful, they too will not be eligible for a disregard and/or pardon.

It is illogical in that Northern Ireland in 2008 determined that the correct age of consent is 16 and that it is wrong to impose a higher age of consent for these acts.

The point about discrimination/decriminalisation is overly simplistic. The legal situation is much more complex.

For instance, heterosexual buggery was completely illegal for 21 years (between 1982 and 2003) when homosexual buggery was progressively decriminalised and, as such, the pardons and disregards that could be granted do not merely address discrimination against gay men.

Also, I am not sure that one can easily conclude that “there was no discrimination/social injustice against men who had consensual sex with 16 year old girls, the law was not discriminatory” because, of course, discrimination could be claimed if the comparator chosen was heterosexual sex with a 16 year old in Great Britain – and that seems a reasonable comparator to me.

This just all seems muddled! NI has an age of consent of 16 and wants to address the fact that, historically, people were wrongly treated by laws that criminalised consensual sexual acts. It should, therefore, in my view, disregard and/or pardon those convicted of or cautioned for offences involving consenting persons over the age of consent (16). The fact that it might be difficult to look at the “unlawful carnal knowledge” issue (or a desire to avoid looking at it) should not be a basis for setting the condition for disregards/pardons at 17.

P

From: Jeffrey Dudgeon <jeffreydudgeon@hotmail.com>

Date: Friday, 25 November 2016 at 12:03

To: Paul <paul.johnson@york.ac.uk>

Subject: Fwd: Chart attached

I haven't sent her your longer piece yet or any argumentation of my own.

It will be hard to shift her now.

I suspect from calls there may be some who were convicted in that category hoping for disregards.

-------- Original message --------

From: "Patterson, Amanda" <Amanda.Patterson@justice-ni.x.gsi.gov.uk>

Date: 11/25/2016 11:33 am (GMT+00:00)

To: 'Jeffrey Dudgeon' <jeffreydudgeon@hotmail.com>

Subject: RE: Chart attached

Jeff

Thank you. This just reinforces the options we discussed – either to confine disregards/pardons to those convicted of consensual same sex activity with a person aged 17 or over (which is our preference and reflects the policy basis in E&W) or widen consideration to a scheme of disregards/pardons not on the basis of discrimination/social injustice, but just because an offence has been decriminalised. There was no discrimination/social injustice against men who had consensual sex with 16 year old girls, the law was not discriminatory, there was no compelling reason to break the law and therefore no grounds for granting pardons.

It is, of course, always something that the NI Assembly may wish to return to in their own right, but for now I think the Minister will have to follow the logical argument of asking approval for provisions to apply to the point where the age of consent equalised and discrimination ended.

However, we’ll hold fire until I see your next email?

Thanks.

Amanda

From: Jeffrey Dudgeon [mailto:jeffreydudgeon@hotmail.com]

Sent: 25 November 2016 09:20

To: Patterson, Amanda

Subject: Chart attached

Amanda

I am attaching a chart from Paul Johnson which clarifies the dates and types of abolished offences.

I am told the MLAs from my party are reassured about the Lexden amendments.

More text to come.

Jeff

<http://www.belfasttelegraph.co.uk/opinion/columnists/fionola-meredith/gay-pardons-a-welcome-sign-that-northern-ireland-doesnt-always-have-to-say-no-to-social-change-35205223.html>

LCM: That this Assembly endorses the principle of the extension to Northern Ireland of a number of provisions within the Policing and Crime Bill, by amendment at Lords Committee and Lords

Report Stage, insofar as they relate to UK maritime enforcement powers; UK cross jurisdictional arrest powers; anonymity for victims of forced marriage and pardons for convictions of certain abolished offences.

Here is the Hansard from Justice Committee consideration of NI amendments:

<http://data.niassembly.gov.uk/HansardXml/committee-19666.pdf>

Annex

<http://www.niassembly.gov.uk/globalassets/documents/justice/lcm-policing-and-crime-bill-papers/lcm-police-and-crime-bill-7.11.16.pdf>

Justice Committee 1st discussion of LCM video

<https://niassembly.tv/video/committee-justice-meeting-10-november-2016/>

**From:** Executive News Service <[EIS.Newsservice@executiveoffice-ni.gsi.gov.uk](mailto:EIS.Newsservice@executiveoffice-ni.gsi.gov.uk)>  
**Date:** 8 November 2016 at 15:45:13 GMT  
**To:** <[EIS.Newsservice@executiveoffice-ni.gsi.gov.uk](mailto:EIS.Newsservice@executiveoffice-ni.gsi.gov.uk)>  
**Subject:** **DOJ News Release - SUGDEN - PROPOSALS TO PARDON CONVICTIONS FOR ABOLISHED HOMOSEXUAL OFFENCES**

DEPARTMENT OF JUSTICE   
  
08 November 2016   
  
**Sugden - Proposals to pardon convictions for abolished homosexual offences**

Justice Minister Claire Sugden has secured Executive agreement to ask the Assembly to pass a Legislative Consent Motion (LCM) to include provisions in the Policing and Crime Bill for pardons for convictions relating to abolished homosexual offences.

Minister Claire Sugden said: **“Pardon arrangements should be brought to Northern Ireland as soon as possible to ensure that there is equal treatment for gay and bisexual men here as for their counterparts in England and Wales.**

**“This is an opportunity for the criminal justice system to try and right the wrongs of the past and one which will allow for much earlier resolve than that presented by way of an Assembly Bill.”**

The motion for legislative consent will now go forward for consideration by the Assembly. If passed, it is intended that the Policing and Crime Bill will provide the same pardon arrangements for Northern Ireland as for England and Wales. The provisions will allow for pardons, both posthumously and for live cases, in respect of convictions for abolished homosexual offences involving consensual activity with persons over the age of consent.

**Notes to editors:**

1. Section 92 of the Protection of Freedoms Act 2012 provides a power in England and Wales to disregard convictions and cautions for abolished homosexual offences, ie where the activity was consensual and the other party was over the age of 16. In effect, a successful application would result in such details being disregarded from relevant official records.  Amendments tabled to the Bill and supported by the UK Government will mean that anyone who has their conviction or caution disregarded through these provisions will also be pardoned for the offence. In addition the amendment will offer posthumous pardons for those with convictions or cautions for the same offences.

2. All media enquiries should be directed to the Department of Justice Press Office 028 9052 6444. Out of office hours please contact the duty press officer via pager number 07623 974383 and your call will be returned.

**The issue of those heterosexuals convicted of offences involving 16-17 year olds when the age of consent in NI was higher than GB**

The disregard scheme and the pardons that Lord Lexden’s amendments will introduce to NI are not limited to anyone according to sexual orientation. The offence of buggery was applicable to men and women. Buggery remained completely criminal for heterosexuals until 2003.

To talk of “equality” and compare pardons for “homosexual offences” involving those over 16 but under 17 who were convicted or cautioned for a “heterosexual” offence makes a classic mistake in discrimination law. The mistake is in the choice of comparator. The correct comparator for this group who were convicted or cautioned for a “heterosexual” offence is not “homosexuals” but, rather, heterosexuals in other parts of the UK.

The question is: was maintaining an age of consent of 17 for heterosexual acts discriminatory when the age of consent for the same acts was 16 in Great Britain. The answer might be “yes”, but it has nothing to do, on the whole, with the treatment of those engaged in homosexual acts.

The comparison of those convicted of “homosexual offences” with those convicted of “heterosexual offences” involving a person over 16 but under 17 is the wrong comparison. The only time that comparison would be valid would be between 2000 and 2003 when the age of consent was the same for *some* homosexual and heterosexual acts,

I say “on the whole” because the only time that heterosexual and homosexual acts could be compared, for the purpose of determining any discrimination, would be from 2000 to 2003 (the time in which the age of consent was lowered to 17 for homosexual acts, until the time that “gross indecency” was repealed). If, in that time scale, a person was convicted for a “homosexual offence” who was over 16 but under 17 and subsequently obtained a disregard or pardon, when a heterosexual in the same position could not, then I would regard this as discriminatory.

But when we take the issue in the whole – which relates to a time frame stretching back to 1634 – this is hardly a major issue. It leads me to think of our now favourite phrase: let perfection not prevent good. Don’t let the perfect drive out the good.

One could put the whole thing another way: because buggery was partially decriminalised between men in 1982, but not between men and women until 2003, heterosexuals have more scope for pardons and disregards.

Lord Lexden NI amendments to Policing and Crime Bill (from 3rd list):

<http://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0055/17055-III.pdf>

There are other aspects relating to NI and (other later amendments) in the Policing and Crime Bill so it partially extends to NI (s. 149 in the original draft): http://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0055/17055.pdf

Alistair Lexden amendments are supported by Lord Cashman and Baroness Blood and written by Strasbourg expert, Professor Paul Johnson of York University <https://www.amazon.co.uk/Going-Strasbourg-Orientation-Discrimination-Convention/dp/0198777612>

NI research paper of 2009 on Legislative Consent Motions (LCMs) formerly Sewel Motions gives some background to LCMs (Sewel motion) but not much when a Government bill in the Lords is amended by a private member:

<http://archive.niassembly.gov.uk/io/research/2009/2309.pdf>

Devolution guidance note 10 refers to Scotland but would have some application to NI:

<http://www.gov.scot/Resource/Doc/37349/0066833.pdf>

<http://www.belfasttelegraph.co.uk/news/northern-ireland/stormont-failure-over-gay-pardons-a-disgrace-35168076.html> - Belfast Telegraph story on DOJ Friday 28 October 2016

It looks like the Home Office should tell the DOJ of the amendments and ask if they will try for an LCM in the Assembly or just look for a mood of assent or a lack of dissent as all major parties are supportive.

[No gay law reform has ever gone through the Assembly.]

It may however well be the case that officials don’t like the NI separate body of law being tampered with.

If DOJ or the Assembly decline and the amendments had been passed would the government have to remove them or try to?

The Justice Minister told me she was advised it would require legislation in the NI Assembly.

I told her she may be being wrongly advised. She went cold.

An LCM would not work.

Old Lexden amendment list:

[http://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0055/17055-II(a).pdf](http://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0055/17055-II%28a%29.pdf)

Ulster Unionist Party Councillor for Balmoral, Jeffrey Dudgeon, has welcomed a funding decision to ringfence £250,000 for the first phase of a new community sports hub at Belvoir in South Belfast.

The funding from Belfast City Council’s Belfast Investment Fund was earmarked for the Castlereagh area which transferred into Belfast in 2015. It will be provided to a local partnership which involves the Belfast Battalion of the Boys Brigade, Linfield Football Club and Belvoir Football Club and bring about the much-needed modernisation of existing facilities and pitches. Councillor Dudgeon who was yesterday elected Chair of the Council’s South Belfast Area Working Group stated:

“This is a very positive development for the Belvoir area of South Belfast and enables an exciting project to get underway. The funding from Council will initiate Phase 1 of the project to provide a new grass pitch for Belvoir FC and also allow work to commence on the wider development of the 22 acre site as a community sports hub for the Boys Brigade and Linfield FC.”

“I have been delighted to work with this partnership as the project gets off the ground and I look forward to seeing the plans develop in the months and years ahead.”

Roy McGivern, Director of Linfield Football Club also welcomed the funding announcement. He stated:

“We are delighted to get the first tranche of funding for this project which will provide a state of the art training base for the growing Linfield Academy and also put in place modern facilities for the local community in South Belfast. It is a very positive development for Linfield Football Club also for our partners in the Boys Brigade and Belvoir FC.”

**Notes**

1.       The development of this 22 acre site in South Belfast is a £4.5 m. project to modernise and transform the current Boys Brigade sports facility in Belvoir. Phase 1 of the project, costing a total of £1.5m will provide a new grass pitch for Belvoir FC, a full size 3G pitch for Linfield, the BB and the local community and a floodlit grass pitch with the same dimensions as Windsor Park.

2.       Other proposed developments in the full scheme include further 3G training pitches and an indoor dome to facilitate all year training for the organisations involved and the wider community.

Press Release



**UUP Press Statement**

Tuesday 1 NOVEMBER 2016

**Dudgeon welcomes funding for Belvoir community sports hub**

The Ulster Unionist Party’s Councillor for Balmoral, Jeffrey Dudgeon, has welcomed a funding decision to ring-fence £250,000 for the first phase of a new community sports hub at Belvoir in South Belfast.

The funding from Belfast City Council’s Belfast Investment Fund was earmarked for the Castlereagh area which transferred into Belfast in 2015. It will be provided to a local partnership which involves the Belfast Battalion of the Boys Brigade, Linfield Football Club and Belvoir Football Club and bring about the much-needed modernisation of existing facilities and pitches.

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2. Other proposed developments in the full scheme include further 3G training pitches and an indoor dome to facilitate all year training for the organisations involved and the wider community.

ENDS

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