

Schrödinger's pardon: the difficulties of the Turing Bill

democraticaudit.com /2016/10/24/schrodingers-pardon-the-difficulties-of-the-turing-bill/

By Democratic Audit UK

2016-10-24

When the 'Turing Bill' – which would have granted pardons to people with historical convictions for consensual gay sex – was talked out by the government last week, there was confusion and misunderstanding about the ramifications. The practical problem is that the old law did not distinguish between non-consensual and consensual gay sex. **James Chalmers** explains the difference between disregarding a conviction and pardoning it, and how the 'Sharkey amendment' accepted by the government will differ from John Nicholson MP's 'Turing Bill'. He suggests another way of tackling the problem – but one which is unlikely to gain backing.



Peter Tatchell and Green Party candidate Peter Cranie with a statue of Alan Turing in Manchester, 2009. Photo: [Pete Birkinshaw](#) via a [CC-BY 2.0 licence](#)

The last few days have seen some confusion over the law relating to historic convictions for consensual gay sex. First, [the government announced that it would accept an amendment](#) (proposed by the Lib Dem peer Lord Sharkey, and referred to as the “[Sharkey amendment](#)”), granting pardons to people convicted of such offences. Then a [Private Member's Bill from the SNP MP John Nicolson](#), also providing for such pardons, was “[talked out](#)” by the government and will progress no further. This has led to considerable controversy, with a great deal of misunderstanding as to the law on both sides of the debate. What follows is an attempt to try and answer various questions about the current law, the Sharkey amendment, and the Nicolson Bill.

For these purposes, I have ignored all questions relating to *posthumous* pardons, and instead discussed only how the law affects persons who are still alive.

What is the current legal position? Anyone convicted of an offence under one of eleven different statutory provisions [can apply to the Home Secretary to have their conviction “disregarded”](#). The Home Secretary can disregard a conviction if it appears to her that the conduct which resulted in the conviction was (a) consensual, (b) between persons aged 16 or over and (c) would not be an offence under s 71 of the Sexual Offences Act 2003 (sexual activity in a public lavatory).

Why do people have to apply for a “disregard”? Why can't it be automatic? The practical problem here is that there never was an offence of “consensual adult homosexual activity”. If there was, we could simply remove all these convictions from the records. But the old law simply did not distinguish between consensual and non-

consensual sex, or have a concept of “underage sex” – before 1967, gay sex was criminal regardless of consent and regardless of age.

This means that if someone has a conviction for – for example – “gross indecency”, you cannot tell from the fact of the conviction whether they were convicted for doing something which would still be an offence today or not. They might have been convicted for doing something which would now be prosecuted as sexual assault or a child sex offence.

Couldn't we just disregard these convictions anyway? They must all be old and irrelevant

convictions. Possibly. You might argue that the laws under which these convictions occurred were illegitimate, because they didn't take account of consent or age, that the state has put itself in a position where it cannot guarantee that its criminal records are fair or just, and that therefore it should simply delete those records it cannot guarantee to be fair or just rather than asking the convicted person to demonstrate the opposite. But I don't think anyone actually has made that argument. Even if you find it theoretically attractive, Parliament is not going to agree to wipe criminal records which might include cases of sexually abusive behaviour which would still be criminal today. And the disregard process covers some relatively recent convictions, as the age of consent was not equalised in England and Wales until 2001.

But none of this has any practical effect, surely? Convictions become “spent”, and people don't have to declare them after a certain amount of time. That's true for most purposes, but not always. Even very old criminal records may be relevant to people applying to work in certain professions, with vulnerable groups, or who get caught up again in the criminal justice system in some way. For example, here's a [2012 BBC report](#) of a man who applied to do voluntary work with prisoners and discovered that his 1959 conviction was still on record. So the current disregard process has real practical benefits for people.

But why do we have to ask people to apply? Couldn't we tell from criminal records whether or not the conduct alleged would still be a crime today? If we could, this would be a whole lot simpler. But we can't rely on criminal records to have accurately recorded facts which were, in law, irrelevant to whether or not someone was guilty of an offence – if we have records of any facts at all beyond the conviction itself. This works both ways – if, for example, there is some sort of record suggesting that the conduct concerned was non-consensual, the person with the conviction should be able to argue that the record is wrong.

“Disregard” sounds pretty rubbish. Wouldn't a pardon be better? A pardon *sounds* better: the concept is well-known although probably not well-understood. A pardon means your conviction stands, but that the penalty attached to the offence is removed – and for historic offences where any sentence will have been served, that isn't worth much. A “disregard” means the conviction is treated as if it never existed. In practical terms, that is far more important.

What will the Sharkey amendment do? Under the Sharkey amendment, anyone who has their conviction disregarded is automatically pardoned.

But a conviction that has been disregarded doesn't exist any more. How can you pardon a conviction that legally doesn't exist? You can't, at least not in a way that has any sort of practical effect. So the Sharkey amendment is merely a gesture. Gestures matter, though.

How is the Nicolson Bill different from the Sharkey amendment? Mainly this: it would have made a pardon automatic for some (not all) of the offences covered by the disregard scheme, provided that criteria similar to the disregard ones were met (the act was consensual and between people over 16, and would not be an offence today).

What's wrong with that? Nothing harmful, as far as I can tell. But because the Bill doesn't provide any mechanism for deciding whether the criteria are met, it means there would be no way of telling whether someone had actually been pardoned or not. (Again, though: gestures matter.) The person *might* have been pardoned or they might not.

Most of the time, you could find out by applying to the Home Secretary for a disregard: if she granted it, you could treat this as an official statement that the criteria were met. But this defeats the purpose of the Bill, which was to pardon people automatically without them having to apply to the Home Secretary. We might, in an imperfect metaphor, say that the Bill creates a Schrödinger's Pardon.

Were the government objections to the Nicolson Bill valid? The government seemed to think that the Bill was positively dangerous. "What", [Sam Gymiah said](#), "is important is the safeguard that prevents someone who has had sex with a minor from receiving a blanket pardon and then, for example, going to work in a school". But remember: a pardon doesn't affect the conviction (a point repeated in clause 2(6) of the Nicolson Bill). Only a disregard would remove the conviction from the records. So it's difficult to see how this argument works. (Maybe Mr Gymiah was trying to argue that the effect of a pardon is so unclear – pardons are almost never used in practice – that it would somehow affect the criminal record even though the conviction was left unchanged. But if he was trying to do that, he made a very bad job of it. And if it was really thought necessary to avoid any doubt, the Bill could have been amended to make it absolutely explicit that criminal records would only be altered by the disregard process.)

So what practical effect would the Nicolson Bill have? None, I think. But again, gestures matter.

Gosh, this is very complicated, isn't it? It's not *that* complicated, but it hasn't been accurately reported. Many reports have wrongly suggested that the Nicolson Bill would have the effect of quashing convictions. For example, the [BBC reported that](#) "[a] bill that would have wiped clean the criminal records of thousands of gay men has fallen at its first parliamentary hurdle". This is not true: the Nicolson Bill was not designed to wipe convictions. [The Guardian](#) said that the Sharkey amendment "only pardons the thousands of men who are already dead, while the living will have to apply to the Home Office to get their convictions overturned". But the Nicolson Bill would not have changed that, because a pardon doesn't overturn a conviction. The result is that many people have been left with the impression that the Nicolson Bill would have had practical effects it was never designed to have, and that the government has therefore done a great injustice by blocking it.

Does this mean the disregard process is as good as it gets? Couldn't we do something better? Here's one suggestion. When it comes to sexual offences, the law on the books is much broader than the law in action. For example, we very rarely prosecute a 16 year old who has sex with a 15 year old, unless there is evidence of violence or exploitation. People caught engaging in sexual acts in public might, depending on the circumstances, be told by the police to move on rather than being arrested, much less charged. There will be people with criminal convictions for homosexual sex in circumstances which would not be prosecuted today, but who are ineligible for a disregard because the conduct they engaged in still contravenes the law on the books. Neither the Sharkey amendment nor the Nicolson Bill would change this. Perhaps people in that situation could be given a right to apply for their case to be reviewed by a prosecutor, and to have their conviction disregarded if the prosecutor concludes that it was not in the public interest to prosecute them (the test which must always be satisfied before any prosecution can go ahead). This would make a practical difference to people's lives. It would be a brave and perhaps controversial step. It will not happen.

Is there something less brave we could do? Well, the disregard scheme only applies to England and Wales, and the Nicolson Bill would have been similarly limited. Perhaps Holyrood could act?

This post represents the views of the author and not those of Democratic Audit. It was first published at the [University of Glasgow School of Law blog](#).

James Chalmers is Regius Professor of Law at the University of Glasgow.

