

## **PE1855/A**

Scottish Government submission of 17 March 2021

I have provided information in the following areas which I hope is helpful to Parliament's consideration of the petition.

### Consideration of free pardon in individual cases

It might be helpful if I first outline some of the factors which have a bearing on the granting of a posthumous Free Pardon. The First Minister is generally responsible in Scotland for recommending to Her Majesty the Queen the exercise of the Royal Prerogative of Mercy to grant a Free Pardon. The criteria currently adopted by the First Minister have proper regard to the constitutional position that the courts and not the Scottish Government decide whether a person is guilty of a crime. Thus the First Minister would generally only recommend the granting of a Free Pardon in respect of offences where it is impracticable to refer the case to the courts, and where new evidence had come to light which demonstrated conclusively that no offence was committed or that the individual concerned did not commit the offence.

The effect of a Free Pardon is that the conviction is disregarded to the extent that, as far as possible, the person is relieved of all penalties and other consequences of the conviction. Only the courts have the power to quash a conviction.

Additionally, from 1 April 1999 the Scottish Criminal Cases Review Commission (SCCRC) became responsible for the review and referral to the High Court of alleged miscarriages of justice – taking over this function from the Secretary of State for Scotland. The SCCRC has the power to consider a case even after the death of the person or persons convicted. While this process has largely superseded the Royal Prerogative of Mercy (RPM), the RPM remains in place. However, the First Minister will not generally consider recommending a free pardon until an appeal has been dismissed, or leave to appeal has been refused, and any application to the SCCRC seeking to have the case referred to the Appeal Court has been rejected.

I am sure that the Committee will appreciate that, against this background, the First Minister's powers to intervene in such matters are used sparingly. As the Committee is aware, the Witchcraft Act 1563 no longer applies in Scotland and thankfully has not done so for many years.

In line with established precedent for how cases under the RPM are considered, should Ms Mitchell wish to submit representations in relation to a specific case or set of cases, these would be considered carefully. In the context of the precedent for sparingly use of the posthumous Free Pardon, it would be for consideration in a given case as to whether such representations would cover the type of case in which it would be appropriate for the First Minister to recommend to Her Majesty the granting of a posthumous Free Pardon.

### Legislating for a free pardon

There is recent precedent for legislation in the area of pardons. The Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018 provided for a pardon for all those who were convicted under discriminatory laws or where more general laws had been used in a discriminatory manner in respect of same sex sexual activity where the same activity between people of a different sex was not criminalised.

There are clearly similarities between the injustices of those convicted in a discriminatory manner for same-sex sexual activity and the injustices of women classed as witches many centuries ago which could justify legislative steps being taken in this area.

### Advancing Women's Rights and Equality

The Scottish Government acknowledges that those accused and convicted of the offence of witchcraft were women who faced discrimination and had very little protection in law from allegations of criminality including witchcraft. Whilst undoubtedly much remains to be done, since then society has vastly improved and women rights have been acknowledged and been put into law. It is a priority for the Scottish Government to achieve women's equality and further women's rights in Scotland. Part of this is to ensure that processes are in place and accessible to adequately challenge out dated and harmful views on the role of women in society.

Gender equality is at the heart of the Scottish Government's vision for a fairer Scotland, one where women and girls have and are empowered to exercise equal rights and opportunities, have equitable access to economic resources and decision making, and live their lives free from all forms of violence, abuse and harassment. The Scottish Government is leading by example, appointing the first gender-balanced Cabinet as well as taking legislative and non-legislative steps to make real progress towards gender equality.

One example is Misogyny. This is an insidious behaviour that must be challenged and the Scottish Government have established an independent Working Group to examine the types of behaviours in Scotland which amount to Misogyny and should be addressed by the criminal law.

An independent Working Group on Misogyny and the Criminal Justice System in Scotland, chaired by Baroness Kennedy QC, has now been established with a panel of experts with specialisms in Scots law, human rights, women's equality and perpetrator behaviours relating to gender-based violence. The panel includes specialisms in Scots law, international human rights, women's equality and perpetrator behaviours relating to gender-based violence.

This is an important piece of work addressing the many forms of violence, transgression and abuse experienced by women which may emanate from misogyny. Scotland has led the way on creating serious responses to domestic abuse with its zero-tolerance position and this could be another area for pioneering reform. This is a complex area that has garnered much attention throughout the Justice Committee's scrutiny of the Hate Crime and Public Order (Scotland) Bill. The appointment of the working group to consider misogyny, in the context of furthering women's human rights, marks another important milestone in making society safe, equal and fair.

We are also implementing the broad ranging and ambitious recommendations of the First Minister's National Advisory Council on Women and Girls (NACWG). The First Minister appointed the NACWG in 2017 with a mission to "be bold" and to challenge the Scottish Government about where it needs to do better in order to realise gender equality. The NACWG's have now provided all 3 of their programmed annual reports to the Scottish Government and are considering what form the NACWG will take in the future. If it is helpful to the Committee, I would be happy to provide further information on the recommendations of the NACWG to date and the work of the Scottish Government in this area which demonstrates the Scottish Government's firm commitment to address gender inequality in Scotland.