

Sewel Memorandum

Sexual Offences (Amendment) Bill

Introduction

1. This Memorandum relates to the Sexual Offences (Amendment) Bill (hereafter referred to as the Bill) the reintroduction of which was announced in the Queen's Speech on 17 November. It is expected to be introduced to the House of Commons shortly. The Memorandum explains why the Scottish Executive proposes that the Bill should be dealt with by Westminster despite its covering devolved matters.

Policy objectives of the Bill

2. The Bill would make three changes to the law on sexual offences.

2.1 First, it would reduce the minimum age at which a person may lawfully consent to certain homosexual acts (and buggery in England and Wales). This reduction would be from 18 to 16 years of age in Scotland, England and Wales and from 18 to 17 in Northern Ireland. This would equalise the age of consent for sexual activity so that it is the same for male homosexuals as for heterosexuals and lesbians.

2.2 Second, a person under the age of consent would no longer commit an offence themselves if they engage in homosexual acts with a person over the age of consent. This parallels existing provision for heterosexuals.

2.3 Third, the Bill would introduce a new offence where a person aged 18 or over has sexual intercourse or engages in any other sexual activity with or directed towards a person under that age, if the person aged 18 or over is in a position of trust in relation to the younger person in circumstances specified in the Bill. Further detail on the offence is set out below.

3. The subject-matter of the Bill, so far as it relates to Scotland, is devolved. The Scottish Executive however recommends that the Bill should proceed on a UK basis and be dealt with by the UK Parliament.

4. The Scottish Executive fully supports the policy intentions of the Bill both in regard to equalisation of the age of consent and to the provisions providing for an offence of abuse of trust to protect all young people. It is clear from the history of the Bill (see below) that it has been fully debated pre-devolution, was overwhelmingly supported in the House of Commons and that the only reason it has not already been enacted as UK legislation is because of the opposition of the House of Lords.

History of the Bill

5. The Bill was introduced to the House of Commons in December 1998 and had its 2nd reading on 25 January 1999 where it was supported by 313 votes for with 130 against. It was fully debated in Committee Stage, including on the floor of the House when considering the

age of consent clause; this was supported by 330 votes to 126. The Bill was defeated in the House of Lords in April following an amendment tabled by Baroness Young with the purpose of delaying 2nd reading and effectively ending the Bill's passage.

6. The First Minister announced to the Scottish Parliament on 9 June that if the Home Secretary were to reintroduce the Bill to Westminster and use the Parliament Acts to ensure its passage then the Scottish Executive would support such a move. Because the subject matter is devolved however the Scottish Parliament would be given the opportunity to debate the Bill's provisions and it would remain open to the Scottish Parliament if it so wished to amend or repeal in the future any Scottish provisions enacted by the passage of the Bill. Following discussions with the First Minister in respect of the Scottish provisions, and the First Minister's statement of 9 June in the Scottish Parliament, the Home Secretary announced in July, in the context of ECHR consideration of the Sutherland case (see below), that the Bill would be reintroduced and the Parliament Act used if necessary. The Bill's reintroduction was subsequently announced in the Queen's Speech on 17 November 1999.

7. It is worth noting too that a previous move to equalise the age of consent was made during the Parliamentary passage of what became the Crime and Disorder Act 1998. On 22 June 1998 the House of Commons was given the opportunity to vote on an amendment to the then Crime and Disorder Bill to reduce the age of consent for homosexual acts to 16. The amendment was passed on a free vote in the Commons but rejected by the House of Lords on 22 July; it was not reinstated. The defeat in 1999 of the Sexual Offences (Amendment) Bill was, therefore, the second time in recent years that the Commons have had the opportunity for full consideration of the proposals for equalisation and endorsed them while the Lords have rejected the proposals.

New Offence of Abuse of Trust

8. The Bill would introduce a new offence where a person aged 18 or over has sexual intercourse or engages in any other sexual activity with or directed towards a person under that age, if the older person is in a "position of trust" in relation to the younger person. The definition of position of trust is limited to particular circumstances where the young person is particularly vulnerable or the relationship of trust particularly strong. The definition covers situations where the older person is regularly involved in caring for, training, supervising or being in sole charge of the younger person while the younger person is:

- in full-time education;
- detained under certain court orders or enactments (this would include where the young person is detained as a result of the criminal justice system or penal system under the Immigration or Mental Health Acts or under military law.);
- looked after by the local authority, whether in foster care, residential care or semi-independent accommodation; and
- in a hospital (including private hospitals), a nursing home, children's home or other institution providing health and/or social care.

9. The Bill contains an order-making power which may be used to extend the circumstances in which a position of trust would exist. The making of any such order would be a matter for consideration by the Scottish Parliament.

10. These principles would apply irrespective of sexual orientation. neither homosexual nor heterosexual relationships are acceptable within a position of trust.

11. A person found guilty of the offence of abuse of trust at a Sheriff Court sitting summarily in Scotland would be liable to a maximum penalty of six months' imprisonment and/or the statutory maximum fine (currently £5,000). On conviction in the Sheriff Court sitting with a jury or in the High Court in Scotland, the maximum penalty would be five years' imprisonment, an unlimited fine, or both. A person convicted of such an offence, unless they are under the age of 20, would be subject to the notification requirements under the Sex Offenders Act 1997.

12. The Executive will provide guidance for organisations whose activities would bring them within the scope of the Bill.

ECHR - Sutherland Case

13. Euan Sutherland complained to the European Court of Human Rights that by fixing the minimum age for lawful homosexual activities at 18, rather than 16, the UK was in violation of his right to respect for his private life, and was discriminatory. In their report, adopted on 1 July 1997, the Commission concluded, by 14 votes to 4, that there had been a violation of Article 8 of the Convention (privacy), taken in conjunction with Article 14 of the Convention (discrimination).

14. In the light of this decision the UK Government reached an agreement in October 1997 with the applicant and Chris Morris, an applicant in a parallel case, that the cases would not be pursued pending Parliamentary consideration of the issue. It was agreed that Parliament would be given the opportunity of a free vote on the issue. As explained above, this was taken forward first by the amendment tabled unsuccessfully to what is now the Crime and Disorder Act 1998, and subsequently by the Sexual Offences (Amendment) Bill. Following a further joint approach by the Government, supported by the applicants (following the Bill's defeat in April) the Court agreed a further stay in proceedings until 31 July 2000. In seeking this further extension in July 1999, the Government made clear to the Court that the Bill would be re-introduced this session and the Parliament Act would be used if necessary. The commitment to equalise the age of consent in this context is a UK one.

Parliament Act

15. If the Lords were to reject the Bill again then the Parliament Act can be used to ensure its passage. If the Parliament Act is used, the Bill must be endorsed, with a certificate signed by the Speaker, to say that the Parliament Act provisions have been complied with. The Bill can then be presented for Royal Assent.

16. Use of the Parliament Act requires an identical Bill to be introduced. It follows therefore that if the Scottish Parliament does not agree to the Scottish provisions remaining in the UK Bill, and the Bill were to be amended so that it did not apply to Scotland, then the Parliament Act mechanism cannot be used in the event of further rejection by the Lords.

Conclusion

17. The Scottish Executive acknowledges that the Bill covers devolved matters which will remain the responsibility of the Scottish Parliament in the future. However, the Executive supports the Bill's reintroduction in Westminster and the wish of the Home

Secretary to use the Parliament Act if necessary to ensure its passage. The support of the Scottish Parliament would speed the removal of this discriminatory provision in all parts of the United Kingdom. Thereafter however, these matters will remain devolved and it will be for the Parliament to repeal or amend the legislation in the future. The Scottish Executive therefore invites the Parliament to agree that the Bill should be considered by the UK Parliament.

Scottish Executive
January 2000