

Citizen Participation and Public Petitions Committee

2nd Meeting, 2021 (Session 6), Wednesday, 1
September 2021

PE1855: Pardon and memorialise those
convicted under the Witchcraft Act 1563

Note by the Clerk

Petitioner	Claire Mitchell QC
Petition summary	Calling on the Scottish Parliament to urge the Scottish Government to pardon, apologise and create a national monument to memorialise those people in Scotland accused and convicted as witches under the Witchcraft Act 1563.
Webpage	petitions.parliament.scot/petitions/PE1855

Introduction

1. This is a new petition that has been under consideration since 17 March 2021.
2. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe A**.
3. While not a formal requirement, petitioners have the option to collect signatures and comments on their petition. On this occasion, the petitioner elected to collect this information. 3,414 signatures and 296 comments have been received.
4. In Session 5, the Public Petitions Committee agreed to seek advanced views from the Scottish Government on all new petitions before they are formally considered. The Committee has received a response from the Scottish Government and this is included at **Annexe B** of this paper.

Scottish Government submission

5. In its written submission, the Scottish Government explains that, in Scotland, it is the First Minister who is responsible for recommending to Her Majesty the Queen the exercise of the Royal Prerogative of Mercy to grant a Free Pardon.
6. If a Free Pardon is granted, 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. The conviction is not quashed, however, as only the courts have that power.
7. The Scottish Government also explains that since 1 April 1999, the Scottish Criminal Cases Review Commission (SCCRC) has been responsible for the review and referral to the High Court of alleged miscarriages of justice.
8. The SCCRC has the power to consider a case even after the death of the person or persons convicted. Although the Royal Prerogative of Mercy (RPM) remains in place, it is largely superseded by the SCCRC process.
9. The Scottish Government highlights that 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.
10. The Scottish Government states, however, that it would carefully consider representations from the petitioner highlighting a specific case or set of cases, with a view to establishing whether such case(s) constituted appropriate grounds to recommend a RPM.
11. In this written submission, the Scottish Government notes that the [Historical Sexual Offences \(Pardons and Disregards\) \(Scotland\) Act 2018](#), referenced in the petition, provides a recent precedent for legislation in the area of pardons.
12. It states that there are clear “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”. The submission further states that these similarities could justify legislative steps being taken in this area.
13. 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.
14. The Scottish Government also stresses that achieving women’s equality and further women’s rights in Scotland is a priority. It cites the appointment of the first gender-balanced Scottish Cabinet and the establishment of an independent [Working Group on Misogyny and the Criminal Justice System in Scotland](#), chaired by Baroness Kennedy QC, as examples.

15. The Scottish Government also highlights that it is implementing the “broad ranging and ambitious recommendations” of the First Minister’s [National Advisory Council on Women and Girls](#).

Action

16. The Committee is invited to consider what action it wishes to take on this petition.

Clerk to the Committee

Briefing for the Citizen Participation and Public Petitions Committee

Petition Number: [PE01855](#)

Main Petitioner: Claire Mitchell QC

Subject: Pardon and memorialise those convicted under the Witchcraft Act 1563

Calling on the Scottish Parliament to urge the Scottish Government to pardon, apologise and create a national monument to memorialise those people in Scotland accused and convicted as witches under the Witchcraft Act 1563.

Background

The following information has been taken from '[The Survey of Scottish Witchcraft 1563 - 1736](#)' ("the Survey"¹).

The Survey identified a total number of 3,837 people who were accused of witchcraft in Scotland between 1563 and 1736. The authors state that older accounts of the subject tended to produce much higher figures, such as 4,500 or 30,000, but that they are based on speculation rather than detailed research.

Of the 3,837 people who are on the survey database, 3,212 are named and there are a further 625 unnamed people or groups. Of the 3,212 named individuals, the sentence given after trial is only known in 305 cases: 205 were to be executed; 52 were acquitted; 27 were banished; 11 were declared fugitive; 6 were excommunicated; 2 were "put to the horn" (outlawed); 1 person was to be kept in prison; and 1 person was to be publicly humiliated. In addition, a further 98 were recorded as having fled from prosecution. This would suggest that 67% of those tried were sentenced to death.

However, the authors state that this figure is probably not very accurate. It is based on only 305 cases - less than a tenth of the 3,212 people known to have been accused.

¹ Survey of Scottish Witchcraft, 1563 – 1736. Goodare, Julian; Yeoman, Louise; Martin, Lauren; Miller, Joyce. (2010). Survey of Scottish Witchcraft, 1563 - 1736, [Dataset]. University of Edinburgh. School of History, Classics and Archaeology.

A number of courts were involved in the trials of witches. Local church courts had no criminal jurisdiction and would pass on complaints about witchcraft to one of the following bodies:

- Privy Council, committee of estates or parliament – these bodies did not hold trials but would issue “commissions” authorising people to hold trials
- Court of Justiciary – the highest criminal court situated in Edinburgh which tried numerous witches
- Circuit courts – travelling versions of the Court of Justiciary which often tried witches in the locations at which they were held
- Local criminal courts held under commissions of justiciary (see above) – these were usually ad hoc courts trying one person at a time. Most Scottish witches were tried in such courts.

The Survey states that four types of evidence were used in the trials which took place:

- Confession evidence – this was often extracted under torture. Typically, if a suspect was interrogated they would be expected to confess to making a pact with the Devil and to harming their neighbours by maleficent witchcraft, though one or other was often omitted.
- Neighbours’ testimony – statements by neighbours usually ignored the Devil. They usually described quarrels with the suspect followed by misfortune they had suffered.
- Other witches’ testimony – when witches were interrogated they were sometimes asked about their accomplices. The people they named could then be arrested and interrogated. This was an effective way of increasing the number of suspects; it seems mainly to have happened during short periods of intense witch-hunting.
- The Devil’s mark – the Devil was believed to mark his followers at the time they made a pact with him, as a parody of Christian baptism. A physical search of the suspect’s body could find this mark – either a visible body blemish or an insensitive spot. The insensitive spot was discovered by pricking with pins, sometimes by the interrogators themselves and sometimes by itinerant professional “witch-prickers” (of whom about 10 are known to have acted in Scotland).

The Survey states that the lawyers in charge of the central courts gradually became less convinced that the usual kinds of evidence could prove guilt. The validity of confessions made under torture was questioned and pricking for the Devil’s mark came to be seen as fraudulent.

The Survey goes on to say that after the so-called Glorious Revolution², the state became more secular and no longer needed to prove its godliness by executing witches.

The Scottish Witchcraft Act, entitled, [Anentis Witchcrafts](#), which was passed in the Parliament of Scotland in the Ninth Parliament of Queen Mary in 1563, and which forms the basis of the present petition, was repealed in 1735 by the introduction of the Witchcraft Act 1735 which was, in turn, repealed by the Fraudulent Mediums Act 1951.

Scottish Parliament action

A similar issue was previously considered in 2008, by the then Public Petitions Committee (“the Committee”) in response to petition [PE1128](#) which was lodged by Ewan Irvine. That petition called on the Parliament to urge the Scottish Government to take necessary action to grant a posthumous pardon to all persons convicted in Scotland under all witchcraft legislation.

Following consideration of that petition in its [deliberations on 4 March](#), the Committee agreed to write to the Scottish Government for its view on whether such a pardon could be granted.

[In August 2008, the Scottish Government wrote to the Committee](#) setting out, amongst other things, how the Royal Prerogative of Mercy (RPM) works, and some of the factors which would have a bearing on the granting of a posthumous Free Pardon. Essentially, the Scottish Government did not consider that the use of the RPM would be appropriate in this case.

After considering the Scottish Government’s response, the Committee took the decision to close petition PE1128 at its meeting on 9 September 2008.

With regard to the current petition, the petitioner states that the Parliament has recently set a precedent for righting historic wrongs and pardoning those who were previously convicted of offences. The petitioner points to the passing of the [Historical Sexual Offences \(Pardons and Disregards\) \(Scotland\) Act 2018](#).

Scottish Government action

As set out above, the Scottish Government has previously responded on a similar issue which was raised at the Public Petitions Committee in 2008.

Graham Ross
Senior Researcher
1 March 2021

² The Glorious Revolution took place from 1688 to 1689 in England. It involved the overthrow of the Catholic King James II, who was replaced by his Protestant daughter Mary and her Dutch husband, William of Orange.

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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.