

Section 28 - the repeal of “vindictive Tory legislation”.

Wendy Alexander, Minister for Local Government, Social Inclusion and Housing has announced that the Scottish Executive will bring forward a measure disapplying Section 28 with respect to Scotland in the forthcoming Ethical Standards in Public Life Bill which will be before Parliament early next year. The Minister said that this “vindictive Tory legislation that singled out gay relationships for condemnation ... has no place in the Scotland of tomorrow.”¹ **Brian Dempsey** reviews the impact of Section 28 with particular reference to school bullying.

Formally speaking, reference should be made to s2A of the Local Government Act 1986, added by Section 28 of the Local Government Act 1988, but the widespread resistance to this law both in the UK and in the rest of the world made Clause 28 and then Section 28 notorious. We therefore refer to Section 28 throughout.

A little picture book for children, *Jenny lives with Eric and Martin*^[2] was to be the catalyst for the introduction of Section 28. The book tells the story of a few days in the life of five year old Jenny, which are much the same as for any little girl except that she lives with her dad and his lover Eric. When some local councils, mostly in London, made the book available to teachers as a reference work the right-wing tabloids were outraged. “Positive images” of children living in Jenny’s situation had to be stamped out and Section 28 was the means to do this.^[3]

The Local Government Act 1986 as amended provides, in relevant part 2A (1) A local authority shall not -a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality; b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship. (2) Nothing in subsection (1) above shall be taken to prohibit the doing of anything for the purpose of treating or preventing the spread of disease.

Section 28 has never been used in court and, as Kenneth Norrie pointed out in 1988,^[4] is literally meaningless. For example, homosexuality is generally considered a state of being;^[5] it is impossible to teach that homosexuality is a relationship, acceptable or otherwise, just as it is impossible to teach that being tall is a relationship.

Similarly, what is outlawed is teaching that homosexuality is a pretended family relationship. If this has any meaning it seems to assert the truth of our family relationships and strike at the labeling of our relationships as “pretend”. This was clearly not what the bigots who promoted Section 28 had in mind.

In so far as Section 28 has any meaning it does not stop teachers or anyone else from teaching what they will since it is aimed at local authorities. Section 28 does not even stop local authorities allowing teachers to say what they like about homosexuality; it merely stops a local authority encouraging (promoting) teachers to do whatever it is the section outlaws. However, a ban on the actions of local authorities is slightly less absurd in Scotland, where local authority have responsibility for education via local education authorities, than it is in England and Wales where responsibility lies with school governors.^[6]

The first effect of Section 28 was to reawaken the lesbian and gay rights movements; in early January, before the Bill was passed, 50,000 protestors marched in London^[7] and activism in Scotland soon became more lively than at any other time during the 1980s. The media profile of resistance to “Clause 28” was remarkable. During one Parliamentary debate, three angry lesbians disrupted proceedings by abseiling into the House of Lords. On one occasion Sue Lawley had to deliver the Six O’Clock news over muffled shouts while her co-presenter Nicholas Witchell sat on top of a lesbian protester who had penetrated the BBC studios.

Yet Norrie warned against complacency, pointing out that the courts would strain to find some meaning in Section 28 and also highlighting the worry that the Government’s attack on homosexuals would legitimate and increase hate crimes. “Unfortunately, however, the courts have a quaintly naive reluctance to accept that the words of Parliament can be inept or meaningless; and they will without hesitation distort words used in statutes to find some meaning.^[8]

“More dangerous is the very clear signal that the section gives out: though the words ... are legally meaningless, the government is clearly saying ‘we cannot tolerate tolerance of homosexuals.’ That signal will be heard and picked up and acted upon by dangerous people.”^[9]

Section 28 and safe schools

The extent of homophobic bullying in Scottish schools is not known.[10] However, a recent University of London report has shown that in England and Wales, 82% of schools surveyed were aware of verbal homophobic bullying and 26% were aware of physical assaults

motivated by homophobia. Despite this, only 6% of these schools made specific reference to attacks against lesbian, gay or bisexual pupils in their anti-bullying policy.[11]

There are certainly some schools which promote respect and acceptance of all their pupils and staff and this is a welcome change. Despite the best efforts of many teachers, however, anecdotal evidence suggests that many young lesbian, gay, bisexual and transgendered people face a school life of isolation and fear of exposure, if not of direct violence and abuse.

While all forms of bullying is likely to be under-reported where victims may assume that their complaints might leave them open to further abuse, young people who suffer racial bullying may report this to their families and receive community support. Young LGBT people may fear exposure to their family whether or not their families would, in practice, reject them. Indeed, homophobic prejudice may be so prevalent that young LGBT people come to accept this as the norm and fail to identify humiliating experiences as bullying.[12]

A recently published report on experiences and perceptions of violence and intimidation in Edinburgh's LGBT communities[13] showed a disturbingly high level of attacks. More than a third (36%) of interviewees reported suffering physical assault during the previous year compared to a figure of one in forty in the population as a whole[14] Well over a third reported that they had been bullied at school or college and 10% reported ill treatment at the hands of school staff.[15]

A similar study in Glasgow found that almost one third believed their educational achievements were negatively affected by attitudes to their sexuality and more than half experienced overt forms of social exclusion based on homophobia while at school.[16] This report concludes that, overall, the "(mis)use of Section 28 has had a devastating effect on lesbians and gay men in Glasgow".

Despite the fact that Section 28 is not formally directed at teachers, 44% of schools in the England and Wales study reported that Section 28 had caused them difficulty in addressing the needs of lesbian, gay and bisexual pupils[17] while eight in ten schools said that they would benefit from clarification on the implications of Section 28.[18] A mere one in four schools considered their lesbian, gay and bisexual students and staff worthy of inclusion in their equal opportunities policies.[19] While these schools may not be guilty of promoting homophobic bullying they may fairly be described as failing to support their pupils. No similar research has been conducted on the situation in Scottish schools.

Notwithstanding the evidence of the negative impact of Section 28 on equality in schools, the Daily Mail in

November 1998 ran two stories that they chose not to link. The first was that the Westminster Government had again postponed the repeal of Section 28. The second was a report on the inquest into the death of a fifteen year old boy driven to take his own life as a result of homophobic bullying at school.[20]

The boy had been physically attacked and verbally abused because his school-mates had decided he was a "poof". He felt unable to seek help from his school and was even disciplined for being "disruptive" when he stood up to his tormentors. Without any support at school he saw killing himself as the only way out.

The school response

Bullying is increasingly seen as a problem which requires a response; children should no longer be left to survive the violence of their school days as best they can.[21] Yet, in *Scott v Lothian Regional Council*[22] the court found that the ineffective action taken by teachers at Edinburgh's Royal High School in relation to bullying meant that they could not be said to have acted in a way in which no teacher of "ordinary skill and competence" would act. The case involved the sustained violent and sexualized bullying of a female pupil whose health and exam results were undermined by the bullying.

It would seem, therefore, that the test for breach of duty of care is a high one even in cases of gross bullying; failure to act effectively against sustained and violent bullying is to be excused provided some action is taken. The Westminster Education Minister was reported as saying that legislation would be introduced to prevent schools which fail their pupils from being held accountable in the courts if, as a result of the school's inaction, the pupil's exam results suffer.[23]

This unsatisfactory situation may change if the European Court of Human Rights case arising from *X (Minors) v Bedfordshire County Council*[24] is successful. The Commission has unanimously found a breach of Article 3 (inhuman and degrading treatment) and Article 6 (fair hearing in respect of civil rights and obligations) following the House of Lords ruling that the local authority could not be sued for their failure to protect four children who suffered abuse at the hands of their parents.[25]

The refusal of schools to take effective action against homophobic bullying degrades everyone, victim and perpetrator, "gay" and "straight". A recent study of sexual bullying in English classrooms[26] found a close link between homophobia and violent attitudes towards women and anyone perceived as being vulnerable. The sexist and "hard" culture among boys "suggests that boys' unpreparedness for heterosexual, or indeed any human, relationships, ... made them more callous in their general social attitudes." [27]

While both boys and girls were subject to homophobic name calling, this seemed to be more threatening for boys. There is even the bizarre yet strangely compelling notion that boys who spend time with girls and are "nice" to them must be gay. Since many boys cannot admit the

possibility of an equal relationship between men and women it is perhaps unsurprising that they were violently opposed to the notion of loving relationships between men, whether sexual or not. If a boy were to confide that he was gay "[t]he older boys responded with frightening alacrity that they would attack them, even if they had been close friends up to that point." [28]

Even where schools attempt to control general bullying, Duncan notes that sexuality and sexualized bullying are usually left unaddressed, with pupils left to wrestle with sometimes overwhelming problems on their own. [29]

The Scottish Office document *A Route to Equality and Fairness*, designed as a resource "to help schools to evaluate their quality of practice in combating discrimination and achieving equality of opportunity for success" correctly stresses the need to develop, implement and monitor good practice to make education "relevant, interesting and challenging for all pupils". [30] However, LGBT pupils and staff are systematically rendered invisible in this document which must lead to serious doubts as to whether "all pupils" really does mean all.

There is growing evidence that school can often be a place where the challenge for lesbian, gay, bisexual and transgendered people is simply to survive. If, as one educationalist states "one of the aims of education in a democratic society must be the promotion of knowledge and understanding which enables people to live well as members of the democratic community" [31] then our schools are failing all of us.

Community groups

The other main effect of Section 28 has been to deny community groups access to local authority support. Wendy Alexander comments that repeal will help such groups "not only in their work in the gay and lesbian community itself but through that work in making a wider contribution to our community life in general." [32]

Unlike the position in England, [33] the threat of judicial review of council decisions in Scotland has been raised not to strike at support for community initiatives but by LGBT groups themselves, challenging the refusal of grants. As early as 1989 campaigners from the Scottish Homosexual Action Group (SHAG) were exploring the possibility of review of the decision by Edinburgh District Council to turn down a grant application. The council had refused the application after taking opinion from Andrew Hardie QC who was alleged to have given advice to the council that, in effect "because SHAG had said that heterosexuals could attend the [open air concert] there was a considerable risk that the five hours of music and poetry would encourage homosexuality." [34]

This view was taken despite councils in England giving similar grants without being prosecuted under Section 28 and an assurance from the event organisers that "it is not our intention in staging this event to seek to encourage people who are not lesbian or gay to become lesbian or gay". [35]

The Council leader appeared almost to invite review by stating that the council was strongly committed to funding the event, but felt constrained by their legal advice. [36] Given the evident danger of an unduly distorting interpretation of Section 28 by the Scottish courts SHAG eventually decided not to seek review.

In 1993 the City of Glasgow District Council sought the opinion of Sir Crispin Agnew, in the face of threats of judicial review over their hesitant attitude towards funding the cultural festival "Glasgay!". Unlike the then Mr Hardie, Sir Crispin's concern was not so much that heterosexuals would be "turned" but rather that the simple "forwarding into the attention of the general public of homosexuality" would be a breach of Section 28. [37] A few months after receiving this opinion, the council awarded a grant of more than £7,000 to "Glasgay!". [38]

Although both Edinburgh and Glasgow councils bore the brunt of anger at their early timidity in the face of Section 28 [39] this may reflect the fact that their lesbian, gay and bisexual tax payers had some expectation of fair treatment by their respective councils. Aberdeen City Council, Kyle and Carrick District Council and another anonymous council reported that they had refused to provide financial assistance for a creche at a "lesbian" film festival in fear of Section 28. [40]

As with bullying in schools, little research has been done on the level of refusal of grant support by Scottish councils in recent years though anecdotal evidence appears to point to continuing difficulties. Repeal of Section 28 will allow future applications to be considered on their merits.

Conclusion

In the introduction to the draft *Improvement in Scottish Education Bill*, Education Minister Sam Galbraith asserted that "[t]he Scottish Executive ... will place children at the centre of its concerns. We will work to ensure that each and every child realizes his or her potential." [41]

The draft Bill has, as key outcomes, "raising attainment and promoting social inclusion - making sure we get the basics right." In our submission, *Outright Scotland* highlighted the problem of homophobic bullying and proposed amendments which would place a duty on the Minister and local authorities to take appropriate measures to promote social inclusion and for the non-application of Section 28 in Scotland. It is thought that the omission of any mention of social values as an expected attainment in the draft Bill will meet with widespread criticism.

Repeal of Section 28 is not about the detail of what gets taught in the classroom. Nor would repeal stop teachers from pointing out that some elements in society find the existence of LGBT people problematic or controversial. [42] Repeal is about removing an obstacle to social inclusion and thereby raising attainment. Schools cannot achieve excellence if there are young people feeling isolated and frightened or are being bullied.

Schools should be promoting the principle that pupils think for themselves rather than pushing out-dated

Christian or Conservative doctrine. Wendy Alexander argues that, with repeal of Section 28 "schools and teachers could develop (and local authorities could support) programmes that deal with homosexuality using the same principles that apply to [other controversial] topics."^[43]

Section 28 is a barrier to ensuring that Scottish society is both equal and fair. It has had a "chilling" effect on setting appropriate educational objectives and on the ability of schools to take corrective action when incidents of exclusion, bullying, harassment or assault occur. It has also provided an excuse for the exclusion of LGBT community groups from local authority support and recognition.

The current Westminster government is committed to repealing Section 28 "as soon as a suitable legislative opportunity arises".^[44] The Scottish Parliament will soon have the opportunity to lead the way in contributing to building an inclusive and democratic society and the Executive's initiative is to be welcomed.

□ *Brian Dempsey is Assistant Secretary of Outright Scotland, PO Box 23253, Edinburgh, EH1 3XD.*

Endnote

¹ W Alexander unpublished speech to Glasgow University Labour Club 29/10/99

² S Bosche (1983) *Jenny lives with Eric and Martin* (GMP:London)

³ See eg D T Evans (1989) "Section 28:law, myth and paradox" 1989 *Critical Social Policy* p73

⁴ K McK Norrie (1989a) "How to promote homosexuality" 1989 *SCOLAG* 74 @ p75. See also Norrie (1988) "Symbolic and Meaningless Legislation" 1988 *JLSS* 310

⁵ Norrie's assertion of this "essentialist" view is challenged by sociologist Dave Evans who argues that homosexuality is a social role; "a status or role that can be learnt and adopted to extents dependent upon a range of social situational and interactional circumstances" Evans (1989) op cit p80

⁶ Norrie (1988) op cit p313/4

⁷ Evans (1989) op cit p73

⁸ K McK Norrie (1989b) "How to Promote Homosexuality" *Gay Scotland* #44 p9

⁹ Norrie (1988) op cit p314

¹⁰ For an overview of research in England and Wales see Nicola Douglas et al (1997) *Playing it Safe* (University of London) esp pp 11-17

¹¹ Douglas (1997) op cit p22 &25

¹² Sue John & Adele Patrick (1999) *Poverty and Social Exclusion of Lesbians and Gay Men in Glasgow* (West of Scotland Lesbian and Gay Forum) p6/7

¹³ Moira Plant et al (1999) *Experiences and Perceptions of Violence and Intimidation of the Lesbian, Gay, Bisexual and Transgender Communities in Edinburgh* (City of Edinburgh Council Community Safety Unit)

¹⁴ Plant pp47-52

¹⁵ Plant p61 & 63

¹⁶ S John & A Patrick (1999) p6/7

¹⁷ Douglas (1997) op cit p33

¹⁸ *ibid* p34/5 & 33

¹⁹ *ibid* p29

²⁰ "Torment of choirboy driven to kill himself" *Daily Mail* 5/11/98

²¹ See N. Gow (1997) "School Bullies" 28 *Fam L B* 2

²² 1998 *GWD* 33-1719

²³ Gow op cit p3

²⁴ [1995] 2 *AC* 633

²⁵ *Z and others v UK* (Application #29392/95, adopted 10/9/99)

²⁶ Neil Duncan (1999) *Sexual Bullying* (Routledge:London)

²⁷ *ibid* p125

²⁸ *ibid* p108

²⁹ *ibid* p135

³⁰ Scottish Office (1999) *A Route to Equality and Fairness* (HMSO:Edinburgh) p2, my emphasis

³¹ P White (1991) "Parents' Rights, Homosexuality and Education" 39 *B. J. Education Studies* p398 @ p399

³² Alexander op cit

³³ P Thomas & R Costigan (1990) *Promoting Homosexuality* (Cardiff Law School; Cardiff) p30/1

³⁴ "Difference of opinion" *Gay Scotland* #46 August 1989, p3. See also Thomas & Costigan (1990) op cit p29

³⁵ Thomas and Costigan (1990) op cit p29

³⁶ "Difference of Opinion", *Gay Scotland* #46, August 1989

³⁷ Unpublished - Opinion of Counsel for City of Glasgow DC regarding funding of "Glasgay"

³⁸ "Glasgow gives £7K for Glasgay! Events" *Gay Scotland* #74 November 1993, p3

³⁹ For Edinburgh see eg "Council under attack from gays on funding" *Glasgow Herald* 14/3/91, "Lesbian group's grant vetoes" *Evening News* 22/2/91 and Glasgow see eg "Library ban sparks new Section 28 fight" *Pink Paper* 15/9/95

⁴⁰ Thomas & Costigan (1990) op cit pp28-30

⁴¹ Scottish Executive (1999) *Improving our Schools* (HMSO: Edinburgh)

⁴² White (1991) op cit p404 where she argues that schools can tell pupils that homosexuality or the eating of shell-fish is viewed as morally wrong by some religionists and asking pupils to think about the issues for themselves.

⁴³ Alexander op cit

⁴⁴ 5/6/98 House of Lords Hansard