



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Equalities and Human Rights Committee

**Thursday 1 February 2018**

**Session 5**



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**EQUALITIES AND HUMAN RIGHTS COMMITTEE**  
**3<sup>rd</sup> Meeting 2018, Session 5**

**CONVENER**

\*Christina McKelvie (Hamilton, Larkhall and Stonehouse) (SNP)

**DEPUTY CONVENER**

\*Alex Cole-Hamilton (Edinburgh Western) (LD)

**COMMITTEE MEMBERS**

- \*Mary Fee (West Scotland) (Lab)
- \*Jamie Greene (West Scotland) (Con)
- \*Gail Ross (Caithness, Sutherland and Ross) (SNP)
- \*David Torrance (Kirkcaldy) (SNP)
- \*Annie Wells (Glasgow) (Con)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Tim Hopkins (Equality Network)

**CLERK TO THE COMMITTEE**

Claire Menzies

**LOCATION**

The Robert Burns Room (CR1)



# Scottish Parliament

## Equalities and Human Rights Committee

Thursday 1 February 2018

[The Convener opened the meeting at 10:00]

### Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill: Stage 1

**The Convener (Christina McKelvie):** Good morning and welcome to the third meeting in 2018 of the Equality and Human Rights Committee. I make the usual request that mobile devices be switched off and mobile phones be taken off the table. We will go straight into agenda item 1.

Today marks the start of LGBT history month in the United Kingdom, and 2018 sees several important anniversaries in the movement for same-sex equality. First, 2018 sees the 40th anniversary of the murder of Harvey Milk, one of the first high-profile openly gay politicians to be elected in a western democracy and a member of the San Francisco Board of Supervisors. His life and work inspired a generation of lesbian, gay, bisexual, transgender and intersex politicians to seek election and begin to turn the tide of hatred of and discrimination against LGBTI people.

This year also sees the 30th anniversary of the passage of the Local Government Act 1988, which contained the controversial section 28 provisions that prohibited local government from promoting homosexuality in schools. The Scottish Parliament led the way in repealing section 28 in one of its first acts. The committee's work has led to the current LGBTI inclusive education working group, which is working with the Scottish ministers to ensure that all forms of anti-LGBTI discrimination and prejudice are removed from our education system.

However, despite that progress, the discrimination of the past casts a long shadow over the lives of many LGBTI people in Scotland to this day. That is why it is fitting that our main item of business today is our inaugural oral evidence-taking session on the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill. The bill seeks to right yet another historical wrong against gay and bisexual men by addressing the legacy of historical convictions for offences that would not be a crime today.

We have only one witness: Tim Hopkins, who is the director of the Equality Network. We are

grateful for his written evidence and incredibly grateful that he has come along to speak to us. I hope that he will be able to give us an opening statement on the bill, what it will do and areas where we need to tighten it up.

**Tim Hopkins (Equality Network):** Thank you very much indeed for inviting me and for those comments. As you say, today is the first day of LGBT history month and the bill is, in fact, making history.

I will say two things about the bill. The first might sound slightly negative but it is important to recognise the bill's limitations, and the limitations of what the Parliament can do, to

"lift the burden of conviction",

as the policy memorandum says, and of the history of the discriminatory laws that affected gay and bisexual men.

The First Minister got it right when she made her statement of apology in the chamber on the day the bill was introduced. Among other things, she said:

"Nothing that Parliament does can erase those injustices, but I hope that this apology, alongside our new legislation"—

that is, the bill—

"will provide some comfort to the people who have endured them."—[*Official Report*, 7 November 2017; c 8.]

That gets the balance exactly right. The discriminatory laws that criminalised gay and bisexual men affected not only people who ended up with convictions, although many of those people were hugely affected. I am afraid to say that some of them will have taken their own lives as a result of their conviction. Some will have spent time in prison, but those who were only fined will undoubtedly have been affected in important ways by their conviction. However, criminalisation affected all gay and bisexual men in the 20th century. People lived in the shadow and fear of being discovered and prosecuted, so they had to live double lives.

Although criminalisation applied to men only—women were not criminalised in the same way—it had a knock-on effect on all LGBTI people. The committee has received written evidence from a woman who was dismissed from the armed services because she was a lesbian. Although she had not committed an offence, as men in the armed services were seen to have done, people who were lesbian, gay or bisexual, whether men or women, were routinely dismissed, and the criminalisation of gay and bisexual men underpinned that discrimination.

There were huge effects on the people who were affected, and some of those effects continue.

The bill cannot hope to make up for that discrimination and its effects, but we have to do what we can do. Having said that, as far as we are concerned, the bill is welcome.

The bill does two things. Its first effect is declaratory, and it declares three important things. First, section 1 says clearly that those convictions were wrongful and discriminatory. It is important to say that, and the legislation that has similar effect in the rest of the United Kingdom has been criticised for not saying it. There is a concern that, if you pardon someone, that implies that they must have done something wrong, and section 1—alongside the First Minister's apology—makes up for that by saying that people did not do anything wrong and that it was the law that was wrong.

Secondly, the bill declares to people with those convictions that they have been pardoned. We can perhaps talk about that in a bit more detail later, but that pardon is formal and symbolic; it has no practical effect, but it gives some comfort to people who had those convictions: not only have their convictions been declared to be wrong and discriminatory but they have formally been pardoned.

The declaratory effect of the bill is much wider than that, because it also declares, quite clearly and publicly, that Scotland now thinks that discrimination should end and wants to treat its LGBTI citizens equally, and that the Scottish Government and the Scottish Parliament are determined to take whatever steps are possible to make that equality a reality.

The bill also has a practical effect, which is where the disregard comes in. If you are going to pardon people, you have to make that pardon concrete, as far as you can. That is what the disregard does. We can talk about why that is done on the basis of application rather than being automatic, because that is an important point, but the disregard itself is welcome, and its effect is quite wide. It declares that the conviction cannot be used in any way to disadvantage somebody, because it also declares that the conviction has to be regarded for all purposes as never having happened.

Overall, we very much welcome the bill. We welcome its declaratory effect and its practical effect. We hope that the committee and the Parliament as a whole will support it. It has wide support in the country as a whole.

**The Convener:** Thank you for that opening statement, which gives us a number of questions that we can pursue.

You mentioned that section 1 declares the law to have been wrongful and discriminatory. Can you tell us what other differences there are between the bill and the English Policing and

Crime Act 2017, and whether there are any lessons that we can learn from that legislation?

**Tim Hopkins:** The English legislation was welcomed when it was introduced. In fact, disregards have been available in England and Wales for five years, and the pardons legislation came into effect a year ago for the rest of the UK—that legislation also extended the disregards to Northern Ireland.

However, the English legislation has been criticised. In fact—to talk about history again—last year was the 50th anniversary of the Sexual Offences Act 1967 in England and Wales, which decriminalised sex between men in certain circumstances. There was a series of television programmes in which men who had those convictions were interviewed, and a number of them criticised the legislation that was introduced for the rest of the UK. They made three points. One was that they were uncomfortable about being told that they were pardoned, because that implied that they had done something wrong and were now generously being given a pardon—that is what a pardon normally means. That is why it was important to us to say that it must be made clear that men in that situation did nothing wrong. Section 1 of the bill does that, especially when taken together with the First Minister's apology. It will be really important to continue to make section 1 and the apology public in order to allay the concerns about what the pardon means.

The second concern about the English legislation was that the pardon is provided automatically only to men who died before that legislation came into effect, which was 31 January last year. That means that, if you were still alive on 31 January last year, you would not be automatically pardoned. Even though the pardon is only formal and symbolic, to get the pardon, you have to apply for the disregard.

We estimate that only about 2 per cent of the people in England and Wales with those convictions who are still living have applied for the disregard. There are a number of reasons for that. Applying for the disregard is a bit complex—there is a three-page application form and you have to give all sorts of details about the original conviction. A lot of men do not want to do that; perhaps they do not want to be reminded of what happened in the past. If you are not running into practical difficulties regarding the records of your conviction, why apply for the disregard?

As I say, 98 per cent of people with those convictions south of the border have not applied for the disregard and therefore have not received the pardon, even though it is only formal and symbolic. In fact, any man in that situation who has died in the past 12 months will never receive the pardon. Men who died before 31 January last

year received the pardon automatically. Any man who has died in the past 12 months without having applied successfully for the disregard in those 12 months, or earlier, will never receive the pardon. Any man who is still alive has to apply for the disregard to receive the pardon. We can see no good reason for that. Our colleagues in Stonewall in London were very critical of that aspect of the legislation.

One man in that situation was interviewed on television last summer and said that not only was he annoyed about the fact that he had not received the pardon but he realised that the apology that was given in the House of Commons by a junior Government minister last year specifically applied only to men who had received the pardon. He thought that he had received an apology and was happy about that, but when he looked at the wording he discovered that only men who had received the pardon were receiving the apology, so therefore he had not been apologised to either. That is a major flaw in the legislation for the rest of the UK and I am very pleased that the Scottish Government said at an early stage that it would ensure that its legislation gave the pardon automatically to all men with those convictions, both people who are still alive and people who are no longer alive.

The third problem that has been identified by groups such as Stonewall and men in this position down south is the limited list of offences that is in the legislation for the rest of the UK. That legislation covers what are broadly—certainly in Scots law—called homosexual offences. In Scotland, those offences are called gross indecency and sodomy, and in England they are called gross indecency and buggery. What is missing in particular from the English legislation is coverage of the offence that is called importuning, which is where men were prosecuted for chatting up other men. Some of those men were entrapped. Men who were interviewed on television last year described being at gay bars in London and chatting up other men, perhaps outside the bar, only for one of them to say, “I’m a police officer and you’re nicked for importuning.” The men received a criminal record, and, typically, a fine.

Controversially, that offence is not covered by the legislation south of the border. Former Scottish MP John Nicolson introduced a private member’s bill in the House of Commons to do that job—he drafted his bill to include the offence of importuning. Unfortunately the UK Government, having initially said prior to the election last year that it would support that bill, decided when it came down to it that it would not support it. Instead, it supported some amendments to a bill of its own in the House of Lords, which excluded that particular offence. Under pressure, the UK

Government agreed to an amendment to include an order-making power to add other offences to the list in the legislation, but that power has not yet been used, so it is still a live issue for the rest of the UK.

I am very glad to say that, against that background of quite public controversy down south, the Scottish Government thought about the issue quite carefully and has included that offence, both explicitly in the list of offences in section 2, and in the definition of sexual activity between men. Sexual activity between men is explicitly defined in section 2(4) as including

“conduct intended to introduce or procure such activity.”

That is there to make sure that the legislation covers cases in which a man was prosecuted simply for chatting up another man. As I have said, the word that is usually used for that is “importuning”.

Those are the three main concerns that have been raised about the legislation for the rest of the UK. I am glad to say that the Scottish Government has listened to those concerns and has dealt with them effectively in the bill.

10:15

**The Convener:** Thank you very much. Stonewall UK is coming to see us at next week’s committee meeting, so we will interrogate the differences further then.

We will move on to questions from committee members. Mary Fee has the first question.

**Mary Fee (West Scotland) (Lab):** Good morning, Tim. Thank you very much for your very helpful opening statement.

I have a couple of questions. The first is about individuals who apply for a disregard. What support will they and their families need? The disregard process will affect not just those individuals but their wider families. I do not know whether the process will be the same here as it is in England, where you said that there is a three-page application form. There may be some individuals who will need help. Should something be put in place to ensure that there is support for such individuals and their families?

**Tim Hopkins:** Yes—very much so. The first issue is one of publicity. It will be very important to publicise the provisions of the bill once enacted, to ensure that the maximum number of people in that circumstance know about it. The majority of them will be in their 50s or older and will not necessarily be linked in with networks such as ours. Therefore, the more publicity that there is, the better.

In our submission, we mentioned that it is very important that support is provided by the Scottish Government. Disregards will effectively be implemented by the Scottish Government, to which people will apply, so there will be an office somewhere in the Government with staff whose job it will be to deal with them. It will be very important that the process is as accessible as possible and that support is provided to people who need it. That might be communications support or support with filling in the form and advice on exactly what the form asks about.

In its submission, the Law Society of Scotland suggested that it would be good if legal aid were to be available for advice that somebody might need from a lawyer in order to make such an application. I certainly agree with that.

You are quite right to say that it is important that all those forms of support and advice should be available to people making applications for disregards. The cost will not be great, because the number of such applications will be very small.

**Mary Fee:** Should someone automatically be given legal aid to progress an application for a disregard, regardless of their circumstances?

**Tim Hopkins:** I am not an expert on the way in which legal aid works, so I would not like to say, now, that there should be no element of means testing as there is for legal aid for other purposes. One of the Scottish Government documents that accompany the bill says that legal aid would be available if somebody needed to make an appeal to the sheriff court. However, I agree with the Law Society of Scotland that it would be helpful if legal aid were to be available for those who need it—at least for those who need advice on making the initial application.

**Mary Fee:** I agree that, as the Scottish Government will process disregards, there will be someone there to give people support with filling out the form. However, there may be individuals and family members who will need emotional support. Should there be provision in the bill to ensure that, for example, third sector organisations are given the necessary funding to provide such emotional support?

**Tim Hopkins:** That is a very good point, although I am not sure that it needs to be in the bill. The main organisation that provides direct front-line support to older LGBT people in Scotland is LGBT Health and Wellbeing. I am sure that it would want to make its helpline and other support available. It runs a couple of groups for older LGBT people. I am sure that it would want to extend such support to people in the situation that we are discussing and to their families. I would not like to speak on its behalf about whether it feels that the resources that it has to run that helpline

and give that support are sufficient, although I am sure that it would always welcome more resource. As I have said, the numbers are small. However, it is important that help is available to people who need it.

**Mary Fee:** The other issue that I want to ask you about is the attitude towards those in the LGBT community. It is depressing to see the recent reports, including from Stonewall, about the level of discrimination that people from the LGBT community still face. What impact will the bill have on that? Will it make the situation worse or better?

**Tim Hopkins:** I think that the bill will make the situation better. I would not say that it will make a huge difference, but every step that the Government and this Parliament have made over the past 18 years—it is almost 19 years—has helped move forward public attitudes towards LGBT people.

We have seen in the Scottish social attitudes survey, and in the British social attitudes survey before that, a steady improvement in attitudes since the low point of the late 1980s. The improvement has particularly accelerated in Scotland since 2000, which I am absolutely sure is, in part, a result of the legislative steps that have been taken, starting with the repeal of section 28 and moving on to the introduction of civil partnership and gender recognition and all the other steps that have been taken up to and including equal marriage. I am quite sure that the bill—and the publicity around it—will be another factor that moves us in the right direction.

A lot of the change in public attitudes is to do with leadership and demonstration of the fact that—as the bill says—discrimination is considered to be unacceptable.

**Mary Fee:** On the issue of publicity, you said in your answer to the convener that section 1 and the apology should continue to be made public. How would you like to see that being done?

**Tim Hopkins:** The Government could do various press-related work when the bill is enacted. It will be important for the Government to publicise the system through its websites and so on. We will obviously publicise it, and I am sure that our colleagues and other LGBTI organisations will publicise it as widely as they can, too.

The message from the Government that the legislation has been introduced because the convictions are wrongful and discriminatory needs to be repeated at every possible opportunity through the Government's press and media work at each stage of the passage of the bill.

**Gail Ross (Caithness, Sutherland and Ross) (SNP):** Good morning, Tim. Thank you for your written evidence, which I found enlightening.



A small number of respondents said that they would prefer the disregard to be automatic, like the pardon will be, but we know that for legal reasons that will not be possible, because some of the convictions are for crimes that are still crimes today.

Last week, we heard about the difficulties of going through everyone's records to find out about their convictions. Some crimes were recorded as breach of the peace, which raises difficulties. Are there men who would want that aspect of the past to be kept in the past and would not want it to be brought up again? Will you comment on those two issues?

**Tim Hopkins:** Yes. We conducted a survey—which was a survey of all LGBT people, generally—about what we knew would be in the bill in early autumn last year. At that stage, we did not know everything about the bill. Of the 630 people who commented on the bill, 45 said that the disregard should be automatic. Out of those 630 people, only four said that they had convictions that they thought that the bill should cover, and of those four only two said that it was likely that they would apply for the disregard. Four out of 630 people is less than 1 per cent. That is not surprising, because, as we said in our written evidence, we think that the number of people who will qualify for the pardon who are still alive will be in a small number of hundreds, which is less than 1 per cent of the number of gay and bisexual men in Scotland. It is not surprising that the number who contacted us who have such convictions is so small. Of the four, two said that they would like the disregard to be automatic, if possible, so it is certainly an issue of importance to people.

As we said in our written evidence, we have thought hard about the issue—indeed, we have been talking to the Scottish Government about it since 2014—but we cannot see any way in which the disregard could be made automatic. That would be a huge task, costing millions of pounds and taking many years to do, and I do not think that it would be 100 per cent successful in identifying all the convictions anyway.

As you said, there will be men who simply want to put the whole thing behind them—men who have done their best to put it behind them for decades and who want to keep it in the past—so it is not necessarily the case that everybody would welcome being contacted proactively by the Government to be told that their conviction had been disregarded.

Taking all that into account, we think that the bill gets it right by providing that the disregard has to be applied for. Other countries have introduced legislation along such lines. In Germany, an application system will be used—the system is not yet in place, but the relevant bill specifies that

disregards will have to be applied for. Indeed, an application will have to be made even for the pardon, so it is very welcome that, here, the pardon will be automatic, as I have said.

The system for the disregard in England and Wales has been in place for five years, and it seems to work pretty well from the point of application onwards, although the number of applications has been small. We have not had negative feedback about the way in which the system works—I am sure that Stonewall UK will talk to you about that.

**Gail Ross:** We have heard about how having such a conviction on their protecting vulnerable groups disclosure has affected people who want to work with what we would class as vulnerable groups. Should the bill contain a provision that would automatically wipe reference to all such convictions from PVG disclosures?

**Tim Hopkins:** The way that I interpret the bill is that it does that, even though that is not spelled out. It specifies that if someone successfully applies for the disregard, their conviction will be disregarded for all purposes. For all purposes, they will be treated as if their conviction never happened.

Making that real is a question of updating the conviction records, wherever they are held. The details of that process will be dealt with in regulations, and the issue is one for the detail of those regulations. Because they will be introduced under the negative procedure, it will be important that the Scottish Government consults on them and gets them right before it introduces them.

Under the bill, the regulations can cover any records that are held anywhere, and they will specify how those records are to be updated. The Government has explicitly stated that the records on which disclosures are based, which are Police Scotland records, will be covered by the removal process once a disregard is obtained. There could be records that might already have been generated from the police records, so there is a danger that such convictions could continue to show up in disclosure and PVG checks. That will need to be considered under the regulation procedure. We must ensure that all records are caught by the regulations.

However, there is a general provision in the bill that says that someone in such a position is to be treated as if the conviction had never happened. That means that, if something went wrong, they would always have the right to say, "Hang on—that's wrong. In law, I must be treated as if the conviction had never happened, so you need to put this right."

**Gail Ross:** Can you expand on what records you are talking about and where they might be kept?

**Tim Hopkins:** There will be records relating to the convictions at Police Scotland, in the Crown Office and Procurator Fiscal Service—because it would have dealt with the original prosecution—and in the Scottish Courts and Tribunals Service. As I understand it, when someone applies for a disclosure, Police Scotland processes the application, and it would rely on its own records. In one of the accompanying documents to the bill, the Government says that the police records in Scotland will be held on something called the criminal history system. However, for reasons that it does not explain—I am not sure what they are—it says that some of the records might also be held on the English police national computer system, and it acknowledges that a process might need to be put in place to deal with those records.

I do not know where other records might be held, apart from the three places that I mentioned, but it is clear that the regulations need to be wide enough to cover anywhere where records are held that might be drawn into the disclosure process.

The regulation-making power will continue to exist, so if, in future, someone applies for the disregard and, for some reason, records do not disappear in the way that they are supposed to, it will be possible for the regulations to be updated to put that right.

10:30

**Mary Fee:** The disregard will remove information from official records but not historical records. What is your view on that?

**Tim Hopkins:** The word “remove” should be in quotes. The disregard system is based closely on the system for England and Wales—the legislation is almost identical. England and Wales use the word “delete” in their legislation and, again, that should be in quotes. As section 10(4) of the bill says, the definition of “remove” in the regulations that specify how the disregard is to be done can mean annotating the records to make it absolutely clear that the information is not to be revealed.

The Government gives two reasons for that. One is that some of the records might be in a form that cannot be simply deleted, such as microfiche, and the other reason, which I think is valid, is that we do not want to delete the historical records. We do not want future historians to be unable to look back at records and write a book about the level of discrimination there was against men who had sexual relationships with other men, and they should be able to look at individual cases so that they can describe individual examples. That information needs to be available to historians

without causing any detriment to the men who were in that situation and who are still alive. It will be important to get that balance right.

The regulations are key. When rules are introduced about how records should be annotated and what should happen to the records that are annotated, we need to be absolutely clear that, although the record is still there, it cannot be used in any way that causes detriment to the person who is still alive but it will still be available for the use of future historians.

Section 16 excludes records held at National Records of Scotland. I am not sure that that exclusion needs to be there, given that the removal process will be set out in regulations. The provision could probably have been included in the regulations.

I am not necessarily concerned that National Records of Scotland records are excluded as long as they are in a form that cannot be accessed by, say, a journalist or a member of the public to find out whether a living person received one of the convictions. That is an important point that the Scottish Government will need to address so that we can all have confidence that the removal process, including the way in which records at National Records of Scotland are kept and made accessible, ensures that people who are still alive and have these convictions cannot be subject to any detriment, if they have the disregard.

**Mary Fee:** That is a helpful explanation. My initial view was that if a conviction is to be disregarded, it should be removed from every record, but if we look at that from the angle of rewriting history, I accept your point. That is helpful.

**Jamie Greene (West Scotland) (Con):** I should probably start by declaring an interest as a founder and co-convener of the cross-party group on LGBTI+ issues, for which the Equality Network is the secretariat. If the convener will indulge me, I will place on the record my public thanks to Tim Hopkins and the Equality Network for their support for the cross-party group during the past 18 months, and specifically for updating us on the progress of the bill.

I have a couple of diverse questions. Perhaps they should have been addressed to the bill team, but I appreciate that Tim Hopkins has a lot of knowledge on the subject. Is it your understanding that the bill will retrospectively pardon all men who were convicted of age of consent offences in Scotland?

**Tim Hopkins:** Yes, as long as what they were convicted of is no longer an offence. Prior to 1980, there was no age of consent for sex between men, which was a crime in all circumstances. Between 1980 and 1994, the age of consent was 21, and

between 1994 and 2001 it was 18, while it was 16 for everybody else, including women who had sex with women.

Generally speaking, if someone was convicted of an age of consent offence with a person who was over 16, they will receive the pardon. The exception is that someone who was convicted of an offence with a person aged 16 or 17 and who was in a position of trust will not be pardoned, because that remains a crime. The general age of consent is now 16 for everybody regardless of gender mix, but it is 18 if the person who is being charged is in a position of trust over, in some sense, the other person.

**Jamie Greene:** That point is very pertinent to people such as me who were around during the period in which certain behaviour was illegal based on the age of consent. A small group of people fall into that anomaly. I appreciate that answer.

In your opening statement, you touched on some submissions that we have had from serving or ex-serving members of Her Majesty's armed forces. Do you have any understanding of whether, given that those convictions or disciplinary measures pertain to the armed forces, those individuals are covered under the England and Wales act or whether they will be able to take advantage of the provisions in the Scottish bill? Whether or not those people were resident in Scotland, I presume that their convictions were not registered in Scottish courts.

How does the legislation affect their ability to ensure that any declarations of discharge or court martialing, for example, will not be required on current applications?

**Tim Hopkins:** This is a slightly complex point. It was a crime for a man in the armed forces to engage in sexual activity with another man. That would normally have been prosecuted in a court martial under the armed forces legislation. That legislation extends to the whole of the United Kingdom, but it is based on English law. For example, someone would have been prosecuted for buggery, not sodomy, because English law underpins the armed forces legislation.

Pardons and disregards for such convictions are covered by the legislation that has already been passed at Westminster. That is the case even if the conviction happened in Scotland. As I understand it, if a man was convicted under the armed forces legislation of sexual activity with another man on, say, an armed forces base in Scotland, they would receive their pardon and disregard on application under the legislation for the rest of the UK.

Once that person receives their disregard, they should, according to the legislation for the rest of

the UK, be treated as if the conviction never happened. That means that, if someone was dismissed from the armed forces purely as a result of the conviction—which was standard practice—they should not suffer any detriment in any circumstances because of that dismissal. That would include when applying for jobs now.

Unfortunately, the situation is a bit more complicated than that in practice, because it could be argued that men who were dismissed from the armed forces were dismissed not just on the basis of such a conviction but because they said that they were gay. In fact, many men who did not have such convictions were dismissed from the armed forces because they said that they were gay. Even if a man had such a conviction, if he also said in interview at the time that he was gay, it might be argued that he was dismissed for that reason, at least in part. Setting aside the conviction would not set aside, in any sense, the dismissal.

In addition, the person who submitted written evidence to the committee is a woman, and women were dismissed from the armed forces for exactly the same reason, even though they were not subject to court martial because their behaviour was not a criminal offence. That woman was interviewed in what sounds like a horrendous way—that was not unusual—and she said that she was a lesbian, then she was automatically dismissed. That is affecting her now because when people apply for certain posts—she mentions security posts, or at least security vetting for posts, here at the Scottish Parliament—they are asked whether they have been a member of the armed forces and whether they were dismissed. Then the whole story comes out.

The bill will not help with that. It will not help directly where somebody has been dismissed from the armed forces because of their sexual orientation, and the Westminster legislation that applies to court martials does not help, either. Other steps need to be taken.

My view is that, in theory at least, if someone who applies for a job somewhere is asked whether they were dismissed from the armed forces, that person says yes, and then, when they are asked for the circumstances, they say, "I was dismissed from the armed forces in 1991 because I said I was a lesbian," and the prospective employer treats them less favourably because of that—they do not give them the job, for example—the employer is probably breaching the Equality Act 2010, because they will be discriminating against that person. That may be on the ground of dismissal from the armed forces, but if the person was dismissed because they were a lesbian, that is indirect discrimination. If it is not direct discrimination, it is certainly indirect discrimination.

The Equality Act 2010 means that no employer should be discriminating against somebody because of that record.

However, there are practical steps that could be taken by employers, including the Scottish Parliament, to put that right. For example, the person who submitted written evidence suggests that, rather than just asking whether someone has been dismissed from the armed forces, the Scottish Parliament could specifically annotate that question to say, "If you were dismissed on the basis of your sexual orientation, you do not have to answer this question".

The bill does not deal with the issue. It is a reserved issue, so it is not something that the Scottish Parliament can deal with. The rest of the UK legislation from Westminster that gives pardons and disregards does not deal with it directly and probably does not help very much. It certainly does not help women in that circumstance. However, as I said, it is already the case that the Equality Act 2010 applies and should protect people from discrimination based on such history.

**Jamie Greene:** Thank you. That was a very comprehensive and helpful answer. It has flagged up a group of people who will not benefit in any sense from either the English and Welsh legislation or the Scottish legislation. Again, I declare an interest in that I have a number of close and dear friends who have been affected by the issue.

I appreciate what you say about guidance for employers but, obviously, that would not be statutory. Is there any room for manoeuvre in the devolved or reserved setting to enhance the bill or other legislation to make it easier for those who were dismissed from the armed forces for being gay to, in effect, wipe their slate clean, too? It seems like it might be a missed opportunity.

**Tim Hopkins:** Certainly that is a possibility. I think that it would be a reserved matter, but it could be possible to pass legislation at Westminster that would direct the armed forces to amend or annotate their records and issue letters to people who were dismissed on that basis to apologise and make it clear that they would not be dismissed now and that the policy has changed. That legislation could make it clear that people should not suffer any detriment on that basis.

Another practical step that could be taken relates to something that is always a big hurdle for people to get over. If somebody came to us who had run into practical difficulties because they had been dismissed from the armed forces on that basis, say in the 1990s, and it was affecting their prospects of finding jobs, we would say that a possible way forward is to consider taking a case

under the Equality Act 2010. Of course, that is a big hurdle for people to get over.

**Jamie Greene:** I have a final question on a separate issue. My understanding is that the disregard process can be done only by the individual who was convicted. I have a concern that there is no opportunity for the living relatives, family members or partners of people who are deceased to apply for a disregard on behalf of the deceased person. Does that mean that, although those people will have been pardoned in the grand scheme of things, those records and convictions will still exist? That may affect people's future prosperity. Should that have been addressed in the legislation or is it practically impossible to implement that at this late stage?

**Tim Hopkins:** In all cases, the conviction will still exist. The bill will not erase the convictions from history. The disregard says that, for all practical purposes, the convictions are to be treated as if they never happened.

It is a very important question. Whether the practical recompense that the bill potentially provides to anybody who receives the automatic symbolic pardon should be extended to people who are no longer living depends on whether one thinks that it would have a practical effect on people who are no longer living.

The stated purpose of the disregard is, at least primarily, to deal with the issue of disclosures. Certainly, for the people who have contacted us to say that they want to apply for the disregard—only three in total have done that and only two of them have given us details—it is clear that the reason why they want the disregard is exactly because of the disclosure problem. Clearly, that is not a problem for people who are no longer alive.

10:45

The answer to the question depends on exactly what practical recompense the bill gives to people who apply. In Germany, the legislation is rather different. People have to apply and, if the application is successful, they get two things, at least—a certificate of pardon/disregard and financial compensation. As far as I know, Germany is the only country in the world that offers to provide people with financial compensation. In Germany, applications are open to the families of people with such convictions who are no longer living. My understanding is that the families do not necessarily receive the financial compensation in that case, but that they receive the certificate.

The question of financial compensation is a different one. However, that illustrates that whether it makes sense to open to relatives of those who are no longer living the practical

recompense that is done by application—it has to be done by application—depends on what the practical recompense does and what its purpose is. If the purpose is focused on disclosures and on the person not suffering detriment, for example when they apply for a job—those things are covered in the bill—it might not be necessary to open it to the families of people who are no longer living. That is probably not necessary. However, if it was extended, for example to provide some kind of certification, as in Germany, I think that there would be a case for opening it up to the families of those who are no longer alive.

**The Convener:** I have a quick supplementary question in which I want to go back to the armed forces section of the response that you gave us. What is the impact on someone if they have a dishonourable discharge on their record or if they were dismissed from the armed forces? What effect does that have on their pension rights, honours and medals, and their ability to wear their uniform and to participate in veterans' organisations? Have you come across any situations in which that has been the issue?

**Tim Hopkins:** I am afraid that I do not know what the effects are on those things, but I could perhaps add one more related point. You mentioned dishonourable discharge, which is what it is called in the United States, I think. A woman who was discharged from one of the United States armed forces many decades ago has just won the right to have her dishonourable discharge converted into an honourable discharge. She was going through the court process, but she received that news before it came to court. That is the kind of practical step that the armed forces could take in this country. However, I think that that is a reserved matter.

**Mary Fee:** I have a brief follow-up to the question that Jamie Greene asked you about family members applying for a disregard. You mentioned in your opening remarks that some individuals have taken their own lives because of a conviction. In those circumstances, should the question of a family member applying for a disregard be treated differently?

**Tim Hopkins:** Again, it would depend on what the disregard provides. If the disregard is focused on issues such as disclosure and not suffering detriment when applying for jobs, I cannot see that it would make much difference. We do not know of any cases in which that has happened, but it is very likely that it has, which would be a dreadful situation for the families of the people in those circumstances. However, given what the bill provides through the disregard at the moment, I cannot see a direct reason why people should be treated differently.

**Alex Cole-Hamilton (Edinburgh Western) (LD):** Good morning, Tim. I have hung on your every word today; it has been a fascinating evidence session and I could listen to you all afternoon.

I would like to explore a couple of issues. First, I was not aware that Germany provides financial compensation. At what magnitude is that compensation issued? I ask that because we understand from briefings prior to this meeting that we are not talking about a huge number of men here. If the English experience is anything to go by, we are probably talking about 50 to 100 men—tops—in Scotland, and I do not think that it would break the bank to offer them Scottish Government-funded compensation. What sort of level of compensation is there in Germany, and would that be welcome in Scotland?

**Tim Hopkins:** The legislation in Germany, as I understand it, is not yet in effect. It was a Government bill and was passed by the Bundestag, which is the lower house, last June. I do not know what has happened in the upper house, although the upper house had certainly indicated that it would pass the bill, but there were elections in Germany in the autumn and that may have held up the process. It was said in the German media at the time, last summer, that it would take five years to put the process fully into place.

To answer your question, the level of compensation is a flat rate of €3,000 to everybody who has a relevant conviction and successfully applies, taking into account the fact that it does not cover convictions for things that are still crimes, and then €1,500 on top for every year spent in prison. Looking at the sentencing of those offences in Germany, I think that it is clear that it was harsher than here. In fact, the average sentence for people convicted under paragraph 175, which was the German equivalent of what we call homosexual offences, was two years in prison, whereas the average here, even in the 1950s, was a period of months in prison. The German Government has apparently set aside €30 million, which is an average of €6,000 per person—on the basis of a €3,000 flat fee plus €1,500 a year for an average of two years in prison, which accounts for the other €3,000—for each of the 5,000 people who it is expected may successfully apply through that process.

**Alex Cole-Hamilton:** Is that the model that we should adopt here in Scotland?

**Tim Hopkins:** The first thing to say is that, of the four men who responded to our survey last autumn, in which we invited people to say what they felt was needed in addition to what the bill was already offering, none raised the question of compensation. Eight people in total, out of the 736

who responded to the survey, suggested compensation, but none of those eight was one of the four men who had convictions. They raised other issues, but not the issue of compensation.

We base our policy on what we hope is a consensus among LGBTI people. We do a lot of consultation, which is why we do these surveys. The reason why we have not proactively been calling for compensation is, in part, that the large majority of people did not raise it as an issue. Having said that, I do not want to speak on behalf of the men—there may be between 100 and 200 such men—who are living with those convictions. It is really up to them, and I hope that the committee will have the opportunity to speak to, or at least to take evidence from, some men in that situation.

**Alex Cole-Hamilton:** That is really interesting. I am struck by the element of human decency and by the fact that a lot of the men who have corresponded with you on the issue did not think about money, because they just want justice to be done, but compensation might still be the right thing to do, even if they have not thought about money and do not want to be seen as looking for an easy payout. Notwithstanding the time spent in prison, and it is great to hear that Germany is recognising that financially, such sentences may have had a significant impact on people's careers in terms of lost earnings and lost promotions, some of which might be quite easy for individuals to evidence with legal support. Should the committee actively consider compensation? The men whom the LGBTI community represents, and those who have already come forward to talk to you about it, are not necessarily looking for compensation, but it might still be the right thing to do. How do you feel about that?

**Tim Hopkins:** One important point is that, whatever the level of compensation, it is "compensation" in inverted commas, because it is not going to make up for the damage. I agree that there will probably be men who can point to the effect on their careers and may very well be able to quantify that, and the value of lost earnings is likely to be tens of thousands of pounds or more. I should have said that the German legislation has been criticised by LGBT organisations in Germany on the basis that the compensation is not enough. A sum of €1,500 to compensate for having to spend a year in prison is not compensation in the normal sense of the word; it is a symbolic payment. Any practical level of compensation is going to be symbolic, even in Germany, which is the only country that has so far moved to introduce it. However, concrete symbols are important and, as I say, it is the voices of those who are in that situation which need to be heard.

I have one final point. We estimate that the number of men still living with those convictions is in the small number of 100s, by which I mean that it could be as low as 100 to 200. The Government estimates that it might approve 15 applications for disregards in the first five years, which is one tenth of the number in England and Wales. That means that most people will not be applying for the disregard, so there is a question about whether compensation should be given only to those who apply for the disregard.

There are a number of reasons why somebody might not apply for the disregard; for example, because emotionally they do not want to handle the hassle and reopen the whole question. That would mean that they would not get the compensation, because there would be no way of compensating them. There is a question of fairness there that needs to be thought about.

**Alex Cole-Hamilton:** It is an interesting proposition. It might generate more interest in application for the disregard, but it is something for the committee to consider.

I have a final question, which is about whether there is a potential wrinkle for those men who were convicted in other jurisdictions—overseas and in other countries—of a crime that is no longer illegal. Although annotation, removal or redaction would be impossible from criminal records that are held overseas, we can still disregard such convictions in the way that we are doing for everybody else here. Is that something that you have considered and how might we reflect it, for example, in the regulations underpinning the bill?

**Tim Hopkins:** To be honest, we have not considered that. It is a very interesting question. I do not know whether, when someone applies for an enhanced disclosure, the police include not just conviction records but any other material that they think is germane to the application, and whether convictions in other countries ever get reflected through enhanced disclosures. Potentially they might, if the police are aware of them. I certainly agree that there is the potential to address that.

There is another way of addressing it, when it comes to people applying for jobs and so on, because the provisions of the Equality Act 2010 would apply. If someone was disadvantaged because of a conviction in another country for something that is no longer a crime there and would not be a crime here but is essentially based on their sexual orientation, that would potentially be unlawful under the 2010 act.

**Alex Cole-Hamilton:** In the case of applying for a job, if the application asks applicants for criminal records and to disclose any information, they might out of honesty feel obliged to include an offence that they had picked up in France in the

1960s or something and not know that they did not have to. Perhaps we need to reflect that in guidance and the publicity around the passing of the bill. Would you agree?

**Tim Hopkins:** Yes. It is unlawful for a prospective employer to ask people about convictions that are spent, except in the context of enhanced disclosures, and it is only lawful to apply for those for certain jobs. It is good practice to say specifically on job application forms: "Have you any past convictions? Do not mention any convictions that are spent." The rules apply only to convictions within the UK, but that statement is at least a pointer that old convictions in another country do not need to be mentioned.

**The Convener:** There are no other questions, so does Tim Hopkins have any final comments? Have we missed anything?

**Tim Hopkins:** We have covered a wide range of material. I will just check whether there was anything else. I mentioned the situation in Germany; perhaps it is also worth mentioning that there are a number of other countries that are currently putting through legislation along these lines, including Canada, New Zealand and at least one Australian state. If we did not do this, Scotland would be falling well behind. It is something that shows that, along with those countries, Scotland is a country that is no longer willing to accept discrimination against LGBTI people. As I say, I hope very much that the committee will support the bill.

**The Convener:** That is a good place to finish our deliberations. We are very grateful to Tim Hopkins for coming along this morning. We will continue our deliberations over the next few weeks, so if you go away and think of something that you missed, please let us know, because we will still consider it up until the point that we run out of time.

**Tim Hopkins:** I will certainly do that. Thank you very much.

10:59

*Meeting continued in private until 11:29.*





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