OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities and Human Rights Committee

Thursday 1 March 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 1 March 2018

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EQUALITIES AND HUMAN RIGHTS COMMITTEE
6th 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:

Colin Brown (Scottish Government)
Angela Constance (Cabinet Secretary for Communities, Social Security and Equalities)
Patrick Down (Scottish Government)
Michael Matheson (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Equalities and Human Rights Committee

Thursday 1 March 2018

[The Convener opened the meeting at 09:15]

Decision on Taking Business in Private

The Convener (Christina McKelvie): Good morning and welcome to the sixth meeting in 2018 of the Equalities and Human Rights Committee. I make the usual request for mobile phones to be switched off and kept off the table.

Agenda item 1 is a decision on taking business in private. I seek the agreement of the committee to consider in private our approach to forthcoming legislation, correspondence on the audit and accountability framework for the United Kingdom and Scotland, the Children and Young People's Commissioner Scotland's draft revised strategic plan for 2018 to 2020 and issues relating to our human rights inquiry. Does the committee agree to take those items in private at future meetings?

Members *indicated agreement.*

The Convener: Excellent—thank you so much.

Subordinate Legislation

Equality Act 2010 (Authorities subject to the Socio-economic Inequality Duty) (Scotland) Regulations 2018 [Draft]

09:16

The Convener: Under agenda item 2 we will consider an affirmative Scottish statutory instrument. This session will allow us to question the Cabinet Secretary for Communities, Social Security and Equalities on the content of the draft regulations and on plans for their implementation. We will then proceed to consideration of the formal motion. Cabinet secretary, we are grateful that you are here this morning to speak to the draft SSI.

Members have a paper from the clerks and the Scottish Parliament information centre. Annex B covers the purpose of the draft instrument, and annex A provides further details. Members may wish to note that the Delegated Powers and Law Reform Committee has drawn our attention to comments that it has made on the draft instrument, which are included in annex C. There is also a letter from the cabinet secretary, at annex D, on the Government's plans to implement the socioeconomic duty.

Good morning, cabinet secretary.

Angela Constance (Cabinet Secretary for Communities, Social Security and Equalities): Good morning.

The Convener: We also have Colin Brown, from the Scottish Government.

Cabinet Secretary, I invite you to give us some opening remarks on the purpose and detail of the draft SSI.

Angela Constance: Good morning to you, convener, and to committee colleagues. I am always grateful for the invitation to come to committee to give evidence. I am particularly pleased to give evidence on the fairer Scotland duty ahead of the committee's consideration of the draft regulations.

The duty is an important one. The draft instrument introduces a new requirement on ministers and public bodies through the Equality Act 2010, whereby all strategic decisions made by the public sector must, from April this year, include careful consideration of how inequalities of outcome caused by disadvantage can be narrowed.

It is a duty with a purpose. It helps to ensure that public sector bodies, including Scottish ministers, carefully consider inequalities of outcome in decision making. It makes it easier to

hold public authorities to account for those decisions, and it encourages better decisions. Ultimately, it should deliver better outcomes for people facing poverty and disadvantage.

The duty finally completes for Scotland a set of duties that was originally planned at a UK level in 2010: duties on equality, on child poverty and, now, on socioeconomic inequality. Together, they provide a strong basis on which to build the fairer Scotland that we all want to work towards, and I am keen to ensure that the duties will work well together over the coming years.

To ensure that the new duty works well in practice, the Scottish Government will be delivering a range of support. Non-statutory guidance will be published shortly, having been informed by our consultation last year and developed in consultation with a wide range of stakeholders, including the Equality and Human Rights Commission and the Convention of Scottish Local Authorities.

In addition, we are funding a new national co-ordinator post at the Improvement Service to deliver training and share best practice. We are considering how to build on the support that we have already provided to three local authorities to set up their own poverty truth commission-style bodies.

On the draft regulations themselves, as you know, the Scottish Government can name public authorities to be listed under the duty if they meet the three-point test under the Equality Act 2010. We consulted on an initial list of authorities based on our own assessment, and we were able to add a number of further bodies that were suggested by consultees. Newly established statutory bodies that meet the three-point test can be made subject to the duty through future regulations.

The committee will have seen the letter that I sent to the convener, which sets out some additional information and, I hope, addresses the matter that was raised by the Delegated Powers and Law Reform Committee.

I am more than happy to answer any questions.

The Convener: Thank you, cabinet secretary. I will move straight to questions from committee colleagues.

Mary Fee (West Scotland) (Lab): Good morning, cabinet secretary. There is something that I would like to probe in a little bit more detail with you. I am referring to the letter that you sent to the convener, in which you gave the background to the measures. You describe how you would go about ensuring the compliance of

"future bodies (i.e. those that meet the three point test in the Equality Act but are not yet established)".

You go on to say:

"This might mean, for example, introducing new regulations covering a range of new bodies, every two or three years."

I am fully supportive of everything that is being done to take this piece of work forward. We obviously want to get to a place where the equality duties are completely incorporated and embedded into every public sector organisation, which would lead to better outcomes. Have you had any more thought about how you would do that?

Angela Constance: It is important to make a distinction, and I invite you to look at the examples that I gave in my letter. For new public bodies and the legislation that establishes them, we can think about the example of the new social security agency. Because the legislation sets up such public bodies by reference to the Scottish ministers, they will automatically become subject to the duty. That is because of that link with the Scottish ministers—it is straightforward. That applies to new bodies such as the social security agency from the start. It should be in their DNA to implement the duty as part of their big strategic decision making, particularly as they grow as organisations. It is a particularly powerful tool and a particularly powerful duty.

Regarding other types of organisations that have yet to be established, as I say in my letter, although we know that there are new bodies to be established, such as the new public health authority and the south of Scotland skills body, because they are not designated in the context of the Scottish ministers under legislation, we will have to make regulations for them. My initial thinking is just to do that at regular intervals, and certainly to review the situation at regular intervals. I am open to discussion and suggestion if people have other preferences. For the bodies that would not automatically be subject to the duty, I am not sure what the options are, other than our making regulations every two to three years. It would not be particularly burdensome to do that. The Government would be more than happy to do that, given the importance of the duty.

Mary Fee: You are more or less saying that, as we go forward, you will be taking a belt-and-braces approach to ensure that everyone is included.

Angela Constance: Yes. We are keen to apply the duty where it can be applied. The great thing about the consultation was that we were able to extend the list of bodies that are subject to the duty. That was the result of suggestions from people who responded to the consultation. The suggestions regarding Food Standards Scotland and Revenue Scotland came forward through the consultation responses. We therefore consulted with those bodies, and they were more than happy

to be included. There is broad support for this measure across the public sector.

Mary Fee: Would introducing regulations every two or three years, say, give you an opportunity to update any guidance that goes to all organisations?

Angela Constance: Yes. That is a really important point. We are introducing interim guidance for April.

On your point about embedding duties, I emphasise that they really make a difference on the ground. That is partly to do with cultures and attitudes.

We are issuing interim guidance, which is of course based on consultation. By having a three-year implementation phase, we will be able to work very closely with public bodies, carefully examining what works and what is helpful in practice—and perhaps what is less than helpful—so that, when we issue the final guidance at the end of the implementation period, it will be based on practice and on what supports good practice. That was the other reason for funding the national co-ordinator's post with the Improvement Service.

We want to work with people at a practical level, sharing best practice, so that the duty is not something that people feel is being imposed upon them. We do not want people to feel that it is another burden, and that certainly has not been the response that we have received—people have been welcoming. We want to help people work with the duty so that it has the maximum impact.

Mary Fee: That is helpful—thank you.

Alex Cole-Hamilton (Edinburgh Western) (LD): Good morning, cabinet secretary, and thank you for coming to see us today. I would like to ask you about the three-year implementation period. That seems quite a long time. I do not have a problem with that, but I wondered whether you could explain the reasoning for it. Will some bodies have particular hurdles to clear before they can be compatible with the duty?

Angela Constance: That is an interesting point about how long the implementation period should be. The duty puts tackling poverty and inequality at the heart of the big, strategic decisions that organisations make. That is right at the core of it. I am conscious that some organisations are not making big, strategic decisions week in, week out, however. There is a cycle to their business. They might make such decisions in an annual budget or in a three-year corporate plan. They might make bigger decisions around infrastructure investment. On balance, we felt that a period of about three years was right.

The other consideration, which came back through the consultation, was about how to ensure that the duty is well knitted with public sector equality outcomes and the duties of local authorities and health boards on child poverty targets and reporting.

You will be aware that the public sector equality duties will be subject to review. That will happen later this year. That is another area where the Equality and Human Rights Commission is very active. From some of the questions that I have had from the committee and from some of the views that I have heard committee members express, either in committee or in the chamber, I am conscious of the feeling that the public sector equality duties could be working better. With the review of the equality duties that needs to be done and the life-cycle of decision making for bigger strategic decisions in mind, three years felt about right.

Alex Cole-Hamilton: One of our shared interests in the committee and, I am sure, across the Parliament is the idea that new policy or directives such as this, which are aimed at improving the work that all bodies in the public domain do on equalities, should do more than just sit on the shelf. I am obviously very supportive of the duty, as it brings us closer to that aim, but I think there will still be a variance in how different bodies apply the duty. You have spoken a bit about best practice, but what engagement have you had with the public bodies to which the duty will apply, and what has their feedback been? Are some elements of them resistant to it? Do they think that it is just another Government diktat for which they will have to find a way to tick a box?

09:30

Angela Constance: No. People were very clear in the consultation responses that what we did not want, and what the public sector most certainly does not want, is a tick-box exercise.

The other thing that struck me from the consultation feedback was that people wanted to be able to use the duty as a way to prevent or deal with the causes of poverty and inequality, as opposed to always mitigating their consequences. It is fair to say that there is good, broad support for the duty in principle.

Inevitably, people will always have concerns about how the socioeconomic duty interacts with other duties. We need to work with people to ensure that we get it right, and that is why we are having an implementation period. People will be subject to the duty from April but, over the next three years, we will be actively considering how things are working on the ground. We will be trying to help the public sector proactively, through the funding of the national post and through the work

that we will do to constantly review and appraise the interim guidance.

The work that is being done with poverty truth-type commissions will enable us to have a continuing dialogue before we issue final guidance. We have an open mind as to whether, at the end of the implementation period, I will need to come back and make further regulations or indeed consider a piece of primary legislation to ensure that the various duties are aligned.

I felt that this was really important, given that the relevant part of the 2010 act had lain dormant for so long and that the measures were something that we could implement. I am of the view that, when you can do something, you should get on and do it. You can always tweak and refine as you go on.

It is really important, given the scale of the challenge that we face in modern Scotland, to get on and do things. We can, of course, review, refine and improve how we work in practice—but we have to get on and do it.

Jamie Greene (West Scotland) (Con): Can the cabinet secretary furnish me with any practical examples of how, in her view, the duty in the draft SSI may affect the relevant agencies on a day-to-day level? We often talk about wording such as "giving due regard to" in policy notes when it comes to making decisions, but what does that mean in real terms for the way in which bodies or organisations will make decisions or alter their decision-making processes?

Angela Constance: On the types of decisions that bodies could be making, we would expect them to give due regard to how they are going to narrow socioeconomic disadvantage, and when we as Scottish ministers are making significant announcements about significant investments, about big new policy developments or about legislation, the duty has to be at the heart of all that.

As you know, Food Standards Scotland has responsibilities around healthy eating, so there is an obvious connection there. For local authorities, it could involve their budget-setting process, and we would expect that process to have the fairer Scotland duty very much at its heart.

For big, strategic corporate plans, if a public body was developing a new estate or leisure facility, we would expect the duty to be at the heart of its decisions.

The interim guidance that we have prepared helpfully lays out, in a plain-English manner, details addressing some of the points that you have made about definitions. It is important that we all have the same understanding of what we mean by inequalities of outcome or socioeconomic disadvantage. We define socioeconomic disadvantage as living on a below-average income, with little accumulated wealth, leading to greater material deprivation, and restricting the ability to access basic goods and services. Socioeconomic disadvantage can be experienced both in places and in communities of interest, leading to further negative outcomes such as social exclusion.

On the process, I have already spoken about what we mean by "strategic decisions" or "at a strategic level". That could include local development plans, major investment plans, city deals, legislation, budgets, the shape, size or location of an estate, a local outcome improvement plan under a community planning partnership, locality plans or corporate plans. The commissioning of services is particularly important, too.

On the point about having due regard, the guidance covers the need for active consideration in the strategic decision-making process. It also involves participation. It may be easier to demonstrate that due regard has been paid if an assessment involves those who may be affected by the decision. That is an important point regarding the scale of the challenge in understanding inequality and the inequality gap in a particular community or area. Understanding the scale of the issue in a particular community interest group or community is important.

The interim guidance outlines a very clear process, which I have touched on, for authorities to work through.

Jamie Greene: I appreciate that comprehensive response. Could I probe a little bit further on that? This strikes me as quite similar to some of the language that is used in other bills that the Parliament is scrutinising, such as the Islands (Scotland) Bill, where local authorities, public bodies and Government agencies must have due regard to island communities when making decisions with a specific outcome.

One of the things that we identified throughout our analysis of that bill was the "what if" scenario—if a decision is made that will have a negative effect or outcome, there is often very little ability to mitigate such decisions, generally as a result of financial constraints.

If I give an example, it may help. I by no means want to pick on any specific local authority but, in my own area, Inverclyde Council made a decision to close an alcohol day centre, which I think had a very negative effect on socioeconomic outcomes in that part of the world. That policy decision was made for financial reasons, because of limitations in the council's budgets. I dare say the possible

negative outcome resulting from that closure was identified.

What would the SSI before us and the additional duty have changed in that situation? That centre would probably still have closed. Is the duty actually giving us a way to ensure that such decisions might not happen in the first place? I do not want to be specific or to pick on anyone in particular, but that is a practical example.

Angela Constance: I am not familiar with that example so, as you will appreciate, I would prefer to speak in broader terms.

It is imperative that, when people are making decisions about the provision of a service, whether it is an alcohol-related service or a community care service—and there is a particular issue around the commissioning of services—they are able to demonstrate publicly, with a public record, how they are applying the fairer Scotland duty to big, strategic decisions.

Of course, specific decisions can always be challenged. They can be challenged politically, and members will not need me to tell them how to go about that. People can also explore judicial review regarding the fairer Scotland duty. It is the law—it is in legislation, and people are meant to do it. They are meant to be demonstrating how they are doing it, with a public record. Ultimately, people have political avenues to pursue, and the duty could be subject to judicial review.

Jamie Greene: That is very interesting and very helpful.

Finally, I have a technical question about the definitions. The Scottish ministers are listed as a public authority. The accompanying policy note says that that includes the Scottish Government, and there is a list of agencies. I would like to check, on a factual level, that that includes all publicly owned organisations, companies and subsidiaries. Examples include companies such as David MacBrayne, which is a publicly owned organisation. If it was to make a policy decision—for example, timetable changes on a ferry route that would have a negative outcome on a certain community—would that be subject to the duty as a result of the company's relationship with the Government, its ownership by the Government or its reporting lines to ministers? The set of things covered under the definition of "Scottish Ministers" is wide and varied, so I wondered how far that goes when it comes to who is accountable.

Angela Constance: I will ask Colin Brown to respond on that point in a moment, but the definition of "Scottish Ministers", in terms of core and main government, is as listed in the guidance. As the policy note says,

"'Scottish Ministers' includes the following: The Scottish Government, Accountant in Bankruptcy; Disclosure Scotland; Education Scotland; Scottish Prison Service; Scottish Public Pensions Agency; Student Awards Agency for Scotland; Transport Scotland"

and

"The new Scottish Social Security Agency, once established".

The organisation that you mention is not listed. It is important to remember that a three-point test has to be applied here. This is where we are bound by the architecture of the original 2010 act.

There are three important points. For organisations to be listed for the duty, they need either to be based in Scotland or to have a function that is in Scotland. They need to be devolved. The more challenging bit is that they need to be equivalent to the English bodies. The 2010 act lists a whole range of bodies south of the border, and we had to see where our equivalent bodies were—hence the importance of our consultation. It took a bit of exploring. Organisations could be broadly comparable but not exactly the same, given the devolved settlement.

Colin Brown (Scottish Government): The "Scottish Ministers" definition would refer to bodies that are within the umbrella of Scottish ministers in statute. It would not directly apply to a private company, because it is not set up that way.

Jamie Greene: To clarify, it was a publicly owned company that I mentioned.

Colin Brown: If the company is publicly owned—if Scottish ministers are directing that company—Scottish ministers are exercising functions of a strategic nature, and they are of course subject to the duty. Some of those bodies may come into it through the back door. That would have to be looked at with regard to the structure of a particular body, rather than in the abstract. They are not entirely outwith the ambit of the duty. Of course, bodies can voluntarily follow the principles of the duty without technically being subject to it.

Jamie Greene: I understand. The Gender Representation on Public Boards (Scotland) Bill, for example, included a schedule with a list of agencies, and there was therefore no ambiguity whatever around who would have to work under the duty covered by that bill and which organisations it would apply to, whereas the provisions before us are perhaps more open. If you have to indirectly go down the chain to work out whether an organisation is a public body or not, it may leave some ambiguity as to whether or not it is covered.

Angela Constance: I am not sure that there is ambiguity. We will take the opportunity to double-

check, but the question is whether and how a public body is set up by its founding legislation and whether it is established or designated via the Scottish ministers. I would disagree that there is ambiguity.

Colin Brown: To an extent, the design of the list affects the powers, and the existence of the three-point test affects what can be listed. As the cabinet secretary has already said, there is a constraint from the architecture.

Angela Constance: There are differences here. The bodies that are subject to the public sector equality duty are different. There is an overlap. Not all the bodies that are subject to the public sector equality duty, which is wider, are subject to the fairer Scotland duty, but the primary legislation was not ours—it is not our architecture. We are working within the constraints of that—we are getting on with it and making the best of it.

09:45

Alex Cole-Hamilton: I have a supplementary question linked to the definitions. I still bear the scars—as do many people who were involved in the passage of the Children and Young People (Scotland) Act 2014—because of the confusion about such things as the difference between the definitions of "wellbeing" and "welfare" and the triggers for information sharing. It is often in the interpretation of what we mean by legislation where things fall apart.

On definitions, are there issues around language and interpretation—which have clearly been raised in the consultation and which go beyond the question of to whom the duty applies—that we should be worried about?

Angela Constance: People were calling for clarity around definitions and approach. In my view, the interim guidance is clear on what is meant by socioeconomic disadvantage. It is clear on the definition of "due regard". For the sake of brevity, I will not read out the guidance, but it is fairly succinct.

The proof of the pudding is always in the implementation—in how people are able to actually use the duty to good effect on the ground. That is why we have an implementation period, so that, if there are issues with definitions and how they help or indeed hinder, we can revisit the matter, either in the final guidance or through revising regulations. If we need to consider some form of primary legislation, we will do so.

The Convener: Your letter covers the three-year implementation plan and the national co-ordinator post. The fourth aspect of your letter, which caught my eye, was

"the development of a new funding stream, offering small sums of money to help bring the diverse voices of people with direct experience of poverty and disadvantage more directly into strategic decision-making at local level."

You will know about the work that the committee did during our destitution inquiry on the voices of Gypsy Travellers, of young people with disabilities and of people in our asylum and refugee community. Are those the types of people's voices that you would like to hear in this regard, as well as wider community voices? I know that a huge part of the work that will be done concerns community input into the fairer Scotland action plan. Will those two things work together, and what types of voices are you hoping to hear?

Angela Constance: Helpfully, we have made the connection between socioeconomic disadvantage, or income poverty, and particular groups. We know that particular groups of people are more at risk of poverty.

In our work we have supported the poverty truth commission, and we have invested in three local versions of that commission in Dundee, Shetland and North Ayrshire. We are happy to continue to support that type of activity, and I have engaged with the new Dundee body. People will be beholden to reach into all communities, but that is something that we will keep a close eye on.

That is work that we support, not work that we lead. It is important that people locally and those with lived experience are leading and guiding the work. It is important that we are always sense-checking with one another, given what we know about the high risks of exclusion and poverty for particular groups. We know that 37 per cent of children in black and minority ethnic households are growing up in poverty, which compares with about 20 per cent of their white peers. We know that children growing up in a house where there is a disabled child or a disabled adult are at elevated risk. The same applies to children growing up in houses where there is unemployment, and so forth.

The interim guidance helpfully makes the connection. When we are talking about socioeconomic disadvantage, it is rather burdensome. Legally, it is the socioeconomic duty, but we are calling it the fairer Scotland duty, because that resonates more with our stakeholders. In the interim guidance, we recognise that the issues are about income, lack of wealth, people's background, communities and areas of deprivation. They are about place and about whether someone is from a particular community that is at an elevated risk of poverty.

The Convener: Is that one of the reasons why the Scottish Government is keen to share the rich data and information that it has as a community resource? That can also apply to public bodies.

How do you ensure that you do not just deal with the usual suspects? Some of the voices that we have heard are from people who might not ordinarily engage in community projects, and who might be sitting outside them. How do we ensure that their lived experiences are included in the process?

Angela Constance: That is where we are all beholden to consider this. It really irritates me when people say that folk get sick of being consulted. That is a demonstration that we are going about consultation in the wrong shape and manner. People do want to be engaged and to influence the resources, decisions and spend that affect their lives on a daily basis. If Government or other organisations are not successful in their engagement, that tells us that we are going about it in the wrong way.

The many different organisations in different communities do not need to be doing the same thing. The work that the poverty truth commission has done has been highly successful, and the local groups that I have referred to in Dundee, Shetland and North Ayrshire are going about their work in a successful manner. The experience panels offer another example. If we are not reaching communities, we are doing it wrong, and that means that we need to try something else.

The Convener: That is reassuring. Thank you so much, cabinet secretary.

There are no final questions from members. We now move on to agenda item 3, which is a debate on the motion to approve the draft SSI on which we have just taken evidence from the Cabinet Secretary for Communities, Social Security and Equalities. I ask the cabinet secretary to speak to and move motion S5M-10560.

Angela Constance: I do not have anything to add to my opening remarks and the answers that I have given to the committee this morning.

I move,

That the Equalities and Human Rights Committee recommends that the Equality Act 2010 (Authorities subject to the Socio-economic Inequality Duty) (Scotland) Regulations 2018 [draft] be approved.

The Convener: I now offer colleagues the opportunity to make comments. Nobody wishes to contribute to the debate, so you must have answered all the questions, cabinet secretary—thank you. We are very grateful to you.

Motion agreed to.

09:53

Meeting suspended.

10:00

On resuming—

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

The Convener: Good morning and welcome back to the Equalities and Human Rights Committee. Agenda item 4 is our continuing evidence on the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill. We are just about to conclude stage 1 consideration of the bill, and we will hear from the Cabinet Secretary for Justice this morning.

Before we move to the evidence-taking session, I wish to state that, last week, the committee took evidence in private session from men with historical convictions who plan to apply for a disregard. The clerks are preparing a note on that meeting, which will be included in our stage 1 report. The two men who took part are happy for us to do that, although their evidence will be anonymised.

I put on record my thanks, on behalf of the whole committee, to the men who met us last week. I am sure you will agree that, when they shared their personal stories, it put a human face on what the bill means, showing us how important the proposed legislation is to them and how it will improve their lives once it is enacted. I am sure that members will keep their stories fresh in their minds today as we talk to the cabinet secretary.

On that note, I welcome you to the committee this morning, cabinet secretary. It is not often, when a committee is going through a bill process, that we are at one about how important the bill is and can see the difference that it could make to people's lives. We are really happy to be doing this piece of work in the committee.

I am keen for you to give us some opening remarks, cabinet secretary. We have taken evidence on a number of areas, and the evidence session that we had in private last week was the icing on the cake for us. We have a number of questions for you this morning, but, if you could give us an opening statement and put things into context for us from your point of view, that would be very helpful.

Michael Matheson (Cabinet Secretary for Justice): Thank you, convener, for inviting me to give evidence this morning on the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill. It may be helpful to the committee if I briefly set out the context for the new legislation.

The bill is intended to deal with the on-going impact on people's lives of discriminatory laws that criminalised same-sex sexual activity between men. It makes provision in two separate but connected areas. First, it provides a pardon to people who were convicted of historical sexual offences for activity that is now legal. Secondly, it puts in place a scheme to enable a person who has been convicted of a historical sexual offence to apply to have that conviction disregarded, so that it will never be disclosed—for example, as part of an enhanced disclosure check.

The two schemes apply to offences that were used to prosecute sexual activity between men which, if it occurred in the same circumstances today, would be lawful.

The pardon provides that a person who has been convicted of a historical sexual offence is pardoned for that offence if the conduct that constituted the offence would not be criminal on the day on which the eventual act comes into force.

The pardon is symbolic. It provides formal recognition that the person should never have been punished. In contrast with the approach that is being taken in England and Wales, it is automatic. A person does not need to make an application in order to be pardoned.

The bill also provides for a disregard scheme, which enables a person with a conviction for a historical sexual offence that criminalised same-sex sexual activity between men that would now be legal to apply to have that conviction disregarded, so that information about that conviction does not show up in any disclosure check that is carried out when that person applies for certain work or voluntary roles.

Whereas the pardon is a symbolic matter, the disregard scheme has a real practical benefit attached to it. The bill provides for a presumption in favour of granting the disregard. That is to say, the disregard is granted unless it appears either that the conviction is not actually for a historical sexual offence at all or that the conviction was for an act that remains illegal today—for example, because it concerned non-consensual conduct or because of the age of the complainer.

When a disregard is granted, the bill provides that official records must be updated so that information about the conviction is removed or annotated in such a way as to make it clear that it should never be disclosed.

The bill also provides that, when a disregard is granted, the person who was convicted of the offence is to be treated for all purposes as not having committed the offence and not having been charged, prosecuted, convicted or sentenced for that offence. That means, for instance, that it would not be lawful for a potential employer to discriminate against a person because they have such a conviction.

I hope that that is helpful. I am, of course, happy to answer any questions from committee members.

The Convener: Thank you very much, cabinet secretary. I will take questions from members in turn this morning, as they have all been pursuing different areas of the bill.

Alex Cole-Hamilton: Good morning, cabinet secretary, and good morning to our colleagues from the Scottish Government.

We have been struck by the evidence that we have received at stage 1. It has been compelling, dignified and very striking. We learned in a previous evidence session that, in countries where this process has happened before—for example, Germany—an element of financial compensation is paid out to those who apply for a disregard. There is an automatic basic payment, and an enhanced payment is made if additional circumstances are identified. It was clear that the majority of the people whom we took evidence from had not even thought about compensation, and it was certainly not a motivating factor for them. They suggested that it was neither here nor there to them—the bill was about righting a wrong.

However, we also heard from people who suffered financially. They perhaps had to pay a fine as part of their sentence, or they had to pay very significantly through their career prospects as a result of having a criminal conviction. We heard from one gentleman who was clear that it had hampered his career progression. What consideration—if any—has the Scottish Government given to awarding at least a basic level of compensation, perhaps with an enhancement, to those who come forward?

Michael Matheson: You raise a very important issue. When we were considering introducing this piece of proposed legislation, the principal focus was on providing a disregard, particularly for those who continued to have the offences on their criminal records, and on providing a pardon across the board to those who had been convicted of the offences. As you say, it was about righting a wrong, recognising that there was legislation in this country that was discriminatory—it was state sanctioned. The representations that we received and the views that were expressed to us were about the apology, the pardon and the provision of a disregard.

The challenge that I have around the idea of compensation is that, although only a limited number of men were convicted of the offences, a greater number of men were affected by the very fact that there was legislation that discriminated

against men who were gay or bisexual. The reality is that it would have impacted on their lives in different ways, although they may not have been convicted of offences.

There is, therefore, a danger of creating an arbitrary divide between those who were convicted of an offence and those who were not convicted of an offence but who were affected by the very fact that there was state-sanctioned legislation that discriminated against the type of sexual relationship that they wished to have. I am of the view that that would be an arbitrary division that I do not think is appropriate. To some degree, it would create a hierarchy of those who may have been more affected by the law than others. In reality, such discriminatory legislation should never have been in force in the first place.

For those reasons, and having considered the matter, I do not think that a compensation scheme would be appropriate. It would create an arbitrary divide between those who were convicted and those who were not. It would not recognise the fact that thousands of men were affected by the very fact that there was discriminatory legislation in place, even though they may never have been convicted of an offence. A compensation scheme would potentially introduce that arbitrary type of divide, which I do not think is appropriate.

Alex Cole-Hamilton: That view was certainly expressed by the majority of people who gave evidence, and, as a committee, we are probably coming round to that way of thinking.

It was amusing when one of the witnesses who gave evidence privately last week said, "Well, you could always pay me my 40-shilling fine back." The point that he went on to make was exactly what you have said about creating that arbitrary distinction.

I will move on. Although it is clear what the bill does to criminal records—we all accept that there will not be a deletion of the criminal record, because it is important that we do not accidentally preside over a sort of revisionist history of what happened in that period, albeit that the facts will be disregarded—evidence of sentencing can be found in other places as well. For example, in a very small number of cases, there may be medical records showing medical interventions that were made in the 1950s, 1960s and early 1970s as a result of sentencing or as a sort of alternative to custodial sentencing. It might not be appropriate for that information to be deleted from medical records, but there may need to be a mechanism by which the appellants can have something attached to their medical records explaining what happened to them or somehow having it disregarded. Is any consideration being given to that side of things?

Michael Matheson: The legislative provisions around medical records are somewhat different from those concerning criminal records. The challenge is that the proposed legislation addresses individuals who have criminal convictions for offences that would not be considered to be a criminal offence today.

The challenge with medical records is that the medical procedure took place. Although there are issues about whether that medical procedure should have taken place—our views on that have changed—the reality is that it did take place and is part of the person's medical history. In my view, it would be extremely difficult to erase that from their medical record. There would be a potential risk that, if someone had undergone a particular medical procedure, their medical record would no longer be complete, which might be relevant at some point in the future if their medical history needed to be taken into account for other procedures or treatments. It would be for the committee to seek medical advice on whether that view is entirely correct, but my suspicion is that such information would be important.

In addition, medical records are disclosed only in very limited circumstances, which is different from the disclosure of criminal records. Medical records are often disclosed only to other clinicians for the purpose of their awareness. Such information is not of the type that is disclosed through a disclosure check, for example, when someone seeks employment.

The circumstances in which the information would be provided are different, and there is an issue around someone's medical history potentially no longer being complete if records of certain medical procedures were to be erased.

The other element worth keeping in mind is that there is a process that patients can go through in accessing their medical records and challenging information that may be contained within those records, if they choose to do so. However, the purpose for which medical records would be used is very different from that of criminal records. There are potential practical and clinical challenges around altering people's medical records, given that they form part of their medical history.

10:15

Alex Cole-Hamilton: How will the bill apply to those people who are living in the United Kingdom now who have criminal records for the offences that we are talking about, which are no longer offences, who were prosecuted in other jurisdictions—perhaps overseas? How can we extend the provisions of the bill to ensure that people who are subjects of this country can have

the disregard irrespective of where the sentence was handed down?

Michael Matheson: The disregard applies to legislation that is relevant to Scotland or the UK. The challenge in extending it on an extra-jurisdictional basis is that the application of laws in other countries is different. The thresholds are different, and the rationale behind the law concerned will be different.

It is worth bearing in mind that the disregard is intended to remove the matter from a person's criminal record, and Disclosure Scotland would not normally hold information relating to offences that took place in other jurisdictions on people's criminal records here. If a disclosure check took place, Disclosure Scotland would not necessarily hold that information and it would not be disclosed at that point. As I understand it, Disclosure Scotland considers offences that have taken place outwith our jurisdiction only when an enhanced disclosure check is undertaken. In such circumstances, that consideration would broadly relate to protected persons' roles—people working with children and young people—and, by and large, would deal with offences relating to child sexual offences in other jurisdictions, which Disclosure Scotland may wish to check for.

Disclosure Scotland has an arrangement in place with 12 other European Union member states, I think, for the sharing of that information as and when that is appropriate. However, the disclosure checks that take place for employment here—even the enhanced disclosure checks—would not necessarily contain the information about prosecution in another jurisdiction if it was not relevant to the post that the person was applying for or working in.

The challenge is that the thresholds, the purpose of the legislation and the nature of its application in another jurisdiction would be different from here. We would not necessarily have access to court records, for instance, so that we could scrutinise them in detail in the same way. The proposed legislation is limited to Scotland and the UK for the reasons that I have mentioned and because of some of the practical and operational difficulties that would stem from what you suggest. Disclosure Scotland would often not hold that information anyway.

The Convener: Before I move on to our next colleague, I note that the questions that Alex Cole-Hamilton has been asking on compensation are ones that he has been asking everyone, and we have gathered lots of evidence on the issue. The gentleman who asked us last week, "What are you going to do? Give me my 40 shillings back?" went on to say that, if there was to be a compensation scheme, the money should be spent on awareness raising of the eventual act, when it comes into force, and on support—whether that is legal aid or other support for people who need it to navigate the system. Might the Government consider using the money to raise awareness and support people rather to establish what might be, in a sense, an arbitrary compensation scheme?

Michael Matheson: With the will of the Parliament and with its support for the bill, we will consider having a public information campaign. We intend to pursue that by working in partnership with third sector organisations to publicise the provisions in the eventual legislation and the process for applying. The idea of providing financial resource to facilitate awareness and understanding of the proposed legislation is something to which we are already giving consideration.

Turning to your second point, on the issue of legal aid, my intention is to make the application process as straightforward as possible. I would like to avoid the need for individuals who wish to apply for a disregard to have to engage any professional expertise to support them in making that application.

We are giving quite a lot of thought to how we make the application form as straightforward as possible while ensuring that it provides the necessary information to allow us to consider the application. I want to avoid the process becoming one in which people feel that they must seek legal representation. However, an applicant may wish to consider whether they require legal representation if they decide to appeal a decision not to remove an offence from their criminal record. Once I have considered an application, the applicant will be able to appeal to a sheriff for reconsideration. We are looking at the existing rules and considering how legal aid may be made available to someone in those circumstances.

I hope that our public information campaign, our work to ensure that the application process is straightforward and our consideration of how existing legal aid rules would apply to the appeals process provide assurance of our commitment that the legislation will work as effectively as possible and that individuals who require legal representation will be provided with additional support.

The Convener: Thank you, cabinet secretary. My colleagues have a few more detailed questions on those areas.

Gail Ross (Caithness, Sutherland and Ross) (SNP): Good morning, cabinet secretary—I thank you and Patrick Down for coming along today. Everyone from whom the committee has taken evidence has warmly welcomed and been very supportive of the automatic pardon. However, a small number of people asked whether the

disregard scheme should be automatic, so we took more evidence on that. Police Scotland explained in evidence that some of the offences in question may well still be offences, so an automatic disregard would not be possible. In addition, many cases were prosecuted under obscure byelaws relating to breach of the peace and things like that. Also, we heard that some men may simply wish to keep such matters in their past rather than have them brought up again.

We also spoke with witnesses about the application process; the convener touched on the question of how you will publicise that process. However, I have a question about the form itself. Last week, we saw the English version of the form, and it was put to us that it is perhaps a little bit overcomplicated. You mentioned just now that you want the process to be as simple as possible. Can you tell us what the form here might look like?

Michael Matheson: First, I will deal with your initial point about an automatic disregard. It is important to recognise that we drafted the bill to deal with both common-law and statutory offences. If someone had been convicted under a common-law offence such as breach of the peace, we would be able to understand the exact nature of the offence only when we scrutinised the police records and court reports. Gail Ross is right to point out that some offences for which individuals were convicted remain criminal offences—for example, if an act was non-consensual or involved a person under the age of 16. The disregard process must involve scrutiny in order to validate a person's right to have a conviction disregarded.

One of the benefits of there being a process already in place in England and Wales is that we can learn from the experience there; we have already identified the need to avoid producing an overly complicated form. I cannot set out just now specifically what our form will look like, but I assure you that we are seeking to ensure that the process is very simple and straightforward. We will try to achieve that aim as best we can.

I am conscious that many of the offences occurred a considerable time ago, so it is important to ensure that we capture as much information as possible from the person who makes the application. We are talking about pre-1980 offences, so people's recall of dates and exact circumstances may have changed. It is important that we allow people to provide as much information as possible for us to take into account. When we draw down criminal records from Police Scotland and information from the Scottish Courts and Tribunals Service, they will give us a higher level of information and detail.

At present, I cannot give any specific information about the form, but I assure Gail Ross that we are learning from the experience in England and Wales and seeking to draft the form in a fashion that will ensure that it will be straightforward to complete. I anticipate that some road testing will be undertaken before it goes live; for example, we will work with third sector organisations and engage with individuals to test how straightforward they find the form before it is introduced.

Gail Ross: Once the scheme is publicised through third sector organisations—Disclosure Scotland has already written to the committee to say that it is happy to help with that—how will people go about the application process? Where will they find the form? Will it be available to download? Can people get it on paper? How will the process work in practice?

Michael Matheson: Our intention is that the form will be downloadable—people will just be able to take it off the web and fill it in. I do not want to say just yet that it will definitely be possible to fill in the form online, in case there are technical issues or other problems. I think that it should be possible, but I am not an information technology guru.

I hope that individuals will be able to contact the third sector organisations with which we are working. Those organisations will be able to send out forms, and they may have links on their websites. People can also use the Scottish Government website to contact the Government or they can contact MSPs, who could download the form and send it out. The system should be open, transparent and readily accessible. Given the nature of the information that will go on the form, I expect that we will provide explanatory notes to set out what we are looking for in the various sections in order to make the process as straightforward as possible.

Gail Ross: The convener touched on legal aid. It is reassuring to know that that will not be an issue—we hope—if the process is going to be quite straightforward. However, what about emotional support? Last week, we heard in evidence that there might be men out there who might find it very difficult emotionally to drag all this up again. How should we handle that?

Michael Matheson: That is a valid question. That is also a reason for not having an automatic disregard. There will be men who want to leave things in the past and who do not want to engage in the process.

I am happy to explore whether we can seek assistance from third sector organisations, which may be able to provide support to individuals who require assistance in completing the form. That may include not only practical assistance but emotional support, given that people who are going through the process will be reliving difficult

incidents from their past. I am happy to take that point away to explore with those organisations whether there is a mechanism by which we can provide practical and emotional support for individuals who require it.

Gail Ross: Thank you. That is very reassuring. Finally, do you have any idea how many men the legislation is likely to affect?

Michael Matheson: The scheme in England and Wales has been operating since 2012. To date, just over 250 applications have been made—Patrick Down will confirm the number.

Patrick Down (Scottish Government): The scheme has received 254 valid applications, excluding applications relating to assault, fraud or other offences that have nothing to do with the legislation.

Michael Matheson: Based on a proportionate share of those figures over a five-year period, we anticipate about 25 applications. However, the definition of a sexual offence in the Scottish bill is much wider than it is in the legislation that covers England and Wales, so it could draw in a greater number of applications.

On the flipside, it is worth keeping it in mind that the Scottish requirement for corroboration, which does not exist in England and Wales, could play a part in reducing the number of applications, because there may have been fewer such convictions in Scotland in the first place.

10:30

I cannot be accurate—I can give only our best estimate based on the experience in England and Wales, which suggests that the number of applications will be in the mid-20s. However, the number could be greater, given that our bill defines a sexual offence more broadly, which allows it to take in a much wider group of people. Nonetheless, the scale will be very limited, even with a threshold of 25 applications, and the numbers will certainly be manageable.

The Convener: There are some variables in that regard. Stonewall UK suggested to the committee that many people in England and Wales have not applied because the application process is too complicated or too much for them. We just need to be ready: that is the watchword.

Mary Fee: Good morning, cabinet secretary. The pardon will apply to all men, living or dead. In previous evidence sessions, I have used the following example, and although I accept that it might be extreme, the circumstances will exist for many families. A family might want to clear the name of a dead relative, and the individual might have taken their own life because the shame and trauma of a conviction were too much for them.

Setting that to one side for a moment, there will also be individuals who lived with the shame and trauma of their conviction every single day. It may have affected the way that they led their lives, their job opportunities and how they conducted themselves, and their family will be acutely aware of that. Families may also be aware that, if the individual was still alive, they would apply for the disregard. Have you given any consideration to that, or will you consider doing something about it?

Michael Matheson: We have given that matter some consideration. I acknowledge Mary Fee's point; the issue is a valid one to consider. The reason why there are no such provisions in the bill is that the disregard is for the purpose of a disclosure check, which would not apply to a dead person. In addition, the police do not normally hold criminal records on dead people, and criminal records are an important element of the checks in the process of deciding whether the disregard should be applied.

I understand that, in some circumstances, a family may wish the disregard to be applied, despite the fact that it is for the purpose of a disclosure check. I am happy to give the matter further consideration. If there is a means by which a disregard could be achieved in such cases, I would not be opposed to it. I suspect that the number of such cases would be very small, anyway.

However, I offer alongside that the warning that families might not, in many cases, have the level of detail that would be necessary to enable us to undertake proper checks, given that the individual who had been convicted would no longer be with us, and given that we could not access criminal records because Police Scotland would no longer hold them. In addition, there is a potential danger that if a family applied for a disregard and we did not have the necessary background information and the criminal record, we could end up—even with a presumption in favour of the disregard—saying that the disregard would not apply. In such circumstances, we would risk compounding the anxiety and concerns of the family.

As I said, I am not opposed in principle to such applications, but there are potential unintended consequences. We need to understand the risks more fully before we make a judgment on whether that would be the right thing to do. I have set out the principal reasons why the bill does not currently include such a provision. If the committee, given the evidence that it has heard, thinks that the bill should include that provision, I will certainly consider the matter once I have received its stage 1 report.

Mary Fee: I appreciate those comments, and I welcome your willingness to look at the matter. We heard in previous evidence that it would help even

if the family could be sent a letter to say that their relative would not, given the circumstances of their case, have been convicted today.

Although I accept what the cabinet secretary has said, the disregard is symbolic. I appreciate that there would be obstacles in terms of lack of information about the conviction, but a number of organisations—and, I know, a number of families—would appreciate the inclusion of such a provision in the bill. The committee should perhaps consider how that could be done, but I accept your comments. As you said, offences that could otherwise be disregarded might still be seen as crimes because we do not have the information and the detail to grant a disregard.

Michael Matheson: As I said, there are potential negative consequences. We have to be careful that we do not, with the intention of trying to do the right thing for families, end up compounding problems. I am very open to considering the committee's views on the matter in its stage 1 report, and we will reflect on those views.

Mary Fee: That is very helpful. Thank you.

Annie Wells (Glasgow) (Con): Good morning, cabinet secretary. A lot of my questions have been answered, but I have one more question. The bill includes an extensive list of offences. Is it extensive enough, and will there be scope to add more offences if necessary?

Michael Matheson: That question is important, because the definition of a sexual offence in our bill is much wider than it is in the legislation in England and Wales, and it covers both common-law and statutory offences. We have put in place a catch-all provision because we are conscious that some individuals may have been prosecuted under local authority byelaws of which we have no real knowledge.

Annie Wells: We heard about some of those byelaws at our meeting last week.

Michael Matheson: Such circumstances would become apparent only when someone made an application and we considered the court records. As ever, the danger in listing things is that we leave something out. The catch-all provision in the bill allows us to pick up convictions under obscure byelaws that local authorities produced, in order to ensure that individuals do not find themselves being excluded from the scheme because we were not aware of a byelaw. I suspect that some local authorities are no longer aware of such byelaws, which might have been put in place many decades ago.

We have included in the bill a broad range of statutory and common-law provisions—we have got that right—and the catch-all provision will allow us to consider a disregard request in relation to offences under obscure byelaws that may have been used.

The Convener: At our meeting last week, we heard about one of those laws—I think that it was the Edinburgh local authority of the time's cleansing byelaws of 1839. There were a lot of very interesting provisions in it, including one that related to conduct in public toilets. We do not envy you your job of looking through all those records, cabinet secretary.

Jamie Greene: We can obviously learn from the experience in England and Wales, and we have an excellent opportunity to shape a bill that meets our intentions. I warmly welcome the bill and thank you for introducing it.

I have a couple of short questions. First, would a person who currently lives in Scotland but was in the past convicted of an offence in England or Wales have to use the system for England and Wales or would they be able to take advantage of the Scottish legislation?

Michael Matheson: If the person was convicted in England or Wales, they would need to use the system that covers England and Wales.

Jamie Greene: That leads me on nicely to my next question, which picks up on the point that Annie Wells made about the wider scope of the bill.

The application form for the England and Wales scheme, which we saw last week, states specifically that people cannot apply for a disregard if the offence for which they were convicted took place in, for example, a public lavatory. We have raised that with some witnesses during our evidence sessions. Their understanding is that a person in England or Wales would not be able to apply for a disregard in those circumstances, but someone in Scotland would. That opens up an element of confusion. When the scheme goes public, will people out there be wondering, given the provisions in the scheme that covers England and Wales, whether or not their convictions are covered under the Scottish legislation? How do we address that issue so that, when the system goes live in Scotland, people will be forthcoming in applying for a disregard?

Michael Matheson: Jamie Greene has highlighted an important issue. The scope of the disregard scheme in England and Wales is limited to crimes of gross indecency and buggery; it does not cover offences that were used to criminalise activities such as—but not limited to—soliciting for prostitution. The provisions in that scheme are much more limited.

Part of the challenge for the public information campaign in Scotland will be to find sensitive ways

in which to explain how the legislation operates and the types of offences for which a disregard can be applied. That must be carried out sensitively, because we do not want to compound what was discriminatory legislation in the past, of which many people are no longer aware, by unduly raising awareness of it. I hope that the campaign will help people—even those who do not understand the legalities around the offences that the legislation covers. I hope that people who were convicted of offences of that nature feel that the process is straightforward, open and accessible, and that they feel able to apply even if they are unsure, simply in order to check. The combination of a public information campaign and the open nature of the application process can help to address some of the issues and prevent confusion.

Jamie Greene: Thank you for that very helpful answer.

I have another question—again, I suspect that I know what the answer will be, but I will ask it anyway. In previous sessions, the committee explored the situation of current or former members of the United Kingdom armed forces who served in Scotland and currently reside here. In some instances, people were discharged from the armed forces for being gay, but they had committed no common-law or statutory offence. They will not be covered under any legislation, either in England and Wales or in Scotland.

The committee has written to the Ministry of Defence—which, understandably, is aware of the situation—to ask for its views, and we have also written to the UK Government. If someone previously served in Scotland and still resides here—in other words, let us imagine that they have never crossed Hadrian's wall—but they were convicted under English and Welsh law within the jurisdiction of the armed forces, they will not be able to take advantage of the Scottish legislation. Could any further work be done to explore the legalities of that issue in order to see whether any of those people could take advantage of the Scottish legislation?

Michael Matheson: The committee has identified a very important issue. I am grateful to the convener for sharing with me the letter that she has written to the MOD on the matter. The MOD should recognise that, as wider society is righting a wrong, the military also has the opportunity to do so. It can look at military rules that previously applied in this area and the discriminatory nature of the way in which those rules were used against individuals in the armed forces.

The bill focuses on Scottish criminal law. If someone was convicted under criminal law in England and Wales, they would have to apply for a disregard under the scheme that covers England and Wales. If the conviction was issued under military rules, it would be for the military to put in place a disregard or pardon scheme that would reflect how the military rules process operates.

To be frank, I think that it would be difficult for the MOD to come back and say, "No—I don't think we should do anything." There is a scheme in England and Wales, and we are about to introduce a scheme in Scotland that has cross-party support. It would therefore be difficult for the MOD to say anything other than that it will look at the matter and try to find a mechanism that allows it to introduce a disregard or pardon scheme in the context of how military rules operate. I certainly encourage it to do so.

It will be interesting to see the response to the committee from the Ministry of Defence. If, after the committee receives a response, you feel that it would be helpful for the Scottish Government to make representations to the MOD or the Secretary of State for Defence to address the situation of service personnel who are Scottish or were based in Scotland, I will be more than happy to do so. That might assist in bringing some focus to the matter. However, I think that it would be difficult for the MOD to come back with anything other than a positive confirmation that it is prepared to look at the matter and that it will try to find a mechanism that will ensure that military rules reflect the current position of wider society on the issue.

10:45

Jamie Greene: Thank you, cabinet secretary. It is not for me to pre-empt the MOD's response in any way but, anecdotally, our discussions with individual members of the armed forces have all been very positive in that respect. There has been a cultural shift in the organisation, so I am hopeful—I know that the issue has certainly been recognised. I just wanted to mention it to you because people who are now resident in Scotland and who were discharged or convicted for offences that were committed in Scotland might be wondering whether the bill can help them in any way.

On a technical point, I suppose that, if someone was convicted of a common-law offence and an armed forces offence in Scotland, they could still apply for a disregard in relation to the legal aspect if not the military aspect.

Michael Matheson: Yes, they could do that, although the conviction would still be on their military record. My understanding is that, in the past, individuals were discharged from the military for the very fact of being gay. If their family looks at their military record, they will see that that is recorded there. It seems reasonable to me that the

military should be looking to correct that in the same way that we are seeking to do so through our criminal justice system.

The Convener: At our meeting last week, we saw some of the military acts that were imposed on people, which included some very stigmatising language. We are very grateful for your support in the work that we are taking forward with the MOD.

There are a couple of supplementaries, because while we have been talking, members have come up with more questions, which is always a good thing. Alex Cole-Hamilton can go first.

Alex Cole-Hamilton: Mine is a very technical question—it concerns a very small number of people who might be affected by the bill. For completeness, we do not want to miss this opportunity to right wrongs across the board, so we have to consider every possibility that might arise.

The committee discussed the fact that, certainly within living memory—I am talking about the 1950s and 1960s—people would be sentenced and would, to hide their shame and embarrassment, use an assumed identity or an alias in that process. Are you content that, if there were people in Scotland to whom that applied, they would, if they came forward, be able to obtain a disregard even though they might be applying under a different name?

Michael Matheson: Do you mean people who were convicted under a different name, or who used an alias at that time?

Alex Cole-Hamilton: Yes. I am talking about a range of circumstances.

Michael Matheson: I think that that would probably be a criminal offence in itself.

Alex Cole-Hamilton: They might be admitting to fraud.

Michael Matheson: Yes.

I am confident that the scheme makes the necessary provision to enable us to consider the criminal records that the police and the courts hold even if someone has changed their name since that time, but I think that if someone changes their name, their criminal record remains with them.

Alex Cole-Hamilton: I was thinking of cases in which an assumed identity was taken—which might have been a fraud in and of itself—because someone was seeking to avoid embarrassment and all the rest of it. You have kind of answered my question.

Michael Matheson: Someone in that position might want to consider carefully what they do. They might want to take legal advice. However, I suspect that the chances of something like that happening are very small—

Alex Cole-Hamilton: So we do not need to cover that.

Michael Matheson: If someone who was applying for a disregard had previously used an alias, we would certainly consider that as part of the process, although—for the reasons that I mentioned—the person might want to take advice before they make an application and highlight that point.

Gail Ross: I recall that the definitions in the bill came up as an issue in a previous evidence session. Is there provision in the bill for people who have changed their gender since they were convicted?

Michael Matheson: Is there provision for them to make an application through the disregard scheme? If they have changed their gender and they still have a criminal record that is identified as theirs as a result of being prosecuted before 1980, that would be the case. The reality is that, if someone has changed their gender, their criminal record, with any previous convictions that they received, remains with them. They would still be covered by the legislation as it stands.

Mary Fee: I have a couple of questions about record keepers. Section 10(5) of the bill allows the Government to make regulations that would list relevant record keepers. Have you given any thought to what a comprehensive list of record keepers would look like? If so, could you share that information with us? Should that Scottish statutory instrument be subject to the affirmative or the negative procedure?

Michael Matheson: On your latter point about the procedure that we will use, I will come back with a clarification. The principal record keepers will be Police Scotland, which keeps criminal records, and the Scottish Courts and Tribunals Service, which holds records on the court element of the process. The only other body that would keep records is National Records of Scotland.

With regard to procedure, have we—

Patrick Down: It would be the negative procedure.

Michael Matheson: We would use the negative procedure for the regulations. The two principal bodies that hold the records are Police Scotland and the SCTS.

Mary Fee: I have a question about the records that are held by National Records of Scotland, which relates to an issue that we have probed in previous evidence sessions. We will be unable to delete or remove anything from national records. The equality organisations have expressed the

view that, if we could do that, we would in effect be changing history, and it is really important that we do not try to change or remove anything that has happened. The SCTS has said that it would be open to adding something to national records to say that, while a conviction exists, there would no longer be a conviction in the same circumstances today. I would be interested to hear your views on that.

Michael Matheson: The reality is that national records for individuals do not become available until 100 years after someone's death, so people will not be able to access them in the near future. I can check with the SCTS exactly how it would want to achieve removal. I am not instinctively opposed to that, but I agree that these matters are an important part of our history. It is important that we recognise that we got it wrong—badly wrong—in that period of history, and we need to reflect on the past as part of our learning for the future. If there is a mechanism by which the SCTS believes that it can achieve that removal, it can do so. However, that would apply only to those who go through the disregard scheme—it would not apply to others. I am also conscious that, if people compare two sets of records in future and they see that one set has a correction because the person applied through the disregard scheme while the other set does not, they might wonder whether that implies some form of guilt or a difference in some way.

That issue notwithstanding, I am happy to check with the SCTS how it would seek to achieve that. If there is a mechanism by which it is happy to make corrections to national records to highlight such matters, I am happy to support it in doing so.

Mary Fee: Okay—thank you for that.

The Convener: To follow on from Mary Fee's question, the SCTS raised some concerns with us regarding extract convictions and how we reach an agreement on the sharing of especially sensitive information. Do you have any comments on that, cabinet secretary?

Michael Matheson: I cannot give you any more information on that, but we are engaging with the SCTS to address any concerns and ensure that there is a mechanism by which we can access the appropriate information. At this stage, I can say that I hope that we will be able to address those concerns and allow the disregard scheme to be applied.

The Convener: On the issue of sharing sensitive information, you mentioned earlier that there is an agreement across a number of European Union countries on sharing some sensitive data, especially in relation to child sexual abuse, as well as to human trafficking—I think that that is right.

Michael Matheson: It could be, yes. Through Europol and so on, we exchange information with a range of jurisdictions across Europe. I think that your question relates to Disclosure Scotland and the information that it can access from other jurisdictions.

The Convener: Yes. Do we have any reassurance that Brexit will not affect that?

Michael Matheson: To be honest, I do not know what reassurance I can give you about Brexit one way or the other. I suspect that the scheme that is in place will have some European provisions around it, although it applies to only 12 countries at present, so it is not pan-European in the sense that it covers all member states of the European Union. I will need to check whether there is going to be an impact. There is absolutely no doubt that the exchange of criminal information post-Brexit will be more challenging than it is at present. The nature and extent of the challenge will vary depending on what the final outcome is, but there will be challenges.

The Convener: You can see why elements of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill will be of interest to the committee in relation to such issues and to equalities and human rights in general.

Michael Matheson: Absolutely. We need to consider things such as the European arrest warrant, which provides for fast-track extradition. Extraditions are normally dealt with through treaties, and the previous treaties with EU countries have since become extinct, so if we could not use the European arrest warrant, we would be back to making treaty arrangements. The timeline for extradition under treaty arrangements is much longer—in the cases that I normally deal with, it can take about nine months—whereas the European arrest warrant is used and executed within about 40 days. The process is much quicker. There is no doubt in my mind—as I have set out previously in Parliament—that there will be significant consequences for our criminal justice system as a result of Brexit. A key part of that will involve the flow and exchange of information.

The Convener: That is a much bigger topic for another committee session—in fact, it is probably one for many committee sessions to come.

I have a final question. The committee wrote to Disclosure Scotland to ask what action that organisation could take to highlight on the application form for a disclosure that people might have the right to have their conviction disregarded. Disclosure Scotland already holds some of the relevant information, and we want to increase awareness of the scheme. We received a very quick and incredibly positive response from

Disclosure Scotland, which listed a number of areas, including sharing and gathering of information and raising awareness of the legislation, on which it believes that it can work very effectively. Are you aware of that response to the committee? If so, what work are your officials doing to realise some of the aims that it sets out?

Michael Matheson: We have a copy of the letter that the committee received from Disclosure Scotland, which is very helpful. I will certainly encourage Disclosure Scotland to work to support the implementation of the bill and to put in place provisions to highlight the issues that you raise. That is one of the ways in which we can ensure that the scheme is brought to the attention of people who might want to think about applying. Public information campaigns only go so far, and highlighting the information to individuals could be very useful.

The Convener: We have eventually exhausted our questions to you, cabinet secretary. We are working on our stage 1 report, and we will get it to the Government as soon as it is completed. We are grateful for your evidence, and for the support from your officials during stage 1 of the bill process.

10:58

Meeting continued in private until 11:15.

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