OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities and Human Rights Committee

Thursday 8 February 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 8 February 2018

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EQUALITIES AND HUMAN RIGHTS COMMITTEE
4th 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:

Linda Fabiani (East Kilbride) (SNP) (Committee Substitute)
Anne Marie Hicks (Crown Office and Procurator Fiscal Service)
Detective Superintendent Stuart Houston (Police Scotland)
Gillian Mawdsley (Law Society of Scotland)
Raymond McIntyre (Police Scotland)
Paul Twocock (Stonewall UK)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities and Human Rights Committee

Thursday 8 February 2018

[The Convener opened the meeting at 09:32]

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

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

We have apologies from our colleague David Torrance. Linda Fabiani, who is a substitute member, has joined us. Welcome, Linda.

Agenda item 1 is continuation of our scrutiny of the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill at stage 1. We have six witnesses, so it is quite a big panel. I thank the witnesses for the written evidence that they have given us. We look forward to hearing from you. With us are Anne Marie Hicks from the Crown Office and Procurator Fiscal Service, Gillian Mawdsley of the policy executive team of the Law Society of Scotland, Detective Superintendent Stuart Houston of the specialist crime division of Police Scotland, Raymond McIntyre, who is a criminal records manager with Police Scotland, and Paul Twocock, who is the director of campaigns, policy and research for Stonewall UK. I hope that we will be joined soon by Derek Ogg, who has been held up.

There is not time for all of you to make an opening statement, so I will open with a general question. What are your thoughts on the general principles of the bill and any key aspects that we should scrutinise?

Paul Twocock (Stonewall UK): I thank the committee for inviting me to give evidence.

In short, Stonewall UK warmly welcomes the Scottish Government's bill and the approach that the Scottish Government is taking on it. We might go into more detail later about some of the differences between the approaches in Scotland and England and Wales.

Our two objectives for the legislation in England and Wales were to have an automatic pardon for people who are living and people who have died, and to widen the scope of the disregard scheme. As members know from evidence last week, we failed to achieve the first objective in England and Wales, but we were really pleased to have worked on a cross-party basis with Baroness Williams, who is the Government's spokesperson in the House of Lords, Lord Cashman, Lord Sharkey and others to achieve a commitment to the second objective. I would be really pleased to talk a bit about work that has been going on in the Home Office to widen the scope of the scheme. It is really important that the Scottish bill is going through now, because it gives the Home Office an opportunity to ensure that there is parity on the issue across the United Kingdom, particularly in relation to the disregard scheme.

Raymond McIntyre (Police Scotland): Good morning. I am here on behalf of national systems support as criminal records manager in that team. We are here to support the bill and to ensure that anything that needs to be done with police records technically and practically can be achieved. I will leave it to my colleague Stuart Houston to explain the wider policy and support from Police Scotland that there will be.

Detective Superintendent Stuart Houston (Police Scotland): Good morning. It is essential with the legislation that the police are able to recognise that people have had convictions for offences that are now no longer relevant or competent. We welcome that opportunity. People out there have been discriminated against and barred from certain occupations or even voluntary organisations because of a conviction that goes back a number of years. I am really glad that we have been invited to take part in this discussion and to talk about how we can make the process as efficient as we can. Raymond McIntyre touched on the fact that a lot of the records are held by Police Scotland. We want to ensure that we can do things quickly and in the most efficient way possible.

The Convener: The Law Society of Scotland gave us a pretty detailed submission, for which we are grateful. That submission went into aspects of the use of language. In Gillian Mawdsley's opening remarks on the general principles of the bill, will she tell us a wee bit about why the change in the use of language is important?

Gillian Mawdsley (Law Society of Scotland): Yes. In our submission, we said:

"The Bill employs neutral terminology similar to that employed by the Sexual Offences (Scotland) Act 2009".

We think that the use of language is important. We recognised that the bill

"deliberately does not apply to women",

and we addressed that. As we said,

"Language used in the past to refer to convictions for same sex activities has no place now in Scotland as the terms were both offensive and discriminatory."

That is why we welcomed in particular the drafting of the legislative intent behind the bill.

The Law Society of Scotland is happy to go over any points in our submission. In our role of wanting to achieve a fairer and more just society, we obviously welcome the premise of the bill and very much support it.

Anne Marie Hicks (Crown Office and Procurator Fiscal Service): Speaking as the last of the witnesses, I endorse everything that has been said. The Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill is an important piece of equality legislation that will help to modernise our country and bring us to where we should be. It is really important that its purpose is set out firmly and squarely in section 1, which acknowledges

"the wrongfulness and discriminatory effect of past convictions".

The Crown Office warmly welcomes the bill.

The Convener: I thank you all very much for your opening remarks, which put the bill into context for us.

Alex Cole-Hamilton (Edinburgh Western) (LD): Good morning, everyone, and thank you for coming. I agree that a historic and important bill has been entrusted to the committee.

Last week, we heard evidence on the bill from Tim Hopkins, who is the chief executive of the Equality Network. He made a very eloquent pitch on the importance of righting historical wrongs, and he gave us the interesting international example of Germany, where that has been done already. It offers a symbolic payment of compensation to men who come forward to apply for a pardon and a disregard. They also receive a certificate. Germany is the only country that we know of that is doing that. That symbolism has not been actively called for by equalities or lesbian, gay, bisexual and transgender rights organisations, partly because the people to whom the bill applies are not thinking about money; they just want to see justice served and a historical wrong righted. However, perhaps giving compensation is the right thing to do. Should we consider that being part of the bill? I will start with Paul Twocock from Stonewall UK, particularly because it is a campaigning organisation.

Paul Twocock: Our mind is with Tim Hopkins on that issue, which he wrote about briefly in his submission. The Equality Network did some research with gay and bi men in Scotland, in which a small number of people thought that compensation should be on the table.

The wider point is that all sorts of historic wrongs have been committed in the past against the wider LGBT+ communities. Those historic sexual offences convictions were particularly vicious, but there was discrimination throughout life. The question would be where compensation should lie for any number of LGBT people who experienced discrimination in the past. It would be unfair to compensate one part of the community that experienced one type of discrimination but not look at compensation for other parts of the community, so it is probably not the right route to go down.

People in Scotland have received the apology from the First Minister; it was very important for the people who were affected by those persecutory offences to hear directly from the First Minister. The legislation is clear that those convictions of gay and bi men should never have happened in the past, and that is the most important thing.

Anne Marie Hicks: I endorse what Paul Twocock has said about the issue of fairness. I was interested to read Tim Hopkins's evidence, which made a lot of compelling points. The issue is about fairness for people who may not have been prosecuted but whose lives may have had to change—by not doing certain things or not living their life in as normal a way as they might have wanted—because of the law. People who were prosecuted were not the only ones to be subjected to discrimination.

The issue is also difficult because some people may have died and some might not take advantage of the scheme because they are not aware of it. Compensation may end up being for only a small proportion of people, for the reasons that Paul Twocock has given.

Alex Cole-Hamilton: I will follow up with another of my lines of questioning from last week's meeting, which is about the reality that some men were prosecuted in jurisdictions outside the United Kingdom. They live in the UK but might still have a criminal record for a crime that is no longer illegal. What would be the process by which we could offer a pardon and disregard to people who are in that category?

Detective Superintendent Houston: Raymond McIntyre's role as record manager means that he may have knowledge of how convictions overseas are recorded, but we would have to see what is recorded and held in Scotland about convictions that are outwith our jurisdiction.

Raymond McIntyre: Overseas records would only come to light if active requests were made through the courts, fiscals or the police to bring that information to the UK. In the UK, information is available through the police national computer,

which is the central repository for England and Wales. Any of Scotland's information that is recorded on the police national computer is linked directly to the criminal records in Scotland, and we manage those records to the same extent that we manage any information on the criminal history system. The police forces in England and Wales manage their information under the disregard scheme that is in place in England and Wales. Does that cover your question?

Alex Cole-Hamilton: That is very helpful—thank you.

Mary Fee (West Scotland) (Lab): Good morning, panel. I will start with a question to Paul Twocock, because I am particularly interested in the impact of the legislation in England and Wales. How was it publicised, what impact has it had on the LGBT community, and has it had any impact on attitudes towards the LGBT community? I do not need to tell him that there has been long-standing discrimination against the community. Has the legislation helped to reduce that?

09:45

Paul Twocock: The real impact of the legislation is in indicating the progress that we have made. It will confirm, particularly for those who experienced the sharp end of those offences, that they should never have been prosecuted and that the Government acknowledges that it was wrong—that the justice system was wrong to pursue them in the way that it did. That will impact a relatively small group of people now, but it is so important for those individuals, and for the wider LGBT community, as another marker of the progress that has been made on attitudes. I will not expand on all the many other areas in which we still need to go further.

One of the key lessons that I would pick out to be learned from England and Wales is about the confusion between a pardon and a disregard. That confusion continues in England and Wales and it is a major problem in relation to increasing the uptake of the disregard scheme by people who would be eligible to have their crimes disregarded.

Despite the best efforts of Stonewall and other LGBT organisations to explain that difference, people in the LGBT community have not understood it. When people hear the word "pardon", they often think that it means that the crime has been deleted. They do not understand that, if they have a historical sexual offence, it will come up on a barring-scheme or criminal-records report if they apply for a job where that is relevant, so they will still feel the impact.

Because the Scottish legislation provides an automatic pardon, I would say that it provides a better foundation for explaining that difference. It says clearly that the Government and the justice system were wrong to prosecute people in that way and that is why they are receiving a pardon. However, the records still exist and, if the person wishes the record to be removed so that it does not come up during any barring-scheme check, they should apply for a disregard, which will be processed in the most efficient way possible.

It is important to get that message across. The Scottish Government will need to invest resources and time to publicise it and to focus on that difference, particularly with LGBT communities. It should work with LGBT organisations.

Mary Fee: Should it be just the Scottish Government that campaigns or should LGBT organisations campaign as well? Should there be guidance along with the bill to help with that?

Paul Twocock: Absolutely—it is a partnership. It is important that there is a partnership, because the LGBT organisations have access to those networks. It will largely be a relatively older LGBT population who will be eligible for the disregards, although there are instances of the offences being used right up until repeal in 2003 in the UK so, actually, the population that could be eligible covers quite a wide range of ages. It is important that there is a partnership and that the LGBT organisations are not just relied on to do it. The Scottish Government should use the opportunity of passing the legislation as a point for publicity, and it should think about how to reach all the gay and bi men who could be eligible for a disregard.

Mary Fee: Would it be a short campaign or a long one, to keep pushing home the message that people can apply?

Paul Twocock: Realistically, it is important for it to be a well resourced and thought-out short campaign. It is important that there are resources, which is perhaps where the partnership with LGBT organisations can be picked up, so that the LGBT information services have the right guidance for people who inquire about the disregard scheme later on.

The reality is that there is so much information and noise in society at the moment. If the right resources and thought processes are put into ensuring that we use the opportunity of passing the legislation, that might do the trick and we would perhaps then have a slightly better uptake than we have had so far in England and Wales.

Mary Fee: Last week, we asked Tim Hopkins about the impact of applying for a disregard. It can be traumatic, as the person relives things that have happened. It is traumatic not only for the person who is involved but for their family. In England and Wales, was any emotional and psychological support made available to people to

help them through the process? Should we consider doing that in Scotland?

Paul Twocock: Frankly, there has been no structured or funded emotional support for people who have applied for a disregard, apart from that offered through the normal services of LGBT organisations. For instance, when the Protection of Freedoms Act 2012 passed, we developed guidance that we published on our website, we received inquiries through our telephone information service and we provided signposting to other services, including counselling services, that were available to people. Along with organisations such as the LGBT Foundation in Manchester, we provided that signposting through the normal core information work that we do.

Linda Fabiani (East Kilbride) (SNP): On the specific point that Mary Fee raised, there will obviously be times when great sensitivity is required. How can we ensure confidentiality throughout the process?

Paul Twocock: That is probably an issue for the committee to respond to when it is thinking about the process. Ensuring confidentiality is of absolute importance and is, through the work that it has been doing since 2012, something that the team in the Home Office has a view on and has regard to.

An interesting aspect of confidentiality that the committee should perhaps consider is that there are individuals who have been prosecuted under offences in the past who have since changed their gender identity. There is a real issue about exposure of that transition in how the process will work: we should give due regard to how the process deals with such cases.

The Convener: There is an issue about how records are sourced, where they are kept and how they are used in the disregard process. Maybe Stuart Houston could give us some insight on that.

Detective Superintendent Houston: It is crucial that we ensure that the application process, if application is to the Scottish Government first, is a secure network that allows that to feed into the criminal records system, which is held by Police Scotland. It is good that the criminal records system is contained within one department that has access to criminal records: a person's criminal record is confidential material. We need to ensure that the process is robust, and that we say how the checks are done and what information we still hold. We need to ensure that we have that process in place at the right time.

I come back to my first point: there should be a clear, efficient and quick process when someone comes in. The issue is then about trying to find any historical information that is held, so we need to ensure that we can give the feedback and information that relate to an individual conviction.

Alex Cole-Hamilton: In respect of the language on disregard in the bill and whether a criminal offence is "removed" or "deleted", I think that those terms are interchangeable and that there is a difference between the UK legislation and the bill.

We heard a really interesting argument from Tim Hopkins last week about the importance of not deleting criminal records, although they can be disregarded or disapplied so that they do not appear on things such as protecting vulnerable groups checks. The physical and tangible record should be kept intact, because we do not want to preside unwittingly over some kind of revisionist history with the result that, generations from now, people will look at the criminal record and not find this stain on our conscience.

Where does the panel sit on that issue? Should we be actively removing records in their entirety, or should we retain the historical record but disapply them in all other respects? Perhaps, for a change, we can start with Stuart Houston instead of Paul Twocock.

Detective Superintendent Houston: Raymond McIntyre, as the records manager, might be in a position to answer that question.

Raymond McIntyre: Your point about revisionist history is interesting. To my knowledge, the criminal history system is not the criminal records archive for Scotland; that tends to be the court procedures, which are not used in vetting and/or barring people. In practical terms, to remove that information from the criminal history system would be to remove information that is unnecessary for police officers and unwanted by disclosure agencies. There are places from which information can be removed without damaging historical integrity, but there are other places from which—Alex Cole-Hamilton is right to point this out—the record of such activities and information about the existence of such legislation and persecution of people under it would not be removed. It is all about striking a balance; we need to do some analysis on how we will apply a disregard scheme and what we will do when we make such decisions under it.

The Convener: Because we have moved on to records, I will bring in Gail Ross, who last week asked about cross-border and national police records.

Gail Ross (Caithness, Sutherland and Ross) (SNP): Good morning, panel, and thank you for coming in and giving evidence.

I will follow on from a couple of points that have been made. In his written submission that we received for last week's meeting, Tim Hopkins said

that a small percentage of people would like disregards—as pardons will be—to be automatic, but we have heard various reasons why that is not possible. I wonder whether Police Scotland representatives can explain the difficulties with making disregards automatic.

Detective Superintendent Houston: As we have pointed out in our written submission, we need to look at applications case by case, because there will be convictions still on people's records for activity that might still be illegal. On consent, for example, prior to 1980 or 1981 recording of sodomy made no distinction between consensual and non-consensual activity. It would therefore be really difficult just to strike such a conviction off and to say that what happened was consensual.

There are other circumstances to take into account. For example, was there coercion? Was there an imbalance of power or what we would now call a breach of trust? Again, we need to look at such issues in order to make sure that a disregard would be the correct course of action—in particular, with regard to common-law issues. For statutory offences, the position is probably more clear cut and easier to understand—with, for example, the age of consent having gone from 21 to 18 and then to 16—but I have highlighted that we need to make sure that there is, in an offence, no other behaviour that might still be termed "criminal".

Raymond McIntyre: Stuart Houston is absolutely right. This is about context and circumstances, and we need to get access to whatever information still exists about cases. Exceptional circumstances would include coercion or age factors that would mean that the behaviour in question is still criminal but, at the other end of the scale, there might be clear evidence that a case was nothing more than a person being persecuted because of their sexuality. Our target is to have a disregard scheme that enables us to use information as efficiently and effectively as possible.

The idea of an automatic disregard scheme and dealing with everything in one fell swoop is challenging. The other end of that scale is to say that we will deal with cases only on a come-to-notice basis, which would be by application. Those are the two ends of the scale, but there might be a process that could be practically achieved that falls somewhere in the middle and would wipe away a substantial amount of information that we know was based on persecution, but would retain some of the stuff that needs a little more investigation and a bit more context.

10:00

Paul Twocock used the word "partnership"; it is about getting the right people involved in deciding how we structure the process and go about it. In our written submission, Police Scotland has suggested that some work can be done around being more effective, efficient and consistent in how the scheme will be applied.

Gail Ross: Just for the record, if the scheme comes to pass, is publicised and a gentleman out there wants to apply, how will the process work? How will he go about it, where will he get the form, where will the form go, how will the record be searched and how will information be taken off the record? Will you give us a step-by-step explanation of how the scheme will work?

Detective Superintendent Houston: I can cover the first part of that. Part of the discussion that we had with the Scottish Government team was about who would put out the application form. As you can see from the written submission, there was originally a suggestion that it should be done by the police, which we feel is not correct. We should not be the decision maker; we do not hold all the information, which is a big part of the process.

We think that the application process should be through the Scottish Government, with applications being passed in a secure and confidential format to the police to allow us to do background checks from the records that are held by Police Scotland and any partner agency that might have information. That would bring in the Crown Office and Procurator Fiscal Service and, possibly, the Scottish Courts and Tribunals Service, which might hold information. There needs to be a wider aspect to it.

Gillian Mawdsley: On the application process, I fully endorse what has been said about making sure that there is good guidance—I assume that there will be guidance, because it has been well trailed. It must be easy for people to apply, but I envisage that, on occasion, there will be a role for solicitors. Therefore, it is incredibly important that people know that they can get advice on the process. I hope that the process will be easy enough that people will not necessarily require advice, but that is why we have reflected on the question of legal aid or legal advice and assistance. It is an important point because people will have to take active steps to get something and the Government must recognise that those people will be required to do that.

In talking about needing support, I am also thinking of more vulnerable people, because a number of people who will be affected could well fall into the "vulnerable" and "supported" categories. As well as partnerships, some third

sector organisations that work with people with learning difficulties have a support role. You have talked about confidentiality, as has the legal profession, with regard to supporting people, where that is required.

Gail Ross: I have a small final question for Paul Twocock on automatic disregard. The committee spoke to Tim Hopkins last week about how there will probably be a percentage of men who have such things in their past and who want to keep them in the past. Will you comment on that?

Paul Twocock: That is true and it is why I warmly welcome the automatic pardon. It is an important symbolic acknowledgement for those who do not wish to rake up the past or to go back to difficult times in their lives. It might well be the case that they are not affected by a continuing impact of having that criminal record in existence so, for them, there is no reason to apply for a disregard. That is absolutely fine and is the right thing to do for them, which is why the automatic pardon is so important.

Jamie Greene (West Scotland) (Con): Good morning, panel. I apologise for missing the opening statements, if there were any.

Before I ask a question of my own, I want to check whether my reading of a comment that Mr McIntyre made is correct. At the moment in the rest of the UK, people must apply proactively for the disregard, which is what is proposed here. At the other end of the spectrum is automatic disregard, which we have heard in evidence might be complicated; indeed, it might even be viewed as unwarranted by people who would stand to benefit from it. Did you suggest that there could be, somewhere in the middle, room for movement in Scotland, because the bill has not been passed? There could be a semi-automatic disregard process for certain types of offences, such as some statutory offences in which the situation is clear cut, as opposed to more complex cases in which multiple offences had been committed. In such cases, an automatic disregard would be more difficult. In addition, as Detective Superintendent Houston pointed out, there are cases involving common-law offences that are more complex.

Are we missing a trick in assuming that a proactive process, whereby people must apply for the disregard, is the only option that is available?

Raymond McIntyre: That was a fair paraphrasing of what I am suggesting. We live in modern times and have access to modern technology, so there might be opportunities for us to analyse data in order to find information that should not be there and which we could get rid of. I am saying as a records manager that those opportunities exist.

I would welcome a partnership approach being taken, which would involve asking people about the art of the possible and how we can best go about making the blanket pardon and the disregard scheme as efficient and effective as possible. We also want to make the scheme as fair as possible for everyone: we do not want to force people to apply, but we want to give people who are worried about the issue the opportunity to confirm whether information has been removed.

Jamie Greene's summation was correct: there is a middle ground.

Jamie Greene: I have a follow-up question for Paul Twocock. Will such a system pose problems? Will people who fall under an automatic disregard for certain types of offences want to be notified that those offences have been disregarded, or would that create a new set of problems, with people getting letters through the door that they do not expect or even want?

Paul Twocock: I have not considered the issue, because that was not the approach that was taken in England and Wales, and there was no suggestion that such an alternative approach might be feasible. I think that that is a live issue. As Gail Ross said, there are people who would rather keep in the past what was for them a difficult time. For someone to receive a letter from Police Scotland or the Scottish Government saying that their crime had been disregarded might unnecessarily create an emotional issue. It would be necessary to consult the LGBT community on how an alternative approach would work and whether it would involve any proactive contact.

Jamie Greene: I will move on from that interesting third option to the question that I originally wanted to ask. Last week, I asked a question about people who serve in the armed forces or have done so in the past and who—if I can use this phrase—"committed a crime" in Scotland and were disciplined or prosecuted under English and Welsh law because they were a member of the forces, even though they were in Scotland. I would also like to know about the position of members of the armed forces who currently reside in Scotland or who have retired and now live in Scotland. Will they be able to take advantage of the Scottish process, or would they—because of their status—have to pursue the matter using the system in England and Wales?

Anne Marie Hicks: The bill sets out the offences to which the process would apply, and it includes provision for the Scottish ministers to regulate for other offences to be covered, should such a need come to light. I do not think that that would cover anything that had occurred in another jurisdiction. If an offence was committed while someone was in the armed forces, I think that it

would be a UK conviction, so the pardon scheme in England and Wales would have to be used.

Raymond McIntyre: I am open to being corrected on the legislative instrument, but from a Scottish records perspective, the Army Act 1955 would encompass any action that had been taken against people in such circumstances, so it would be a matter of checking whether reference to that act was recorded in Police Scotland's records, and of looking at the provenance of the relevant records to see whether they came from a prosecution in England in Wales, from a court martial or from a case that was heard in a Scottish court. It would be a question of challenging the records that are held in Scotland and which would therefore come under the Scottish legislation.

Jamie Greene: It is worth pointing out that people were dismissed from the armed forces not for committing an offence that would be illegal in the civil world but simply for being LGBT. It appears that the bill does not go any way towards pardoning those people or disregarding the disciplinary actions against them—nor does the legislation in England and Wales. Does anyone have any further views on that?

Anne Marie Hicks: The purpose of the bill is to deal with previous convictions. I go back to Paul Twocock's opening remarks on the fact that there have been many discriminatory actions towards LGBTI over decades and not just in the armed forces. Many people will have experienced discrimination in the workplace—not getting jobs, being dismissed or experiencing harassment and discrimination. Wider discriminatory wrongs have occurred. The bill's purpose is quite specific in relating to previous convictions and it would be widening its scope to bring in some of those other aspects.

Paul Twocock: I endorse that. The way in which men in the armed forces were dealt with for being gay or bi is an important issue, and there has been no clear acknowledgement by the state of that, but it is a separate issue and it would muddy the waters if it were brought into the scope of the bill. However, the issue still needs to be addressed.

Stonewall UK works very closely with all the armed forces to improve LGBT inclusion. They have made huge progress and now feature in our top 100 employers. I am sure that the armed forces would collaborate on any work in that area.

Mary Fee: I have a couple of follow-up points. Gillian Mawdsley, your submission covers legal aid and you covered some aspects of that in answer to Gail Ross's questions. Given that a relatively small number of men will go through the process of applying for a disregard and that we are righting a wrong to those individuals that should never have happened, should legal aid be automatic?

Gillian Mawdsley: That is a very interesting question. We have thought about that because, as you say, it is about righting a wrong. It is a question for the Government. The process should be as simple as possible. No one here is canvassing for a complex system that necessarily requires legal intervention or support, but were someone to require it, they would be able to access civil advice and assistance in the initial process. If there were a process before the court, they would require representation, which means civil legal aid, and my understanding is that it would be subject to the usual legal aid tests of financial eligibility and so on.

Given that the First Minister has acknowledged that this is righting a wrong, the Government should perhaps address the issue. If we look back to the story of Alan Turing and the reason why we are doing this in the first place, it follows that we should ask why someone should be disadvantaged by getting something to which the state says that they are entitled. That is a matter for Parliament and the Government.

Mary Fee: That is very interesting. Perhaps Paul Twocock could follow up on that. In England and Wales, were individuals who applied for the disregard given any financial support to go through the process?

10:15

Paul Twocock: Not as far as I am aware, no.

Mary Fee: That is interesting. The bill contains a larger number of historical sexual offences than the legislation in other parts of the UK does. The legislation here includes, for example, importuning. I know that in England and Wales, there is an order-making power that allows additional offences to be added. Do you think that we have the right list of offences in the bill, and is there any indication that additional offences will be included in England and Wales?

Paul Twocock: We have been working with the Home Office since the Policing and Crime Act 2017—which is where the legislation was placed—was passed. The team that works on the disregards scheme is working on that regulation at the moment. We have been providing some evidence in case law to demonstrate why other offences need to be included. That includes importuning or soliciting by men, which is the key offence, because that is where there have been the most rejections of disregard applications out of the ones that have come through in England and Wales since 2012.

The section 32 law was certainly used right up to 1995. A constituent of Matthew Pennycook MP had his application rejected just because it was not within the scope; his experience was similar to the ones that Tim Hopkins talked about last week. He essentially chatted up a plainclothes police officer in a sting in 1995 outside a bar in Soho and was persuaded to receive a caution, which is now a permanent sexual offence on the record. It is important that that offence and other offences be included, particularly those that are permanently on barring scheme records—sexual offences. There is a commitment from the Government to do that. It is clear that it will include section 32 on importuning and we have been providing case law, particularly for armed forces offences that are not included at the moment, such as "disgraceful conduct" and "scandalous conduct". We have made representations that they need to be included.

As I said in my opening statement, it is useful for that process in England and Wales that the Scottish bill is going through now with such a wide scope. What is very helpful in the Scottish bill is the very clear definition of the group of offences that this applies to—the definition of sexual activity—which was missing in the legislation in England and Wales.

The England and Wales process, because it is built on the 2012 act, looks at it offence by offence. It does not really ask what type of persecutory offence we should be looking at. That seems to be the approach that is being taken by the Home Office team at the moment. It is looking at as wide a scope as possible, which would include a similar definition of sexual activity, excluding those offences that would still be illegal today.

My hope is that there will be parity and it is helpful that this legislation is passing now, because that is a live activity and we expect a regulation to come out of the Home Office at some point this year.

Mary Fee: That is very helpful—thank you.

The Convener: Paul, your comments tie into something important, which I mentioned in my opening remarks to Gillian Mawdsley. It is about the use of language and how we need to update that use of language. However, that language was used in convictions at the time, so there will be people who have a conviction for breach of the peace, although it would actually have been for something else. If we look at the language in the Army Act 1955—I am going to read this out because it is horrendous and it gives us a good example of such language—section 64 states:

"Every officer subject to military law who behaves in a scandalous manner, unbecoming the character of an officer and conduct of a gentleman, shall, on conviction by court-martial, be cashiered."

Section 66 states:

"Any person subject to military law who is guilty of disgraceful conduct of a cruel, indecent or unnatural kind shall, on conviction by court-martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act."

In Scots law, none of those are terms that you would convict someone under. Getting that language right is incredibly important to ensuring that we target the right people who can have the disregards applied to their records.

Can you give us a wee bit of insight into how we can do that and say whether there is anything that we have missed in the bill?

Gillian Mawdsley: I do not think that anything has been missed in the bill. The question of language is important. There is great opportunity here. Obviously, once the bill is passed, there will be a period of time before the legislation comes into force. What is vital is the system that the Government sets up in relation to the forms and the guidance. A lot of guidance that is created to support primary legislation is sent out in draft form to stakeholders. I fully endorse the guidance in relation to this legislation being sent out in draft form.

To pick up on your point about language, convener, I thought that it was good that Mr Ogg was asked whether other categories of offences should be included and whether people were being actively asked about that at this stage. I would endorse that at the guidance stage. I am not saying that there should be a public consultation, but that gives us an opportunity to discuss issues such as what is offensive at a point at which everybody is on one page, as it were. The spirit is there. It is about getting the best language that we can to support the fair society. That might be one way of going forward in relation to language.

The bill picks up on the modern approach to the drafting of legislation that involves being neutral. The Sexual Offences (Scotland) Act 2009 talked about person A and person B. That is exactly the spirit here, which is important. We recognise that we are dealing with men with this legislation; women obviously form groups in this regard, but the legislation does not apply there because there is no evidence to support the idea that they have been convicted of any offences to which the legislation would apply. However, that whole category is still important when we look at the way in which language is used and the message that is being sent out for the future.

The Convener: That is really helpful.

Before we move on, I note that the trial that Derek Ogg is involved in has overrun, so he has

sent his apologies—the vagaries of the law, I suppose.

Linda Fabiani: I have a small question that concerns an issue I picked up in the Scottish Parliament information centre paper, which is very good. I would like your opinion on something that perhaps ought to be included in the guidance even if it is not in the legislation.

As we have said throughout our evidence taking, there are elements of the legislation that are symbolic. With regard to posthumous pardons, what is your view on the question of whether families who are perhaps delighted that a relative of theirs who is now dead has been recognised not to have been the criminal that they were painted to be should be able to make an application to get something in writing that would symbolically state that they were right all along and would give them something to prove that? How would we do that?

Detective Superintendent Houston: One of your first difficulties is that, if the person is deceased, there might not be a police record to say where that conviction had taken place, what court was involved and so on. It is not outwith the realms of possibility that that information would exist, but the chances are that the record would have been deleted on their death, unfortunately, and that would make that process extremely difficult.

Linda Fabiani: That is interesting.

Jamie Greene: Last week, I asked whether relatives of deceased people could apply retrospectively for a disregard. I believe that the disregard scheme is only for those who are living and to whom the offence is relevant. If someone's parent, brother, sister, son or whoever had passed away after having been convicted, they will be included in the pardon, in a sense, but that criminal offence will still appear in historical records, where they exist, which means that that person will never have those offences disregarded.

Is there scope to allow immediate family members or next of kin to go through the process to have those records updated, in the way that would happen with a living person? Within the realm of what is possible in record keeping, I like to think that when someone passes away, all their criminal records disappear overnight, although I am sure that they exist for a period. Is there some possibility of including that mechanism, which does not exist at the moment?

Detective Superintendent Houston: If a record has been deleted after we were made aware that the person is deceased, it is really difficult. As that record might not exist, the difficulty would be knowing where to start. Where would we go? I am probably not giving you the answer that you would like. The pardon aspect of the bill would still stand for that person, which might be some comfort.

I fully appreciate the fact that something might have been in the person's criminal record and that years from now someone might have the opportunity, if the record were kept, to look at it. However, the issue is difficult to address if we do not know whether the record has been deleted.

Jamie Greene: In the German system, I believe that people who receive a disregard also receive a certificate. Although that is symbolic, it is a visual piece of documentation, and given that a person has gone through a proactive process, it would not be a huge surprise to receive something of that ilk in the post. Would it be a good idea for us to do that in Scotland?

Detective Superintendent Houston: Someone spoke earlier about how the legislation could be marketed in a short campaign. For a lot of people who have been debarred because of their convictions over the years, their convictions came to light when they made applications to a PVG scheme or Disclosure Scotland.

When someone is doing an application to Disclosure Scotland, there could be an opportunity to say, "You might think that you are not able to do this, but here you go—here's an application". Signposting them towards the disregard at that point might be another, longer-term marketing opportunity. If the application form included that information, the record would not be there by the time that someone made an application.

I appreciate the symbolic aspect, but that suggestion would be something practical that would give people the opportunity to do things that they might not have been able to do previously.

The Convener: That is a good point.

Annie Wells (Glasgow) (Con): We have talked about enhanced disclosure. Organisations might have had reports back with information on them about offences that people have put down but which are no longer offences. However, a lot of organisations will also have previous records. How do we go about making sure that they get to those records as well? They could be records for social work, football coaching or whatever, which are sitting with different organisations.

Detective Superintendent Houston: As I said before, it probably comes down to a marketing and awareness-raising campaign. People can be told, "If you are going down the road of getting a conviction disregarded, you will be able to reapply for things and make sure that the correct record is available to those people". It is difficult, but we will have to try to tell people, "You need to do this—

you have previously been debarred, but let's make sure we get it right."

Annie Wells: People who had a conviction on their record might no longer be going for a position, but that record still exists within organisations. If anyone were to look through those records, one of them would say, "Annie Wells did not get this job because of X." The record will still be live within the organisation. I do not know how we go about ensuring that that is no longer the case.

Alex Cole-Hamilton: Section 10(1)(b) removes them from all organisations. It requires the keepers of records—

Annie Wells: Yes, but how do we tell the organisations to remove the records? If I have applied for an enhanced disclosure in order to apply for a job—and I have done that—those records will still be sitting there. How do we get to the organisations to ask them to remove them?

Paul Twocock: Presumably, Disclosure Scotland will have records of the provision of enhanced disclosure. That means that there will be an opportunity to be proactive and contact the organisations that have received an enhanced disclosure about those individuals as part of the process. That might be the best way of achieving that.

10:30

Raymond McIntyre: A big part of what Disclosure Scotland does now is the protection of vulnerable groups scheme. That is a continual monitoring process, so the removal of offences from people's central records will trigger an update in that scheme. However, it does not push that through into employer organisations. Annie Wells is right to say that there is a challenge around that. That would become part of the marketing and education campaign that would need to accompany the bill to ensure that all organisations that are recipients of police information—even if it is historical—action their own records, as they are required to do under the Data Protection Act 1998.

Gillian Mawdsley: I endorse what has been said about marketing and education. The only issue that I would raise is that, in the situation of a failed job application, there will be rules that apply to the information that can be kept on such matters, so that, after a period of time, it can be deleted. However, I do not take away from the fact that we do not want to have it there in the first place. A safeguard will come in, because, once someone has not got a job, there will be a very limited period afterwards in which information is kept but it should be deleted from the record. Someone who is involved in employment areas would be better placed to give an indication of what the applicable rules would be.

The Convener: How the PVG scheme might work throws up an interesting area on which to direct our questions. There is usually a cost implication for accessing that scheme, so we might need to investigate that as well. However, we can talk about that in a wee while.

Mary Fee: I have a brief follow-up point on Linda Fabiani's question about posthumous pardons. I think that there should be a mechanism in place whereby a family can apply for a disregard when someone has been convicted. I appreciate that you may not give me a different answer from the one that you gave Linda Fabiani, but I will ask my question anyway. There have been cases in which individuals have taken their own lives because they have been convicted. Their families have had to live with the distress of the conviction and then the distress of a family member taking their own life. There should be a mechanism whereby such a family should be allowed to go through the process of getting that conviction removed, to give them some comfort and peace. I am interested in the panel's views on whether we should look at that.

Paul Twocock: I agree that there will be such cases. There might be a small—but important—handful of them in which families might want to do that. I wonder whether it would be feasible to develop a process in which—even if the answer is that, after searching, the records are found to no longer exist—at least the family can have confirmation that their loved one has received the automatic pardon. Although that would involve an administrative process, it would be quite simple to do. It would probably be for only a small group of people, but it would be so important for them.

Mary Fee: Yes, that is interesting. Are there any other views?

Detective Superintendent Houston: I know that I am repeating myself, but I take on board the point that if we could say that the record did not exist at all, that might then be of some comfort.

Mary Fee: So there would be some way of communicating that to the family.

Detective Superintendent Houston: That would be possible, quite easily. A quick check would reveal that no record existed.

Mary Fee: That is helpful. Thank you.

Alex Cole-Hamilton: Section 10, which is about the removal of disregarded convictions from official records, will give comfort to applicants that evidence of their conviction has been expunged from the records of anyone who holds it. However, it occurs to me that aspects might have been recorded that are not about the conviction itself.

The principal example on which I would like to focus is the small number of cases in which chemical castration was part of the conviction process. Famously, that happened to Alan Turing, who undertook it to avoid prison. Such castration will have been noted in medical records.

Through this legislation, should we offer applicants the opportunity not just to expunge their criminal records but to have things redacted from medical records, too? At the moment, if patients dispute something in their medical records, they have the right to have notes attached to them but not to have anything redacted. Is this the place to address that? I throw that question open to any panel member.

Anne Marie Hicks: Again, you would have to look at the scope of the bill. If something in the medical records related to a criminal sentence, that might bring it within the scope of the bill, but we would have to be really careful that we were not encroaching on other areas. Although there is no doubt that records of discriminatory practices are held elsewhere, the second part of the disregard is very practical—it has a very particular purpose in that it is about removing convictions that, even today, can be a barrier for people. We would have to be careful how far we went in widening the removal of the record of a conviction.

Detective Superintendent Houston: The same could be said for someone who was convicted and sentenced to imprisonment. They would enter the prison records, too, and any medical records held by the prison could be slightly different. As my colleague said, there is a wider aspect. Where do we stop?

Alex Cole-Hamilton: Sometimes other parties—for example insurance companies—have access to people's medical records, whereas you can be pretty confident that other parties will not go digging around in people's prison records. I asked that question because someone might so fervently want the state to acknowledge that they did nothing wrong that they want any mention of what they did removed from their personal records. I think that a medical record is the only other example of a record that could materially impact people's judgment of someone's character, so they might fiercely want to have that record redacted. I wonder whether we should give them that opportunity via this legislation.

Paul Twocock: Clearly, it is a good idea in principle. You are right to point out that it might relate to only a small number of cases. I guess that it would be useful to think through how the process would work and which other organisations would need to be brought in to allow medical records to be redacted. I have not really thought about it, but I would agree with the principle.

Alex Cole-Hamilton: Great. The convener has pointed out that the same is true for conversion therapies, psychiatric treatment orders and the rest of it, all of which have very pregnant meaning on medical records. People would be very keen to have such treatments redacted.

Paul Twocock: Absolutely.

The Convener: We ventured earlier into the use of legal aid. I have a couple of questions about the appeals procedure. I note that there have been no appeals under the disregard scheme in England and Wales. Is that because it was a seamless, easy process, or has there been no opportunity to appeal? Do we have it right here? The Law Society of Scotland commented on that, so I will come back to Gillian Mawdsley, but I wondered how the legislation in England and Wales compares with our proposed legislation.

Paul Twocock: I have to admit that we have not spoken to any individuals who have had a disregard rejected. I talked about the case in 1995 when a man was convicted under section 32. There was no route for legal appeal because it was very clear that the offence that he was convicted for was outwith the scope of the law—that was made clear to him in the communication about his rejection. He has pursued that as a campaign with his member of Parliament, which we have supported.

I suspect that that is probably the case for the other 268 applications that have been rejected. The Home Office has made it very clear why those applications have been rejected—in most instances it is because the case has been outwith the scope of the legislation. A lot of those cases were related not to historical sexual offence convictions but to offences that are still illegal today. Such examples are very clear, but other cases, for example involving the importuning offence, related to simple loopholes in the law. In such cases the law needed to be changed. Communication from the Home Office has been very clear, so I suspect that people have decided that there is absolutely no point in appealing. It has been a very difficult process for those people. They have taken the proactive step of trying to get their conviction disregarded only to find that the state is still saying that it will keep the conviction in place.

Of course, a lot of cases are rejected because the offences are still illegal. In particular, a large group of cases was rejected because they related to sexual offences that were committed in a public lavatory; obviously, that is still illegal today. The group of 81 people who have been rejected on that basis do not have any recourse for appeal, which is probably why they have not appealed.

The Convener: The Law Society's submission went into some detail on appeals, the use of legal aid and what other support is available. Will you give us some insight into your thoughts on that, Gillian?

Gillian Mawdsley: I had a look at the English equivalent. There is a process involving the court that an applicant can make. That is obviously a good thing. My only concern is about why the process would be any different from any other process that goes to a sheriff. In the normal order, a sheriff can be appealed and, although we might not want the issue to be appealed to the Court of Session, there is a sheriff appeal court that could be used.

Looking at the English examples that we have talked about, I think that the concern is more a matter of theory than the practice. However, the committee has the opportunity to consider whether it wants the court to have that finality. I appreciate that the mechanism would be that, if the application for the disregard fails and more information becomes available, a new application could be made, so I understand that there is another way back through the process.

We did not have a strong view on the matter but the question was really why it should be different. That was my only concern. Against that, we do not want cases to be trundling through. However, what the sheriff has to do is clear so the situation should be more or less clear to a sheriff. I was only thinking that, if a sheriff gets it wrong, there is no further mechanism. The individual would be back to having to make a new application with new information.

The Convener: That clears up that question in my head.

My other question is for Police Scotland. In the conclusion to its submission, at paragraph 6.1, Police Scotland uses the term "victims". I will read it so that the witnesses understand what I mean:

> "These processes, gathering and compiling relevant historical and associated information on the subjects, and if possible 'victims', could enable Ministers to arrive at a position where all relevant records are identified".

Police Scotland has put the word "victims" in inverted commas. That jumped out at me. I ask the witnesses to explain what they mean by that.

Raymond McIntyre: It was trying to point the committee in the direction of the art of the possible, and to make it clear that the records and information could be examined and a determination could be made as to whether a case related to someone being persecuted for their sexuality or whether they were acting in a sexually predatory fashion. That brings into question the other party who may have been involved in what was purported to be offending behaviour and means that there was either a victim or somebody who was party to the activity. The records might show that two people were charged with the same offence at the same time and, therefore, were party to it, in which case there would be no victim. In other circumstances, as Stuart Houston said, somebody might have been abusing power or there might have been an age-related issue, in which case we would have somebody who would be referred to as a victim.

The Convener: That clears that up perfectly.

I think that we have exhausted all the questions. We have had superb responses that have helped us to understand a bit more where we need to go next and some avenues to investigate. I express the committee's gratitude for the witnesses' oral evidence, which has been incredibly helpful, and their written evidence. If they go away and think of something that they should have said, they should let us know because we are continuing the inquiry for another few weeks until we get it right for a stage 1 report. Anything that the witnesses could offer us would be gratefully received.

We will take our second agenda item in private.

10:44

Meeting continued in private until 11:23.

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