OFFICIAL REPORT
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Equalities and Human Rights Committee

Thursday 17 May 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 17 May 2018

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EQUALITIES AND HUMAN RIGHTS COMMITTEE
15th 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)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Gail Ross (Caithness, Sutherland and Ross) (SNP)
*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Michael Matheson (Cabinet Secretary for Justice)
Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Equalities and Human Rights Committee

Thursday 17 May 2018

[The Convener opened the meeting at 09:30]

Prisoner Voting Report

The Convener (Christina McKelvie): Welcome to the 15th meeting in 2018 of the Equalities and Human Rights Committee. I make the usual request that mobile devices are switched to airplane mode and that mobile phones are kept off the table.

Before we kick off, I have a brief statement about the committee's report on prisoner voting in Scotland, which was published at the beginning of this week. I would like to place on record my personal disappointment that the findings of the report were leaked to a national newspaper, where they appeared on the front page on Friday 11 May.

Therefore, for the avoidance of doubt, I would like to draw members' attention to the following provisions of the code of conduct for members of the Scottish Parliament. In the sections under "Confidentiality rules", it says:

"12. All drafts of committee reports, and committee reports which, although agreed by a committee and no longer in draft, have not yet been published, should be kept confidential, unless the committee decides otherwise. In addition, the following should be treated as confidential: briefing provided to members by Parliamentary staff for particular members' information only; documents produced during a private session of a committee; evidence submitted to a committee sitting in private from a witness which it has been agreed can be treated as confidential; any other documents or information which the committee has agreed should be treated as confidential; and minutes of private discussions.

13. Unless the Parliament or the relevant committee has agreed otherwise, such documents should not be circulated, shown, or transmitted in any other way to members of the public (including those in Cross-Party Groups), media or to any member of any organisation outwith the Parliament, including the Scottish Government, nor to other MSPs who are not members of the committee or committees for whom the material was intended.

14. Members must not provide the media with off the record briefings on the general contents or 'line' of draft committee reports or other confidential material or information. Disclosures of this kind can also seriously undermine and devalue the work of committees.

15. Unless the Parliament or the relevant committee has agreed otherwise, members must not disclose any information to which a member has privileged access, for example, derived from a confidential document or details of discussions or votes taken in private session, either orally or in writing.

16. Where a committee member wishes to express dissent from a committee report, the member should only make this public once the committee report has been published in order to avoid disclosing the conclusions of a draft report."

In the light of the recent press reports, I would like to emphasise to all members the importance of complying with those rules and to ask that particular attention is paid to them in future.

Having been a member of the Equal Opportunities Committee in a previous parliamentary session, I know that there is a long-standing tradition of keeping politics to a minimum in our committee's work. Whenever possible, we try to put politics to one side and to put those who are the most vulnerable in our society at the forefront, so that their voice is heard in the decision-making process. Over time, we have gained the trust of those who have shared their lived experience with us and they expect us to treat their information respectfully. A short-lived political stunt strikes at the heart of that hard-won reputation.

As parliamentarians, we have standards to live up to, not just for those who govern our conduct but, importantly, for the people of Scotland. It is my hope that the committee can move forward in a collegiate manner, although I recognise that it will take time to build that trust again—trust that is fundamental to the effectiveness of this committee in helping the most marginalised in our society.

Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill: Stage 2

09:33

The Convener: We move on to stage 2 consideration of the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill. I welcome Michael Matheson, the Cabinet Secretary for Justice, who joins us today as the minister in charge of the bill. I also welcome Stewart Stevenson, who is here to speak to an amendment in his name. Our aim is to complete stage 2 consideration this morning.

Before we move on to consideration of amendments, it would be helpful if I set out the procedure for stage 2. Everyone should have a copy of the bill as introduced, the marshalled list of amendments that was published on Monday and the groupings of amendments, which sets out the amendments in the order in which they will be debated.

There will be one debate on each group of amendments. I will call the member who lodged the first amendment in each group to speak to and move their amendment, and to speak to all other amendments in that group. Members who have not lodged amendments in the group but who wish to speak should indicate to me in the usual way.

If the cabinet secretary has not already spoken on the group, I will then invite him to contribute to the debate before I move to the winding-up speech. As with a debate in the chamber, the member who is winding up on a group may take interventions from other members, if they wish. The debate on each group will be concluded by me inviting the member who moved the first amendment in the group to wind up.

Following the debate on each group, I will check whether the member who moved the first amendment in the group wishes to press their amendment to a vote or to withdraw it. If they wish to press ahead, I will put the question on that amendment.

If a member wishes to withdraw their amendment after it has been moved, they must seek the committee's agreement to do so. If any committee member objects, the committee must immediately move to the vote on the amendment.

If any member does not want to move their amendment when I call it, they should say, "Not moved". Please remember that any other MSP may move such an amendment. If no one moves the amendment, I will immediately call the next amendment on the marshalled list.

Only committee members are allowed to vote at stage 2. Voting in any division is by show of hands. It is important that members keep their hands clearly raised until the clerk has recorded the vote.

The committee is required to indicate formally that it has considered and agreed each section and schedule of the bill, and so I will put a question at each appropriate point.

Section 1—Purpose of this Act

Section 1 agreed to.

Section 2—Historical sexual offence: definition

The Convener: Amendment 6, in the name of Jamie Greene, is in a group on its own.

Jamie Greene (West Scotland) (Con): Good morning, cabinet secretary.

My amendments are intended to be helpful, and I look forward to feedback from other members and indeed from the cabinet secretary on the specific wording of any of them.

Amendment 6 relates to section 2 and the definition of sexual activity between men. The current wording in section 2(4)(a) defines such activity as

"any physical ... activity between males of any age which is of a type"

characteristic of

"an intimate personal relationship".

That definition is open to being loosely interpreted, in that intimate personal relationships between men who are over the age of 16 and those who are under could be covered by the bill.

Although I appreciate that offences that are still offences today are not covered by the bill, my understanding of the wording of section 2(4)(a), especially "of any age", is that it could be interpreted in a way that leaves open the possibility that intimate relationships between men who were over the age of 16 and men who were under 16 could be included.

For that reason, my amendment would add a single line to say:

"(provided that the activity is not between a person who has attained the age of 16 years and one who has not)",

to strengthen the understanding of what sexual activity is and is not acceptable today.

The Cabinet Secretary for Justice (Michael Matheson): As I understand it, amendment 6 is intended to ensure that a pardon or disregard is never granted to a person who engages in sexual activity with a child under the age of 16. I

understand the member's concern and I would like to explain why the amendment is not necessary and may indeed have unintended consequences.

Protections are already built into the bill to ensure that, where a person is convicted for sexual activity that remains unlawful, that person is not pardoned, and a disregard will not be granted. Section 3 makes it clear that a person who has been convicted of a historical sexual offence is pardoned for the offence only if the conduct constituting the offence is not an offence when the act comes into force. Section 7(3)(b) provides that a disregard is not to be granted if it appears to the Scottish ministers that the conduct constituting the historical sexual offence would still have been an offence when the act came into force.

Amendment 6, by applying a blanket exclusion that covers any offence where one person has attained the age of 16 and the other has not, runs the risk of excluding from the legislation cases in which the activity in question is lawful and the pardon or disregard should therefore apply. The definition of "historical sexual offence" is necessarily broad and covers activity that people might not necessarily think of as sexual. For example, committee members heard evidence from a man who said that he was convicted of a breach of the peace for kissing his same-sex partner in a public place. The effect of amendment 6 would be to exclude, for example, a 16 year old who was convicted of a breach of the peace for kissing or holding hands with his 15-year-old same-sex partner. That would not be a criminal offence now, and it would never have been a criminal offence where opposite-sex partners were involved. I therefore invite the member not to press amendment 6.

Jamie Greene: That example is a good illustration—I had struggled to think of any practical application of the legislation in circumstances in which a pardon or disregard would have been acceptable if an offence had been committed by someone over 16 with someone under 16. I would never want to inhibit someone's ability to apply for a pardon or disregard in respect of the example that the cabinet secretary gave. My hope was that amendment 6 would avoid any loopholes in the legislation that arise through the phrase "of any age", but the cabinet secretary, by giving that example, has clarified the matter and cleared up my confusion over it. For that reason, I am happy to withdraw my amendment.

Amendment 6, by agreement, withdrawn.

The Convener: Amendment 7, in the name of Jamie Greene, is grouped with amendment 13.

Jamie Greene: Amendment 7 is another short amendment, which gives ministers the ability to add offences to the definition of "historical sexual offence". At present, the parameters around the definition of the detail are clearly set out in section 2. There is broad agreement that section 2, as it stands, covers most bases. The purpose of amendment 7 is to future proof the legislation. If, in the event—although it is perhaps unlikely—that our sexual offence laws are changed in the future, ministers would have the ability to include other definitions in the remit of the legislation.

Amendment 7 leads into amendments 10 and 11, to which I will speak later. Those amendments relate to the ability to alter the purpose of the legislation. At present, there is broad agreement as to what we consider to be the bill's purpose with regard to historical offences. I highlight our experience of other legislation that has tried to achieve the same thing. We have discovered that people have since come forward with a number of offences—in some cases, quite unusual ones—for which they had been convicted. Awareness of the legislation is out there in the community, and we have found deficiencies in similar pieces of legislation, in the sense that the definitions were too narrow.

The definition in this legislation is good, but it does not allow the opportunity, from a technical point of view, for ministers in the future to alter the definition of a sexual offence, subject to further consultation or legal advice. The purpose of amendment 7 is not to state that ministers must add further definitions; it simply gives them the option to add historical sexual offences, subject to appropriate regulation. That is the only reason that I have lodged amendment 7. I would be keen to hear the cabinet secretary's views on it.

09:45

Michael Matheson: Amendment 7 provides for a regulation-making power to add new offences to the list of historical sexual offences at section 2.

It might be helpful to the committee if I reiterate that section 2(2) already provides for a catch-all provision, which provides that a historical sexual offence includes any offence that regulated, or was used in practice to regulate, sexual activity between men and which has either been repealed or abolished, or which once covered sexual activity between men of a type which, or in circumstances which, would not amount to the offence now.

The provision is included in the bill because we recognise that, although efforts have been made to identify the offences that were used to prosecute same-sex sexual activity that is now legal, we know that other common law or statutory

offences, such as breach of the peace, or indeed local by-laws, might have been used to prosecute such activity. This ensures that a person with a conviction for any offence that was used to prosecute same-sex sexual activity that is now legal is pardoned and can apply for a disregard without the need for a power to add new offences to the list at section 2(1).

In that sense, the power in amendment 7 would serve no useful legal purpose: it is unlikely that it would ever be used. Because amendment 7 is not limited to sexual offences used to prosecute same-sex sexual activity between men, it could be used to add sexual offences of any kind to the list at section 2—for instance, offences used to prosecute sexual activity between opposite-sex partners. Members will be aware the bill is limited to dealing with the discrimination against men involved in same-sex sexual activity, so we do not consider that it would be appropriate for the scope of the legislation to be fundamentally altered through secondary legislation in this way. On that basis, I invite the member not to press the amendment.

Jamie Greene: I should have added that amendment 30 is a technical amendment that is linked to amendment 7.

I hear what the cabinet secretary says, but I guess that I am looking for reassurance that section 2(2) enables the flexibility that I am looking for in the future for all types of offence, not just sexual offences. My intention is not to include types of sexual offence that lie outwith the bill's remit. That is absolutely not the intention. If amendment 7 is worded in that way, I apologise.

For example, if people are convicted for a wide range of other behaviours that, in future, are deemed to be covered by the legislation, my hope is that those people will be able to take advantage of the legislation. The intent of amendment 7 was simply to allow future ministers to add certainty where there might not be any, if and when new cases come forward.

I appreciate that the cabinet secretary says that the power might never be used, but it might be. We do not know who is out there and who might come forward with individual and specific circumstances. Amendment 7 intended to give future ministers that flexibility. I hope that, as it is currently drafted, the bill has that flexibility, so I am minded to withdraw amendment 7 for that reason. Perhaps I could chat with the cabinet secretary's bill team to clarify how some future circumstances might arise and how people could go about taking advantage of the scheme when it is not clear at the moment whether they have committed an offence. That would be helpful.

The Convener: Cabinet secretary, given that Jamie Greene has asked for a point of clarification, do you want to come back in?

Michael Matheson: The first thing to say is that it is not clear to me what legislation is in place that would criminalise activity between same-sex partners that we might want to repeal in the future. That legislation has already been addressed. Secondly, the bill deals with historical matters, so trying to make provision to deal with something that might happen in the future would not be within the terms of the bill.

The important point to make is that I cannot think of any current piece of legislation that would continue to discriminate against same-sex partners in the way that people were discriminated against by the historical legislation that the bill seeks to address through the provision of the pardon and the disregard.

Amendment 7, by agreement, withdrawn.

Sections 2 to 4 agreed to.

After section 4

The Convener: Amendment 1, in the name of Mary Fee, is in a group on its own.

Mary Fee (West Scotland) (Lab): I begin by thanking Tim Hopkins of the Equality Network for his work in assisting with the drafting of my amendments. His knowledge in this field is unrivalled and his expertise has been invaluable to me throughout the process. I would also like to record my thanks to the Cabinet Secretary for Justice for his continued constructive dialogue, which I have greatly appreciated.

Amendment 1 would provide for a pardon letter for deceased persons. As colleagues know, today is the international day against homophobia, biphobia and transphobia, which is a worldwide day of campaigning and celebration. Therefore, it is a particularly appropriate day on which to be considering the bill.

After similar legislation came into effect south of the border last year, 94-year-old George Montague publicly criticised that legislation. He had been convicted for consensual sex with another man in 1974. He said:

"I will not accept a pardon. To accept a pardon means you accept that you were guilty. I was not guilty of anything."

He called for an apology to be provided instead. It is right to provide the pardon and the disregard, but the committee agreed in our stage 1 report that those are not enough.

A declaration of the wrongfulness and discriminatory effect of such convictions should be front and centre of any responses to them. That is

set out in section 1 of the bill, and it was set out in the First Minister's unreserved apology in the Scottish Parliament, which made it clear that the wrong was done to the convicted person, not by them.

In our report, the committee asked the Scottish Government to consider how a letter of comfort could be provided to the families of deceased people with such convictions. My amendment 1 is intended to explore that further. It proposes to insert a new section, subsection (1) of which would provide that a close family member of a deceased person with a relevant conviction would be able to apply to the Scottish ministers for a letter of comfort. Subsection (2) provides that an application could not be made if an application for a disregard for the same conviction had already been made by the deceased person and dealt with before they died. Subsection (3) provides that, in the application for the letter, the family member should include as much information as they know about the conviction.

As the family member might not have detailed information on the conviction and the deceased person's criminal records might have been deleted when they died, it might well be the case that the full details of the conviction will not be available to the Scottish ministers. I have therefore recognised in amendment 1 that the proposed letter of comfort cannot be an unconditional letter saying that the deceased person has definitely been pardoned. It would need to be a conditional letter that said that the person had been pardoned if the conviction was for a historical sexual offence that is not a crime today, and it would need to explain in general terms what that means.

Therefore, subsection (4) provides that the Scottish ministers would not supply the letter if it was clear from the information in the application that the pardon would not apply. Otherwise, they would provide the letter, without the need for further checks, as the letter itself must be conditional. An applicant would receive the letter unless it was already clear from the information that they provided in the application that the pardon did not apply. That would avoid the difficulty of an applicant finding out from the Scottish ministers' reply that investigation of the records had cast doubt on the pardon applying, which would provide the opposite of comfort.

Subsection (5) sets out the content of the letter, which would explain the application of the pardon. It would include a statement acknowledging the wrongfulness and discriminatory effect of convictions pardoned by the bill. It would also include an apology for those convictions in similar terms to those that were used by the First Minister in her statement to the Parliament on 7 November last year. The subsection also proposes that the letter be signed by the First Minister, reflecting her statement to the Parliament.

Subsection (6) lists the close family members who could apply for the letter. It is unlikely that relatives of deceased people would make a large number of such applications, but the provision of a letter could be a great comfort to relatives, even though it cannot be unconditional.

The extra load that providing the letters would place on the Scottish Government would be small. I appreciate that it might be possible to provide the letters administratively without provision being needed in the bill. I hope that the Government will commit to doing what it can to make that possible.

I move amendment 1.

Alex Cole-Hamilton (Edinburgh Western) (LD): I echo Mary Fee's thanks to Tim Hopkins and the Equality Network, not only for the work that they have done on amendment 1 but for the way in which they have helped us throughout the bill process. It has been illuminating.

In my remarks in the stage 1 debate, I intimated that the only deficiency that I saw in this otherwise excellent bill was that it did not extend not only comfort but justice to families of deceased men who, because of their sexuality, had been convicted for an activity that is no longer criminal. There is a human cost to the application of criminal justice in less-enlightened times, which is measured in the tragedy of lives that were cut short by people taking their own lives as a result of the shame or embarrassment that was caused by the criminal record hanging as a millstone round their necks.

I express my support for amendment 1. It will close that gap. It will be the final piece in the jigsaw of a piece of legislation that is not only historic but important for the Parliament.

Jamie Greene: I echo my committee colleagues' comments. Mary Fee eloquently stated the case. As Alex Cole-Hamilton said, there was a missing piece of the jigsaw. I, too, felt strongly that family members or partners of people who are now deceased should be able to receive not just a blanket apology but something individualised and personal to them that would allow them to move on in some of the tragic circumstances that have been mentioned. The number of people who might choose to take advantage of that would be small, but nonetheless they should be offered the opportunity to apply. Therefore, whatever form it ends up in, I support the concept.

Michael Matheson: Amendment 1 seeks to put in place a statutory mechanism whereby the relatives of a person who has died who believe that that person was convicted of an offence for

engaging in same-sex sexual activity that is now lawful can apply to receive a letter of comfort that would provide a conditional pardon and disregard, based on the information provided by the deceased person's relatives.

I can understand why committee members might consider that the relatives of a person who has died might wish to apply for a posthumous disregard so as to confirm that their relative has been pardoned. As I explained during the stage 1 debate, there are a number of potential problems with that.

The primary difficulty is that, if a person has died, it is likely that the information held about them on the criminal history system has been removed and that there will be little or no information available on which ministers can make a decision about whether the disregard should be granted. A second issue may arise in cases in which family members are unaware of the circumstances in which their relative was convicted of an offence and, as a result, could receive unwelcome news that their relative was convicted of, for example, a serious sexual offence.

I am sympathetic to the intention behind the amendment and confirm that the Scottish Government is content to put in place such a scheme. However, it is not clear to me that the scheme requires to be placed in statute. Indeed, I believe that it would be more appropriate in the circumstances to have the flexibility that would be provided by a purely administrative scheme rather than one based in statute.

I hope that that reassures members that the administrative scheme to enable relatives of a deceased person to receive a letter of comfort of the kind envisaged by amendment 1 will be put in place. I can also confirm that the letters will be signed by the First Minister. I therefore invite the member not to press her amendment.

10:00

Mary Fee: I thank the cabinet secretary for his constructive and supportive comments. I fully understand the concerns that the cabinet secretary has raised around the potential legal difficulties and I welcome his commitment to provide a letter of comfort to family members. On the basis of those comments, I seek to withdraw my amendment.

Amendment 1, by agreement, withdrawn.

Section 5—Application to have conviction for historical sexual offence disregarded

The Convener: Amendment 2, in the name of Stewart Stevenson, is grouped with amendments 8, 3, 3A and 14.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Amendment 2, which I trust committee members will feel is simple and straightforward, with no side effects beyond its central purpose, follows my comments during the stage 1 debate on certain aspects of the bill's drafting.

Briefly, section 5(2) sets out the information that a person applying for disregard must provide in their application. Section 5(2)(b) requires the applicant to state their name and address at the time of the conviction. However, as I said in the stage 1 debate, given the passage of time and the social circumstances under which many of the people who might seek such a disregard lived, it may well be possible that some applicants are not able to state with the required certainty what their address was at the time that they were convicted.

I have realised after further consideration that it is also possible—although perhaps less likely—that an applicant might have changed their name and might not be entirely sure whether the conviction occurred before or after the time that they changed their name. There could be cases in which an applicant cannot say with the required certainty what their name was at the time that they were convicted.

Amendment 2 would amend section 5(2)(b) to provide that an applicant must state their name and address at the time of conviction, but that requirement would now be qualified with

"in so far as known to the applicant".

That brings the requirement into line with sections 5(2)(c) and 5(2)(d), regarding associated information that the applicant is asked to provide about the offence and conviction.

I do not intend to speak on other amendments in the group. I encourage committee members to give due weight—as I am sure they always would do—to their movers' comments and to the cabinet secretary's response.

I move amendment 2.

Jamie Greene: I have no comments on Mr Stevenson's amendment 2. As always, he comes to the committee with sage words. I will speak to my amendments, starting with amendment 8; perhaps Alex Cole-Hamilton can explain its premise if that is not entirely clear in the wording, or indeed if the amendment is not entirely efficient in what it is trying to achieve.

My aim is to ensure that as many people as possible can take advantage of a disregard. Given the demographic of the types of people who may

wish to apply for a disregard, it is important to allow a provision that would give people the opportunity to receive assistance and help with their application and indeed the opportunity for someone to make the application on their behalf, with their consent.

Amendment 8 refers to an application being made

"on behalf of a person who has been convicted".

I appreciate that the current wording—I am willing to discuss this—could be taken to mean that anyone could apply for anyone else without their consent. That is not the purpose of the amendment.

I am of the view that people who are physically incapable, or who because of other reasons, such as mental issues, need assistance with an application should be able to take advantage of third-party organisations—for example the excellent organisations that we heard from such as the Equality Network and Stonewall, or other charities or advocacy groups—or even simply family members or partners or spouses.

The purpose of amendment 8 is to make provision so that the Government would accept an application from a third party, with due consent, as deemed appropriate. If the wording of the amendment does not meet the requirements, I ask the cabinet secretary to give thought to the process. Under the current wording in the bill, an application could be accepted only from the person involved and not from any other. I like to think that third-party applications will be possible, and that is the purpose of the amendment.

I am keen to hear what Mary Fee will say on amendment 3, as amendment 3A is perhaps of the same ilk, but a little shorter. I will perhaps not move amendment 3A if Mary Fee moves amendment 3, as my amendment refers to a "certificate", which is perhaps too prescriptive. Throughout the process, I have been of the view that something symbolic should be given to people who have been successful in their application. Whether that should be a certificate or a letter is a matter for debate, but the purpose of amendment 3A is to ensure that they get something. I heard the comments that were made on amendment 1 about people being enabled to apply for deceased members of their family, and I like to think that the same opportunity could be extended to those who are living and who have a successful application. Again, I will listen further on that.

Amendment 14 is a technical amendment that relates to amendment 8, so I will not say anything on that.

Mary Fee: Amendment 3 relates to the disregard notice. As I said when we considered amendment 1, it is crucial that any response to a conviction that is pardoned under the bill acknowledges the wrongfulness of the conviction and provides an apology.

Amendment 3 explores the content of the notice that is issued to an applicant when a disregard is granted. The amendment proposes that the notice must include a clear statement that the applicant has been pardoned. It would also state that the wrongfulness and discriminatory effect of their conviction are acknowledged by the legislation. It would include an apology to the applicant, in similar terms to those that were used by the First Minister in her statement to Parliament on 7 November last year, and it would be signed by her.

Including that content in the notice of disregard that is sent to the applicant would help to address the criticism that providing a pardon could be seen as confirming that the applicant did something wrong. It is right that the notice should include a clear apology and an acknowledgement that the wrong was done to the applicant and not by them.

Jamie Greene's amendment 3A would provide that the notice of disregard should be in the form of a formal certificate, which would also be useful.

I recognise that it might be possible for those measures to be implemented without the need for explicit provision in the bill. However, it is important that there is a clear commitment to provide that kind of response to people who are granted a disregard.

Alex Cole-Hamilton: I have a couple of brief reflections on Jamie Greene's amendment 8 and Mary Fee's amendment 3.

I have some sympathy with amendment 8. In many pieces of legislation, we include a right to independent advocacy, and we recognise that diminished capacity can sometimes mean that the act of filling in a form can be difficult for an individual. My slight reservation is about how we ensure that there is informed consent and how it is guaranteed that that is the will of the person involved. I will reflect further on the cabinet secretary's response to that, but I am sure that that could be dealt with in guidance. At present, I am minded to support Jamie Greene's amendment, although that depends on the cabinet secretary's response.

Mary Fee's amendment 3, which is excellent, relates very much to the eloquent remarks that she made at the top of the meeting about the importance of the bill being not just the redaction of the record but a recognition that we as a country got it wrong and harmed a great many people in the application of our laws. That recognition and profound apology are the very least that these men deserve.

Gail Ross (Caithness, Sutherland and Ross) (SNP): I have a quick comment on amendment 8, which perhaps the cabinet secretary could refer to in his response. Is amendment 8 necessary? Do not the laws on power of attorney already cover what amendment 8 seeks to do?

Michael Matheson: Amendment 2 addresses the point that Stewart Stevenson raised during the stage 1 debate on 17 April regarding section 5, which sets out the information that a person who seeks a disregard must include in their application. Section 5(2) requires the applicant to state their name and address at the time of conviction. As Stewart Stevenson noted, it is possible that some applicants might not be able, given the passage of time, to state with certainty what their address was at that time. It is also possible—although perhaps less likely—that an applicant might have changed their name and might not be entirely sure whether the conviction occurred before or after the time that they changed their name, so there might also be cases in which an applicant cannot say with certainty what their name was at the time when they were convicted. I therefore ask the committee to support amendment 2.

Amendment 3 seeks to set out in statute what would require to be included in a letter that confirms that a disregard has been granted. The amendment would place a duty on Scottish ministers to include in any such letter a statement making clear that the applicant had been pardoned for a historical sexual offence, noting that the wrongfulness and discriminatory effect of the conviction were acknowledged by the eventual act, and an apology for the conviction, acknowledging the wrong done to the applicant by the state. The amendment would also require the letter to be signed by the First Minister.

Amendment 3A would require the letter to be accompanied by

"a certificate of historical sexual offence disregard."

I understand the importance of ensuring that the wrongfulness and discriminatory effect of the disregarded conviction are acknowledged and that a disregard letter should make clear that the wrong was done to, and not by, the applicant. I can therefore confirm that the Scottish Government will ensure that those points are reflected in letters to applicants confirming that a disregard has been granted. On that basis, I ask the members not to press their amendments.

Amendment 8 seeks to place on Scottish ministers a duty to make regulations to enable an application for a disregard to be submitted on behalf of a person who has been convicted of a historical sexual offence. There are already circumstances in which a person asks, for example, a solicitor or a person who has a power of attorney to submit an application on their behalf. I reassure the committee that the normal laws relating to agency and power of attorney would allow for a person's solicitor or someone with power of attorney, for example, to submit an application on behalf of someone with such a conviction, without the need for any specific provision to be made in the bill to allow for that.

Jamie Greene: I appreciate the response—it was perhaps to Gail Ross's question—around existing provisions that would allow an application to be made on someone's behalf using the laws on power of attorney. However, my worry is that that is very focused and would be restricted to people or agencies with power of attorney; it would not include other third parties, such those that Alex Cole-Hamilton mentioned: advocacy groups, third-party groups, charities or even individuals who might wish to make an application with relevant due consent as detailed in guidance. Given what the cabinet secretary said, the current provisions would not guarantee that those people could make an application, which is something that I would like to see. That is why I lodged amendment 8.

10:15

Michael Matheson: The member needs to recognise that the person would have to give consent to enable someone else to apply on their behalf. If they do not have the capacity to give that consent, that is where the provision of a power of attorney would come into play.

If the person gives consent for a third party to make an application on their behalf, they can do so, and that is the position as the law stands. They would have to give consent for the very reasons to which Alex Cole-Hamilton referred: if an application were to be received from a third party but the person whom the application was for had not given their consent, we would have no way of knowing whether that person had consented to the application being made in the first place. The person always has to give consent, if they have capacity. If they do not have capacity, the provisions of power of attorney and so on are applied.

What the member intends with amendment 8 can already happen within the existing legal framework, so there is no requirement for anything to be put in the bill to allow it to happen.

The Convener: I call Stewart Stevenson to wind up, and to press or withdraw his amendment.

Stewart Stevenson: That was an illuminating debate, in which I learned some interesting things.

I will make a wee observation that may illuminate the name change issue. In Scots law, as I understand it, there is no direct legal process for

changing one's name—the person can simply start using another name on any day that they choose. Indeed, I have personal experience of that, because someone I know did that.

I have nothing more to say; it has all been said. I press amendment 2.

Amendment 2 agreed to.

Section 5, as amended, agreed to.

Section 6—Application for disregard: further information

Amendment 8 moved—[Jamie Greene].

The Convener: The question is, that amendment 8 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Greene, Jamie (West Scotland) (Con)
Wells, Annie (Glasgow) (Con)

Against

Cole-Hamilton, Alex (Edinburgh Western) (LD)
Fee, Mary (West Scotland) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
Ross, Gail (Caithness, Sutherland and Ross) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 8 disagreed to.

Section 6 agreed to.

Section 7—Determination of application for disregard

The Convener: I call Mary Fee to move or not move amendment 3.

Mary Fee: On the basis of the cabinet secretary's comments, I will not move the amendment.

Amendment 3 not moved.

The Convener: I call Jamie Greene to move or not move amendment 2A.

Jamie Greene: It is amendment 3A.

The Convener: Yes—amendment 3A.

Jamie Greene: On the same basis as Mary Fee's comments, I will not move amendment 3A.

Amendment 3A not moved.

Section 7 agreed to.

Section 8—Appeals

The Convener: Amendment 9, in the name of Jamie Greene, is in a group on its own.

Jamie Greene: You are doing a sterling job, convener. I will try not to overcomplicate this one amendment. We have talked in great detail about the availability of legal aid. I appreciate that there are existing provisions and rules in this area, so my amendment simply says,

"For the avoidance of doubt, civil legal aid would be available, subject to entitlement, for the purposes of an appeal under this section."

Amendment 9 is a simple addition to bring to bear members' strongly held view that people can use the legal aid system for the purposes of an appeal; it removes any doubt about whether that is the case. I hope that members will support it.

I move amendment 9.

Alex Cole-Hamilton: Again, I have a lot of sympathy with this amendment. The issue came up in the stage 1 debate and several times during our proceedings. I will support the amendment unless I hear from the cabinet secretary that other provisions exist that would automatically trigger entitlement to legal aid. It is important that there be no legal impediment to justice in this area, and that goes for appeals, too.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I was not on the committee during stage 1 deliberations, and I am not sure what effect the amendment would have. My understanding is that people would be entitled to legal aid anyway, if they were eligible. I ask the cabinet secretary to clarify that before I decide how to vote.

Michael Matheson: Amendment 9 is intended to put beyond doubt that a person who wishes to appeal against the refusal of an application for a disregard is entitled to civil legal aid, subject to meeting the eligibility requirements. It might be helpful if I outline the Scottish Government's position concerning the availability of legal aid in respect of the bill.

With regard to the preparation for an application, we do not anticipate that legal assistance should be required in order to submit an application for a disregard. That is because the application process will be designed to be as user friendly as possible. We will work with the Equality Network to ensure that a user-friendly process is delivered. However, if an applicant feels the need to seek legal advice and assistance from a solicitor, that will be available for the preparation of the application for a disregard, subject to the general eligibility requirements under the advice and assistance scheme.

If an applicant wishes to be represented in court for an appeal, civil legal aid is subject to eligibility requirements, including financial eligibility. I hope that that reassures the committee that legal aid is available to someone who wishes to appeal

against the refusal of a disregard. Provision can be made for representation in court through advice by way of representation—ABWOR—instead of civil legal aid. ABWOR is advice and assistance that is provided to a person by taking, on their behalf, any steps in instituting or conducting any proceedings before a court. I can therefore confirm that the Scottish Government will introduce regulations to make ABWOR available to a person who wishes to appeal a decision to refuse an application for a disregard, subject to eligibility requirements. Importantly, the provisions of ABWOR would not be conditional on financial eligibility tests. On that basis, I ask the member to withdraw amendment 9.

The Convener: I ask Jamie Greene to wind up and to indicate whether he wishes to press or withdraw amendment 9.

Jamie Greene: On the first point—that people should not need legal assistance to complete the initial application—I think that the cabinet secretary has made a very important point and a very welcome comment. I appreciate that a lot of work will go into the application process to make sure that it is as simple and jargon free as possible, so that the widest variety of people can take the opportunity of the process.

However, the appeals process is somewhat different. It is a much more legal and technical process, and for that reason I felt that, subject to entitlement, we should be specific in the bill. The cabinet secretary's comments and the Scottish Government's commitment to offer legal assistance—it sounds as if that will not be financially means tested—to people who are rejected and who choose to appeal are very welcome and a positive step forward. I am sure that it will be appreciated by those who may need to use that process in the future. I thank the cabinet secretary and the Scottish Government. For those reasons, I will not press the amendment.

Amendment 9, by agreement, withdrawn.

Section 8 agreed to.

Sections 9 to 13 agreed to.

After section 13

The Convener: Amendment 4, in the name of Annie Wells, is in a group of its own.

Annie Wells (Glasgow) (Con): Amendment 4 is intended to put the onus on the Scottish Government to take steps to publicly promote awareness and understanding of the operation of the act. During the committee sessions, it became clear that work would have to be done to advertise the existence of the disregard process and to make it abundantly clear that, despite the pardon, people will still have to go through the separate process of applying for a disregard. During evidence sessions, a witness intimated that he had asked a couple of his friends about the bill and they knew nothing about it. We cannot assume that information about it will naturally disseminate into the wider public. We need to be proactive in publicising it and recognise that not all gay men—particularly those who are in more remote areas—are linked to lesbian, gay, bisexual, transgender and intersex groups. That is why I lodged the amendment.

I move amendment 4.

Alex Cole-Hamilton: I support amendment 4, in the name of Annie Wells. I believe the statement of apology that was made by the First Minister to be a welcome first step in our national atonement on the issue, but the promotion of the scheme will be very important for ensuring that people are not only made aware of their rights to obtain disregards and pardons but actively encouraged to come forward to do so.

Michael Matheson: Amendment 4 seeks to put in place a requirement for the Scottish ministers to take appropriate steps to promote public awareness and understanding of the operation of the act. As we set out in our response to the committee's stage 1 report, we will work closely with relevant stakeholders, including Stonewall and the Equality Network, to ensure that people who may have convictions for historical sexual offences for engaging in activity that is now lawful are aware of the pardon and the disregard scheme, and of the distinction between the two concepts.

In doing so, we also committed to considering the particular needs of people with such convictions who may live in rural and remote communities. I ask members to note that such a requirement is not normally included in legislation. The statute books would become very crowded if we were to have provisions about publicity for every new offence or policy that was made into law. When a new offence or other significant policy change is created, the Scottish Government will always consider what steps are required to make the public aware of them.

I hope that that provides the reassurance that members looking for, and I invite Annie Wells not to press amendment 4.

Annie Wells: I welcome the cabinet secretary's remarks, on the basis of which I will withdraw my amendment.

Amendment 4, by agreement, withdrawn

The Convener: Amendment 10, in the name of Jamie Greene, is grouped with amendments 11 and 15.

Jamie Greene: Members and panellists will have noted that amendments 10 and 11 are very similar in nature. I will come on to amendment 11 later.

Amendment 10 has two purposes. One is to give ministers in the future the opportunity to review the effectiveness of the bill. That purpose is detailed in subsections (1) and (2) of the new section that amendment 10 would introduce. Although the bill is in a very good place, we have learned lessons from other pieces of legislation that have sought to achieve similar outcomes. In Parliament we do our best to get legislation right up front, but things often arise and reviewing legislation is a common process. The wording in amendment 10 appears in many other pieces of legislation. It would provide an opportunity, in that the Scottish ministers may—not "must"—review the effectiveness of the bill in future and, in doing so, and as they think appropriate, consult people, some of whom are perhaps in the room today. The amendment is intended be helpful, in that, in the future, and for a number of reasons, ministers may seek to ensure that this piece of legislation has truly met its objectives.

We perhaps dealt earlier with subsections (3) and (4) of the new section that amendment 10 would introduce, in relation to ministers' ability, as part of such a review, to alter the definition of "historical sexual offence". The specific reason for lodging amendment 10—and amendment 11, which goes further—was to address another issue that we have discussed in great detail and about which I have felt very strongly, which is those who have been considered to have offended while serving in our military. I appreciate that such offences might have been administered via other jurisdictions. Nowhere in my amendments do I seek to find a solution to that problem. I think that we are all in agreement that there is still an outstanding issue that neither the bill nor the legislation in England and Wales addresses. There are still people out there who were court-martialled or dismissed from the armed forces for committing no offence other than being gay.

10:30

Although I do not for a minute expect the bill to deal with that issue, I hope that in future all concerned bodies—both Governments, agencies and the military—can come up with a solution to the problem. There is not one at the moment; there is discussion. My amendments do not seek to offer a solution but simply allow that, if there is an agreement in the future about offences that were committed in Scotland, for example, or about people who reside in Scotland and wish for a pardon or disregard for those types of offences, the bill may be used as a vehicle to do so.

I have been careful with the wording not to include anything outside the Parliament's competence. The words simply ask the minister to consult on the matter and, subject to regulation, give the ability for ministers to alter the definition of "historical sexual offence". An example may be to include wording to cover those who were dismissed from the armed forces for committing a so-called offence, but that is subject to further discussion between Governments and agencies, and we do not know what the outcome will be—I appreciate that that is a difficult circumstance. Because of the progressive nature of this bill, which is not as narrow as others, I would like to think that it could be used as a mechanism to add further pardons and disregards if that was deemed to be technically possible in the future. That is the only reason why I have added amendment 11 and I hope that the cabinet secretary will have some sympathy with the premise of the amendment.

Amendment 15 is largely technical and relates to amendments 10 and 11, so I will not speak to it. I will be keen to hear the views of members and the cabinet secretary on my intention with the amendments.

I move amendment 10.

Mary Fee: I have a deal of sympathy for some of Jamie Greene's comments and the intention of the amendments. One of the most important aspects of any legislation that is passed by Parliament is how we make sure that it adequately does the job that it is intended to do. In my view, the committee could play a crucial and important role, with the Equality Network and other stakeholders, in scrutiny of the effectiveness of the bill. I will be interested in the cabinet secretary's view.

Gail Ross: In his summing up, maybe Jamie Greene can talk to this point. Amendment 11 says:

"Scottish ministers must consult ... Her Majesty's military forces".

That is a reserved issue, so I wonder how that interplay would work. The cabinet secretary may want to address that issue as well.

Michael Matheson: Amendments 10 and 11 are two versions of an amendment that provides for a power for Scottish ministers to review the outcome and effectiveness of the bill. I agree that monitoring and evaluating new legislation is important to ensure that it has the effect that was intended. However, amendment 11 requires that, in undertaking such a review, Scottish ministers would be required to consult Her Majesty's military forces. As members are aware, the power to legislate to grant pardons and disregards with respect to convictions for military offences is reserved to the United Kingdom Parliament. A person with such a conviction can apply for a

disregard via the Home Office's disregard scheme. As such, it would not be appropriate for a power to undertake a review of the operation and effectiveness of the bill to include such a requirement, given that it will not in fact impact on Her Majesty's forces.

I also have concerns about the way in which subsection (3) in both amendments is drafted. The subsection requires that, in undertaking the review, the Scottish ministers

"seek advice on any further historical sexual offences which take place in Scotland but are not listed under section 2."

I think that what is intended is that the Scottish ministers should seek advice on whether there is evidence that people have been convicted for same-sex sexual activity that is now lawful but is not included in the list that is contained in section 2(1) of the bill. As I said earlier, I think that the catch-all nature of the definition of "historical sexual offence" in section 2(2) means that the use of that power would be very unlikely, if it would ever be used at all.

Parliament has an important role to play in post-legislative scrutiny, and it would be more appropriate for it to conduct that process rather than that being done internally in the Government.

I therefore invite Jamie Greene to seek to withdraw amendment 10 and not to move amendments 11 and 15.

Jamie Greene: I thank my colleagues for their helpful and constructive comments. I will address some of their questions.

Mary Fee made a very good point. This committee in particular will have a very valuable and purposeful role in reviewing the effectiveness of the bill in the future. Reviewing acts and placing a duty on ministers to review them are common practices that add strength to the process. I appreciate the cabinet secretary's comments on its perhaps being for Parliament and not ministers to review the legislation, but Parliament always has a duty to review legislation.

I take on board the comments on subsections (3) and (4) in amendment 11.

I lodged both amendment 10 and amendment 11 because I knew that amendment 11 would raise the issue that Gail Ross raised on competence and reserved matters. I appreciate that; the aim was really to stimulate conversation about that matter. I still think that there is no harm in both Governments and the military sitting down and having a conversation. Some people who will be affected may currently reside in Scotland, or the offence may have taken place in Scotland, albeit under other law. I would have thought that removing the reference to "military forces" in amendment 11 would have been more palatable to the cabinet secretary.

If the committee is confident that Parliament will review the bill without placing a duty on ministers, I am confident in the committee's ability to do so. I will therefore not press amendments 10, 11 and 15.

Amendment 10, by agreement, withdrawn.

Amendment 11 not moved.

The Convener: Amendment 12, in the name of Jamie Greene, is in a group on its own.

Jamie Greene: Amendment 12 is an important amendment on guidance. Its initial purpose and premise when I spoke to the legislation team was to ensure that people would be signposted to the legislation when going through disclosure processes. That is its background.

Guidance relating to the legislation should be issued, so that would be the purpose of including a guidance provision. In particular, I would like guidance to be given on disclosure schemes, particularly under the Protection of Vulnerable Groups (Scotland) Act 2007, in so far as they will interact with the legislation. The reason is that we discussed at great length in committee, and felt strongly, that in the guidance for applications for disclosure or enhanced vetting processes, people should be signposted.

I have worded amendment 12 in such a way that it does not say that the Scottish Government will have to redraft and reprint all current guidance for vetting processes and disclosure schemes; I appreciate that that would be onerous. However, I would like future iterations of it to signpost people to the legislation in black and white. That is the purpose of the guidance and that is why the amendment has been drafted as it has.

I hope that other members of the committee support the concept of the Government issuing guidance and of it being explicit. For the avoidance of doubt, the matter should also be addressed in the guidance for disclosure schemes. We heard, for example, evidence that people who had applied for certain types of jobs were not really aware of what historical offences they did and did not have to disclose. I would like to think that people who are not aware of the bill but who will interact with it through the disclosure process will be proactively signposted towards it, take advantage of the disregard and then proceed with their vetting processes. That would be a positive move. It might increase uptake of disregards.

It is not an overly onerous ask for the Government to ensure that its guidance on those processes is explicit about the existence of the bill and not just to leave it up to public awareness. For

that reason, I ask the committee to support amendment 12.

I move amendment 12.

Alex Cole-Hamilton: I have a great deal of sympathy with everything Jamie Greene said. Given its interrelationships with other pieces of legislation, such as the Public Records (Scotland) Act 2011 and the legislation on disclosure and data protection, the successful implementation of a bill of this nature would, however, require extensive guidance. If the cabinet secretary confirms that, I will be minded not to support amendment 12 because I imagine that we could not go far into implementation without guidance.

Michael Matheson: Amendment 12 would place a requirement on the Scottish ministers to

"issue guidance on such matters relating to the operation of the Act as they consider appropriate."

I reassure the committee that the Scottish Government will provide guidance to the bodies that are responsible in any way for implementing the disregard scheme. I note that subsection (2) of the new section that amendment 12 would insert provides that such guidance

"must ... make provisions in regard to the disclosure scheme under the Protection of Vulnerable Groups (Scotland) Act 2007 in so far as it"

will be affected by the bill. It might be helpful if I clarify that the disclosure schemes in question are operated by Disclosure Scotland, which works on the basis of information that is provided to it by Police Scotland. The purpose of the disregard scheme is to ensure that disregarded convictions are deleted or marked so that they are never disclosed. As a consequence, Police Scotland should not pass information about disregarded convictions to Disclosure Scotland for the purposes of disclosure checks.

Appropriate guidance will be provided to relevant bodies, including Disclosure Scotland, on implementing the provisions in the bill. However, it is not required that that be provided for in legislation. On that basis, I ask Jamie Greene not to press amendment 12.

Jamie Greene: Is the cabinet secretary confident that, in the future, the guidance notes that accompany disclosure applications will refer to the existence of the eventual act?

Michael Matheson: Specific guidance will be issued once Parliament has approved it. That is often the case in relation to legislation. Guidance will be tailored to assist and advise the relevant organisations, such as those to which Alex Cole-Hamilton referred. That will happen as a matter of course, but it would not be stipulated in the bill. The reason why guidance is issued is simple: it is to ensure that the legislation is properly understood and properly implemented by agencies. That probably happens with all pieces of legislation that introduce new statutes such as this.

10:45

Jamie Greene: I thank the cabinet secretary for that answer. I am reassured by his comments.

Amendment 12, by agreement, withdrawn.

Section 14—Regulations

The Convener: Amendment 5, in the name of the cabinet secretary, is in a group on its own. I point out that, if amendment 5 is agreed to, I cannot call amendments 13 to 15 because they will have been pre-empted.

Michael Matheson: Amendment 5 will amend section 14, which makes provision regarding the regulation-making powers that are contained in the bill to provide that two of them will be subject to affirmative procedure: the power under section 10(3) to

"prescribe the manner in which references to disregarded convictions are to be removed"

and the power under section 10(5) to prescribe relevant record keepers to whom the disregard scheme applies.

Amendment 5 is a response to the recommendation at paragraph 115 of the committee's stage 1 report that, given the importance of such regulations to the effective operation of the disregard scheme, they should be subject to affirmative rather than negative procedure. We accepted that recommendation in our response to the stage 1 report.

I move amendment 5.

Amendment 5 agreed to.

Section 14, as amended, agreed to.

Sections 15 to 18 agreed to.

Long title agreed to.

The Convener: That ends stage 2. Thank you very much, cabinet secretary. It has been a superb bill to work with. It has been very well drafted and its intention makes us all incredibly proud to be part of the process.

Michael Matheson: Thank you very much, convener.

The Convener: I thank all members for their participation at stage 2 of the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill. It has been great to see.

The next meeting of the committee will be on 31 May at 9.30 am in this committee room. We have no meeting next week.

Jamie Greene: Before we close the meeting—[*Interruption*.] Mary Fee has run away. [*Interruption*.] Have a seat, Mary.

Mary Fee: I apologise. I am back.

Jamie Greene: Before we close the meeting and while the official reporters are still here, I would like to record that this is my last meeting at the committee. I am sad to be moving on to another committee, so I thank my committee colleagues, the convener, deputy convener, the clerks and the other staff. Everyone who works on the committee does an excellent job; it has been a real privilege to be part of it over the past year. I wish the committee all the best in its future deliberations.

The Convener: Thank you very much, Jamie. On behalf of the committee, I thank you for the work that you have done in sometimes tenacious fashion, which is always welcome on a committee, and wish you well in your new endeavours.

Meeting closed at 10:48.

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