OFFICIAL REPORT
AITHISG OIFIGEIL

Education and Skills Committee

Wednesday 20 November 2019

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 20 November 2019

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EDUCATION AND SKILLS COMMITTEE
31st Meeting 2019, Session 5

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Daniel Johnson (Edinburgh Southern) (Lab)

COMMITTEE MEMBERS

*Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP)
*Jenny Gilruth (Mid Fife and Glenrothes) (SNP)
*Iain Gray (East Lothian) (Lab)
*Ross Greer (West Scotland) (Green)
*Alison Harris (Central Scotland) (Con)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Gail Ross (Caithness, Sutherland and Ross) (SNP)
*Liz Smith (Mid Scotland and Fife) (Con)
*Beatrice Wishart (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Gemma Grant (Scottish Government)
Gerard Hart (Disclosure Scotland)
Kevin Lee (Disclosure Scotland)
Maree Todd (Minister for Children and Young People)

CLERK TO THE COMMITTEE

Roz Thomson

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Education and Skills Committee

Wednesday 20 November 2019

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Clare Adamson): Good morning, everyone. Welcome to the 31st meeting in 2019 of the Health and Sport Committee. I remind everyone present to turn their mobile phones and other devices to silent for the duration of the meeting.

The first item of business is a decision on whether to take future consideration of the draft report on the Disclosure (Scotland) Bill in private. Are we agreed?

Members *indicated agreement.*

Disclosure (Scotland) Bill: Stage 1

10:00

The Convener: Our next item of business is the fifth and final evidence session on the Disclosure (Scotland) Bill. We have heard from a range of bodies since September, and all the evidence that we have received has been helpful.

Today, we welcome to the committee the Minister for Children and Young People, Maree Todd, and her officials Kevin Lee, the bill team leader, Gerard Hart, director of protection services and policy—both from Disclosure Scotland—and Gemma Grant, who is a lawyer in the Scottish Government's legal directorate.

I invite the minister to give her opening remarks.

The Minister for Children and Young People (Maree Todd): Thank you for inviting me to give evidence on the general principles of the bill.

The Disclosure (Scotland) Bill is the result of extensive engagement through the day-to-day operation of Disclosure Scotland and the review of disclosure since 2016. The protection of vulnerable groups scheme is widely viewed as a vital tool to support safe recruitment and public confidence in those who carry out certain roles with vulnerable people.

Recent inquiries involving sexual abuse in sport and other spheres of life that impact children have once again raised public consciousness about the importance of safeguarding. A number of recent high-profile cases involving the exploitation of adults have also served to remind us that the PVG scheme exists to protect us all in circumstances in which we might be especially vulnerable to harm. However, it is clear that change is required to ensure that the scheme remains able to meet tomorrow's demands.

Since becoming the Minister for Children and Young People, I have heard moving accounts of the on-going impact of disclosure for children and young people who have come into contact with the justice system. It is with that in mind that the bill makes new provisions surrounding the disclosure of childhood offending and seeks to simplify the process for adults to realise their right to apply for the removal of certain disclosure information.

The committee has focused on fees, the decision-making frameworks underpinning disclosable information and a minimum age for accessing disclosure. I acknowledge that stakeholders would like more information on those areas.

I understand the concerns of individuals and organisations about the impact of changes to fees. Although the proposals in the bill could be delivered using the current fee structure, there is a question about whether we could find better ways forward. I have an open mind on the issue and I am committed to consulting fully on fee structures. However, I am clear that the fee waiver will continue for qualifying voluntary organisations.

I am also committed to the statutory guidance on the review process that is being developed in consultation with stakeholders. Comprehensive and clear guidance will accompany the changes to the disclosure system. Our stakeholders have committed to helping us to draft the guidance and test it with their users to ensure that it meets their needs.

I understand the concern that an unintended consequence of setting a minimum age for disclosure might be that organisations avoid taking on volunteers who are under that age. In England, Wales and Northern Ireland, children under the age of 16 cannot obtain state disclosures, but that has not affected the many United Kingdom-wide organisations that offer opportunities to children. I will ensure that Disclosure Scotland and the Government more widely communicate effectively on that issue to make sure that children are not disadvantaged in obtaining volunteering opportunities.

I thank everyone who has provided evidence to the committee. We have listened carefully and we will continue to engage proactively with stakeholders to strengthen and improve the bill. I am happy to answer questions and provide more detail if the bill progresses.

The Convener: We will move straight to questions.

Liz Smith (Mid Scotland and Fife) (Con): Minister, the basic principles of the bill have been generally well received, as has its intention to simplify a number of issues. As you said, the situation is not always simple.

With that in mind, we need to consider some of the complexities that witnesses have recently flagged up to us. In its letter to the committee, the Faculty of Advocates said:

"The proportionality of the disclosure will inevitably require balancing the rights of individuals with the potential risk to members of society ... this balancing act is 'of the greatest public importance'."

I think that all the witnesses from whom we have heard agree with that. Minister, how confident are you that there is a good legal foundation to that statement?

Maree Todd: I am very confident that there is a good legal basis to that statement. As I explained in my letter to the committee of 21 October, the two-part test on whether information is "relevant for the purpose of the disclosure" and "ought to be included in the disclosure" is well established in the context of decisions by the police to provide other relevant information, for example, for inclusion in a disclosure certificate. The approach has been approved by multiple decisions of the United Kingdom Supreme Court.

We need to be clear about the type of information to which the two-part test applies. The two-part test for whether something is relevant for the purpose of the disclosure and ought to be included applies to three separate categories of information: ORI; childhood conviction information; and removable convictions. Although the same wording applies, the test will be applied in different contexts, depending on the information in question, the stage in the review and who is making the decision—the chief constable, ministers or the independent reviewer.

Liz Smith: Do you accept that two witnesses questioned how able they would be to interpret the different categories of information that you mentioned? Although good guidance might be forthcoming, the witnesses are concerned that it will come down to a legal interpretation, especially if a decision is challenged, and they do not feel competent and confident to make such judgments? Is that a potential concern for you in the context of the bill's progress?

Maree Todd: It is obviously a concern if stakeholders are saying that they do not feel confident about the process. I will ask my legal official to try to clarify the situation.

Gemma Grant (Scottish Government): As the minister said, the two-part test is well established and has been approved in multiple decisions of the Supreme Court, including in the case that was referred to in the letter from the Faculty of Advocates, that is, R(L) v Commissioner of Police of the Metropolis.

The leading judgment in that case was delivered by Lord Neuberger, who commented that if the test was only one of relevance for the purpose of the disclosure, it would be insufficient to meet the proportionality test in the context of article 8 of the European convention on human rights. He said that the requirement for the chief officer to go on to consider whether the information ought to be included is a necessary part of the test for establishing proportionality.

Lord Neuberger gave examples of factors that would be considered as part of a decision about what ought to be included. They include:

"the gravity of the material involved, the reliability of the information on which it is based, whether the applicant has had a chance to rebut the information, the relevance of the

material to the particular job application, the period that has elapsed since the relevant events occurred, and the impact on the applicant of including the material".

A decision maker who is applying the tests must comply with those established principles, to ensure that the decision is lawful and proportionate.

The Faculty of Advocates said in its letter:

"We support the Minister's comments"—

in a previous letter to the committee—

"that the test will be informed by case law from the Courts and reflected in guidance."

It is worth making the point that, in preparing the bill, a balance has had to be struck between the need for foreseeability, which we recognise is a key component of making legislation that is consistent with ECHR requirements, and the need to allow for flexibility, which I think that witnesses have recognised is an important part of a rights-based approach. A nuanced approach, particularly in relation to childhood convictions, has been supported by a number of witnesses.

Liz Smith: Obviously, Police Scotland, Disclosure Scotland and any independent reviewer will be cognisant of the law as it stands and of the two tests. However, I think that some of the people who run organisations that have volunteers are concerned that the judgment that they must make about what is relevant information and what ought to be disclosed requires specialist information, and is therefore quite difficult.

The minister said that there would be extensive engagement with stakeholders. What will be done to ensure that the guidance that will be given to those who have to make a judgment about relevant information and what ought to be disclosed is clear and offers them an assurance about what they must do?

Gerard Hart (Disclosure Scotland): That is an important consideration as the bill progresses. There are two on-going strands that will help with that. The current police arrangements in England and Wales have a quality assurance framework that provides a decision-making framework that helps chief constables to make decisions in line with that two-part test. I hope that, as the bill progresses, we will produce similar guidance for Scotland in order to provide a framework and structure.

At the same time, we have another strand called Scotland works for you. It involves engaging employers across the country to talk about how they can use disclosure information effectively to make balanced and proportionate decisions about allowing people with previous convictions safely back into work.

We think that a twin-track approach is needed with regard to the bill. There is the decision-making process about how to put the information into the disclosure system fairly and accurately; the other strand is about how to equip employers to use the disclosure information better. Without that latter strand, it would perhaps be more difficult to build the necessary knowledge base and attain the desired strength of decision making.

Liz Smith: That is an interesting point. I am not at liberty to disclose the name of the person whom we spoke to in private session. However, they were an employer, and they said that the information that is given to the employer is different from the self-disclosure. With regard to what you have just said, I would say that that is a potential problem. How would you address that?

Maree Todd: On the issue of separation between self-disclosure and state disclosure, we recognise that the two have to match, and we are working on solutions, particularly with regard to children.

Liz Smith: What will you do to make sure that they tie up?

Gerard Hart: As the minister has just said, the individual must be able to predict what they have to disclose. When there is no immediate, obvious or identical duty on the individual because of the operation of the rules in the "always" list with regard to what might be removed on appeal, there is a presumption that the individual does not have to disclose those matters until those appeals are exhausted. The duty of an individual to self-disclose crystallises when the state decides what will be disclosed. That principle defaults to protect the rights of the individual, rather than going the other way, so that the duty would somehow hang over the individual until the state makes a different decision.

We will do a lot of stakeholder engagement and online work to make the process clear, and that includes the calculator. We still have to work with stakeholders on how to get that message across most effectively. However, the individual will not be in an adverse position in terms of having to disclose things that they might not have to disclose later if they were successful in an appeal against having to disclose a conviction.

Liz Smith: That is helpful. I just think that there are issues about the fact that, when an employer wants to take somebody on as a volunteer, there is the potential for some information to have been disclosed by the person who wants to volunteer. That is quite an important issue, and I ask you to consider it in your engagement.

Gerard Hart: That is a possibility. However, I think that the stakeholder engagement piece of

work has to be around preparing employers to interact with the legislation in a positive and progressive way.

Daniel Johnson (Edinburgh Southern) (Lab): Following on from Liz Smith's line of questioning on the two tests, can you provide an example of information that would meet the relevance test but fail the "ought" test?

10:15

Gerard Hart: I could have a stab at answering that.

Daniel Johnson: I was rather hoping that the minister would answer the question.

Maree Todd: I think I will ask my officials to answer that. You can see that we are all slightly baffled by the question.

Daniel Johnson: In some ways, your response illustrates the difficulty that we have been having. Although I accept that the test is well established in the courts, there might be a lack of clarity for people who are applying the tests and are considering what is to be disclosed, and for those who are undergoing the checks. Can you comment on the fair degree of consensus that there has been on the part of witnesses about the suggestion that it would be a good idea to establish in the bill the principles that will be applied to that "ought" test? In particular, the Law Society and the Howard League for Penal Reform gave good examples of the sorts of principles that could be included in the bill and suggested how they could maintain the element of flexibility.

Maree Todd: An obvious example of a situation in which there might be a question about whether a conviction ought to be disclosed later in life is that of an extremely early childhood conviction—say, when someone was aged 10. I would like to think that that would be carefully considered.

I will ask Gemma Grant to comment in more detail on the legal specifics that you have asked for. This is a really complex area, and I want to be absolutely sure that we get on record the accurate situation and provide you with the correct answers to your questions, so that we can move forward and develop the legislation in the simplest way possible, so that it serves the people it is meant to serve.

Gemma Grant: I will reiterate some of the factors that the Supreme Court has said would be pertinent to the decision about what ought to be included. In line with the example that the minister has given, one factor could involve the length of time that has elapsed since the conviction was accrued by an individual. On the face of it, a conviction that might be relevant to the role that a person is applying for ought not to be disclosed because it is a historical one and there has been no pattern of offending behaviour in the interim period. A further factor that might come into play in that regard might be the severity of the conviction, because, even after the passage of time, such a conviction might still be relevant and ought to be disclosed.

That aspect of the test is what ensures proportionality, as does the issue of the interference with the rights of an individual. Although the courts have recognised that, in certain circumstances, there should be bright-line rules, this is one of the areas in which it is difficult to have such bright-line rules, because it is inherent in the nature of this type of decision that having flexibility supports the rights of individuals and might, in some circumstances, allow them to move on from past offending.

Daniel Johnson: My slight issue with that is that, in the Supreme Court judgment that you cited, the judge provided a set of criteria that were similar to the ones that were suggested to us by the Howard League, and included criteria such as the circumstances of the offence, the number of offences, the age at the time of the offence and how recently the offences were committed. Why would you not include those criteria in the bill, particularly if you made them amendable by either affirmative or negative procedures, as the Law Society has suggested? That would provide welcome clarity as well as flexibility, which, rightly, you reference as being important.

Maree Todd: We are open to dialogue about whether codification could improve clarity. It might be helpful if I put the issue into context by saying that there are bright lines around the vast majority of the decisions that are made. Last year, only 600 disclosure certificates contained information relating to convictions accrued between the ages of 12 and 17. Further, of the 275,200 PVG certificates that were issued in 2018, only 401—that is, 0.15 per cent—contained ORI. Only a small number are affected by the two-part test.

Daniel Johnson: That depends on your frame of reference. In my view, 400 people sounds like a lot.

I recognise the Supreme Court judgments, but I note that those judgments apply English law in English cases. Although I understand that the courts up here accept Supreme Court judgments as guiding their decisions, would such judgments have an impact in respect of the legal status of the two tests in the bill?

Maree Todd: No, I do not think so. That would not give me any concern at all. Obviously we pay a great deal of attention to the UK Supreme Court's judgments, whether in Scottish cases or in cases relating to other parts of the UK.

Daniel Johnson: But those judgments are not binding if they are made according to English law, even if they are judgments of the Supreme Court.

Gemma Grant: It is correct to say that they are not binding, but in this case they would be highly persuasive because the statutory test is set down in precisely the same terms.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): I am keen to come in briefly on the back of the minister's example of how the system would work for someone who committed an offence when they were 10 years old. The committee has heard a lot of anecdotal evidence—I will put it that way—about the problems that someone in that situation would face if they had accepted offence grounds in a children's hearing. In some cases, if someone does not have legal representation, they might not understand the offence grounds. Are you satisfied that the new system will deal more understandingly—if that is an adverb—with people in that situation?

Maree Todd: We understand that it is difficult for children to understand offending behaviour, and that the acceptance of offence grounds can have lifelong consequences for employment opportunities, for example. That is why the Age of Criminal Responsibility (Scotland) Act 2019, the Management of Offenders (Scotland) Act 2019 and the bill have all sought to reduce the scope for such information to be disclosed.

The ACR act raised the age of criminal responsibility, and it provides that behaviour under the age of 12 can be disclosed only as other relevant information. The Management of Offenders (Scotland) Act 2019 provides that children's hearings disposals become spent immediately, which means that they will never appear at disclosure level 1, which is the lowest and most common level.

The bill ends the automatic disclosure of childhood convictions and replaces it with an individual case-by-case approach. That is a real improvement on the current situation. The two 2019 acts and the bill interact to form a cohesive approach to a difficult issue that concerns us all.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Minister, I want to ask about the lists of offences, particularly the criteria that are used for the timescales for disclosure and the content of those lists. The Children and Young People's Commissioner Scotland stated in written evidence that:

"An approach based on lists of offences is a blunt instrument which does not allow for a proper assessment of risk of future harm",

and raised a point about whether there should be separate lists for childhood and adult offences.

The Centre for Youth and Criminal Justice raised concerns with us about

"wilful fire-raising as a List A offence"

and offences that can accrue to care-experienced children in specific circumstances. What criteria were used to decide on the content of the lists, how they were split and the timescales for disclosure?

Maree Todd: We are aware that some of the respondents to the consultation on the bill, and some witnesses to the committee, have suggested that there should be different lists for children. However, that would increase complexity, which we want to avoid. All that the lists do is act as a filter. They remove from the scope convictions that are irrelevant for state disclosure.

For convictions that are automatically non-disclosable, as a result of that filtering process the inclusion of childhood conviction information is subject to case-by-case assessment, first by ministers and then, if necessary, by an independent reviewer. We consider that tailored approach to be much more proportionate than introducing a separate list of offences in relation to childhood convictions.

Rona Mackay: We have heard concerns about the content of such lists possibly being out of proportion or not compatible. Would you work with other stakeholders to refine that?

Maree Todd: We are always willing to work closely with stakeholders. In the evidence that has been given previously, the committee will have heard just how closely Disclosure Scotland does the same. Much of the content of the bill has come about as a result of such close engagement and working together.

There are strong policy justifications for having the two different lists. Without them, there would be no distinction between offences such as public indecency, which is a list B offence, and rape, which is a list A offence. Both offences are relevant and serious, which justifies the need to be able to disclose such convictions after they become spent. Having just one list would fail to acknowledge that we are dealing with a spectrum of offences, as was acknowledged by the Law Society of Scotland in its evidence.

Rona Mackay: Are you still of the view that childhood offences that have been committed by care-experienced children should be treated the same as others, or would consideration be given to the external circumstances in such cases?

Gerard Hart: The lists are not an articulation of a wish to treat such cases the same way. The process behind the operation of the lists will allow the unique and individual circumstances of each person who is affected to be considered fully.

Disclosure Scotland has been very cognisant of care-experienced young people and their increased propensity to be convicted as children, which is a very serious problem. We work in partnership with Who Cares? Scotland and other organisations, including the CYCJ, on trying to address that.

The lists are probably better seen as a way of saying what is not disclosable. The vast majority of stuff will not be disclosed because it is not on the lists. They kick-start a process whereby a nuanced and individual look is taken at the material so that a proper, fair and balanced decision can be made. There are some young people whose offending will indicate a serious propensity to go on to cause serious harm as adults, but the vast majority of them do not go on to perpetrate such behaviour in adulthood—even those who, in childhood, evince sexually harmful behaviour.

There is no way that we can have a process other than a completely nuanced and qualitative one that would really sift through such information to ensure that we attach disclosure status only to those who genuinely need it and that the vast majority of young people do not have to face the persistent disclosure of their childhood problems.

Rona Mackay: I am concerned about how the detail of that approach will appear in the bill. Will it be worded so as to make it clear that such cases are not viewed in black and white?

Gerard Hart: The guidance that will be produced for our staff in the Scottish Government, the independent reviewer and the police will have, at its very heart, the balance that has to be struck between fairness to the individual and protection of the public. It will have to take full cognisance of the serious and evidence-based concerns that exist about young people who are looked after and accommodated, and the trajectory that they can have in their lives because of the persistence of disclosure requirements. That will be absolutely central to writing good guidance, which we will prepare with stakeholders so that it is as shared as much as possible in both its conception and its operation and is made subject to regular review.

Gemma Grant: On your question about the wording of the bill, I add that a conviction that is non-disclosable because of the operation of the lists cannot be a childhood conviction. A non-disclosable conviction is not disclosable at all, does not go through the decision-making process and is not subject to the statutory tests; it just falls off the disclosure. That is a feature of the bill as it is currently drafted.

Rona Mackay: With regard to the proposed timescales, what general criteria did you use?

10:30

Kevin Lee (Disclosure Scotland): The bill does not set out timescales, because we wanted to engage with stakeholders to set appropriate timescales. We do not want to set something that does not give individuals enough time to engage in the process. By the same token, we do not want to set timescales that are too long for organisations from which we might need information, because we obviously want to ensure that the process works as quickly as possible. We are aware that delays could be seen as a proxy for something else that is going on. With our approach, we think that we can deliver the number of applications involved in a matter of days. We are not talking about months, which is how long it takes just now. An application to get a conviction removed from a disclosure by a sheriff can take months, if not over a year. We certainly believe that the approach that we have taken will radically improve the situation for people who want to apply to get information removed from their disclosure.

Rona Mackay: You are confident that it will speed up the process.

Kevin Lee: Yes.

Gail Ross (Caithness, Sutherland and Ross) (SNP): Good morning. I want to follow up on a point that Gemma Grant made about childhood convictions automatically falling off. Does that mean that they are there but not disclosed, or does it mean that they are permanently deleted and there is no record of their having happened?

Gemma Grant: If somebody had had a conviction in childhood that had become non-disclosable because of the passage of time, it would not be included in any of their disclosure products under the bill. However, I would need to check with my Disclosure Scotland colleagues on the matter of record keeping and whether that information would still be held.

Gerard Hart: We disclose from the police record. Obviously, the police have a criminal history system, the police national computer and other systems that they maintain for the purposes of law enforcement and the apprehension of offenders, from which we disclose. We process that information when we take it from the police and apply the disclosure rules to it.

The police would still hold the information, but they have their own weeding and retention rules, which are commonly referred to as the 20:40:70 proportionality rules; it is the chief constable who applies those. The information that we process is drawn from the police systems. The police would therefore still know about a conviction, unless they had weeded it, but it would not be disclosed by the state on a disclosure.

Gail Ross: Thank you.

I want to move on to what Gemma Grant said earlier about article 8 of the ECHR. Of the system that is proposed in the bill, Alison Reid of Clan Childlaw said in her written submission:

"A system so complex as to mean there is the lack of foreseeability, is at risk of being incompatible with Article 8 of ECHR."

Furthermore, in a recent letter to the committee, the Faculty of Advocates said that

"the disclosure would 'represent an unwarranted invasion' of an individual's article 8 rights."

What is your view of that evidence? Is there a genuine concern there?

Gemma Grant: I can certainly confirm that, in order for laws to be compatible with the ECHR, their effects need to be foreseeable. That means that they need to be accessible to the people who are affected by them and must not be arbitrary. If a piece of legislation gives a decision maker discretion, there has to be sufficient clarity about the way in which that discretion will be exercised. What the case law does not say, though, is that decision makers and public bodies are not permitted to have such discretion in making decisions; it is just a question of having a set of parameters that are based on guidance or already known and established legal principles so that the application of those rules is reasonably foreseeable in practice.

The Scottish Government's position is that what is set out in the existing legislation and in the bill is sufficiently foreseeable, and that that will also be informed by the guidance that is to be developed in consultation with stakeholders.

Gail Ross: Alison Reid commented on that aspect when she gave evidence to the committee. She said:

"We are trying to explain the scheme to young people who potentially have complex mental health issues, who have experienced physical and emotional abuse or trauma or who have been exposed to neglect."

She said that "really complex concepts" had to be explained. That is possibly at odds with what you said about it being foreseeable. I asked her how we could make things simpler. She said:

"In relation to the way that childhood offending behaviour is addressed, our view is that it should not be treated as a conviction."—[*Official Report, Education and Skills Committee*, 9 October 2019; c 8-10.]

Do you have any opinions on that?

Maree Todd: Discussion is absolutely vital to balancing public protection and rights. That is well established in the process of self-disclosure and state disclosure. I will ask Gerard Hart to give the committee more detail on how we intend to engage with stakeholders to ensure that they understand the process clearly and that there is material available on how decisions might be made and how that might impact on people's future prospects.

Gerard Hart: As the minister said, the concept behind the bill is to try to provide the right tools to ensure that anyone who has a criminal record that could be disclosed can have access to fair and proportionate ways for their case to be looked at on an individual level. There are two poles: we could have a system in which everything is disclosed—that is kind of where we were before the UK Supreme Court ruling in 2014 and our subsequent convention compliance order in 2015—or we could have a system in which nothing is disclosed and everything is protected. There are camps of opinion for both. We are trying to strike the right balance between those two positions and that necessarily drives a degree of discretion into the consideration process.

We have tried to solve that through some of the things that we have talked about today. What we call the rules list and the always list—the lists in schedules 8A and 8B to the Police Act 1997—give a clear articulation of what is never disclosed and what could be disclosed, and the new appeal processes that are being put in place give ready access to justice for people who want those things to be looked at.

The imposition of the independent reviewer across the process adds a new layer of proportionality and fairness, but that brings with it a degree of complexity, because it is a complex problem. We are trying to solve a complex problem that needs an individual and nuanced approach. To counter that, we have to write really great guidance that is fantastically clear so that everyone can understand it. We must do that in partnership with all our stakeholders and have great online services that enable people to access those things easily. We are determined to do that and to have that kind of openness and clarity in the process.

Maree Todd: The Government is confident that the bill will help to deliver a system of disclosure of childhood convictions that is fairer and more individualised, and that it strikes a more proportionate balance between someone's ability to move on from past behaviour and the need for wider public protection.

One thing that we have not highlighted so far in our evidence is the fact that the bill will enable those with childhood convictions to provide representations that include details about the wider context of their previous behaviour to ministers before any disclosure to a third party is made. That is a significant change from the current system, and I think that it improves

proportionality and privacy for individuals who need to use the disclosure system.

Dr Allan: We might have touched on some of what I am about to discuss, but not all of it. I am interested in the context around convictions. Will the bill allow for context to be disclosed, when that is relevant? Can you say a bit more about how context informs decisions about disclosure?

Maree Todd: The decision-making framework where the two tests are applied enables people to consider that context and seek further information to help them to make a decision about whether something needs to be disclosed. As I said, that applies in relation to ORI and, when disclosing information, to ministers or the independent reviewer.

That is where context will be sought, so that people can make a good and informed decision about whether something is relevant and ought to be disclosed. They will have access to suitable context for those decisions to be made.

Dr Allan: Can you say a bit more about the role of ministers in the system and whether you see it increasing or decreasing? Will the proposed system be an improvement on what is there now? How much discretion or involvement are ministers likely to have at any stage in this process on any cases?

Maree Todd: In simple terms, ministers make the first decision on whether something needs to be disclosed; Disclosure Scotland makes that first judgment on behalf of the Scottish ministers. There is then a process of ensuring that the person about whom information is to be disclosed has an opportunity to see that, if they are a child, and to make an appeal to the independent reviewer.

I will ask one of my colleagues to provide some more detail on how the system works.

Dr Allan: I understand that decisions will be made on behalf of ministers, but are there any circumstances in which decisions could end up on the minister's desk?

Gerard Hart: It has happened. We have consulted ministers. The Carltona principle, which applies across the civil service, means that when we make decisions, we do so on behalf of the minister, as if the minister had made them herself, and she is accountable for those decisions. We obviously have to do that with full cognisance of what that might mean. When there is a particularly difficult matter, it is sometimes right to let the ministers see those cases, and we do that from time to time.

It is also sometimes right to disclose the context of something so that it can be understood by the person who is going to use the information. Running the PVG barring service, from time to time, I might see, for example, a murder case from 30 years ago, the file on which just says, "Murder. Life imprisonment", and because records have been deleted, we do not know what the details are.

In a curious and helpful way, what we are doing now through the disclosure of information that covers much more than just a bland conviction allows for some of the context around behaviour to be set out so that it will be accessible further on down the line. For example, if an awful murder has been committed, or perhaps a rape and murder, and the circumstances are horrible, at present, that might be disclosed as, "Murder. Glasgow High Court. Life", whereas, in 30 years' time, the disclosure might include information about the context of the murder, which will give the person who uses the disclosure a bit more information than they will get at the moment. Focusing more on the task for which the information is being provided will improve public protection.

We have thought through how we can provide context as part of the bill process.

Gemma Grant: As far as the provisions in the bill on providing context are concerned, representations will be at the heart of all the review mechanisms, so individuals will have the opportunity to provide that context themselves. There are also wide information-gathering powers for ministers in exercising their functions under the bill and for the independent reviewer to ask third parties to provide context-specific information.

Dr Allan: On the other side of the equation, which is about education and awareness, do you think that individuals will have the confidence to work out when they are required to self-declare information—for example, when they are applying for a job? Will people continue to be aware of that, or will they need education?

Maree Todd: Education will always be needed for that aspect of self-disclosure. As I said earlier, there is a principle that self-disclosure should synchronise with state disclosure, and we are certainly working to ensure that that is the case through the bill.

Iain Gray (East Lothian) (Lab): A couple of times, we have touched on the interaction between the bill and existing legislation and, in particular, the consistency—or lack of consistency—between the self-disclosure and state disclosure regimes. There are probably three pieces of legislation that are relevant here: the Rehabilitation of Offenders Act 1974, the Age of Criminal Responsibility (Scotland) Act 2019 and the Management of Offenders (Scotland) Act 2019, all of which have some contradictions with what is proposed in the bill.

Minister, in your letter and this morning, you have indicated that you intend to lodge amendments to the bill in order to resolve that. Will you give us a bit more detail on those amendments and explain exactly how you intend to resolve the contradictions?

10:45

Maree Todd: We are still considering that, so I cannot give you any detail today, but I certainly promise to provide details in as timely a manner as possible, so that the committee has time to consider those details before we reach stage 2.

Iain Gray: The matter is quite pressing, because we are at the end of our stage 1 consideration of the bill. When will you be able to show us how you intend to amend the bill?

Kevin Lee: Right now, the self-disclosure regime, which is covered by the Rehabilitation of Offenders Act 1974, and the state disclosure regime, which is governed by the Police Act 1997 and the PVG scheme, are broadly aligned. The real issue is the treatment of childhood convictions, because the bill says that they will be assessed on a case-by-case basis. If we did nothing to the 1974 act as it applies at the moment, the act would compel a person to disclose a conviction from under the age of 18 while it is unspent, yet the bill proposes that the state will take a case-by-case approach. Therefore, we could have a situation in which a person is required to disclose under ROA, but the conviction is not disclosed by the state. The provisions in the bill would be of no use to that person in those circumstances, and that is the issue that we need to fix.

It is a complicated area, because although the Rehabilitation of Offenders Act 1974 is not in our policy area, it has necessary connections with what we are doing under the bill. Work is on-going with our justice colleagues to resolve the issue and to prepare amendments, and we will make the committee aware of them at as early a stage as we can.

Iain Gray: The obvious way to fix the inconsistency would be to amend the Rehabilitation of Offenders Act 1974. Are you saying that you do not know whether you will be able to do that?

Kevin Lee: It is our intention to make consequential amendments to the 1974 act.

Iain Gray: You implied that you are still discussing whether you could do so.

Kevin Lee: We are discussing how, not whether, we can do so.

Gerard Hart: We are working to the principle that the systems should be aligned, and if they fail—by which I mean, if there is any ambiguity whatsoever—they should fail on the side of fairness to the individual. We have a number of policy models for how that can be solved, which ministers are considering. The minister will indicate how quickly she intends to address the matter, but we are advanced in our thinking on how to deal with it.

Iain Gray: Minister, you say in your letter that the bill does not amend the Age of Criminal Responsibility (Scotland) Act 2019 or the Management of Offenders (Scotland) Act 2019 because, at that point, neither of the bills had received royal assent, so the acts were not on the statute book. Do you intend to lodge amendments to the bill that will amend those two acts?

Gemma Grant: A number of consequential amendments are required to the Age of Criminal Responsibility (Scotland) Act 2019. The disclosure mechanisms that were introduced for under-12s' behaviour were based on the provisions of the Police Act 1997 being in force, so the 2019 act will require to be updated.

Iain Gray: When will you be able to tell us what those amendments are?

Maree Todd: We will do so as soon as we can.

Iain Gray: That is not much of an answer.

Maree Todd: The Management of Offenders (Scotland) Bill was passed only this year. When I wrote to the committee, the two bills had not been enacted. The acts are very recent pieces of legislation. However, the Government is taking a cohesive approach across the three pieces of legislation to try to solve some of the challenging issues that have taxed and vexed us all for many years. I am actively working on all those issues and I will provide details of the amendments as timeously as I can. I want the committee to understand and be able to scrutinise what we are doing, but I could not provide that detail before the two bills were enacted.

Iain Gray: Will it be before the committee enters stage 2 of the bill proceedings?

Maree Todd: I am keen to make sure that the committee has all the information that it needs before it enters stage 2—yes.

Iain Gray: It probably requires more than being keen, but thanks very much.

Ross Greer (West Scotland) (Green): Let us turn to the minimum age and how under-16s will relate to the scheme. Minister, in your opening remarks, you mentioned the situation in England, Wales and Northern Ireland, where the fact that under-16s do not have to take part in the

equivalent schemes seems not to impact on their ability to participate. I am not familiar with the schemes in the rest of the UK. Is that a result of changes that were similar to those that are proposed in the bill? Concerns have been raised about the impact that a change in the system could have in relation to participation. If that has always been the case in the rest of the UK, it is not particularly comparable.

Kevin Lee: They made the change more recently.

Maree Todd: Yes—the change was made more recently, so the situation is similar to the situation here. We are keen not to discourage volunteering among children and young people. They volunteer more than adults do and they contribute a huge amount to Scotland by doing so. We want to make sure that it is still possible for them to do that.

The committee heard evidence from organisations that already consider children differently as volunteers and that do not require them to have PVGs or take on responsibility for performing roles that we would consider to be regulated work. I am confident that we will still be able to provide plenty of opportunities for children to volunteer. I do not think that the change will be as significant as we might imagine, because it has already happened throughout the rest of the UK without great consequence.

Ross Greer: I absolutely agree that organisations submitted evidence that they distinguish between those who are over 16 and those who are under 16. That is best practice, but we cannot make law on the basis of assuming that everyone will follow best practice. There are concerns that the combination of the offence of undertaking a regulated role without appropriate disclosure and the movement to an under-16 system could lead smaller organisations in particular, which are often volunteer led and have less infrastructure, to feel that the safest position to take is not to have under-16s participating in such work. I accept that that is not the intention, but there is concern that that will be the effect.

What problem is being solved by 16 being set as the minimum age? Is it an issue of proportionality?

Maree Todd: I think that it is an issue of privacy for under-16s in that it is not necessary for them to have those things disclosed. Ross Greer has articulated the challenge for us to have really good engagement with stakeholders and produce really good materials in order to ensure that everybody who uses the disclosure system in Scotland is clear about how it operates and what their responsibilities are. We are aware that we need to do a good job on that, and we certainly intend to do so.

As I mentioned, many of the people who gave evidence to the committee talked about the level of engagement with Disclosure Scotland. We are keen to continue to engage intensively with everyone that we need to engage with in order to make sure that the system works at the end of the day.

I ask Gerard Hart to say a little more on that.

Gerard Hart: We have been exploring with stakeholders a number of underpinning issues in relation to that matter. First, we are not saying that under-16s cannot get a disclosure. It is about the fact that joining the PVG scheme means persistent monitoring—every single day—of the person and of the potential for their being considered for listing and being barred if something comes on to their scheme record. Any kid whose behaviour is causing that level of concern should be getting managed under the getting it right for every child framework through all the various aspects that might surround them, such as the police, social work, health and education. There is an expectation that those systems will manage risk and threat for children who might be at risk of having the extreme behaviours that the PVG scheme is there to stop.

The bill provides for children who cannot join the PVG scheme to get what will, in effect, be an enhanced disclosure, so it will still be possible to get a check done. However, because of the protections that I have just mentioned, that should be necessary in only a very small number of cases. The idea is that, in normal circumstances, children ought not to be subjected to that kind of state scrutiny unless there is a really good reason, and even then it should be as an enhanced disclosure or a lower, level 2 disclosure rather than a PVG disclosure.

When they turn 16 or 17 and start to work and be part of the workforce, it will be appropriate for them to join the official regulated roll, but it is not appropriate for them to do so earlier. Stakeholders told us again and again in different contexts that they do not want children who are under 16 to be drawn into the web of state disclosure through the PVG scheme.

Ross Greer: What you have just touched on relates to concerns that have arisen that are underpinned by the idea that the PVG scheme is seen as the be-all and end-all, particularly by smaller organisations that are less familiar with the detail of the system and see the PVG scheme as the only product that is on offer.

I understand how the system would work in relation to the small number of young people who are listed, but there is a larger group of young people whose behaviour might arise. If they are over 16, their behaviour might be disclosed even

though they have not reached the threshold for listing. My understanding of what is proposed is that that situation would be managed through the GIRFEC process, but there is concern that that is not perfect. We would all acknowledge that, particularly when young people move between local authorities, situations that are dependent on local authority social work services can create a lot of pressure and people sometimes fall through the cracks. However, given what you have just said, Mr Hart, is that an example of the situations where enhanced disclosure would be the appropriate product?

Gerard Hart: It is everyone's job to ensure that children and protected adults are safe, which means that the system has to join up across all its different aspects. Disclosure is not a panacea that reduces or limits all risks. We saw in the youth football abuse situation that there has to be a real coming together of different parties in order to make safeguarding work. Disclosure is part of that, but not all of it. We can eliminate risk by having joined-up systems, which is what GIRFEC aims to do. That is the point of the Government's policy on joining up children's services and having that focus on the child.

On the sexually harmful behaviours that we are talking about, my experience as a former social worker and former social work inspector with the Social Work Inspection Agency is that the really good services across Scotland that are dealing with such behaviours are joining up on, for example, information exchange and passing on child protection messages and so on. We anticipate that the collective goodness of the system will be sufficient for us to deal with the risks, rather than our having to try to crack a nut with a sledgehammer.

Jenny Gilruth (Mid Fife and Glenrothes) (SNP): I want to address some of the technical concerns that Scottish Women's Aid raised in its written submission, which relate to section 76 of the bill. You might be aware that SWA expressed concern about the proposal

"to redefine the meaning of 'protected adult'"

because

"This listed vulnerability through 'disability or illness'".

It says:

"focussing ... on disability or illness created a loophole, as this definition would not automatically cover women experiencing domestic abuse".

Has the Government considered that?

Maree Todd: The Scottish Government's experience of operating the PVG scheme has highlighted challenges with the current definition. The policy intention is to move away from the current lengthy and complex definition to focus on the range of issues that affect a person's wellbeing, capabilities and capacity and mean that they require additional safeguarding protections. I agree with the stakeholder comments that the simplification and improvement of the clarity of the process must not be to the detriment of the protection of vulnerable groups and that efforts to make the definition easier for users to navigate must be balanced with safeguarding. We are listening carefully to the stakeholders and we will certainly consider how to move forward in the light of their views.

11:00

Jenny Gilruth: Scottish Women's Aid also says:

"section 76 limits the protection of the legislation to adults regarded as being vulnerable due to a 'personal' condition. This is defined as a mental or physical disability, illness or old age".

It goes on to say:

"this is a specific issue for ... women experiencing domestic abuse who are accessing refuge accommodation".

It asks for section 76 to be rewritten to include

"the full spectrum of services within which regulated roles in respect of 'protected adults' would exist."

I appreciate that you said in response to Iain Gray's question that you are not quite ready to give us the detail, but is the Government actively considering amendments in that area, specifically with regard to women?

Maree Todd: I acknowledge that there is a question around whether the definition of protected adults is appropriately scoped. My officials have met Scottish Women's Aid to discuss its concerns about the new definition and we are reflecting on any gaps that it might have created. We will certainly consider lodging amendments of the kind that you suggest. As you said, I cannot tell you now exactly what we will do at stage 2, but we are considering our approach.

The Convener: Beatrice, did you want to come in?

Beatrice Wishart (Shetland Islands) (LD): The issues that I intended to raise in relation to children's hearings and the long-term consequences have been covered.

The Convener: Ms Harris?

Alison Harris (Central Scotland) (Con): I am in the same position—most of the issues that I wanted to raise have been covered.

The Convener: Minister, I have a couple of final questions. Thank you for your helpful letter to the committee, in which you say that a formal consultation will be carried out on fees. Will the

changes in the bill ensure that organisations do not rely too heavily on the PVG scheme as the be-all and end-all when it comes to decision making?

Maree Todd: The committee has heard from numerous stakeholders. I reiterate my concern that there is sometimes a perception that the PVG scheme is a catch-all and that, as long as a PVG check has been carried out, people will be safe. I think that everyone in this room would be concerned about perpetuating that myth. In my role as Minister for Children and Young People, I make it absolutely clear that there is more to safeguarding than simply PVG checking and that safeguarding children is everyone's responsibility.

The Convener: I know that you are going to consult on fees, but will you explain how volunteers who move into paid work will be charged under the PVG scheme? Currently, organisations can apply free of charge.

Maree Todd: I ask Gerard Hart to take that question.

Gerard Hart: The policy idea is that people should be able to take ownership of their PVG scheme membership and use it in a way that benefits their career and helps the economy to function even better. That applies in the paid work sector and the volunteering sector. We will need to decide how the fee structure will apply when someone crosses the Rubicon between paid work and voluntary work, and we will address that in the consultation on fees. If we have any proposals on how that will be done, we will engage with stakeholders and carry out user research on how we can make sure that that Rubicon can be crossed with ease. A lot of that will involve digital and online provision and making things easy to access, but the detail is still to be developed, and we will do that with our stakeholders.

The Convener: If somebody who is in a volunteering role becomes paid, how will you ensure that the organisation and the person understand that the move into regular work will mean that a failure to receive a PVG check will become an offence? How will you ensure that that is dealt with proportionately? There is concern about that.

Gerard Hart: When an individual wants to work for an organisation, the safeguarding payload of the scheme lies in us knowing that they are working for that organisation. As part of the registration of the transaction for us to know that the person wants to work for organisation A, the status of the work will have to be disclosed to us. If it is voluntary, there will be no fee, whereas if it is paid work, there will be a fee. It is necessary for us to register the organisation in order to deal with the transaction of giving the disclosure, and a by-product of that is that we will be able to identify whether the transaction should be paid for or free.

Liz Smith: One witness raised a potential anomaly. Given that there is usually one person in an organisation who is responsible for looking after disclosure information and passing it on to the relevant authorities, what would happen if a complaint in relation to the PVG scheme was made about that person?

Gerard Hart: In circumstances in which the countersignatory becomes the subject of consideration for barring, the Scottish Government will write to the person's employer under section 30 of the current legislation, stating that the person is under consideration for barring. That is not unheard of, but it is very rarely the case that the individual who co-ordinates the disclosure process is at the top—or even close to the top—of the organisation. We would notify their superior in the organisation of their status, which would allow them to take any relevant action to safeguard—

Liz Smith: Will the new legislation cover that?

Gerard Hart: The current legislation covers it.

Liz Smith: I am sorry—I am asking whether the new legislation will cover it.

Gerard Hart: Yes. The existing arrangement will continue in the future. As part of the disclosure process, we vet those people who are logged with us as countersignatories. They have to go through separate checks, which are quite rigorous, to make sure that they are suitable persons to receive disclosure information. That is done as an extra safeguard.

The Convener: That concludes questions from the committee. I thank the minister and her officials for their attendance.

Next week, we will take evidence from the Cabinet Secretary for Education and Skills on the progress that has been made in relation to the recommendations in the committee's report on Scottish national standardised assessments, subject choices and the exam diet in 2019.

11:07

Meeting continued in private until 11:19.

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