



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# JUSTICE COMMITTEE

Tuesday 21 June 2011

Session 4

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**Tuesday 21 June 2011**

**CONTENTS**

**Col.**

**OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) BILL ..... 15**

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**JUSTICE COMMITTEE**  
**2<sup>nd</sup> Meeting 2011, Session 4**

**CONVENER**

\*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

**DEPUTY CONVENER**

\*James Kelly (Rutherglen) (Lab)

**COMMITTEE MEMBERS**

\*Roderick Campbell (North East Fife) (SNP)

\*John Finnie (Highlands and Islands) (SNP)

\*Colin Keir (Edinburgh Western) (SNP)

\*John Lamont (Ettrick, Roxburgh and Berwickshire) (Con)

\*Alison McInnes (North East Scotland) (LD)

\*Graeme Pearson (South Scotland) (Lab)

\*Humza Yousaf (Glasgow) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED**

Assistant Chief Constable Campbell Corrigan (Association of Chief Police Officers in Scotland)

Roseanna Cunningham (Minister for Community Safety and Legal Affairs)

Les Gray (Scottish Police Federation)

Dr David McArdle (University of Stirling)

Alan McCreadie (Law Society of Scotland)

Bill McVicar (Law Society of Scotland)

**CLERK TO THE COMMITTEE**

Peter McGrath

**LOCATION**

Committee Room 6



# Scottish Parliament

## Justice Committee

*Tuesday 21 June 2011*

[The Convener *opened the meeting at 10:00*]

### Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

**The Convener (Christine Grahame):** Good morning. I welcome everyone to the Justice Committee's second meeting in the fourth session of the Parliament. I remind everyone to switch off mobile phones and other electronic devices as they interfere with the sound system, even when they are on silent. No apologies for absence have been received, although James Kelly will be a few minutes late as he is declaring his interests at the first meeting of the Scotland Bill Committee.

Item 1 on the agenda is consideration of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. This is the committee's first evidence session on the bill. Before we begin, I thank all the witnesses, including the minister, for agreeing to give evidence at such short notice. I put it on the record that among those we invited were representatives of the Catholic Church and Celtic Football Club. Understandably, at short notice some witnesses are not able to attend, although I understand that the Catholic Church will put written evidence to the committee.

I welcome the first panel of witnesses: Roseanna Cunningham, the Minister for Community Safety and Legal Affairs; Richard Foggo, head of community safety; Gery McLaughlin, the bill team leader; Heather Wortley, from the Scottish Government legal directorate; and Willie Ferrie, from the office of the Scottish parliamentary counsel.

I thank all the witnesses for attending, and I invite the minister to make a brief opening statement.

**The Minister for Community Safety and Legal Affairs (Roseanna Cunningham):** Thank you, convener. I thank the committee for the opportunity to be here this morning.

I welcome the committee's scrutiny of the bill, albeit that that has to be done as quickly as it is being done. I know that the committee has moved quickly to ensure that it will take evidence from a number of expert witnesses before stages 1 and 2. I am sure that the Parliament's consideration of the bill will benefit from that, and I look forward to

seeing the outcome. The Government welcomes the measures that the committee is taking to ensure that the Parliament's scrutiny of the bill is informed, effective and responsive.

All I want to do at this stage of the proceedings is briefly remind everybody what we saw during the last football season—scenes that I hope none of us ever wishes to see repeated. The scenes were broadcast throughout the world, and they shamed Scotland.

Football is our national game. Millions of people are passionate about it, but we really cannot tolerate the complete corruption of that passion into hate. Whether it is mass sectarian chanting or bullets and bombs in the post, we all know that it must stop.

The bill is intended to tackle head-on the recent problems that we have all witnessed. First, on offensive and disorderly behaviour at football matches, it is now abundantly clear that that behaviour has wider consequences for our society. We can no longer tolerate seeing and hearing hatred expressed on the terraces when we know that it has such consequences. Secondly, on threatening communications, we must make it clear that we will not tolerate threats of serious harm or threats that incite religious hatred, whether they are sent through the post or posted on the internet.

The Government is committed to putting the new legislation in place in time for the new football season. It is essential that we make it clear that the scenes of last season must never be repeated. We believe that the bill sends a clear message to the people of Scotland—I think that they expect a response to what was witnessed over the past few months—that we have had enough of the bigots who have blighted our football and damaged Scotland's reputation, and anyone who does not heed that message will feel the full weight of the criminal justice system.

I know that sectarianism is not confined to football. It is a much wider and deeper problem for Scotland, and this Government is committed to rooting it out. The bill is therefore only part of a much wider programme of actions against sectarianism. It is, however, a vital first step in the Government's programme in this new session of Parliament. It is about paving the way for a fresh start for the game and about ensuring that everyone is clear about what is expected for the 2011-12 season and beyond. If we can start the new season with the legislation in place and with a shared commitment to stamp out the unacceptable bigoted behaviour that appalled us last season, we can avoid a repeat of those scenes.

I welcome the support for the introduction of the bill from the football authorities, the police and

other partners. I believe that the way that the bill addresses the important issues that we face will ensure Parliament's support, too.

**The Convener:** Thank you, minister. I invite questions on the first part of the bill, which deals with offensive behaviour at regulated football matches. We will then move on to questions on the second part, which deals with threatening communications.

**Graeme Pearson (South Scotland) (Lab):** I declare an interest at the outset as a former officer with Strathclyde Police and a match commander for five years, and as someone who has retired from the Association of Chief Police Officers in Scotland.

Although the minister has outlined the position as she sees it, a large group of advisers have come forward with reservations about the circumstances that have led to our current considerations. We already have the breach of the peace offence, the Crime and Disorder Act 1998, the Criminal Justice (Scotland) Act 2003, the Offences (Aggravation by Prejudice) (Scotland) Act 2009 and the Criminal Law (Consolidation) (Scotland) Act 1995. There is a view that we have a sufficiency of enforcement and prosecution powers in relation to the kind of conduct about which the minister has reservations. What flaws are out there that made the Government decide to offer the bill to Parliament for its consideration?

**Roseanna Cunningham:** The first is the continuing problems, which were clearly not being tackled by existing legislation. If legislation has not dealt with a problem, in any objective sense one must consider that it is insufficient.

In relation to the first offence, there is growing concern that breach of the peace is becoming more and more narrowly defined and less of a handy tool operationally. It is a common-law offence and has always been useful in Scotland. However, as we know, Scottish law is no longer operating on its own, and the undefined nature of breach of the peace is beginning to cause issues. We felt that we could not go forward on the complacent basis that breach of the peace would simply do when we could see increasingly that that was not the case.

We have tried to take the original essential elements that are required to prove breach of the peace, to turn it into a specific offence. The new offence will not tackle hugely different behaviour; we are turning breach of the peace into a more concrete offence so that people are clear about what is being tackled. The breach of the peace offence was beginning to cause some concern. I have used before the example of 25,000 people chanting something at the 25,000 people on the other side of the football ground who are chanting

back at them. Whose peace is being breached? That offence began to raise questions, and we have to tackle them. The new offence to be created by the bill is about tackling those questions.

**Graeme Pearson:** I hear what the minister says, but a strong view has been offered by many with experience in such circumstances, including the Law Society of Scotland, that indicates otherwise. She spoke about enforcement of the existing legislation and whether it has been sufficient. At present, there are around 100 football banning orders. That does not quite reflect an energetic commitment to dealing with the problems that the minister outlined.

**Roseanna Cunningham:** No, but the bill is not the only action that we are taking. We are also working with the police and other partners, through the football action group, to try to toughen up other available measures. Football banning orders will continue to be part of that armoury.

When a piece of legislation is introduced, there is always a discussion about whether it is required, and I know that there is a debate about the bill. In all the circumstances, we felt that the job would be better done than left undone.

**Alison McInnes (North East Scotland) (LD):** We have a written submission from Dr Sarah Christie and Dr David McArdle who make the point that

"the new legislation adds little to the existing criminal legal remedies".

They go on to say:

"A more appropriate response would have been to consider how the existing laws can be enforced more effectively, rather than rushing through legislation which adds very little to what is already available."

I draw the minister's attention to the fact that, following a game on 2 February 2011 between Celtic and Rangers, more than 229 people were arrested for breach of the peace and racist or sectarian offences. It seems to me therefore that it is possible to use the existing legislation.

**Roseanna Cunningham:** Someone may be arrested and charged, but that does not necessarily mean that the courts will uphold the case. In some cases, rather awkward decisions have been made. I do not want to quote which case was involved, but I think that I am right in saying that a sheriff has already decided that certain chants were offensive because they were about religion, but also that they were not offensive because they were about politics or something else. In all fairness, we cannot sit back and allow that situation to continue.

Being charged with breach of the peace will have been a salutary experience for the

individuals involved. However, I am curious to know how many of those 200-odd cases went the distance. I am not sure that that is outlined in the submission.

I have only had about 10 minutes to look at the paper from Sarah Christie and David McArdle so I have not been able to go through it in detail. Their line is that the existing legislation is sufficient. That is a matter of opinion rather than absolute fact and the Government is of a different opinion.

**The Convener:** I understand that the minister cannot provide examples of cases in which a breach of the peace charge has not been sustained. It would be useful for the Scottish Parliament information centre to provide the committee with a note of cases in which there was a charge of breach of the peace but no conviction or, for whatever reason, the prosecution was not successful. Are members content with that?

*Members indicated agreement.*

**Roseanna Cunningham:** It is also important to look at cases in which the decisions about what constitutes a breach of the peace have begun to change. That is one of the issues that we have to deal with. Historically, the general nature of, or imprecision in, the definition of breach of the peace was regarded as a great strength in Scotland. Against the backdrop of a completely different argument that is going on in another place, that is less acceptable to people who consider that there should be precision when we are talking about criminal offences. A tension is beginning to arise there, and we will have to address it.

**The Convener:** I refer you to and give you the opportunity to write back to the committee on the statement in third paragraph on page 2 of the submission from Dr Christie and Dr McArdle that the definition of breach of the peace in the policy memorandum is wrong. I am not expecting a response just now.

**Roseanna Cunningham:** I can give you a brief response on the record just now.

**The Convener:** In relation to the cases mentioned?

**Roseanna Cunningham:** We will write back to the committee. One of the difficulties reflects the difficulties for lawyers in relation to a policy memorandum. The public disorder aspect is implicit in the policy memorandum's discussion of breach of the peace because that was the context of that discussion. I look at the critique in the submission and say that the policy memorandum is not a legal textbook. Breach of the peace is discussed in the policy memorandum within the context of public disorder rather than the context that is being described in the submission.

However, we will write to the committee with a longer explanation.

**Alison McInnes:** I go back to the minister's answer to my earlier question, when she noted that it would be interesting to know how many of the 229 arrests resulted in a prosecution. Before she considered introducing new legislation, would it not have been appropriate to review that information?

10:15

**Roseanna Cunningham:** With the greatest respect, we are talking about not just 200-odd arrests in February 2011 but events in the years before that. Obviously, we have looked at the impact of the existing legislation, and we consider that it is not reaching where it needs to reach, so we have to look at the issue again. However, I do not know how much longer we in Scotland can continue to review and discuss and not actually take any action. People can be criticised—in my view, they are almost damned if they do and damned if they do not, and I think that we are in that position here. We have had years and years of something not achieving what it is supposed to achieve.

The problem with focusing on the February match is to do with defining where the arrests took place. The problem was over the whole of the force area, as I understand it, not necessarily just specifically at the match. It is not always easy to define football-related things, which is why we have tried to put the new criminal offence in the context that we have. It is always easier to look at negatives. I understand that, because in a sense that is what the job is, but it has been suggested to me that one advantage of doing things in this way is that we will begin to define the category of offences that are football related, and we will then see that there is potentially another category of sectarian offences that are not football related. People will then become more understanding that this is not just a football issue. The football aspect is important and we have to tackle it, but we know that sectarianism is not just a football issue. The tool in the bill—paradoxically—allows us to emphasise that even more.

**Alison McInnes:** I do not doubt the minister's good intentions; indeed, I share her desire to tackle the issue. She has acknowledged that the problem has been around for a long time and she said that the Government wants to take some action. However, all the written submissions that we have received so far express serious concern about the speed at which we are legislating. Surely it is worth taking just another month or two to get the legislation right.

**Roseanna Cunningham:** But it would not be just another month or two. It would run over the summer and into the period when we come back in September; we would be halfway through the next football season before we were able to put any of this into operation. I know as a politician—and I think you know as a politician—that if the new season picked up where last season left off and we ended up with the same sorts of scenes being repeated, people with microphones would be back in front of politicians demanding to know why we had not acted when it was possible to do so.

We have narrowly defined what we think is appropriate in the short space of time that we have allocated for the bill. I acknowledge that a much greater amount of time is always ideal and I do not rule out the possibility of revisiting the situation with legislation in a few years' time. We have proposed two new offences—only two—and introducing them in a short timescale is not only feasible but desirable. We have kept the bill as tight as possible, so there will be some objections that it does not go far enough—I have heard that. However, I think that we have made the right choice in the available timescale.

I need to point people back to the fact that the bill has been supported by the football authorities and the police.

**The Convener:** Right. We will be testing that as well and pressing them on the matter.

John Lamont and Humza Yousaf have supplementaries on the same line of questioning.

**John Lamont (Etrick, Roxburgh and Berwickshire) (Con):** Good morning, minister. My point is on the same issue, but from a slightly different perspective. Given the history of the laws and your frustration that they are not working to achieve your objective, how many people do you anticipate will face prosecution once the bill is enacted? Clearly, that is not in the Government's control, but you must have a feeling for how many people will face prosecution under the new laws who escape prosecution under the current regime.

**Roseanna Cunningham:** I cannot possibly answer that, I am afraid, because it will depend entirely on circumstances that arise at matches and decisions that are made by match commanders and the police on the ground. If you were to ask me what the Government is hoping for, it is for there to be immediate and early arrests in situations where there is disorder, but we hope that, over the piece, the bill will act as a deterrent as much as anything else and that there will not be hundreds or indeed thousands of arrests week in, week out. We are hoping that the legislation will be used by the police in the early part of the season and that it will be needed less as time goes on.

**The Convener:** John is itching to come back in.

**John Lamont:** With the greatest respect, minister, that is the critical point. Surely the point about deterrence is that it works when people fear the prospect of being arrested and prosecuted under new legislation. Currently, such deterrence is not there. If you are not able to tell me how many more people are going to be prosecuted, surely that is a fundamental hole in your proposal. If you are not able to say that X number of people are going to face prosecution, what is the deterrence?

**Roseanna Cunningham:** I am sorry, but how can I possibly answer that? I cannot possibly say. For the first three months there might be absolutely no disorder at any single football match.

**John Lamont:** But you have the history of previous cases.

**Roseanna Cunningham:** With the very greatest respect, I cannot answer your question. It would perhaps be better to ask the police witnesses what they believe is the likely extent to which they will be able to use the legislation. All I would be able to do is take a wild guess, but I am not in a position to do that. We are obviously not expecting the police to arrest 5,000 people, but if disorder of the kind that we have seen kicks off, we expect the police to use the legislation, where they consider it appropriate. It will still be a matter for the police on the ground to make those decisions, because they are operational issues. We hope that early use of the legislation will result in enough salutary lessons being learnt by football fans to ensure that its use is needed less in the future.

**The Convener:** If John Lamont does not mind, we will perhaps put that question to the police witnesses. I call Humza Yousaf. Is your question still on this line, Humza?

**Humza Yousaf (Glasgow) (SNP):** Yes. My original point related to Alison McInnes's point, but, on deterrence, I do not imagine that the number of people who might be prosecuted, should the bill become law, will necessarily be the biggest deterrent factor. I imagine that the five-year sentence and other penalties in the bill would act as deterrents.

**The Convener:** That is not a question; it is a statement. I would like a question.

**Humza Yousaf:** The minister hinted at this in her answer to Alison McInnes's question. Is the Government willing to look at putting a sunset clause in the bill? It is certainly something that was mentioned in a number of submissions.

**Roseanna Cunningham:** There has been considerable discussion of a sunset clause. We are looking at a variety of possibilities for how the

legislation might be reviewed over time. There is concern that a sunset clause would not be an appropriate mechanism to use in relation to criminal offences, but that does not rule out the possibility of some other form of review. We are considering that.

**The Convener:** You said that having a sunset clause in relation to criminal offences might not be appropriate. Can you expand on that?

**Roseanna Cunningham:** There could be a situation where criminal offences had ceased to be criminal offences but people were still charged with said criminal offences because they had been charged prior to the sunset clause coming into force. In such circumstances, perhaps a different form of review might be more appropriate. We are currently discussing that. Our minds are not closed to the idea of reviewing the legislation; we are simply not certain that using sunset clauses, as we currently know them, is the way to manage that.

**The Convener:** Humza, do you have further questions?

**Humza Yousaf:** No. I am satisfied with that answer.

**The Convener:** Graeme Pearson has a supplementary.

**Graeme Pearson:** I return to the issue of enforcement and the nature of the proposed legislation. In its submission, the Law Society of Scotland cites the 2009 case of Mark Harris v HMA and states:

“the Appeal Court held that breach of the peace simply requires some serious disturbance to the community.”

The submission then goes through some of the other legislation that is available to be enforced at this time.

I am really concerned that in our haste to deal with an activity that we all agree is abhorrent by introducing new legislation, we will create more confusion and more enforcement difficulties. The speed with which we are pushing the bill through Parliament gives us no time to consider those matters more deeply.

**Roseanna Cunningham:** I do not see why the bill should make things more difficult or confusing. One might reply that the bill is simply one more tool in the armoury when people are considering the most appropriate offence that an individual might be charged with. In our view, the bill clarifies a developing situation, particularly in connection with breach of the peace offences, which courts are starting to construe more narrowly in response to pressures from elsewhere. I do not see that what we have produced in relation to the first offence creates any more difficulty than might, at

best, be experienced now; indeed, we feel that it will provide the police with another and better tool.

You have quoted from a submission that I have not been able to read. We will look at what the Law Society has to say, consider its suggestions and take on board anything that we consider to be well founded.

**The Convener:** Is John Finnie’s question on this issue or on enforcement, on which I also have a question?

**John Finnie (Highlands and Islands) (SNP):** I will be touching on enforcement, convener.

**The Convener:** Well, you ask your question and I will ask mine if you do not deal with the issue that I want to raise.

**John Finnie:** First, I declare an interest as a former police constable.

The shorthand is that this legislation deals with sectarian matters. However, paragraph 4 of the policy memorandum states:

“What is crucial about the measures in this Bill is that they do not rest on any such definition.”

The minister commented that there is to be further legislation. Will that legislation define the term “sectarian”?

**Roseanna Cunningham:** I did not say that there would be further legislation; I said that we would not rule out further legislation if we thought that it was required. I have been tasked with the big job of tackling sectarianism over the Parliament’s fourth session, and if at some point I consider that more legislation is required I will not hesitate to argue for it. However, I cannot sit here and say that there will definitely be further legislation.

We have at the moment good reasons for not attempting to define the term “sectarian”. In Scotland, sectarianism is a shorthand term for a particular form of interaction between Protestants and Catholics and Catholics and Protestants. However, a definition of sectarianism in Scotland could hardly be confined to that interaction and, once we try to define the term, it becomes quite difficult to do so over a much broader piece. The definition might be used colloquially but, as I say, trying to define the term in legislation will be quite difficult and might lead us into all sorts of bother that, in the circumstances, we might not wish to be in. It would be precisely the kind of thing that would make this bill quite difficult to take through Parliament in a very short space of time.

**John Finnie:** Can you tell us in how many breach of the peace cases in which the original charge contained a sectarian element that element was dropped when they went to court?

**Roseanna Cunningham:** Offhand, no, but I will endeavour to get back to you with that information.

**The Convener:** I have a couple of follow-up sweepers. Is sweeping up a football term? I am not too familiar with the sport.

I want to pursue the use of the term “in relation to” in section 1(1), which refers to

“A person”

committing

“an offence ... in relation to a regulated football match”.

That phrase is defined in section 2(2), which states

“a person’s behaviour is in relation to a regulated football match if it occurs ... in the ground where the regulated football match is being held ... while the person is entering or leaving ... the ground ... or”—

more interestingly—

“on a journey to or from the regulated football match.”

Section 2(4)(a) goes on to say

“a person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match”

and also covers “breaks”. It seems to me that, evidentially, those provisions will be very difficult to enforce.

10:30

**Roseanna Cunningham:** Certain evidence will always be required; I suppose that people may be picked up in circumstances in which it is clear that they have been at a football-related activity. We should not forget that the legislation applies not just to matches at stadiums, but to other places such as pubs and any outdoor venues where matches are broadcast.

The definition is taken from football banning orders, so we have not invented a new definition: we have taken the terminology that applies to the orders and applied it in this legislation. The terminology exists and is already being used. It will presumably be familiar to the police, and will already have been tested in the ways that you are talking about.

**The Convener:** I am just concerned—for example, I have seen supporters’ scarves sticking out of cars when people are driving about, and there might be a football team slogan on the back of the car. Those people are not going to a match—there might not even be a match on—but they might be pulled over by the police who say that they are breaching the legislation. I hate to raise the issue again, but there might be difficulties with the European convention on human rights in relation to not only the right to freedom of speech but the right to freedom of movement.

**Roseanna Cunningham:** We have to find a way of dealing with the hooligans who travel to and from matches but who do not necessarily even go to the matches. Football banning orders are already in place, and I am not aware that there has been any challenge to the detail of them.

I repeat that we are using the terminology that already applies to football banning orders; it has not been invented for the bill. There is an existing test that applies to banning orders, and we want to apply it under in the bill.

**Graeme Pearson:** You indicated that you have been reluctant to provide a definition of “sectarian” because of the difficulties that arise. The convener made the point about journeys and fans moving about the country. That indicates how difficult an area this is with regard to the proposed legislation, and takes me back to my original point about the legislation that is currently in place.

That aside, the 100—or thereabouts—banning orders that are currently invoked indicate, as I said earlier, the current impetus on the authorities to deal with such matters. We need to return to that enforcement element and ensure that we take it forward. I am sure that the police will comment on that later.

You said to John Lamont that you had no knowledge of what the future might hold in terms of prosecutions, which I well understand. Have you allocated enough financial resource to support the police and the authorities in implementing the legislation? If you think that you have, how much is it?

**Roseanna Cunningham:** The financial memorandum applies, and yes—we have allocated enough resource. We have considered the policing aspects of the legislation, but we are working with the police in respect of the work that they will need to do.

I remind members that the police are involved in the football action group, which is currently examining a number of aspects of what happens at football matches. The group will not report until July, so we are still in a fast-moving situation. I understand that it is difficult from the committee’s perspective: the timing is difficult for us all, because Parliament goes into recess in a couple of weeks. However, in our on-going work with the police, we have considered an amount of between £0.7 million and £1.5 million per annum, which I think is in the financial memorandum. The Government will keep that figure, as it would any such figure, under constant review.

**John Lamont:** The minister will be aware of the words of the song “Flower of Scotland” and those of the British national anthem. Can you envisage the singing of either of those songs becoming offensive behaviour under the act?

**Roseanna Cunningham:** The glib answer to that is no, of course not. However, in terms of a criminal offence, all the surrounding facts and circumstances might turn that into something problematic. It might have been more appropriate to consider, for example, “Rule, Britannia”, which I understand is frequently sung on one side of the terraces in Scotland and which I would not regard as being an offensive song. However, we do not define which songs are offensive and list them, because whether something is offensive is a matter of the facts and circumstances of the case.

I have seen hundreds of Celtic fans gesticulating across an open area to Rangers fans by making the sign of the cross in a manner that I can only describe as aggressive. The sign of the cross is not, in itself, offensive, but I suppose that in circumstances such as Rangers and Celtic fans meeting on a crowded street, it could be construed as being so, which shows why the circumstances are so important.

My immediate answer to your question is no, of course not. However, no matter how inoffensive an action, the response must always be qualified with the caveat that it depends on the circumstances.

**John Lamont:** Just to be clear, is the minister saying that if supporters want to be absolutely sure of not falling within the definition of the act, they should probably avoid singing those songs?

**Roseanna Cunningham:** I will not be drawn into making that kind of statement, Mr Lamont. You know perfectly well what I am saying, and so does everybody else.

**The Convener:** I will move on. I want to get on to the second part of the bill, so let us have short questions so that we can do justice to it.

**Humza Yousaf:** My point is short and is related to John Lamont’s question. It is on section 1(2)(e), on the

“other behaviour that a reasonable person would be likely to consider offensive.”

How do we prevent that from straying into matters of freedom of speech, and what would be the mechanism for measuring what is likely to be considered offensive?

**Roseanna Cunningham:** At the end of the day, that will always be—as it is now—an operational decision for the police in the circumstances that they are assessing. We could spend hours trying to define scenarios that would or would not be offensive; behaviour that is not a problem in one place may be a problem somewhere else. Without being able to define every single circumstance, we cannot say what will be considered offensive.

I remind members that the first offence is directly connected with football and that in the second offence we are not tackling speech, precisely because of the arguments and concerns to which that gives rise.

**The Convener:** I hope to move on to the second part of the bill shortly and I think that many of the questions are on evidential issues, which I have strayed into, so it will also be useful to put those issues to the police. Members should therefore bear in mind our timescale.

**Alison McInnes:** I have two brief follow-up questions. John Finnie spoke about the definition of sectarianism. My concern about the bill is that it has quickly become known as “the sectarianism bill”. It is drawn more widely than that and would be more appropriately described as a hate crime bill, because it rightly includes many other categories, under section 4. It is important for the public to be aware of that, so that aspect should perhaps be discussed more.

I turn to the concern that the convener raised about how broadly drawn is the provision on travelling to and from football matches. The bill is very broadly drawn both in that regard and in relation to the definition of places where a televised match is being shown. The Law Society of Scotland’s submission states:

“The Committee expresses serious concern about”

the definition, which

“would appear to cover pubs, outdoor arenas, hospital day rooms and TV sales outlets and also mobile TV receivers and computers—such a variety of broadcast possibilities underlines how difficult this provision will be to enforce.”

You spoke about the imprecision of the offence of breach of the peace. Surely the definition in the bill is also imprecise.

**Roseanna Cunningham:** We will consider the specific issues that the Law Society raises in relation to whether or not those situations are caught within the definition. As you can imagine, a number of questions of this sort arise, and we will find a way of saying what the position is, if necessary. Our principal concern is with the broadcasting of matches in circumstances in which one could expect large numbers of fans to be present; for example, in pubs or at outdoor large-screen facilities, which are sometimes provided by councils as a general civic duty. As far as I am concerned, the provision is not intended to apply to what is shown on a screen at a television sales centre. As the Law Society has raised the matter, we will carefully consider whether or not we might be inadvertently extending the measure to such situations.

I repeat that the issue is about football-related violence. Provisions for all other potential offences

are still available for any situations of the sorts that we have been discussing. The question is whether or not they fall within the ambit of the criminal offence under the bill. However, if it is felt that an offence does not fall within the bill's ambit, that does not necessarily mean that it does not constitute a criminal offence.

**The Convener:** I suggest to Alison McInnes—the minister can perhaps agree to this—that we could perhaps obtain a fuller written response to the Law Society's concerns regarding those other areas before our meeting on 28 June. We could then put our questions to the minister on the 28th. Would that be possible?

**Roseanna Cunningham:** I was not aware that I was going to be here on the 28th.

**The Convener:** I was about to say, “Ye ken noo,” but that is not very polite.

**Roseanna Cunningham:** No, it is not.

**The Convener:** I accept that. You appreciate that the committee is trying as best it can. I thought that the minister was aware that we intended—[*Interruption.*] It has been confirmed to me that your office has been informed that we are having you back on 28 June. That will be very useful for the committee, in the interests of hearing a more expansive explanation of that particular area. We wish to be of assistance to the minister in this regard.

**Roseanna Cunningham:** We will do what we can in the available time. The short timescale imposes certain difficulties for us, too, in giving as much information as we can.

**The Convener:** Indeed. As I am sure the minister appreciates, the Justice Committee is being put in a very difficult position in wishing to examine the bill on behalf of the public at large—not just the footballing public. In fairness to the minister, we are trying to expose all the arguments in advance of the final debate at stage 3. We wish to be helpful in that regard, as I have said.

I ask John Finnie and Graeme Pearson to make their questions short. We must get on to the second part of the bill.

**John Finnie:** My question is about the term “a reasonable person”. I accept that sectarianism is a nationwide problem. Do we imagine that there will be regional variations within Scotland in respect of what is a “reasonable person”? Can training be given to police officers and sheriffs to ensure uniformity? That could be essential.

**Roseanna Cunningham:** The use of the term is absolutely standard throughout the law. The reasonable person is always assessed in all the facts and circumstances of the case. Whether there is regional variation is not necessarily just up

to the police; it is also up to the sheriffs in their deliberations. We are working with the police and will try to ensure that there are not massive variations throughout Scotland, but we cannot impose uniformity, either on police forces or on courts.

The reasonable person test is pretty well understood in Scots law, and I do not think that it will cause an enormous amount of difficulty. I suspect that what we have seen emanating from football over the past six months horrifies about 95 to 99 per cent of the population. The reasonable Scot is probably already wondering why we are still having to deal with this problem.

**Graeme Pearson:** The minister has mentioned two particular clubs. I hope that she will join me in acknowledging that the kind of thuggish behaviour that we are discussing can be replicated at many clubs across Scotland.

**Roseanna Cunningham:** Absolutely.

**Graeme Pearson:** We should not gravitate to a notion that it is a particular west of Scotland problem, with just two clubs being involved.

I invite the minister to share with us any expectations that she has of club management and the football authorities in delivering on a better Scotland for the future.

10:45

**Roseanna Cunningham:** That work is continuing through the joint action group, whose final report we will receive in July. The joint action group's deliberations will be made public on 11 July, and I do not want to pre-empt what the group is discussing at present. You are right to reiterate that the problem is not confined to two football clubs and that neither is it confined to only one part of Scotland. Despite the fact that many people would like to describe it in that way, that is obviously not the case. One of the biggest problems that has been raised is the difficulties that arise out of travelling support, which can be much harder to track. That takes the issue much more widely around Scotland than people might comfortably describe.

**The Convener:** The minister has been here for a long time and I would like to move to the second element of the bill and questions on threatening communications.

**James Kelly (Rutherglen) (Lab):** Good morning, minister. I am interested in the resources that will be allocated to dealing with threatening communications. According to the financial memorandum, the police work will be pulled from existing resources. The fact that the bill is being processed in such a short timescale demonstrates—you have outlined this—that you

feel that it is a major issue to ensure that legislation is in place for the start of the new football season. What specific police resources are you going to allocate to monitoring and tracking down offensive and threatening behaviour on the internet?

**Roseanna Cunningham:** The provisions are designed for serious cases, to deal with the problem that we have seen and to improve practice in relation to internet crime, although the problem is not confined to internet crime. You will have Campbell Corrigan in front of you as a witness at some point to discuss the matter. We are confident that the police can encompass the work within what they are already doing. As I said, we are working with them on strands of activity to ensure that that continues to be the case.

**James Kelly:** Can the minister give a bit more detail on what strands of activity the police will pursue if the bill is passed by the Parliament next week?

**Roseanna Cunningham:** The best people to ask about what the police will do are the police; I expect that you will do that. We are working with the ACPOS football and hate crime sub-groups to ensure that the police are in a position to enforce the new provisions from the outset. Those two groups will also oversee longer-term improvements in policing practice. We must deal with the issue both in the short term and into the longer term, and that work is on-going.

**James Kelly:** It is still not clear to me what specific strands of work are going to be pursued if the bill is passed, but let us move on. How would offences be identified? Do you expect offences to be reported to the police and the police to react to that, or do you expect a more proactive approach from the police arising from any monitoring that they may undertake?

**Roseanna Cunningham:** I expect that, in the early stage, it is most likely that the police will act as a result of matters being drawn to their attention, but that does not, of course, rule out the bringing in of more proactive policing practice in the longer term. I guess that that is exactly how the police came across some of what has developed over the past few months.

**James Kelly:** On practical implementation of the bill, what is your understanding—based on discussions that I am sure you have had with information technology experts and the police force—of how people can be tracked down? Many people post comments anonymously. What expert facilities are available to the police to track down the identities of people who post comments on the internet?

**Roseanna Cunningham:** That is not a new problem, and it is not a problem that is confined to

the particular aspect of potential criminal law that we are discussing; it exists even when people put pen to paper. The anonymity of people who make threats has bedevilled everybody, but software is available. The police already have tools available, and I understand that people have been charged with earlier offences, so it is possible to find out who individuals are. I regret to tell Mr Kelly that the situation in Scotland is such that many folk do not feel at all abashed about appending their names and addresses to such things, so it may be possible in a number of cases to track people down simply because they have made it quite plain who they are.

**Graeme Pearson:** You will have gathered that we have grave reservations about the backdrop to the legislation. A number of submissions have raised issues to do with the jurisdiction of Scottish prosecutions in terms of any international links that are identified in connection with offences that will be created by the legislation. Do you feel confident that, if breaches of the legislation are identified and the offenders live overseas, you will be able to bring them to justice in Scotland?

**Roseanna Cunningham:** The problem confronts the authorities when people are abroad regardless of their offence. That will not be any different under the bill. The fact that the person is abroad does not mean that they will not have committed an offence in Scotland if things are posted in Scotland. The offence will have taken place in Scotland, and they will therefore be subject to Scots law. The extent to which we can track them down will depend entirely on policing. In that sense, this will be no different from any other area of criminal offence in which folk who are outwith our current jurisdiction can be dealt with.

**Graeme Pearson:** So, you do not expect that the European arrest warrant process, for instance, will create a challenge in relation to the legislation.

**Roseanna Cunningham:** I presume that a European arrest warrant may be appropriate in some of the circumstances that we are talking about, but it may not be in others. As you know, the European arrest warrant is a tool to be used. Whether it is a practical tool to use over the longer term is a different matter.

**Graeme Pearson:** I also know that presumption can be a dangerous weapon, and it is very difficult in such circumstances.

**Roseanna Cunningham:** We are not presuming anything. Some of the difficulties that we now face have arisen from pressures on our legal system that have come from the European end.

**Graeme Pearson:** Finally, has thought been given to what a “seriously violent act” is, and to how it differs from a violent act?

**Roseanna Cunningham:** I suppose that one might turn that around and say that there are, as you know, varieties of assault and various types of infliction of bodily harm—

**Graeme Pearson:** There are definitions of those differences.

**The Convener:** Let the minister finish.

**Roseanna Cunningham:** The measure simply falls into that category. My officials have helpfully handed me the bill. Section 6(5) states:

“‘Seriously violent act’ means an act that would cause serious injury to, or the death of, a person.”

**Graeme Pearson:** So it is something that would amount to a serious assault or serious injury.

**Roseanna Cunningham:** Yes.

**The Convener:** We will now have questions from John F—I have to say that, as we have two Johns—Humza Yousaf and then Alison McInnes.

**John Finnie:** I return to the term “reasonable person”, which appears in section 5. Was the issue of perception, as it applies to hate crime, considered as a factor?

**Roseanna Cunningham:** I am sorry. What do you mean by that?

**John Finnie:** As I understand it, post the Macpherson report, a measure was introduced under which someone is racially abused if they perceive that they are being racially abused. Did you consider applying the same provision in the bill?

**Roseanna Cunningham:** We talk about material being

“likely to cause a reasonable person to suffer fear or alarm”,

so we are applying the reasonableness test to that. The offence is also about the intention to stir up religious hatred: there has to be a proven intent to stir up religious hatred. Therefore, inadvertence or whatever would not fall into that category. We do not foresee threatening communications happening in a casual way.

**The Convener:** For the record, I ask the minister to clarify that section 5 is not only about religious hatred, as it has two parts. There is condition A, which is about

“incitement ... to carry out a seriously violent act against a person”.

That condition is not about religious hatred; it is just about hate generally.

**Roseanna Cunningham:** Yes.

**The Convener:** I just want to make it clear that the bill is not only about religious hatred. We will take evidence from equalities people, so it is important to raise that issue.

**Roseanna Cunningham:** Yes, but the second offence is all connected to religion.

**The Convener:** Condition B is connected to religion, but condition A is not.

**Roseanna Cunningham:** Yes.

**The Convener:** The bill states that condition A or condition B must be satisfied, not that condition A and condition B must be satisfied. I read the bill at breakneck speed, but my reading is that section 5 is about communications generally that stir up hatred and cause offence, fear or alarm. They could be to do with sexual matters, gender or a spectrum of issues. I make that point so that we do not miss it in asking our questions.

**John Finnie:** Section 6, which is the interpretation section, defines the term “material”. Will you confirm that graffiti would be covered by the term?

**Roseanna Cunningham:** My reaction is that, yes—graffiti would be covered. The term could also include T-shirts or posters. That is why I say that the offence is not connected only to the internet or electronic crime. In theory, it could be applied to other things. In practice, I guess that it is less likely to be applied to such things than it is to some of what we have seen on the internet. However, graffiti could fall within the ambit of the bill.

For the avoidance of doubt, although the bill does not cover speech, it covers recorded speech. The recording of speech would bring it into the ambit of the bill.

**John Finnie:** Would a tattoo be covered?

**Roseanna Cunningham:** I suppose that, arguably, if somebody tattoos a death threat all over their body, that would potentially fall within the ambit of threatening communication. However, I caution the member against *reductio ad absurdum*.

**The Convener:** I hope that nobody is about to demonstrate that they have tattoos. Members should not feel that they have to declare an interest if they have a tattoo, offensive or otherwise, or one that is liable to be offensive.

11:00

**Humza Yousaf:** The bill has been introduced in the context of what happened last season. Can you clarify where the Government perceives gaps in current legislation? Many submissions make the point that bullets sent in the post or pictures

riddled with bullet holes are covered by current legislation. Where are the main gaps in legislation that the bill attempts to cover? My question relates to threatening communications.

**Roseanna Cunningham:** I understand that. First, most of the current offences relate to the sending of something. You are right to say that the sending of something can be caught. The difficulty is that people do not send things when they put them on blogs, Facebook or Twitter—they put them up or post them, but that would not necessarily be construed as sending. That was one issue that we had to consider.

Secondly, the current Scots law on uttering threats—for those who are not lawyers, uttering does not mean only words—requires one to prove an intention to carry out a particular threat. For example, if someone puts up a Facebook page that says that they want to kill someone, it is arguable that, currently, we would have to prove an intent to carry out that threat.

We want to define intent as intent to threaten and

“to cause fear and alarm”,

so that we do not have to go to someone’s house to establish whether they have bought and sharpened the axe and put the home co-ordinates of the person concerned into their sat nav. The bill makes it much clearer that the threat to cause fear and alarm and with the intention of inciting religious hatred is the offence, so it is not necessary to prove that someone physically intended to carry out that threat. In 99.9 per cent of cases, that is not the case, because the intention is to frighten people.

**Alison McInnes:** I have two separate questions.

**The Convener:** Given that you have asked so nicely, I may just let you have them.

**Alison McInnes:** Thank you, convener. My first question relates to condition A, which is set out in section 5, and concerns the definition of “reckless”. The term may be well defined; I am new to the justice brief and am not a lawyer. However, during the height of the problems earlier in the year, *Metro* reproduced material from the internet. Would the provision constrain it from reporting in that way in the future?

**Roseanna Cunningham:** No. This is straightforward—news reporting will not be caught. “Reckless” is a commonly known and used term in criminal law in Scotland. Generally, it means that a person does not care what impact their action has and is reckless as to that impact. All those who will be involved in applying the provision—police, lawyers, courts and so on—are familiar with the term. It is not enough for someone to say, “How

was I supposed to know?” The point is that the person did not care.

**Alison McInnes:** So, you do not think that newspapers will be caught for adding to the fear and alarm in the community by continuing to reproduce material.

**Roseanna Cunningham:** No.

**Alison McInnes:** Secondly, you define a communication as a communication

“by any means (other than by means of unrecorded speech)”.

I have heard your reasons for that, but how can we properly define a private conversation? Would a private conversation that was unknowingly recorded and played back, or a piece of private writing that was posted by someone else, be caught?

**Roseanna Cunningham:** The individuals who had the private conversation would not be caught within the ambit of the offence. The individual who did the posting, rather than the individuals who were filmed without their knowing that that was happening, might find themselves in bother.

**The Convener:** We have exhausted that line of questioning. I thank the minister for a lengthy evidence session and apologise for the expression that I used earlier. My granny came into my head with, “Ye ken noo,” but I should not have said it; I withdraw the remark. I also apologise to the minister for the fact that she did not know that her officials had been asked whether she could give evidence on 28 June. We are awaiting final confirmation on that point. It seems that everyone is in a bit of a hurry, but there we are. In any event, we hope to see the minister on the 28th.

I suspend the meeting for five minutes.

11:05

*Meeting suspended.*

11:15

*On resuming—*

**The Convener:** I welcome our second panel of witnesses: Assistant Chief Constable Campbell Corrigan, who is the chair of the Association of Chief Police Officers in Scotland football sub-committee, and Les Gray, who is the chair of the Scottish Police Federation. It is extremely helpful that they were in the room during our evidence taking from the previous panel.

We will move straight to questions and proceed on the same basis as before, so we will deal first with the part of the bill that concerns offensive behaviour that is connected with football matches and then with communications.

**John Finnie:** I ask the gentlemen their views on the bill. Is this good legislation?

**Assistant Chief Constable Campbell Corrigan (Association of Chief Police Officers in Scotland):** I think that it is good, because it focuses on a horrendous problem. Believe it or not, I do not think that a police officer should deal with the technicalities of legislation; I think that we should deal with the legislation that we are given and make best use of it. There will be many questions about this legislation—we always question any new legislation—but I find it incredible that we are talking about how many people we will arrest, rather than whether we can prevent people from doing these things in the first place, which is the most important part of the issue for me. If the legislation stops one person on the terraces or the internet doing what we saw people doing last season, I will be happy.

**The Convener:** Mr Gray, would you like to respond? Before you answer, could you say whether you have a title that you use?

**Les Gray (Scottish Police Federation):** Mr Gray is fine.

The Scottish Police Federation's joint central committee—which, as Mr Finnie is well aware, is our national executive—will make a written submission on the bill by Friday. Although it will cover all our questions and concerns, I am more than happy to comment before that.

We welcome the bill. As you know, I was well quoted in the media several months ago in relation to sectarianism and the human and financial cost of football before, during and after the games. Clearly, the police service in Scotland could not continue on that downward spiral and I guarantee that members of the public would not like that situation to continue either.

We are aware that the timing is not great and we acknowledge the concerns about the legislation perhaps being rushed through, but we honestly do not believe that there is an option. The legislation has to come into effect for the start of the football season if it is to have the proper impact.

**James Kelly:** The financial memorandum states that the costs of tracking down offenders under the bill are to be met from existing police resources. What are your feelings on that? Is that adequate, or do the police need more resources to deal with the provisions of the bill?

**Assistant Chief Constable Corrigan:** I will always accept extra resources—that is my starting point. If we are to give the legislation the energy that it will require and that the community wants us to give it, we will need police officers to do that. In answer to your earlier question about the

resources that would be tied up in internet-based investigation, I can say that significant resources are already tied up in that. We will have to develop specialisms in relation to the legislation, as it concerns an area in relation to which we arrest very few people inside football grounds at the moment. Such arrests tend to be in single figures, but if we were to take action on the new offences to the level that we could, we could deploy many more resources to deal with the issue.

We must understand that there must be proportionality in all this. On a Saturday, we might be dealing with a crowd of 60,000 people, with 20,000 people singing. The match commander's primary concern is safety and we do not intend to destabilise a crowd by wading into it and trying to take out large numbers of fans. We will have to use different tactics, which we have at our disposal, but they will take significant resources. As for whether enough resources have been set aside for the bill, we will have to judge the situation very carefully as the season progresses. Should we require more resources I will, on behalf of ACPOS, make strong representations to that effect.

**Les Gray:** Since the bill was introduced, I have been quoted all week in the media. I have absolutely no doubt that the financial memorandum is way off the mark and I do not think that either £0.5 million or £0.7 million will scratch the surface of what is required. From my 31 years' police experience, I believe that Mr Corrigan is right. The two serving police officers and three former police officers in the room will remember the Criminal Justice (Scotland) Act 1980, which introduced the banning of alcohol at games and all the other associated offences. For want of a better phrase, we absolutely hammered that legislation with education and enforcement measures. We had—and still have—all these offences in relation to people trying to get into matches with drink and that legislation, which was very similar to this bill, had to find its own level. That meant having extra police officers at all the games; searching everyone; and taking forward dozens of test cases involving everything from quenchy cups and Capri Sun pouches to flasks, medical or otherwise. All these things were tried and tested in the court, and it will be the same with this bill.

In any case, my direct answer to your question, Mr Kelly, is that I do not believe that the financial memorandum goes anywhere near covering the potential costs. Over the past two years, in particular, the police service has been actively removing police officers from football grounds in order to reduce costs. In order to enforce this legislation properly, we will have to reverse that trend and bring in more officers to police these games before, during and after matches and, for

example, check out public houses. In the past, we have sent two, three or sometimes four police officers into a public house and if order has been generally acceptable they have left things at that. However, if we go into a public house to enforce this legislation—which we will have to do to ensure that it works—those two, three or four police officers will simply not cut it; we will need 20 or 30 because it would not be safe to send in any fewer. As a result, we believe that there will be more costs than are stated in the financial memorandum. Does that answer your question?

**James Kelly:** Indeed. That was a very clear and direct response. It is one thing for legislators in the Scottish Parliament to pass such a bill, but it is the police officers on the front line who will have to implement its provisions.

You will have heard the discussion with the previous panel about relevant offences, the songs that would be regarded as offensive under the bill and so on. Are you comfortable that the bill as drafted is clear enough to allow you, come the first day of the season, to brief police officers on what constitutes offensive behaviour and what songs are offensive and could lead to arrest and prosecution?

**Assistant Chief Constable Corrigan:** That is an interesting point. That was an issue prior to the introduction of the bill, because we were always being asked which songs would constitute a breach of the peace with a sectarian aggravation.

I have only had access to the bill for several days but, after an initial reading, we are without question quite clear about certain things that will be included. However, as Les Gray will agree, it is for individual police officers to understand and come to grips with legislation. We will provide training and detail about, for example, reasonable persons and what constitutes sectarianism under the bill; however, it will be up to an officer standing at the side of a crowd to convince himself or herself that the crime has been completed and that an arrest should be made. There is enough in the bill at the moment to allow us to make a start on 23 July, but many things in perhaps greyer areas in relation to sectarian matters will have to be tested.

During the previous panel's evidence, a point was made about whether a T-shirt, for example, could communicate hatred. I suggest that a court will ultimately decide on that. Stated cases will come out of the legislation, as has been the case with other acts; the case of the Criminal Justice (Scotland) Act 1980 is similar. I think there will be lots of that. However, the bill certainly covers the famous things that were reported last season, in my opinion, and if I were the officer in the crowd, I think I could use it to effect an arrest.

**The Convener:** John Finnie indicated that he has a question. Is it a supplementary or another line of questioning? I have a list of members.

**John Finnie:** It relates to the operational side, so I will ask it now if I may, convener.

**The Convener:** Yes. Then I will come to Graeme Pearson, John Lamont and Alison McInnes.

**John Finnie:** Mr Corrigan, all police workers assess risk. You rightly identified that the primary concern of the match commander is safety. When you talk about not making mass arrests, for want of a better term, I presume that the same would apply to the circumstances that Mr Gray outlined in relation to public houses. There is no inference that every public house in any location will be subjected to that. A risk assessment will be done based on operational demands and other needs.

**Assistant Chief Constable Corrigan:** Yes. I approach the issue from the preventative point of view. If someone is looking at the forthcoming season as a football fan who is, shall we say, prone to this type of activity or has been involved in it, I hope that that individual, whether they were going to watch a match on Sky in a public house, or were going to the game, would understand that the bill allows the police to tackle them and that there is potential for quite a serious sentence to come from that. We will not always decide to go into a pub near one of the two big stadiums in Glasgow, for example, because at that moment in time we might not have enough officers to do that as we have deployed them elsewhere. That will remain the case and safety will be paramount. That is the first question that any police officer, never mind the match commander, should consider.

**John Finnie:** Is it your view that the legislation that banned alcohol from sports stadia has been a success?

**Assistant Chief Constable Corrigan:** Yes.

**John Finnie:** Thank you.

**The Convener:** Before we move on, you said that guidance on operational matters would be given to your front-line officers. I have raised the matter of section 2, on

“Regulated football match: definition and meaning of behaviour ‘in relation to’ match”

and particularly the provisions on travelling. It seems to me that they are pretty wide. Section 2(4) states:

“(a) a person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match, and

(b) a person's journey includes breaks (including overnight breaks).”

Will there be difficulties with using that? It is almost like a stop-and-search power, is it not?

**Assistant Chief Constable Corrigan:** I commented at the point when the question was asked that I had picked up on the

“whether or not the person ... intended”

part of the provision. That will form part of my written feedback because I would like to clarify the provision. We can probably deal with the case where someone is travelling to a match and there is an overnight break. Simply put, it will take a bit of investigation; we will have to acquire the evidence that supports a chain of events without a break in the middle, if you like. That is a matter of investigation, albeit that it is different from what we might do at the moment. However, I share your view that there needs to be more clarity on the bit about

“whether or not the person ... intended to attend the match”.

**The Convener:** So we might need to seek clarification on that from the minister, or even to have it amended. Does the provision go a bit too far?

**Assistant Chief Constable Corrigan:** The point is that it applies whether the person intended to attend the match or not. We will be seeking clarification of that.

**The Convener:** Thank you. I call Graeme Pearson, to be followed by John Lamont and then Alison McInnes.

**Graeme Pearson:** First, I realise that from ACPOS’s point of view you want to be positive about new demands that are made upon you—ACPOS is a can-do organisation. Secondly, I have seldom heard a police officer who did not welcome additional powers. I do not think that the fact that the police welcome additional powers is, in itself, a virtue.

**The Convener:** Gamekeeper turned poacher!

**Graeme Pearson:** Absolutely, but I have always thought that. I am more interested in a free community than in a community that is policed to the nth degree.

Before I ask my question, let me take you back to the financial memorandum, which states:

“The Scottish Government does not envisage significant additional costs associated with the introduction of these measures.”

I know that the police have introduced a new football monitoring group; I believe that it started business last week. You commented about pubs near Glasgow, but this situation extends right across the country, as you know, and substantial numbers of officers will be needed to address it. What arrangements have you made for training

officers and briefing them about the requirements? How will that training be rolled out? How many officers will you be able to brief between now and the start of the season? What do you do about the officers who have not been briefed yet, given that the bill has no significant financial implications?

11:30

**Assistant Chief Constable Corrigan:** I take you back to my point that a proportionate response must be the way forward. Yesterday, as part of the joint action group that is tackling violence in football, including sectarianism, we set up a national football unit, which is based in my force at the moment. It will be responsible for getting the new legislation to as many police officers as possible prior to 23 July, and my feeling is that that should be every officer who will be deployed. We have identified four clubs in particular that have a problem, although it is not exclusive to those four clubs. If I were choosing which officers require to be trained first—accepting that I could not train every single officer in Scotland by then, although I might be able to do that—it would be those officers. That will be one of the first tasks for the national football unit, which is headed by a superintendent who is, as we speak, going around the country speaking to chief officers and giving our take on what the bill will involve.

There is no question but that that is costly. If I am instructed to work within my existing resource, which is reasonable to an extent, then my response will be proportionate. I have to balance what the community wants us to tackle, which is not just this problem, so I will use only a reasonable number of officers. For example, I do not intend to triple the number of officers who will go to certain games. We need to be a bit more sophisticated about how we do things.

Members of the committee might be aware that we recently introduced an anti-sectarian initiative at each of our big fixtures. That is a small, specially-trained group of officers with body-worn cameras, whose sole role is to go into crowds to record and gather evidence that might prove some of the offences in the bill.

I completely agree, however, that we would not be able to use many, many more officers on the basis of existing resources.

**The Convener:** Mr Gray, do you want to comment?

**Graeme Pearson:** Could I leave Mr Gray for the moment to save a bit of time?

**The Convener:** I leave it to the witness to say whether he wants to come in.

**Les Gray:** No, I am quite content, convener.

**Graeme Pearson:** It was publicised that 1,000 officers covered one game. The prospect of trying to train 1,000 officers in a short space of time is challenging—it would take months. One does not train 1,000 officers in a couple of weeks. You heard the earlier discussions about the difficulties and you are aware of public concern about the rush that we are involved in with the bill.

The bill sets out that officers will be able to differentiate between an offence, a joke, proselytising—that will be a good one—free speech and satire.

**The Convener:** That is in the policy memorandum, not in the bill.

**Graeme Pearson:** That is right. Given that that is the level of concern and intricacy, do you really feel that the officer on the street, who might well have to take a camera into a crowd, will be well prepared and protected to deliver on the provisions in the bill?

**Assistant Chief Constable Corrigan:** You make a relevant point. I read with interest the same points about the decision of an officer, because it will boil down to an individual officer deciding whether people crossing themselves, for example, in one set of circumstances as opposed to another, is an offence or is liable to incite serious violence. I can tell you that in certain circumstances it might incite violence.

The key for us will be to train officers quickly. You are aware of our internet-based training, with which we will reach a great number of officers quickly. Your point is absolutely right, however; the officers who will be going to matches on 23 July and who need to understand the intricacies of legislation will be those we were talking about in relation to the anti-sectarian initiative. They will receive a different type of training, and as much as we can give them. It will boil down to understanding whether an action is a joke or, because of the circumstances, has gone beyond a joke and is liable to incite violence.

In essence, we are where we are with this. We will be required to train officers by 23 July. I am absolutely confident that I can do what I am describing. Would I like to train officers more so that they have a real grip of and an understanding of the legislation? Yes, of course I would rather have more time, but we are where we are.

**The Convener:** John, you have bid for a supplementary. Is it on training?

**John Finnie:** It is on training.

**The Convener:** It has to be specifically on training, because John Lamont has been waiting quite a while.

**John Finnie:** I think that Graeme Pearson is labouring the point about training. The Scottish criminal law book used to be fairly big. Given all the legislation that has been passed since I left the police, I am presuming that it is bigger now. We have heard about internet training. I presume that training would be in the form of cascade training, team briefings and that sort of thing. This is not rocket science. A lot of the things that Graeme Pearson is alluding to will be shaped by case law, which is cascaded to officers via internet training and team briefings—your match commander will say, “This is the ruling.” So there is really not a great deal of training to be done here. It will come down to experience. Police officers will require to use discretion, which has always been their strongest power, to apply this legislation. Am I correct?

**Assistant Chief Constable Corrigan:** One thing that we are good at is dealing with new legislation. We get it all the time.

**The Convener:** That was said with such weariness.

**Assistant Chief Constable Corrigan:** My absolute hope, which most of my colleagues share, is that at the end of the season we will be talking about not how many people we have arrested, but, as was the case with the most recent old firm game, how significantly sectarian singing has reduced as a result of our talking about the issue. The new powers will come in and the process will be exactly as you describe: there will be pre-match briefings to the officers on the ground and the senior managers and we will deal with the situation accordingly.

I accept that there will be greyness. We will have the stated cases and the cases that were challenged, as has happened up until now. However, if the community tells us that they want us to be tackling sectarianism—which they are—we will do so. That is what we are here for.

**Les Gray:** To back up what Mr Corrigan said, I do not think that we need weeks and months of training, as Mr Pearson suggested. The legislation is reasonably straightforward. We have been doing most of this for years, but we are now putting a name to a lot of these offences. Mr Finnie is a wee bit more accurate in what he says. There will be on-board training, if you like, at briefings.

Speaking from an operational point of view, I imagine that an extra 30 or 45 minutes will be added to most football briefings. Some members of the committee might not be aware of this, but the officers do not just turn up at a football match; they are briefed extensively before the match. In relation to the big games—old firm games—they are briefed the day before, or sometimes two days

before, and information is cascaded down. I imagine that we will have extended football briefings. I hark back to the 1980 act: we got a couple of hours of briefings over two days for that, and it was completely new.

I have every faith that my members will exercise their common sense and discretion in relation to these offences and the definition of “a reasonable person”. A reasonable person is a credible witness, and has been ever since I joined the police 31 years ago; that has not changed. I have every confidence that our members will be trained and ready for the new legislation. It will find its own level, which will be dictated by the test cases that come to court and the stated cases.

**The Convener:** Thank you. We have dealt with training, so I will let in John Lamont. You have been very patient; I do not often say that to you.

**John Lamont:** Thank you, convener. I will focus on the effect and deterrence value of the bill once it is enacted, starting with the same point that I made to the minister. How many people who have effectively escaped the sanction of the criminal justice system so far will face arrest and possible prosecution once the bill is enacted?

**Assistant Chief Constable Corrigan:** Those people have escaped, or, rather, they are tolerated. We need to face the facts. We have for many years policed football very safely, especially inside the ground—there are very few arrests, and we have to a large extent eradicated alcohol and its effects inside the grounds. There has, however, been widespread sectarian singing for many years. We—not only the police, but our community—could decide that we want to deal with that by having the police service arrest as many people for committing the offence as we can literally get our hands on. In some instances, I have heard singing that would definitely be an offence under the bill. I suggest, however, that we do not want to do that. We want to influence crowd behaviour by publicising the fact that these new powers exist and carry a significant sentence. When we decide to go in, even if we do so after the fact by using closed-circuit television to capture those who are responsible or were leading the charge, we will publicise those arrests. We will publicise that those people have received football banning orders, and that they have been banned by their clubs—an important point that we have not yet talked about.

It is about creating a deterrent rather than saying that we are going in to arrest everybody. That is definitely not the solution; it should be about football.

**John Lamont:** For clarification, what is the new offence that is not currently covered by a breach of the peace or by section 38 of the Criminal Justice

and Licensing (Scotland) Act 2010? What additional powers are you getting? I want you to pinpoint exactly what the additional offences are.

**Assistant Chief Constable Corrigan:** First, I should say that I am not a lawyer. I am encouraged that under the bill people can get a football banning order when they are travelling to and from the match or watching the football in a pub, which is not currently the case.

There are certain circumstances in which the stretch of breach of the peace and our applying for a football banning order—as we do in every instance—may result in the sheriff saying no. The bill, however, is quite clear that if the person is watching the football in a pub or is on the way to or from the match and we charge them with the offence, it would attract a football banning order. That is one of the obvious things.

The other thing is the sentence that the offence attracts, which comes up when I speak to my colleagues and to members of the public. I have not seen anyone given five years for a breach of the peace in many years. As I say, however, I am not a lawyer.

**John Lamont:** That would require an arrest, would it not? You say that you do not anticipate having to arrest many more people, but to get that sanction you would have to arrest the person.

**Assistant Chief Constable Corrigan:** Absolutely yes, in that case.

**The Convener:** I read into your answer that while the existing legislation—I am talking about breach of the peace common law—does many other things, the bill is in balance a preventative measure, rather than giving you more powers.

**Assistant Chief Constable Corrigan:** Yes.

**The Convener:** You have mentioned a few differences, but I read into that that you will implement it in very much the way that you implement the legislation now, except that it is more of a threat and a deterrent. Is that a fair way to look at it from the police point of view?

**Assistant Chief Constable Corrigan:** We will use the legislation effectively as required, but we will be proportionate about it. You will not see us destabilising crowds in order to arrest people at a time of large-scale sectarian chanting, for example, but we will use other methods to arrest those people after the fact. The legislation will be about deterrence.

11:45

**Alison McInnes:** My question follows neatly on from that. There seems to be a disconnect between what the minister expects—she said today that she expects such behaviour to stop on

23 July—and what you are saying, which is that you will police in the same way as you do under the current legislation because your first interest is in maintaining public safety and public order at football matches. Surely, the problem is not that we need new legislation but that we need a different way of enforcing it. Given what you have said this morning, is there not a real risk that the bill could fall into disrepute from the very start if, in the first two or three games of the season, the sectarian chanting continues?

**Assistant Chief Constable Corrigan:** Perhaps I did not make myself clear. We will use the legislation from the start of the season. The difference between a couple of seasons ago and the end of last season is that we now have a dedicated, well-trained team whose job is to deal with this aspect and nothing else in the match. The anti-sectarianism initiatives will be rolled out across Scotland and you will see the legislation being used—I am quite confident about that.

I would fear the worst if we measured success by the number of people whom we arrested for sectarianism. As part of the joint action group we are doing many other things to influence whether people sing sectarian songs at football matches. Whether breach of the peace with an aggravation worked or whether the new legislation works, we will use all the tools at our disposal and, because we are launching an anti-sectarianism initiative entirely for that purpose, you will see more arrests this year—there is no question about that. Will that be success? I do not think so.

**Alison McInnes:** Let me turn the question around, then. What would be a failure?

**Assistant Chief Constable Corrigan:** We will use not only the legislation, but a wide range of measures that the joint action group is proposing should be used from the start of the season, which will involve the clubs and the supporters in educating people about what is and is not allowed. If all those things failed and, at the end of the season, we did not see any difference in the stadiums, that would be failure.

**Humza Yousaf:** Good morning, gentlemen. Thank you for coming. It is important to have you at the first committee meeting at which we are looking at the bill. Mr Gray made the point that the financial memorandum is, in his opinion, way off the mark. Where would you judge the mark to be? What do you think the cost should be—I expect that you will put it in the written submission that you will submit by Friday—and on what do you base that figure? Assistant Chief Constable Corrigan suggested that there will not be floods of new officers in addition to those who are at grounds already, stabilising crowds. Where do you think that the extra resources will be deployed and what do you see the financial cost being?

**Les Gray:** We will require extra police officers at games. If we want to do it right, we will require police officers stopping supporters buses—as we did in the 1980s under the Criminal Justice (Scotland) Act 1980—and going into public houses. I believe that there should be an enforcement/education process whereby a stigma is attached to people who are charged and convicted. That will make the difference. Before, when people were charged with breach of the peace, it would not have made many headlines. I hope that there will now be a stigma attached to people who are charged with sectarian and racist offences. I hope that the media will report the matter and that those people will be known in their communities as being sectarian and racist.

You mentioned breach of the peace. We have always had such powers, but breach of the peace has been under attack recently in some aspects of the law and we have had the ridiculous scenario whereby people have been let off because it was only two police officers whom they swore at. That is how it was laid out in the stated case. It is not a breach of the peace to stand and swear at two police officers—how ridiculous is that in today's society?

That is why I am pleased with the bill. Article 7.1 of the European convention on human rights states that offences should be clearly defined. A lot of people walk away from court when that is not the case. For example, two police officers could be standing at a corner, and somebody might come out shouting, bawling and swearing during a match, or at any time, but the courts will not take it up. That is just crazy in my commonsense view. I hope that most reasonable people think the same.

I believe that we cannot enforce the anti-sectarian provisions with the same amount of police officers. On behalf of my members, I hope that we will have more police officers on the ground enforcing the provisions and more police officers hitting the public houses so that, in the first few months, members of the public get the message loud and clear that anti-sectarian behaviour is not acceptable to normal people in our society.

Success for me would be the same as it would be for Mr Corrigan—by the end of the season, sectarian chanting and so on would be greatly reduced. We will not be able to do away with it altogether within a year or so; it will take time. However, if it is greatly reduced, that would be success. We should not measure success according to the number of people who are charged. The police's first priority is to prevent crime. I agree with Mr Corrigan 100 per cent that if we can prevent sectarian acts from being committed in the first place, that would be a success.

**Humza Yousaf:** The first part of my question for Mr Gray was that, if the figure in the financial memorandum is way off the mark, what do you judge the mark to be? The second point is whether, given what Assistant Chief Constable Corrigan said, there is a difference of opinion about what the approach should be. Mr Gray made it clear that we should put more officers into grounds and public houses. Am I right in saying that Assistant Chief Constable Corrigan does not think that that would be the right approach? I do not expect the two bodies necessarily to be convergent on that issue, but will it need to be discussed?

**Les Gray:** If I could give you an answer to that, Mr Yousaf, I would probably be in line for another promotion. I do not honestly know the answer.

**Assistant Chief Constable Corrigan:** If you give the right answer, you might be in line for promotion.

**Les Gray:** I will be putting on this week's lottery numbers.

However, my 31 years in the police service tells me that the policing of games and the fantastic work that Strathclyde Police and other police services did at the end of the football season in reaction to the escalating old firm nonsense—it can only be described as nonsense—come at a cost. The police pot—this is where I get on my federation soapbox—is finite and the budget, like everyone else's budget, has been hit. In order to police sectarian behaviour in the way that it needs to be policed, we will have to rob Peter to pay Paul.

If on-duty officers are brought in at no cost to the football side of it, those officers are not in their community. If officers are brought in on their day off, they are not getting paid but they will still have to have their day off further down the line, so the community will suffer from that. If officers are brought in on overtime, there is obviously a financial cost. Whatever way it is policed, there will be a cost.

Mr Corrigan is right that the online offences, which the committee will come on to, will grow arms and legs. As anyone in the police service will tell you, you might start off an online inquiry with one thing, but that will grow. For instance, with paedophilia inquiries, you start off with one person's computer being seized, but before you know it you are looking at 100 or 200 people. It will be the same with an online inquiry in this case: it will grow arms and legs.

My instinct from 31 years in the police service and my common sense tell me that the financial memorandum's cost estimate of £0.5 million to £0.7 million will not touch the real cost and that extra funds will be needed. However, that could be

reviewed every year. If we are successful, the policing cost could come down, just as it did for policing the alcohol ban at football matches. Many moons ago, we used to have four cops at every turnstile for that, but we do not have that now. We have reduced the numbers of police involved because the crime is not there. The long-term goal in this case would therefore be to reduce policing in such a fashion that the cost will come down.

**The Convener:** Do you agree that if the bill was successful as a preventative measure, it could be a spend-to-save matter, in that we would have fewer prosecutions, fewer applications for legal aid and so on? With fewer prosecutions, perhaps fewer people would be paying fines or be in jail. If the bill's provisions operated as a preventative measure as well as in giving the police more clarity—that is not my view but your view, I believe—it might be possible to save money for the public purse in other areas, including hospitalisation and so on.

**Les Gray:** Absolutely. I have been saying for many months that crime costs money across the public sector. For example, it affects not just the police but hospitals. Anyone who goes into Glasgow royal infirmary or any other hospital after an old firm match sees the cost to the national health service and social services. There is also a cost to education, private employers, public employers and the courts—a raft of areas. In my view, if we spend to save in the first year and hammer it, for want of a better term, and enforce it—that is the only way to put it—

**The Convener:** We are trying to get away from violence, Mr Gray, but we will take that metaphorically.

**Les Gray:** If we enforce it properly and there is a deterrent, which Mr Lamont is looking for, without a shadow of doubt we will save money in future years.

**The Convener:** We will have a question from Graeme Pearson, after which I would like to move to the second part of the bill.

**Graeme Pearson:** As I said in the justice debate last week, if we are announcing a fanfare deterrent, that is one thing. We all want to be identified as being against sectarian hate crime and hate crime in general. I leave that as being completely supported.

I do not wish to labour the point about training, but we do not want to experiment on the public. The last thing we need is to have ill-advised officers applying a law that is not clearly understood, and a law that is challenged by the public in the media glare. There is a whole issue around public confidence, not just as far as the police are concerned but as far as the authorities are concerned generally.

You mentioned football banning orders, and you heard me rehearsing some points about them with the minister earlier. Why has there been what I would identify as a fairly low pick-up on banning orders? What is your view regarding the future?

**Assistant Chief Constable Corrigan:** On your first point, please be assured that we will never allow police officers to experiment on the public. We police the community with the community and for the community. That is it—there is no other deal.

Officers will be trained to a standard where they are able to do their job to the level that they should be at. The test that may be applied thereafter—I am sure that it will be—will be at court, where I hope that rigour will be applied, as is right and proper. From that, we will get some clearer definition around certain parts of the new provisions. That is normal—I am sure that that will be the case.

There is never a scenario in which we walk into policing a new law without a sense of learning as we go. My entire desire is for us to be reasonable and proportionate around this whole agenda. My job, which is slightly different from Les Gray's job, is to balance priorities, and we will do that, but we should balance them in such a way as to make the provisions reasonable in their implementation, rather than going into football grounds to take a hard, heavy-handed approach and—

**Graeme Pearson:** “Hammer it”?

**Assistant Chief Constable Corrigan:** Well, I would certainly not use a word like “hammering”.

**The Convener:** You were getting on so well, Mr Gray and Assistant Chief Constable Corrigan. Mr Gray made a good pitch for promotion earlier—but I think that we will move on.

**Assistant Chief Constable Corrigan:** I absolutely promise you that there will be a very reasonable, proportionate response to the measures. We will indeed learn as we go, as that is the very nature of such measures.

Sectarianism will not be cured through people being arrested inside football grounds. There are currently 124 football banning orders in place. If we balance that against the number of arrests that are made, we see a fairly decent picture. Very few arrests are made inside football grounds. Referring to the point about the bill possibly supporting other people becoming subject to football banning orders, I suggest that the number might go up.

I can assure the committee that we ask for a football banning order on every occasion now. Training is undertaken by both the police and sheriffs, and we are getting to grips with the new legislation around football banning orders. On the

basis of the bill, I suspect that we will be asking for them more.

**The Convener:** I want to move on to the second part of the bill, on threatening communications. I invite questions on that aspect—although we have also been discussing resources, and members may develop that area, too, if they wish.

**John Finnie:** We have heard about the sex crime investigations that take place, Mr Corrigan. Can you give an indication about any other forensic examinations that take place? I presume that a resource is available for the purposes of dealing with proceeds of crime and so on. I am asking about inquiries of a forensic or IT nature.

12:00

**Assistant Chief Constable Corrigan:** Internet investigators are specialists within the service. They are not always police officers—they are people who are gifted in the field of IT and the internet. A good lower-level example of what they do would be Strathclyde Police's operation access, which tackled gang violence and the posting on Facebook, by young men, mainly, of pictures of themselves carrying weapons such as machetes, often in public places. Through an internet investigation, we identified them and cases went to court at which they were charged with possession of offensive weapons in a public place because we could prove, through those photographs, that the offence had been committed in a public place. The people who progressed those inquiries were police cadets. We had three police cadets in our building who were highly gifted in the use of Facebook. They devised the strategy for what we did thereafter. That is the lower end.

At the top end, when we are talking about international money laundering and fraud, there are covert internet investigators in the Scottish police service who carry out such investigations. In the context of the bill, we are talking about a varying scale, from the posting of simple, horrific examples of sectarianism on internet notice boards to, at the other end of the spectrum, clearly defined threats to kill individuals.

Before we set sail on the new challenge, we will have to train more people in internet investigation, but I suggest that we would probably have had to do that anyway, because the world is moving towards a position in which everything is done on the internet. The people whom we train will be multifaceted. I do not think that they will be dedicated entirely to the investigation of sectarianism; they will learn how to deal more effectively with wider issues.

**The Convener:** Will you comment on the fact that the bill goes wider than sectarianism? I feel

that we are overlooking issues, as condition A is not to do with sectarianism. What is the situation when someone puts on the internet something that is offensive and which is an incitement? What is the current legal position? Is that an offence under the communications legislation, or is it just a common-law offence?

**Assistant Chief Constable Corrigan:** It could be a number of things. It might be a breach of the peace—depending on the circumstances, breach of the peace might be the most appropriate offence with which to charge someone who had caused alarm, annoyance or disturbance to a member of the public. In other circumstances, when a message has been sent by text, it may be a statutory breach of the peace under the telecommunications legislation. It would depend very much on the circumstances.

Equally, if a threat were sent over the internet that was real, was intended and which could be carried out, it could come under the common-law crime of threats; indeed, it could range as far as conspiracy to murder or anything else. It would very much depend on the circumstances.

**The Convener:** I am trying to recall what the minister said. I think she said that, for a serious crime, it was necessary only to demonstrate intent to cause fear and alarm but that the threat need not necessarily be carried out. I think that that is the distinction that she made between the position in the bill and the current position. Is that correct?

**Assistant Chief Constable Corrigan:** With regard to the crime of threats, specifically, someone must be able to do, or intend to do, what they say that they will do, whereas with the proposed new offence, I think that the minister said that that was not necessary.

**Humza Yousaf:** Whenever proposed legislation is discussed that deals with offence, fear and alarm, or the intent to cause them, there is always a worry, especially on the part of the public, about the potential for powers to be misused. Nowhere is that more evident than with the terrorism legislation, which I remember being used against an 80-year-old gentleman who heckled at a political party conference—in the spirit of being consensual, I will not mention what political party that was. There is a worry that that could happen here. How will you look to quell those public concerns about freedom of speech, particularly in relation to demonstrations, rallies and so on?

**Assistant Chief Constable Corrigan:** That is a key point. There must be a balance in relation to both the offences in the bill. We must be pragmatic and clear that we are talking about people who peddle hate. Given the number of people that we will be able to deal with, we are talking about people who are threatening and who peddle

serious sectarianism or racism or whatever. The first test that should be applied is through internal supervision in the police service. We examine what our officers do in relation to what goes to court. We should ask whether it is reasonable for someone to go to court. For example, we should consider whether it was a joke between two young lads who were sending things about their favourite football team, which is often the reality. Alternatively, we should consider whether there was something like what we had last year: defined and clear threats against a named person, showing marks on his body where he was going to be injured. We first need to consider that internally in the police service, and we have measures in place to do that.

The second test that it is right and proper to apply is through the Crown. In Scotland, the Crown decides whether a crime has been committed. If we had the horrendous scenario that the member describes, the area procurator fiscal would come back to us and say, “Not only is there not a crime, but this is a complete abuse of your powers.” It might be recommended that disciplinary proceedings be initiated against the officers. That is the everyday reality. The point is important, because we are in the territory of people’s views, politics and religion. Those matters have to be carefully policed. That is why I continuously use the word “proportionate”. Our response must be proportionate.

**Les Gray:** Various concerns have been voiced, although nobody has yet used the term “civil liberties”. The bill will not be an attack on anyone’s civil liberties in Scotland—far from it. Apart from anything else, the police do not have sufficient resources to look at people’s Facebook pages and this, that and the next thing. The people who will be targeted are those who have been highlighted in the past few months. They are the people on whom we need to concentrate. There are various well-tested and documented procedures to allow people to complain against the police and other people in authority. I have absolutely no concerns about that. The police will not form roadblocks and stop every car and bus that might be going to a football game, when in fact they are going to the supermarket. It will be quite the opposite: the police will use the bill in the way that it is intended to be used. There will be no infringement of anyone’s civil liberties.

**Humza Yousaf:** I more than have faith in the internal processes, and we also have the independent Police Complaints Commissioner for Scotland.

I have been on anti-war demonstrations and other demonstrations during which people have burned effigies of politicians or people with a public profile. I should say that I distance myself

from such actions. That could cause fear and alarm to the person with a public profile or to other people who are around. Would such an act be prosecuted under the new law? I hate to throw examples at you, as that is probably not the best way to conduct proceedings.

**Assistant Chief Constable Corrigan:** There is a famous policeman's saying that we should take every case on its merits. The answer to your question is that it would depend very much on the circumstances. To return to breach of the peace, there is a notion of conduct that is likely to provoke a breach of the peace. That would be down to the prevailing circumstances. For example, if a crowd would be incensed or up in arms and would react violently as a result of a person burning an effigy, the individual police officer who was there at the time would consider the situation and decide whether the crime was complete. That is right and the way that it should be.

However, we could never say definitively what the only circumstances are in which a crime could happen. In some circumstances, it might not cause the slightest bit of offence to allow somebody to burn an effigy, especially if it happened in a self-contained community, as is often the case at a rally. If such things were going on, the police officer who was on the scene might decide that it was better not to do anything.

**Humza Yousaf:** Is that not the point behind the legislation? As I understand it, police officers do not feel that they have the power to go into a self-contained group of 30, 40 or 50 fans of a certain football club singing a song with no other opposition, rival football fans or members of the public present and make arrests or, indeed, do anything at all about it. Does what you are saying contradict that notion?

**Assistant Chief Constable Corrigan:** No. I understand exactly what you are saying. The legislation will allow us not only to do exactly as you have described, but to make decisions based on circumstances. If it appears unreasonable to act in such a way, police officers will not do so. It is certainly not what the community would want us to do.

With regard to internet-based crime, it is probably worth mentioning that we often apply to service providers to find out people's identity. A Government watchdog—the Scottish Information Commissioner—polices our policing of the internet and would scrutinise our applications to check whether it was reasonable, proportionate or necessary to ask for such information. If we were acting beyond where we should have been, that would be picked up.

**The Convener:** With regard to e-mail communications, if I understood the minister, she

said that under section 5 if an e-mail sent by one individual to another for their eyes only implying

“a threat, or an incitement, to carry out a seriously violent act against a person or against persons”

but no one else apart from the recipient—who will no doubt not be unhappy about receiving it—sees it, it would not be an offence. However, if the recipient puts the e-mail into the public domain, it is the recipient not the individual who originally sent it who will be guilty of the offence.

**Assistant Chief Constable Corrigan:** That is my understanding of the minister's comments.

**The Convener:** Might that not cause you problems with evidence? The original individual might simply say, “It wisnae me, guv, it was him what sent it out into the public domain.”

**Assistant Chief Constable Corrigan:** That is the run of things in normal investigations. We would normally proceed on the understanding that the person had posted the communication. However, when we interview that person, they might well say, “No, it wasn't me—it was actually Les who did it.”

**The Convener:** And you were doing so well, Mr Gray.

**Assistant Chief Constable Corrigan:** At that point, the investigation would take a different turn and we would have to evidence the fact that Mr Gray had posted that material. In other words, we would have to find corroborated evidence to support our case and allow us to send it to the procurator fiscal.

**The Convener:** Will it not cause difficulties if the recipient of the e-mail posts it in the public domain and you have to establish that they did not have the sender's consent to do so?

**Assistant Chief Constable Corrigan:** Perhaps I can draw a comparison with offences involving the kind of threatening texts that are now and again sent to people. In some of the cases that we are called to investigate, an individual has actually left their phone down and someone else has sent the text but such offences are similarly difficult to investigate and prove. This is not unheard of but it is unfortunately the way things go with internet and telecommunications-based crime.

**The Convener:** I am trying to find out whether it is the case that where there is a will, there is a way to get round the law. No doubt we will see what happens in due course when the legislation is in place.

If there are no other questions—[*Interruption.*] I knew that this would happen. I said to the clerks, “If I say ‘There are no other questions’, a hand will go up.” I call James Kelly.

**James Kelly:** I am sorry, convener, for stopping you in full flow as you were about to end the session.

I have only one question. With regard to condition A, which, as section 5 sets out, is that

“the material consists of, contains or implies a threat, or an incitement, to carry out a seriously violent act against a person or against persons”

are you confident that there is enough in the legislation to help you differentiate between a “seriously violent act” and just a violent act?

**Assistant Chief Constable Corrigan:** Police officers will go straight away to definitions and the definition that was read out in the previous evidence session is exactly what should be used. I was interested by that question, because it raised a point on which I myself would have sought clarification. As I say, given the basis of that definition, I would advise police officers to use that.

**James Kelly:** Thank you.

**The Convener:** I thank the witnesses for their helpful evidence and for attending at such short notice. I suspend the meeting for one minute only for a witness changeover, so members should stay put.

12:15

*Meeting suspended.*

12:16

*On resuming—*

**The Convener:** I welcome our third panel of witnesses, who have been very patient and have listened to a lot of the evidence: Dr David McArdle from the University of Stirling’s law school; and Bill McVicar and Alan McCreadie from the Law Society of Scotland. As before, we will move straight to questions.

**Roderick Campbell (North East Fife) (SNP):** Dr McArdle, if we accept for the moment that paragraph 21 of the policy memorandum might not adequately deal with the conjunctive test in relation to the public element and the threat of disturbance to the community, and that there is an overlap between section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 and breach of the peace provisions, can I challenge you on the comment in your submission that

“The only feasible justification for this measure is that it draws the attention of the media, the public and football’s international authorities to the fact that something is being done to address ‘Scotland’s Shame’?”

Do you agree that that is a legitimate policy objective for this Parliament?

**Dr David McArdle (University of Stirling):** Absolutely. I do not disagree with that at all. However, we need to be robust and confident enough to say that that is why we are doing what we are doing. If we are happy to do that, as a policy basis, that is absolutely fine.

**Alison McInnes:** Dr McArdle, towards the end of your submission, you say:

“given that criminal sanctions already exist to cover these issues, the better question would have been how to facilitate their enforcement in appropriate instances”.

Will you elaborate on what else you think that we could have done?

**Dr McArdle:** Yes, but let me give you a little background first. In the past 12 months, I have spent an unhealthy amount of time doing some research on behalf of the justice analytical services division of the Scottish Government on the use of football banning orders and the perceived reluctance of sheriffs to use them as frequently as people expected that they would use them. That is what has informed my thinking on this area. I am not Scottish, I am not a criminal lawyer and I am not a football fan—it is a silly game that should be banned.

**The Convener:** I think that you have just dug yourself into a great big hole.

**Dr McArdle:** That is fine. I am saying that I do not have an agenda. However, over the past 12 months, I have heard evidence from sheriffs that they are willing to use the existing breach of the peace laws and to impose football banning orders in appropriate cases if they perceive that the general mood in wider society is for them to be used more robustly than they have been.

As a consequence of the game on 22 March—at which, we should remember, it was the behaviour of the players and managers, not the fans, that precipitated people’s concern—and the subsequent public debates, there would have been in any event a greater willingness on the part of the judiciary to use football banning orders and to impose sentences of imprisonment.

Two months ago, we heard a case that involved a Celtic fan who was visited with three months’ imprisonment and a five-year FBO—FBOs are invariably a maximum of one year up here—for directing the N-word at a black Glasgow Rangers player. The fan was picked up not by the match day stewards or the police, but by other supporters, who brought his identity to the attention of those authorities. We need to remember that the police are not the most effective means to deal with such behaviour in grounds and that the first line for dealing with such offences is not the stewards, who are paid perhaps £30 a pop for attending a match, but other fans who say, “I’m not willing to put up with

you doing or saying that.” If people hear that from others who sit next to them week in, week out, that can be a strong deterrent.

The clubs, sheriffs and prosecuting authorities would have been more proactive anyway as a consequence of what happened in March, and we would have seen a lot more convictions and a lot more use of football banning orders under the existing law without the need for the new regime.

That was a long-winded response to a short question. I am sorry about that.

**Alison McInnes:** No. That is fine. That is very helpful. Thank you.

**The Convener:** I want to pick up on deterrents and summarise what has been said. I think that the police said in evidence that breach of the peace is a wide thing that people do not really recognise or understand, and that putting a name or label in the bill may or may not add to what we already have or it may duplicate it, but by doing that there will be a deterrent element or preventive measure that does not exist so much at the moment. Perhaps that picks up on Rod Campbell’s point. That deterrence exists in some respects, but the bill would add to it. What are the panel’s views on that?

**Dr McArdle:** I take the point that that is a perfectly legitimate policy aim, but prosecutors and sheriffs like certainty. If someone is faced with perhaps 70 guilty pleas on a Monday morning in Glasgow sheriff court, I think that the default position will be to consider what the police, the prosecuting authorities and the sheriff are comfortable with. In the first few months, we will see the new provisions being used a lot, as they will be brand new and shiny, and everybody will try to work out what they can do with them, but I think that people will fall back to what they know will work. Perhaps we will see breach of the peace, for example, being used more robustly, but I expect that by Christmas or perhaps by Easter at the latest we will see the old provisions being used more than they are in the first few months.

For what it is worth, I expect that we will see less of a problem next season, as such things are cyclical. There were two or three bad matches last year, which the media rightly got hold of, but there is no reason to think that the same problems will emerge next year as well. We might have a quiet period and people might say, “The legislation’s been successful,” but after two or three years, something else will happen and we will have new legislation to deal with it. That is how policing football fans has been for 130 years.

**Bill McVicar (Law Society of Scotland):** I agree with Dr McArdle. The Law Society of Scotland’s view is that the efforts that have been put into the talks and discussions on advancing

new legislation have been entirely commendable and worth while, as they have highlighted the fact that there is a serious problem that needs to be addressed. Our issues are to do with technical arrangements, whether the legislation is necessary, and whether it will add anything to the armoury at the disposal of the police and the prosecution authorities.

A couple of points require to be borne in mind in considering the competency of dealing with crimes that are committed abroad. That can be done, but in my experience prosecutions of crimes that were committed abroad have tended to focus on much more serious crimes, such as serious sexual offences against children. The provisions that are currently on the statute book in relation to such crimes require an element of dual criminality—that is, the crime has to be a crime abroad and in the prosecuting jurisdiction. Paragraph 37 of the explanatory note states:

“In these circumstances, the acts will constitute offences under Scots law (though not necessarily under the law of the country in which the act took place).”

That might cause technical problems, so some thought might be necessary in relation to that aspect of the bill.

There are also difficulties with regard to proving actions that take place abroad, and getting the necessary witnesses to come to Scotland, along with the accused, if they happen to reside abroad. The bill deals with what has been called Scotland’s shame. We cannot have people who are affiliated to Scotland behaving in that reprehensible fashion abroad. However, I question whether it is actually possible to prosecute people who are abroad for this kind of thing.

**The Convener:** I will let Graeme Pearson come in on that.

**Graeme Pearson:** Thank you, convener. I thank the panel for their submissions, which I found extremely helpful. They gave candid responses to the earlier evidence about the efficacy of what is proposed.

Dr McArdle mentioned the game in March that created a great deal of heat, and not a great deal of intelligence and understanding thereafter. We are now visited with the situation here. You commented on the current legislation and the fact that, to some extent, it has lost its glamour in terms of its being enforced with the enthusiasm that one might have hoped for.

We also saw that occur in relation to drinking at sports grounds. Initially, there was, as Les Gray would have said, the hammering of the issue to the extent that the behaviour in the fans was noticeably affected. However, to a degree, alcohol has returned to the ground scene.

Earlier, I tried to elicit whether people were surprised at the number of banning orders. I know that it was around 100. Given that the legislation has been in force for about four years—

**Dr McArdle:** Since September 2006, I think.

**Graeme Pearson:** Nearly five years, then. Are you surprised at the lack of enthusiasm for engaging with that element of legislation? What does that tell you about what we are going to do with the bill?

**Dr McArdle:** I have to choose my words carefully, because although the report is written—it has been ready to go for about two months—it is still not in the public domain, and I am really wary of saying things that I should not about what we have discovered vis-à-vis sheriffs and football banning orders. When the report is out, I will happily have a beer and a coffee with anybody—

**Graeme Pearson:** In the generality, then.

**Dr McArdle:** The generality is no, I am not surprised, because the sheriffs see banning orders as a regime that was developed down south to deal with a peculiarly English problem. One of the sheriffs said, “It is an English act with a kilt on it.” It is of limited utility in Scotland, but I think that that will change.

**The Convener:** Is there a timescale for the publication of the report on banning orders?

**Dr McArdle:** The last date that I heard was late May or early June.

**The Convener:** That is now. Perhaps someone else wants to ask about that.

**John Finnie:** I want to ask either of the gentlemen from the Law Society about their submission. Like Graeme Pearson, I am grateful for both the helpful submissions. I found the third paragraph on page 2 of the Law Society’s paper, about section 1(5)(b) of the bill, to be particularly helpful. I ask you to expand on your concern that

“there does not require to be anyone present to be incited to public disorder.”

**Bill McVicar:** This is where we consider section 1.

**John Finnie:** Yes. It is the comment in the third paragraph on the second page of your submission.

**Alan McCreadie (Law Society of Scotland):** I am happy to take that question. I should say thank you for the opportunity that has been afforded to us to present oral evidence to the Justice Committee this morning.

The concern is to do with the fact that it appears to be something of an offence in the abstract. I think that it is meant to cover a situation in which

there has been offensive behaviour within a football ground but the other fans have left or there is an insufficient number of other fans.

For the purposes of section 1(1), the issue is not behaviour that incites public disorder but behaviour that is likely to or would be likely to do so. There is concern that the bill defines such behaviour as behaviour that

“would be likely to incite public disorder if public disorder would be likely to occur but for the fact that ... measures are in place to prevent public disorder”—

I assume that that means that there is a sufficient police presence—

“or ... persons likely to be incited to public disorder are not present”.

I am not sure about the provision. The overall situation is that the behaviour could be dealt with adequately under existing legislation, perhaps as a breach of the peace, because it is likely that someone would be there. There are also issues around provability and enforcement, but the point is that there may be no one there to take offence at what is happening.

12:30

**John Finnie:** Ironically, what you view as the downside is meant to be the upside of the bill. If the intention is to tackle behaviour that would be unacceptable, the mere absence of the people who would take offence at it should not stop the behaviour being classed as unacceptable. Is that not beneficial? Is it not a serious improvement on the current situation?

**Bill McVicar:** It is not an improvement, in the sense that it does not add anything to the law as presently stated. I assume that the provision is meant to cover disorderly conduct in a public place. It refers to conduct that

“would be likely to incite public disorder”,

so there must be some sort of public element to the conduct. That means that it falls within the definition of breach of the peace—it is not one of the private situations that are excluded from that, which led to the introduction of section 38 offences. The concern that we have expressed relates to whether the provision is necessary, because it does not add anything.

**John Finnie:** Let us take the example of a situation in which there are two factions, one of which is some distance away from the other, around the corner, with police officers present. Do you see no benefit in applying the bill’s rigour to people from one faction who say something that would be wholly offensive to others who, by good fortune, are around the corner?

**Bill McVicar:** I see that there is potential benefit in the situation that you describe, but I reiterate that the provision adds nothing to the present law. One concern that we have tried to raise is that the bill, rather than being innovative, in many ways simply restates the law that already exists. We are concerned that there should not be two different sets of law that apply. Why should the law that applies to non-football situations—for example, a disturbance in the street involving people who have been at a rock concert or something of that sort—differ from that which applies to circumstances related to football, especially given that the common law covers both instances? People say that breach of the peace is not a serious crime, and perhaps in some circumstances it is not, but at the end of the day it is a common-law offence for which an unlimited penalty is available. In a sense, the bill restricts the level of punishment that a court could impose in appropriate circumstances.

**John Finnie:** Earlier, we heard from police officers about the dilution of breach of the peace. I understand that using the F-word to patrolling police officers is no longer deemed to be a breach of the peace. Does that not suggest to you that there is inadequacy in breach of the peace as life goes on?

**Bill McVicar:** I am not sure that using the F-word to a police officer would necessarily fall within the definition in the bill. With respect, it is not a good comparison to use.

**John Finnie:** My point relates to how breach of the peace has altered over the years. At one time, what is known in your profession as a two-cop breach would have been a reasonably common offence, but there has been a dilution of breach of the peace. Do you not accept that the bill is intended to address that?

**Bill McVicar:** I do not think that section 1(5)(b) covers the specific example that you have in mind. Breach of the peace was recently redefined—perhaps that is the best way of putting it—to make clear that there has to be a public element. That was what the Harris case was about—it was about something happening in a public place. If someone is shouting obscenities at a police officer in a public place, it is arguable that there is a breach of the peace, depending on the circumstances. I do not see how section 1(5)(b) would change that.

**John Finnie:** I should have added the caveat that I am not a lawyer, although I have some passing knowledge of the law. The pertinent point is that the public are not present; only police officers and a faction are present.

**Bill McVicar:** The faction is the public, for the purposes of the definition of breach of the peace,

is it not? If someone is doing something in a crowd of people, the public are present.

**John Finnie:** I am envisaging a situation in which there are 30 people in a group and someone is saying something that other people might find offensive but which none of the other 29 individuals in the group finds offensive. That is where the gap is.

**Dr McArdle:** I take the point entirely, but let us be clear: what we are doing here is criminalising hate speech when nobody is present to be offended by it. I do not have a problem with that. In lots of mature democracies, it is not unusual to say of a word that is offensive to the wider community, “You cannot use that word—end of.” I have no reservation about our going down that route. My concern is that this conversation should be taking place over a period of months, not a couple of days—that is, if my reading of section 1(5)(b) is correct.

**Bill McVicar:** I agree with Dr McArdle on that, for what it is worth. Our concerns and reservations relate to the length of time that has been allowed for the process.

My colleague Mr Clancy wrote a paper, which he has not submitted to the committee, in which he drew attention to the high points of the Scottish system of bringing about new legislation. He referred to a review—I have lost the place in my notes; please give me a second.

**The Convener:** Can I ask for clarification on section 1(5)(b)? My thoughts are knitting together rather badly. Section 1(5) provides:

“For the purposes of subsection (1)(b)(ii), behaviour would be likely to incite public disorder if public disorder would be likely to occur but for the fact that—

(a) measures are in place to prevent public disorder, or

(b) persons likely to be incited to public disorder are not present or are not present in sufficient numbers.”

Let us say that I am in a supporters club and we are busy singing something that might well fall within the ambit of being offensive and stirring people up to some kind of race or gender hatred. If I am doing that and everyone else is doing exactly the same, I do not fall within the ambit of the bill. Is that correct?

**Dr McArdle:** I think that you do fall within the ambit of section 1(5)(b).

**The Convener:** Why?

**Dr McArdle:** Because although nobody else is present who would be offended by the behaviour and you are not provoking fear and alarm among other people—because everyone is of a like mind—the police, the Crown and ultimately the sheriffs might take the view that you have said something that simply should not be said.

**The Convener:** Okay, so I am reading the section wrongly. I am happy to be corrected on that. The point is that even if everyone is very happy with what they are singing, they will fall within the ambit of the bill. I am putting aside evidential requirements; strictly speaking, they will fall within the ambit of the bill.

**Dr McArdle:** I add the caveat that I had two hours with the bill yesterday morning and I could be wrong. Like you, I am willing to be corrected.

**The Convener:** Mr McVicar, can you clarify the position?

**Bill McVicar:** I do not know that it is necessarily easy to clarify. I go back to what I said earlier: if someone is in a supporters club and all the supporters are singing an offensive song, they are in a public place. The club is a place to which the public have access—the public being the members of the club. If someone was in their front room with their family, shouting and bawling at the telly, I dare say that there probably would not be a breach of the peace, but if they were with other members of the public in a place to which the public had access, it seems to me that there would be a breach of the peace.

That does not answer the specific question about section 1(5)(b), but what I am saying is that the conduct that you have in mind is criminal in any event, so unless it can be shown that section 1(5)(b) would bring additional benefit and catch criminal activity that is not caught by the existing law, it might not be necessary to bring the bill into force. It is difficult to understand what is intended by the bill. It seems to me that the law that we have been operating for a number of years is relatively straightforward and clear, although the odd glitch occurs from time to time in relation to things that happen in private.

**The Convener:** I do not think that I am clear, but I will have to read what you have both said. I am not clear in my mind whether it would be an offence to sing in a supporters club—with nobody else but supporters present—a song the singing of which in other circumstances would be considered to breach the law. I am not clear whether, if nobody else was present and everybody was content, that would fall within the ambit of the bill. There is the “but for” in section 1(5). I am not clear about that, but maybe it is just late in the day.

**Bill McVicar:** Perhaps we have to look back to section 1(1)(b)(ii), which states:

“would be likely to incite public disorder.”

The issue is the link between that and section 1(5)(b), which we identified in our submission.

**The Convener:** That is a fair point.

**Bill McVicar:** I think that that is what section 1(5)(b) is intended to catch, but it is trying to catch something that is already a criminal offence.

We suggest that it might be helpful to take more time to look at what it is necessary to legislate for, once one has analysed what the existing law provides for. As Dr McArdle said, it might be that more strenuous use of the existing law and the existing penalties, such as football banning orders, would have a greater effect than legislation of this sort, which is rushed. I do not blame anyone for that, because there is a matter that requires to be dealt with, but I wonder whether more haste might mean less speed.

**The Convener:** Rod, is your point on the same problem?

**Roderick Campbell:** Yes. I think that we have rather laboured section 1(5)(b), but do you accept for the moment that, rightly or wrongly, it might be intended to take the law beyond the decision in *Harris v HMA*?

**Bill McVicar:** That might be the intention.

**The Convener:** For those of us not familiar with *Harris v HMA*, can you tell us what the decision was?

**Roderick Campbell:** It was about the public element. The case failed because the rude remarks to the police were not made in public.

I record that I found the submission on section 2 helpful, and I will be interested to see what the Government makes of it when it has the opportunity to consider the matter, so thank you for that submission.

**Bill McVicar:** Thank you.

**The Convener:** Alison, is your question on the same public/private point?

**Alison McInnes:** Yes. The lack of clarity in the past 10 minutes demonstrates exactly why it is dangerous to be taking the bill through Parliament at such a ridiculous speed. I want to hear the panel’s views on whether they think that the emergency legislation procedure is warranted in this instance.

**Bill McVicar:** My view is that it is not warranted in this instance. I readily understand that there is a requirement for debate, consideration and discussion of the problems, but I do not know that the bill, of itself, will help. Indeed, it may cause confusion, because it seeks not to replace or clarify the existing law but to add another layer of law, which is not always the best way to approach things.

**Alan McCreadie:** There is nothing that I can usefully add to that.

**Dr McArdle:** Likewise, I agree with Mr McVicar. It is not Cadder.

**Humza Yousaf:** My question is on a slightly different tack. All your submissions contain the idea of including a sunset clause and reviewing the legislation. I think that everybody on the committee—I suppose that I should not speak for the whole committee but, nonetheless—

**The Convener:** I would stop there. Speak for yourself, if you want to last.

**Humza Yousaf:** I have heard from the discussions that we all have concerns about the speed at which the bill is going through, but there is an understanding that legislation can be reviewed, looked at and updated. The police, as well as the politicians, are very keen to get something on the ground before the football season starts.

I am not sure whether you were here when the minister gave her evidence and we questioned her, but she said that there is a problem with sunset clauses in relation to criminal cases. Do you accept that there can be problems with enforcing sunset clauses for criminal offences? If so, what other review structures could be put in place?

12:45

**Bill McVicar:** A sunset clause is one that brings an end to the effect of a statute at a particular point in time. It is not common for such clauses to be a feature of criminal practice. However, I do not see any reason why they could not be included in a statute, provided that there were sufficient transitional provisions to deal with what comes at the end of the period specified. There may be a device that would allow the legislation to continue subject to whatever voting procedure may be thought appropriate. Alternatively, there might be provision that prosecutions that have been commenced before the sunset clause takes effect are to continue.

I return to two points. First, it seems to me that what the bill seeks to criminalise is already an offence. If I am right in my analysis that it is not adding a new crime, the sunset clause is to some extent redundant, because the offence would continue to be criminal at common law in any event. There could be a common-law prosecution even at the end of the sunset clause.

The second and perhaps more fundamental point is why, if we are dealing with criminal legislation, we are considering whether there is a need for a sunset clause. That of itself indicates that we are bringing in criminal legislation with too much haste.

Criminal legislation is very important to those who are affected by it. It is important for the police, the public and those who happen to be accused of breaking the law. There has to be a degree of clarity so that everybody knows where they stand. My concern is that if the bill is enacted in its present form, there is likely to be a degree of confusion for a time. It might be better to resolve any matters that could be capable of causing confusion before the bill is enacted.

**Humza Yousaf:** Is such confusion not quite common with most pieces of legislation, on which there are test cases? The police did not suggest that there was huge confusion; they thought that they would be able to train their officers—or at least a significant portion of their officers—in time to implement the legislation. Is it not common for all pieces of legislation to develop and evolve, regardless of how long it takes to pass them?

**Bill McVicar:** Not in my experience.

**Humza Yousaf:** Test cases come through. The prohibition on drinking at football grounds was the example that Mr Gray gave. He said that there were test cases involving flasks, quenchy cups and so on. However, you do not think that that is common.

**Bill McVicar:** My experience is that, when new legislation is enacted, it is usually reasonably clear what is intended. There might be a few people making the odd esoteric point from time to time, but careful thought about what you are putting in place in legislation should serve to defeat any of the more esoteric challenges that might be thought up.

I return to what I said before. The law is reasonably clear at present. I do not see that there is any great confusion at present about what the courts, the prosecutors and the police can do, although, as I have said several times already, the fact that we are talking about the issue is welcome, because it raises its public profile and allows people to state their concerns and the public to become better informed about the situation.

**Humza Yousaf:** I want to make one final point about that. The two things that I have taken away from this meeting—I will rephrase that because I have taken away a lot more than two. One of the two main things that stick in my mind from this evidence session is that the offences that the police did not feel they had the powers to deal with were the ones that John Finnie touched on earlier, which involve breach of the peace without anyone whose peace is being breached being present. Actions in those scenarios can still be prosecuted even if those present are like-minded supporters.

The other point was about the intention to cause fear and alarm. In your experience, do provisions exist to tackle that?

A third point is about threatening communications. I think that the minister said that sending e-mails and letters can be prosecuted, but posting things on a blog perhaps cannot be, because the blog is not being sent out. That was my reading of what was said.

Will you touch on those points?

**Bill McVicar:** I do not know whether what the minister said about the third category is correct. I am not terribly well acquainted with blogs and suchlike.

**Humza Yousaf:** So that might need some legislation.

**Bill McVicar:** I do not know whether that needs to be done, to be frank. If we had more time to consider the matter, we would be able to give you a better answer. If we could get back to you in writing on that, that might be more helpful to you.

As I understand the law, the first two scenarios that you raise are already covered by the law in its present form. I do not think that there is a need to legislate to increase police powers as you suggest.

**Dr McArdle:** In the several years for which we have had on the statute book the racial and religious prejudice aggravations of breach of the peace, only one case—*Walls v Brown*—has, on appeal, gone to the High Court by way of stated case. I would be astonished if we were suddenly to see masses of cases being appealed under the new legislation, because the law simply does not work in that way. We will get the occasional isolated example of somebody trying it on, but the situations in which there are important issues of law to be clarified are and will continue to be few and far between.

**The Convener:** I have a supplementary question about sunset clauses, which I considered early on as a protective measure for the Parliament and the committee. Many committee members share the concern about legislating in haste and facing litigation at leisure because of unintended consequences.

The line in your written submission about a sunset clause is interesting. The minister touched on the questions of what would happen to people who were already imprisoned and what would happen to people who were in the middle of a prosecution—whether the case was still running. You say that we would still have all the other common law in place for protection. However, the sunset clause would apply to the entire bill, including the areas that you have raised issues about, such as its application in other jurisdictions.

If that is one of the options for the Parliament, is that not better? At least the legislation would come back to the Parliament and either it would fall or the Government would have to do something to keep it running, which would protect us.

**Bill McVicar:** I agree that it would be helpful for that to be included in the bill if it were necessary. One would hope that sufficient time would be allowed, but I appreciate that it is not going to be in this case. A sunset clause is better than nothing and is a good second choice.

**The Convener:** Let us assume that the bill is going to proceed as emergency legislation. Stage 1 is on Thursday, so we are already in the position of having stages 1, 2 and 3 on the same day. The committee shares many of the concerns about that. If we had the Government in that position, we would at least have given the Parliament some control.

**Bill McVicar:** I agree.

**The Convener:** James Kelly will now take a completely different tack.

**James Kelly:** Let us turn to section 5. I do not know whether you were present earlier when we discussed the offence of threatening communication. Section 5 lays out two conditions, A and B. Condition B is specifically about “religious hatred”, but condition A makes no reference to either football or religious hatred and potentially goes much wider than the Government intends it to be drafted. What are your thoughts on that? Is the provision relevant as drafted, or should it be narrowed down to deal with football or religion-related offences?

**Alan McCreadie:** We talked earlier about section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, which is mentioned in the Law Society’s written submission. I add the caveat that, as you will appreciate, the submission was made as a result of the truncated bill procedure. Nevertheless, my understanding is that section 38 of the 2010 act would cover that.

Condition A—as James Kelly rightly stated—seems to apply to any type of behaviour; confer condition B, which deals with a situation in which there is intention to stir up religious hatred. There is a difference between the two. Under condition B at section 5(5) there must be intention, and it may allow for the situation in which something is said that perhaps should not have been but there was no intention to stir up religious hatred. Condition A is wider than that, in that, although it specifies intention at section 5(2)(c)(i), at 5(2)(c)(ii)—to which the minister alluded in her evidence—it refers to whether a person

“is reckless as to whether the communication of the material would cause fear or alarm.”

I am of the view that common-law breach of the peace and section 38 of the 2010 act, along with the statutory aggravations of breach of the peace, would cover such situations. However, to go back to the general point, I am not sure whether it takes you any further forward.

**James Kelly:** Does Dr McArdle want to comment?

**Dr McArdle:** I really could not. I did not have time to look in any depth at section 5 and at the discussion document from my colleague Sarah Christie, so I would not feel comfortable adding anything to her comments.

**James Kelly:** I appreciate that. If you have any reflections on it and want to give us a further written submission, that would be helpful.

**Dr McArdle:** That is very kind.

**The Convener:** Just write to me as convener and the submission will be distributed to the committee.

**Bill McVicar:** I want to make one point before we leave—

**The Convener:** You are not leaving, because I have someone waiting to ask a question.

**Bill McVicar:** Before we leave section 5.

**The Convener:** Okay.

**Bill McVicar:** It occurred to me that section 5 is perhaps more restrictive than breach of the peace. Section 5 appears to require either intention or recklessness as a critical element of the offence, whereas common-law breach of the peace is an offence that is defined not by intention but by the effect of the conduct. One wonders whether that therefore restricts the offence that would currently be dealt with as a breach of the peace. I made a note of that earlier and I have just deciphered my handwriting.

**The Convener:** Does it not add to the offence, because it runs along with breach of the peace?

**Bill McVicar:** But you have to prove intention or recklessness, and that is not always easy. The effect of conduct is easier to prove, so breach of the peace is an easier offence to prove in that sense.

**The Convener:** Yes, that is evidential, but that is not what I am talking about. I am saying that the test in section 5 is that someone intends to do something, whether or not they do it. It adds to the set of offences. If someone intends to do it, notwithstanding that they do not do it, that is sufficient for an offence in itself. The effect is also an offence, so there is an additional bit. I accept that the evidential is another matter. Do you agree?

**Bill McVicar:** I can see that argument.

**The Convener:** Is Roderick Campbell still in? I have Graeme Pearson on the list as well.

**Roderick Campbell:** I am out for the moment, convener—I will let you know if I want to come back in.

**Graeme Pearson:** On the sunset clause issue, it is a matter of record that committee members, including me, were so concerned about the speed with which we were moving forward that we made representations to the convener—which she thankfully supported—on the necessity of holding these conversations.

I put a point to the police earlier about experimenting with the public by introducing the bill. Given all that you have said about the current state of the law, would you advise that we take some time at this point and seek to revitalise our current approach, rather than state up front that we have our reservations but will put in a sunset clause so that we can revisit what we are inventing in haste?

I am trying to put together a logical stance in my mind. I genuinely want to deal with the issue, but at the same time I want to improve our situation rather than making it more confusing. Although I was initially attracted to the notion of having a sunset clause as a breathing space, it appears that we might end up making things more complex and more difficult to manage. Given your experience, what is your view in that respect?

13:00

**Bill McVicar:** My initial view was that the bill should be postponed so that we would not have to worry about sunset clauses. However, given that this is going to come about no matter what I say, my choice—if I have one—is that there should be a sunset clause in any bill that is being put through in haste to ensure that any difficulties arising from such haste can be dealt with.

**Graeme Pearson:** But the purist in me is saying that the Parliament decides whether there should be legislation.

**Bill McVicar:** Absolutely.

**Graeme Pearson:** So this will not come down the track without the agreement of Parliament after considering—as we are now—the best advice available.

**Bill McVicar:** Indeed.

**The Convener:** In winding up, I want to clarify that the stage 1 debate is being held this week and that stages 2 and 3 are next week. I might have sounded confused, but I was not—the words just came out of my mouth wrong. We are not

doing it all in the one day—as we did, in fact, with the Cadder legislation.

Do any of the witnesses wish to add anything that we have not asked about?

**Alan McCreadie:** For the benefit of committee members, I want to raise a small technical point that is not included in the Law Society's submission but which I picked up after looking at the bill again this morning. The definition of "regulated football match" in section 2 is cross-referenced with section 55(2) of the Police, Public Order and Criminal Justice (Scotland) Act 2006, but I am not entirely sure whether that covers a match between two foreign teams in Scotland. I will investigate the matter further.

**The Convener:** Please feel free to think on the matter and write to us with your views. We will put the question to the minister.

That ends the session. I close the meeting.

*Meeting closed at 13:02.*

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